



Order F20-03

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Laylí Antinuk
Adjudicator

January 27, 2020

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Summary: In a court ordered reconsideration of Order F18-51, the adjudicator found that s. 19(1)(a) (threat to health or safety) applied to the names of certain British Columbia Hydro and Power Authority (BC Hydro) employees who worked on the Site C project. Therefore, the adjudicator concluded that BC Hydro was authorized to withhold this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 19(1)(a).

INTRODUCTION

[1] This order reconsiders the aspects of Order F18-51 that relate to s. 19(1)(a) (threat to health or safety) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator in Order F18-51 found that s. 19(1)(a) did not apply to the names of certain British Columbia Hydro and Power Authority (BC Hydro) employees associated with the Site C Clean Energy Project (the Site C project).¹ On judicial review, the BC Supreme Court found the adjudicator's decision regarding s. 19(1)(a) unreasonable and ordered this reconsideration.²

¹ Order F18-51, 2018 BCIPC 55.

² *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at paras. 100-101 [BC Hydro].

ISSUE

[2] In this inquiry, I will decide whether s. 19(1)(a) authorizes BC Hydro to withhold the information in dispute. BC Hydro bears the burden of proving that the applicant has no right to access this information.³

DISCUSSION

Background

[3] This matter arose when an applicant requested that BC Hydro provide information related to the Site C project under FIPPA. In response, BC Hydro disclosed records to the applicant, withholding some information under multiple FIPPA exceptions, including s. 19(1)(a).

[4] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review BC Hydro's decision to withhold information. Mediation by the OIPC did not resolve the issues and the matter proceeded to an inquiry, culminating in Order F18-51. Among other things, the adjudicator decided that s. 19(1)(a) did not apply to the names of certain BC Hydro employees who worked on the Site C project.

[5] BC Hydro applied to the BC Supreme Court for a judicial review of the adjudicator's decisions respecting ss. 19 and 22 (disclosure an unreasonable invasion of personal privacy), arguing that these aspects of the decision were unreasonable. When it came to s. 19, the Court agreed with BC Hydro.⁴ Specifically, Madam Justice MacDonald held that the adjudicator unreasonably required BC Hydro to provide evidence of actual harm to meet its burden of proof under s. 19(1)(a). In her reasons, she states:

By expecting BC Hydro to demonstrate that harm would likely result if the names were disclosed, the [adjudicator] imposed an unduly high onus on [BC Hydro]... By imposing such a high onus on BC Hydro, the [adjudicator's] interpretation of s. 19 was unreasonable. I find the [adjudicator's] application of s. 19(1)(a) is not within the range of possible, acceptable outcomes and is not defensible in respect of the facts and the law... I remit the matter back to the Privacy Commissioner to make the appropriate order(s) in accordance with these reasons.⁵

[6] I have carefully read Madam Justice MacDonald's reasons and kept them at the forefront of my mind when making this decision. I make this decision based

³ Section 57(1) of FIPPA. Whenever I refer to section numbers throughout this order, I am referring to sections of FIPPA.

⁴ The Court found the adjudicator's decision respecting s. 22 reasonable. See paras. 54-74 of *BC Hydro*, *supra* note 2.

⁵ *BC Hydro*, *supra* note 2 at paras. 96 and 98.

on the same evidence and submissions that the previous adjudicator had before her, but with the benefit of Madam Justice MacDonald's judgment. I did not offer the parties an opportunity to provide additional materials for this reconsideration.⁶

Information in dispute

[7] The information in dispute consists of the names of eight BC Hydro employees who worked on the Site C project. These names appear in a board briefing document and a PowerPoint presentation. As indicated above, BC Hydro withheld these names under s. 19(1)(a).⁷

Threat to health or safety – section 19(1)(a)

[8] Section 19(1)(a) permits a public body to withhold information if its disclosure could reasonably be expected to threaten anyone's safety, or mental or physical health. This subsection contains one of the harms-based exceptions to disclosure under FIPPA. In discussing these exceptions, former Commissioner Loukidelis explained:

... harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests.⁸

[9] All the harms-based exceptions in FIPPA contain the "could reasonably be expected to" language. The Supreme Court of Canada has characterized the standard imposed by this language as "a middle ground between that which is probable and that which is merely possible."⁹ Meeting this standard requires proof that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."¹⁰ The evidence BC Hydro provides must demonstrate "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."¹¹ As stated by Madam Justice MacDonald:

⁶ In a letter to the OIPC dated January 10, 2020, BC Hydro offered to make an additional submission regarding the nature and effect of the *BC Hydro* decision if I found myself "favouring a conclusion that s. 19(1)(a)" did not apply. I did not request any submissions from either party.

