NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51

Date: 20190612
Docket: CA 475210
Registry: Halifax

Between:

Nova Scotia Office of the Ombudsman

Applicant

v.

The Attorney General of Nova Scotia
representing the Department of Health and Wellness
and The Minister of Health and Wellness

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Heard:	March 27, 2019, in Halifax, Nova Scotia
Subject:	**Democracy. Democratic Institutions. Application (Stated Case). Origins and Jurisdiction of the Ombudsman. Good Government. Government Misconduct. Adult protection. Independent Oversight. Public Accountability. Ministerial Responsibility. Public Access to Information. Protection of Personal Information. Statutory Interpretation.** ***Ombudsman Act,*** R.S.N.S. 1989, c. 327**.** ***Adult Protection Act,*** R.S.N.S. 1989, c. 2**.** ***Freedom of Information and Protection of Privacy Act,*** S.N.S. 1993, c. 5**.** ***Personal Health Information Act,*** S.N.S. 2010, c. 41**.**
Summary:	The Ombudsman launched an investigation into the actions of the Adult Protection Services regarding the treatment and protection of an adult, A.B., under its care. Prompted by concerns that the APS may have mishandled A.B.'s case, thereby causing him harm, the Ombudsman demanded a

complete, unredacted record of APS's involvement in the matter, including the adult's personal health information. The Minister of Health and Wellness refused to produce anything other than a heavily redacted record, arguing that the Ombudsman lacked jurisdiction to demand such disclosure, and other provincial legislation obliged the Minister to safeguard the adult's privacy interests. The Ombudsman's demands for the full record were repeatedly declined by the Minister, thus leading to an Application seeking the Court's answers to two Stated Questions.

Held: Application allowed and the stated questions are answered as follows:

(a) Does subsection 11(2) of the *Ombudsman Act* preclude jurisdiction of the Ombudsman from investigating DHW with respect to their handling of complaints, referrals and care concerning AB?

Answer: No.

(b) Does the jurisdiction of the Ombudsman, if any, provide for the production of the Record in full from DHW?

Answer: Yes.

The Court conducted a comprehensive historical and statutory analysis of the various statutes implicated by this dispute. The Office of Ombudsman occupies a special, unique and important role in Canada's constitutional democracy. In terms of statutory interpretation, the *Ombudsman Act* receives special treatment because it represents the paradigm of remedial legislation. The Ombudsman has sweeping powers to investigate how government departments or municipal units administer the law in ways that are, for example, unlawful, mistaken, erroneous, oppressive, discriminatory, unreasonable, unjust, irrelevant or improper. Those powers are to be given a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. The

authority of the Ombudsman to investigate and report on the actions or inactions of elected or unelected government officials serves as a potent tool for citizens with reasons to doubt the claims of "transparency" and "accountability" from those whose hands control the levers of power. Exposing such untruths and failures to follow the law is a laudable objective in ensuring good government. The Ombudsman's statutory jurisdiction acts as a watchdog over the operations of government by providing an impartial and independent review with broad authority to investigate, subpoena, question under oath and, if necessary, publicly censure government misconduct.

The Ombudsman has clear and unfettered jurisdiction to investigate DHW and APS. The Minister's blacking out of relevant information impairs the effectiveness of the Ombudsman's investigation and thwarts his ability to exercise his statutory responsibilities.

The Minister's reliance upon other "privacy" legislation as a basis for refusing the Ombudsman's demands for complete disclosure, is without merit. Nova Scotia's *Freedom of Information and Protection of Privacy Act* is unique in Canada. Nova Scotia is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are "fully accountable to the public". It is clear the Nova Scotia Legislature deliberately imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to certain limited exceptions, disclose all government information so that public participation in the workings of government will be informed and fair. This province's *FOIPOP* ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations enure to the benefit of good government and its citizens.

Neither *FOIPOP* nor the *Personal Health Information Act* provide any basis for the Minister's refusal to comply with the Ombudsman's demand for production.

There is no obligation upon the Ombudsman to divulge the name of a complainant, or any information which might tend to identify the complainant. In holding government to account, the Ombudsman will often receive confidential communications from a whistleblower. Such communications are to be encouraged and requiring the Ombudsman to "give up" the name of a complainant would be absurd.

The Ombudsman's oversight reminds both government and its bureaucracy that they – like the citizens they serve – are bound by the Rule of Law and will be held to account for its breach.

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v.

The Attorney General of Nova Scotia
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and The Minister of Health and Wellness

Respondent

Judges:	Farrar, Saunders and Bourgeois, JJ.A.
Application Heard:	March 27, 2019, in Halifax, Nova Scotia
Held:	Application allowed per reasons of Saunders, J.A.; Farrar and Bourgeois, JJ.A. concurring.
Counsel:	Roderick H. Rogers, Q.C. and Sara Nicholson, for the applicant Edward A. Gores, Q.C., for the respondent

Reasons for judgment:

[1] This matter comes before us by way of an Application – Stated Case, initiated by the Nova Scotia Office of the Ombudsman ("Ombudsman"). The respondent is the Attorney General of Nova Scotia, representing the Department of Health and Wellness and the Minister of Health and Wellness (the "DHW" or the "Minister").

[2] The Ombudsman launched an investigation into the actions of the Adult Protection Services ("APS") regarding the treatment and protection of an adult referred to as A.B., under its care. Prompted by concerns that the APS may have mishandled A.B.'s case, thereby causing him harm, the Ombudsman demanded a complete, unredacted record of APS's involvement with A.B., including A.B.'s personal health information. A dispute arose between the parties with respect to the Ombudsman's jurisdiction.

[3] In broad strokes, the Minister defended his refusal to provide a full, unredacted record on two fronts. First, he said the Ombudsman's demands were precluded by certain provisions of the *Ombudsman Act*, R.S.N.S. 1989, c. 327 (the *Act*), in order to safeguard A.B.'s privacy interests. Second, he said other provincial legislation obliged him to refuse the sought-after production.

[4] After almost a year of "negotiations", the parties were not able to reach an accommodation, prompting the present application.

[5] Due to the unique nature of the case, there is no record. The parties collaborated in preparing and filing an Agreed Statement of Facts ("ASOF"). Initials and pseudonyms have been used throughout to protect the identities of the parties.

[6] We are asked to answer the following two Stated Questions:

> (a) Does subsection 11(2) of the *Ombudsman Act* preclude jurisdiction of the Ombudsman from investigating DHW with respect to their handling of complaints, referrals and care concerning AB?
>
> (b) Does the jurisdiction of the Ombudsman, if any, provide for the production of the Record in full from DHW?

[7] For the reasons that follow I would answer "No" to the first question, and "Yes" to the second question.

[8] To provide context, I will present a brief summary of the background. Further detail will be added during my analysis of the issues raised by the application.

Background

[9] A.B. is an adult with physical and mental health issues. He currently resides in a continuing care facility. He was cared for by his mother in their family home until 2011 when she moved to a nursing home. She has since passed away. From 2011 until 2016 AB lived in the family home with and under the care of his older brother, C.D.

[10] In 2011 a referral was made to APS concerning A.B.'s welfare. A second referral was made in September 2016.

[11] On September 25, 2016, the RCMP attended the home and found A.B. confined in a room. There was no electricity or running water in the house.

[12] Subsequently, an application was made on behalf of A.B. seeking an order pursuant s. 10 of the *Adult Protection Act*, R.S.N.S. 1989, c. 2, authorizing the Minister to provide A.B. with service and care.

[13] The application was heard by Family Court Judge Marci Lin Melvin. She found that A.B. was in need of protection and incapable of caring for himself by reason of mental infirmity. She also found that C.D. was a source of danger to his younger brother, A.B. By order dated October 4, 2016, Judge Melvin directed the Minister to provide A.B. with service and care, including placing him in a facility.

[14] After receiving a complaint by telephone, the Ombudsman asked for production of any and all of the DHW's files involving A.B., including but not limited to notes, reports, and any information regarding assessments of both A.B. and his caregiver, C.D.

[15] The Ombudsman's request for those records led to a year-long debate between his office and the DHW as to whether the Ombudsman had jurisdiction to require production of the documentation he demanded as part of his investigation. This unproductive, back and forth exchange of communications, at various bureaucratic levels, centered on the Minister's questioning the Ombudsman's reasons for making the request, his claimed authority for doing so, as well as what, if anything, would be produced, and if so, on what basis.

[16] In responding to those inquiries the Ombudsman indicated that one aspect of his investigation would focus on an allegation that APS did not follow up in a timely and appropriate manner when handling A.B.'s file, and that as a result, A.B. suffered harm.

[17] Subsequently, DHW took the position that information could not be disclosed without consent. That stance was obviously meaningless because A.B. did not have the capacity to give consent, nor would his official guardian (whose identity is redacted) agree to provide it.

[18] In September 2017 DHW provided the Ombudsman with a heavily redacted record. The Ombudsman objected, saying what had been provided lacked important information including the identity of officials and staff involved in the matter, as well as opinions, conclusions and recommendations that may have been expressed by those individuals.

[19] To those requests the Minister asserted that privacy legislation, specifically, the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*FOIPOP*") and the *Personal Health Information Act*, S.N.S. 2010, c. 41 ("*PHIA*") prevented disclosure of the record in full. The Minister also claimed that s. 17(4) of the *Ombudsman Act*, R.S.N.S. 1989, c. 327, did not override privacy legislation.

[20] The Ombudsman's recurring demands for the full record were repeatedly declined, thus leading to the present Application.

Issues

[21] We are asked to answer two Stated Questions:

> (a) Does subsection 11(2) of the *Ombudsman Act* preclude jurisdiction of the Ombudsman from investigating DHW with respect to their handling of complaints, referrals and care concerning AB?
>
> (b) Does the jurisdiction of the Ombudsman, if any, provide for the production of the Record in full from DHW?

[22] These questions encapsulate the nature of the Minister's challenge to the Ombudsman's statutory authority. The Ombudsman seeks this Court's answers to what amounts to an objection to his jurisdiction and he brings the Application by way of stated case pursuant to s. 11(3) of the *Ombudsman Act* which states:

> 11 (3) Where a question arises as to the jurisdiction of the Ombudsman to investigate a grievance under this Act, he may apply to the Appeal Division of the Supreme Court for a determination of the question of his jurisdiction.

[23] Determining the scope of the Ombudsman's jurisdiction will involve an interpretation of the *Ombudsman Act*, as well as *PHIA* and *FOIPOP*.

[24] In providing this Court's answers to the two stated questions, my analysis will be divided into four principal areas. First, I will briefly trace the origins of the Office of Ombudsman, and its adoption in Canada. In doing so I will highlight the relevant portions of the Nova Scotia statute which describe the Ombudsman's broad authority to investigate grievances that arise from the malfeasance, misfeasance or nonfeasance of government actors. This will be followed by explaining the rules of statutory interpretation that ought to be applied when considering the jurisdiction of the Ombudsman. This will include a discussion of the unique and important role the Ombudsman plays in Canada's constitutional democracy. Then I will deal specifically with the authority of the Nova Scotia Ombudsman to investigate government conduct in general, and this case in particular. That will include a consideration of the Ombudsman's authority to require production of the full record in this case. Finally, I will consider the impact of other privacy legislation upon the Ombudsman's jurisdiction in conducting this investigation.

Standard of Review

[25] This is a matter of first instance. It does not engage a standard of review analysis. The Application does not derive from any decision made by either the Ombudsman or the Minister. Rather, this is an Application (Stated Case) made pursuant to s. 11(3) of the *Ombudsman Act*. We are asked to decide two specific questions concerning the jurisdiction of the Ombudsman to investigate a complaint under that *Act*.

[26] An application seeking our determination on a matter of jurisdiction is a question of law which requires our statutory interpretation of the relevant legislation. What we declare to be the correct interpretation and application of those statutory provisions will obviously bind the parties going forward.

Analysis

(1) The origins of the Office of Ombudsman, and its adoption in Canada

[27] History tells us that the concept of the Office of Ombudsman originated in Sweden and was formally established in the Swedish Constitution of 1809. For more than 200 years it has served as a major institution of Swedish democratic government and, over time, became the object of international interest. Important historical details surrounding its genesis in Sweden and eventual proliferation around the world can be found in "The Swedish Ombudsman" by Professor Stig Jägerskiöld, [1961] 109 U. Pa. L. Rev. 1077 at 1077-1099.

[28] The idea to create the Office of Ombudsman in Canada gained traction in the early 1960's. Several opposition parties' initiatives and private member's bills along with considerable academic support, lent weight to the suggestion that Canadian legislatures ought to adopt the Ombudsman idea. As Stewart Hyson reports in his book, *Provincial & Territorial Ombudsman Offices in Canada*, (Toronto: University of Toronto Press, 2009) in the Chapter entitled "The Ombudsman Idea Comes to Canada" at p. 6:

> … The visit in 1964 of New Zealand's first Ombudsman, Sir Guy Powles, which included an address to the Canadian Bar Association (CBA), was also instrumental in introducing the Ombudsman idea to a highly influential audience. That speech, and other appearances in Canada by Powles, removed most people's suspicions that the Ombudsman idea was limited to Scandinavian countries and was unsuited to Westminster-style governments; … the advent of radio open-line shows and the remarkably popular CBC TV public affairs program *The Ombudsman*, which first aired in 1974, did much to familiarize Canadians with the practice of complaining to an impartial person (albeit in this case a radio or TV host) who would listen to and investigate their grievances. [footnotes omitted]

[29] The Province of Alberta was the first to pass legislation in Canada creating an Ombudsman, in January 1967. New Brunswick followed in May of that year. Since then all other provinces and every territory except Nunavut have enacted legislation to create an Office of Ombudsman.

[30] Mr. Hyson reports that in 1964 the Government of Nova Scotia tasked a legislative committee with the responsibility of gathering information and weighing the pros and cons of creating an Office of the Ombudsman. He notes at p. 160 that there:

> … was some resistance to the idea among provincial politicians. Some felt that Ombudsman was unnecessary because politicians themselves were appropriate people to handle complaints and inquiries about government services. In 1969, under pressure from the opposition, the government appointed a new committee to revisit the issue. Following the committee's positive recommendation, the *Ombudsman Act* took effect in 1971. [footnote omitted]

[31] Based on interviews with past and current Ombudsmen, Mr. Hyson reports at p. 174:

> … the number of inquiries per year to the Nova Scotia Ombudsman has hovered at around 2,000 since 2000…

Besides those inquiries:

> Every year, as it has the authority to do, the OmbudsOffice [sic] pursues 'own motion' investigations. Some of these stem from public complaints that might have seemed minor or one-dimensional at first but eventually revealed other issues demanding attention. Or, the Ombudsman can choose to conduct a systemic investigation of a certain department once it has become the subject of an increasing or extraordinary number of complaints. This is one way for the Ombudsman to make a meaningful contribution to policy development and improved service delivery … (p. 176-177)

[32] Stig Jägerskiöld describes the context in which the institution of Ombudsman evolved in Swedish society. At pp. 1079-80 he explains:

> The institution of the Ombudsman cannot be understood except against the background of the long Swedish evolution toward a society bound by the rule of law but administered by a bureaucracy … Adequate control of the bureaucracy has been a necessary complement … and it has appeared especially desirable that this control should emanate from Parliament, which is free from the duties and loyalties of the bureaucracy. The functions of the Ombudsman are part of a network of controls which include the right of citizens to have access to all public documents with certain statutory exceptions designed for the protection of public and private information which is rightly secret, the power of private individuals to institute proceedings against officials for faults committed in the exercise of their duties, and the concomitant personal liability of officials for damages in cases where prejudice to the interests of private citizens has resulted from dereliction of duty.

[33] We see aspects of those functions reflected in the legislation enacted by provincial and territorial governments in Canada. I will now turn to a

consideration of the Nova Scotia *Ombudsman Act* which is the subject of this Application.

[34] The Office of Ombudsman is a creature of statute. Whatever power, authority and jurisdiction may be exercised by the person who serves as Ombudsman is defined by the legislation.

[35] In Nova Scotia the ombudsman is an officer of the House of Assembly who is appointed by the Governor-in-Council (s. 3(1) and (2)). The Ombudsman acquires all the powers of a Commissioner under the *Public Inquiries* A*ct*, R.S.N.S. 1989, c. 372 (s. 9). The position of Ombudsman is described in s. 3(1) as being "a commissioner for investigations" who shall:

> (5) … faithfully and impartially perform the duties of his office and will not divulge any information received by him under this Act except for the purpose of giving effect to this Act.

[36] The appointee will be entitled to hold office for five years and be eligible to be re-appointed (s. 4(1)).

[37] Further detail regarding the Ombudsman's power to investigate government departments and municipal units, whether as a result of complaints received from persons aggrieved, or on the Ombudsman's own motion, are found in s. 11(1) which provides:

> 11 (1) Subject to subsection (2), where any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved, the Ombudsman, on the written complaint of or on behalf of the person aggrieved or on his own motion, may investigate the administration
>
> (a) by a department or an officer thereof, of any law of the Province;
>
> (b) by a municipal unit or an officer thereof, of any law of the municipal unit or any law of the Province that applies to the municipal unit.

[38] A limitation on the Ombudsman's power to investigate is found in ss. (2) which effectively prohibits the Ombudsman from investigating any matter where the merits of the case are properly brought to a court or tribunal for determination. We see this in s. 11(2) which says:

> (2) Notwithstanding subsection (1), the Ombudsman shall not investigate
>
> (a) any decision, recommendation, act or omission in respect of which there is under any Act a right of appeal or objection or a right to apply for

> a review on the merits of the case to any court or to any tribunal constituted by or under any Act, whether or not that right of appeal or objection or application has been exercised in the particular case and whether or not any time prescribed for the exercise of that right has expired; or
>
> (b) any decision, recommendation, act or omission of any person acting as a solicitor or prosecuting officer for the Crown or acting as counsel for the Crown in relation to any proceeding.

[39] Section 11(3) permits (as is the case here) an application to this Court whenever a challenge arises with respect to the Ombudsman's statutory jurisdiction:

> (3) Where a question arises as to the jurisdiction of the Ombudsman to investigate a grievance under this Act, he may apply to the Appeal Division of the Supreme Court for a determination of the question of his jurisdiction.

[40] Providing proper notice of the intended investigation is outlined in s. 15 which says:

> **Notification of investigation**
>
> 15 Where the Ombudsman intends to investigate a grievance under this Act, he shall
>
> (a) in the case of a grievance relating to a department, notify the minister and the chief officer of the department;
>
> (b) in the case of a grievance relating to a municipal unit, notify the chief officer of the municipal unit.

[41] The wide scope of the Ombudsman's inquiries, and the fact that privacy will be assured, are set out in s. 16(1) and (2) which provide:

> **Nature of investigation**
>
> 16 (1) Every investigation under this Act is to be conducted in private.
>
> (2) Subject to this Act, the Ombudsman may hear or obtain information from any person and may make inquiries.

[42] The Ombudsman's broad power to summon and examine persons under oath and demand production of documentation relevant to an investigation is found in s. 17(1):

Furnishing of information

17 (1) Subject to subsections (2), (3), (4), (5), (6) and (7) and Section 18, where the Ombudsman requests a person who, in the opinion of the Ombudsman, is able to furnish information relating to a matter being investigated by the Ombudsman to furnish such information, that person shall furnish that information and produce any documents or papers that, in the opinion of the Ombudsman, relate to the matter and that may be in the possession or under the control of that person whether or not that person is an officer of a department or municipal unit, and whether or not the documents and papers are in the custody or under the control of that department or municipal unit.

(2) The Ombudsman may summon before him and examine on oath

(a) any officer of a department or municipal unit who, in his opinion, is able to give any information referred to in subsection (1);

(b) any complainant; and

(c) with the approval of the Attorney General, any other person who, in the opinion of the Ombudsman, is able to give any information referred to in subsection (1).

[43] The Ombudsman's sweeping powers to investigate are generally focused on how government departments or municipal units administer the law in ways that are, for example, unlawful, mistaken, erroneous, oppressive, discriminatory, unreasonable, unjust, irrelevant or improper. Should the investigation lead the Ombudsman to conclude that because of such misconduct in failing to properly administer the law, "a grievance exists or may exist", then his broad authority to rectify the situation, make recommendations, and publicly report on the government's response to those recommendations, are all found in s. 20 which says:

Report of Ombudsman if grievance established

20 (1) Where upon investigation the Ombudsman is of the opinion that a grievance exists or may exist because a department or municipal unit or officer thereof administered or is administering a law of the Province or a law of the municipal unit or a law of the Province that applies to the municipal unit

(a) unreasonably, unjustly, oppressively or in a discriminatory manner, or pursuant to a rule of law, enactment or practice that so results;

(b) under mistake of law or fact, in whole or in part;

(c) wrongly;

(d) contrary to law; or

(e) by using a discretionary power for an improper purpose, or on irrelevant grounds, or by taking irrelevant considerations into account, or by failing to give reasons for the use of a discretionary power when reasons should have been given,

and if the Ombudsman is of the opinion that

(f) the grievance should be referred to the department or municipal unit or officer thereof for further consideration;

(g) an omission should be rectified;

(h) a decision should be cancelled or rectified;

(i) a practice by reason of which the grievance arose or may arise should be altered;

(j) a law by reason of which the grievance arose or may arise should be reconsidered;

(k) reasons should be given for the use of a discretionary power; or

(l) other steps should be taken as he may advise,

the Ombudsman shall report his opinion, his reasons therefor and any recommendation to the minister and the chief officer of the department or the chief officer of the municipal unit concerned.

(2) Where the Ombudsman makes a recommendation under subsection (1) he may request the department or municipal unit to notify him within a specified time of the steps it proposes to take to give effect to his recommendations.

(3) Where, after the time stated under subsection (2), the department or municipal unit does not act upon the recommendation of the Ombudsman, refuses to act thereon or acts in a manner unsatisfactory to the Ombudsman, the Ombudsman may send a copy of his report and recommendation to the Governor in Council, in the case of a department, or the council of the municipal unit, in the case of a municipal unit, and may thereafter make a report to the House.

[44] The Ombudsman's authority is not limited to his or her annual report to the House as is made clear in s. 24:

Reports

24 (1) The Ombudsman shall report annually to the House on the exercise of his functions under this Act.

(2) The Ombudsman, in the public interest or in the interests of a person, department or municipal unit, may publish reports relating generally to the exercise of his functions under this Act or to any particular case investigated by him, whether or not the matters to be dealt with in the report have been the subject of a report made to the House under this Act.

[Underlining mine]

[45] With this brief review of the legislative provisions that are relevant to this Application, I will now consider the approach taken by Canadian courts when interpreting such legislation.

(2) The rules of statutory interpretation to be applied when considering the jurisdiction of the Ombudsman and his unique and important role in Canada's constitutional democracy

[46] The leading case in Canada is the seminal decision of Dickson, J. (as he then was), writing for a unanimous Supreme Court of Canada in *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 447. That was a case where a dispute arose between the British Columbia Development Corporation and a restaurant, King Neptune, over the restaurant's location in a waterfront re-development plan. Although BCDC recognized that its negotiations with the restaurant had given rise to a "moral obligation on its part to take the restaurant's interests into account" an agreement ensuring King Neptune's participation in the redevelopment scheme was never reached.

[47] The restaurant filed a formal complaint with the Ombudsman requesting an investigation. Subsequently, the Ombudsman informed the Chairman of the BCDC that his office was investigating the restaurant's complaint alleging that BCDC had unreasonably refused to renew its lease or sell the restaurant property to it. The Ombudsman directed BCDC to produce all documents in its possession relating to King Neptune's complaint. BCDC refused to produce them. A vice-president of the Corporation was served with a "Direction to Produce Documents" and told that if the documents were not delivered forthwith, he could be charged with an offence under the *Ombudsman Act*.

[48] The dispute was eventually heard by McEachern, C.J.S.C. who ruled that the restaurant's complaint fell outside the jurisdiction conferred upon the Ombudsman under the provincial statute. He granted the petition, quashed the direction to produce documents and declared that the Ombudsman was acting without jurisdiction. On appeal to the British Columbia Court of Appeal the majority allowed the appeal, finding that the legislation was intended to enable a citizen to request that a complaint of unjust conduct on the part of government be investigated by the Ombudsman. McFarlane, J.A. dissented and would have dismissed the appeal for the reasons given by Chief Justice McEachern.

[49] On appeal to the Supreme Court of Canada, Justice Dickson described the "sole issue in this case" as being:

> … whether the Ombudsman has jurisdiction under s. 10(1) of the *Act* to investigate King Neptune's complaint against B.C.D.C. … No question of the merits of the complaint is raised.

[50] I observe that there is no material difference between the investigative powers of the Ombudsman under s. 10(1) of the British Columbia statute (R.S.B.C. 1979, c. 306) and the jurisdiction of our Ombudsman pursuant to this Province's legislation.

[51] While there are differences in the facts (unlike A.B. here, King Neptune was an active participant in the dispute, and the privacy of health records was not a concern), nonetheless, the similarities to the principal issues in play, and the approach to statutory interpretation taken to resolve them, are striking.

[52] Justice Dickson began his reasons, recognizing at the outset that his judgment would have far-ranging application beyond the borders of British Columbia:

> [2] The Ombudsman (in original form "Jusitieombudsman", a Swedish word meaning "Procurator for Civil Affairs", but translated loosely as "citizens' defender") is an office typically provided for by a legislative body and headed by an independent public official with power to receive complaints about, inquire into, and report upon, governmental abuses affecting members of the public. Any analysis of the proper investigatory role the Ombudsman is to fulfil must be animated by an awareness of this broad remedial purpose for which the office has traditionally been created.
>
> [3] At the same time it must be emphasized that the Ombudsman is a statutory creation. It is elemental that the nature and extent of the jurisdiction which may be exercised by the Ombudsman in this case turns upon the interpretation to be given the specific language of the British Columbia legislation.
>
> [4] This appeal may affect Canadian jurisdictions beyond British Columbia. All provinces, except Prince Edward Island, have Ombudsman Acts not unlike the British Columbia Act. The Ombudsmen of Ontario, Quebec and Saskatchewan have intervened in the present appeal to support the Ombudsman of British Columbia. The provincial Attorney General has intervened to support British Columbia Development Corporation (hereinafter "B.C.D.C."), one of the appellants.

[53] Referring back to Roman times, Dickson, J. described the "need for some means of control over the machinery of government" as being "nearly as old as government itself". He wrote:

> [30] … The Romans, as long ago as 200 B.C., established *a Tribune*--an official appointed to protect the interests and rights of the plebians from the patricians. …

[54] Justice Dickson then went on to explain why the need for such a public overseer had become even more pressing in the modern age:

> [34] The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.
>
> [35] As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them. See L. Hill, The Model Ombudsman (1976), at pp. 4-8.
>
> [36] The traditional controls over the implementation and administration of governmental policies and programs—namely, the legislature, the executive and the courts—are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. The demands on members of legislative bodies is such that they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue. See Powles, Aspects of the Search for Administrative Justice (1966), 9 Can. Pub. Admin. 133, at pp. 142-43.
>
> [37] The limitations of courts are also well-known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.

[55] Creating the Office of Ombudsman provided a legislative solution to these shortcomings and concerns. The authority of the Ombudsman to investigate and report on the actions or inactions of elected or unelected government officials

serves as a potent tool for citizens with cause to doubt the claims of "transparency" and "accountability" from those whose hands control the levers of power. Exposing such untruths and failures to follow the law is a laudable objective in ensuring good government. Equally so is the conclusion reached after a thorough investigation that appropriate action *has been* taken by government departments and personnel. Such assurances by a truly independent and impartial body, after a proper assessment of the facts, will inspire confidence that our democratic institutions are functioning as they should. Dickson, J. put it this way:

> [39] The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.C.), per Milvain C.J., at pp. 192-93. … On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

[56] All of this led Justice Dickson to carefully define the approach that ought to be taken when interpreting the statutory jurisdiction of an Ombudsman:

> [46] Read as a whole, the *Ombudsman Act* of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. …

[57] In the result, the Court dismissed the appeal, finding that the "Ombudsman possessed jurisdiction to investigate the complaints made by King Neptune against BCDC …".

[58] The force of Justice Dickson's clear directions has not diminished over the years. They have been consistently applied by trial and appellate courts across the country. Here in Nova Scotia reference to three subsequent cases will suffice. In *Ombudsman of Nova Scotia v. Sydney Steel and AGNS*, [1976] N.S.J. No. 449 (A.D.), Chief Justice MacKeigan, writing for a unanimous Court, declared:

> [13] The *Act* is surely concerned broadly with supervision of the performance of governmental functions in the broadest sense. An ombudsman is "a government official (as in Sweden or New Zealand) appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials" (*Webster's New Collegiate Dictionary*). *Black's Law Dictionary* defines "Ombudsman Concept" as:
>
> > "A citizen aggrieved by an official's action or inaction should be able to state his grievance to an influential functionary empowered to investigate and to express conclusions."
>
> [14] Thus, having regard to the apparent purpose of the *Ombudsman Act* as a whole, we should interpret s. 11(1)(a) as if it related to administration by a department of all law or laws relevant to the carrying out of the governmental or public function or functions which are assigned to it. Thus we are concerned not with administration of a law in a vacuum but with how the department carries out its function of service, i.e., its impact on the public generally and on the aggrieved complainant in particular.

[59] More recently, in *R. v. Nova Scotia (Ombudsman)*, 2016 NSPC 58, Judge Buckle affirmed the unique and impartial role of the Ombudsman. She correctly held that:

> [37] The Office of the Ombudsman is "a unique office that provides independent, unbiased investigations into complaints against provincial and municipal government departments, agencies, boards and commissions. It operates as an independent agency that considers and investigates complaints from people who believe they have been treated unfairly when using government services or when they believe a policy or procedure has not been followed correctly or is unfair …"

[60] Finally, as my colleague Justice Fichaud put it in *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 31:

> [1] The Ombudsman's Office investigates complaints of bureaucratic abuse and bungling. …

[61] The "broad purposive interpretation consistent with the unique role the Ombudsman is intended to fulfill", as espoused by Dickson, J. in *British Columbia Development Corp.*, *supra*, matches the "modern approach to statutory interpretation". When deciding the meaning of legislation, the words of a statute are:

> to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87, as adopted by my colleague Oland, J.A. in *Coates v. Capital District Health Authority*, 2011 NSCA 4 at ¶36.

[62] Finally, the "broad, purposive interpretation" and the "modern approach to statutory interpretation" are both consistent with s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 which states:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject

[63] These then are the principles I will apply in determining the Ombudsman's jurisdiction to conduct the investigation in the manner he chose, and to oblige the Minister to produce a complete, unredacted copy of the record deemed necessary as part of his investigation.

[64] Respectfully, the respondent's reliance upon the decision of the Ontario Court of Appeal in *Ombudsman of Ontario v. Ontario Labour Relations Board*, [1987] O.J. No. 7 is misplaced. The case is easily distinguishable and has no bearing on this matter. That appeal arose "out of a longstanding dispute between the Ombudsman of Ontario and the Ontario Labour Relations Board" and concerned the jurisdiction of the Ontario Ombudsman "to investigate complaints with respect to the merits of decisions made by the Board in its adjudicative capacity". In delivering oral reasons for the Court, Robins, J.A. referred to a continuing feud in which the Ombudsman had:

> [9] … sought to investigate the Board's quasi-judicial decisions … complaints relating to such matters as the Board's assessment of the credibility of witnesses, its determination of the weight to be given to evidence presented at a hearing, its assessment of collective bargaining policy considerations, and its determination of the proper interpretation and application of provisions of the *Labour Relations Act* …

Clearly, the concerns described by Robins, J.A. involving the Ontario legislation are of no assistance to my consideration of the issues here.

(3) The jurisdiction of the Nova Scotia Ombudsman to investigate government conduct in general, and this case in particular, including his authority to require production of the full record in this case

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

[66] The Ombudsman's jurisdiction to investigate the DHW and the APS for their involvement in A.B.'s case is clearly set out in the *Act* and in particular s. 11. For convenience I will repeat here some of the material provisions which I canvassed earlier in this decision.

[67] The matter first came to the attention of the Ombudsman as a complaint from an unnamed individual. Thereafter the Ombudsman launched an investigation on his own motion, as he is entitled to do under his enabling legislation. Nothing turns on the distinction. Nor did he require anyone's permission or consent to thoroughly investigate the case.

[68] The Ombudsman may proceed with an "own motion investigation" when of the opinion that any person may be aggrieved. Section 11 of the *Act* expressly allows for an Ombudsman "own motion" investigation and states:

> **Investigation**
>
> 11 (1) Subject to subsection (2), where any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved, the Ombudsman, on the written complaint of or on behalf of the person aggrieved or on his own motion, may investigate the administration
>
> (a) by a department or an officer thereof, of any law of the Province;
>
> (b) by a municipal unit or an officer thereof, of any law of the municipal unit or any law of the Province that applies to the municipal unit.

[Underlining mine]

[69] Section 2(c) of the *Act* defines “department” as “a department of the Government of Nova Scotia”. Therefore, the actions of DHW (and APS), as a department of the Government of Nova Scotia, are reviewable under s. 11(1) of the *Act*.

[70] In this matter, APS was administering the *Adult Protection Act*, a law of the province, in its handling of complaints, inquiries and referrals concerning the continuing care of A.B. Accordingly, APS was clearly engaged in the "administration of a law" of the province as contemplated in section 11(1).

[71] The Ombudsman may investigate DHW as an "own motion" when a person “is … or … may be aggrieved”. In *British Columbia Development Corp.*, Justice Dickson held that a person is "aggrieved or may be aggrieved" whenever he or she "genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question."

[72] In this matter, the Ombudsman was informed that multiple referrals had been made to APS regarding A.B., an adult with mental health issues, which were not followed-up in a timely and appropriate manner and that as a result A.B. suffered harm. The Ombudsman was also aware of the Court Order issued by Judge Melvin directing that not only was AB in need of protection and incapable of caring for himself by reason of mental infirmity, but also that A.B.'s caregiver, C.D., was a source of danger to A.B.

[73] Based on that information, it was unquestionably open to the Ombudsman to conclude that A.B. may have been aggrieved. Accordingly, he was well within his authority to commence an investigation.

[74] I am also satisfied, and accept the Ombudsman’s submission that the Minister’s refusal to produce the complete, unredacted record thwarted his investigation and blocked his ability to exercise his statutory authority.

[75] In its factum at ¶54, the respondent relied upon s. 11(2) as well as ss. 17(4) and (5) of the *Act* saying they “expressly remove the ability of the Ombudsman to receive information or to investigate certain kinds of complaints”. However, in oral argument the respondent, at times, appeared to resile from its reliance upon s. 11(2) and place greater emphasis on ss. 17(4) and (5). Be that as it may, I will explain why I would reject any reliance upon s. 11(2) in the circumstances of this

case. The simple, yet complete answer, lies in the language of s. 11(2) which says (leaving out the immaterial words):

> 11(2) … the Ombudsman shall not investigate
>
> (a) any decision … act or omission in respect of which there is under any Act a right of appeal … to any court or to any tribunal constituted by or under any Act. …

The *PHIA* has no mechanism for an internal appeal and so that enactment has no bearing on the Ombudsman's power to investigate complaints about a government department or municipal unit.

[76] Neither does the *Adult Protection Act* provide an individual or complainant with a right of appeal, or otherwise, to seek a review of the Minister's decision by a court or tribunal. Accordingly, s. 11(2)(a) of the *Ombudsman Act* does not apply.

[77] For all of these reasons the Ombudsman has clear and unfettered jurisdiction to investigate DHW and APS on his own motion.

[78] I turn now to the separate question relating to the Ombudsman's authority to compel production of the complete record. In my opinion, the broad scope of the Ombudsman's jurisdiction entitles him to require full disclosure of the information he demanded from the Minister as part of his investigation.

[79] Pursuant to s. 17(1) of the *Act*, the Ombudsman has authority to request DHW to furnish information, including documents under its control which relate to the investigation. Section 17 provides:

> **Furnishing of information**
>
> 17 (1) Subject to subsections (2), (3), (4), (5), (6) and (7) and Section 18, where the Ombudsman requests a person who, in the opinion of the Ombudsman, is able to furnish information relating to a matter being investigated by the Ombudsman to furnish such information, that person shall furnish that information and produce any documents or papers that, in the opinion of the Ombudsman, relate to the matter and that may be in the possession or under the control of that person whether or not that person is an officer of a department or municipal unit, and whether or not the documents and papers are in the custody or under the control of that department or municipal unit.
>
> (2) The Ombudsman may summon before him and examine on oath
>
> (a) any officer of a department or municipal unit who, in his opinion, is able to give any information referred to in subsection (1);

> (b) any complainant; and
>
> (c) with the approval of the Attorney General, any other person who, in the opinion of the Ombudsman, is able to give any information referred to in subsection (1).
>
> (3) The oath referred to in subsection (2) is to be administered by the Ombudsman.
>
> (4) Subject to subsection (5), where a person is bound by any law or by an enactment to maintain secrecy in relation to, or not to disclose any matter, the Ombudsman shall not require that person to supply any information or to answer any question in relation to that matter or to produce any document or paper relating to the matter which would be in breach of the obligation of secrecy or non-disclosure.
>
> (5) With the prior consent in writing of the complainant the Ombudsman may require a person to whom subsection (4) applies to supply information or answer questions or produce documents or papers relating only to the complainant and that person shall do so.

[Underlining mine]

[80] In this case we are advised that the redacted record excludes significant and relevant information, including the analytical process and decisions of APS in response to referrals regarding A.B. By way of illustration, the APS note dated August 19, 2011, excludes the APS workers' analysis and conclusion. It states: "This worker believes: [REDACTED]" [ASOF, Tab 10 at p. 33].

[81] Similarly, the physician notes are also completely redacted as is the correspondence from the police (ASOF, Tab 10 at pp. 158-161 and 175-177, respectively].

[82] I accept the Applicant's submission that the blacking out of pertinent information in the redacted record, such as the APS's analytical process, names of persons contacted, health and safety information regarding A.B., and conclusions reached, impairs the effectiveness of the Ombudsman's investigation. The Ombudsman is unable to assess APS's decision-making process in order to identify proper or improper conduct in administering the law with respect to A.B. Thus, the redacted record severely circumscribes the Ombudsman's investigation and thwarts his ability to exercise his statutory responsibilities.

[83] I turn now to the respondent's reliance upon ss. 17(4) and (5) as a basis for refusing the Ombudsman's demands for production. Respectfully, such reliance is as misplaced and flawed as was its attachment to s. 11(2)(a).

[84] The Ombudsman acknowledges that s. 17 of the *Act* says he may only obtain documents from a government department as long as another piece of legislation does not prohibit disclosure. In my view, no other Nova Scotia statute bars the Ombudsman from receiving a complete and unredacted copy of the record he has demanded. Put another way, there is no other piece of legislation which would preclude the Minister from complying with the Ombudsman's demands. For reasons I will now explain, ss. 17(4) and (5) have no application to this case.

[85] For convenience, I will repeat the wording of ss. 17(4) and (5):

> (4) Subject to subsection (5), where a person is bound by any law or by an enactment to maintain secrecy in relation to, or not to disclose any matter, the Ombudsman shall not require that person to supply any information or to answer any question in relation to that matter or to produce any document or paper relating to the matter which would be in breach of the obligation of secrecy or non-disclosure.
>
> (5) With the prior consent in writing of the complainant the Ombudsman may require a person to whom subsection (4) applies to supply information or answer questions or produce documents or papers relating only to the complainant and that person shall do so.

[Underlining mine]

[86] Because the wording of these provisions contemplate the impact of "any" other "law" or "enactment", my analysis must straddle the *Ombudsman Act* as well as *PHIA* and *FOIPOP*. It will also engage well-settled principles of statutory interpretation.

(4) The impact of other privacy legislation upon the Ombudsman's jurisdiction, in the circumstances of this case

[87] There is a legal presumption that in enacting legislation lawmakers know what they are doing and that their choice of language is deliberate. That simple truth finds expression in a great variety of interpretative principles. In this part of my reasons I will briefly describe my application of the principles that are relevant to this case.

[88] As I have already explained, the modern approach to statutory interpretation requires that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of lawmakers in enacting

it. The *Ombudsman Act* itself attracts special treatment because it "represents the paradigm of remedial legislation" and so must receive a broad, purposive interpretation which is consistent with the Ombudsman's unique role in our constitutional democracy. Lastly, because the *Ombudsman Act*, as well as both *PHIA* and *FOIPOP*, are, like all enactments, deemed remedial; each is to be given such fair, large and liberal construction and interpretation as will best ensure the attainment of its objects. See for example, *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 at ¶24; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at ¶26; *Rizzo & Rizzo*, [1998] S.C.J. No. 2; and, *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47.

[89] In its written and oral submissions the respondent says that *FOIPOP* and *PHIA* prohibit disclosure of the unredacted record sought by the Ombudsman and that therefore the Minister had no choice but to refuse the Ombudsman's request. The argument begins with an emphasis upon a portion of a particular provision of the *Ombudsman Act* where, in s. 17(4) it says:

> … where a person is bound by any law … to maintain secrecy … or not to disclose any matter, the Ombudsman shall not require that person to supply any information … or to produce any document … which would be in breach of the obligation of secrecy or non-disclosure.

[90] My rejection of the respondent's reliance upon these provisions turns on the words "is bound by". Interpreting those three words in their grammatical and ordinary sense leads me to conclude that they mean "obliged", "compelled", "forced to", and "no choice but to comply". Applying such a meaning to these words, and informed by the statutory scheme, object and purpose of the relevant enactments, exposes the flaws in the Attorney General's position.

[91] I will first consider *PHIA* and its key legislative provisions. The purpose of *PHIA* is to protect personal health information and to allow for the disclosure of personal health information in limited circumstances. In other words, the statutory objective is two-fold. Section 2 of *PHIA* states:

> **Purpose of Act**
>
> 2 The purpose of this Act is to govern the collection, use, disclosure, retention, disposal and destruction of personal health information in a manner that recognizes both the right of individuals to protect their personal health information and the need of custodians to collect, use and disclose personal health information to provide, support and manage health care.

[Underlining mine]

From this we see that protecting privacy is only one element. Using that information to manage health care is the other. In my opinion, "managing health care" is deliberately and broadly defined to express the Legislature's intention that the work of the APS would be included within it.

[92] Continuing my analysis, the wording of s. 38 of *PHIA* is key. It provides:

> **Disclosing information without consent and review process**
>
> 38 (1) A custodian may disclose personal health information about an individual without the individual's consent
>
> …
>
> (n) subject to the requirements and restrictions, if any, that are prescribed, to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under this Act or another Act of the Province or an Act of the Parliament of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;

[Underlining mine]

[93] From this we see that pursuant to s. 38(1)(n) of *PHIA*, DHW may disclose the personal health information about an individual without the individual's consent, to the Ombudsman, he being a "person carrying out an investigation". Disclosure is not compelled. It is discretionary. That means DHW is not "bound by any law … to maintain secrecy".

[94] Moreover, s. 7 of *PHIA* provides that an enactment that "more completely protects the privacy of personal health information prevails" and that "there is no conflict unless it is not possible to comply with both" acts. Multiple protections are afforded under the *Ombudsman* Act. That statute requires that the Ombudsman's investigation be conducted in private (s. 16(1)), thus guaranteeing that A.B.'s privacy interests will be "more completely" protected. Further, the Ombudsman is obliged to "faithfully and impartially perform the duties of his office" and shall "not divulge any information received by him under this *Act* except for the purpose of giving effect to this *Ombudsman Act* (s. 3(5)). Because these comprehensive safeguards more completely protect A.B.'s privacy, the *Ombudsman Act* "prevails".

[95] The *Ombudsman Act* and *PHIA* have distinct, yet perfectly compatible, objectives. The *Ombudsman Act* gives the person who holds the Office, the power to investigate and expose government misconduct. Any such investigation must be independent, impartial, and kept private such that any information received during the course of the investigation will not be divulged except for the purpose of fulfilling the Ombudsman's statutory obligations. For its part, *PHIA* permits the custodian of any person's personal health information to gather, use and disclose that information to the Ombudsman, without that person's consent, so as to facilitate the Ombudsman's investigation. Accordingly, there is no impediment to complying with both enactments, and therefore, no conflict between the two.

[96] In sum, *PHIA* does not bind DHW, nor prevent disclosure of the record in full, as demanded by the Ombudsman. Rather, *PHIA* expressly permits the Minister to provide full, unredacted disclosure of the record, including whatever personal health information of A.B. it may contain.

[97] I turn now to a consideration of the impact, if any, of *FOIPOP* upon the Ombudsman's investigation.

[98] In his factum the Ombudsman takes the position that *FOIPOP* has no bearing on this case because he did not apply under that statute for access to information. For its part, the respondent asserts at ¶93 of its factum:

> *FOIPOP* places obligations upon the Department to maintain A.B.'s privacy.

[99] While it is true that the Ombudsman did not apply under *FOIPOP* for complete unredacted access to the APS records, that is not a complete answer to dismissing out-of-hand the position taken by the Minister.

[100] In my view, while *FOIPOP* is not central to the outcome, one cannot address the dispute in this case without recognizing the potential implications of our provincial *FOIPOP* whenever one is called upon to interpret legislation that has been drafted to regulate both "public access" to information, and "personal privacy" to that same information.

[101] Whenever questions arise concerning the interpretation and application of *FOIPOP* in Nova Scotia, parties to litigation would do well to recall the comprehensive directions given by this Court 18 years ago when the enactment was first considered.

[102] In *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132, this Court declared:

> [36] Thus it can be seen that the Legislature has identified three objectives as constituting the purpose of the *Act*. First, to ensure that public bodies are fully accountable to the public. Second, to provide for the disclosure of all government information, subject to certain exemptions said to be "limited and specific". Third, to protect the privacy of individuals over their own personal information.
>
> …
>
> [40] Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.
>
> [41] The *FOIPOP Act* ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.
>
> …
>
> [53] Before turning to an analysis of the particular provisions of the *FOIPOP Act* material to this case, I wish to comment briefly on how the legislation in Nova Scotia compares to similar legislation in other provinces in Canada. Such a comparison together with the statute's own legislative history may be useful when considering the meaning to be attached to its provisions.
>
> [54] Having compared all of the freedom of information and privacy acts in the other provinces across Canada, I find that the purpose clause in the Nova Scotia statute is unique. This is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are "<u>fully</u> accountable to the public" [underlining mine]…
>
> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only *Act* that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:
>
> > b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
> >
> > (i) facilitate informed public participation in policy formulation,
> >
> > (ii) ensure fairness in government decision-making,
> >
> > (iii) permit the airing and reconciliation of divergent views;

> [56] Thus the *FOIPOP Act* in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.
>
> [58] And so before turning to an analysis of s. 13, its meaning and its application to this case, I think it important to bear in mind these features that make our *Act* unique. …

[103] Nothing has changed. Those findings expressing this Court's interpretation of our provincial *FOIPOP*'s statutory provisions – unique to Canada and to Nova Scotia – are of the same force and effect today, and should inform the Attorney General's position in this and any other case where *FOIPOP* is engaged.

[104] Returning to the facts of this case, I conclude that the Minister was required to consider the impact, if any, of *FOIPOP* on his department's involvement with A.B., and in particular, his statutory role as custodian of all information pertaining to APS's involvement in A.B.'s case which will include A.B.'s personal health information. I will undertake that review now.

[105] Section 4 of *FOIPOP* says:

> **Application of Act**
>
> 4 (1) This Act applies to all records in the custody or under the control of a public body …

[106] Section 4 applies to the DHW because the DHW is a "public body" pursuant to s. 3 which says:

> **Interpretation**
>
> 3 (1) In this Act,
>
> **…**
>
> (j) "public body" means

> (i) a Government department or … other body of persons … [who are] …
>
> (B) … public officers or servants of the Crown

[107] In this case, the respondent argues that the Minister's refusal to produce the record sought by the Ombudsman was justified by operation of ss. 4A, 20 and 27 of *FOIPOP*. Respectfully, I disagree. Leaving out the words that are not material, I will explain why these provisions do not support the Minister's position.

[108] Section 4A says:

> **Conflict with other enactments**
>
> 4A (1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless … the other enactment states that the provision of the other enactment prevails over the provision of this Act.

[109] First (and similar to my analysis of *PHIA*), I see no conflict between this provision and the Ombudsman's statutory authority under the *Ombudsman Act*. Second, I interpret certain specific sections of the *Ombudsman Act*, together with the broad purposive interpretation that is to be applied to the Ombudsman's jurisdiction to express the Legislature's clear intention that the *Ombudsman Act* is obviously meant to "prevail" over any provision found in either *FOIPOP* or *PHIA*. In my opinion, this express intention is found in s. 13 which says:

> **Statutory prohibitions inapplicable**
>
> 13 Notwithstanding any other Act providing that a … act or omission is final or that … no act or omission of a department or municipal unit is to be … reviewed … or called in question, the Ombudsman may exercise the powers under this Act.

and Section 18 which says:

> **Limitations on provision of information**
>
> 18 (2) … a rule of law that authorizes or requires … the refusal to answer any question on the ground that the disclosure of the document, paper or thing, or the answering of the question would be injurious to the public interest, does not apply in respect of any investigation by or proceedings before the Ombudsman.

[110] These express provisions coupled with the Ombudsman's special role and broad authority to investigate, subpoena, question under oath and, if necessary, publicly censure government misconduct, can mean only one thing; the Legislature clearly intends that any perceived disharmony between the *Ombudsman Act* and other enactments dealing with the custody, protection and disclosure of an individual's personal and private information will be resolved in favour of the Ombudsman.

[111] Similarly, I do not regard s. 20 as supporting the respondent's submission. It reads:

> **Personal information**
>
> 20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
>
> (b) the disclosure is likely to promote public health and safety …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, … psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation; .
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (c) an enactment authorizes the disclosure; …

[Underlining mine]

[112] In my view, a proper interpretation of those provisions means that the Ombudsman's investigation must be deemed to be "reasonable" and the disclosure "desirable" in order for the Ombudsman to fulfil the statutory obligations in reviewing the activities of the DHW and the APS, the result of which will promote public health and safety in this and future cases.

[113] The justification for the Ombudsman's demands finds further support in s. 27 of *FOIPOP* which says:

> **Disclosure of personal information**
>
> 27 A public body may use personal information only
>
> (a) in accordance with this Act or as provided pursuant to any other enactment;
>
> …
>
> (d) for the purpose of complying with an enactment …

[114] These provisions give the Minister statutory authority to release the unredacted record to the Ombudsman as being both "in accordance" with *FOIPOP* as well as "for the purpose of complying" with the *Ombudsman Act*.

[115] Lastly, neither the Minister nor his staff risks jeopardy in complying with the Ombudsman's demand because s. 17(9) of the *Ombudsman Act* says:

> **Furnishing of information**
>
> 17 (9) No person is liable for an offence against any Act by reason of his compliance with any requirement of the Ombudsman under this Act.

[116] Before concluding my analysis of these three statutes I wish to comment briefly on the principle of coherence which has some application to this case. If one were to characterize certain parts of the three enactments I have examined as "competing provisions", then the sequence in which legislation is passed is also relevant when considering what academics have come to refer to as the "external context" of legislation, from which the meaning of that legislation can then be inferred.

[117] Elmer Dreidger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at 107-108 has defined "external context" broadly:

> … External context is the setting of the Act, and will here be considered under the headings Social, Legal, Language and Intellectual Contexts.

[118] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis Canada, 2014) at p. 646 suggests that:

> [e]xternal context is relied on to provide background from which inferences about the meaning of legislation can be drawn. …

[119] As explained by Lord Denning in *Escoigne Properties Ltd. v. Inland Revenue Commissioners*, [1958] 1 All E.R. 406 (H.L.) at p. 414:

> A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what was the object, appearing from those circumstances, which Parliament had in view.

[120] Further, in *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, which dealt with whether a levy imposed under a provincial egg marketing scheme could be deducted as a business expense under the *Income Tax Act*, Bastarache, J. summarized the approach to determining legislative intent in the face of competing provisions at ¶7:

> [7] The statute book as a whole forms part of the legal context in which an act of Parliament is passed. As Driedger notes in the second edition, at p. 159, "one statute may influence the meaning of the other, so as to produce harmony within the body of the law as a whole"; see also Côté, *supra*, at pp. 433-40. Sullivan in *Driedger on the Construction of Statutes* is even more explicit in this regard, at p. 288:
>
> > The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation.
> >
> > ... It is presumed that the legislature does not intend to contradict itself or to create inconsistent schemes. Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred. [Footnotes omitted.]

[Underlining mine]

[121] Similarly, Pierre-André Côté,. *Interprétation des lois*, 3e éd. Montréal: Thémis, 1999, explains, at p. 433, that:

> [TRANSLATION] Different enactments of the same legislature are supposedly as consistent as the provisions of a single enactment. All legislation of one Parliament is deemed to make up a coherent system. Thus interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislator.

[Underlining mine]

[122] As has been explained, the Nova Scotia *Ombudsman Act* was enacted in 1971. *FOIPOP* came into being in 1993. *PHIA* became law in 2010. Had the Legislature intended for *FOIPOP* and/or *PHIA* to prevail over the Ombudsman's statutory authority it would have been very easy to say so. The fact that lawmakers declined to do so adds further support to the strength of the Ombudsman's claim to "prevailing" jurisdiction in this case.

[123] Finally, I wish to briefly address two discrete points which arose when questioning counsel at the hearing. First, in the various correspondence between the Minister and the Ombudsman leading up to the within Application, the Minister seemed to imply that he was entitled to require from the Ombudsman details concerning the complaint and the complainant. For example, in the ASOF there appears an e-mail from the Director, Privacy and Access, Department of Health and Wellness addressed to the Office of the Ombudsman dated April 21, 2017, wherein the Director asks, in part:

> …Please confirm whether the Ombudsman's Office is conducting an investigation into a written complaint pursuant to s. 11 of the Act? If there is an investigation being conducted into a written complaint, we would be grateful to receive the full particulars of the investigation and the complaint. … please provide a copy of the written complaint(s) …

[124] I wish to make it clear that there is no obligation whatsoever upon the Ombudsman to divulge the name of the complainant, or any information which might tend to identify the complainant. To do so, would violate the Ombudsman's own statutory duty to assure privacy and prevent the disclosure of information he is required to keep confidential. In holding government to account one can easily anticipate that an Ombudsman's interest in a matter and eventual decision to pursue it will often be sparked by communications he or she receives from a

whistleblower. Such referrals may well include contact from individuals employed by the very departments or municipal units whose actions are impugned. Clearly, such private communications with the Ombudsman are to be encouraged in order to give effect to the Legislature's objectives in enacting the statute. Requiring the Ombudsman to "give up" the name of the complainant would be absurd, which is yet another reason to presume Nova Scotia's lawmakers intended the *Ombudsman Act* to prevail.

[125] Finally, there was some oblique reference to "relevance" during argument as it pertained to the information sought by the Ombudsman. For convenience I will repeat part of s. 17(1) which says:

> **Furnishing of information**
>
> 17 (1) …where the Ombudsman requests a person who, in the opinion of the Ombudsman, is able to furnish information relating to the matter being investigated … that person shall furnish that information and produce any documents or papers that, in the opinion of the Ombudsman, relate to the matter …
>
> [Underlining mine]

[126] No challenge was raised in this case as to the "relevance" of the information sought by the Ombudsman. I will assume, without deciding, that the Legislature has deemed the Ombudsman to be in the best position to decide what is "relevant" and therefore free to compel production of whatever information he believes may "relate to the matter" being investigated. Whether there might be any basis for a future custodian of records to challenge the Ombudsman's jurisdiction on the basis of "relevance" I prefer to leave to another case, and another day.

Conclusion

[127] In Nova Scotia the Ombudsman is empowered to ensure that in administering the law, public bodies are fully accountable to the public they serve. The legislative purpose of the *Ombudsman Act* is remedial; meant to oversee the workings of government by providing an independent and impartial review of provincial and municipal departments. This is achieved by applying a broad, purposive interpretation to the Ombudsman's statutorily defined jurisdiction, informed by the special, important and unique role the Ombudsman plays in our constitutional democracy.

[128] The Ombudsman's authority is a potent force which acts as part of a system of legislative checks and balances on the proper functioning of our democratic institutions. The Ombudsman's oversight reminds both government and its bureaucracy that they – like the citizens they serve – are bound by the Rule of Law, and will be held to account for its breach.

[129] For all of these reasons I would allow the Application and answer the Stated Questions as follows:

> **(a) Does subsection 11(2) of the *Ombudsman Act* preclude jurisdiction of the Ombudsman from investigating DHW with respect to their handling of complaints, referrals and care concerning AB?**
>
> **Answer: No.**
>
> **(b) Does the jurisdiction of the Ombudsman, if any, provide for the production of the Record in full from DHW?**
>
> **Answer: Yes.**

[130] Both parties are public bodies and as such they neither seek, nor wish to respond to, an award of costs. I accept their position as being sound, and accordingly would decline to order costs.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.