Case File No. CA40578

FORM 7 (RULE 11 (A))

Court of Appeal File No._____

Supreme Court File No.S116639

Supreme Court Registry Vancouver

COURT OF APPEAL

BETWEEN:

BRITISH COLUMBIA LOTTERY CORPORATION

Respondent
(Petitioner)

AND:

**CHAD SKELTON AND
THE INFORMATION AND PRIVACY
COMMISSIONER OF BRITISH COLUMBIA**

Appellant
(Respondents)

NOTICE OF APPEAL

Take notice that The Information and Privacy Commissioner of British Columbia hereby appeals to the Court of Appeal for British Columbia from the order of the Honourable Justice Goepel of the Supreme Court of British Columbia pronounced the 8th day of January, 2013, at Vancouver, British Columbia.

1. The appeal is from a:

   [ ] Trial Judgment [ ] Summary Trial Judgment

   [ ] Order of a Statutory Body [X] Chambers Judgment

2. If the appeal is from an appeal under Rule 18-3 or 23-6 (8) of the Supreme Court Civil Rules or
   Rule 18-3 or 22-7 (8) of the Supreme Court Family Rules, name the maker of the original decision, direction or order: N/A

3. Please identify which of the following is involved in the appeal:

   [X] Constitutional/Administrative [ ] Civil Procedure [ ] Commercial

   Family – [ ] Divorce [ ] *Family Relations Act* [ ] Corollary Relief in a Divorce Proceeding [ ] Other Family

   [ ] Motor Vehicle Accidents [ ] Municipal Law [ ] Real Property

   [ ] Torts [ ] Equity [ ] Wills and Estates

And further take notice that the Court of Appeal will be moved at the hearing of this appeal for an order that the appeal be allowed and that the Order of the Honourable Justice Goepel made January 8, 2013 be set aside. The appellant does not seek costs.

The trial/hearing of this proceeding occupied 4 days.

Dated at Victoria, British Columbia, this 18th day of January, 2013.

Deborah K. Lovett, QC,
Counsel for the Appellant
Information and Privacy
Commissioner of BC

To the respondent(s): British Columbia Lottery Corporation

And to its solicitor: K. M. Stephens
Hunter Litigation Chambers Law Corporation
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

This Notice of Appeal is given by The Information and Privacy Commissioner of British Columbia, whose address for service is Suite 300 - 848 Courtney Street, Victoria, British Columbia, V8W 1C4, Fax: 250-480-7455.

To the respondent(s):

IF YOU INTEND TO PARTICIPATE in this appeal, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Notice of Appearance" (Form 2 of the Court of Appeal Rules) in a Court of Appeal registry and serve the notice of appearance on the appellant WITHIN 10 DAYS of receiving this Notice of Appeal.

IF YOU FAIL TO FILE A NOTICE OF APPEARANCE

(a) you are deemed to take no position on the appeal, and

(b) the parties are not obliged to serve any further documents on you.

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Kamloops BC V2C 6K4

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Lottery Corporation v. Skelton,* 2013 BCSC 12

Date: 20130108
Docket: S116639
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (as amended)

And in the Matter of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (as amended)

And in the Matter of Order No. F11-25 of the Information and Privacy Commissioner for British Columbia

Between:

British Columbia Lottery Corporation

Petitioner

And

Chad Skelton and the Information and Privacy Commissioner of British Columbia

Respondents

Before: The Honourable Mr. Justice Goepel

On judicial review of Order No. F11-25 of the Information and Privacy Commissioner for British Columbia dated August 25, 2011

Reasons for Judgment

Counsel for Petitioner:	K.M. Stephens G. van Ert
Counsel for Respondents:	D.K. Lovett, Q.C.
Place and Date of Hearing:	Vancouver, B.C. April 30, May 1, June 26-27, 2012
Place and Date of Judgment:	Vancouver, B.C. January 8, 2013

Introduction

[1] Chad Skelton made a request to the British Columbia Lottery Corporation ("BCLC") pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA"*) for disclosure of the lottery products purchased through BCLC's PlayNow.com website by provincial postal code (the "Sales Figures"). When BCLC denied Mr. Skelton's request, he applied to the Information and Privacy Commissioner of British Columbia (the "Commissioner") for a review of the decision.

[2] Following the receipt of written submissions, the Commissioner ordered BCLC to release the Sales Figures to Mr. Skelton. BCLC challenges the Commissioner's decision and seeks an order setting the decision aside. Pursuant to s. 59(2) of *FIPPA* the decision was automatically stayed as a result of the application for judicial review.

[3] This petition was heard together with the petition in *British Columbia Lottery Corporation v. Dyson*, 2013 BCSC 11 [*Dyson]* where similar issues arose. In reasons released concurrently with this judgment, I dismissed the Dyson petition as moot.

BACKGROUND

A. Legislative Framework

[4] *FIPPA* applies to all records in the custody and under the control of a public body. BCLC has been designated a public body for the purposes of *FIPPA*.

[5] *FIPPA* creates, in general terms, a specialized regulatory regime governing the right of access to information in records which are in the custody or under the control of public bodies. *FIPPA* sets out limited exceptions pursuant to which documents can be withheld and the Commissioner's independent oversight role in relation to the administration of *FIPPA*.

