Decision F06-07

FRASER HEALTH AUTHORITY

David Loukidelis, Information and Privacy Commissioner
June 20, 2006

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Summary: Public body and contractor objected to applicant's inclusion of an affidavit on grounds it did not meet criteria for "expert evidence" under the *Evidence Act*. The Information and Privacy Commissioner will not treat or accept the affidavit as expert opinion evidence and it is therefore not necessary to decide whether ss. 10 and 11 of the *Evidence Act* are relevant. The Commissioner will decide what if any weight and significance to attach to affidavit during his deliberations on the merits of the inquiry.

Key words: Expert opinion evidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17, 21; *Evidence Act,* ss. 10, 11.

Authorities Considered: B.C.: F05-29, [2005] B.C.I.P.C.D. No. 39; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-52, [2001] B.C.I.P.C.D. No. 55.

Cases Considered: *R. v. Mohan,* [1994] 2 S.C.R. 9; *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246 (F.C.A.); *Workers' Compensation Board-Alberta v. Appeal Commission* (2005), 258 D.L.R. (4th) 29; *British Columbia v. Clayoquot Band of Indians,* [1991] B.C.J. No. 3367 (S.C.); *Napoli v. Workers' Compensation Board* (1981), 121 D.L.R. (3d) 301 (affirmed at 16 D.L.R. (3d) 170 (B.C.C.A.)).

1.0 INTRODUCTION

[1] This inquiry involves an access request for a contract, described as renewed or newly signed, for housekeeping services in the public body's

facilities. In issue is information withheld under s. 17 and s. 21 of the *Freedom of Information and Protection of Privacy Act* ("Act"). For both disclosure exceptions, s. 57 assigns the burden of proof to the public body.

[2] This preliminary ruling involves objections by the public body and the contractor to an affidavit included in the applicant's initial submission. That submission attempts to address the public body's anticipated case on s. 17 and s. 21 through an affidavit of Jim Amos. Jim Amos is based in the United Kingdom. He describes himself as an Honorary Senior Research Fellow in The Constitution Unit, Department of Political Science, University College London. He is described by the applicant as an "expert in freedom of information".

[3] The public body refers to *R. v. Mohan,*[1] a case about the admissibility of expert testimony to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. The public body cites the four criteria for admissibility set out in that case: (1) properly qualified expert; (2) relevance; (3) necessity in assisting the trier of fact; and (4) absence of any exclusionary rule. The public body objects to Amos's affidavit because:

- There is no evidence before the inquiry to qualify Amos as an expert on the effect of disclosure under the Act on the public body or the contractor;
- The context for Amos's evidence is the United Kingdom access to information statute, where the test for disclosure of commercial or financial information is significantly different than the test in the Act;
- Amos's 1999 study (a copy of which forms Exhibit "B" to his affidavit) focussed on how businesses would be affected generally and could benefit from proposed legislation in the United Kingdom, not on the effect on public bodies in a competitive environment or on businesses where information is disclosed;
- In any event, Amos's affidavit does not support the applicant's position that the harms tests in s. 17 or s. 21 are not met for the disputed information in this inquiry.

[4] The contractor objects to Amos's affidavit because:

- His evidence was not provided in accordance with s. 10 of the *Evidence Act* (which, in the absence of proceeding rules for the introduction of expert evidence and the testimony of experts, contemplates a statement in writing setting forth the expert's opinion being furnished to each party

[1] [1994] 2 S.C.R. 9.

adverse in interest to the party tendering the statement at least 30 days before the statement is given in evidence);

- It essentially amounts to legal argument about the interpretation of "harm" in the Act;
- To the extent the affidavit is evidence at all, it relates to foreign law that is not in issue in this inquiry and that also incorporates a different legal test than the test in s. 17 or s. 21 of the Act.

