IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Langley (Township) v. De Raadt,* 2014 BCSC 650

Date: 20140415
Docket: S136273
Registry: Vancouver

Between:

The Corporation of the Township of Langley

Petitioner

And

Jacob A. De Raadt, Grassroots Consulting Services and the Information and Privacy Commissioner of British Columbia

Respondents

Before: The Honourable Mr. Justice Cohen

On appeal from: An order (F13-14) of the Information and Privacy Commissioner of British Columbia, dated July 24, 2013

Reasons for Judgment

Counsel for the petitioner:	J.H. Goulden R. Berger
Counsel for the respondent, The Information and Privacy Commissioner of British Columbia:	T.L. Hunter
Place and Date of Hearing:	Vancouver, B.C. February 13, 2014
Place and Date of Judgment:	Vancouver, B.C. April 15, 2014

I. The Petition

[1] The petitioner, The Corporation of the Township of Langley, seeks the following orders:

> (a) a declaration that the Township is entitled to withhold drafts of contracts, including but not limited to, draft service agreements, as well as the documents which are the subject of Order F13-14 dated July 24, 2013 (the "Order"), as such documents are legal instruments by which a public body acts pursuant to s. 12(3)(a) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA");
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> (b) an order that the Order of the delegate of the Information and Privacy Commissioner (the "Delegate") requiring the Township to provide certain documents pursuant to FIPPA be quashed or set aside; and
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> (c) an order extending the automatic 120 day stay of the Order pursuant to s. 59(2) of FIPPA, if necessary, pending the final determination of this application.

II. Background

[2] The respondent Jacob A. De Raadt is a civil engineer acting for several residential landowners whose properties border a land development in the petitioner's jurisdiction. He is the principal of the respondent, Grassroots Consulting Services ("Grassroots").

[3] Grassroots made a freedom of information ("FOI") request to the petitioner pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as amended ("*FIPPA*"), seeking access to certain of the petitioner's records, including records relating to a servicing agreement between the petitioner and a third party development corporation. The request included a storm water management plan that was appended to the servicing agreement.

[4] The petitioner disclosed the final version of the servicing agreement that included the final version of the storm water management plan, but withheld drafts of the storm water management plan on the basis that they were drafts of a "legal instrument" by which the petitioner acts, and thus were an exception to the FOI request under s. 12(3)(a) of *FIPPA*. This section provides as follows:

> (3) The head of a local public body may refuse to disclose to an applicant information that would reveal

> (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill …

[5] Grassroots requested that the respondent, The Information and Privacy Commissioner of British Columbia (the "Commissioner"), review the petitioner's decision to withhold the drafts of the storm water management plan.

[6] Following an inquiry by the Commissioner, the Commissioner's Delegate, in her decision dated July 24, 2013, concluded that the petitioner was not authorized by s. 12(3)(a) of *FIPPA* to refuse to disclose the original and the four subsequent revisions of the storm water management plan. The Delegate found that the meaning of "other legal instrument" in s. 12(3)(a) did not include the servicing agreement or the storm water management plan. In arriving at her decision and Order, the Delegate said, *inter alia*, as follows:

> (11) The next step in this analysis is to determine what is meant by "other legal instrument" in s. 12(3)(a). FIPPA does not define the term. The *Interpretation Act* requires that every enactment be construed as remedial and be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. Further, the Supreme Court of Canada, on numerous occasions, has stated that the modern approach to statutory interpretation requires that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislators.
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> (12) In my view, the term "other legal instrument" must be read in the context in which it is found, namely a list of specific terms: "resolution", "bylaw", "private Bill", all of which share the characteristic of being a legislative or statutory enactment or decision of a public body. The term "legal instrument", used in its general sense, would include all legal documents such as contracts, wills, deeds, promissory notes, etc. If the Legislature had intended for the term to be used in this general sense, presumably there would have been no need to spell-out or list several specific kinds of records as the general term would have captured them all. In this current context, "other legal instrument" must be read to share the common trait of other terms in the list. Therefore, a consistent reading of the section would suggest that "other legal instrument" means a legislative enactment or decision of a public body, something a contract is not. Accepting Langley's assertion that "other legal instrument" includes contracts would make it, in effect, the odd-one-out in the list.
>
> (13) Three previous orders of this Office have addressed s. 12(3)(a). In two, the orders provide little assistance because the records in dispute differ significantly from those in this inquiry and no reasons or analysis for the s. 12(3)(a) decision are set out. In the third, Order No. 281-1998, former

