SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JAN 18 2017

S-170514

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the decision of the Delegate of the Information and Privacy Commissioner for British Columbia, Order F16-49 and in the Matter of the *Judicial Review Procedure Act*, RSBC 1996, c. 241

BETWEEN:

PLENARY GROUP (CANADA) LTD.

PETITIONER

AND:

JOE FRIES, MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES, and INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

The Respondent, Joe Fries, 101 - 186 Nanaimo Ave. W., Penticton, BC, V2A 1N4

The Respondent, the Ministry of Technology, Innovation, and Citizens' Services, 3rd Floor, W341 - 4000 Seymour Place, Victoria, BC, V8W 9V1

The Respondent, the Information and Privacy Commissioner for British Columbia, 4th Floor - 947 Fort Street, Victoria, BC, V8V 3K3

The Attorney General for British Columbia, Legal Services Branch, 6th Floor - 1001 Douglas Street, Victoria, BC, V8V 1X4

This proceeding is brought for the relief set out in Part 1 below, by:

☒ the person named as petitioner in the style of proceedings above

If you intend to respond to this proceeding, 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),

(c) if you were served with the petition anywhere in Canada, within 21 days after that service,

(d) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(e) if you were served with the petition anywhere else, within 49 days after that service, or

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

The address of the registry is:	800 Smithe Street Vancouver, BC V6Z 2E1
The ADDRESS FOR SERVICE of the petitioner is:	Tamara Hunter DLA Piper (Canada) LLP Barristers & Solicitors 2800 Park Place 666 Burrard Street Vancouver, BC V6C 2Z7
Fax number address for service (if any):	604.605.3712
E-mail address for service (if any):	tamara.hunter@dlapiper.com
The name and office address of petitioner's lawyer is:	Tamara Hunter DLA Piper (Canada) LLP Barristers & Solicitors 2800 Park Place 666 Burrard Street Vancouver, BC V6C 2Z7

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order that Order F16-49, dated December 5, 2016, of a delegate of the Information and Privacy Commissioner for British Columbia requiring the Ministry of Technology, Innovation, and Citizens' Services (the "Ministry") to provide certain records be quashed;

2. An order remitting this matter back to the Information and Privacy Commissioner for British Columbia to reconsider and determine the application of s. 21(1) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ("*FIPPA*") to the records at issue in accordance with the Court's reasons;

3. An order extending the stay of proceedings until the judicial review of Order F16-49 is complete;

4. An order sealing *in camera* material that was before the Office of the Information and Privacy Commissioner for British Columbia in the below proceedings and the court clerk's notes regarding this sealed *in camera* material;

5. An order authorizing the Petitioner Plenary Group (Canada) Ltd. ("Plenary Group"), the Ministry, and the Information and Privacy Commissioner for British Columbia to make *in camera* submissions to this Court regarding documents sealed by this Court's order;

6. Costs; and

7. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

The nature of this petition

1. Adjudicator Celia Francis (the "Adjudicator"), a delegate of the Information and Privacy Commissioner for British Columbia, issued Order F16-49 on December 5, 2016.

2. Order F16-49 followed an inquiry held pursuant to the provisions of *FIPPA* and as a result of an access request made by the Respondent Joe Fries to the Ministry (the "Inquiry").

3. Order F16-49 requires the Ministry to provide Mr. Fries with access to certain information and records by January 18, 2017. The Petitioner says that the records that the Adjudicator ordered the Ministry to disclose contain information that the Ministry must refuse to disclose pursuant to s. 21(1) of *FIPPA*, in light of the third party business interests of Plenary Group.

4. This petition is an application for judicial review of Order F16-49.

The parties

5. The Petitioner, Plenary Group, is a corporation incorporated under the laws of Canada. It is in the business of public infrastructure project development and public infrastructure management.

6. The Ministry is a ministry of the government of British Columbia and a "public body" under *FIPPA*.

7. Mr. Fries is a journalist with the *Penticton Herald*.

8. The Information and Privacy Commissioner, through the Office of the Information and Privacy Commissioner (the "OIPC"), is a tribunal established under the provisions of *FIPPA*.