[5] The applicant answers these objections with the following points:

- The time constraints of the inquiry process under the Act and the logistics of obtaining the affidavit did not permit the applicant to give notice or a written summary of Amos's evidence to the public body or to the contractor;
- The affidavit is necessary in that it provides "research-based evidence with respect to the issue of harm as a result of FOI disclosure in other jurisdictions";
- Amos is qualified as an expert because he possesses knowledge beyond the Commissioner or a delegate hearing this inquiry;
- There is no rule excluding Amos's evidence;
- Section 10 of the *Evidence Act* is geared to give notice of expert evidence in advance of an oral hearing and s. 11 gives the person presiding considerable latitude to allow expert testimony despite non-compliance with the notice and time requirements in s. 10. This leads to the conclusion that a person presiding over a written inquiry under the Act has discretion under s. 11 of the *Evidence Act* as to procedure for the admission of expert evidence;
- Lack of notice of Amos's affidavit has not been prejudicial to the public body or to the contractor since they have both responded to the merits of his evidence in their reply submissions in the inquiry.

[6] I have concluded that I will not be considering Amos's affidavit as expert opinion evidence. I will therefore comment on the applicability of the procedures in ss. 10 and 11 of the *Evidence Act* and the criteria in *Mohan* respecting the tendering of expert evidence in this inquiry under the Act. It is not strictly necessary for those issues to be resolved in this ruling.

[7] My consideration of Amos's affidavit as argument, public policy commentary or to some extent factual evidence will be part of my deliberations on the merits of the inquiry, when I will take into account the public body's and

the contractor's submissions on the relevance of this evidence and the appropriate weight to be given to it.

Relevance of accessibility of similar information in other jurisdictions

[8] In Order F05-29,[2] which involved the British Columbia Assessment Authority and the applicability of s. 21(1) and s. 21(2) to a retailer's access request for information relating to assessments of shopping centres where the retailer had leased stores, I explained the potential relevance of the accessibility of similar information in other jurisdictions:

> [41] My view of the relevance of the accessibility of similar information in other jurisdictions is summarized in the following passage from Order 01-52, which concerned whether the disclosure of grizzly bear kill location data could reasonably be expected to result in harm within the meaning of the s. 18(b) disclosure exception in the Act:
>
> > [89] ...the fact that another jurisdiction may have a law or policy regarding the public disclosure of grizzly bear kill locations will not drive the interpretation or application of s. 18 of the Act, but concrete evidence justifying or explaining the experience of the law or policy of another jurisdiction could be pertinent....
> >
> > [90] In Order 01-20, [2001] B.C.I.P.C.D. No. 21, a decision concerning ss. 17 and 21 of the Act, I considered evidence of the U.S. experience relating to public disclosure of exclusive supply agreements between U.S. universities and cold beverage companies. In that case, I decided that the U.S. evidence was relevant to showing that – regardless of the similarity or dissimilarity of U.S. access to information statutes – the absence of confidentiality for 11 exclusive supply agreements provided to me in evidence had not prevented the U.S. universities and cold beverage companies from entering into exclusive sponsorship agreements. I found this was relevant to the question of whether disclosure of the exclusive agreement in question in that inquiry gave rise to a reasonable expectation of harm to the interests of the public body or of the third party under ss. 17 and 21 of the Act.
> >
> > [91] I also referred in Order 01-20 to the decision of the Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246. That case involved the question of whether disclosure of government inspection reports containing negative assessments of meat-packing plants posed a sufficient risk of harm to the business interests of a third party meat-packer. Similar reports were publicly available in the U.S. and had previously also been available in Canada. Evidence was presented of negative publicity surrounding product safety issues discussed in U.S. government reports unrelated to meat-packing plants or their inspection. The third party meat-packer's position in Canada Packers

[2] [2005] B.C.I.P.C.D. No. 39.

> was that its interests would be harmed by unfavourable press coverage if the inspection reports were disclosed. The Federal Court of Appeal found this to be the "sheerest speculation". It found that the third party's position was not established by remote evidence about experience in the U.S. with publicity surrounding product safety issues in government reports. If that evidence had any relevance, it was outweighed by the fact that meat-packing plant inspection reports were publicly disclosed in the U.S. and had until recently also been publicly disclosed in Canada, yet no evidence had been adduced of unfavourable publicity associated with those disclosure practices.

