IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 904

Date: 20110707
Docket: S106484
Registry: Vancouver

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

And in the Matter of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 (as amended)

Between:

K-Bro Linen Systems Inc.

Petitioner

And

Information and Privacy Commissioner for British Columbia, Vancouver Coastal Health Authority, and Hospital Employees Union

Respondents

Before: The Honourable Mr. Justice Bowden

On judicial review of Order No. F10-28 of the Information and Privacy Commissioner of British Columbia dated August 16, 2010

Reasons for Judgment

Counsel for the Petitioner:	L.D. Ridgedale R. Robertson
Counsel for the Respondent, Information and Privacy Commissioner for British Columbia:	S.E. Ross
Counsel for the Respondent, Vancouver Coastal Health Authority:	M.S. Muller

Counsel for the Respondent, Hospital Employees Union:	C. Boies Parker
Place and Date of Hearing:	Vancouver, B.C. February 2, 3 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. July 7, 2011

Introduction

[1] On October 23, 2007, the Hospital Employees' Union ("HEU") submitted a Freedom of Information Request to the Vancouver Coastal Health Authority ("VCH") requesting a copy of a commercial contract and amendments thereto between VCH and the petitioner. The petitioner asserted that the release of the contract would cause it significant commercial harm. VCH decided that it would release the contract.

[2] The matter was referred for a written inquiry to the Information and Privacy Commissioner ("Commissioner") or his delegate, the "Adjudicator". The Adjudicator ordered VCH to provide full access to the contract and amendments to HEU. Pending a decision in these proceedings, the order has been stayed pursuant to s. 59(2) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*").

[3] The petitioner seeks the following:

1. An order quashing the decision of the Adjudicator dated August 16, 2010 and recorded as Order F10-28;

2. A declaration that VCH must refuse to disclose to HEU, certain information that the petitioner says is protected from disclosure;

3. An interim order staying the decision of the Adjudicator until the final disposition of this judicial review;

4. Costs of this proceeding.

[4] The respondent, VCH, takes no position in these proceedings.

Background Facts

[5] I will summarize the evidence which was before the Adjudicator.

[6] The petitioner, K-Bro Linen Systems Inc. ("K-Bro"), is an Alberta corporation registered in British Columbia and carries on the business of providing laundry and linen services to healthcare, hospitality and other commercial enterprises.

[7] On October 23, 2007, HEU made a request ("FOI Request") under *FIPPA* for a copy of a commercial contract and subsequent amendments ("Requested Documents") between VCH and the petitioner.

[8] The Requested Documents consist of a "Laundry and Linen Services Agreement" between the petitioner and VCH dated January 15, 2003, and subsequent amendments thereto ("Agreement").

[9] The petitioner was notified of the FOI Request by VCH on November 22, 2007. The petitioner informed VCH that it did not consent to the release of the Requested Documents; that they contained information the disclosure of which would be harmful to its business interests; and that VCH was required by s. 21(1) of *FIPPA* not to disclose them.

[10] VCH agreed with the petitioner and portions of the Requested Documents containing information which the petitioner considered harmful were redacted ("Protected Information") and the Requested Documents were then released to the HEU.

[11] The HEU requested that the Office of the Information and Privacy Commissioner for British Columbia ("OIPC") review the decision by VCH to withhold the Protected Information.

[12] In view of an earlier decision of the OIPC, (Order F08-22), the OIPC asked VCH to reconsider its position and as a result VCH decided it should not withhold the Protected Information and informed the petitioner that it intended to release it.

[13] The petitioner then asked OIPC to review VCH's decision to release the protected information. The petitioner's position was that the Protected Information:

1. constituted the petitioner's trade secrets and commercial and financial information;

2. was supplied in confidence by the petitioner to VCH; and

3. would cause significant commercial harm to the petitioner if released.

[14] The petitioner provided detailed submissions and evidence in support of its position and in relation to the provisions of s. 21(1) of *FIPPA* to OIPC.

[15] While being of the view that many of the submissions of the petitioner were reasonable and contained valid concerns about harm to its business interests, VCH informed OIPC that its decision to release the Protected Information was based solely on Order F08-22. VCH also expressed the view that when third party business information is released under *FIPPA* in these kinds of circumstances, it has a negative effect on VCH's ongoing RFP process.