Background and procedural history

9. In April 2014, the government of British Columbia awarded a contract (the "Project Agreement") to Plenary Justice Okanagan Limited Partnership ("Plenary Justice"), a partnership wholly owned and led by the Petitioner, Plenary Group. The contract was to design, build, finance, and maintain the Okanagan Correctional Centre (the "OCC"), a correctional facility in Oliver, British Columbia.

10. The Project Agreement was the result of a successful bid submitted by Plenary Justice in response to a Request for Proposals dated March 20, 2013 to design, build, finance, and maintain the OCC (the "RFP").

11. On August 1, 2014, Mr. Fries submitted an access request to the Ministry of Justice for a copy of certain schedules and appendices to the Project Agreement (a redacted copy of the Project Agreement including schedules and appendices had already been proactively disclosed by the Ministry). The Ministry of Justice transferred Mr. Fries' access request to the Ministry on August 14, 2014 pursuant to s. 11 of *FIPPA*.

12. On December 23, 2014, the Ministry provided Mr. Fries with records responsive to his request, with redactions pursuant to ss. 17 and 21 of *FIPPA*.

13. On January 9, 2015, Mr. Fries asked that the OIPC review the Ministry's decision to redact these records.

14. Mediation did not resolve the matter. On March 2, 2016, the OIPC referred the matter to an Inquiry pursuant to Part 5 of *FIPPA*. On the same day, the OIPC notified the Petitioner about the Inquiry, gave the Petitioner a copy of Mr. Fries' request for a review of the Ministry's decision to redact the requested records, and invited the Petitioner to make written representations in the Inquiry.

15. On March 23, 2016, the Ministry withdrew its reliance on s. 17 of *FIPPA*. It also took the position that s. 21(1) applies only to Schedule 15 to the Project Agreement ("Schedule 15"). Schedule 15 is a 587-page spreadsheet that includes a breakdown of the projected costs for the OCC project, and is commonly referred to as the "financial model" for the project.

16. The Petitioner agreed that s. 21(1) applies to Schedule 15. In addition, the Petitioner maintained that s. 21(1) also applies to Appendix 2F to the Project Agreement ("Appendix 2F"). Appendix 2F is a six-page chart of the draft initial project schedule for the construction of the OCC.

17. The Ministry accordingly disclosed to Mr. Fries complete copies of the requested records except Schedule 15 and Appendix 2F to the Project Agreement (collectively, the "Information in Dispute"). The Ministry withheld the columns of Appendix 2F showing the proposed start and finish dates for each task listed. Schedule 15 was withheld in its entirety.

18. On April 21, 2016, the OIPC authorized the Petitioner to file parts of its evidence on an *in camera* basis.

19. On May 5, 2016, the Petitioner filed its Initial Submissions in the Inquiry. In support of its Initial Submissions, the Petitioner filed the affidavit of Rajan Bains, made May 5, 2016, and the affidavit of Joseph Oliverio, made April 13, 2016.

20. Pursuant to the OIPC's April 21, 2016 order authorizing the Petitioner to file parts of its evidence on an *in camera* basis, the Petitioner filed two versions of Mr. Bains' affidavit. The Petitioner filed a redacted "applicant version" of Mr. Bains' affidavit. The Petitioner also filed an unredacted *in camera* version of Mr. Bains' affidavit. The unredacted *in camera* version of Mr. Bains' affidavit was not disclosed to Mr. Fries.

21. Also on May 5, 2016, the Ministry filed its Initial Submissions in the Inquiry. In support of its Initial Submissions, the Ministry filed the affidavit of Nathan Salomon, made April 15, 2016, the affidavit of Tim Philpotts, made April 5, 2016, and the Affidavit of Del de Medeiros, made April 15, 2016.

22. On May 26, 2016, Mr. Fries' filed his Response Submissions in the Inquiry. Mr. Fries did not file any evidence in support of his submissions. Accordingly, the Petitioner and the Ministry's evidence was entirely uncontradicted.

23. On June 10, 2016, the Petitioner and the Ministry each filed Reply Submissions in the Inquiry.

24. The Adjudicator did not request any additional evidence or submissions from the parties.

The Adjudicator's reasons

25. On December 5, 2016, the Adjudicator issued Order F16-49, which contained the reasons for her decision following the Inquiry.