[9] In Order F05-29, I concluded as follows:

> [42] The existence of assessment legislation in Quebec, Ontario and Alberta that permits tenant access to assessment information or gives assessment authorities discretion in the area cannot be used to read similar content into British Columbia legislation if the legislative language in British Columbia does not support it. Further, this inquiry under the Act is of course not a forum for legislative change, if change is necessary, to bring British Columbia closer into line with other Canadian jurisdictions in terms of access, under the *Assessment Act*, to the information that HBC seeks. The accessibility of similar information elsewhere in Canada may, however, support HBC's argument that information is not confidential (para. 15, BC Assessment reply submission) and may be relevant to whether disclosure could reasonably be expected to result in harm under access to information legislation, in this case under s. 21(1)(c) of the Act.

[10] The public body is correct that in Order 01-20[3] I was provided with evidence that similar agreements had been regularly released in other jurisdictions (in the United States) without the harm that the public body and cold beverage company before me were saying could reasonably be expected to happen. The circumstances were similar for the meat packing plant inspection reports at issue in *Canada Packers Inc. v. Canada (Minister of Agriculture)*.[4]

[11] In Order 01-20, there was no expert opinion evidence on the impact of disclosure on universities or cold beverage companies in the United States. It was self-evident from the U.S. contracts tendered that large-scale exclusive cold beverage agreements were still being entered into despite the public availability of the contracts. In *Canada Packers Inc.*, expert evidence was submitted by the third-party meat-packing company on the question of whether disclosure of inspection reports was likely to cause harm to its business interests. The court did not find the tendered evidence compelling in light of, at least in part, the routine disclosure practice in the United States respecting such information. In Order 01-52,[5] the applicant and the public body both tendered

[3] [2001] B.C.I.P.C.D. No. 21.
[4] (1988), 53 D.L.R. (4th) 246 (F.C.A.).
[5] [2001] B.C.I.P.C.D. No. 55.

affidavits of wildlife biologists with expertise in grizzly bears—one of the grizzly bear biologists also had past experience as a big game guide outfitter—about whether public disclosure of kill location data was likely to damage or interfere with the conservation of grizzly bears.

Admissibility of expert opinion evidence generally

[12] It is doubtful that the general criteria for the admissibility of expert evidence described in *Mohan* apply, strictly or at all, to the admissibility of opinion evidence in an inquiry under the Act. The question was not fully argued here, but in *Workers' Compensation Board-Alberta v. Appeal Commission* (2005),[6] the Alberta Court of Appeal forcefully concluded that the criteria in *Mohan* did not apply in an administrative law setting where the strict rules of evidence do not apply and the weighing of evidence is generally regarded as a question of fact:

> ¶62 The WCB's second argument is that the Appeals Commission erred in failing to apply the test for admission of expert evidence outlined by the Supreme Court in *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419, at para. 17. The *Mohan* test requires four elements to be established as a precondition to the admission of expert opinion evidence: 1) relevance; 2) necessity in assisting the trier of fact; 3) the absence of any exclusionary rule; and 4) a properly qualified expert. Specifically, the WCB alleges the Appeals Commission failed to fulfill the fourth criterion which, it contends, was an error of law.
>
> ¶63 This argument departs from established principles of administrative law. As a general rule, strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed: *Toronto (City) v. C.U.P.E., Local 79* (1982), 35 O.R. (2d) 545 at 556, 133 D.L.R. (3d) 94 (C.A.). See also *Principles of Administrative Law* at 289-90; Sara Blake, *Administrative Law in Canada*, 3rd ed., (Markham, Ont.: Butterworths, 2001) at 56-57; Robert W. Macaulay, Q.C. & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2004) at 17-2. While rules relating to the inadmissibility of evidence (such as the *Mohan* test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required to apply those strict rules: *Practice and Procedure before Administrative Tribunals* at 17-11. "Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law": *T.A. Miller Ltd. v. Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 (C.A.), at 995; *Trenchard v. Secretary of State for the Environment*, [1997] E.W.J. No. 1118 (QL) (C.A.), at para. 28. See also *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A.).

[6] 258 D.L.R. (4th) 29.

¶64 This general rule applies even in the absence of a specific legislative direction to that effect. While many statutes stipulate that a particular tribunal is not constrained by the rules of evidence applicable to courts of civil and criminal jurisdiction, "these various provisions do not however alter the common law; rather they reflect the common law position: in general, the normal rules of evidence do not apply to administrative tribunals and agencies": *Administrative Law*, *supra*, at 279-80.