[16] The Adjudicator decided that while the Protected Information constituted commercial and financial information under s. 21(1)(a)(ii), it had not been "supplied in confidence" by the petitioner as provided in s. 21(1)(b). While that determination ended the matter, the Adjudicator went on to hold that the petitioner also failed the third part of the test in that section because, in the words of the Adjudicator, "I find that K-Bro has failed to establish that it would suffer a reasonable prospect of harm from the disclosure of the terms of the contract…". On August 16, 2010, the Adjudicator ordered VCH to provide access to the Protected Information to HEU.

Petitioner's Position

[17] I will summarize the position of the petitioner as follows:

1. The Adjudicator violated the duty of fairness by failing to consider the evidence and the petitioner's submissions with respect to the Protected Information being its trade secrets.

2. The Adjudicator erred in law in determining the meaning of the term, "supplied in confidence".

3. The Adjudicator violated the duty of fairness by failing to consider the affidavit evidence presented by the petitioner to establish that the Protected Information had been supplied to VCH in confidence.

4. The Adjudicator erred in concluding, in *obiter dicta*, that the petitioner would not suffer harm from the disclosure to the HEU of the Protected Information.

Hospital Employees' Union Position

[18] The HEU's position may be summarized as follows:

1. Regarding trade secrets, the Adjudicator was not required to specifically determine whether some or all of the information consisted of the petitioner's trade secrets. The Adjudicator is not required to recite every piece of evidence and argument which has been made and clearly had regard to the petitioner's evidence.

2. The Adjudicator's interpretation of the term "supplied in confidence" in s. 21(1) of *FIPPA* is subject to review on the standard of reasonableness and is both reasonable and correct. It is the same interpretation which has been adopted in numerous other orders, and which has previously been confirmed by this Court.

3. The Adjudicator had regard to the petitioner's evidence about the confidentiality of the information but found that it had not provided evidence that demonstrated that the information had been "supplied" as that term has been interpreted in the past. The Adjudicator's finding was both reasonable and correct.

4. The determination by the Adjudicator that the petitioner had not established that it would suffer significant harm from the disclosure of

> the information was based on the Adjudicator's specialized expertise, which is entitled to considerable deference. The Adjudicator had regard to the petitioner's evidence as well as previous cases which had discussed the type of evidence which is sufficient to establish harm in this context. The Adjudicator's decision was reasonable and correct. In a judicial review, it is not appropriate for this Court to reweigh the evidence and come to a different conclusion.

Position of the Information and Privacy Commissioner

[19] The OIPC did not take a position in support of or opposing the Adjudicator's decision which is under review. The OIPC assisted the Court by making submissions regarding the appropriate standard of review, how it should be applied in this case and the sufficiency of the reasons given by the Adjudicator.

Analysis

[20] The purpose of *FIPPA* is stated in section 2(1) as follows:

> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> a) giving the public a right of access to records,
>
> b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> c) specifying limited exceptions to the rights of access,
>
> d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> e) providing for an independent review of decisions made under this Act.

[21] Among the limited exceptions to the rights of access are those provided in s. 21(1) of *FIPPA*.

[22] The decision of the Adjudicator relates to the application of s. 21(1) which provides as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information

> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[23] In Order F10-28, the Adjudicator concluded that s. 21(1) does not require VCH to refuse to give access to the Requested Documents and the Protected Information to HEU and ordered VCH to provide both to HEU.

[24] The Adjudicator found that the information constituted commercial and financial information of the petitioner but that it was not "supplied" within the meaning of that word in the phrase "supplied in confidence" in s. 21(1)(b). He found that the terms of the contract were negotiated and not supplied and that no financial statements, fixed costs or other information was provided that could be considered to have been supplied and not negotiated. While agreeing with the petitioner that information in the contract might enable an informed reader to reach conclusions about how it operates, the Adjudicator said that the information that an informed reader could infer must itself be information that had been "supplied" to the public body. The Adjudicator decided that the petitioner did not support its assertions that the information had been supplied in accordance with s. 21(1)(b) with any evidence.

[25] In *obiter* the Adjudicator also decided that the allegations by the petitioner regarding the significant harm that the disclosure of the information would cause

were vague, speculative and lacking in evidentiary support and that the petitioner had failed to establish a reasonable prospect of such harm.

