SUPREME COURT OF YUKON

Citation: *Re: The Yukon Ombudsman*, 2023 YKSC 26

Date: 20230530
S.C. No. 20-A0108
Registry: Whitehorse

THE YUKON OMBUDSMAN

PETITIONER

Before Justice E.M. Campbell

Counsel for the Petitioner	Joan M. Young
Counsel for the Government of Yukon, the Attorney General of Yukon, Minister of Health and Social Services and the Director of Family and Children's Services	I.H. Fraser

REASONS FOR DECISION

INTRODUCTION

[1] The Yukon Ombudsman (the "Ombudsman") commenced an investigation involving the Government of Yukon, Department of Health and Social Services (the "Department"), specifically, the Family and Children Services Branch ("FCS"). In the course of the investigation, a number of issues arose between the Ombudsman, the Department, and the Government of Yukon, Department of Justice, Legal Services Branch ("Legal Services") regarding the Ombudsman's power to compel full disclosure of information and documents from FCS. As a result, the Ombudsman petitions the Court and seeks three declarations which, the Ombudsman argues, are related to its jurisdiction to investigate matters under the *Ombudsman Act*, RSY 2002, c. 163 (the

"*Act"*). The Ombudsman contends that these declarations are necessary to carry out its mandate properly and effectively.

[2] The Attorney General of Yukon, the Minister of Health and Social Services, and the Director, Family and Children Services (collectively referred to as "Yukon") oppose the petition and seek an order dismissing the Ombudsman's application with costs.

BACKGROUND FACTS AND ISSUES

[3] The facts in this matter do not appear to be in dispute. On November 18, 2019, a complaint was made to the Ombudsman by the father of a child alleging that FCS had failed to follow its procedures when being involved with his child and the child's mother. Specifically, the father complained that despite the FCS' longstanding involvement with the child and the child's mother, FCS had failed to advise him of the risk of violence associated with the mother's partner which, in his view, created safety risks for both him and his child.

[4] Commencing in November 2019, the Ombudsman contacted the Department to obtain documents regarding this complaint. At the same time, the Ombudsman advised the Department of its Informal Case Resolution Process. The Ombudsman also sought to meet with a representative of the Department to discuss the complaint. The Ombudsman was then referred to legal counsel for the Department. In response to repeated requests between November 2019 and August 2020, including two notices to produce records, legal counsel for the Department took the position that disclosure of information and documents sought by the Ombudsman was prohibited by ss. 178 and 179 of the *Child and Family Services Act*, SY 2008, c.1 (the "*CFSA*"), without an order from the Supreme Court of Yukon, to which the Director, Family and Children Services

(the "Director") was prepared to consent provided the Ombudsman agreed to a number of conditions, including the redaction of third parties' names. The Director also sought to narrow the scope of the Ombudsman's disclosure demand based on relevance. In addition, legal counsel insisted the Ombudsman communicate with the Department and FCS only through legal counsel. While the Ombudsman did not object to the documents being redacted to protect the identity of third parties, it took the position that a disclosure order from the Supreme Court was not required because the *CFSA* did not preclude the Director and FCS from disclosing the requested information and documents to the Ombudsman.

[5] As a result of the refusal by the Department (more specifically FCS and the Director) to comply with its notices to produce, the Ombudsman filed a Petition with the Supreme Court seeking three declarations pursuant to s. 12(3) of the *Act*, which permits the Ombudsman to seize the court with a question regarding the scope of its jurisdiction.

[6] First, the Ombudsman seeks a declaration that its jurisdiction to investigate an authority, including the Department, includes a right to question the authority directly, and the Ombudsman is not required to communicate through an authority's legal counsel (*Requested Declaration #1*).

[7] Second, a declaration is sought that the Ombudsman has the jurisdiction to require the disclosure of full and unredacted documents from a person or authority, except:

(i) to the extent ss. 18 and 20 of the *Act* provide otherwise; and

(ii) to the extent a court may, upon application of the authority, order otherwise (*Requested Declaration #2*).

[8] Third, a declaration is sought that the Ombudsman's jurisdiction to investigate complaints related to FCS includes a right to access documents in the possession of the Department and a Director appointed under the *CFSA*, which right is not precluded by ss. 178 and 179 of the *CFSA* (*Requested Declaration #3*).

[9] After the petition was filed by the Ombudsman, the parties filed a consent order allowing the Ombudsman to obtain disclosure from FCS on agreed upon terms to pursue its investigation. The consent order was entered into on a without prejudice basis to the parties' respective positions in this matter. Nonetheless, a decision from the Court is sought to clarify, among other things, the statutory power of the Ombudsman to compel full disclosure of FCS' records.

BRIEF CONCLUSION

[10] For the reasons expressed below, I am not prepared to grant Declarations #1 and #2. I find it appropriate to grant only Declaration # 3. Also, considering the nature of this case and the mixed results, both parties will bear their own costs with respect to this petition.

THE ROLE AND POWERS OF THE OMBUDSMAN

[11] The Ombudsman plays an important role and carries out an important mandate as an independent officer of the Yukon Legislative Assembly. The Ombudsman has the power to receive, inquire into, settle, and report upon complaints from members of the public who believe they have been treated unfairly by territorial government departments and other territorial administrative authorities identified in the legislation

(ss. 1 & 11 of the *Act* and *British Columbia Development Corporation v Friedmann (Ombudsman)*, [1984] 2 SCR 447 ("*Friedmann*") at 450).

[12] The institution of Ombudsman dates back to Sweden more than 200 years ago. In *Friedmann* at 450, the Supreme Court of Canada explained that the term Ombudsman comes from a Swedish word which may be loosely translated as "citizens' defender" (see *Nova Scotia (Office of the Ombudsman) v Nova Scotia (Attorney General),* 2019 NSCA 51 *("Nova Scotia (Office of the Ombudsman)*") at paras. 27-28). *Friedmann* is the leading case in Canada with respect to matters of statutory interpretation involving the role and jurisdiction of the institution of Ombudsman.

[13] The Supreme Court of Canada further noted in *Friedmann* that the institution of Ombudsman has, since its inception in Sweden, been adopted in many jurisdictions around the world, including Canada. At the time of the *Friedmann* decision, in the mid-80s, most provinces had established their own Ombudsman's office, with similar jurisdiction and investigative powers.

[14] In *Friedmann,* at 459 and 461, the Supreme Court of Canada described as follows the role the institution of Ombudsman plays in a democratic society in providing for an independent means of oversight and accountability over the actions of government administration entities:

> The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

> As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them. See L. Hill, *The Model Ombudsman* (1976), at pp. 4-8.
>
> The traditional controls over the implementation and administration of governmental policies and programs—namely, the legislature, the executive and the courts—are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. …
>
> …
>
> The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.C.), *per* Milvain C.J., at pp. 192-93. On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.
>
> In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.

[15] More recently, in *Nova Scotia (Office of the Ombudsman),* the Nova Scotia Court of Appeal made similar comments regarding the important role played by the Nova

Scotia Ombudsman and the broad investigative powers it was given by the provincial legislature to properly perform its supervisory and review responsibilities:

> [65] As previously discussed, the legislative purpose of the Ombudsman is remedial. His broad statutory jurisdiction enables him to act as a watchdog over the operations of government. He has legislative authority to provide an impartial and independent review of the conduct of provincial and municipal government departments in properly and fairly administering the law. These responsibilities are achieved by recognizing the Ombudsman's considerable powers to investigate, subpoena, question under oath, compel production, make recommendations, publicly report, and when considered necessary, expose abuse and misconduct.

[16] Nonetheless, the office of the Ombudsman is a creature of statute. Therefore, the Ombudsman's authority, powers, and jurisdiction emanate from the legislation (*Nova Scotia (Office of the Ombudsman)* at para. 34). As is the case in other Canadian jurisdictions, the Yukon Ombudsman's statutory powers to investigate matters of administration are significant.

[17] The function and duty of the Yukon Ombudsman are found at s. 11 of the *Act* which stipulates that:

> (1) It is the function and duty of the Ombudsman to investigate on a complaint any decision or recommendation made … or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in their or its personal capacity, in or by any authority, or by any officer, employee, or member thereof in the exercise of any power or function conferred on them by any enactment.

[18] The Ombudsman may, upon receiving a complaint referred to in s. 11(1), investigate a decision or recommendation made; an act done or omitted; or a procedure used by an authority that aggrieves or may aggrieve a person (s. 11(2)). An authority includes, among other entities, all departments of the Government of Yukon, hospitals

and boards of management of hospitals governed by the *Hospital Act*, RSY 2002, c. 111, schools other than private schools governed by the *Education Act*, RSY 2002, c. 61. It also includes any members or employees of the authority (s. 1 and Schedule A of the *Act*). The Ombudsman also has the authority to refuse to investigate a complaint in certain circumstances (s. 14).

[19] Section 10 of the *Act* imposes an obligation of confidentiality on the Ombudsman and its staff regarding the information they receive while performing their duties under the *Act*. They may not disclose that information except when permitted by the *Act*. Also, the Ombudsman must conduct its investigation in private unless the Ombudsman is of the opinion there are special circumstances in which public knowledge is essential to further the matter or is required to carry out its mandate. In addition, the Ombudsman must take an oath to act in an impartial manner while performing its mandate.

[20] There are certain limitations to the Ombudsman's jurisdiction to investigate a matter. Section 12 of the *Act* precludes the Ombudsman from investigating conduct that occurred before the coming into force of the *Act*. It also precludes the Ombudsman from investigating any matters in respect of which the merits of the case can be, and have been, properly brought to a court or a tribunal for determination, or until the time prescribed for the exercise of the right to appeal, object, or to a review of the merits of the case to a court or a tribunal has expired. In addition, the Ombudsman cannot investigate a decision, recommendation, act, or omission of legal counsel for an authority.

[21] If the Ombudsman determines that it should launch an investigation into a complaint, "the Ombudsman shall notify the authority affected and any other person considered appropriate to notify in the circumstances" (s. 15(1) of the *Act*).

[22] During or after an investigation, the Ombudsman has the power to "consult with an authority to attempt to settle the complaint, or for any other purpose" (s. 15(2) of the *Act*).

[23] Section 16 of the *Act* sets out the Ombudsman's broad investigative powers to demand production of relevant documents; to enter and inspect premises occupied by an authority; and to summon and examine persons under oath. It stipulates:

> **16 Power to obtain information**
>
> (1) The Ombudsman may receive and obtain information from the persons and in the manner considered appropriate, and in the Ombudsman's discretion may conduct hearings.
>
> (2) Without restricting subsection (1), but subject to this Act, the Ombudsman may
>
> (a) at any reasonable time enter, remain on, and inspect all of the premises occupied by an authority, converse in private with any person there and otherwise investigate matters within the Ombudsman's jurisdiction;
>
> (b) require a person to furnish information or produce a document or thing in their possession or control that relates to an investigation at a time and place the Ombudsman specifies, whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority;
>
> (c) make copies of information furnished or a document or thing produced under this section;
>
> (d) summon before the Ombudsman and examine on oath any person who the Ombudsman believes is

> able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of an authority;
>
> (e) receive and accept, on oath or otherwise, evidence, the Ombudsman considers appropriate, whether or not it would be admissible in a court.
>
> (3) When the Ombudsman obtains a document or thing under subsection (2) and the authority requests its return, the Ombudsman shall within 48 hours after receiving the request return it to the authority, but the Ombudsman may again require its production in accordance with this section.