¶65 Although the WCB Act does not expressly state that strict rules of evidence do not apply, two of its provisions support the application of this rule in respect of Appeals Commission proceedings. Pursuant to ss. 13.2(1) and (2), the Appeals Commission must consider the records of the claims adjudicator and the review body relating to the claim. Notably, these records often contain medical documents and opinion evidence, all unsworn, in the form of hearsay and lacking expert qualification or other admissibility procedures. In addition, s. 13.2(6) provides that the Appeals Commission "shall give all persons with a direct interest in the matter under appeal ... an opportunity to present any new or additional evidence" [emphasis added]. These provisions are inconsistent with the application of strict rules of evidence.

¶66 As strict rules of evidence do not apply to Appeals Commission hearings, it follows that the Appeals Commission's failure to formally qualify Dr. Flor-Henry to give expert evidence does not give rise to an arguable question of law or jurisdiction. The record reflects that the Appeals Commission considered Dr. Flor-Henry's resumé, professional qualifications and testing methodology, and concluded that his evidence deserved some weight. The Appeals Commission did not rely on this evidence alone, but found it supported the evidence of other medical practitioners: Decision No. 2003-235, *supra*, at 10.

¶67 It appears, therefore, that the WCB's real complaint is with the weight the Appeals Commission placed on Dr. Flor-Henry's evidence. In an administrative law context, "[r]elevant expert evidence is admissible. Any frailties in the facts or hypotheses upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence, but not its admissibility": *Administrative Law in Canada*, *supra*, at 59, citing *Bombardier Ltd. v. Canada (A.G.)* (1980), 113 D.L.R. (3d) 295 (F.C.T.D.) at 306-07; *University of Sask. Engineering Students Society v. Sask. (Human Rights Commission)* (1983), 24 Sask. R. 167 (Q.B.) at 176.

¶68 The reviewing judge correctly concluded that it was not open to the WCB to argue that the Appeals Commission was bound to apply the admissibility criteria outlined in *Mohan*, or that a failure to apply these criteria constituted a denial of natural justice. Rather, the arguable issue involved the weight the Appeals Commission placed on this evidence, which he characterized as a question of mixed fact and law: at para. 20.

> ¶69 Weighing evidence is generally characterized as a question of fact, as factual conclusions result from the weight assigned to the underlying evidence: *Housen* at para. 23. See also *R. v. Spencer*, 2002 ABCA 32, at para. 13. There is a legal aspect to the Appeals Commission's weighing of evidence because it had to decide whether Mr. Davick suffered an injury in the accident that entitled him to benefits under workers' compensation legislation. However, the question raised by the WCB in this case, the weight given to expert medical evidence, does not have the traditional earmarks of a legal issue: there is no legal principle or test involved and the question is specific to the case, lacking in precedential value: *Southam* at para. 37. Nor is there any extricable legal question. The question in issue is highly fact intensive, attracting a more deferential standard of review: *Dr. Q.* at para. 34.

[13] I accept the force of the proposition that the admissibility criteria in *Mohan*, which are quite limiting, do not apply in administrative law proceedings because they are not bound by the strict rules of evidence that govern judicial proceedings. This will not, of course, mean that "anything goes" as regards expert opinion evidence in administrative proceedings, as suggested by the following passage from R.W. Macaulay and J.L.H. Sprague in *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1997) at paras. 17-14:

> Obviously, as an administrative agency is not bound by the rules of evidence, the same strict standards do not apply to the admission of expert evidence as apply in judicial proceedings. In fact, since many agencies themselves are experts, if the rule were applied strictly expert evidence would be received even less often than in courts.
>
> Agencies can accept opinion evidence of laypersons—subject to weight considerations, it follows then that they can also accept the evidence of experts as opinions–without complying with the same criteria as the courts must follow.
>
> But in accepting expert evidence the agency should ask the purpose for which it is doing so. If the expert evidence is being admitted for the same reasons as a court (*i.e.* because issue is beyond your ability to understand unaided) then the agency may wish to adopt [the] same cautious approach as the courts in use of that evidence.