> Commissioner Flaherty found that an official community plan, approved by way of a bylaw to which it was appended, was not a bylaw for the purposes of s. 12(3)(a). He did not address the issue of whether it was a legal instrument. However, on judicial review, Hood, J. did. After finding that the official community plan was an integral part of its approving bylaw so amounted to a "bylaw" for the purposes of s. 12(3)(a), he went on to find that it was also a "legal instrument" under that section. This was, Hood, J. found, because the official community plan had a "legislative effect" owing to the *Municipal Act* requiring all future bylaws and works conform to the official community plan. That interpretation is consistent with my understanding that "other legal instrument" means a document that has a legislative or statutory character. In conclusion, I find that the term "legal instrument" in s. 12(3)(a) means a legislative or statutory enactment or decision.
>
> (14) Returning to this case, Langley argues that the drafts of the storm water management plan are drafts of part of a "legal instrument", namely the servicing agreement. While I accept that the storm water management plan forms an integral part of a contract (it is an appendix to the servicing agreement), this does not answer the fundamental question of whether the servicing agreement is a legal instrument for the purposes of s. 12(3)(a). It does not share the trait of being a legislative enactment or decision, which is common to the other documents listed in s. 12(3)(a). Therefore, I find that the servicing agreement is not a legal instrument for the purposes of s. 12(3)(a).
>
> (15) I have also considered whether the storm water management plan, as a stand-alone document separate from the servicing agreement, would be a "legal instrument" for the purposes of s. 12(3)(a). I find that it would not, again, because it does not share the trait common to the other types of documents listed in s. 12(3)(a), that of being a legislative enactment or decision.
>
> (16) In summary, the requested records are not drafts of a resolution, bylaw, other legal instrument or private Bill for the purposes of s. 12(3)(a). Therefore they may not be withheld under that exception.
>
> [Footnotes omitted].

[7] Following the Delegate's decision, the petitioner released to Grassroots the drafts of the storm water management plan that were the subject of the Delegate's Order.

III. Analysis

[8] In my view, the first issue for determination is whether the petition raises moot or hypothetical issues that should not be decided by the Court.

[9] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*], the Court dealt with mootness. Sopinka J., for the Court, set out the application of the doctrine in the following terms (beginning at para. 15):

> Mootness
>
> **15** The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> **16** The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
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> When is an Appeal Moot? - The Authorities
>
> **17** The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.
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> …
>
> **34** The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

35 The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal, supra.*

36 Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra.* The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

37 There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and Kates and Barker, *supra*, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal, supra,* at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

…

40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra,* and Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 67.)

41 In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally

> agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369, at p. 373:
>
> > The latter function of the mootness doctrine - political flexibility - can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.
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> I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.
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> **42** In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[10] The respondents De Raadt and Grassroots did not appear at the hearing of this petition. In the circumstances, counsel for the Commissioner reviewed the relevant portions of the Delegate's decision and addressed the issues before the Court. The position of the Commissioner is that the petitioner's unilateral action in releasing the drafts to Grassroots following the decision of the Delegate means that there simply is no longer any live or concrete issue between Grassroots and the petitioner. Thus, the issue of whether the Delegate was "reasonable" or "correct" in ordering that the drafts be released to Grassroots is clearly academic or "moot".

[11] The position of the petitioner is that if the Court decides that providing the drafts to Grassroots caused the issue to become moot, then the Court should still exercise its discretion to hear the petition for several reasons. First, there is a lack of clarity on this point, as there are no judicial decisions that discuss the interpretation of s. 12(3)(a) in the context of the facts before the Court.

[12] Second, the issue will continue to arise for the petitioner and other municipalities and clarification on the correct interpretation and application of *FIPPA* extends beyond Grassroots seeking the drafts of the storm water management plan at issue in the case at bar.

[13] Third, servicing agreements are the type of contract that is routinely negotiated between the petitioner and developers to ensure that appropriate works and services are provided for in the development of projects within the petitioner's jurisdiction. Storm water management plans are routinely included as appendices to serving agreements. If the petitioner is required to disclose drafts of these types of records, it will impede the free discussion necessary to negotiate the final documents. Parties to the process will be hesitant to write comments, questions or positions in or on the documents if those notations will be subject to public disclosure.

[14] Fourth, the petition involves a matter of legal interpretation and does not require the Court to pronounce a judgment that intrudes into the role of the Legislature.

[15] I agree with the position of the Commissioner that the petition raises hypothetical and moot issues and that the Court should decline to grant the relief sought by the petitioner.

