IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.,*** 2004 BCSC 217

Date: 20040218
Docket: L024017
Registry: Vancouver

Between:

Architectural Institute of British Columbia

Petitioner

And

Information and Privacy Commissioner for British Columbia

Respondent

Before: The Honourable Mr. Justice Metzger

Reasons for Judgment

Counsel for the Petitioner:	J.H. Goulden
Counsel for the Respondent:	S.E. Ross
Counsel for the Ministry of the Attorney General:	V.N. Poole
Appearing on his own behalf:	J. Redenbach
Date and Place of Trial/Hearing:	September 18 & 19, 2003 Vancouver, B.C.

[1] This is an application by the Architectural Institute of British Columbia ("AIBC") for a s. 52 judicial review of Order 02-56 made on November 14, 2002, by an adjudicator. The adjudicator was the Commissioner's duly appointed delegate under Part 5 of the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165 (the "***Act***").

[2] Jak Redenbach, a former employee of AIBC, requested certain information from AIBC, a public body as defined under the ***Act***. Some information was produced and some was not, as AIBC relied on the exceptions in ss. 17 and 22 of the ***Act***. The records that were not produced were eventually reviewed by an adjudicator and she ordered the disputed records to be produced, except for certain personal information. AIBC does not want to produce the disputed records at all; hence this application alleging errors in law, and mixed fact and law by the adjudicator.

[3] The disputed records that AIBC does not want to produce are:

a) Records 4 and 5 which set out in detail the Executive Director's August 1999 and December 2001 employment contracts; and

b) Records 7 and 8 which set out the original and current employment contracts of the Director of Professional Services.

[4] AIBC withheld the records pursuant to ss. 17 and 22 of the ***Act*** on their belief that the references to individual salaries, benefits and termination provisions are personal information.

[5] In Order 02-56, the adjudicator held that:

1. AIBC was not authorized by s. 17 to refuse to disclose any information in the disputed records.

2. The information in the disputed records that fell under s. 22(4)(e) was not required to be withheld under other subsections of s. 22.

3. The information in the disputed records that did not fall under s. 22(4)(e) was required to be withheld as follows:

   (a) Section 22(1) - home address information contained in Disputed Records Nos. 4, 5, 7 and 8;

   (b) Section 22(3)(g) – performance review information contained in Disputed Record No. 5.

Filed for the exclusive use of the court was an *in camera* affidavit setting out the four disputed records. The portion of each record to be removed pursuant to Order 02-56 was highlighted.

[6] AIBC submitted that the adjudicator erroneously applied the legislation to the facts and failed to consider the reasonable expectation of harm to the third parties named in the disputed records. AIBC alleged that the adjudicator's order, even with deletions, amounted to an unreasonable invasion of privacy.

ALLEGED ERRORS

Number One:

[7] AIBC alleged that the adjudicator failed to require Mr. Redenbach to meet the s. 57 burden of proof that disclosure of the disputed records could not reasonably be expected to harm the financial or economic interest of AIBC, as set out in the s. 17 exception. AIBC alleged that the adjudicator wrongfully required AIBC to meet the s. 57(1) burden of proof. AIBC submitted that if the disputed records contain any personal information, the burden of proof shifts to the applicant as set out in s. 57(2), whether an exception is claimed under s. 17 or s. 22.

Number Two:

[8] AIBC alleged that the adjudicator failed to require Mr. Redenbach to produce "real" evidence to meet the s. 57 burden of proof that the disclosure of the disputed records was not an unreasonable invasion of third party personal privacy, as set out in the s. 22.

Number Three:

[9] AIBC alleged that the adjudicator failed to appreciate that s. 17(1)(a) to (e) is not an exclusive list of the types of information the disclosure of which could reasonably be expected to result in harm under s. 17(1).

Number Four:

[10] AIBC alleged that the adjudicator failed to apply the s. 17(1) "could reasonably be expected" standard when considering the harm that could result

from disclosure of the disputed records. AIBC submitted that the adjudicator applied a "certain or imminent risk of harm" test. In other words, the adjudicator required more evidence of harm than was required by the ***Act***.

Number Five:

[11] AIBC alleged that the adjudicator failed to assign appropriate weight to the evidence of harm that was adduced pursuant to s. 17(1).

Number Six:

[12] AIBC alleged that the adjudicator failed to continue and consider ss. 22(2) and (3) after she had determined that the information fell under s. 22(4)(e). I note there is no submission by AIBC that the information did not fall under s. 22(4)(e).

THE LEGISLATION

[13] "Personal information" means recorded information about an identifiable individual.