[24] Pursuant to s. 17 of the *Act*, if it seems to the Ombudsman that there may be sufficient grounds for making a report or a recommendation that may adversely affect an authority or a person, the Ombudsman must inform the authority or person of those grounds and give them the opportunity to make representations before the Ombudsman makes a determination on the complaint.

[25] After receiving and investigating a complaint, the Ombudsman reports its findings, as well as any recommendations, to the authority being investigated. If it finds that the complaint is substantiated, the Ombudsman has the authority to make recommendations to the authority on how to remedy the situation and may seek that the authority report back on how it will implement or not the recommendation(s) it made. If the Ombudsman finds the authority has not responded adequately or appropriately to its recommendation(s), it may decide to report to the Commissioner in Executive Council and, after that, to the Legislative Assembly (ss. 23-25 of the *Act*).

[26] Also, after an investigation is completed, the Ombudsman must, within a reasonable time, inform the complainant of the result of the investigation (ss. 22 and 26 of the *Act*).

[27] Finally, the Ombudsman may, in addition to its annual report to the Legislative Assembly, make a special report to the Legislative Assembly, or comment publicly on a matter relating generally to the exercise of its duties or on a particular case it investigated (s. 31 of the *Act*).

PRINCIPLES OF STATUTORY INTERPRETATION

[28] The declarations sought by the Ombudsman require a determination of the meaning of, and interaction of, provisions of several statutes that relate to the scope of the Ombudsman's investigating powers over the Department and more specifically FCS.

[29] When determining the meaning of statutory provisions, Canadian courts apply the modern approach to statutory interpretation. This approach requires that the words of a statute 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 the Legislature. *R v McColman*, 2023 SCC 8 ("*McColman*") states:

> [35] Under the modern approach to statutory interpretation, "the words of statute must 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'": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49, at para. 37. In determining the meaning of the text, a court cannot read a statutory provision in isolation, but must read the provision in light of the broader statutory scheme: *Rizzo*, at para. 21.

See also *R v JD*, 2022 SCC 15 at para. 21; *R v Breault*, 2023 SCC 9 at paras. 25-26.

[30] Also, in *Friedmann*, the Supreme Court of Canada gave specific guidance regarding the appropriate analytic approach to take in matters involving the investigatory role of an Ombudsman: “Any analysis of the proper investigatory role the Ombudsman is to fulfill must be animated by an awareness of [the] broad remedial purpose for which the office has traditionally been created” (at 450).

[31] However, the Supreme Court of Canada also noted in *Friedmann* that the analysis regarding the scope of an Ombudsman’s jurisdiction and powers must be grounded in the specific language of an Ombudsman’s enabling legislation.

> At the same time it must be emphasized that the Ombudsman is a statutory creation. It is elemental that the nature and extent of the jurisdiction which may be exercised by the Ombudsman in this case turns upon the interpretation to be given the specific language of the British Columbia legislation. (at 450)

[32] The Supreme Court of Canada went on to find, at 463, that “the *Ombudsman Act* of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated.’’ It also found the British Columbia Ombudsman’s legislation “represents the paradigm of remedial legislation’’, and that “[i]t should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil” (at 463).

[33] The guiding principles enunciated in *Friedmann* have been applied consistently by courts across the country when tasked with determining the scope of the authority and powers given to an Ombudsman in their respective jurisdictions (*Nova Scotia (Office of the Ombudsman)* at para. 58). The statutory role, jurisdiction and powers of the Yukon Ombudsman are very similar to the British Columbia Ombudsman (now the

Ombudsperson). Therefore, the guiding principles set out in *Friedmann* apply and must guide the statutory analysis required to answer the questions raised by this matter.

[34] In addition, s. 10 of the *Interpretation Act*, RSY 2002, c. 125 ("*Interpretation Act*"), must be considered and applied when interpreting territorial statutes. Its wording aligns with the principles enunciated by the Supreme Court of Canada in *Friedmann*:

> **10 Every enactment remedial**
>
> Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.

THE DISCRETIONARY NATURE OF THE DECLARATORY RELIEF SOUGHT BY THE OMBUDSMAN

[35] The Ombudsman seeks three declarations, which are judicial statements or determination, from the Court regarding the scope of the Ombudsman's statutory jurisdiction, and, more specifically, the scope of some of its investigative powers (s. 12 of the *Act*; *Reid v Manufacturers Life Insurance Co*, 2010 ONSC 4645 at paras. 18-22; *Solosky v The Queen*, [1980] 1 SCR 821 at 830- 831 ("*Solosky*")).

[36] There is no dispute the Supreme Court of Yukon has jurisdiction to hear the Ombudsman's petition (see *Judicature Act*, RSY 2002, c. 128, s. 32; s. 12 of the *Act*).

[37] The granting of a declaration is discretionary. A court may refuse to grant a declaration even if the case for it has been made out. In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, referring to *Canada (Prime Minister) v Khadr*, 2010 SCC 3, the Supreme Court of Canada restated the test for when a declaration may be granted is as follows:

> [11] … The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real

> and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v the Queen,* [1980] 1 S.C.R. 821; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

[38] In addition, there are a number of factors to consider when determining whether to exercise the court's discretion to issue a declaration. I will address those that are relevant under each of the declarations sought by the Ombudsman.

REQUESTED DECLARATION #1

[39] The Ombudsman seeks a declaration that its jurisdiction to investigate an authority includes a right to question the authority directly, and that it is not required to communicate through an authority's legal counsel.

Positions of the Parties

The Ombudsman

[40] The Ombudsman submits that while performing investigative and settlement functions, it possesses significant powers to engage in communications and seek information.

[41] The Ombudsman contends that these powers include a right to question an authority, including the Department, directly, as opposed to communicating through the authority's legal counsel, when directed by the authority or its legal counsel.

[42] The Ombudsman maintains that its powers to directly gather information from, and to speak directly with, individuals within government goes to the core of its function and mandate. The Ombudsman submits that its ability to fulfill its functions and mandate would be materially impaired if it were to be prevented from engaging directly with individuals in its discretion while performing its investigative and settlement functions.

[43] The Ombudsman argues that no legislative provision in the *Act* allows an authority to restrict these expansive powers by refusing to engage with the Ombudsman except through legal counsel.

[44] As a result, the Ombudsman maintains that it has the right to question a representative of an authority without communicating through the authority's legal counsel.

[45] The Ombudsman submits that, contrary to what Yukon contends, this is not a right to counsel case, and s. 10(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the *"Charter"*) is not engaged in the context of its investigations.

[46] Finally, the Ombudsman submits there are no facts before the Court that could suggest the Ombudsman ever precluded anyone from seeking timely legal advice in the context of its investigations.

Yukon

[47] Yukon objects to the Court issuing any of the three declarations in the form sought as, according to Yukon, it would not resolve any substantive legal issue in dispute and would serve no practical purpose.

[48] Nonetheless, Yukon, through its counsel, formally acknowledged at the hearing that the Ombudsman has the right to speak with an authority directly and is not required to communicate solely through an authority's legal counsel. Yukon added there is no suggestion that the Ombudsman has ever tried to bypass counsel in the past.

[49] However, Yukon submits the declaration sought by the Ombudsman is broadly worded and could be interpreted in a manner that affects or interferes with an authority's

or a person's right to obtain legal advice and have legal counsel represent them in their interactions with the Ombudsman. Yukon submits the declaration, as worded, could be misinterpreted as a judicial pronouncement on three related, but distinct, issues involving the rights of various persons, upon which the parties disagree.

[50] First, Yukon contends a person the Ombudsman seeks to question has the individual right to assistance by counsel of choice to represent and advise them during questioning.

[51] Second, Yukon contends there is a statutory authority for Department of Justice's counsel to be present on behalf of the Attorney General whenever the Ombudsman seeks to gather information or documents from any person who may possess information or documents subject to certification under s. 18 of the *Act*.

[52] Third, Yukon contends the Minister (or Deputy Minister) of Health and Social Services has the statutory authority to direct that persons employed by the Department refrain from communicating with the Ombudsman unless counsel for the Department of Justice are involved, both to represent the interests of the Government of Yukon and to subsequently be in a position to provide informed legal advice to the Minister (or Deputy Minister).

[53] Yukon maintains that, assuming for the purposes of this petition, the Ombudsman has the power to compel persons to answer its questions, two aspects arise from an entitlement to have counsel present for the purposes of representation. First, whether there is a right to counsel under the *Charter*, and, alternatively, whether the *Act* should be interpreted with *Charter* values so as to prevent a person from being

compelled to answer questions from the Ombudsman without first retaining counsel to represent them in the course of such questioning.

[54] In terms of the *Charter* right, Yukon contends that the Ombudsman's questioning of a representative of an authority amounts to testimonial compulsion, thus engaging a liberty interest. It is argued that this amounts to a "detention" within the meaning of the *Charter*. According to Yukon, such questioning by the Ombudsman may well result in the person being interviewed requiring assistance from counsel in terms of how, or even whether, to answer a question. Yukon submits the Ombudsman's authority to investigate is not unlimited, and the scope of any investigation is constrained by the nature of the complaint and the provisions of the *Act*.

[55] Yukon submits that even where the *Charter* does not have direct application, its values should inform a court's interpretation of both statutory provisions and common law rules and serve as a constraint on any exercise of administrative discretion.

[56] Yukon argues that the *Charter* value stemming from s. 10(b) is that those individuals compelled to answer questions by a state authority should have the ability to choose whether to have counsel present to represent their interests and advise them as required. Doing so would in no way negatively impact the Ombudsman's discharge of its statutory duties or constrain its discretion under the *Act* to respect the *Charter* value.

[57] Yukon also submits that the *Act's* use of the term "in private" does not equate to a conversation or proceeding being held without the ability for counsel to be present.

[58] Additionally, Yukon highlights s. 18 of the *Act*, which contemplates, in certain circumstances, the Minister of Justice making and delivering a certificate to prevent the Ombudsman from entering a premise or requiring anyone to furnish information or

documents. If counsel were unable to be present to determine if an entry, question, or demand for production should be covered by a certificate, the Minister of Justice would be prevented from discharging her duties under the *Department of Justice Act*, RSY 2002, c. 55.

[59] Finally, Yukon submits that an investigation by the Ombudsman may result in complex legal issues arising, requiring the Minister (or Deputy Minister) of Health and Social Services to seek legal advice and representation. Allowing the Ombudsman to exclude legal counsel from aspects of an Ombudsman's investigation may well result in unfairness and prejudice to the Minister.

Analysis

[60] First, Yukon's statement that the Ombudsman is not required to communicate with an authority solely through legal counsel does appear to resolve a live issue that arose in this matter.

[61] Nonetheless, Yukon's acknowledgement coupled with its assertion there is no longer a dispute between the parties on this issue is not determinative of whether I should exercise my discretion to issue or not the first declaration sought by the Ombudsman. Considering Yukon's lengthy submissions on the *Charter* rights concerns raised as a ground for opposing the declaration, I feel compelled to address arguments Yukon made in that regard.