[16] First, one of the grounds of relief sought by the petitioner is for a declaration that it is entitled to withhold drafts of contracts, including, but not limited to, draft service agreements, as well as the records that are the subject of the Order. As pointed out by the Commissioner, the Delegate's Order related only to drafts of the storm water management plan, whereas the declaration sought attempts to include records well beyond the subject matter of the Order.

[17] Accordingly, I agree with the Commissioner that the declaration sought addresses a hypothetical issue not before the Delegate. The Order would only result

in drafts of the storm water management plan being released to Grassroots, and not drafts of the servicing agreement.

[18] Second, on the issue of whether the requisite tangible and concrete dispute has disappeared, rendering the issues academic, the petitioner released the drafts of the storm water management plan to Grassroots following the Delegate's decision, as earlier noted. The petitioner asserts that it disclosed the previously withheld records to Grassroots without prejudice to its position regarding the records generally and judicial review specifically, and in the spirit of, and out of respect for, the Delegate's Order and transparency of the petitioner's actions.

[19] However, as the Commissioner notes, the petitioner's step in disclosing the records to Grassroots was unilateral and not based on an agreement by the other parties to this proceeding that no issue of mootness would be raised on judicial review if the petitioner released the records to Grassroots.

[20] In any event, I agree with the argument made by the Commissioner that, in light of the release of the records to Grassroots, there is no longer a live issue between Grassroots and the petitioner as to whether the Delegate was reasonable or correct in making the Order, rendering the issue moot.

[21] Third, I do not think the Court should exercise its discretion to hear this case notwithstanding the fact that the issue raised in the petition is now moot.

[22] The petitioner submits that in the event of a finding of mootness, the Court should nonetheless elect to address the issue. The petitioner says that there is a lack of clarity in the law on this point, as there is no judicial decision that discusses the interpretation of s. 12(3)(a) of *FIPPA* in connection with contracts between the petitioner and third parties. Moreover, as Grassroots is not participating in the judicial review, there is no need for a full adversarial context between the parties, but the matter meets the second and third factors discussed in *Borowski*: the concern for judicial economy and the need for courts to be sensitive to their adjudicative role and avoid intrusions into the legislative role.

[23] The petitioner argues that the finding of the Delegate affects the petitioner's interests and the Order has a practical effect on the rights and responsibilities of the petitioner. It claims that this issue will continue to arise for it and other municipalities and clarification on the correct interpretation and application of *FIPPA* extends beyond Grassroots seeking the records at issue in this proceeding.

[24] In support of its position, the petitioner filed the affidavit of Mr. Ramin Seifi, the petitioner's General Manager, Engineering & Community Development, sworn on January 10, 2014, wherein Mr. Seifi deposed at paras. 5-9, as follows:

> 5. This particular case involves a servicing agreement, which is the sort of contract routinely negotiated between the Township and developers to ensure that appropriate works and services are provided for in the development of projects within the Township. The Township and other local governments use these servicing agreements on a regular basis to fulfil their statutory mandate to provide for services.
>
> 6. Storm water management plans are routinely included as appendices to servicing agreements. These plans are an example of something which forms part of the types of agreements which the Township routinely enters into. The Township negotiates and signs many of these types of agreements every year.
>
> 7. Servicing agreements, including their appendices, like other negotiated agreements, are typically subject to several revisions and drafts during the course of a negotiation, and as plans for a particular project evolve. Both sides often write comments, questions and positions onto the documents during those negotiations. In my opinion, if the Township is required to disclose drafts of agreements, such as servicing agreements or storm water management plans, this will impede the free discussion necessary to negotiate the most reasonable final documents. Both sides will be hesitant, in my opinion, to write comments, questions or positions in, or on the subject documents, if those notations will be subject to public disclosure. This hesitation or unwillingness will in turn make it more difficult for the parties to negotiate the terms of those agreements in the most efficient and effective manner.
>
> 8. There is great value to the Township, and accordingly its residents and the public generally, in clarifying the nature of these and other sorts of agreements with respect to the application of the *Freedom of Information and Protection of Privacy Act.*
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> 9. The Township receives various access requests for development files pursuant to the *Freedom of Information and Protection of Privacy Act,* as I would expect would be the case with other local governments. It would be valuable for the Township, and I expect other local governments, to understand its public access obligations with respect

> to these and other similar records. Clarification of this issue may also assist owners and developers negotiating these agreements, as well as others negotiating certain agreements with the Township, to understand what information may be publicly accessible.