Standard of Review

[26] Applying the approach of Gropper J. in *B.C. Freedom of Information and Privacy Association v. B.C. (Information and Privacy Commissioner)*, 2010 BCSC 1162 ("*Privacy Association*"), the first step in a judicial review of this nature is to determine the proper level of deference to the Adjudicator's decision. As in that case, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 does not apply to the Commissioner and thus the determination of the standard of review falls to be determined on the basis of the common law. Gropper J. refers to *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"), where the Supreme Court of Canada clarified the analytical framework for determining the standard of review and she went on to state at paras. 18 and 19:

> [18] *Dunsmuir* defines the correctness standard as that which is to be used where the reviewing court does not show deference to the decision makers reasoning process. The court undertakes its own analysis of the question. The court will decide whether it agrees with the decision maker's determination or, if not, the court will substitute its own view. The specific circumstances where the correctness standard might apply is where the decision turns on a constitutional question regarding the division of powers, the jurisdiction of the decision maker to decide a particular matter, or where the question of issue is one of general law, important to the legal system as a whole and outside the decision maker's specialized area of expertise (*Dunsmuir* paras. 50 and 58).
>
> [19] Reasonableness is the standard to be used in all other circumstances where the court must defer to the decision maker's decision, in particular where the question is one of fact, discretion or policy or where legal and factual issues cannot be easily separated. …

[27] The decision being reviewed involves an interpretation of s. 21(1) of *FIPPA* by the Adjudicator. The errors alleged by the petitioner are those of mixed fact and law.

[28] I accept the Commissioner's submission that the reasonableness standard of review applies to the decision of the Adjudicator in this case. It does not appear that the petitioner takes issue with the application of that standard. The application of the standard of reasonableness in a review of this nature is supported by decisions in

Dunsmuir; *Jill Schmidt Health Service Inc. v. British Columbia (Information and Privacy Commissioner)* (2001), 33 Admin. L.R. (3d) 27 (S.C.); *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 ("*CPR*"); *British Columbia (Ministry of Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1700; *British Columbia (Premier) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112; and *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131 ("*BCTF*").

[29] In *BCTF*, Garson J. (as she then was) said at para. 77:

> Accordingly even on the questions of statutory interpretation I find that the Commissioner is entitled to deference based on his expertise and his polycentric functions. Considering all of the factors mandated by the functional and pragmatic analysis as set out above and the weight of the judicial authority just quoted, I conclude that the appropriate standard of review is reasonableness.

[30] I am of the view that in this case there is no constitutional or jurisdictional issue or any question of general law that would attract the correctness standard. The Adjudicator had the authority to hear and decide the review and inquiry which resulted in Order F10-28. The section interpreted by him was his "home statute" and his interpretation should be shown deference by this Court.

[31] The Supreme Court of Canada in *Dunsmuir* assists a reviewing Court in applying the standard of reasonableness at para. 47 where it states:

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

[32] It appears that the approach to applying the standard of reasonableness stated by the Supreme Court of Canada in *Law Society v. Ryan*, [2003] 1 S.C.R. 247 at paras. 55 and 56 is still the law:

> 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56).This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[33] The case authorities make it clear that in performing a reasonableness analysis a Court should not apply its preferred view of the evidence or facts. The reviewing court is not to posit alternative interpretations of the evidence; rather it is to determine whether the administrative decision maker's interpretation is unreasonable. (*College of Physicians and Surgeons of British Columbia v. Dr. Q*, [2003] 1 S.C.R. 226.)

[34] I will turn now to consider the implications of the omission by the Adjudicator of any reference to "trade secrets", either as that term is used in s. 21(1)(a) or as it is found in the evidence adduced by the petitioner.

[35] Although the Adjudicator did not refer to "trade secrets" he did find that the Protected Information constituted "commercial and financial information" of the petitioner as provided in s. 21(1)(a)(ii). He also referred to the petitioner's assertion that its service delivery options and performance management provisions were unique. As a result of his findings, the first of the three requirements of s. 21(1), as provided in s. 21(1)(a)(i) and s. 21(1)(a)(ii), was met. He then went on to decide that the second requirement of s. 21(1), as found in s. 21(1)(b), had not been satisfied because the Protected Information had been "negotiated" and not "supplied" within the meaning of that term in s. 21(1)(b). He also concluded, by way of *obiter*, that the

third requirement, found in s. 21(1)(c)(i), of significant harm, had not been established by the petitioner.