[62] Yukon has referred to Supreme Court of Canada and other appellate jurisprudence in the criminal and quasi-criminal area in support of its argument that a person questioned by the Ombudsman, in the course of its investigation, is detained in law. As such, they should be provided with their right to counsel pursuant s. 10(b) of the

Charter. However, detention under ss. 9 and 10 of the *Charter* only occurs when an individual's liberty interests are suspended "by a significant physical or psychological restraint" (*R v Grant*, 2009 SCC 32 at para. 44). An individual's s. 10(b) right to counsel arises immediately upon detention, even if the detention is only for investigative purposes (*R v Suberu*, 2009 SCC 33; *R v Mann*, 2004 SCC 52).

[63] Yukon maintains that a person questioned during an Ombudsman's investigation may face jeopardy based on responses given to the Ombudsman's questions. Yukon states the person may face negative employment or economic consequences or criminal or regulatory sanctions depending on their responses, and the ultimate conclusions of the investigation by the Ombudsman.

[64] However, these submissions are based on hypotheticals that are not supported by the record before me. In any event, as mentioned, the case law interpreting s. 10(b) of the *Charter* is in the criminal and quasi-criminal areas.

[65] In *British Columbia (Attorney General) v Christie*, 2007 SCC 21, the Supreme Court of Canada held that s. 10(b) of the *Charter* only provides for a right to legal services in one specific situation, namely the right to retain and instruct counsel, and to be informed of that right, "on arrest or detention" (para. 24).

[66] This jurisprudence relates to a person's jeopardy in terms of a deprivation of liberty and the risk of self-incrimination. It does not support the hypothetical fact situations put forward by Yukon with respect to the interactions between a Government of Yukon employee and the Ombudsman. The Ombudsman's investigation is neither criminal nor quasi-criminal in nature. The Ombudsman is not dealing with a suspect or suspects; it is responding to a complaint from a member of the public in terms of their

administrative dealings with the government. This is clearly not a situation that triggers a duty for the Ombudsman to provide an employee of the government with their s. 10(b) right to counsel.

[67] As mentioned, Yukon submits that the questioning of a representative of an authority amounts to testimonial compulsion, which, in turn, engages a liberty interest. I have already found such a scenario does not amount to a 'detention' within the meaning of the *Charter*. Nonetheless, Yukon maintains that even if s. 10(b) is not directly applicable, *Charter* values should be considered to assist in interpreting the Ombudsman's powers, specifically the Ombudsman's request for a declaration that it has the right to question representatives of an authority without going through counsel. Yukon points to words of La Forest J. in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, where he states that the compulsion to testify results in a deprivation that triggers the right to life, liberty and security of a person protected by s. 7 of the *Charter*.

[68] The *Thomson Newspapers Ltd* decision concerned an investigation under the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Pursuant to s. 17 of the *Combines Investigation Act*, the Restrictive Trade Practices Commission had ordered Thomson Newspapers Ltd., and some of its officers, to appear before the Commission to be examined under oath and to produce documents in the context of an inquiry as to whether an offence under the legislation had occurred. A person who refused to comply with a s. 17 order was liable to punishment by the Commission.

[69] The Supreme Court of Canada held that although there was a compulsion to provide oral testimony pursuant to the legislation, which constituted a deprivation of

liberty, such compulsion, in and of itself, did not violate the principles of fundamental justice. The Court directed that when assessing whether a measure offends the principals of fundamental justice, it is necessary to consider the specific context in which the measure operates. In considering the context of the *Combines Investigations Act*, Laforest J. stated at 541-42:

> … Here it must be kept in mind that inquiries under s. 17 are inquisitorial rather than adversarial in nature, a distinction I have borrowed from E. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979), at p. 21. They are investigations in which no final determination as to criminal liability is reached. As I pointed out in discussing s. 8 of the *Charter*, unlike standard criminal investigations where the question is whether X has committed offence Y, the questions confronting investigators under the *Combines Investigation Act* are more likely to take the form of whether offence Y has occurred, and if so, who is likely to be responsible for its commission. In other words, inquiries held under the Act do not focus on the conduct of a single individual in the way in which ordinary criminal investigations typically do. They are more open ended, in the sense that the scope of the information gathering activity is not as narrowly directed to the probability of any particular individual's legal culpability. Relative to ordinary forms of criminal investigations, the investigations conducted under s. 17 do not involve the use of state power in the interests of securing the conviction of a particular individual.
>
> I see a significant difference between investigations that are truly adversarial, where the relationship between the investigated and investigator is akin to that between accused and prosecution in a criminal trial, and the broader and more inquisitorial type of investigation that takes place under s. 17 of the Act. The lower probability of prejudice the latter represents to any particular individual who comes within its reach, together with the important role such investigations play in the effective enforcement of anti-combines and possibly other regulatory legislation, suggests that a more appropriate balance between the interests of the individual and the state can be achieved by retention of the power to compel testimony and the recognition of the right to object to

> the subsequent use of so much of the compelled testimony as is self-incriminatory.

[70] Subsequently, in *British Columbia Securities Commission v Branch,* [1995] 2 SCR 3, the Supreme Court of Canada dealt with the question of whether compellability outside the criminal justice system of individuals who might subsequently be charged with a criminal or quasi-criminal offence breached s. 7 of the *Charter*. The Supreme Court of Canada stated the following, at para. 35, regarding the nature of the British Columbia Securities Commission's inquiries:

> Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and <u>not</u> to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the ***<u>Charter</u>***, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: *S. (R.J.)*, *supra*. [emphasis in original]

[71] As pointed out in this decision, although a witness is compelled to testify in proceedings of this nature, the general rule, in compliance with the *Charter*, is that they receive evidentiary immunity in return.

[72] Individuals who are questioned by the Ombudsman receive the protection against self-incrimination afforded by s. 20 of the *Act*, except in case of perjury or an offence under s. 32 of the *Act* for obstructing, making a false statement or misleading the Ombudsman or another person in the exercise of power or duties under the *Act*; or refusing to comply with a lawful requirement of the Ombudsman or another person under the *Act*.

[73] The Ombudsman's important function and duty is to investigate complaints relating to matters of administration. Such an investigation or inquiry is clearly of a civil nature. It should be noted that, in the matter before me, there is no evidence that the Ombudsman prevented anyone from seeking legal advice or from communicating with counsel. The Ombudsman acted in accordance with its enabling statute by providing the authority with proper notice of its investigation and seeking the authority's cooperation throughout the process. The facts also reveal the Ombudsman's staff attempted to work with legal counsel, once appointed, in order to achieve a reasonable solution. However, despite these efforts, at some point in the investigation, legal counsel prevented any direct communication between the Ombudsman and the authority. Once counsel became involved, the authority essentially became irresponsive to the Ombudsman's requests and counsel directed the Ombudsman to speak only with them. Legal counsel essentially acted as a shield between the authority and the Ombudsman. While

reasonable parties may disagree on the effect of legislation, the way this matter was conducted from the Department's end is questionable.

[74] While it was appropriate for the authority to contact counsel to ensure, for example, that proper privileges be claimed and confidentiality be maintained, legal counsel cannot, and should not, act as a shield between the Ombudsman and an authority when the Ombudsman is exercising its powers and duties under the *Act*. Yukon acknowledges counsel went too far in this case by insisting legal counsel be the Ombudsman's only point of contact with the authority. It concedes there are no grounds for an authority to take such a position.

[75] At least in this case, at the end of the day, the result might well have been the same in that the parties may have had to resolve their disagreement on the appropriate interpretation of the legislation by way of recourse to this Court.

[76] Nonetheless, I have some difficulty with the declaration sought by the Ombudsman. First, the Ombudsman seeks, as part of the declaration, that its jurisdiction to investigate an authority includes a right to question the authority directly. I note that s. 16 of the *Act* already stipulates that it has the right to "converse in private with any person", and to require "a person to furnish information".

[77] The second part of the declaration being sought is that the Ombudsman is not required to communicate through an authority's legal counsel during an investigation. I find that such a declaration would be overly broad. Although, as stated earlier, legal counsel should not become the Ombudsman's sole point of contact with an authority, there may well be situations where legal counsel's involvement becomes necessary

(e.g. a s. 18 certification by the Minister of Justice). In such cases, one might expect direct communication between legal counsel and the Ombudsman.

[78] Also, while this is not what took place in this case, it is expected the Ombudsman would not attempt to use its power to communicate directly with an employee of the authority to get around an authority's legal position, whether communicated through legal counsel or not, with which the Ombudsman disagrees. It is expected that, in such a case, discussions would take place between the Ombudsman and the authority's representatives.

[79] In addition, as there is no factual record in this regard, I am not in a position to pronounce on the issue of whether counsel may be present while an employee of an authority is being questioned. A general pronouncement as requested by the Ombudsman could result in some misunderstanding on the scope of the declaration or misinterpretation in that regard.

[80] In the result, I decline to make the first declaration sought by the Ombudsman.

REQUESTED DECLARATION #2

[81] The Ombudsman seeks a declaration it has the jurisdiction to require the disclosure of full and unredacted documents from a person or authority, except:

(i) to the extent ss. 18 and 20 of the *Act* provide otherwise, and

(ii) to the extent a court may, upon application of the authority, order otherwise.

Positions of the Parties

The Ombudsman

[82] The Ombudsman submits that access to information and documents is key to its investigative and settlement functions. The Ombudsman submits it must be able to gain access to documents it deems necessary or relevant to its investigation to carry out its mandate properly, not just those that an authority subject to an investigation is prepared to provide.

[83] The Ombudsman submits its broad powers to gather information and documents are balanced by the very strong confidentiality obligations placed upon the Ombudsman and its staff pursuant to s. 10 of the *Act*.

[84] The Ombudsman submits it is given significant powers to compel disclosure of information and production of documents pursuant to s. 16 of the *Act*, subject only to the specific and narrow limitations set out in ss. 18 and 20 of the *Act.* The Ombudsman submits that even if s. 19 is not specifically mentioned in the wording of this declaration, it is included and covered by the declaration as worded because it is referenced in s. 20 of the *Act*.

[85] The Ombudsman submits ss. 18-20 fully contemplate the interactions between the Ombudsman's broad powers to compel disclosure under the *Act* and the provisions of other statutes regarding an authority's or a person's confidentiality and non-disclosure obligations. They also provide for the application of the law of privileges as well as a process whereby the Minister of Justice may prevent the Ombudsman from requiring information revealing deliberations or proceedings of the Executive Counsel,

or a committee of it, or information that might compromise a regulatory or criminal investigation or proceedings.

[86] The Ombudsman submits that, considering the exhaustive nature of ss. 18-20, an authority cannot redact or refuse to produce information other than in the limited circumstances provided for in those sections. The Ombudsman argues there is no authority (including any provisions of the *CFSA*, *Access to Information and Protection of Privacy Act*, SY 2018, c. 9 ("*ATIPPA*"), or *Health Information Privacy and Management Act*, SY 2013, c. 16 ("*HIPMA*") that supports Yukon's position that the Department has the authority and obligation to screen out documents requested by the Ombudsman to determine what is relevant to the Ombudsman's investigation.

[87] The Ombudsman contends there are good reasons that support its position. The authorities are the ones under investigation. As a result, they should not be the gate keepers of how the Ombudsman carries out its role and responsibilities. The Ombudsman submits there is a risk of mischief if the authority under investigation decides what documents or information the Ombudsman can obtain.

[88] Finally, in response to one of Yukon's arguments, the Ombudsman submits that paramountcy provisions in other statutes, that have the effect of imposing a duty of confidentiality or non-disclosure on a person or an authority, would be captured by the language of s. 19(2) of the *Act*. Therefore, there is no reason to refuse the declaration sought.