[25] The petitioner submits that it and other municipalities routinely face issues regarding similar draft documents in the provision of services and information to their residents. Further, this matter is one of legal interpretation and does not require the Court to pronounce a judgment that intrudes into the role of the Legislature, because this is an issue that affects the petitioner's right to withhold information; affects what the public is entitled to see; and affects how the petitioner and its contractors will conduct business. Therefore, the Court is fulfilling an important adjudicative function by making a decision.

[26] I agree with the position of the Commissioner that Mr. Seifi's evidence does not establish that requests under *FIPPA* for drafts of storm water management plans or servicing agreements are routine or common and, even if it did, there is no evidence before the Court that the issue raised in this proceeding might "evade review" (*Borowski*, at para. 36). As argued by the Commissioner, a future dispute involving these or similar type records can be determined by the Commissioner. If a live controversy remains following an inquiry and decision by the Commissioner, a judicial review application can be brought and determined on the facts giving rise to the controversy in an adversarial context.

[27] Moreover, on the petitioner's submission that there is a lack of clarity in the law on the interpretation of s. 12(3)(a) of *FIPPA*, the decision in *Nanaimo (Regional District) v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 1283 [*Nanaimo*] deals with this section of *FIPPA* and was referred to in the Delegate's decision. At paras. 26, 51, 54-58, Hood J. said as follows:

> 26. Perhaps the best description of an OCP, which is often quoted, is that given by Henry, J. in Re: Cadillac Development Corp. Ltd. et al and City of Toronto (1973), 39 D.L.R. (3d) 188 (Ont. H.C.) at p. 195. There he was referring to the effect of the OCP in light of s. 19 of The Planning Act before him, subsection (1) of which is a conformity provision similar to s. 884(2) of the British Columbia Municipal Act. At p. 195 he leads into the subject matter with the following:

> The Official Plan therefore, as it is in effect from time to time, represents a policy or program having legislative effect, governing the area to which it applies. It is clear from the scheme of the Act that the Official Plan is not immutable (s. 17) and does not have effect to implement the policy outline by it. Implementation is to be effected by by-laws of the Municipal Council that conform to the policy specified in the plan.

And further down the page, dealing with s. 19(1) of The Planning Act:

> Nor is there, so far as I can see, any requirement that the Council set about implementing the Official Plan; what the Act does is, by s. 19, to place limits on the passing of future by-laws affecting the area to which the plan relates in that they must conform to it. Thus, it is ensured that as the municipality develops, purposefully or otherwise, the legislative changes through the by-laws necessary to allow land development to proceed are gradually channelled in the direction of implementing the policy set out in the Official Plan. Thus a municipal council that wishes to give effect to the Official Plan or any part of it is free to proceed (subject to objections being brought before the Ontario Municipal Board) under s. 35 but a council that wishes to permit development that conflicts with the policy of the plan is restrained and must first have recourse to the cumbersome machinery for amending the plan and the meticulous scrutiny it entails.

…

51. Subsections (1) and (2) of s. 884 should be read together. I will set them out here again:

> The Effect of Official Community Plan
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> 884(1) An official community plan does not commit or authorize a municipality, regional district, or improvement district, to proceed with any project that is specified in the plan.
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> (2) All by-laws enacted or work undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of:
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> (a) an official community plan, or
>
> (b) an official community plan under s. 711 of The Municipal Act R.S.B.C. 1979, c. 290, or an official settlement plan under s. 809 of that Act before the repeal of those sections become effective, must be consistent with the relevant plan.

In one sense then, it has no legal effect on a private landowner. For committal or authorization, or direct effect at least, generally speaking, a zoning by-law implementing the project must be obtained. However, subsection (2) provides that all by-laws enacted, or works undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of the OCP, “must be consistent with the relevant plan”. Clearly then, the OCP does have a legal effect on the governmental bodies referred to, in that it controls or restricts all future development. It also does

have some legal effect regarding private landowners as well, because zoning by-laws, which affect them, must be consistent with the OCP.

…

54. Under the present Municipal Act, in order for a plan to become the official community plan, it must be adopted by a by-law. The by-law must meet the usual requirements enabling it to be passed, including the usual three readings and a public hearing. But is the adopting by-law, a by-law within the meaning of the word as used in s. 12(3)(a)? Mr. Roberts seems to distinguish between an adopting by-law and a zoning or implementing by-law. It may be a question of content. However, while there may be some distinctions between the two, I do not believe that they should exclude from s. 12(3)(a) a draft of a by-law to adopt an OCP, given the purpose of s. 12. While the word "draft" may apply more to the plan than to the wording of the by-law proper, in my view the plan is an integral part of the by-law, particularly because once it becomes an OCP the provisions of s. 884(2) of The Municipal Act are triggered and affect the duties and rights of local governments and of individuals, indirectly and perhaps directly. It certainly is not akin to a budget. It follows that in my opinion the draft by-law in question comes within the meaning of the word "by-law", as used in the section.