[6] Part II of *FIPPA* establishes information access rights and sets out how those rights may be exercised when seeking disclosure of information in the custody and

control of a public body. The general policy of *FIPPA* is that there is a right of access to any record in the custody or under the control of the public body: *FIPPA* s. 4(1). The right of access does not extend to information excepted from disclosure under ss. 12 to 22.1 of *FIPPA*. These exceptions either require or authorize the head of a public body to refuse access to information in the circumstances described therein.

[7] The exception at issue in this proceeding is s. 17(1). Section 17(1) allows the head of a public body to refuse to disclose information under *FIPPA* in certain circumstances. The section reads:

> **17** (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[8] When the head of a public body refuses access to a document, the applicant may ask for a review of that decision: *FIPPA,* s. 52. The Commissioner is authorized to conduct an inquiry as to whether the documents should be released. In an inquiry into a decision to refuse an applicant access to all or part of a document the onus is on the head of the public body to prove that the applicant has no right of access to the record: *FIPPA,* s. 57.

[9] Pursuant to s. 58(2) of *FIPPA*, the Commissioner, on completing an inquiry, must do one of the following:

> (2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the Commissioner must, by order, do one of the following:
>
> > (a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;
> >
> > (b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;
> >
> > (c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.

B. BCLC

[10] BCLC is a commercial Crown corporation of the province of British Columbia (the "Government'). The Government is its sole shareholder. Its directors are appointed by the Government. It is for all purposes an agent of the Government.

[11] BCLC's mandate is to undertake business related to gambling. Section 7(1) of the *Gaming Control Act,* S.B.C. 2002, c. 14 (the "*GCA*") sets out that BCLC is responsible for the conduct and management of gaming on behalf of the Government. BCLC and the Government are parties to a shareholder's letter of expectations which provides in part that the shareholder directs BCLC to "optimize the corporation's financial performance, within the gaming and social policy framework established by the shareholder and in response to customer and marketplace demand for products and services, proposing new revenue opportunities as they arise".

[12] All gaming revenue generated by BCLC is public funds. BCLC's net income is distributed in part to the federal government pursuant to an agreement with the provinces, and the remainder to the Government to fund local community projects, gaming policy and enforcement activities, health care services and research, and a variety of additional provincial programs which are related to health care and

education. In the fiscal year end 2009, the net income from commercial gaming distributed to the Government was approximately $1.09 billion.

[13] As part of its mandate, BCLC conducts online gaming under the authority of the *GCA* and the *Criminal Code*, R.S.C. 1985, c. 46. The vast majority of the online gaming industry is conducted on offshore gambling websites, commonly referred to as "grey market" sites, which are largely unregulated and cannot legally transact with Canadian residents. BCLC's site, PlayNow.com, results in BCLC directly competing with these grey market websites.

[14] BCLC launched the PlayNow.com website in October 2004. Originally it offered Sports Action games for purchase online, and over time added lottery games, interactive games, e-bingo, casino games and online poker.

[15] PlayNow.com is available only to players who reside in British Columbia. Before they can purchase online products, they must register online. This includes providing their home addresses and postal codes. Approximately 115,000 players were registered with PlayNow.com in the fiscal year 2008-2009. By 2010, this figure had risen to 140,000.

[16] In 2010, PlayNow.com generated $34 million in revenue for BCLC, comprising 1% of its total revenue. BCLC expects this figure to increase to 4% of its total revenue by 2014, for additional revenue of $100 million.

[17] BCLC uses a variety of marketing techniques to promote PlayNow.com including television, print and online advertising, VIP promotional events, newsletters, email and other online marketing, and sports sponsorships. BCLC has no legal competition within the province for online gaming products. However, PlayNow.com allows BCLC to compete directly with dozens or hundreds of grey market sites.

[18] Grey market sites are largely unregulated and cannot legally transact with Canadians. Nevertheless, the reality is that grey market competitors accept wagers from BC residents and market lottery products to BC residents from servers in

foreign jurisdictions. Most grey market sites will start with some kind of free product and then invite consumers to play for money.

[19] Grey market sites use a variety of marketing techniques to attract customers, including banner and pop up online advertisements, spam email, television advertising during sports games, print advertisements, direct to consumer marketing, in person street intercepts, door to door canvassing, windshield pamphlet drops and mail intercepts, telemarketing, VIP promotional events targeting a specific area, and targeted advertising such as online marketing aimed at young professionals and advertisements in local newspapers aimed at retired people.

C. Mr. Skelton's Request

[20] Mr. Skelton is a journalist at the Vancouver Sun. On April 9, 2010 he made a request to BCLC for access to the Sales Figures.

[21] On May 18, 2010 BCLC responded to Mr. Skelton by letter and informed him that although it had one record responsive to Mr. Skelton's request, it was withholding it in its entirety under ss. 17(1)(b) and (d) and s. 22 of *FIPPA*. Section 22 allows documents to be withheld if disclosure would be an unreasonable invasion of a third party's personal privacy.

[22] In a further letter dated May 19, 2010, BCLC provided Mr. Skelton with its rationale for withholding the requested information. It advised that it believed that releasing the data regarding its PlayNow sales by postal code could cause significant harm to its financial and economic interests. It advised that the Sales Figures are BCLC's proprietary information and have monetary value. It indicated that it used the Sales Figures for its own marketing and other business purposes, and if disclosed this data could be used by BCLC's competitors. BCLC further indicated that disclosure of the Sales Figures when combined with other information could potentially be used to identify BCLC customers thereby constituting an unreasonable invasion of personal privacy.