[36] Having determined that the information was not "supplied" within the meaning of s. 21(1)(b), does it matter that the Adjudicator did not make any reference to the arguments of the petitioner regarding trade secrets? I think not. Even if it is assumed that some of the Protected Information contained in the agreements amounted to trade secrets, the Adjudicator decided that none of the information was supplied within the meaning of that word in s. 21(1)(b). It is arguable that because trade secrets are singled out by the legislature and not included in the description of information found in s. 21(1)(a)(ii), the term "supplied" might be applied differently in relation to trade secrets than to commercial and financial information. For example, it might be argued that trade secrets are simply not something that are subject to negotiation. However, no arguments were made by the petitioner that trade secrets should be treated any differently than commercial and financial information when applying s. 21(1).

[37] Based on my view of the Protected Information, it is not clear that it was anything other than commercial and financial information. One inference that might be drawn from the reasons of the Adjudicator is that he concluded that the petitioner had not established that the Protected Information included trade secrets. In the end result I am not able to find that the Adjudicator made an error in not referring to trade secrets in the reasons for his decision. In my view, based on his interpretation of the word "supplied", the result would have been the same whether he considered the Protected Information to be trade secrets or commercial and financial information.

[38] That leaves to be determined whether the Adjudicator's decision that the Protected Information was not "supplied" was reasonable.

[39] In deciding whether the Protected Information was supplied the Adjudicator determined that:

> "… as VCHA had the option of agreeing to the bid, in whole, or in part, I find the terms of the contract must be considered to have been "negotiated" not

> "supplied". The contract outlines the services a public body agreed that it will receive and the prices that it agreed to pay using public funds. There are no financial statements, fixed costs, or any other information over which I could conclude there was no negotiation.
>
> Moreover there is no evidence that K-Bro "supplied" the information at issue. The only evidence in support of its submission is one affidavit from K-Bro's President and CEO. While the affidavit attests to the nature of the commercial information in the contract, steps taken to ensure confidentiality and concerns about the harm K-Bro might suffer from the disclosure of the information, the affidavit is silent on the issue of whether K-Bro had supplied the information in accordance with s. 21(1)(b).

[40] In taking this approach the Adjudicator relied on previous decisions of the Commissioner such as Order 01-39 which was upheld by this Court in *CPR*.

[41] In Order 01-39, the adjudicator described the intention of s. 21(1)(b) as follows:

> … to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change, but, fortuitously, was not changed.

[42] He provided examples of what he described as "relatively immutable" information as being overhead or labour costs set out in a collective agreement or the financial statements provided to the public body.

[43] In *Canadian Pacific Railway*, Ross J. preferred the approach of focusing on the "nature of the information and not solely on the question of mechanical delivery" and commented that that was consistent with earlier jurisprudence.

[44] In paras. 39 and 40 of the petitioner's submissions to the Adjudicator it stated:

> 39. However, in K-Bro's submission, all of the Protected Information meets the "supplied" test. None of the information pertaining to K-Bro's informational assets including its service delivery model, pricing and financial information, and other business information, was susceptible to change since K-Bro does not negotiate about this information.
>
> 40. Terms relating to K-Bro's informational assets were incorporated into the Agreement from the Proposal without change. There were no "give and take" negotiations on these issues.

[45] However, I agree with the Adjudicator that there was no evidence provided by the petitioner to support its submission that the Protected Information was supplied within the meaning of that term in s. 21(1)(b). There was no evidence to show that the information was not susceptible of change in the negotiation process such as would be the case with financial statements or fixed costs.

[46] The affidavit of Ms. Linda McCurdy, which I was told was the only evidence presented to the Adjudicator by the petitioner, deals extensively with the concerns of the petitioner regarding the confidentiality of various parts of the Agreement but it does not address whether the Protected Information contained in the Agreement was or was not susceptible to negotiation. From my review of the redacted portions of the Agreement it is not apparent that any of them were not susceptible to change by negotiation. It may be that the petitioner was not prepared to negotiate all or part of what it described as its "service delivery model" or other aspects of the Agreement but there is no evidence to support that view.

[47] Having reviewed the evidence presented to the Adjudicator, I have concluded that the reasons given for his decision that support his conclusion are tenable and his decision is not unreasonable.

[48] The Adjudicator's decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

[49] In view of my conclusion it is not necessary to consider the decision of the Adjudicator, in *obiter*, relating to the third requirement of s. 21(1) regarding the harm that could result from disclosure.

[50] Accordingly, the petition is dismissed with costs to the HEU at Scale B. An interim order is made staying the decision of the Adjudicator until the final disposition of this judicial review.

"Bowden J."