26. The Adjudicator held that the issue before her was whether s. 21(1) of *FIPPA* required the Ministry to refuse Mr. Fries access to the Information in Dispute. The relevant parts of s. 21(1) are as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal [...]
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> [...]
>
> (iii) result in undue financial loss or gain to any person or organization, [...]

27. The Adjudicator applied the following test to determine if s. 21(1) shielded the Information in Dispute from disclosure:

> [15] [...] First, the party resisting disclosure must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c).
>
> [...]
>
> [20] B.C. orders have consistently found that information in an agreement or contract does not normally qualify as "supplied" for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:
>
> - where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change; or

- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information of, or about, a third party that had been supplied in confidence but which does not expressly appear in the agreement.

[footnotes omitted]

28. The Adjudicator found that the Information in Dispute was both "commercial" and "financial" information within the meaning of s. 21(1)(a).

29. However, the Adjudicator determined that Plenary Justice had not "supplied" the Information in Dispute to the Ministry within the meaning of s. 21(1)(b). In coming to this conclusion, she held as follows:

> [26] I acknowledge that the Ministry and Plenary take the position that the information in dispute in this case was not negotiated but was incorporated unchanged into the Project Agreement (although both Plenary and the Ministry admitted that Schedule 15 was amended to include clarifications and "mechanical adjustments" to interest rates). This does not, however, suffice to make it "immutable." As Order F08-22 stated, the term "supply"
>
> > ... is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor" or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.
>
> [27] Both the Ministry and Plenary acknowledged that the RFP for the OCC project explicitly stated that the Ministry reserved the right to negotiate changes to a preferred proponent's proposal and to the Project Agreement itself. Other provisions in the RFP also make it clear that the Ministry intended to negotiate the terms of the final Project Agreement with the preferred proponent, including the "funding arrangements," which I take to include Plenary's financial arrangements with its partners and lenders. Moreover, the Project Agreement states that the schedules are "deemed fully a part of this Agreement." These facts alone signify that that the Ministry and Plenary agreed to the terms of Appendix 2F and Schedule 15 and to their inclusion in the Project Agreement.
>
> [28] These terms were thus not "supplied" for the purposes of s. 21(1)(b) but negotiated.
>
> [28] I recognize that the Ministry and Plenary argue that Schedule 15 includes the "fixed price," "fixed costs" and "fixed schedule" of Plenary and its partners and lenders set out in Plenary's bid. Plenary submits that the withheld information is therefore "immutable." I also acknowledge that the Ministry's evidence was that it would not normally "seek" to negotiate changes to a proponent's financial model or project schedule. However, under the terms of the RFP, the Ministry was free to negotiate the terms of the final Project Agreement, including the funding arrangements. Thus, even if the terms of Schedule 15 and Appendix 2F

> are the same as in Plenary's bid, they were, in my view, nevertheless "susceptible to change" and their inclusion in the contract signifies that the Ministry agreed to them. I therefore conclude that the withheld information is not the type of information that past orders have found to be "immutable" (e.g., labour costs a proponent is obliged to pay under a collective agreement).
>
> [...]
>
> [31] I have also considered Plenary's argument that this case is similar to Order F15-03 which found that some information in a third party's financial model, attached as an appendix to a contract, was "supplied" for the purposes of s. 21(1)(b). However, in that case, the adjudicator had evidence of the "relative immutability" of the information he found was "supplied." The evidence in this case does not, in my view, support such a conclusion. Moreover, it appears that the adjudicator in Order F15-03 did not have evidence that the RFP permitted the negotiation of changes to the resulting contract, as the RFP in this case did. He also did not say if the contract itself expressly stated that the appendices were part of the agreement, as is the case here.
>
> [footnotes omitted]

30. The Adjudicator also stated in footnote 31 of Order F16-49 that "[t]he parties did not provide me with a copy of the Project Agreement. However, it is publicly available on PBC's website: http://www.partnershipsbc.ca/files-4/projectocc-schedules/PA-and-Schedules_except-Schedules-3-and-15_and_Appendices-2A-%202Fand-4A-Redacted.pdf".

31. The main body of the Project Agreement was not part of the record before the Adjudicator in the Inquiry. Further, the Adjudicator did not provide the Petitioner and the Ministry with an opportunity to make representations on the particular provisions of the Project Agreement before making findings with respect to the effect of those provisions of the Project Agreement.