[23] On June 8, 2010, Mr. Skelton wrote to the Commissioner seeking a review of BCLC's decision.

[24] On November 8, 2010, BCLC informed the Commissioner that it no longer relied on s. 22 as a basis to deny disclosure of the Sales Figures.

[25] On January 19, 2011, after mediation attempts failed, Mr. Skelton asked that the matter proceed to an inquiry.

[26] On February 21, 2011, the Commissioner advised that she would conduct a written inquiry arising out of Mr. Skelton's request for the Sales Figures.

D. Submissions to the Commissioner

[27] BCLC's evidence in support of its decision to withhold the Sales Figures included the affidavit of Karen Gray, then senior manager of E-Gaming and Marketing at BCLC, and the affidavit and expert report of Paul Lauzon (the "Lauzon Report"). Ms. Gray has 19 years experience in marketing. Her primary job duty was to oversee all aspects of the marketing of PlayNow.com. Mr Lauzon is Senior Vice President, Lottery Gaming, with the marketing research firm Ipsos Reid. He has been immersed in lottery and gaming market research for nearly 14 years and he manages a team of several lottery gaming research professionals.

[28] Ms. Gray deposed that the Sales Figures provided valuable information which she believed would, if made publicly available, be used by grey marketing website operators to compete against BCLC, resulting in financial harm to BCLC and the Government. She noted that the Sales Figures would provide a link between specific geographic areas and the value of online lottery products purchased by consumers residing in that area. She deposed that this specific data would allow grey market online gambling competitors to target the areas with the highest amount of lottery product sales. She further deposed that the information in the Sales Figures could be easily combined with statistical information available from the Canada census or other commercial available sources to create a "consumer profile" which grey market competitors could use to focus market spending in areas with a high concentration of

active participants in online gambling. She indicated that she believed that grey market competitors could use the information contained in the Sale Figures to create profiles of British Columbia consumers who are inclined to gamble on line and could use the profiles to more effectively target their marketing.

[29] In the Lauzon Report, Mr. Lauzon provided his opinion on the following issues:

> (a) Whether the Sales Figures have, or are reasonably likely to have monetary values;
>
> (b) Whether the Sales Figures are competitively valuable information and, if so, to whom;
>
> (c) Whether the disclosure of the Sales Figures:
>
> (i) could be reasonably expected to harm the financial or economic interests of either BCLC or the government of British Columbia;
>
> (ii) could reasonably be expected to give competitive advantage to a third party or parties and, if so, the nature of the competitive advantage;
>
> (iii) would help competitors to obtain market share in the business of online gaming; and/or
>
> (iv) would otherwise result in harm or improper benefit to a third party or parties.

[30] In answering these questions, the Lauzon Report expressed the following opinions:

> (a) The Sales Figures have significant monetary value, estimated to be in excess of $2 million. This value was arrived at by estimating the cost of obtaining it by means of a random digit dial telephone survey, the cost of which he estimated to be $2.25 million. The results of such a survey would likely not be as accurate as the Sales Figures themselves.

(b) The Sales Figures are competitively extremely valuable to all internet/online gaming operators taking wages from residents of British Columbia. The postal code information is used by many companies to narrow geographic target areas for direct marketing, which therefore significantly increase their likelihood of success and, in turn, significantly increases their cost of reaching customers. By the use low cost software maps third parties could create density maps of PlayNow.com customers based on their total online spending with BCLC and thus be able to more easily target those geographical areas with direct marketing strategies.

(c) Disclosure of the Sales Figures would most significantly harm the financial/economic interest of both BCLC and the Government by allowing BCLC's grey market competitors to use the information to lure away BCLC customers, resulting in a decline in revenue for BCLC and the Government.

(d) Disclosure of the Sales Figures would give third parties, namely BCLC's grey market competitors, a competitive advantage over BCLC. The nature of this competitive advantage is that grey market competitors are not subject to regulatory restrictions imposed by law on BCLC and could therefore use the Sales Figures to engage "in whatever unfair marketing tactics, strategies or incentives they deem necessary to lure customers away from BCLC".

(e) Disclosure of the Sales Figures would put BCLC's grey market competitors in "a strong position to capture market share away from BCLC".

E. The Commissioner's Decision

[31] On August 25, 2011, the Commissioner released her decision entitled "Order F11-25" in which she declined to sustain BCLC's objections and required BCLC to give Mr. Skelton access to the Sales Figures. In her reasons, the Commissioner framed the issue in the inquiry this way:

> [3] The issue before me is whether the disclosure of the sales figures could reasonably be expected to harm the financial interests of the government of

> British Columbia or of the Lottery Corporation, because one or both of the following applies:
>
> - the sales figures are financial or commercial information that has, or could have, monetary value for the Lottery Corporation under s. 17(1)(b) of [*FIPPA*].
>
> - disclosure of the sales figures could reasonably be expected to result in undue loss to the Lottery Corporation or undue gain to its competitors under s. 17(1)(d) of FIPPA.