Yukon

[89] Yukon submits the Court should not issue the declaration sought by the Ombudsman because ss. 18 and 20 of the *Act* provide an incomplete picture of the

Ombudsman's powers to compel disclosure of information and production of documents from an authority and little guidance regarding its scope in circumstances other than the specific case at bar. Also, Yukon submits that s. 19 of the *Act*, which is central to the issues before the Court, is not specifically mentioned in the declaration sought by the Ombudsman.

[90] Yukon submits the *Act* contains a deferral provision (s. 19(2)) that requires consideration and application of other territorial statutory provisions to determine the specific scope of the Ombudsman's powers to compel disclosure of information and production of documents from a particular authority or person. This means the statutory provisions to consider in any given case will vary depending on the specific legislation applicable to the authority subject of the Ombudsman's investigation. As a result, Yukon submits the Court should not grant the declaration sought because there may be other statutes, not canvassed in argument, that would operate as a bar to disclosure in ways that are not captured by the language of s. 19(2) of the *Act*. In addition, Yukon submits that other statutes, which may contain paramountcy provisions that would make them prevail over the *Act* in case of conflict, may provide restrictions on the disclosure of information or production of documents.

[91] Yukon submits that, in this case, the *CFSA*, *ATIPPA*, and *HIPMA* all contain provisions that are relevant to determine whether the Ombudsman may compel the Department and, more specifically, the Director to produce documents. According to Yukon, these statutes preclude the Director from producing the requested documents to the Ombudsman without a court order.

[92] In addition, Yukon submits that *ATIPPA* and *HIPMA* are more recent and specific statutes than the *Act* that pertain to the collection, use, and disclosure by public bodies of certain types of information. Yukon submits these two statutes have strong paramountcy provisions that make them prevail over the *Act* because the *Act* does not contain an express and specific provision providing otherwise.

[93] Yukon submits *ATIPPA* and *HIPMA* impose the obligation on public bodies (custodians) to disclose only what is necessary to the purpose for which disclosure is sought. Therefore, Yukon argues when disclosure or production is permitted, the determination of what is relevant to the Ombudsman's investigation falls on the public body, more specifically FCS whose documents were being sought in this case, not the Ombudsman.

Analysis

[94] It is not disputed the Ombudsman has jurisdiction to investigate complaints against the Department, and more specifically FCS, including the investigation that brings the parties to court. They are an authority as defined in the *Act*.

[95] As stated previously, s. 16 of the *Act* confers upon the Ombudsman broad powers to compel disclosure of information and production of documents from an authority or a person in the course of an investigation. Nonetheless, the *Act* also sets out limits to those investigative powers. These limitations are set out in ss. 18-20 of the *Act*.

[96] I accept the Ombudsman's submission that s. 19 is incorporated by reference in the declaration it seeks. Therefore, the declaration sought by the Ombudsman raises the question of whether the limitations set out in ss. 18-20 of the *Act* are all

encompassing or, stated differently, are the only limitations that can be invoked or relied upon by any authority to refuse to comply with a disclosure or production demand from the Ombudsman.

[97] Section 18 of the *Act* provides the Minister of Justice has the authority to prevent the Ombudsman from entering a premise, requiring that a person or an authority answer questions, provide information, or produce documents in certain circumstances. Section 18 reads as follows:

> **18 Executive Council proceedings**
>
> If the Minister of Justice certifies that the entry on premises, the giving of information, the answering of a question, or the production of a document or thing might
>
> (a) interfere with or impede the investigation or detection of an offence;
>
> (b) result in or involve the disclosure of deliberations of the Executive Council; or
>
> (c) result in or involve the disclosure of proceedings of the Executive Council or a committee of it, relating to matters of a secret or confidential nature and that the disclosure would be contrary or prejudicial to the public interest,
>
> the Ombudsman shall not enter the premises and shall not require the information or answer to be given or the document or thing to be produced, but shall report the making of the certificate to the Legislative Assembly not later than in the Ombudsman's next annual report.

[98] Section 20 of the *Act* provides that, subject to s. 19 of the *Act,* the powers of the Ombudsman to compel disclosure from an authority are subject to the law of privileges. Section 20(1) reads as follows:

> **20 Privileged information**
>
> (1) Subject to section 19, a person has the same privileges in relation to giving information, answering questions, or producing documents or things to the Ombudsman as that person would have with respect to a proceeding in a court.

[99] There is no dispute between the parties regarding the Minister of Justice's authority to preclude disclosure of information or production of documents to the Ombudsman in specified circumstances listed in s. 18. Also, there is no dispute between the parties that, subject to s. 19, the law of privileges can be invoked by an authority or a person to refuse to answer a question, give information or produce documents to the Ombudsman. It is not disputed an authority can also invoke a recognized privilege such as, solicitor-client privilege, to redact documents prior to providing them to the Ombudsman.

[100] The issue between the parties revolves around the scope and application of s. 19(2) of the *Act*, which addresses the interaction between the *Act* and the provisions of other statutes regarding disclosure. More specifically, the issues between the parties are as follows:

(a) whether s. 19(2) of the *Act* encompasses all the circumstances where other statutes could operate as a bar to the disclosure of information or production of documents to the Ombudsman; and

(b) whether an authority has the duty to not disclose information or documents to the Ombudsman based on relevance or lack thereof.

[101] Section 19 reads as follows:

> **19 Application of other laws respecting disclosure**
>
> (1) Subject to section 18, a rule of law that authorises or requires the withholding of a document or thing, or the refusal to disclose a matter in answer to a question, on the ground that the production or disclosure would be injurious to the public interest does not apply to production of the document or thing or the disclosure of the matter to the Ombudsman.
>
> (2) Subject to section 18 and to subsection (4), a person who is bound by an enactment to maintain confidentiality in relation to or not to disclose any matter shall not be required to supply any information to or answer any question put by the Ombudsman in relation to that matter, or to produce to the Ombudsman any document or thing relating to it, if compliance with that requirement would be in breach of the obligation of confidentiality or nondisclosure.
>
> (3) Subject to section 18 but despite subsection (2), if a person is bound to maintain confidentiality in respect of a matter only because of an oath under the *Public Service Act* or a rule of law referred to in subsection (1), the person shall disclose the information, answer questions, and produce documents or things on the request of the Ombudsman.
>
> (4) Subject to section 16, after receiving a complainant's consent in writing, the Ombudsman may require a person described in subsection (2) to, and that person shall, supply information, answer any question, or produce any document or thing required by the Ombudsman that relates only to the complainant. [my emphasis]

[102] Sections 19(1), (3), and (4) are not at issue in this case. They do not provide a basis for an authority or a person to refuse to answer questions, disclose information or produce documents to the Ombudsman. Only s. 19(2) provides a ground for an authority or a person to refuse to disclose information or produce documents to the Ombudsman. Section 19(2) provides that a person who is bound to confidentiality or to non-disclosure by another statute, on grounds other than those excluded by ss. 19(1), (3), and (4), may refuse to comply with an Ombudsman's disclosure demand, if

compliance would result in the person being in breach of their confidentiality or non-disclosure obligation.

[103] Both parties agree the expression “is bound” contained in s. 19(2) means the person is obliged or has no choice but to maintain confidentiality or to not disclose. If the statutory provision in question gives an authority or a person discretion to disclose, then the exception does not apply, and the person must disclose to the Ombudsman. The parties’ views on this question are consistent with the interpretation given by the Nova Scotia Court of Appeal to the same expression found in s. 17(4) of the Nova Scotia *Ombudsman Act*, R.S.N.S. 1989, c. 327. Section 17(4) of the Nova Scotia *Ombudsman Act* serves the same purpose as s. 19(2) of the *Act* and is worded similarly.

[104] The question the Nova Scotia Court of Appeal was asked to determine in the *Nova Scotia (Office of the Ombudsman)* case is similar to the one that arises in this case, which is whether the Nova Scotia Ombudsman has the statutory authority to compel production of full and unredacted records from a government department – in that case the Nova Scotia Department of Health and Wellness. After considering the specific language of the statutory provisions at issue, the Court of Appeal concluded it did.

[105] In answering the interpretation issue between the parties, the Nova Scotia Court of Appeal stated the following on the meaning of the expression “is bound by” in s. 17(4):

> [89] In its written and oral submissions the respondent says that *FOIPOP* and *PHIA* prohibit disclosure of the unredacted record sought by the Ombudsman and that therefore the Minister had no choice but to refuse the Ombudsman’s request. The argument begins with an

> emphasis upon a portion of a particular provision of the *Ombudsman Act* where, in s. 17(4) it says:
>
> > … where a person is bound by any law … to maintain secrecy … or not to disclose any matter, the Ombudsman shall not require that person to supply any information … or to produce any document … which would be in breach of the obligation of secrecy or non-disclosure.
>
> [90] My rejection of the respondent's reliance upon these provisions turns on the words "is bound by". Interpreting those three words in their grammatical and ordinary sense leads me to conclude that they mean "obliged", "compelled", "forced to", and "no choice but to comply". Applying such a meaning to these words, and informed by the statutory scheme, object and purpose of the relevant enactments, exposes the flaws in the Attorney General's position.

[106] The Ombudsman contends that s. 19(2) is clear. A person can refuse to comply with the Ombudsman's disclosure demand only if they are obliged by another statute to maintain confidentiality or to not disclose the information or document sought by the Ombudsman.

[107] In response to Yukon's argument about the non-exhaustive nature of s. 19(2) of the *Act*, the Ombudsman contends that if a paramountcy provision, or any other type of provision in another statute, has the effect of compelling a person or an authority to maintain confidentiality or to not disclose, it will necessarily be captured by s. 19(2). According to the Ombudsman, ss. 18-20 of the *Act* are comprehensive and clearly meant to cover all the situations limiting the Ombudsman's power to compel disclosure and the declaration should be issued by the Court.

[108] I disagree with the Ombudsman. While ss. 18-20 of the *Act* are indeed comprehensive, I am of the view it would not be prudent to issue a declaration of general application, such as the one sought by the Ombudsman, based only on a

review of the four territorial statutes at issue in this case. There is, at least, one situation where another statute could preclude disclosure to the Ombudsman that would not fall under the circumstances provided by ss. 18-20*,* and that is through an exemption. If, for example, another statute were to exempt certain types of information or documents from the Ombudsman's power to compel their disclosure under s. 16, the other statute would not be creating or imposing an obligation of confidentiality or non-disclosure on a person or an authority covered by s. 19(2). Nonetheless, the other statute would provide a basis or a ground for an authority to refuse disclosure based on the Ombudsman's lack of jurisdiction.

[109] In addition, as it became clear during the submissions of the parties on this issue, the wording of ss. 18-20 of the *Act* is not the source of the legal dispute in this case. The issue revolves around their differing interpretation of the other statutory provisions at play (the *CFSA*, *ATIPPA*, and *HIPMA*) and the limits they placed on FCS and its Director's discretion to disclose information and documents. Therefore, the broad declaration sought by the Ombudsman is of very limited utility because, even if granted, the declaration would not resolve the dispute between the parties, nor would it help resolve any future disagreements over the scope of another authority's confidentiality and non-disclosure obligations emanating from the wording of statutory provisions other than the ones at issue in this matter.