⁷ BC Hydro also withheld its employee's names under s. 22, but that aspect of BC Hydro's decision is not an issue in this reconsideration.

⁸ Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 48.

⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

¹⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.

¹¹ *Ibid* at para. 219.

... to rely on s. 19(1)(a) of *FIPPA*, the public body does not need to prove the harm will *probably* occur if the information is disclosed. However, the mere *possibility* of harm is also not sufficient. Put another way, the test articulated by the Supreme Court of Canada is that the probability of the harm need only be reasonably expected; the test does not require probable or actual harm.¹²

[10] To summarize, the courts have made clear that s. 19(1)(a) does not require proof of actual or even probable harm. BC Hydro does not need to prove that if the employee names at issue are disclosed, those employees will definitely, or even probably, experience threats to their safety, or their physical or mental health.¹³ Rather, as Former Commissioner Loukidelis has explained:

Section 19(1)(a), specifically, is aimed at protecting the health and safety of others. This consideration focusses on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm.¹⁴

Parties' positions

[11] BC Hydro submits that it has legitimate concerns that the disclosure of the employee names at issue in this case could threaten the safety, or mental or physical health of those employees.¹⁵ BC Hydro notes that these specific employees are not publically associated with the Site C project. According to BC Hydro's evidence, the Site C project has been the focus of contentious public debate that has included alarming displays of physical and threatened violence.

[12] BC Hydro provides numerous examples of these types of violence, including an incident in which the police shot and killed a knife-wielding, masked man at a Site C public information meeting hosted by BC Hydro. This incident led the organizers of a rally against Site C at the BC Hydro headquarters to cancel the event because of security concerns. BC Hydro says that it is:

... extremely concerned that the release of individual names will put those individuals at risk for targeted violence by extreme opponents to Site C and increase the risk of mental distress of the employees at the fact that their names are now publically associated with the deeply divisive project, where previously they had not been... BC Hydro is very concerned that a dissemination of individual names will increase the risk to those employees' own mental wellbeing and risk their mental health.¹⁶

¹² *BC Hydro, supra* note 2 at para. 88.

¹³ *BC Hydro, supra* note 2 at para. 93.

¹⁴ Order 00-28, 2000 CanLII 14393 (BC IPC) at p. 3.

¹⁵ The information in this paragraph comes from BC Hydro's initial submission at para. 48 and the Security Project Manager's Affidavit at paras. 8, 10 and 11 and Exhibits A, B and C.

¹⁶ BC Hydro's initial submission at para. 57.

[13] The applicant contends that there is no clear and obvious connection between any of the violent incidents described by BC Hydro and the public having access to the names of people who work on the Site C project.¹⁷ For example, he notes that there is no evidence that the knife-wielding individual shot by police had attended the public meeting to harass a specific, named person whose identity had been accessible in public documents. The applicant also notes that several BC Hydro employees have publically identified themselves as working on the Site C project on the social media site LinkedIn. The applicant argues that this means that BC Hydro's concerns about employee names are baseless and must not be accepted.

[14] According to the applicant, the examples provided by BC Hydro are not sufficient to establish harm and BC Hydro's allegations are all speculative. From the applicant's perspective, not one of the incidents described in BC Hydro's evidence "can be attributed to any opponent of the project knowing the name of anyone working on the project. Nor does BC Hydro advance any evidence of the public knowing names of workers on any project in BC leading to harm of those workers."¹⁸

[15] In reply to the applicant's arguments, BC Hydro submits that it is not only concerned that disclosure of the names may make those specific employees targets for extreme opponents of Site C, it is also concerned that disclosure of the employee names increases the risk that those employees will experience mental distress.¹⁹ BC Hydro also notes that the willingness of a few employees to publically associate their names with the Site C project via social media "does not diminish BC Hydro's overarching concern that the majority of its employees do not want to be publically associated with Site C given the violence, threats, and controversy that already surrounds the Project."²⁰

Analysis

[16] For the reasons that follow, I find that BC Hydro had a reasonable expectation that disclosing the information at issue could threaten its employees' mental health.

[17] BC Hydro has provided ample evidence of incidents of threatened and actual violence related to, or reasonably perceived to be related to, the Site C project. These examples include:²¹

¹⁷ The information in this paragraph comes from the applicant's response submission at paras. 55, 57, 59, 63, and 72.

¹⁸ *Ibid* at para. 81.

¹⁹ BC Hydro's reply submission at para. 7.

²⁰ *Ibid* at para. 8.