[32] At para. 16 of her reasons, the Commissioner discussed the expert evidence of Mr. Lauzon. She said:

> [16] The Lottery Corporation said it was submitting "expert opinion evidence" in support of its position, along with its other evidence. The Lottery Corporation argued that I should admit and give weight to what it calls expert evidence, "as it is logically-probative-of a number of the key issues engaged by s. 17 of *FIPPA*".[2]
>
> [17] In Order F11-12[3], the Lottery Corporation asked that the adjudicator accept affidavits of two individuals as "expert evidence". The adjudicator referred to s. 10 of the *Evidence Act* and then discussed the function of an "expert" in a setting such as this inquiry:
>
> > [16] In their text, *The Law of Evidence* (3rd ed.) (at p. 785), Sopinka, Lederman and Bryant describe the function of an expert in a judicial setting as being to provide the trial judge with a ready-made inference from proven facts since the technical or scientific nature of the subject matter is likely to be beyond the fact-finder's knowledge or expertise. Such evidence is admissible when the fact-finder is unable to draw an inference or to form a proper conclusion without the assistance of experts and the evidence is otherwise admissible at common law or under statute. ...
> >
> > …
> >
> > [18] While Commissioner Loukidelis accepted (in Decision F06-07) that the strict rules of evidence do not apply to expert evidence, he also said that this does not mean that "anything goes" in respect of such evidence. Although an administrative tribunal can accept such evidence, in doing so, it might well ask the purpose for which it is doing so and may wish to adopt a more cautious approach if, for example, the evidence is being tendered on the basis that it is beyond the ability of the decision-maker to understand unaided. [footnote omitted]
>
> [18] The adjudicator accepted the first affidavit as admissible but not as "expert evidence" because the individual's opinions were not
>
> > ... necessary for me to appreciate the underlying facts due to their technical nature. Similarly, in respect of his opinions on whether the Manual "has or is likely to have monetary value" or whether "in its

> entirety it derives independent economic value, actual or potential, from not being generally known by the public or other persons", I do not see the factual basis upon which Mr. Rodrigues's opinions are based to be ones beyond my comprehension without an expert's assistance; nor do I feel ill-equipped to draw proper inferences from such facts.[4]
>
> [19] The adjudicator also said that this individual's opinion on whether disclosure of the record in dispute could reasonably be likely to harm the financial or economic interests of either the Lottery Corporation or the Government of British Columbia", or "would result in harm or improper benefit" to third parties, to be the
>
> > ... very questions of statutory interpretation that I am called upon to decide. Additionally, the brief opinions Mr. Rodrigues gives in this regard are highly speculative and general in nature ...[5]
>
> [20] The other individual's affidavit was accepted as admissible by the adjudicator, but she allowed only one part as "expert evidence" because most of his evidence did not offer an opinion and the part that did was general and speculative in nature.[6]

[33] At para. 21 the Commissioner noted the matters upon which Mr. Lauzon had been asked to opine and at para. 22 concluded her discussion as follows:

> For reasons similar to those given by the adjudicator in Order F11-12, I consider Mr Lauzon's evidence to be admissible but not as "expert evidence" because Mr. Lauzon is providing an opinion on the precise matters that I am legally obligated to decide under ss. 17(1)(b) and (d). I would add that the evidence is also general and speculative in regard to the issue of reasonable expectation of harm under s. 17.

[34] I would note that Order F11-12 referred to in the above quotation was the subject of the judicial review in *Dyson*.

[35] The Commissioner next turned to consideration of the interpretation and application of s. 17(1)(b) of the *FIPPA* to the withheld record. She concluded at para. 48 that BCLC's evidence was insufficient to establish that the Sales Figures have any current or potential "monetary value" for the purposes of s. 17(1)(b). In reaching that conclusion she found BCLC's arguments and evidence were speculative and did not suffice to establish that the Sales Figures have any current or potential monetary value.

[36] The Commissioner then turned to s. 17(1)(d) of *FIPPA* which allows the withholding of information that can be expected to result in undue financial loss. She

ultimately concluded that BCLC's evidence and the question of undue loss or gain was too speculative to engage s. 17(1)(d).

THE PETITION

[37] In the petition, BCLC seeks the following orders:

(a) relief in the nature of certiorari quashing and setting aside the Sales Figures decision;

(b) a declaration that the head of the petitioner may refuse to disclose the Sales Figures pursuant to ss. 17(1) of *FIPPA;* and

(c) in the alternative to (b), a direction that the Commissioner reconsider and determine the matters of whether the petitioner may refuse to disclose the Sales Figures together with any directions that the court thinks appropriate for the reconsideration.

[38] BCLC submits that the Commissioner committed the following reviewable errors:

(a) she failed to admit the Lauzon Report as expert evidence, and failed to meaningfully consider and apply the evidence in the interpretation of s. 17(1) as a whole in the application of that subsection to the Sales Figures;

(b) she failed to give any weight to the other evidence tendered by BCLC and, in particular, that of Karen Gray;

(c) she erred in the interpretation and application of s. 17(1) as a whole;

(d) in particular, the Commissioner

(i) erred in her interpretation of the concept of a reasonable expectation of harm;

(ii) imposed a standard of proof higher than that required by s. 17(1);

(iii) failed to interpret and apply s. 17(1) to the Sales Figures separately from its paragraphs a - f, which paragraphs are (as she correctly observed) merely examples of instances in which the head of a public body may refuse to disclose information under s.17(1);

(iv) erred in her interpretation and application to the Sales Figures of the phrase "that has, or has been reasonably likely to have, monetary value" in s. 17(1)(b); and

(v) erred in her interpretation and application to the Sales Figures of the phrase "information the disclosure of which could reasonably be expected to result in ... undue financial loss or gain to a third party" in s. 17(1)(d).

[39] In regard to the Commissioner's interpretation of reasonable expectation of harm, BCLC places considerable reliance on the Supreme Court of Canada's recent decision in *Merck Frost Canada v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 [*Merck]. Merck* was handed down after the Commissioner's decision in this matter. BCLC submits that the Commissioner applied a different test than that enunciated in *Merck.*

[40] In addition, BCLC submits that the Commissioner made findings of fact and inferences not supported by the evidence, including:

1. the finding that even if "grey market" competitors did find the Sales Figures useful or were interested in obtaining them, this is not enough to show that the Sales Figures have or are likely to have monetary value; and

2. the finding that the "grey market" competitors have other, cheaper methods at their disposal for compiling information similar to the Sales Figures than by the means of disclosure of the Sales figures by the petitioner.

[41] BCLC also contends that the Commissioner's failure to admit the Lauzon Report as expert evidence, and her corresponding failure to meaningfully consider that evidence in the interpretation and application of s. 17(1) as a whole, constitutes a breach of the rules of natural justice and procedural fairness.

ROLE OF TRIBUNAL'S COUNSEL

[42] Like the situation in *Dyson*, Mr. Skelton chose not to appear at this hearing. Unlike the situation in *Dyson*, however, Mr. Skelton still seeks access to the Sales Figures. In these circumstances the question of mootness does not arise.

[43] In her response to the Petition, the Commissioner's counsel indicated that the Commissioner did not anticipate taking a position on the merits of the petition. That response was consistent with the normal role played by tribunals when their decisions are subject to challenge.

[44] Ordinarily, a tribunal's standing to participate in judicial review proceedings is limited to making submissions on or explaining the legislative scheme, the record of proceeding, the standard of review and questions of jurisdiction: *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437. Allowing tribunals to defend the merits of their decision is generally considered unseemly and inappropriate: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 24 B.C.L.R. (5th) 306.

[45] In *Timberwolf Log Trading Ltd. v British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 at para. 11, 311 B.C.A.C. 227, the Court recognized three exceptions to the normal rule:

> (a) where the question is whether the tribunal has made a patently unreasonable interpretation of the statutory right to be heard;
>
> (b) where the tribunal is defending a long standing policy; and
>
> (c) where there is no one else to argue the other side.

[46] As a result of Mr. Skelton's decision not to participate in this judicial review, there is no one else to argue the other side of this petition. In these circumstances it is appropriate that the Commissioner participate in a more fulsome way in order to ensure that the court has the benefit of competing arguments: *R.M. v. College of Physicians and Surgeons of British Columbia*, 2011 BCSC 832, 26 Admin. L.R. (5th) 142.

[47] At the commencement of the hearing I granted leave to the Commissioner's counsel to make submissions on all issues in dispute. I should note that BCLC did not oppose the Commissioner's full participation.

COMMISSIONER'S RESPONSE

[48] In regard to the merits, Commissioner's counsel submits that the Commissioner properly exercised her discretion in favour of accepting Mr. Lauzon's evidence as being "admissible", but not as expert evidence, because Mr. Lauzon was providing an opinion on the precise matters the Commissioner was legally obliged to decide. In this regard, it was open to the Commissioner to conclude that the factual bases upon which Mr. Lauzon's opinions were based were not beyond her comprehension or that she was ill equipped to draw the proper inferences from those facts without the assistance of Mr. Lauzon's "expert opinion". In this regard, to the extent that Mr. Lauzon opined on whether disclosure of the withheld records could reasonably be expected to harm BCLC's financial interests, these types of questions were the very questions of statutory interpretation that the Commissioner was called upon to decide. As the Commissioner is the recognized expert in the interpretation and application of *FIPPA*, Mr. Lauzon's opinions on such matters were superfluous.

[49] The Commissioner submits that questions about the admissibility and weight of evidence are properly characterized as matters of discretion relating to the Tribunal's adjudication and fact-finding function. That function falls squarely within the Commissioner's core area of expertise and forms an integral part of her adjudicative role and, accordingly, attracts a high level of deference.

[50] The Commissioner submits that BCLC's real quarrel is with the weight that she accorded some of the evidence that BCLC tendered as expert evidence. Such matters do not engage procedural fairness concerns. It is submitted that with respect to her evidentiary conclusions, the Commissioner's reasons cannot be said to be unreasonable.

[51] The Commissioner submits that whether the evidence meets the s. 17 probability of harm standard is a matter for determination by the Commissioner. To accept BCLC's s. 17 submissions that are founded on the premise that the Commissioner erred because her articulation of the standard of proof is inconsistent with *Merck* would be tantamount to applying a correctness standard to the Commissioner's order. In this regard, the Commissioner submits that her order must be reviewed on a reasonableness standard and that the Commissioner's interpretation of s. 17(1) is in fact reasonable, even if it is not consistent with *Merck*.

STANDARD OF REVIEW

[52] The parties are in agreement that, to the extent the BCLC is challenging the merits of the determination reached by the Commissioner, the standard of review is reasonableness. They do not agree, however, as to the standard of review with respect to the treatment accorded to the BCLC's expert evidence.

[53] BCLC submits that the decision not to admit the report as expert evidence raises issues of natural justice and procedural fairness and the standard of review is correctness. The Commissioner agrees that a correctness standard of review applies to issues of natural justice and procedural fairness, but submits that the decision to admit the reports as evidence, but not as expert evidence, is not properly characterized as a question of natural justice and procedural fairness. She submits it is a decision about the admissibility and weight of evidence that is properly characterized as matters of discretion relating to the Tribunal's adjucation and fact finding function, a function which falls squarely within the Commissioner's core area of expertise and forms an integral part of her adjudicative role. The Commissioner submits that such decisions are entitled to a high level of deference.