[110] As a result, I am of the view it would not be appropriate to exercise my discretion to grant this declaration.

[111] I will address the issue raised by Yukon regarding which entity is responsible for determining what information or documents are relevant to an investigation by the Ombudsman under the third declaration sought by the Ombudsman.

REQUESTED DECLARATION #3

[112] The Ombudsman seeks a declaration that its jurisdiction to investigate complaints related to FCS includes a right to access documents in the possession of the Department and a Director appointed under *CFSA*, which right is not precluded by ss. 178-179 of the *CFSA*.

Positions of the Parties

The Ombudsman

[113] The Ombudsman contends that, pursuant to ss. 178-179 of the *CFSA,* the Director is not bound to confidentiality or non-disclosure. As a result, the Director cannot rely on s. 19(2) of the *Act* to refuse to comply with the Ombudsman's disclosure demand.

[114] The Ombudsman acknowledges that s. 179 of the *CFSA* contains a general prohibition against disclosure of any document kept by the Director that deals with the personal history of a child or an adult and has come into existence through a proceeding under the *CFSA* or the former statute. However, the Ombudsman argues that s. 179 grants the Director discretion to consent to disclosure. As the Director has a choice to consent to disclosure under s. 179, FCS is not bound to confidentiality or non-disclosure, and FCS has to provide to the Ombudsman the disclosure it requested.

[115] Also, the Ombudsman submits the exercise of the Director's discretion under s. 179 is not constrained by the circumstances set out in s. 178, as argued by Yukon.

The Ombudsman contends that, if it were the case, the legislature would have expressly stated so in s. 179. However, there is no reference to or mention of s. 178 in s. 179. According to the Ombudsman s. 178 does not constitute a prohibition against disclosure, but simply sets out purposes for which the Director may disclose information in its records. The Ombudsman submits another difference between the two provisions is that s. 178 pertains to the disclosure of the Director's information in general, whereas s. 179 deals specifically with the disclosure of a certain type of information and documents kept by the Director.

[116] In addition, the Ombudsman submits the Director's paramount consideration in carrying out its responsibilities under the *CFSA*, including those that pertain to the Director's authority to consent to disclosure under s. 179(2)(b), is the "best interests of the child". The Ombudsman argues disclosure to the office of the Ombudsman is in line with that paramount consideration.

[117] The Ombudsman submits the Department and the Director are subject to the investigative role of the Ombudsman regarding matters of administration pursuant to s. 11 of the *Act*. The Ombudsman points out that one of the Minister's responsibilities under the *CFSA* is to ensure that it is administered in a fair manner. The Ombudsman contends that reading territorial statutes harmoniously, and as a code, makes the investigative powers conferred to the Ombudsman under s. 16 of the *Act* a necessary component to the administration of all territorial statutes, including the *CFSA*. The Ombudsman further submits that its work is an essential component of the Minister's ability to meet the Minister's fairness obligations under the *CFSA*. The Ombudsman argues that interpreting s. 179(2)(b) as suggested by Yukon would prevent the

Ombudsman from investigating a matter of administration regarding FCS and frustrate the Minister's ability to meet their statutory obligation.

[118] In addition, the Ombudsman submits the Director has failed to consider the important role of the Ombudsman as well as the factors relevant to the exercise of the Director's discretion to disclose under the *CFSA*, including the best interests of the child, in refusing to provide to the Ombudsman the documents it requested.

[119] The Ombudsman also submits that neither *ATIPPA* nor *HIPMA* prohibits or restricts the Ombudsman's right to access FCS' information or documents in the context of an investigation.

[120] The Ombudsman submits that s. 7 of *ATIPPA* is a complete answer to Yukon's argument that *ATIPPA* restricts the information or documents the Ombudsman has the authority to compel under the *Act*. The Ombudsman is an officer of the Legislative Assembly and s. 7 clearly states that *ATIPPA* does not affect or limit the power of an officer of the Legislative Assembly to compel a witness to testify or compel production of documents in accordance with their authority to do so. The Ombudsman argues that, as there is no inconsistency or conflict between the *CFSA*, the *Act*, and *ATIPPA,* the paramountcy provision of *ATIPPA* (s. 8) is not engaged.

[121] The Ombudsman submits that the specific exceptions from the general prohibition against disclosure found at s. 25 of *ATIPPA*, which include the Privacy Commissioner (who is also an officer of the Legislative Assembly) but not the Ombudsman, serve another purpose than s. 7. The Ombudsman submits that s. 25 specifically permits disclosure to those officers in cases where their authority to compel

testimony or production is not engaged. According to the Ombudsman, there is therefore no conflict between the application of ss. 7 and 25 of *ATIPPA*.

[122] The Ombudsman submits that, in any event, s. 180 of the *CFSA* stipulates that ss. 177-179 of the *CFSA* apply despite any provision of *ATIPPA*. According to the Ombudsman, this means the discretion afforded to the Director to consent to disclosure under s. 179 of the *CFSA* applies despite any provisions of *ATIPPA*. The Ombudsman submits that, when read together, these provisions give the Director authority to produce documents containing personal information, without a person's consent, in circumstances where such disclosure might otherwise be prohibited under *ATIPPA*.

[123] In addition, the Ombudsman submits Yukon did not provide any specific roadmap to support its broad assertion that *HIPMA* prohibits disclosure of the personal health information or record of a person, in possession of the Department, to the Ombudsman, without a person's consent.

[124] The Ombudsman acknowledges that ss. 13, 15-16 of *HIPMA* impose restrictions and limitations on the Department and the Director, regarding the collection, use, and disclosure of personal health information. However, the Ombudsman submits s. 17 of *HIPMA* makes it clear those limitations and obligations do not apply when the Ombudsman exercises its statutory authority under the *Act* to compel the production of personal health information. Further, ss. 13, 15-16 of *HIPMA* do not provide a basis to refuse to comply with the demand. Consequently, as there is no prohibition against disclosure emanating from *HIPMA*, the Department and the Director are required by the *Act* to produce to the Ombudsman the documents containing personal health information it requested.

[125] The Ombudsman acknowledges there is a limitation requirement built in s. 17 of *HIPMA*, which means that the Department is only required to provide the personal health information requested by the Ombudsman pursuant to its statutory authority. The Ombudsman contends that, as there is no conflict, the paramountcy provision in s. 11 of *HIPMA* is not engaged.

[126] In addition, the Ombudsman submits that the sole purpose of the paramountcy provisions in *ATIPPA* and *HIPMA* is to establish a legislative hierarchy that applies when a provision in another act conflicts with a provision in these two statutes. When this occurs, *ATIPPA and HIPMA* prevail to the extent of the conflict.

[127] The Ombudsman submits that, contrary to what Yukon contends, the purpose of s. 25(e) of *ATIPPA* and s. 58(o) of *HIPMA* is to allow a public body or custodian to exercise their authority to disclose personal information or personal health information as permitted by another statute, or an arrangement or agreement created by another statute.

[128] The Ombudsman submits that, when enacting *ATIPPA* and *HIPMA*, the Legislature could not possibly have considered all laws of the Yukon, or all agreements in existence at the time *ATIPPA* and *HIPMA* were drafted, where there is a legal requirement or authority to disclose personal information. The Ombudsman submits that ss. 25(e) and 58(o) exist solely for the purpose of allowing *ATIPPA* and *HIPMA* to work together with other statutes and agreements made thereunder allowing public bodies and custodians to disclose personal information or personal health information in accordance with these other laws or agreements.

[129] The Ombudsman submits it would be absurd to interpret these provisions as requiring that every other law in Yukon, where disclosure of personal information is authorized or required, contain a provision(s) expressly stating that it prevails over *ATIPPA* or *HIPMA*. It would also be absurd to interpret the authority to disclose as authorized or required by a Yukon law differently from the authority to disclose under a federal law, which is also included in ss. 25(e) and 58(o).

[130] The Ombudsman recognizes that the declaration it seeks does not provide a complete answer with respect to the Ombudsman's authority to compel production of documents from the Department, and more specifically FCS. However, the Ombudsman submits the declaration would, at least, settle the dispute between the parties with respect to the interpretation of ss. 178 and 179 of the *CFSA*.

Yukon

[131] Yukon submits that ss. 178-179 of the *CFSA* expressly prohibit the Director from disclosing its information and documents, without the consent of another person or a court order, except for the specific purposes set out in s. 178. Yukon submits ss. 178-179 must be read together in light of the statutory scheme as a whole. Yukon submits the disclosure restrictions contained in ss. 178-179 recognize the very sensitive and personal nature of the records and information collected by FCS.

[132] Yukon submits the Director has no discretion to disclose unless it falls within the limited circumstances listed at s. 178. Yukon further submits that, as disclosure to the Ombudsman does not fall within any of the specific and limited purposes listed in s. 178, the Director is prohibited from doing so without the consent of the person to whom the personal information relates or a court order.

[133] According to Yukon, the prohibition against disclosure contained in the *CFSA* triggers the application of s. 19(2) of the *Act*. Therefore, the Ombudsman cannot compel the Director to disclose its information and produce its documents without a court order.

[134] Yukon argues it would be illogical for the Legislature to prohibit the Director from disclosing its information except for the very narrow purposes prescribed by s. 178, if the Director could, without any limitations, consent to the disclosure of its documents containing the same information under s. 179.

[135] In addition, Yukon submits that, generally, the information and documents in the possession of the Director fall under the *CFSA*, *ATIPPA*, and/or *HIPMA* statutory regimes.

[136] Yukon submits that, even if the court were to find that disclosure to the Ombudsman is permitted under the *CFSA*, the obligation to determine what information and documents are relevant and what can be disclosed to the Ombudsman would fall on the Director. According to Yukon, both *ATIPPA* and *HIPMA* impose an obligation on the public body, in this case FCS and its Director, to restrict disclosure to no more than the information that is actually required to fulfill the purpose for which it is disclosed (s. 23(b) of *ATIPPA* and ss. 15-17 of *HIPMA*).

[137] Yukon also submits that both *ATIPPA* and *HIPMA* contain a general statutory prohibition against disclosure, subject to specific exceptions. According to Yukon, neither *ATIPPA* nor *HIPMA*, permit the Director to disclose to the Ombudsman information and documents, that fall under their statutory regimes, without a court order.

[138] Yukon submits that there are several reasons why the provisions of *ATIPPA* and *HIPMA* ought to prevail over the *Act*. There are no exceptions in *HIPMA* and *ATIPPA*

that would permit disclosure to the Ombudsman despite the general prohibition against disclosure in these statutes. The Ombudsman does not appear in the list of offices that are specifically permitted to obtain information from government departments under *ATIPPA* and *HIPMA*. The Legislature did not amend the deferential provision s. 19(2) in the *Act*.

[139] Yukon submits the Legislature has specifically and expressly provided, at s. 180 of the *CFSA*, that the disclosure prohibition contained in ss. 178-179 of the *CFSA* applies notwithstanding any provisions to the contrary in *ATIPPA*. According to Yukon, this provision makes it clear that the prohibition against disclosure contained in the *CFSA* continues to apply despite any provision in *ATIPPA* that could be found to allow disclosure. Yukon submits that the enactment of s. 180 was rendered necessary due to the very strong paramountcy provision contained in *ATIPPA*. Yukon submits there is no need for a similar provision in the *CFSA* regarding its interaction with the *Act* because the *Act* does not contain a paramountcy provision, it contains a deferral provision (s. 19(2)). Yukon also submits that the *CFSA*, *ATIPPA*, and *HIPMA* should prevail over the *Act* because they are more recent and specific statutes than the *Act*.

[140] In addition, Yukon submits that the general language found in s. 25(e)(i) of *ATIPPA* and ss. 17 and 58(o) of *HIPMA* permitting disclosure in accordance with another statute does not authorize disclosure to the Ombudsman. Yukon submits that these provisions allow for disclosure to take place only where another statute has an explicit provision stating it prevails over *ATIPPA* and/or *HIPMA*. Yukon argues that, in such a case, disclosure may take place only (i) to the extent the disclosure is explicitly required by the other enactment; (ii) in the manner explicitly prescribed by the other

enactment; and (iii) subject to the requirement that disclosure be restricted to no more than the information that is actually required to fulfill the purposes of that other enactment (s. 23(b) of *ATIPPA* and ss. 15-17 of *HIPMA*). Yukon submits that finding otherwise would effectively make the paramountcy provisions in *ATIPPA* and *HIPMA* entirely ineffective.

[141] Yukon submits that, in any event, these provisions are of no utility to the Ombudsman because the disclosure sought in this case is not permitted by another act considering the prohibition against disclosure found in ss. 178-179 of the *CFSA*.

[142] Yukon also submits that s. 7 of *ATIPPA* is of no use to the Ombudsman because ss. 178 and 179 of the *CFSA* and s. 19(2) of the *Act* make it clear the Ombudsman does not have the power to compel disclosure of information and documents from the Director. According to Yukon, s. 7 was not intended to extend the Ombudsman's power to compel disclosure it has under its own *Act.* Section 7 was designed to address quasi-judicial proceedings, not to deal with situations such as the one before the court.

[143] In addition, Yukon submits that disclosure to the Ombudsman does not fit within any of the specific exceptions to the general disclosure prohibition contained in *ATIPPA* and *HIPMA*.

[144] According to Yukon, there is no statutory authority upon which the Ombudsman can rely to compel disclosure from the Director in this case and there is no basis for the Court to issue Declaration #3.

[145] Finally, Yukon submits the Director recognizes the important role of the Ombudsman. It is the reason why the Director has agreed to consent to a court order that authorizes the Director to disclose its documents to the Ombudsman for the

purpose of its investigation. However, the Director's consent is subject to certain conditions that are consistent with the Director's obligations to protect privacy interests of third parties and established privileges as well as its obligation to restrict disclosure to only what is necessary. According to Yukon, it was appropriate in this case for the Director to consent to court ordered disclosure.

Analysis

[146] Considering the arguments raised by the parties, a determination of this issue requires that I consider the provisions of four territorial statutes: the *Act,* which contains provisions regarding the Ombudsman's powers to compel production of documents and disclosure of information from an authority; the *CFSA*, which contains provisions regarding disclosure of the Director's information and documents; *ATIPPA*, which contains provisions regarding the collection, use, and disclosure of personal information by public bodies; and *HIPMA*, which contains provisions regarding the collection, use, and disclosure of health information by public bodies (custodians).

[147] As previously stated, the Ombudsman has broad statutory powers to compel production of records and disclosure of information from an authority, which are in line with its important mandate. The Department, including FCS and the Director, is an authority whose actions are subject to the Ombudsman's power to investigate complaints.

[148] However, as stated earlier, the Ombudsman's broad powers are limited by s. 19(2) of the *Act*, which prescribes that the Ombudsman cannot compel disclosure from a person or an authority where another act requires a person to maintain confidentiality or is bound by an obligation of non-disclosure.

[149] In addition to the principles of interpretation I mentioned earlier in my decision, I must interpret the provisions of the *CFSA* in accordance with the principles set out in s. 2 of the *CFSA*. This includes the best interests of the child, which is the paramount consideration under the *CFSA.* I must also consider that s. 2 of the *CFSA* prescribes that the act must be administered in accordance with the principles set out in that section (see also s. 4 of the *CFSA* for the factors to consider in determining the best interests of the child).

[150] Given the sensitive and private nature of the information collected by FCS, it is not surprising the *CFSA* contains specific provisions that pertain to disclosure.

[151] Sections 178 and 179 of the *CFSA* pertain to disclosure of information and documents by the Director without the consent of another person. They read as follows:

> **178 Disclosure of information by director**
>
> (1) A director may disclose information in the records of the director without the consent of another person for the purposes of
>
> (a) an assessment and investigation as to whether a child is in need of protective intervention;
>
> (b) assessments and reports regarding the adoption of a child;
>
> (c) an application to the court or a judge under this Act; or
>
> (d) the planning for the care or adoption of a child.
>
> (2) Without limiting the generality of subsection (1), the director may disclose the information without the consent of another person if the disclosure is
>
> (a) necessary to ensure the safety or health of a child or another person;
>
> (b) required by section 71 or by order of a judge;

(c) shared with persons entrusted with the care of a child;

(d) necessary for carrying out, or reporting back on the results of, an assessment and investigation as required under Part 3;

(e) necessary for the involvement of a First Nation in planning for or proceedings in respect of a child who is a member of the First Nation;[1]

(f) necessary for a family conference or other co-operative planning process, mediation or other alternative dispute resolution mechanism used when planning for the safety or care of a child, support services to be provided to a family or for the adoption of a child;[2]

(g) made in the course of obtaining legal or other advice in respect of matters arising under this Act; or

(h) necessary for the administration of this Act.

(3) For greater certainty, subsections (1) and (2) are subject to Division 6 of Part 5.[3]

179 Disclosure of director's records

(1) Subject to sections 71, 140 and 141, no information or document that is kept by a director that deals with the personal history of a child or an adult and has come into existence through any proceedings under this Act or the former Act shall be disclosed to any person other than a person to whom a director has delegated authority under section 176 or a lawyer acting for a director, unless it is disclosed with the consent of the director or under subsection (2).
(2) Subject to sections 71, 140 and 141, no person shall be compelled to disclose any information or document obtained

[1] (**new language since November 30, 2022**)
necessary for the involvement of a Yukon First Nation or an Indigenous governing body in planning for or proceedings in respect of an Indigenous child, or a child whose parent is an Indigenous person;

[2] (**new language since November 30, 2022**)
necessary for a collaborative planning process, or an alternative dispute resolution mechanism used when planning for the safety or care of a child, support services to be provided to a family or for the adoption of a child;

[3] This paragraph has been repealed since the hearing of this matter.

> in the course of the performance of duties under this Act except
>
> > (a) in the course of proceedings before the court or a judge under this Act; or
> > (b) in any other case, with the consent of a director or on the order of the court or a judge.[4]

[152] Sections 178 and 179 are found in Division 3 of the *CFSA*, which pertains to the designation and responsibilities of the Director.

[153] Section 178 sets out a number of specific purposes whereby the Director may disclose information contained in its records, without the consent of another person. The list of purposes set out in s. 178 is not open-ended. In effect, s. 178 circumscribes the situations where the Director is given discretion to consent to the disclosure of information contained in its records.

[154] Section 179(1) contains a general prohibition against disclosure of a specific type of information and documents. It prohibits a person from disclosing any information and any document kept by the Director that pertains to the personal history of a child or an adult and has come into existence through any proceedings under the *CFSA,* unless the Director consents or a court orders its disclosure.

[155] Section 179(2) stipulates that no person can be compelled to disclose any information or document obtained in the course of the performance of their duties under

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[4] (new language since November 30, 2022)
179 (1) Subject to sections 71, 140 and 141, information or document that is kept by a director that deals with the personal history of a child or an adult and has come into existence through any proceedings under this Act or the former Act must not be disclosed to any person other than a person to whom a director has delegated authority under section 176 or a lawyer acting for a director, unless it is disclosed with the consent of the director or under subsection (2).
(2) Subject to sections 71, 140 and 141, a person must not be compelled to disclose any information or document obtained in the course of the performance of duties under this Act except
(a) in the course of proceedings before the court or a judge under this Act; or
(b) in any other case, with the consent of a director or on the order of the court or a judge.

the *CFSA*, except during a proceeding before the court or a judge under the *CFSA*; or, in any other case, with the consent of the Director or on the order of the court or a judge.

[156] The parties agree that s. 179 confers upon the Director a discretion to consent to the disclosure or production of documents that would otherwise be precluded and could not be compelled, unless in the course of a court proceeding under the *CFSA* or by court order.

[157] However, the parties disagree on whether the discretion given to the Director extends to situations where disclosure is requested or demanded by the Ombudsman in the course of an investigation. The disagreement rests mainly on the parties' differing views regarding the interaction between ss. 178 and 179. The Ombudsman argues the Director's discretion to disclose under s. 179 is subject to the guiding principles of the *CFSA* but not to the limitations set out in s. 178, whereas Yukon says the Director's exercise of discretion is subject to s. 178.

[158] The Ombudsman's proposed interpretation of the Director's discretion to consent to disclosure under s. 179 of the *CFSA* requires one to read s. 179 in isolation from s. 178, which, in my view, is not the correct approach. As stated earlier, "in determining the meaning of the text, a court cannot read a statutory provision in isolation, but must read the provision in light of the broader statutory scheme" (*McColman* at para. 35). I agree with Yukon that the interpretation put forward by the Ombudsman leads to an illogical result. If one were to follow that interpretation, the Director would have a broader discretion under s. 179 to consent to the disclosure and production of

information and documents of a sensitive and private nature than it would, generally, for the information contained in its record under s. 178.

[159] In my view, a harmonious reading of ss. 178 and 179 leads to the conclusion that the exercise of the Director's discretion to consent to disclosure in s. 179 is circumscribed by s. 178, which immediately precedes s. 179.

[160] However, this conclusion does not end the analysis. I must also consider whether disclosure to the Ombudsman falls within the purposes enumerated in s. 178, and more particularly s. 178(2)(h), which states:

> (2) Without limiting the generality of subsection (1), the director may disclose the information without the consent of another person if the disclosure is
>
> …
>
> (h) necessary for the administration of this Act.[5]

[161] Yukon submits that the natural and ordinary meaning of the expression "necessary for the administration of this Act" is disclosure necessary for people to perform their functions and duties under the *CFSA*. According to Yukon, interpreting s. 178(2)(h) as including the work of the Ombudsman in investigating matters of administration strains the language of this paragraph further than its natural meaning would take it.

[162] Yukon submits that the language used in s. 178(2)(h) is different than the language found in other statutes that specifically provide for disclosure of information to

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[5] The wording of the French version of s. 178(2)(h) similarly states:
178(2) Sans limiter la portée générale du paragraphe (1), le directeur peut divulguer les renseignements sans le consentement de toute autre personne lorsque la divulgation:
…
h) est nécessaire dans le cadre de l'application de la présente loi.

officers, like the Ombudsman, who are not responsible for administering the statute but whose functions may, in other ways, relate to the statute.

[163] Yukon further submits that the wording of s. 178(2)(h) reveals the Legislature has chosen not to use the type of language that would encompass the Ombudsman's investigative function in the *CFSA* and permit disclosure to the Ombudsman without a court order.

[164] Yukon submits that an example of the type of language that would be required to permit disclosure to the Ombudsman is found in the legislation that the Nova Scotia Court of Appeal in *Nova Scotia (Office of the Ombudsman)* interpreted as encompassing and permitting disclosure to the Nova Scotia Ombudsman.