Discussion of Amos's affidavit

[14] Jim Amos's affidavit is six pages long and has four exhibits appended to it. Exhibit "A" is a two-page resumé that describes him as a consultant who has been involved with a variety of projects and papers on freedom of information, primarily in the United Kingdom. As indicated earlier, Exhibit "B" is an 89-page

1999 study that Amos prepared as a Visiting Fellow at University College London. It is entitled "Freedom of Information and Business & Appendices: The impact of the *Freedom of Information Act* upon business as suppliers of products and services to the UK Government". This report is described in the executive summary as a guide for business to the impact of a freedom of information act that focuses on the likely effect upon business as a supplier of products and services to government. The study and its appendices also examine the development of access to information legislation in the United States, Australia and Canada.

[15] Exhibit "C" is a 41-page document entitled "FOI (Civil Procurement) Policy and Guidance Information, Version 1.1", which describes itself as providing "policy and guidance on how requests for civil procurement-related information under the Freedom of Information (FOI) Act should be handled". In para. 18 of his affidavit, Amos says that Exhibit "C" is official guidance from the UK Office of Government Commerce, an independent office of the Treasury, and he says that part of this document

> …provides the working assumption that service level agreements and performance measurement procedures should generally be disclosed. Normally exempted from disclosure is information that which [*sic*] would allow competitors to calculate the supplier's internal costs.

[16] Exhibit "D" is a 30-page "IPPR" document by Tim Gosling entitled "Openness Survey Paper". Amos says in his affidavit that "IPPR" is the Institute for Public Policy Research, "a public policy think tank in the UK with strong links to government, academia, the corporate and voluntary sector". In para. 19 of his affidavit, Amos says that

> … Based on my review of the survey results, I am informed, and do verily believe that this survey provides examples of bodies within the National Health Service (the "NHS") which are prepared to disclose the full business case, and the key terms of contract [*sic*.]

[17] The remaining key "opinions" and "facts" that Amos offers are encapsulated in the following paragraphs of his affidavit:

> 13. Based on my research, I am informed, and do verily believe that the information broker industry is well established in the US. A company may use an information broker to obtain information such as what information the government possesses regarding the company, information regarding the company's competitors, and/or details of the competitor's contracts with government, of how an agency is interpreting a particular provision:
>
> > The publishing of contract price information in the USA is now established by procurement rules. While this remains a subject of

> contention, it is now increasingly recognized as a cost of doing business with government. (Exhibit "B", page 15)
>
> …
>
> 15. The UK FOIA was implemented in full in January 2005, and the practices around FOIA disclosure continue to develop. Based on my research, I am informed, and do verily believe that the current practices with respect to FOIA disclosure in the UK are broadly consistent with the conclusions of my study. It is becoming more accepted that contracts between government and suppliers will be disclosed, substantially intact. This is subject to consideration of the applicability of exemptions on a case by case basis.
>
> 16. I am informed, and do verily believe that the sensitivity of contract information declines over time.
>
> 17. A recent example of FOIA disclosure concerns the Norwich and Norfolk Hospitals Trust (the "Trust") where the PFI contracts were disclosed publicly, available on the Trust's website, substantially intact. Key documents, including the Summary of the Norfolk and Norwich University Hospital PFI, and the Full Facilities Management Agreement between Norfolk and Norwich Health Care NHS Trust and Octagon Healthcare Limited, were available to the public on April 25, 2006 at http://www.nnuh.nhs.uk/QA.asp?ID=14. These documents provide detailed financial disclosure of contract price. It is my understanding that the Trust and its suppliers are agreed that performance reports should be published. Detailed financial information that would enable a competitor to find out about the internal costs of the supplier would not be disclosed.
>
> …
>
> 20. I am not aware of harm to economic interests, either to the public body or to the supplier, as a result of appropriate FOIA disclosure in the UK. My research into other jurisdictions revealed little evidence of harm to economic interests, either to the public body or to the supplier as a result of appropriate FOI disclosure.

[18] The applicant describes Amos's evidence as "research-based". That may be so, but that label only goes so far. Amos appears to have specialized knowledge of the public policy issues around public access to supply and service contracts with government, as well as some factual knowledge about public disclosure practices in this area in the United Kingdom and, to a lesser extent, the United States, Australia and Canada.