²¹ All examples set out below come from the Senior Project Manager's Affidavit at paras. 9, 13, 14 and Exhibits A and C.

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- An incident at a public information meeting in which a protestor ripped down display maps, overturned two tables and screamed obscenities at BC Hydro employees. A witness called 9-1-1 for police assistance.
 - When police arrived on the scene, they shot and killed a knife-wielding, masked and hooded man outside the meeting (a different man than the one who ripped down displays and overturned tables). The knife wielded by the masked man was a type of switchblade designated as a prohibited weapon in Canada. Witnesses described this man as ‘waving’ the knife, ‘lunging at’, ‘jabbing at’ or ‘trying to stab’ the police officers who backed away, asked him to drop the weapon, and tried using pepper spray before firing a single gunshot, which killed him. An online activist group called Anonymous claimed that the masked man was one of its members and threatened to avenge his death. News organizations reported all of this information nationally.
 - As stated above, this violent and deadly interaction led organizers of an anti-Site C rally at BC Hydro’s headquarters to cancel the rally because of concerns that it could turn violent. News organizations also reported this cancellation and the reason for it.
 - BC Hydro Site C employees found bullet holes in two different signs at Site C – one a stop sign located within the Site C construction zone and the other a Site C sign at the border of the project. The stop sign stood in a very active work area and, because of the size and shape of the two bullet holes found in the sign, BC Hydro’s security team determined that the bullets must have come from a high-powered weapon.
 - At various public meetings on multiple occasions, members of the public said threatening things to BC Hydro employees, such as “watch your back” and “blow them up” and indicated that if employees entered private properties, landowners would have “guns waiting.”
 - Site C protestors also physically demonstrated their anger about the project by waving their fists at public meetings, blocking vehicles and construction equipment, yelling at employees, and in one incident, using a speedboat to encircle an excavator working in the water while shouting obscenities at the worker.

[18] The applicant argues that some of these examples, including the event involving the speedboat and the signs with bullet holes, are not sufficient to establish harm under s. 19(1)(a). The applicant says, for example, that BC Hydro has no way of knowing that the stop-sign shooter or the speedboat driver bore

any ill-will towards the Site C project.²² This may be true, but in my view it misses the mark.

[19] Section 19(1)(a) protects against threats to an individual's mental health. Accordingly, the question before me centres not on the *intentions* of the shooter or the boat driver, or even the knife-wielding masked man, but rather on the *impact* these incidents had on BC Hydro Site C employees. According to BC Hydro's evidence, the incidents described above caused BC Hydro Site C employees to feel vulnerable, apprehensive and threatened in the public arena.²³

[20] I find it reasonable that these events, particularly those that involved physical violence and the use of deadly weapons, caused BC Hydro Site C employees to feel vulnerable, apprehensive and threatened. Therefore, there is a direct link between the disclosure of employee names and a threat to the mental health of those employees under s. 19(1)(a). Employees who already feel vulnerable, apprehensive and threatened in the public arena because of the public's strong and sometimes violent opposition to their work can reasonably be expected to experience increases in those negative feelings upon learning that their names will become publically associated with that work.

[21] Previous orders have found that threats to mental health do not include threats that someone will merely feel upset, inconvenienced, or unpleasant – rather, s. 19(1)(a) requires threats of serious mental distress or anguish.²⁴ Distress means severe trouble, anxiety or sorrow; anguish means severe misery or mental suffering.²⁵ In my view, the mental impacts involved in this case rise above mere inconvenience, upset or unpleasantness to the level of serious mental distress or anguish. As I see it, employees who knew about and already felt apprehensive and threatened by the violent (and, in one case, deadly) incidents surrounding the public's opposition to the Site C project, could reasonably be expected to feel severe anxiety or mental suffering at the thought of their names being released publically in connection with Site C.

[22] Taking all this into account, I find that BC Hydro has provided sufficient evidence to establish a threat to the mental health of its Site C employees that is well beyond the merely possible or speculative. In my view, BC Hydro had a reasonable expectation that the disclosure of some of its employees' names would threaten the mental health of those employees. Given this, I find that s. 19(1)(a) applies to the information in dispute.

²² Applicant's response submission at paras. 58 and 60.

²³ Senior Project Manager's Affidavit at para. 14.

²⁴ For example, see Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 74.

²⁵ *Canadian Oxford Dictionary*, 2nd ed, (Ontario: Oxford University Press Canada, 2004) sub verbis "distress" and "anguish".

CONCLUSION

[23] For the reasons given above, under s. 58, I confirm BC Hydro's decision to withhold the information in dispute under s. 19(1)(a).

January 27, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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