55. I should observe here that there are some authorities which may be said to support Mr. Robert's position, that the OCP itself is not a by-law, which cases were not referred to by counsel. See for example, Re: Howard Investments and South of St. James Town Tenants Association et al (1972), 30 D.L.R. (3d) 148 (Ont. H.C.) at 154, and Re: Harvie and The Queen in Right of Alberta (1981), 128 D.L.R. (3d) 316 (Alta. C.A.) at 324. However, I distinguish those cases for the reasons given, and further because it seems to me that a draft OCP is the type of information which a regional district might not wish to reveal, and for that reason it has been given the right to refuse to do so. The OCP is sufficiently a part of the approving by-law that it falls within that word ("by-law") as used in the section.

56. I am also of the view that if the subject draft OCP does not come within s. 12(3)(a) as a by-law, it certainly does under the words "other legal instrument". That is the effect of s. 884(2) of The Municipal Act, which limits all future by-laws and works undertaken, requiring them to conform to the OCP, thus effecting the implementation of the OCP to a certain degree. While it may be said that OCPs have limited legal effect, it is a substantial effect because it controls all future development. The OCP then, in my opinion, does have legal or legislative effect, and is, for the purposes of the section, a legal instrument.

57. I am also of the view that the OCP is a by-law or a legal instrument "by which the local public body acts". When a regional district adopts an OCP by by-law it triggers, or brings in to play, s. 884(2) of The Municipal Act, which is a statutory obligation, and thereby requires all subsequent by-laws enacted and works undertaken to be consistent with the OCP. Whether a by-law or a legal instrument, it is an instrument by which the regional district has acted. In my view, because of this, the adopting by-law is as effective as an enacting by-law for the purposes of subsection (a).

> DISPOSITION
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> 58. It is my opinion that the Commissioner incorrectly interpreted s. 12(3)(a) of The Freedom of Information and Protection of Privacy Act. The draft OCP being a part of a draft by-law, or a draft legal instrument, by which the regional district acts, the regional district has an absolute discretion to decide whether to disclose any information that would reveal the draft document. It was accordingly authorized to refuse to disclose the information sought. Order No. 281-1988, dated December 7, 1998, is set aside and it is declared that the Petitioner is entitled to withhold those portions of the draft Official Community Plan for Nanoose Bay which it has not already disclosed to David Scott, pursuant to s. 12(3)(a) of The Act.

[28] In light of the above, I find that the Court should decline to decide the petition.

[29] Although I have found that I should dismiss the petition on the ground of mootness, I wish to add that even had I determined that the Court should nonetheless decide the interpretation issue, I would have dismissed the petition in any event.

[30] First, on the central issue of the standard of review to be applied to the Delegate's decision, I am satisfied that reasonableness, not correctness, is the appropriate standard.

[31] The position of the petitioner is that the Delegate erred in law in concluding that the petitioner is required to disclose the drafts and submits that the Delegate did not correctly interpret s. 12(3)(a). The petitioner says that the sole issue before the Court is a narrow issue in interpreting s. 12(3)(a) of *FIPPA*. The petitioner claims that the Court is in a better position to interpret this question of law than the Delegate. The question of whether a contract is a "legal Instrument" by which a local public body acts is particular to the powers and jurisdiction of local public bodies. Understanding and interpreting legislation in the local government sphere is not within the Commissioner's area of expertise and thus, asserts the petitioner, no deference to the Delegate or the Commissioner is required or appropriate and the standard of review is correctness.

[32] The petitioner relies heavily on the decision in *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*, [1999] 6 W.W.R. 1 (B.C.C.A.) [*Aquasource*], where the Court held that the Commissioner possesses no special

expertise in statutory interpretation that would justify deference to an interpretation of s. 12 of *FIPPA*. Donald J.A., for the Court, wrote as follows:

> 22. As it is my view that this case is primarily one of statutory interpretation, I hold that the reviewing Court is as well equipped as the Commissioner to settle the meaning of s. 12. …
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> …
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> 25. The problem of construing s. 12 approaches a pure question of law. As I have said, statutory interpretation is part of the regular work of the superior courts and is not a task related to the special expertise of the Commissioner.
>
> 26. It is argued for the Commissioner that his daily contact with the flow of government information gives him a special advantage in giving meaning to the words of the Act. That is probably true with many of its provisions but I have not been persuaded that that is so with s. 12. The subject matter is Cabinet confidences and, in particular, submissions to Cabinet. The format and procedure for presenting information to Cabinet can be found in a publication entitled "The Cabinet Document System: Guidelines for Preparing Cabinet Submissions and Documentation", and so the background knowledge is readily available and easily understood. My point is that an understanding of s. 12 does not require an in-depth knowledge of government information systems and to the extent that some background is helpful it was explained to us without difficulty.
>
> 27. In summary, the nature of the question before the Commissioner was one of statutory interpretation not heavily burdened with facts. It involved Cabinet communications, a crucial area of government activity. The legislature did not intend to confer a power on the Commissioner to reshape the institutions of government in the course of administering the Act.
>
> 28. For these reasons I have formed the opinion that the Commissioner was required to be correct in his interpretation of s. 12.

[33] The petitioner notes that in *Nanaimo*, Hood J. opined that the Commissioner incorrectly interpreted s. 12(3)(a) of *FIPPA*.

[34] However, in the later decision of this Court in *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131 [*BCTF*], dealing with the standard of review that applies to a decision of the Commissioner, Garson J. (as she then was) held:

> [70] I do not think that any of the issues under review are so discrete that it is appropriate to apply different standards of review to the different issues.
>
> [71] In British Columbia, courts have decided that pure questions of law that limit or define the scope of the *Privacy Act* or that are not regarded as essential to core expertise of the Commissioner such as issues of solicitor

client privilege and Cabinet deliberative secrecy have attracted the correctness standard of review. *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* (1998), 58 B.C.L.R. (3d) 61 (C.A.); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, [2004] B.C.J. No. 2534 (S.C.)

[72] Decisions on matters within the Commissioner's core expertise-for example, fact-intensive questions and the interpretation and application of disclosure exceptions, the burden of proof in s. 57, and the Commissioner's discretionary powers concerning his own process (notice and receipt of *in camera* evidence) have been reviewed on the reasonableness standard. *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79 (S.C.) paragraphs 31, 32; *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2307 paragraphs 6-9, rev'd in part [2004] B.C.J. No. 735 (C.A.); *Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2004] B.C.J. No. 465 (S.C.)

[73] In this case, the most important of the issues under review concerns the application of the disclosure exceptions under s. 22. Those issues, at least at the first stage of the analysis, involve questions of statutory interpretation, for instance whether s. 4 permits the severing of non-personal information from personal information in a record that the Petitioner contends is in its entirety, exempt from disclosure under s.22(3)(d). The application of that statutory interpretation to the documents under review is a question of mixed fact and law. I conclude that these questions of statutory interpretation are questions that engage the core expertise of the Commissioner. They are not pure questions of law outside of his expertise.

[74] In *Aquasource,* Donald J.A. said: "The Commissioner possesses no special expertise in statutory interpretation which would justify according deference to his interpretation of a provision such as s. 12:

[75] That statement must be considered to have been overtaken somewhat by subsequent Supreme Court of Canada dicta in which that court acknowledged expertise and deference to a tribunal in the interpretation of its own statute. In *Moreau-Berubé v. New Brunswick (Judicial Council)* [2002] 1 S.C.R. 249 at paragraph 61 Arbour J. stated:

> However, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference … As Bastarache J. noted in *Pushpanathan*, [1998] 1 S.C.R. 982 "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention."

[76] The Commissioner does have specialized expertise accumulated by his office in the operation of the Act generally, and specifically in applying the presumptions and exceptions in sections 21 and 22. The title of the Act, *Freedom of Information and Protection of Privacy,* illustrates the tension between disclosure of information in the possession of public or government bodies, and the protection against the invasion of the privacy of individuals.

> The careful balancing of those competing policy objectives is the task of the Office of the Commissioner.
>
> [77] Accordingly even on the questions of statutory interpretation I find that the Commissioner is entitled to deference based on his expertise and his polycentric functions. Considering all the factors mandated by the functional and pragmatic analysis as set out above and the weight of the judicial authority just quoted, I conclude that the appropriate standard of review is reasonableness.