32. Having found that the Information in Dispute was not "supplied" to the Ministry, the Adjudicator held that it was unnecessary to determine whether the Information in Dispute was supplied "in confidence" within the meaning of s. 21(1)(b). She also found it unnecessary to determine whether s. 21(1)(c) applied to the Information in Dispute.

33. The Adjudicator accordingly ordered the Ministry under s. 58(2)(a) of *FIPPA* to disclose the Information in Dispute by January 18, 2017.

34. Pursuant to s. 59(2) of *FIPPA*, the Adjudicator's order in Order F16-49 is stayed for 120 days (defined in Schedule 1 of *FIPPA* as excluding holidays and Saturdays) beginning on the day that the Petitioner filed this application for judicial review.

35. Pursuant to s. 59(3) of *FIPPA*, if a date for hearing this application for judicial review is set before the expiration of the stay of the Adjudicator's order referred to in s. 59(2), the stay of the Adjudicator's order is extended until the judicial review is completed or the court makes an order shortening the stay.

Part 3: LEGAL BASIS

Introduction

36. Order F16-49 should be quashed for the following reasons:

(a) the Adjudicator's decision was unreasonable with respect to the interpretation and application of s. 21(1)(b) of *FIPPA*;

(b) the Adjudicator's reasons were insufficient because the Adjudicator did not adequately explain why she rejected the Petitioner and the Ministry's evidence regarding the immutability of the Information in Dispute; and

(c) the Adjudicator breached her duty to be fair by considering and interpreting evidence that was not on the record in the Inquiry and by failing to allow the parties the opportunity to make representations about that evidence.

Legislative provisions

37. The Petitioner relies on:

(a) the provisions of the *Judicial Review Procedure Act*, RSBC 1996, c. 241;

(b) Rules 1-3, 2-1(2)(b), 14-1, and 16-1 of the *Supreme Court Civil Rules*; and

(c) the provisions of *FIPPA*, and in particular ss. 21(1) and 56(3).

Standard of review

38. The standard of review applicable to the Adjudicator's interpretation and application of s. 21(1)(b) of *FIPPA* is reasonableness.

See *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55

39. The standard of review applicable to the adequacy of the Adjudicator's reasons is reasonableness.

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras. 14 and 22 [*Newfoundland Nurses*]

40. The standard of review applicable to questions of procedural fairness is correctness. In the procedural fairness context, the appropriate standard of review has also been described simply as "fairness". The question for this Court is whether the Petitioner was treated fairly. In determining whether a tribunal treated a party fairly, the reviewing court is not required to give deference to the tribunal's own assessment of whether its procedures were fair.

Mission Institution v. Khela, 2014 SCC 24 at para. 79

Seaspan Ferries Corp. v. British Columbia Ferry Services Inc., 2013 BCCA 55 at paras. 49 and 52

The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licencing Branch), 2016 BCCA 165 at para. 14

The Adjudicator's unreasonable interpretation and application of s. 21(1)(b)

41. The Adjudicator held that the Information in Dispute was not "supplied" within the meaning of s. 21(1)(b) based on three factors:

(a) the RFP stated that the Ministry reserved the right to negotiate changes to a preferred proponent's proposal and to the final Project Agreement;

(b) the Adjudicator's view that other provisions of the RFP indicated that the Ministry intended to negotiate the terms of the final Project Agreement; and

(c) the Project Agreement stated that schedules to the Project Agreement (such as Appendix 2F and Schedule 15) are "deemed fully a part of this Agreement".

42. Despite the Petitioner and the Ministry's uncontroverted evidence that the Information in Dispute was not, practically speaking, capable of material change nor the subject of any negotiation, the Adjudicator held that the provisions of the RFP and the Project Agreement referred to in paragraph 41 above rendered the Information in Dispute "susceptible to change". On that basis alone the Adjudicator held that the Information in Dispute was negotiated and not "supplied".

43. Thus the Adjudicator concluded that because the Ministry had the legal right in certain circumstances to negotiate changes to Schedule 15 and Appendix 2F, the Ministry could in fact change Schedule 15 and Appendix 2F and intended to do so. This reasoning is illogical on its face.