[54] In order to determine the standard of review arising out of the expert evidence questions, it is first necessary to examine the actual decision made by the Commissioner and whether that decision can be properly characterized as raising issues of natural justice and procedural fairness. It is to that question I now turn to.

DISCUSSION

A. Expert Evidence

[55] As a general rule, a witness may not give opinion evidence but may only testify as to matters within her or his knowledge, observation or experience. Expert evidence is an exception to this general rule. Experts are allowed to provide opinions in regard to matters that are likely to be beyond the fact-finder's knowledge or experience.

[56] In *R v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 [*Mohan],* the Supreme Court of Canada set out a four part test for the admissibility of an expert's evidence:

1. properly qualified expert;
2. relevance;
3. necessity in assisting the trier of fact; and
4. absence of any exclusionary rule.

[57] Section 10 of the *Evidence Act*, R.S.B.C. 1996, c. 124 authorizes the use of opinion evidence in administrative proceedings. In decision F06-07, *Fraser Health Authority (Re)*, 2006 B.C.I.P.C.D. No. 26 [*Fraser Health]*, Commissioner Loukidelis considered the admissibility of expert evidence in the context of a *FIPPA* inquiry. In the course of his decision he referred to the *Mohan* criteria. He then made reference to the Alberta Court of Appeal decision in *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276, 258 D.L.R. (4th) 29 [*Appeal Commissioner]* where that court held that the strict rules of evidence did not apply in an administrative law proceeding and that the failure of the Tribunal in that case to formally qualify an expert did not prevent the Tribunal from relying on that evidence.

[58] At para. 13 of *Fraser Health* Commissioner Loukidelis said as follows:

> 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.

[59] In *Fraser Health*, Commissioner Loukidelis ultimately refused to consider the expert evidence because the witness lacked the qualifications to give the opinion in question.

[60] In her discussion of the Lauzon Report, which is set out at para. 32 above, the Commissioner referred to the discussion in Order F11-12 which in turn referred Commissioner Loukidelis' decision in *Fraser Health*. She concluded that the Lauzon Report would be admissible but not as "expert evidence" because Mr. Lauzon was providing an opinion on the precise matters that she was legally obligated to decide under ss. 17(1)(b) and (d).

[61] Commissioner Loukidelis found in *Fraser Health* that that the admissibility criteria in *Mohan*, which are quite limiting, do not apply in administrative law proceedings because the strict rules of evidence that govern judicial proceedings cannot be relied on to limit the use of expert evidence in administrative hearings. Nothing said in *Appeal Commissioner* or in *Fraser Health* suggests that an

administrative decision maker can refuse to admit expert evidence that meets the *Mohan* criteria. The issue in those cases was whether opinion evidence that did not meet the *Mohan* criteria could be admitted.

[62] In this case the Commissioner stated that Mr. Lauzon's evidence would be admissible, but not as expert evidence, because he was providing an opinion on the precise matter she was legally obliged to decide and further that the evidence was general and speculative with regard to the issue of reasonable expectation of harm.

[63] The Lauzon Report contains opinions. Opinions are only admissible as expert evidence. If the opinion meets the *Mohan* criteria, it is not open to the Commissioner to determine that she will admit the evidence "but not as expert evidence". Opinion evidence is only admissible as expert evidence. It cannot be admitted in any other way.

[64] What the Commissioner had to decide was whether or not the Lauzon Report met the *Mohan* criteria. If it did, it was then admissible as expert evidence. If it did not, given the relaxed rules of evidence in administrative proceedings, she could at her discretion admit it in any event.

[65] The Commissioner said she rejected the Lauzon Report as expert evidence because it opined on the precise matters that she was legally obligated to decide. What the Commissioner had to decide was whether the disclosure of the Sales Figures could be expected to harm the financial or economic interest of BCLC or the Government. In deciding that question the Commissioner had to determine if the Sales Figures had monetary value and whether the disclosure of the Sales Figures could provide BCLC's grey market competitors with a competitive advantage. Those are questions of fact.

[66] Whether the information had monetary value or its disclosure would put BCLC at a competitive disadvantage are not matters that can be determined in a contextual vacuum. In the inquiry the onus was on BCLC to establish the exceptions upon which it relied. It could only meet this burden by calling evidence. The opinions set

out in the Lauzon Report were intended to provide the evidentiary foundation for its submissions that the Sales Figures had monetary value and their disclosure could be expected to harm the financial or economic interest of BCLC.

[67] The Lauzon Report met the *Mohan* criteria for admissibility. It was prepared by a qualified expert, it was relevant, it was necessary and was not subject to any exclusionary rule. I find the Commissioner erred in failing to consider the Lauzon Report as expert evidence.

[68] The question that then arises is what is the implication of this error. In *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A*., [1997] 3 S.C.R. 1278, 153 D.L.R. (4th) 577, the Court discussed the prohibition on expert evidence in admiralty cases. McLachlin J. (as she then was) rejected the rule against expert evidence, stating at para. 29:

> The rule against expert evidence where a judge sits with assessors in admiralty cases suffers from four defects. First, the prohibition on expert evidence violates the principle of natural justice of the right to be heard, *audi alteram partem*. This principle confers the right on every party to litigation to bring forth evidence on all material points. Trial judges possess a discretion to limit evidence or exclude evidence where its relevance is outweighed by the prejudice it may cause to the trial process. But the principle that every litigant has a right to be heard goes against the exclusion of an entire category of evidence. To say that a litigant cannot call any expert evidence on matters that are at issue in the litigation is to deny the litigant's fundamental right to be heard.

[69] While this case is distinguishable from *Porto Seguro*, in that the Commissioner does not suggest a blanket prohibition on expert evidence, the impact on BCLC is the same. It has been denied the right to bring forth evidence on a material point.

[70] In *Cardinal v Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44, Le Dain J. at 661 observed:

> ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential

> justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

[71] In an administrative law setting, a failure to admit relevant evidence may render the proceeding unfair, resulting in a denial of natural justice: *Univérsité du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494 [*Univérsité du Québec*]. In *Univérsité du Québec,* a labour arbitrator refused the admission of relevant evidence. Lamer C.J.C. concluded that the refusal to admit the evidence constituted a breach of the rules of natural justice. He said at 491:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

[72] I find the failure of the Commissioner to take into account the expert evidence tendered by BCLC led to a breach of natural justice. The failure to admit the evidence denied BCLC the opportunity to bring forth evidence on a material point. The decision of the Commissioner must be set aside.

REMEDY

[73] BCLC asked this court to quash and set aside the decision and declare that BCLC may lawfully refuse to disclose the Sales Figures. It submits there is little to be gained from remitting the matter to the Commissioner when it can be determined by this Court on the record before it.

[74] In the circumstances of this case such a decision would not be warranted. The expert evidence, rejected by the Commissioner, must be weighed and considered. That is properly the role of the Commissioner. Further, whether the Commissioner should apply the *Merck* interpretation of the phase “reasonable expectation of harm” is a matter in the first instance for the Commissioner. As noted by the Commissioner’s counsel in her submissions, it is arguable whether the Commissioner is bound by the *Merck* definition.

[75] In the result I set aside the Commissioner's order and direct a new hearing. The new hearing should only take place if Mr. Skelton confirms that he still wants the Sales Figures. At the new hearing the parties will be at liberty to file additional evidence if they so choose.

[76] Although BCLC was successful in this matter, it advised at the hearing it did not seek costs. In any event, it would not be appropriate to award costs against the Commissioner. The Commissioner took an adversarial position out of necessity, not choice. There will be no order for costs.

"R.B.T. Goepel J."

_____

The Honourable Mr. Justice Richard B.T. Goepel

S-116639

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

BRITISH COLUMBIA LOTTERY CORPORATION

PETITIONER

AND

CHAD SKELTON and THE INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

THIS IS THE PETITION OF:

British Columbia Lottery Corporation
c/o Hunter Litigation Chambers Law Corp.
2100 – 1040 West Georgia
Vancouver V6E 4H1

ON NOTICE TO:

Office of the Information and Privacy Commissioner
4th Floor, 947 Fort Street
Victoria V8V 3K3 (as required by *JRPA* s. 15)

Chad Skelton
c/o The Vancouver Sun
1-200 Granville Street
Vancouver V6C 3N3

The Attorney General for British Columbia
Ministry of Attorney General for British Columbia
11th Floor – 1001 Douglas Street
Victoria V8V 1X4 (as required by *JRPA* s. 16)

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner(s),

(a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: Hunter Litigation Chambers 2100 – 1040 West Georgia Street Vancouver, BC V6E 4H1 Fax number address for service (if any) of the petitioner(s): 604 647 4554 E-mail address for service (if any) of the petitioner(s): [none]
(3)	The name and office address of the petitioner's lawyer is: Hunter Litigation Chambers

	2100 – 1040 West Georgia Street Vancouver, BC V6E 4H1

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1 The following relief by way of application for judicial review of Order F11-25, issued by the Information and Privacy Commissioner (the "Commissioner"), dated 25 August 2011, and requiring the petitioner to disclose certain internet sales figures to the respondent Chad Skelton (the "Sales Figures Order"):

(a) relief in the nature of certiorari quashing and setting aside the Sales Figure Order;

(b) a declaration that the head of the petitioner may refuse to disclose the sales figures to the respondent Chad Skelton pursuant to s 17(1) of the *Freedom of Information and Protection of Privacy Act* RSBC 1996 c 165 (the "FIPPA");

(c) in the alternative to (b), a direction that the Commissioner reconsider and determine the matter of whether the petitioner may refuse to disclose the sales figures, together with any directions that the court thinks appropriate for the reconsideration.

Part 2: FACTUAL BASIS

2 The petitioner British Columbia Lottery Corporation ("BCLC") is an agent of the Government of British Columbia and is authorized under the *Gaming Control Act* SBC 2002 c 14 to conduct and manage gaming in British Columbia, including internet gaming.

3 On 9 April 2010 the respondent Chad Skelton requested disclosure in electronic database format of the total value of lottery products purchased through BCLC's

PlayNow.com web site in the 2008-2009 fiscal year or 2009 calendar year by customers in each Forward Sortation Area in British Columbia (the "Sales Figures"). Mr Skelton made this request under the FIPPA.