[35] In *B.C. Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 [*IPA*], the Court referred to *BCTF* and held:

> [24] In *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131, the court summarized the evolution and the current state of the standard of review jurisprudence, and observed that in British Columbia, the courts have decided that pure questions of law that limit or define the scope of the Act and are not regarded as essential to the core expertise of the Commissioner attract a correctness standard. Decisions on matters within the Commissioner's core expertise must be reviewed as on a reasonableness standard (at paras. 71 and 72).
>
> [25] At para. 75, the Court describes the conclusion of the court in *Aquasource* that a correctness standard was applicable, as having been "overtaken somewhat" by subsequent Supreme Court of Canada dicta in *Moreau-Berubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 61 where Arbour J. stated:
>
> > However, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference ... As Bastarache J. noted in Pushpanathan, [1998] 1 S.C.R. 982 "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention."
>
> [26] Ultimately, the Court concluded that the reasonableness standard of review was the appropriate standard by which to consider both s. 12 and s. 13 of the Act.
>
> [27] The existing case law establishes, in my view, that reasonableness is the proper standard of review for the interpretation and application of s. 13 of the Act.

[36] The petitioner argues that the court should not adopt the conclusions in *BCTF* or *IPA* with respect to the issues in the case at bar and asserts that the Court's determination in *Aquasource* remains the authority on the standard of review to be applied in interpreting s. 12 of *FIPPA*. It submits that the conclusion in *IPA* that the Court's comments in *Moreau-Berubé*, as applied in *BCTF*, meant that any questions

about s. 12 of *FIPPA* were always to be decided on a reasonableness standard is an overbroad interpretation of what was actually stated in *BCTF*. The petitioner points out that the Court in *BCTF* found that the issues at hand were not so discreet as to warrant different standards of review and thus decided to apply one standard of review to all of the issues before the Court. The issues included a minor question regarding ss. 12 and 13 of *FIPPA* and, when the questions were considered as a whole, reasonableness was the appropriate standard to apply.

[37] With respect, I disagree with the petitioner's position on this point.

[38] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at paras. 30, 34, Rothstein J., for the majority, said:

> [30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, … '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
>
> …
>
> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes

> closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[39] In *Weyerhaeuser Company Ltd. v. British Columbia (Assessor of Area No. 4 – Nanaimo Cowichan)*, 2010 BCCA 46, the Court stated at paras. 32-36, 45-47, as follows:

> [32] Accordingly, the standard of review for the Board must be determined using the test set out by the Supreme Court of Canada in *Dunsmuir*, and elucidated in *Nolan*.
>
> [33] The first consideration is whether there is sufficient jurisprudence to determine the standard of review when reviewing a decision in which the Board interprets a regulation promulgated under its constating statute.
>
> [34] In *Vancouver Pile Driving Ltd. v. Assessor of Area #08 – Vancouver Sea to Sky Region*, 2008 BCSC 810, 47 M.P.L.R. (4th) 106, the court surveyed the jurisprudence on the standard of review for decisions under the *Assessment Act*. C.L. Smith J. noted that prior to *Dunsmuir*, the standard applied to interpretations of the meaning of a regulation was correctness (paras. 48-49, 57). The standard applied on stated case appeals from the Board's exercise of discretion was consistently held to be patent unreasonableness (para. 56).
>
> [35] C.L. Smith J. noted however that in *Dunsmuir* the Supreme Court of Canada found that it is not unprincipled to review some questions of law on a standard of reasonableness and others on a standard of correctness, noting that a tribunal's interpretation of its own statute generally requires deference (para. 66). She noted that the Board has expertise in property assessment and in applying the *Assessment Act* and its regulations in the property assessment process (*Vancouver Pile*, para. 73). She found however that the interpretation of s. 57(1)(a) and s. 19(6) of the *Assessment Act*, undertaken by the Board in the case before her, had impact beyond the circumstances of the case at hand, and were therefore reviewable under a standard of correctness (paras. 72, 78). (Sections 57(1)(a) and 19(6) concern the powers and duties of the Board in an appeal and the valuation of property for the purposes of assessment.)
>
> [36] If the pre-existing jurisprudence is insufficient to determine the appropriate standard of review, then the second step requires a contextual analysis of the tribunal and the decision it made. *Vancouver Pile* was decided before *Nolan*. Regardless of whether *Vancouver Pile* is distinguishable on its facts from this case, I prefer to depart from the analysis in *Vancouver Pile* (as I consider I should) on the basis that it was decided before *Nolan. Nolan* is a strong statement that questions of the interpretation of a tribunal's own constating statute in matters relating to its own expertise is reviewable on a standard of reasonableness. In my view the pre-existing jurisprudence is insufficient to determine the standard of review. It is therefore necessary to address the four-part *Dunsmuir* analysis.
>
> …

> [45] In *Dunsmuir*, at para. 60, the court states that a correctness standard applies to questions of general law that are both of central importance to the legal system as a whole and outside the tribunal's specialized area of expertise. Thus, the question here is whether the nature of the question at issue is within the specialized realm of expertise of the Board.
>
> [46] The analysis of the second factor above provided sufficient ground to understand the expertise of the Board. The Board deals with reviewing assessment decisions made by a review panel. Their job specifically entails applying regulations to fact situations to determine if a review panel made the appropriate decision under the *Assessment Act*. Thus, interpreting and applying assessment regulations is within the Board's specialized realm of expertise.
>
> [47] Since the Board was not determining legal questions of general importance to the legal system as a whole, but rather interpreting a regulation promulgated under their own constating statute, the standard of review in this case is reasonableness.