[165] In that case, s. 38 of the *Personal Health Information Act*, SNS 2010, c. 41, gave a custodian discretion to disclose personal health information about a person without that person's consent to "a person carrying out an inspection, investigation or similar procedure that is authorized … under …. another Act of the Province … for the purpose of facilitating the inspection, investigation or similar procedure" (*Nova Scotia (Office of the Ombudsman)* at para. 92) (emphasis in original).

[166] Similarly, s. 20(1) of the *Freedom of Information and Protection of Privacy Act,* SNS 1993, c. 5, provided that the "head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy". To determine what constituted an unreasonable invasion of a third party's personal privacy, s. 20(2) of the Nova Scotia legislation prescribed that all the relevant circumstances must be considered, including whether:

> …
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
>
> (b) the disclosure is likely to promote public health and safety …
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> an enactment authorizes the disclosure; … [my emphasis]

[167] I agree with Yukon that the language of the statutory provisions at issue in *Nova Scotia (Office of the Ombudsman)* was more specific, contemplated and encompassed disclosure to the Nova Scotia Ombudsman, as found by the Nova Scotia Court of Appeal.

[168] However, I do not find that the absence, in s. 178 of the *CFSA,* of the specific type of language used in the Nova Scotia statutes necessarily means the Yukon Legislature did not intend to give to the Director discretion to disclose information and documents to the Ombudsman in the course of an investigation, without a court order.

[169] As stated earlier, the modern approach to statutory interpretation requires that the words of a statute be interpreted in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of lawmakers in enacting the statute.

[170] In addition, s. 10 of the *Interpretation Act*, requires that territorial statutes be deemed remedial and given the fair, large, and liberal interpretation that best ensures

the attainment of their objects. The *Act* itself attracts particular consideration because it "represents the paradigm of remedial legislation" and must receive a broad purposive interpretation consistent with the Ombudsman's important role in our constitutional democracy *(Nova Scotia (Office of the Ombudsman)* at para. 88).

[171] In addition, when examining the interaction between territorial statutes, it is presumed that the body of legislation enacted by the Legislature is meant to work together, that statutes do not contain contradictions or inconsistencies, and that they operate without coming into conflict. Therefore, an interpretation that minimizes the possibility of conflict will be preferred.

[172] In *R v Ulybel Enterprises Ltd*, [2001] 2 SCR 867 at para. 30, the Court quoted Professor Sullivan on *Driedger on the Construction of Statutes,* (3rd ed. 1994) at 288:

> …
>
> The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. … Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

See also *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3*,* at 38; *65302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at para. 7.

[173] The Legislature found it necessary to enact legislation in the Yukon creating an independent office of the Ombudsman. It gave the Ombudsman broad investigative powers over matters of administration to allow the Ombudsman to fulfill its important supervisory and review function over actions, decisions, or procedures taken, made or

adopted by government entities in fulfilling their mandate under their enabling statutes in order to promote and establish accountability and openness within the administration of government. The *raison d'être* of the office of the Ombudsman is to act as a watch dog over the administration of government; to provide an effective way for a private and timely investigation of complaints about the manner in which a statute is being administered, and to recommend corrective action be taken, if necessary. Through its reporting functions, the Ombudsman allows the Legislature to maintain oversight over the administration of the legislation it enacts.

[174] The Legislature gave the Ombudsman's jurisdiction to investigate matters of administration involving the Department, including FCS and its Director. Moreover, the Ombudsman's supervisory power extends to a Yukon First Nation service authority designated under the *CFSA* (s. 170 of the *CFSA*).

[175] Under the *CFSA*, the Minister and the Director both have responsibilities regarding the administration of the Act, which object is the protection, safety, health and well-being of children in the Yukon.[6] The overarching principle and consideration in matters involving the *CFSA* are the best interests of the child. Many families and children across the territory are impacted daily by the actions, interventions, decisions, policies and procedures taken, made or adopted by FCS in delivering and administering its services and programs or otherwise fulfilling its mandate under the *CFSA*.

[176] Pursuant to s. 164 of the *CFSA*, the Minister's responsibilities include:

[6] See Preamble and ss. 2-4 of the *CFSA*.

> …
>
> (a) delivering or providing for services for children and families contemplated under this Act;
>
> (b) establishing territorial objectives, priorities, policies and standards for the provision of services under this Act;
>
> (c) monitoring and assessing service delivery under this Act to ensure standards of service are met; and
>
> (a) allocating funding and other resources for the purposes of this Act. [my emphasis]

[177] The Director's responsibilities are found at s. 174 of the *CFSA,* they include:

> (1) A director must ensure that the provisions of this Act for which the director is responsible are carried out.
>
> (2) A director must, in accordance with this Act, have general superintendence over all matters pertaining to the care or custody of children who come into the director's care or custody.
>
> (3) The director of family and children's services is to be and must perform the functions of the provincial director under the *Youth Criminal Justice Act (Canada)*. [my emphasis]

[178] In addition, s. 3 of the *CFSA* enumerates the service delivery principles, which are centered around the well-being and safety of the child and their connection with their family and community.

[179] Both the Minister and the Director have supervisory and managing responsibilities to ensure the provisions of the *CFSA* are carried out properly.

[180] When considering harmoniously the mandate of the Ombudsman under the *Act* and its supervisory role over matters of administration with the object and principles of the *CFSA*, and the responsibilities of the Minister and the Director regarding the

management and administration of the *CFSA*, I conclude the function of the Ombudsman is a necessary component of the good administration of the *CFSA* – by which complaints regarding the delivery of services or programs, as well as the actions and inactions of FCS, can be investigated by the Ombudsman, its findings reported to the Department and corrective action taken by the Department or Director, if deemed necessary. Good and proper management and administration of the *CFSA* are, in my view, in line with the principle of the best interests of the child.

[181] In addition, the fact the Ombudsman and its staff have the statutory obligation to maintain confidentiality over information they obtain in the course of an investigation addresses legitimate concerns regarding disclosure of the private and personal nature of the information kept by the Director.

[182] I am unable to find that court ordered disclosure, as suggested by Yukon, was how the Legislature intended the Ombudsman obtain the information it requires to fulfill the supervisory mandate the Legislature conferred upon the Ombudsman over the administration of the *CFSA* by the Department, FCS, and the Director. The general principle is that court proceedings are opened to the public, whereas the Ombudsman's investigations generally proceed in private. Also, adding the requirement of a court order to authorize disclosure would slow down the Ombudsman's investigation and potentially disrupt the activities of the Department.

[183] Therefore, I am of the view that the expression "necessary for the administration of this Act" in s. 178(2)(h) of the *CFSA* encompasses the function, mandate, and investigatory role of the Ombudsman. As disclosure to the Ombudsman falls within the purposes for which the Director has discretion to disclose the information kept in its

record pursuant to s. 178, the Director also has discretion to consent to disclosure of its information and documents pursuant to s. 179. This means the Director is not bound by confidentiality or non-disclosure by these two provisions of the *CFSA*. Consequently, the combined application of ss. 178 and 179 of the *CFSA* and s. 19(2) of the *Act* do not preclude disclosure to the Ombudsman, and the Director cannot rely on these provisions to refuse to comply with a disclosure demand from the Ombudsman in the course of its investigation.

[184] However, there are other provisions in the *CFSA* that may impose an obligation of confidentiality or non-disclosure on the Director and the Department that may preclude disclosure of specific information or documents to the Ombudsman. Section 22(5) of the *CFSA* is an example of such a provision. Section 22(5) clearly imposes an obligation of non-disclosure on any information that could reveal the identity of an informant who reported that a child was in need of protection. Disclosure is only permitted if ordered by the court. Sections 22(1) and (5) state as follows:

> **22 Duty to report**
>
> (1) A person who has reason to believe that a child is in need of protective intervention must immediately report the information on which they base their belief to a director or peace officer.
>
> …
>
> (5) A person must not disclose, except as required by an order of the court or a judge, the identity of or information that would identify a person who made the report without the consent of the person.

[185] In this case, the Ombudsman did not request or require any information of that nature and did not oppose redactions for that purpose. Also, the Ombudsman relayed to

legal counsel for the Department and the Director it did not have concerns with the redaction of the names of third parties.

[186] In addition, there may be other specific provisions of the *CFSA* that act as a bar to disclosure of other specific types of information and documents to the Ombudsman, which I have not contemplated or have not been brought to my attention in the context of this petition. This would have to be considered by the parties, if and when applicable.

[187] I will now turn to the provisions of *ATIPPA* and *HIPMA*, which Yukon argues, limit the Director's discretion to consent to disclosure by imposing on the Director, among other things, the obligation to only disclose information or documents it deems relevant to the Ombudsman's investigation.

[188] *ATIPPA* and *HIPMA* are territorial statutes that deal with the collection, use, and disclosure by public bodies (or custodians) of personal information (*ATIPPA*) and personal health information (*HIPMA*).

[189] The parties agree that most if not all of the Director's information or documents sought by the Ombudsman in this case would either meet the definition of personal information under *ATIPPA* or personal health information under *HIPMA*.

[190] Both *ATIPPA* and *HIPMA* have general paramountcy provisions that make them prevail over other statutes in case of conflict unless there is an express provision in another statute that states otherwise. Therefore, an express derogation from paramountcy in another statute is required for them not to prevail.

[191] The *CFSA* contains such an express derogation. Section 180 of the *CFSA* provides that ss. 178 and 179 of the *CFSA* apply despite any provisions of *ATIPPA*. At the time of the hearing, s. 180 read as follows:

> For greater certainty, sections 177 to 179 apply despite any provisions of the *Access to Information and Protection of Privacy Act*. S.Y. 2008, c.1, s.180

[192] Section 180 has been amended since the hearing of this matter. Its scope has been expanded.[7] It now provides that ss. 177-180 apply despite any provisions of both *ATIPPA* and *HIPMA*. The wording of s. 180, both before and after the amendments, makes it clear that ss. 178 and 179 prevail in case of conflict with any provisions of *ATIPPA*. Therefore, no provision of *ATIPPA* may prohibit disclosure otherwise permitted under ss. 178 and 179 of the *CFSA* or permit disclosure prohibited by ss. 178 and 179. Since disclosure to the Ombudsman is permitted under ss 178 and 179 of the *CFSA*, disclosure cannot be prohibited by *ATIPPA*.

[193] Nonetheless, Yukon submits that s. 23(b) of *ATIPPA* limits the exercise of the Director's discretion to consent to disclosure, by imposing on the Department the obligation to disclose only what is reasonably necessary to carry out the purpose of the disclosure. In other words, Yukon submits that s. 23 imposes on the Director, not the Ombudsman, the obligation to assess what information or documents are relevant to the Ombudsman's investigation and to not disclose information or documents the Director deems not relevant.

[194] Section 23 states:

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[7] Section 180 currently reads:

> **180 Scope and application of sections 177 to 179**
> (1) Information referred to in sections 177 to 179 includes personal information within the meaning of the *Access to Information and Protection of Privacy Act* and personal health information within the meaning of the *Health Information Privacy and Management Act*.
> (2) Sections 177 to 179 apply despite any provision of the *Access to Information and Protection of Privacy Act* and the *Health Information Privacy and Management Act*.
> (3) Sections 177 to 179 are subject to section 132 and do not apply to the disclosure of identifying information under Division 6 of Part 5.