4 BCLC denied access to the Sales Figures under ss 17(1) and 22(1) of the FIPPA. BCLC later discontinued its reliance on s 22(1) but maintained its position on s 17(1). BCLC was concerned that the Sales Figures provide valuable information which, if made publicly available, would be used by illegal internet gaming operators (referred to in the Sales Figures Order as "grey market" operators) to compete against BCLC's legal internet gaming business, resulting in financial harm to BCLC and the Province.

5 On 8 June 2010 Mr Skelton requested a review of BCLC's decision by the Office of the Information and Privacy Commissioner. The matter proceeded to an inquiry which was conducted by the Commissioner on written submissions only.

6 BCLC tendered affidavit evidence from five deponents including an expert report by Mr. Paul Lauzon, Senior Vice President, Lottery and Gaming, at Ipsos Reid, who opined on the value of the Sales Figures and the consequences of their disclosure (the "Lauzon Report").

7 The Commissioner made the Sales Figure Order in writing dated 25 August 2011. In the Sales Figures Order, the Commissioner required BCLC to give Mr Skelton access to the Sales Figures pursuant to s 58 of the FIPPA. The Commissioner concluded, among other things, that:

(a) the Lauzon Report was "admissible but not as 'expert evidence'" (para 22);

(b) the Lauzon Report was "general and speculative in regard to the issue of reasonable expectation of harm under s. 17" (para 22);

(c) while BCLC's evidence was that obtaining data comparable, though inferior to, the Sales Figures would cost $2 million, the costs a public body or its

competitor might incur in creating or compiling the same or similar information do not necessarily mean the information has independent monetary value (para 38);

(d) BCLC faces competition from "grey market" competitors who could use the Sale Figures to create consumer profiles of high spending and potentially lucrative customers who are likely to gamble online (para 39);

(e) nevertheless BCLC did not establish that there was a market for the Sales Figures, and even if "grey market" competitors did find the Sales Figures useful or were interested in obtaining them, this was not enough to show that they have or are likely to have monetary value per s 17(1) (para 40);

(f) BCLC's arguments and evidence are speculative (para 48);

(g) BCLC did not persuade her that its "grey market" competitors seek or value the Sales Figures, not least because they have other, cheaper methods at their disposal if they wish to compile similar information (para 51); and

(h) the evidence suggested that BCLC is successfully competing with "grey market" web sites and steadily taking market share away from them, not losing it (para 52).

Part 3: LEGAL BASIS

8 The Commissioner committed the following reviewable errors:

(a) she failed to admit the Lauzon Report as expert evidence, and thus failed meaningfully to consider and apply that evidence in the interpretation of s 17(1) as a whole and the application of that subsection to the Sales Figures;

(b) she failed to give adequate weight, or any weight, to the other evidence tendered by BCLC, and in particular that of Karen Gray;

(c) she erred in the interpretation and application of s 17(1) as a whole; in particular, the Commissioner:

(i) erred in her interpretation and application of the concept of a reasonable expectation of harm;

(ii) imposed a standard of proof higher than required by s 17(1);

(iii) failed to interpret and apply s 17(1) to the Sales Figures separately from its paragraphs (a) through (f) which paragraphs are (as she correctly observed) merely examples of instances in which the head of a public body may refuse to disclose information under s 17(1);

(iv) erred in her interpretation and application to the Sales Figures of the phrase "that has, or is reasonably likely to have, monetary value" in s 17(1)(b);

(v) erred in her interpretation and application to the Sales Figures of the phrase "information the disclosure of which could reasonably be expected to result in ... undue financial loss or gain to a third party" in s 17(1)(d);

(d) she made findings of fact and inferences not supported by the evidence, including:

(i) the finding that even if "grey market" competitors did find the Sales Figures useful or were interested in obtaining it, this is not enough to show that it has or is likely to have monetary value (para 40);

(ii) the finding that "grey market" competitors have other, cheaper methods at their disposal for compiling information similar to the Sales Figures than by means of disclosure of the Sales Figures by the petitioner (para 51);

(e) such further and other grounds as counsel may advise.

9 BCLC also contends that the Commissioner's failure to admit the Lauzon Report as expert evidence, and her corresponding failure meaningfully to consider that

evidence in the interpretation and application of s 17(1) as a whole, constitute a breach of the rules of natural justice and procedural fairness.

10 BCLC pleads and relies upon:

(a) the *Supreme Court Civil Rules*;

(b) the *Judicial Review Procedure Act* RSBC 1996 c 241 as amended;

(c) the *Freedom of Information and Protection of Privacy Act* RSBC 1996 c 165 as amended;

(d) applicable administrative law principles, including the principles of natural justice and procedural fairness;

(e) the inherent jurisdiction of this Honourable Court; and

(f) such further and other authority as counsel may advise.

11 In particular BCLC expressly pleads and relies upon FIPPA s 59(2) pursuant to which the commencement of this judicial review application acts as an automatic stay of the Sales Figures Order until a court orders otherwise.

Part 4: MATERIAL TO BE RELIED ON

1 Affidavit #1 of Skye Armstrong, sworn 3 October 2011; and

2 such further and other material as counsel may advise.

The petitioner estimates that the hearing of the petition will take two days.

Dated: 4 October 2011

Hunter Litigation Chambers
HUNTER LITIGATION CHAMBERS
(per: K. Michael Stephens/Gib van Ert)
Solicitors for the petitioner

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs *[specify]* of Part 1 of this notice of application

☐ with the following variations and additional terms:

[specify]

Date: *[month, day, year]*

_____

Signature of
☐ Judge ☐ Master