[19] He does not have any indicated specialized or direct (first hand or otherwise) knowledge that is specific to the operation or disclosure practices of

health authorities or facilities in British Columbia, or to the public body, contractor or housekeeping services contract involved in this inquiry. He offers broad policy perspectives and predictions about whether public access to price information in supply and service contracts with government is harmful to government or contractors, an issue that is to some degree familiar ground for most access to information commissioners.

[20] I am not persuaded that the affidavit shows his evidence is based on empirical study in a scientific, technical or other verifiable sense. His evidence—whether characterized as argument or commentary—illuminates the public policy debate in the United Kingdom, United States, Canada and Australia, around access to information legislation and public disclosure of pricing information in supply or services contracts with government. His evidence may well have some relevance in an inquiry under the Act, which is not a trial, but I am not going to consider his opinions on public policy as expert opinion evidence on the consequences, in terms of harm under s. 17 or s. 21 of the Act, of public access to this disputed information in this inquiry. The kind of opinion evidence in Amos's affidavit is qualitatively quite different from the kind of opinion evidence from grizzly bear biologists that I considered in Order 01-52.

Sections 10 and 11 of the Evidence Act

[21] These provisions read as follows:

Evidence of experts

10(1) In this section and sections 11 and 12, "proceeding" includes a quasi-judicial or administrative hearing but does not include a proceeding in the Court of Appeal, the Supreme Court or the Provincial Court.

(2) This section and section 11 do not apply to proceedings of a tribunal, commission, board or other similar body that enacts or makes its own rules for the introduction of expert evidence and the testimony of experts, and if there is a conflict between any such rules and this section or section 11, those rules apply.

(3) A statement in writing setting out the opinion of an expert is admissible in evidence in a proceeding without proof of the expert's signature if, at least 30 days before the statement is given in evidence, a copy of the written statement is furnished to every party to the proceeding that is adverse in interest to the party tendering the statement.

(4) The assertion of qualifications as an expert in a written statement is proof of the qualifications.

(5) If the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness.

(6) If an expert has been required to give evidence under subsection (5) and the person presiding at the hearing is of the opinion that the evidence obtained does not materially add to the information in the statement furnished under subsection (3), the person presiding may order the party that required the attendance of the expert to pay, as costs, a sum the person presiding considers appropriate.

Testimony of experts

11(1) A person must not give, within the scope of that person's expertise, evidence of his or her opinion in a proceeding unless a written statement of that opinion and the facts on which that opinion is formed has been furnished, at least 30 days before the expert testifies, to every party that is adverse in interest to the party tendering the evidence of the expert.

(2) Despite subsection (1), the person presiding in a proceeding may, on his or her own initiative or on the application of a party, do one of the following:

(a) if the statement has not been furnished, order that the expert may testify;

(b) if the statement was furnished less than 30 days before the expert is to testify, order that the expert may testify;

(c) order that the expert must be allowed to testify if the statement is furnished within a time less than 30 days before the expert is to testify, and specify the time;

(d) if it appears that a party will tender the evidence of an expert in the proceeding, order that a statement be furnished at a time earlier than 30 days before the expert is to testify and specify the time by which the statement must be furnished.

(3) For the purpose of proving that a copy of a written statement was furnished to a party to a proceeding, the person presiding at the hearing may accept an affidavit made by the person who furnished the statement.

[22] Before 1993, s. 10(1) of the *Evidence Act* did not exclude a proceeding in the Court of Appeal, the Supreme Court or the Provincial Court. This occasioned the consideration of these provisions in a number of civil trial cases, including

British Columbia v. Clayoquot Band of Indians,[7] where Prowse J. (as she then was) summarized some differences in form and purpose between s. 10 and s. 11 as follows:

> Section 10 of the Act was intended to substitute the expert's report for the expert's *viva voce* evidence at trial. Although s. 10(5) of the Act provides that the opposing party may require the attendance of the expert at trial, the intent of the section as a whole was to avoid the time and expense to the parties and the experts of requiring the experts to attend. Section 11, on the other hand, anticipated that the expert would give *viva voce* evidence at trial, and that section was intended to prevent the opposing party from being taken by surprise by the expert's evidence.
>
> On its face, all that s. 10 requires is that the opinion of the expert be provided. If the facts upon which the opinion are based are not contained in the report, then the opinion will be worthy of very little weight. I am unable to read into s. 10 the requirement that the person delivering the report provide with the report "all of the facts upon which that report was based," as that phrase has been interpreted by Chief Justice McEachern in *Delgamuukw*, *supra*.
>
> I also reject the submission of the defendants that the actual documentation referred to in the report forms part of the report. If that were so, the reports in this case would consist of boxes full of documents. It may be that the *Delgamuukw* decision has made that documentation part of the information which must be provided under s. 11 of the Act, but I do not accept that this documentation need be produced under s. 10 in order to meet the requirements of that section. If such a result were intended by s. 10, then it would have to be stated in very clear language, as has been done in s. 11.

[23] In *Napoli v. Workers' Compensation Board*,[8] the court held that s. 10 of the *Evidence Act* applied to a board of review under the *Workers' Compensation Act* so that written statements setting forth expert opinion—contained, in that case, in medical files on a worker—were inadmissible before the board of review without compliance with the provisions of the *Evidence Act*.

[24] Since the 1993 amendment of s. 10(1) of the *Evidence Act* so as to exclude court proceedings, the procedure for admitting expert evidence in the Supreme Court has been governed by Rule 40A of the *Rules of Court*. Rule 40A contemplates the prior delivery of written statements of experts as well as the oral testimony of experts at trial. Summary trials under Rule 18A are generally conducted on affidavit evidence alone without the hearing of oral testimony

[7] [1991] B.C.J. No. 3367 (S.C.).
[8] (1981), 121 D.L.R. (3d) 301 (affirmed at 16 D.L.R. (3d) 170 (B.C.C.A.) without consideration of the *Evidence Act* issue),

before the court. The *Rules of Court* contemplate the delivery of statements of expert opinion for summary trials under Rule 18A, but other Rule 40A procedures for the evidence of experts do not apply. The result is that summary trials, generally heard on affidavit evidence alone, require the prior delivery of written statements of expert evidence but, unless trial procedures are exceptionally ordered, the expert witnesses do not give oral testimony before the court.

[25] I will assume without deciding—it was not argued here—that an inquiry under the Act is a quasi-judicial or administrative hearing within the meaning of s. 10(1) of the *Evidence Act*. On that assumption, I agree with the contractor that, at this time, my office has no rules for the introduction of expert evidence and the testimony of experts within the meaning of s. 10(2) of the *Evidence Act*.

[26] If I had concluded that I would consider Amos's affidavit as expert opinion evidence and s. 10 of the *Evidence Act* applied in the context of a written inquiry under the Act, then I would agree with the applicant that s. 11 of the *Evidence Act* would also be relevant and the two provisions would have to be interpreted together sensibly to accommodate the tendering of expert evidence in quasi-judicial or administrative proceedings that are generally conducted in writing and only exceptionally involve oral testimony. As such, for a written inquiry under the Act, the discretion in s. 11(2) would be available to permit expert evidence to be tendered, despite non-compliance with 30-day prior notice under s.10, and the procedures and schedule for an inquiry under the Act, written or oral, could be adjusted to ensure that parties affected by expert evidence could respond to that evidence on fair and adequate notice.

3.0 CONCLUSION

[27] Sections 10 or 11 of the *Evidence Act* do not come into play for the Amos affidavit because I will not be treating or accepting it as expert opinion evidence on whether s. 17 or s. 21 of the Act applies to the disputed evidence in this inquiry.

[28] I understand the public body and the contractor to say that, if the Amos affidavit were admitted as expert opinion or some other form of evidence, they do not agree that it is cogent or that it even supports the applicant's position on disclosure of the information in dispute in this inquiry. These questions will be left to my deliberations on the merits of the inquiry, at which time I can decide what, if any, significance and weight to attach to Amos's evidence in relation to the issues and other evidence to be considered.

[29] Setting aside whether Amos's evidence is, and can or should be admitted as, expert opinion, it appears to me that the public body and the contractor have been able to respond to all aspects of his evidence in their reply submissions to

the inquiry. Nonetheless, as with all inquiries under the Act, further opportunity to respond to Amos's affidavit can be extended to the public body or the contractor if requested and warranted by fairness.

June 20, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. F05-27007