> **23 Prohibition – disclosure**
>
> A public body must not disclose personal information
>
> (a) except as provided under this Division; and
>
> (b) beyond the amount that is reasonably necessary to carry out the purpose for the disclosure. [my emphasis]

[195] As stated earlier, there is a presumption of coherence between territorial statutes. As a result, courts will favour an interpretation that permits different statutory provisions to coexist harmoniously over an interpretation that result in a conflict between them.

[196] As the Ombudsman is included in the definition of an officer of the Legislative Assembly in s. 1 of *ATIPPA*, I must also consider the impact, if any, of s. 7 of *ATIPPA,* which states:

> **7 Act does not affect certain powers and rights**
>
> This Act does not
>
> (a) replace or limit, other than as provided under this Act, other manners in which the public may access information that is generally available to the public;
>
> (b) prohibit the management of information or records in accordance with an Act of the Legislature or of Parliament;
>
> (c) limit the information otherwise legally available to a party to a proceeding; or
>
> (d) affect or limit the power of a court, an adjudicator or an officer of the Legislative Assembly to, in accordance with their authority to do so, compel a witness to testify or compel the production of documents. [my emphasis]

[197] I take this provision to mean that none of the provisions of *ATIPPA* may affect or limit the statutory authority of an officer of the Legislative Assembly to compel a witness to testify or to compel the production of documents.

[198] Section 7 makes it clear that no provision of *ATIPPA* can affect or limit the existing statutory power of the Ombudsman to compel disclosure from the Director by virtue of the application of s. 16 of the *Act* and ss. 178 and 179 of the *CFSA*. As a result, inasmuch as s. 23(b) of *ATIPPA* purports to limit the power of the Ombudsman to compel production of documents from the Director, by imposing on the Director an obligation of non-disclosure that the Director would not have otherwise, it does not apply. I am unable to agree with Yukon that s. 19(2) of the *Act* plays any role in this analysis other than at the stage of determining the extent of the Ombudsman's statutory power to compel production from the Director under the *CFSA.* Finding otherwise would defeat the purpose of s. 7 of *ATIPPA*. Therefore, I find that *ATIPPA* does not impose an obligation on the Director to assess and determine what information or documents are relevant to the Ombudsman's investigation and refuse disclosure of what the Director considers not relevant, as argued by Yukon.

[199] As I have found that the combined application of ss. 178-180 of the *CFSA* and s. 7 of *ATIPPA* permit disclosure to the Ombudsman despite the provisions of *ATIPPA*, I do not find it necessary to determine whether s. 25 of *ATIPPA*, which list situations where disclosure is permitted under *ATIPPA*, constitute a way by which disclosure to the Ombudsman could be permitted.

[200] Nonetheless, I recognize that s. 25 specifically permits disclosure to at least one officer of the Legislative Assembly (who is not the Ombudsman), which raises the issue

of the scope of s. 7 of *ATIPPA*. I agree with the Ombudsman that a harmonious reading of ss. 7 and 25 of *ATIPPA* leads to the conclusion that these two sections have different purposes. Section 25 gives a public body the authorization to disclose to another entity, including a public officer, in a context where a power to compel disclosure or production is not exercised or does not exist. Whereas s. 7 applies in circumstances where public officers exercise their power to compel production pursuant to their statutory power to do so. Consequently, there are no conflicts between ss. 7 and 25 of *ATIPPA*.

[201] I will now turn to the interactions between the relevant provisions of the *Act*, the *CFSA*, *HIPMA,* and their impact, if any, on the power of the Ombudsman to compel disclosure of personal health information from the Department, and more particularly the Director and FCS.

[202] The Ombudsman acknowledges that any record in the custody or control of the Department, and therefore FCS and the Director, that contains personal health information is subject to *HIPMA*, this includes records collected under the *CFSA*. Also, the Ombudsman acknowledges that, considering the broad definition of personal health information under *HIPMA*, any of the Director's record that contains the personal information of an individual as well as their registration information (a person's name, gender, date of birth, date of death, residential address, telephone number, email address, and personal health number) is deemed to contain personal health information.

[203] The purposes of *HIPMA* are: to protect the privacy and confidentiality of an individual's personal health information; to facilitate an individual's access to their personal health information; to delineate the collection, use, and disclosure of personal

health information in a manner that protects the privacy and confidentiality of that information; to improve the quality and accessibility of health care in the Yukon; to provide for an independent source of advice and resolution of complaint under *HIPMA*, through the Office of the Commissioner; and provide effective remedies for contravention to the statute (see s. 1 of *HIPMA*).

[204] As noted earlier, s. 180 of the *CFSA* has been amended since the hearing of this matter. Section 180 now provides that ss. 178-179 apply despite any provision of *ATIPPA* and *HIPMA*. Therefore, since the amendments, no provision of *HIPMA* may prohibit disclosure otherwise permitted under ss. 178-179 of the *CFSA* or permit disclosure prohibited by ss. 178 and 179.

[205] However, at the time this matter was heard, there was no express provision in the *CFSA* stating that ss. 178 and 179 prevailed over the provisions of *HIPMA*, nor any provision in the *Act* stating the Ombudsman's power to compel disclosure or production prevailed over *HIPMA*. Therefore, due to its paramountcy provision *HIPMA* prevailed in case of conflict. Nonetheless, for the following reasons, I am of the view that disclosure to the Ombudsman was permitted under *HIPMA*, even prior to the amendments to s. 180 of the *CFSA*.

[206] Section 58 of *HIPMA* sets out a list of situations whereby a custodian may disclose personal health information it collected or obtained to another entity.

[207] Section 58(o) stipulates that a custodian may disclose an individual's personal health information, without the consent of that individual:

> o) subject to the requirements and restrictions, if any, that are prescribed, if an enactment of Yukon or Canada, or a treaty, agreement or arrangement entered into under such an enactment, permits or requires the disclosure;

[208] As stated earlier, Yukon argues that considering the strong paramountcy provision in *HIPMA*, s. 58(o) can only mean that disclosure permitted under the other statute is authorized only if the other statute contains a paramountcy provision that makes it prevail over *HIPMA*. According to Yukon, the broad general prohibition against disclosure and strong paramountcy provision found in *HIPMA* would serve no real purpose if the Legislature intended that disclosure in accordance with any other statute be permitted without recourse in that statute to an express provision setting aside *HIPMA*.

[209] I have some difficulty with Yukon's argument in this regard. First, I do not see why it would be necessary to include a specific provision in *HIPMA,* such as s. 58(o), to give effect to an express paramountcy provision in another statute because such a paramountcy provision would stand on its own to set aside any provision in *HIPMA* that would run contrary to what that paramountcy provision would state prevails. Second, as federal legislation is also mentioned in s. 58(o), Yukon's position would amount to requiring a federal statute to contain an express paramountcy provision to prevail over *HIPMA* in case of conflict. Yukon's position on the proper interpretation to give to s. 58(o) is questionable considering the doctrine of federal paramountcy. In my view, the correct interpretation is simply that, in enacting s. 58(o), the Legislature intended that disclosure of personal health information made in conformity with another territorial or federal statute or treaty, or agreement or arrangement thereunder would also be permitted under *HIPMA*, in addition to all the other specific circumstances listed in s. 58. This interpretation does not render the general paramountcy provision in *HIPMA* useless as argued by Yukon. For example, the paramountcy provision in *HIPMA*

ensures that disclosure contemplated by s. 58, but not under the other applicable statute, is nonetheless authorized. However, if the other territorial statute has a provision specifically setting aside *HIPMA*, then only disclosure provided under that statute is authorized. In addition, *HIPMA* deals not only with disclosure but also with collection and use of health information by custodians. *HIPMA*'s paramountcy provisions would apply in these areas as well.

[210] Therefore, since disclosure to the Ombudsman is permitted under the combined application of ss. 178-179 of the *CFSA* and the *Act*, it is also authorized under *HIPMA*.

[211] Also, s. 17 of *HIPMA* provides that s. 13 and ss. 15-16 do not apply to the extent disclosure is required or being mandated by a law:

> 17 Legal requirement
>
> Sections 13, 15 and 16 do not apply to the extent that a law, including an order of a court or other order that has the force of law, requires the collection, use or disclosure of, or access to, personal health information. [my emphasis]

[212] As I have found that disclosure to the Ombudsman is required by a law, through the combined application of s. 16 of the *Act* and ss. 178-179 of the *CFSA*, ss. 13, 15, and 16 of *HIPMA* do not apply to the extent they are in conflict with the Ombudsman's power to compel disclosure.

[213] Sections 13, 15, and 16 of *HIPMA* states as follows:

> **13 Collection, use and disclosure only in accordance with this Act.**
>
> A person who is a custodian or the agent of a custodian may collect, use, disclose and access personal health information only in accordance with this Act and the regulations.

> **15 When other information suffices**
>
> A person who is a custodian or the agent of a custodian must not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.
>
> **16 Minimum to be collected, used or disclosed**
>
> The collection, use and disclosure of personal health information by a custodian or their agent must be limited to the minimum amount of personal health information that is reasonably necessary to achieve the purpose for which it is collected, used or disclosed.

[214] Section 16(b) of the *Act* gives the Ombudsman the power to require a person to furnish information or produce a document or thing in their possession or control relating to an investigation. According to s. 16(b), it is necessarily the Ombudsman who is tasked with determining which information, document or thing relates to an investigation prior to requiring it from the person who controls or possesses it. Inasmuch as ss. 13, 15, and 16 purport to limit the power of the Ombudsman of determining what information, document or thing is required in relation to its investigation, that limit does not apply, as per s. 17. However, a person would not be authorized to disclose to the Ombudsman information it cannot compel such as the identity of an informant as per s. 22(5) of the *CFSA.* In addition, a person could not provide personal health information, or a document or thing containing personal health information the Ombudsman did not request.

[215] As a result, I am of the view that neither *ATIPPA* nor *HIPMA* prevent or restrict disclosure to the Ombudsman that is permitted through the combined application of the *CFSA* and the *Act*.

[216] This conclusion does not mean an authority or a person should blindly abide by a disclosure or production request made by the Ombudsman. As stated previously, if FCS and the Director have concerns with respect to such a request, they should bring them to the Ombudsman's attention for discussion.

[217] I do not intend to weigh in on whose responsibility it is to bring a matter to court in case of disagreement. Considering the nature of the Ombudsman's mandate and jurisdiction, it is expected both parties would cooperate in finding an efficient manner to bring their issue before the court for resolution, if necessary.

[218] Finally, I agree with the Ombudsman that while the declaration it seeks does not fully delineate the scope of its power to compel disclosure from FCS and the Director, Declaration #3 does resolve an important component of the issue of statutory interpretation that opposes the parties with respect to the Ombudsman's jurisdiction.

[219] As a result, in light of the conclusions I reached regarding the interactions between the provisions of the *Act*, the *CFSA*, *ATIPPA* and *HIPMA* and, more specifically, with respect to the combined application of ss. 178 and 179 of the *CFSA* and s. 19(2) of the *Act*, I find it appropriate to grant Declaration #3, which is that the Ombudsman's jurisdiction to investigate complaints related to FCS includes a right to access documents in the possession of the Department and a Director appointed under the *CFSA*, which right is not precluded by ss. 178 and 179 of the *CFSA*.

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CAMPBELL J.