44. For example, Schedule 15 contains terms of previously-existing agreements between the Petitioner's borrowers and the Petitioner. These pre-existing contractual terms are unquestionably not capable of being renegotiated by the Ministry, yet the Adjudicator nonetheless found that these contractual terms were "susceptible to change" due to the language of the RFP. This reasoning contradicted numerous OIPC decisions holding that where a public body entered into a contract with a company that referenced pre-existing contractual terms between the company and a third party, those pre-existing contractual terms were immutable and therefore "supplied" within the meaning of s. 21(1)(b).

Order 01-39 at para. 45, aff'd 2002 BCSC 603

Order F13-22 at paras. 38 and 40

Order F14-04 at paras. 40 and Addendum 2

Order F15-03 at para. 35

45. The Adjudicator's approach also contradicted previous OIPC decisions that found certain information in contracts between public bodies and companies to be immutable notwithstanding the fact that the public body negotiated other terms of that contract. Unlike the Adjudicator, the OIPC in these previous cases did not characterize the public body's general right to negotiate a contract as rendering every piece of information within that contract negotiable and incapable of being protected by s. 21(1).

Order F13-22 at para. 40

Order 14-04 at paras. 39-40 and Addendum 2

Order F15-03 at paras. 34-35

46. As the Saskatchewan Court of Queen's Bench very recently held when considering whether information was "supplied in confidence" within the meaning of freedom of information legislation, the question is not whether information could have been the subject of negotiation, but whether information was in fact the subject of negotiation.

Canadian Bank Note Limited v. Saskatchewan Government Insurance, 2016 SKQB 362 at para. 39

47. The Adjudicator applied a much more stringent standard of immutability than the test of "relative immutability" employed in previous OIPC decisions. She effectively required information to be absolutely immutable (i.e. neither practically nor legally capable of being changed) to be "supplied" within the meaning of s. 21(1)(b).

> Order 01-39 at para. 44, aff'd 2002 BCSC 603
>
> Order F14-04 at para. 17
>
> Order F15-03 at para. 35

48. Accordingly, the Adjudicator did not apply, or misapplied, the established legal test with respect to the immutability exception. Where an administrative decision-maker fails to apply or misapplies an established legal test, their decision is unreasonable.

> See *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11 at paras. 194 and 201
>
> See also *Alberta (Education) v. Canadian Copyright Licencing Agency (Access Copyright)*, 2012 SCC 37 at para. 37

49. Further, consistency with previous administrative decisions suggests that a decision is reasonable. The fact that the Adjudicator's decision was in many ways inconsistent with established OIPC jurisprudence indicates that Order F16-49 is unreasonable.

> *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* 2013 SCC 34 at para. 6
>
> *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para. 61

50. Even if the test of "relative immutability" were not the established legal test, it would be unreasonable for the Adjudicator to interpret s. 21(1)(b) as requiring information to be absolutely immutable in order to be "supplied" within the meaning of that provision. If the Adjudicator's approach were to be upheld, the third party business information exception to disclosure in s. 21(1) would be incapable of protecting <u>any</u> information in a contract in circumstances where a public body has the general legal right to negotiate the terms of that contract, regardless of whether there is information in that contract that is not practically capable of being negotiated. This result is absurd and clearly contrary to the Legislature's intent to permit limited exceptions to the general right of access under *FIPPA*.

> Paragraph 2(1)(c) of *FIPPA*

51. The Adjudicator's approach was therefore incompatible with the principles of statutory interpretation. Legislatures do not intend to produce absurd consequences. Similarly, the "consequences or effects" of an interpretation cannot be incompatible with the object of an enactment.

> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27

52. Taken as an organic whole, Order F16-49 does not contain a tenable line of analysis capable of supporting the result reached by the Adjudicator. Accordingly, it is appropriate to remit the Adjudicator's decision back to the OIPC for reconsideration by a different adjudicator.

<u>The Adjudicator did not give sufficient reasons for rejecting the Petitioner and the Ministry's evidence</u>

53. The Petitioner and the Ministry's evidence set out in meticulous detail why the Information in Dispute could not be negotiated. The Adjudicator's reasons do not indicate that she engaged with

this evidence in a meaningful way, nor do they adequately explain why she rejected evidence that was vitally important to the Petitioner and the Ministry's case.

54. This Court must consider the adequacy of the Adjudicator's reasons in the context of the overall reasonableness of her decision. If her reasons allow this Court to understand why the Adjudicator made her decision and if they permit the Court to determine whether her conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

Newfoundland Nurses at paras. 14 and 16

55. In a case where an OIPC adjudicator gave one conclusory sentence as his reasons for ordering disclosure of certain records, this Court held those reasons to be inadequate and the adjudicator's decision to be unreasonable.

Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 2322 at paras. 102, 103, and 106

56. Here, the Adjudicator's entire analysis regarding whether the Petitioner and the Ministry's evidence established the immutability of the Information in Dispute is contained in one conclusory sentence:

> [31] [...] However, in [Order F15-03], the adjudicator had evidence of the "relative immutability" of the information he found was "supplied." The evidence in this case does not, in my view, support such a conclusion.
>
> [emphasis added]

57. Whether the Information in Dispute is immutable was the central question in the Inquiry. While the Adjudicator did not have to exhaustively canvass all the evidence before her, at a minimum her reasons had to explain why she rejected the Petitioner and the Ministry's evidence on this critical point. The Adjudicator's reasons do not provide this explanation, and accordingly, it is impossible for the Court to determine whether she had a reasonable basis for rejecting the Petitioner and the Ministry's evidence. Thus the Adjudicator's reasons do not demonstrate the requisite level of "justification, transparency and intelligibility" for Order F16-49 to be considered reasonable.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 47

The Adjudicator breached the principles of procedural fairness by not giving the Petitioner the opportunity to make representations regarding the Project Agreement

58. The Petitioner had the right to make representations to the Adjudicator in the Inquiry under s. 56(3) of *FIPPA*. The only express limit on this right was the Adjudicator's discretion to determine if the Petitioner could be present during, have access to, or comment on representations made to the Adjudicator by "another person".

Subsections 56(3) and (4) of *FIPPA*

59. The Petitioner was entitled to know the case to meet. Deciding an issue on a point on which a party has not had a reasonable opportunity to present submissions breaches the rules of procedural fairness.

Economical Mutual Insurance Company v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 903 at para. 85

60. Thus where an administrative decision-maker relies on evidence without giving a party the opportunity to respond to that evidence, the decision-maker breaches the principles of procedural fairness.

See *Northland Properties Corporation v. British Columbia (Liquor Control and Licensing Branch)*, 2011 BCSC 160 at paras. 23, 24, 37, and 38

See also *Imperial Parking v. Bali et al*, 2005 BCSC 643 at paras. 51-53 [*Imperial Parking*]

61. Further, when an administrative decision-maker is performing an essentially adjudicative function, he or she is generally precluded from *ex parte* fact-finding. It will usually constitute a breach of the rules of procedural fairness for an adjudicator to make private inquiries to supplement evidence adduced at the hearing on a question of fact that is controvertible.

Imperial Parking at para. 52

62. The denial of a right to a fair hearing always renders a decision invalid, whether or not it appears to the reviewing court that a fair hearing would likely result in a different decision. This is because the right to a fair hearing is an independent, unqualified right that "finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have."

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643 at 661

British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12 at paras. 70-72

63. The Adjudicator made findings of fact and law on the basis of particular provisions of the Project Agreement, which was not part of the record before her, and without hearing representations from the parties on the particular provisions of the Project Agreement relied on by the Adjudicator.

64. As the Adjudicator's findings with respect to the Project Agreement were central to her reasons for ordering disclosure of the Information in Dispute, the Petitioner was denied the opportunity to make representations on a critical piece of evidence.

65. The Petitioner was therefore not treated fairly. Order F16-49 must be quashed on this ground alone.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Susan Wandell made January 16, 2017.

2. Affidavit #2 of Susan Wandell made January 17, 2017.

3. The complete record and *in camera* record comprising the record before the OIPC in the Inquiry.

The Petitioner estimates that the hearing of the petition will take 2 days.

January 17, 2017
Dated

Alex Hudson
for: Signature of ☒ lawyer for petitioner
DLA Piper (Canada) LLP (Tamara Hunter)

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this petition

☐ with the following variations and additional terms:

_____

_____

_____

_____

Date: _____ _____

Signature of ☐ Judge ☐ Master

No. _____

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PLENARY GROUP (CANADA) LTD.

PETITIONER

AND:

JOE FRIES, MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES, and INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

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