[40] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, the Court dealt with the matter of a legal issue that has been characterized as a question of general law, of essential importance to the legal system as a whole, for which the standard of review is correctness. At para. 94, the Court held:

> [94] The analysis required under *Dunsmuir* has changed the approach to this question. However, an analysis of the four factors to be considered does not result in a different conclusion. The analysis from the pre-*Dunsmuir* cases in relation to the question of solicitor-client privilege claimed under s. 14 is still persuasive. Given the importance of solicitor-client privilege to the operation of our legal system, and the body of jurisprudence which emphasizes the importance of that privilege, it would be inconceivable to conclude that the consideration as to whether s. 14 could be relied upon by a public body should be reviewed on a standard of reasonableness. It must be reviewable on a standard of correctness.

[41] In *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025, G.C. Weatherill J. stated at paras. 45-49:

> [45] The parties are in agreement and, indeed, it is well settled that the standard of review of a decision involving the interpretation and application of s. 13 of *FIPPA* is that of reasonableness: *BC Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para. 34; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39.
>
> [46] "Reasonableness" was described in *Dunsmuir* as a deferential standard animated by the principle that certain questions coming before administrative tribunals:

> 47 …do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within the range of possible acceptable outcomes which are defensible in respect of the facts and law.
>
> [Emphasis added]

> [47] The court is required to pay "respectful attention to the reasons offered or which could be offered in support of the tribunal's decision": *Dunsmuir* at para. 48. A court should be cautious about substituting its own view of the proper outcome: *Newfoundland* at para. 17. Perfection is not the standard: *Public Service Alliance of Canada v. Canada Post* Corporation, 2010 FCA 56 at para. 163, Evans J.A. quoted with approval in *Newfoundland* at para. 18.
>
> [48] This deferential approach is justified because the OIPC is a discrete and specialized administrative regime charged with dealing with the rights of access to information in records held by public bodies. The Legislature has provided the OIPC with tools and powers to enable it to discharge the explicit objectives of *FIPPA* with the result that the OIPC has familiarity and specialized expertise that the courts do not: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 63-65; *Dunsmuir* at para. 49.
>
> [49] Here the question is whether the Assistant Commissioner's conclusion that disclosure of the Records would not reveal the advice or facilitate the drawing of inferences about the advice was reasonable.

[42] I am satisfied, based on the above authorities, that the law is now well settled that the standard of review applicable to a decision of the Commissioner interpreting s. 12(3)(a) of *FIPPA* regarding the term "other legal instrument" should be that of reasonableness.

[43] Moreover, the Courts have held that a decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. The reasons must be taken as a whole and considered in terms of whether they are tenable as support for the conclusion. The majority of the Supreme Court of Canada stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47 [*Dunsmuir*]:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires

> into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[44] Thus, the question in the case at bar is not whether the Court would have decided the issue on the same basis as the Delegate, but whether the Delegate had a tenable basis for her conclusion on the application of s. 12(3)(a) of *FIPPA* to the facts before her. In my view, she did.

[45] The Delegate, in her analysis of the issue, gave careful and thoughtful consideration to the term "other legal instrument" in the context of the terms "resolution", "bylaw", and "private Bill", and held that they all share the characteristic of being a legislative or statutory enactment or decision of a public body. She did not accept the petitioner's assertion that "other legal instrument" includes contracts such that a contract can be read into the list in s. 12(3)(a) of *FIPPA*.

[46] The Delegate also considered previous orders of the Commissioner as well as the decision in *Nanaimo*. She specifically concluded that a servicing agreement is not a legal instrument, and neither is a storm water management plan, holding that the records sought by Grassroots did not fall under the exception in s. 12(3)(a) of *FIPPA*.

[47] In my opinion, the Delegate's decision clearly falls within a range of possible acceptable outcomes, which are defensible in respect of the facts and law and should not be interfered with on a judicial review: See *Dunsmuir*, at para. 47.

[48] However, my views on the standard of review and the application of the appropriate standard to the Delegate's decision are offered for the sake of completeness. The petition is dismissed on the ground of mootness only.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen