IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2025 BCSC 2497

Date: 20251216
Docket: S248454
Registry: Vancouver

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

Between:

Attorney General of British Columbia

Petitioner

And:

Information and Privacy Commissioner for British Columbia

Respondent

Before: The Honourable Madam Justice Forth

On judicial review from: A decision of the Office of Information and Privacy Commissioner dated October 16, 2024 (File No. F23-93436).

Reasons for Judgment

Counsel for the Petitioner:	J. Gibson M. Fingas
Counsel for the Respondent:	A. Hudson
Written Submissions of the Petitioner Received:	August 29, 2025
Written Submissions of the Respondent Received:	September 12, 2025
Reply Submissions of the Petitioner Received:	September 17, 2025
Place and Date of Hearing:	Vancouver, B.C. June 5, 2025

Place and Date of Judgment: Vancouver, B.C.
December 16, 2025

Table of Contents

Introduction

[1] By way of a petition filed December 6, 2024, the Attorney General of British Columbia (the "AG" or the "Petitioner"), seeks a judicial review of a decision made by the Information and Privacy Commissioner for British Columbia (the "Commissioner" or the "Respondent") on October 16, 2024.

[2] The decision at issue arose out of an access to information request made by an applicant (the "Applicant") to the AG on April 21, 2023, pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*]. In the request, the Applicant sought all materials in the possession of the British Columbia Prosecution Service (the "BCPS") relating to Surrey Police Investigative file #2016-184216 (the "Investigative File").

[3] The AG refused to disclose the responsive record, which consisted solely of a charge assessment memorandum between Crown counsel and the Surrey RCMP (the "Charge Assessment Memorandum"), and asserted its right to withhold such information under ss. 15(1), 16(1)(b) and 22 of *FIPPA.*

[4] Upon the Commissioner's issuance of a Notice of Inquiry, the AG applied to the Commissioner requesting that it exercise its discretion to not conduct the inquiry on the basis that it was plain and obvious that the record could be withheld as information used in the exercise of prosecutorial discretion pursuant to s. 15(1)(g) of *FIPPA*.

[5] Section 15(1)(g) of *FIPPA* authorizes a public body to refuse to disclose information that could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. Schedule 1 of *FIPPA* defines the term "exercise of prosecutorial discretion" as follows:

> **"exercise of prosecutorial discretion"** means the exercise by
>
> (a) Crown counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (i) to approve or not approve a prosecution,
>
> (ii) to stay a proceeding,

(iii) to prepare for a hearing or trial,

(iv) to conduct a hearing or trial,

(v) to take a position on sentence, and

(iv) to initiate an appeal…

[6] On October 16, 2024, the Commissioner's delegate and Director of Adjudication, Elizabth Barker (the "Adjudicator") issued a decision declining to consider the AG's application and determining that it was necessary for the Commissioner to review the withheld record pursuant to s. 15(1)(g) of *FIPPA* to make an informed and independent decision on the applicability of that statutory exception (the "Decision").

[7] The AG now seeks an order in the nature of *certiorari* under s. 2(2)(a) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], quashing the Decision, as well as a declaration that the AG is not required to produce the Charge Assessment Memorandum.

[8] The Commissioner argues that the petition is premature, since, to date, it has not made a final decision on the merits of the issue of disclosure. It characterizes the Decision as a non-binding, preliminary decision.

[9] The parties sought and were granted leave to make written submissions in respect of reasons of Justice Thomas dated July 18, 2025, in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2025 BCSC 1365 [*Thomas Reasons*] and a recent decision of the Information and Privacy Commissioner, Order F25-62 [*Order F25-62*]. I have reviewed these decisions and the parties' submissions thereon.

Relevant Background

The Parties

[10] The AG is a "public body" as defined in Schedule 1 of *FIPPA*.

[11] The AG is comprised of several different branches, including the Criminal Justice Branch. The Criminal Justice Branch appoints criminal justice prosecutors, otherwise known as Crown counsel, and assigns them to criminal cases.

[12] The functions and responsibilities of the Criminal Justice Branch are set out in s. 2 of the *Crown Counsel Act*, R.S.B.C. 1996, c. 87. These responsibilities include approving and conducting all prosecutions for offences in British Columbia on behalf of the Crown.

[13] The Commissioner is an independent Officer of the Legislature who oversees the information and privacy practices of public bodies and private organizations. The Commissioner is responsible for the administration of *FIPPA*.

[14] The Applicant was served with the petition but did not file a response.

The Inquiry

[15] In the access to information request, the Applicant sought all material in the possession of the BCPS comprising the Investigative File. In particular, he requested:

> The final Report to Crown Counsel (RCC) from the Surrey RCMP – [Information to Obtains] used to obtain any Search Warrants – Witness Statements – Emergency & Regular Wiretap transcripts – Vehicle Tracking Data – [and] any other Surveillance results
>
> Basically, … a complete copy of the whole police investigative file.

[16] On May 16, 2023, the AG responded advising that the records currently in the possession of the BCPS are excepted from disclosure in their entirety pursuant to s. 15 (disclosure harmful to law enforcement), s. 16(1)(b) (disclosure which would reveal information received in confidence from another government or organization) and s. 22 (disclosure harmful to third party personal privacy) of *FIPPA*.

[17] On June 5, 2023, the Applicant requested that the Commissioner review the AG's decision to withhold the records.

[18] On June 26, 2023, the AG provided an updated response to the Applicant advising that the relevant charge assessment had been concluded on October 26, 2022, and that the Investigative File had been returned to the investigating police agency. The AG further advised that the only record that remained in BCPS custody consisted of internal, confidential Crown counsel memoranda regarding the charge assessment decision. Accordingly, the AG asserted that the record was being withheld pursuant to s. 14 (legal advice), s. 15(1)(g) (records pertaining to the exercise of prosecutorial discretion), s. 16(1)(b) (disclosure which would reveal information received in confidence from another government or organization), and s. 22 (disclosure harmful to personal privacy) of *FIPPA*. The AG suggested that the Applicant contact the Surrey RCMP to obtain information contained in the Investigative File.

[19] On September 16, 2024, the Commissioner issued a Notice of Inquiry under s. 56 of *FIPPA*. The Notice of Inquiry sets out that the adjudicator will consider whether the AG:

1. is required to refuse to disclose the information at issue under s. 22 of *FIPPA;* and/or

2. is authorized to refuse to disclose the information at issue under ss. 14, 15(1)(g), and/or 16(1)(b) of *FIPPA*.

[20] On October 15, 2024, the AG brought a written application requesting that the Commissioner exercise its discretion under s.56(1) of *FIPPA* not to conduct an inquiry in relation to the Applicant's request, and provided written submissions in support. In its application materials, the AG advised that the responsive record consisted solely of the 14-page Charge Assessment Memorandum, and relied upon prosecutorial discretion privilege in asserting that it is "plain and obvious" that the record is excepted from disclosure pursuant to s.15(1)(g) of *FIPPA*. The AG also provided an affidavit of a qualified Crown counsel, confirming that the sole record at issue, being the Charge Assessment Memorandum, is entirely comprised of highly sensitive information to which prosecutorial discretion applies.

[21] The affidavit relied upon by the AG is that of the BCPS' Information and Privacy Counsel, Sally Torani (the "Torani Affidavit"). In the Torani Affidavit, Ms. Torani deposed:

> 25. Based on my experience as Crown Counsel, my knowledge of Crown Counsel operations, policy, and practices and the role of Crown Counsel under the CCA [*Crown Counsel Act*, R.S.B.C. 1996, c. 87], and because I am duly qualified to practice law in the Province of British Columbia, I believe that the Record is entirely comprised of information relating to or used in the exercise of prosecutorial discretion.
>
> 26. I cannot be more specific about the nature of the Record without disclosing their contents and infringing the independence of the Crown Counsel in exercising their prosecutorial discretion.

[22] On October 16, 2024, the Adjudicator provided the Decision, declining to consider the AG's application, stating:

> In a preliminary way, it is my view that it is necessary for the commissioner to review the records to make an informed and independent decision about the application of s. 15(1)(g). As you are aware, this very issue is before the Courts in the judicial review of Order F24-52 which is still to be heard.
>
> In conclusion, I have decided that the OIPC will not consider the Ministry's application that the commissioner decide if it is plain and obvious that s. 15(1)(g) applies to the records in dispute. The Ministry will have a full opportunity during the inquiry to provide its arguments and evidence in support of its claims about the application of the exceptions it has applied to the records, including s. 15(1)(g).

[23] On December 6, 2024, the AG filed the petition seeking an order quashing the Decision and declaring that it bears no obligation to disclose the Charge Assessment Memorandum, on the basis that the Decision is unreasonable, incorrect, and improperly fetters the Commissioner's discretion.

[24] On February 26, 2025, the Commissioner applied to strike the petition on the basis that it is premature, as the Commissioner has not yet made a final decision in this matter. Justice Sharma declined to grant the order, finding that it was not plain and obvious that this Court would decline to exercise its discretion for early intervention with regard to the relief sought in the petition [*Sharma Reasons*].

Issue 1: Is the Petition Premature?

Legal Principles

[25] The Court of Appeal summarized the prematurity principle in *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221:

> [29] Generally, a court will not hear a judicial review petition before a tribunal has rendered its final decision: *ICBC v. Yuan*, 2009 BCCA 279 at para. 24. The prematurity principle is aimed at letting the tribunal get on with its work, and preventing fragmented and piecemeal proceedings with all the attendant costs and delays associated with premature forays into court. The principle is also aimed at avoiding the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may ultimately succeed at the end of the administrative process.
>
> …
>
> [33] … there is no hard and fast rule that a court will not hear a judicial review petition before a tribunal has rendered its final decision. There are many situations in which demands of justice and efficiency weigh in favour of early review by the courts. In other words, prematurity is not an absolute bar, but a discretionary one: *Yuan* at para. 24. It was therefore open to the judge to exercise his discretion to review the decision of the Commissioner under s. 8 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[26] The principle of prematurity was before the Court of Appeal again in *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174. There, the Court summarized the applicable factors on a determination of whether judicial discretion should be exercised to intervene in an administrative decision-making process:

> [66] Factors to consider in determining whether the Court's discretion to intervene early, which have been described under the rubric of "special" or "exceptional circumstances", may include hardship or prejudice to the applicant; waste of resources; delay if judicial review proceeds; fragmentation of proceedings; the strength of the case; and the statutory context: *Thielmann v. Association of Professional Engineers and Geoscientists of the Province of Manitoba,* 2020 MBCA 8 at para. 50; *ICBC v. Yuan,* 2009 BCCA 279 [*Yuan*] at paras. 23–24. The analysis is flexible and does not necessarily turn on a single factor: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [*Hill*] at para. 36; *Thielmann* at para. 49.

Position of the Parties

Position of the Commissioner

[27] The Commissioner argues that this petition is premature and that the Courts should not interfere with an ongoing decision-making process until it is complete, absent exceptional circumstances. It argues that the doctrine of prematurity is engaged since the AG is seeking judicial review of an interlocutory order, and there are no exceptional circumstances justifying early intervention by the Court in this case.

Position of the AG

[28] The AG submits that the Court should intervene at an interlocutory stage of administrative proceedings where justice and efficiency weigh in favour of early intervention. It argues that the factors referenced in *Chu* support proceeding with the judicial review in this case.

Analysis

[29] Earlier in these proceedings, the Commissioner brought an application to strike the petition based on prematurity and that no order had been made under s. 44(1)(b) of *FIPPA*: *Sharma Reasons* at paras. 9, 10. On the issue of prematurity, Sharma J. found:

> [17] As I am going to explain, I am dismissing the Commissioner's application today. In my respectful view, this does fall into that category of exceptional cases where it is appropriate for the Court to intervene in the midst of a statutory tribunal's decision-making process. In other words, I am not satisfied that it is plain and obvious that the petition has no chance of success, and I also do not agree with the Commissioner in how the OIPC characterizes the particular Decision at issue.

[30] Justice Sharma's conclusion that the petition should proceed to judicial review rested on various findings that the factors favouring early intervention are present in this case. Having presided over the judicial review hearing, I retain the discretion to diverge from the *Sharma Reasons* if I find that doing so is appropriate based on additional argument and with the full evidentiary record before me: *Lamb v. Canada (Attorney General)*, 2018 BCCA 266, at paras. 72-74. However, I find Sharma J.'s

findings persuasive, and I see no reason to depart from them in exercising my discretion to decide the issue of prematurity. Accordingly, I adopt the determination at para. 17 of the *Sharma Reasons*: this is one of those exceptional cases in which it is appropriate for the Court to intervene amidst the administrative decision-making process.

[31] I will go on to address the *Chu* factors.

Hardship or Prejudice

[32] The AG submits that the Decision is patently unreasonable and to allow it to stand unchallenged would result in the BCPS being prejudiced, since it would have to disclose the Charge Assessment Memorandum to the Commissioner. I agree that such a prejudice exists. If the AG is correct in its position on this petition, the Charge Assessment Memorandum need not be disclosed in the first instance to the Commissioner, and compliance with the Decision would result in an unnecessary intrusion into prosecutorial independence, which damage cannot be undone.

Waste of Resources

[33] If I find that the Decision is patently unreasonable, it should not stand and the petition cannot be characterized as a waste of resources. If I decide that the Charge Assessment Memorandum should not be disclosed to the Commissioner, then there is a significant saving of resources as an inquiry would not be necessary.

Delay

[34] The Decision was statutorily stayed for 120 days pursuant to s. 59(1) of *FIPPA*. That period has long passed. I find that there is an aspect of delay in this case, but that it does not outweigh the other factors favouring intervention.

Fragmentation of Proceedings

[35] The fundamental issue is whether the Charge Assessment Memorandum should be produced in the first instance to the Commissioner. If the answer is that it

should not, then there is no fragmentation, since the need for any inquiry will be ended.

Strength of the Case

[36] I note Sharma J.'s comments that the document at issue, being the Charge Assessment Memorandum, lies "at the very heart of prosecutorial discretion", which in her view is "unassailable": *Sharma Reasons* at para. 27. I agree, as there is no evidence that in any way contradicts this assertion. I reject the submission of the Commissioner that the AG must show that it is guaranteed to succeed. That sets too high a bar. Justice Sharma found the AG's evidence regarding the nature of the document that the Commissioner seeks to review, which the Commissioner neither contested nor addressed in the Decision in any fashion, was reason enough for the petition to go forward. I accept that the merits of the AG's position are sufficient to find that the petition should proceed.

Statutory Context

[37] I accept that under s. 56 of *FIPPA*, the Commissioner is to decide all questions of fact and law arising in the course of an inquiry. However, it is my view that this section does not prohibit the Court from conducting a judicial review of an interlocutory decision where the exceptional circumstances threshold has been met. As noted by the Court of Appeal in *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [*Hill*] at para. 35, prematurity is not an absolute bar to judicial review, but a discretionary one.

Conclusion

[38] For the foregoing reasons, I am exercising my discretion to find that it is not premature to proceed with the petition.

Issue 2: What is the Correct Standard of Review?

Position of the Parties

[39] The parties agree that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 does not apply to the Commissioner and the determination of the standard of review

should follow the approach set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*]. The parties disagree on whether the standard of review of the Decision should be reasonableness or correctness.

Position of the AG

[40] The AG says that the issues of whether s. 15(1)(g) of *FIPPA* applies to the Charge Assessment Memorandum, and whether the Adjudicator erred in refusing to consider the Ministry's s. 56.1 application while also concluding that disclosure to the Commissioner was necessary, should be decided on a standard of correctness. It submits that these questions concern fundamental principles of central importance to the Canadian legal system as a whole, by analogy to case law involving judicial review of information and privacy decisions vis-à-vis solicitor-client and cabinet privilege.

Position of the Commissioner

[41] The Commissioner argues that the matter at issue is whether the Adjudicator exercised her discretion appropriately in declining to cancel the inquiry, and questions of discretion attract a review on a standard of reasonableness.

Legal Principles

[42] The framework for determining the appropriate standard of review was revised by the Supreme Court of Canada in *Vavilov*, replacing the former framework set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Under the *Vavilov* framework, reasonableness is the presumptive standard of review: paras. 16, 23.

[43] The presumption of reasonableness can be rebutted in two types of situations: *Vavilov* at para. 17. The first is where the legislature has indicated that it intends a different standard to apply (e.g., where the legislature explicitly prescribes the standard of review, or where there is a statutory appeal mechanism). Second, the presumption is rebutted where the rule of law requires that the correctness standard be applied. This will apply to certain categories of questions, including constitutional questions, general questions of law of central importance to the legal

system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies: *Vavilov* at paras. 17, 53.

[44] The category of general questions of law of central importance to the legal system is limited to questions that "require uniform and consistent answers" because they tend to "impact on the administration of justice as a whole", having "significant legal consequences for the justice system as a whole or for other institutions of government": *Vavilov* at para. 59.

[45] Examples given were:

a) when an administration proceeding will be barred by the doctrines of *res judicata* or abuse of process;

b) the scope of the state's duty of religious neutrality;

c) the appropriateness of limits on solicitor-client privilege; and

d) the scope of parliamentary privilege.

Vavilov at para. 60.

[46] The Court stressed that "the mere fact that a dispute is of 'wider public concern' is not sufficient for a question to fall into this category – nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue": *Vavilov* at para. 61.

[47] In *Portnov v. Canada (Attorney General)*, 2021 FCA 171, the Federal Court of Appeal noted that questions only qualify under this category in exceptional circumstances. Each of the questions that have qualified have raised a "sweeping, transcendent point suffused with constitutional or quasi-constitutional principle": at para. 13.

Analysis

[48] In my view, the appropriate standard of review, based on the proper framing of the issue to be decided by this Court, is reasonableness. I agree in part with the AG that the critical question is whether the AG should be compelled to provide the Charge Assessment Memorandum to the Commissioner for review, in light of the Adjudicator's refusal to consider the Ministry's s. 56.1 application (including the Torani Affidavit). However, I do not agree that the Court should make a general determination as to the applicability of s. 15(1)(g) to the Charge Assessment Memorandum at this stage, as the Commissioner has yet to decide this question on the merits.

[49] Accordingly, I am not persuaded that the question at issue involves general questions of law that are fundamentally important and broadly applicable, with significant legal consequences for the justice system as a whole: *Vavilov* at para. 59. The category of "general questions of law of central importance to our legal system" is a narrow one: *G.S.R. Capital Group Inc. v. White Rock (City),* 2022 BCCA 46 at para. 26.

[50] I accept that prosecutorial discretion is an "indispensable device" necessary to ensure a properly functioning criminal justice system: *R. v. Anderson*, [2014] 2 S.C.R. 167 at para. 37. As noted in *British Columbia (Attorney General) v. Davies,* 2009 BCCA 337, leave to appeal ref'd [2009] SCCA No. 421, prosecutorial independence is a constitutionally protected value: at para. 60. However, the question at issue is whether the AG should be compelled to provide one document to be reviewed *in camera* by the Commissioner; it is not whether charge assessment memoranda are, as a matter of law, excepted from review by administrative decision-makers by virtue of prosecutorial discretion. Clearly, the evidentiary record and scope of the submissions in the case at bar could not permit the Court weighing into the latter. Additionally, I note that there has been no decision made that the document at issue, the Charge Assessment Memorandum, will be provided to the Applicant. As such, I am not persuaded that this interlocutory process meets the threshold of exceptional such that the correctness standard should be applied. It

does not address general questions of law of central importance to the legal system as a whole.

[51] For these reasons, I find that the presumption of reasonableness review has not been rebutted. That is the appropriate standard of review in this case.

Issue 3: Was the Decision Reasonable?

Legal Principles

[52] As I have found that the Decision ought to be reviewed on a standard of reasonableness, a brief outline of the guiding principles that apply in a reasonableness review is warranted.

[53] In addition to setting out a new framework for assessing the standard of review, *Vavilov* also provided guidance to reviewing courts on how that review should be conducted.

[54] The focus of the review is on the decision actually made by the decision-maker, with respect to both the reasoning process and the outcome: *Vavilov* at para. 83. A reasonable decision is one “that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at para. 85. Where those criteria are met, a reviewing court must defer to the decision: *Vavilov* at para. 85.

[55] The Court in *Vavilov* recognized that the particular context in which the decision under review was made will impact the reasonableness review, particularly in circumstances where decision-makers are not required to give reasons: *Vavilov* at paras. 76-77, 81, 89-90. The review “can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings”: *Vavilov* at para. 91. A reasonable decision must also meaningfully consider the central issues and concerns raised by the parties and the impact of the decision on affected parties: *Vavilov* at paras. 127-28, 133-35.

[56] Where the decision-making process does not easily lend itself to producing a single set of reasons, an approach to judicial review prioritizing the decision-maker's justification may be challenging. However, the Court in *Vavilov* held that in such circumstances, the reasoning process underlying the decision – discerned from reviewing the record as a whole – may be used to understand the rationale for the decision:

> [137] … in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[57] The governing statutory scheme is particularly relevant in reviewing a decision for reasonableness. As the majority in *Vavilov* wrote:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given... Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion...

[58] Finally, the burden is on the party challenging the decision to show that it is unreasonable: *Vavilov* at para. 100.

Position of the Parties

Position of the AG

[59] The AG submits that the Decision to not consider the application to withhold the Charge Assessment Memorandum under s. 15(1)(g) of *FIPPA* is incorrect, unreasonable, and fails to engage with the relevant evidence and law. It further argues that the Charge Assessment Memorandum provides the rationale underlying a Crown counsel's decision to approve or not to approve a prosecution, making it the quintessential instrument by which the Crown exercises prosecutorial discretion.

Position of Commissioner

[60] The Commissioner argues that no final decision was made and that the issue relating to whether the Charge Assessment Memorandum will be produced to the Applicant will be decided at the inquiry. It characterizes the Decision as a "decision not to cancel the inquiry", the reasonableness of which it says is the overarching issue for determination by this Court.

Analysis

[61] It is my view that the Commissioner, in denying the application of the AG, made a decision in the first instance that it needs to view the Charge Assessment Memorandum to make a further decision on disclosure to the Applicant.

[62] In the Decision, the Adjudicator clearly states, "it is my view that it is necessary for the Commissioner to review the records to make an informed and independent decision about the application of s. 15(1)(g)". This statement is qualified with, "[i]n a preliminary way," but neither the intent nor meaning of that phrase is clear, given the conclusion that the records must be reviewed.

[63] In its supplementary submissions, the Commissioner argued that the Decision is preliminary because there remains the issue of whether the Office of the Information and Privacy Commissioner needs to review the records themselves on an *in camera* basis. I am not persuaded by this characterization of the Decision. I

find that the question of whether the Charge Assessment Memorandum must be provided to the Commissioner was answered in the Decision.

[64] The Decision also states that the Commissioner will not consider the AG's application, and that the AG can make arguments at the inquiry. This indicates that the Adjudicator failed to recognize the point of the application, being the AG's position that the Charge Assessment Record should not be reviewed by the Commissioner at all, even *in camera*, in light of its nature.

[65] In reviewing the Decision for reasonableness, I must focus on the determination of the Adjudicator and the justification offered for it: *Vavilov* at para. 15. It is this second aspect that is entirely absent in the Decision, which contains no information as to what, if any, consideration was given to the evidentiary record or factual matrix. Critically, the Decision is silent on whether the Adjudicator reviewed the Torani Affidavit, including the uncontradicted evidence at para. 25 that the disputed record is "entirely comprised of information to or used in the exercise of prosecutorial discretion". These facts appear to be straightforward and uncontested, and the Adjudicator should have considered whether the Charge Assessment Memorandum is covered by prosecutorial discretion, as well as provided a justification for requiring the AG make production to the Commissioner. However, no analysis was offered in this regard.

[66] A reasonable decision is one that is based on an internally coherent and rational chain of analysis, justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para. 85. A failure of "rationality internal to the reasoning process" is a fundamental flaw that tends to make a decision unreasonable: *Vavilov* at para. 101. Further, a decision will be unreasonable where the reasons, read in conjunction with the record, do not make it possible to understand the decision maker's reasoning on a critical point: *Vavilov* at para. 103. Here, the Adjudicator did not explain her reasoning process nor rationale in "decid[ing] that the OIPC will not consider the Ministry's application that the Commissioner decide if it is plain and obvious that s. 15(1)(g) applies to the records in dispute" and requiring the record to

be turned over. Accordingly, as the reviewing judge, I am unable to understand how the Decision was rendered, nor why the Adjudicator arrived at the conclusion she did.

[67] I turn now to the parties' supplementary arguments respecting *Order F25-62* and the *Thomas Reasons*.

[68] The parties refer me to *Order F25-62* made on August 7, 2025 by Michael Harvey, the Information and Privacy Commissioner for BC. This decision provides Mr. Harvey's interpretation of s. 15(4) of *FIPPA* where the AG had withheld records from production under s. 15(1)(g) of *FIPPA*. Section 15(4) of *FIPPA* requires as follows:

> 15(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reason for decision not to prosecute
>
> (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
>
> (b) to any other member of the public, if the fact of the investigation was made public.

[69] Neither the Decision nor this petition arises from a request by the Applicant for reasons under s. 15(4), as was the case in *Order F25-62*. As such, it is not for me in these reasons to consider Mr. Harvey's conclusion that: "a public body cannot rely on any exception to disclosure found in s. 15 when s. 15(4) applies": *Order F25-62* at para. 26. That is for another proceeding.

[70] However, I am not persuaded that the application of s. 15(4) results in a requirement on the part of the BCPS to disclose a charge assessment memorandum to a victim, relative, friend, or other member of the public bringing a request under that subsection. I agree with the AG that a more nuanced approach is likely required. There remains the need to assess whether the records in question could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[71] The parties also referred me to the *Thomas Reasons* in their supplementary submissions, where there were two orders at issue. The first was a final order requiring the AG to release a record withheld under s. 16(1)(b). The second was an adjudicator's determination that he could not decide whether records withheld under s. 15(1)(g) were properly withheld pursuant to that statutory exception unless he could review them in an unredacted format: *Thomas Reasons* at paras. 7, 8.

[72] Justice Thomas found that the two orders were reasonable, however, he directed the Commissioner to reconsider allowing the AG the opportunity to provide evidence on the potential impact of an *in camera* review of the documents by the adjudicator on prosecutorial independence: *Thomas Reasons* at paras. 11, 104**.**

[73] The records in dispute consisted of approximately 126 pages, including: a police file summary, disclosure notes, general occurrence reports, an accused's history report, a jail report, an interview transcript, reports to Crown counsel and attachments, the VPD notes provided to Crown counsel, and communications between Crown counsel and a defence counsel: *Thomas Reasons* at paras. 28, 53.

[74] The extent of the adjudicator's decision is not entirely clear, however, the *Thomas Reasons* make clear that the adjudicator squarely addressed the issue of prosecutorial discretion and the affidavit evidence before him:

> [99] The Adjudicator was not unreasonable to distinguish prosecutorial discretion from solicitor-client privilege, and that they do not warrant the same treatment in the Inquiry. He noted that past practice supported the OIPC reviewing documents over which s. 15 claims had been previously made, and there was insufficient evidence supporting the proposition that an *in camera* review of the documents by the Adjudicator would impact prosecutorial independence.
>
> [100] In addition, the Adjudicator rejected the Ministry's position that its submissions and affidavit evidence alone were sufficient to decide on s. 15(1)(g). There was no indication in the affidavit evidence that ss. 15(3) and (4) had been considered by the public body. The Adjudicator also noted that the Ministry asserted s. 15(1)(g) over several different types of records in their entirety. This breadth of records, contrasted with the lack of details in the Ministry's affidavit despite being provided with an opportunity to rectify the concerns raised by the Adjudicator, led the Adjudicator to determine that it was necessary to order the production.

[75] The nature of the records at issue in the *Thomas Reasons* are vastly different from the one record at issue in these proceedings. In that case, the need to examine the broad collection of records in their entirety in order to make the necessary determination was understandable as explained by the Adjudicator. In this proceeding, there is one record, a Charge Assessment Memorandum, the nature of which is described in the Torani Affidavit.

[76] I accept that a charge assessment memorandum is the very instrument by which Crown counsel expresses their analysis of the relevant facts and law that underly a charge assessment decision. A decision to approve or not to approve a prosecution is part of prosecutorial discretion: Schedule 1 of *FIPPA.* As the Torani Affidavit explains, Crown counsel, in discharging the charge assessment function, must independently, objectively, and fairly measure all the available evidence and apply a two-part test: whether there is a substantial likelihood of conviction; and if so, whether the public interest requires a prosecution. If Crown counsel does not approve a charge, the BCPS confidentially communicates the assessment and analysis to the relevant police agency in a charge assessment memorandum: Torani Affidavit at paras. 19 and 20.

[77] In my view, the Adjudicator refused to consider the application, including the evidentiary record in support of it. Further, she failed to provide any explanation or justification for requiring the AG to produce the Charge Assessment Memorandum to the Commissioner for review. That approach is not reasonable.

[78] In the circumstances, I am persuaded that the AG has met the burden of showing that the Decision was unreasonable. I next turn to the appropriate remedy.

Issue 4: What Remedy Should be Granted?

Position of the Parties

Position of the AG

[79] The AG seeks an order in the nature of *certiorari* under s. 2(2)(a) of the *JRPA*, quashing the Decision. It further seeks a declaration under s. 2(2)(b) of the

JRPA that the AG is not required to produce the Charge Assessment Memorandum to the Commissioner under s. 44 of *FIPPA*. In the alternative, it seeks an order remitting the matter back to the Commissioner for a reconsideration of the Petitioner's *FIPPA* s. 56.1 application.

Position of the Commissioner

[80] The Commissioner submits that if the Court concludes that any aspect of the Decision was unreasonable or incorrect, the appropriate remedy is to remit the matter back to the Commissioner for redetermination. The *JRPA* does not generally permit the Court to direct the outcome of a matter within the jurisdiction of an administrative tribunal. The Court's power allows it to set aside and to direct a reconsideration. There do not exist any "exceptional circumstances" that would indicate the Court should make the decision assigned to the administrative decision-maker by the legislature.

[81] The Commissioner argues that it has not made a decision on the substance of the AG's argument that s. 15(1)(g) applies to the record at issue. It submits that the following issues need to be addressed in an inquiry:

> (a) whether disclosing the information in dispute to the Access Applicant would reveal any information relating to or used in the exercise of prosecutorial discretion under s. 15(1)(g);
>
> (b) whether the Records contain "the reasons for a decision not to prosecute" within the meaning of s. 15(4);
>
> (c) whether it is necessary for the OIPC to review the Records themselves to determine whether they reveal information relating to or used in the exercise of prosecutorial discretion and/or whether they contain "the reasons for a decision not to prosecute";
>
> (d) whether s. 15(4) prevents the Ministry from relying on s. 15(1)(g) to refuse to produce the parts of the Records that contain the "reasons for a decision not to prosecute";
>
> (e) whether disclosure exceptions other than 15(1)(g) apply to the Records; and
>
> (f) whether and how the Records may be severed such that the Access Applicant does not receive any information that is excepted from disclosure under *FIPPA*.

[82] The Commissioner argues that the legislature intended for it to answer the issues, and not this Court, in the first instance. Thus, it would be inappropriate for the Court to decide these questions, or to give directions that effectively decide these questions, before the Commissioner has done so.

Legal Principles

[83] The *JRPA* provides that if the Court considers the decision unreasonable or incorrect, the appropriate remedy is to remit the matter back to the Commissioner for redetermination: *JRPA* at ss. 5-7.

[84] In *Vavilov*, the Supreme Court of Canada held that, “where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court’s reasons”: at para. 141.

[85] The general rule is that where a party succeeds on judicial review, it is appropriate to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate that the court should make the decision the legislation has assigned to the administrative body: *Hill* at para. 51.

[86] *Vavilov* allows for an exception to the general rule when remittal would serve no useful purpose, such as when disputed statutory language can only bear one interpretation: at para. 124; *Pepa v. Canada (Citizenship and Immigration*), 2025 SCC 21 at para. 121.

[87] The Supreme Court of Canada also recognized that the Court must be guided by “concerns related to the proper administration of justice, the need to ensure access to justice and ‘the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunal in the first place’”: *Vavilov* at paras. 140, 142, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at para. 55.

Analysis

[88] The circumstances here do not warrant the Court substituting its views for the administrative tribunal. I have accepted that charge assessment memoranda are instruments used in the exercise of prosecutorial discretion. However, in light of the Adjudicator's refusal to consider this issue on the evidentiary record before her, I am not persuaded that one particular outcome is inevitable and that remitting the case would serve no useful purpose: *Vavilov* at para. 142. As such, the appropriate remedy is to remit the matter back for reconsideration by the Commissioner.

Disposition

[89] I order that the Commissioner reconsider the AG's s. 56(1) application and provide a set of reasons that:

a) explicitly considers the Torani Affidavit and the nature of the record in dispute, being solely the Charge Assessment Memorandum; and

b) having regard to those considerations, explains the reasoning process and rationale used in determining whether the Commissioner must conduct an *in camera* review of the Charge Assessment Memorandum.

[90] I am not prepared to grant the declaratory relief sought by the AG.

[91] Given the nature of the review and the relationship of the parties, no costs are awarded.

"Forth J."