[14] Section 17 is a provision designed to protect from harm the financial interests of a public body. It states *inter alia* at subsection (1):

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body...[*a list follows*].
>
> [emphasis added]

[15] Section 22 is a provision designed to protect from harm the personal privacy of individuals. It states at ss. (1):

> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of third party's personal privacy.
>
> [emphasis added]

[16] Section 22(3) provides:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...[*a list follows*].
>
> [emphasis added]

[17] Section 22(4) provides:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if...[*a list follows*].
>
> [emphasis added]

[18] Section 57 provides:

> 57(1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.
>
> (2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the

information would not be an unreasonable invasion of the third party's personal privacy.

(3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it us up to the third party to prove that the applicant has no right of access to the record or part.

THE STANDARD OF REVIEW

[19] The standard of review is determined by a pragmatic and functional approach to four contextual factors:

(a) the presence or absence of a privative clause or statutory right of appeal;

(b) the expertise of the tribunal relative to that of the reviewing court on the issue in question;

(c) the purposes of the legislation and the provision in particular;

(d) the nature of the question-law, fact, or mixed law and fact (see ***Dr. Q* v. *College of Physicians and Surgeons of British Columbia***, [2003] S.C.J. No. 18).

Privative Clause:

[20] The ***Act*** does not contain a privative clause, and it does not provide for a right of appeal from the Commissioner's decisions. Statutory silence on these matters is neutral and does not imply a high standard of judicial review (see ***Dr. Q***, *supra*, at para. 27).

Expertise:

[21] In order to evaluate its expertise relative to that of the Commissioner, the Court is required to:

(a) characterize the expertise of the Commissioner;

(b) evaluate its own expertise relative to that of the Commissioner;

(c) evaluate the Commissioner's expertise relative to the issue before the court (see ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 at para. 33).

[22] I note that in the discussion of the Quebec legislation in ***Macdonell* v. *Quebec (Commission d'acces a l'information)***, [2002] S.C.J. No. 71, the functions of the Quebec Commissioner are similar to those of the B.C. Commissioner.

[23] The B.C. Commissioner is required to interpret and apply disclosure exceptions and to conduct inquiries. In addition, he may appoint a non-judicial review of access decisions made by public bodies.

[24] These provisions along with the B.C. Commissioner's experience in carrying out his mandate, and given the determination of the Quebec

Commissioner's expertise in ***Macdonell***, *supra*, I am satisfied that the B.C. Commissioner has general expertise in the field of access to information.

[25] The Commissioner regularly makes findings of fact in the context of the ***Act*** and, thus, has a specialized knowledge and degree of institutional expertise that requires a degree of deference from the court.

[26] Thus, I must still determine whether, in spite of the relative expertise of the Commissioner, the other factors in the pragmatic and functional approach weigh against deference on any of the issues, thereby placing it within the relative expertise of the court.

Purpose of the Statute:

[27] Section 2 of the ***Act*** provides *inter alia* that one of the purposes is to make public bodies more accountable by giving the public a right of access to records while sill protecting personal privacy.

[28] This statute is not legislation that seeks to resolve disputes between two parties, such as usually occurs in a court setting. This ***Act*** requires the Commissioner to protect the privacy of individuals, while at the same time giving the public access to information by weighing opposing interests, determining facts, and defining circumstances.

[29] In ***Dr. Q***, *supra*, at para. 30:

> As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies: see Pushpanathan, supra, at para. 36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.

[30] I am satisfied that this ***Act*** confers polycentric functions on the Commissioner and, therefore, greater deference is required from the reviewing court (see ***Dr. Q***, *supra*, at para. 31).

Nature of the Issues:

[31] I have examined the six issues before me. None of them are issues of pure fact or of pure law. None of them are of general importance or of great precedential value. They are issues of mixed fact and law.

The Effect of the Four Factors:

[32] In the issues before me, the legislative purpose assigns to the Commissioner the function of weighing the competing interests of public body confidentiality of records, public access to information, and protection of third party privacy. This purpose suggests deference. In addition, the issues before the court fall within the relative expertise of the Commissioner or his delegate.

[33] Applying the pragmatic and functional approach to the issues, the four factors indicate the standard of review should be one of reasonableness simpliciter (see ***Dr. Q***, *supra*, at paras. 36-39).

ALLEGED ERROR NUMBER ONE

[34] The adjudicator inquired into AIBC's decision to refuse Jak Redenbach access to all or part of a record under the s. 17 disclosure exception, which is designed to protect from harm the financial interests of public bodies. Thus, AIBC had the burden to prove under s. 57(1) that Jak Redenbach had no right of access to all or part of the record.

[35] AIBC has refused Jak Redenbach access to third party information under the s. 22 disclosures exception, which is designed to protect the personal privacy of individuals, so s. 57(2) applies. Thus Jak Redenbach had the burden of proving that the information would not be an unreasonable invasion of the third party's personal privacy as set out in s. 22.

[36] The language of s. 57(2) refers only to s. 22; otherwise, whenever a record contained personal information, Jak Redenbach would be required to prove the other disclosure exceptions relied upon did not apply. This would be impossible as he would have no knowledge of what those disclosure exceptions were.

[37] Section 57(3) has no application here as the inquiry by the adjudicator was not into "...a decision to give an applicant access to all or part of a record containing information that related to a third party".

[38] I am satisfied that the adjudicator made no error in assigning the burden of proof to AIBC to establish that it was authorized under s. 17 to refuse to disclose all or part of the disputed records. There is no burden of proof on Jak Redenbach under the s. 17 exception.

ALLEGED ERROR NUMBER TWO

[39] Jak Redenbach had no access to the disputed records, as had AIBC and the adjudicator. Thus, the fairness of any inquiry depended on the adjudicator's assessment of the material before her, which included the *in camera* representations of AIBC.

[40] The adjudicator reviewed the disputed records and concluded that the personal information in the disputed records fell under s. 22(4)(e) and, therefore, was not an unreasonable invasion of the third party's personal privacy. She excluded the home address information in all the disputed records and the performance review information in Disputed Record No. 5.

[41] On a reading of the whole of the decision, it is clear that the adjudicator applied the statutory direction in s. 57(2). She did not shift the burden to AIBC. She relied on what she had before her, viz, the disputed records and AIBC's submissions.

[42] I am satisfied that the adjudicator made no error.

ALLEGED ERROR NUMBER THREE

[43] The respondents do not dispute that s. 17(1)(a) to (e) is not an exclusive list of the information that, if disclosed, could reasonably be expected to result in harm under s. 17(1).

[44] At para. 40 of her decision, the adjudicator noted that AIBC relied on s. 17(1)(e) to withhold the disputed records. At paras. 50-56, the adjudicator stated that she was not convinced that the information in the disputed records was about negotiations. She found to be speculation AIBC's submissions that disclosure would harm them in future negotiations or give future employees an unfair advantage over AIBC. This was a reasonable determination on the evidence.

[45] I can find no error in her conclusion that s. 17(1)(e) does not apply to the disputed records.

ALLEGED ERROR NUMBER FOUR

[46] I am satisfied that para. 46 of the adjudicator's decision refers to paras. 41-45 and not to paras. 51-55.

[47] In paras. 41 and 42 of Order 02-56, it is clear from the adjudicator's reference to Order 02-50, and its consideration of s. 17(1) and paras. 124-137 therein, that she had in her mind throughout Order 02-56 the "could reasonably be expected" harm test.

[48] It is clear from the adjudicator's reference in those paragraphs to Order 02-50, that she understood the "could reasonably be expected" harm test and applied it throughout her decision in Order 02-56. Her discussion of the standard of proof in para. 41 shows that she did not use the "certain or imminent risk of harm" test.

[49] Her discussion in para. 54 of the risk of harm indicates that she applied appropriately the test of "could reasonably be expected". I can find no error by the adjudicator.

ALLEGED ERROR NUMBER FIVE

[50] AIBC was obligated to adduce evidence specific to the circumstances that would indicate their claim of harm was not purely speculative (see ***Lavigne* v. *Canada (Office of the Commissioner of Official Languages)***, [2002] S.C.J. No. 55). They did not do so.

[51] The finding by the adjudicator that s. 17(1)(e) did not apply to the disputed records was appropriate given the evidence and submissions before her. I found no error by the adjudicator.

ALLEGED ERROR NUMBER SIX

[52] AIBC does not dispute that the information in the disputed records fell under s. 22(4)(e). AIBC submitted that the adjudicator was required after that determination to continue on and consider whether s. 22(2) and (3) applied to that information.

[53] In Adjudication Order No. 2 (June 19, 1997), Mr. Justice Bauman sitting as an adjudicator under s. 60 of the ***Act*** determined s. 22(4) to be a conclusive deeming provision that takes precedence over s. 22(1)(2)(3). He stated his view at p. 7 and I quote:

> (iv) Section 22(4) importantly acts as an exception to all of the foregoing [i.e., s. 22(1), (2), and (3)] by conclusively deeming the disclosure of certain personal information not to be an unreasonable invasion of a third party's personal privacy. In the context of this case that information includes the third party's "position, functions or remuneration as an officer, employee or member of a public body...".

[54] Thus, I am satisfied that the adjudicator has made no error in her decision.

CONCLUSION

[55] I am satisfied that the adjudicator did not err in granting Jak Redenbach access to the disputed records as ordered. Application to set aside Order 02-56 is dismissed.

[56] The Commissioner does not seek costs.

"R.W. Metzger, J."
The Honourable Mr. Justice R.W. Metzger