Citation:	Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al 2001 BCSC 101	Date: Docket: Registry:	20010116 L002125 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JILL SCHMIDT HEALTH SERVICES INC.

PETITIONER

AND:

BRITISH COLUMBIA (INFORMATION AND PRIVACY COMMISSIONER), BRITISH COLUMBIA (MINISTRY OF ATTORNEY GENERAL), AND BRITISH COLUMBIA NURSES' UNION

RESPONDENTS

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE SATANOVE

Counsel for the Petitioner:	P.M. Pulver
Counsel for the Respondent British Columbia (Information and Privacy Commissioner):	S. E. Ross
Counsel for the Respondent British Columbia (Ministry of Attorney General):	J.M. Loenen
Counsel for the Respondent British Columbia Nurses' Union:	C. Buchanan
Dates and Place of Hearing:	November 7 and 8, 2000 Vancouver, BC

[1] The Information & Privacy Commissioner for the Province of British Columbia (the "Commissioner") has determined that the Ministry of Attorney General (the "Ministry") is not required by section 21 of the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1966 c. 165 (the "***Act***") to refuse disclosure to the British Columbia Nurses' Union ("BCNU") of certain information (the "Disputed Information") contained in service contracts between the Petitioner and the Ministry.

[2] The Petitioner, who purports to be the author of the Disputed Information, applies to the Court for an order setting aside the decision of the Commissioner and remitting the matter to the Commissioner for re-hearing.

Background

[3] The Ministry contracts out the health care services in correction facilities to third parties, including the Petitioner, which provides health services to three correctional facilities.

[4] BCNU is the certified bargaining agent for the Petitioner at these three facilities. As a trade union, it reflects on health issues and spending. In order to do so in an informed manner, it desires to know the allocation of government spending for patient care and other services in health care facilities, and the contracting out of health care services at government facilities.

[5] BCNU requested copies of the service contracts between the Petitioner and the Ministry pursuant to the ***Act***. It was provided with copies of the contracts but the Disputed Information had been redacted by the Ministry.

[6] The Disputed Information is set out in a series of schedules to the service contract. The schedules itemize such things as:

(a) base hourly rates, benefits and totals thereof for certain periods;

(b) charges for occupational first aid allowance, academic bonus, shift differential and safety allowance;

(c) management fees;

(d) general and administrative fees, including legal, accounting, bank charges, travel costs, telephone and pager fees, bookkeeping, advertising, business license, payroll, conference, education, WCB, insurance, office supplies, new staff orientation, educational, occupational first aid course, overtime, contingency fees and mileage costs;

(e) monthly and annual amounts payable to the contractor; and

(f) total amounts for the contracts.

[7] The Ministry declined to disclose to the BCNU the Disputed Information under section 21 of the ***Act*** which states:

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 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.

[8] BCNU sought a review of the Ministry's decision by the Commissioner under section 52 of the ***Act***.

[9] The Commissioner held an inquiry. He found that the Disputed Information was commercial or financial information of the Petitioner, was confidential and could reasonably be expected to harm or interfere significantly with the competitive or negotiating position of the Petitioner. However, the Commissioner found that the Disputed Information was not "supplied" by the Petitioner as it was the result of a give and take of negotiations between the parties. Therefore the second aspect of the test for exclusion under section 21(1) of the ***Act*** was not satisfied and the Disputed Information had to be disclosed.

The Commissioner's Order

[10] The Commissioner devoted four pages of his written decision to explaining his finding that the Disputed Information had not been "supplied" by the Petitioner.

[11] He firstly noted that information negotiated in an agreement between two parties did not ordinarily qualify as information supplied to a public body. He cited as authority for that proposition three Orders in British Columbia, and three Orders in Ontario, as well as some Federal Court decisions.

[12] He referred to the Ministry's assertion that the Disputed Information was "supplied" because it was derived from the Petitioner and was incorporated unchanged into the contracts. He then described the competitive request for proposals process used by the Ministry to select the successful contractors:

> Under the request for proposals process used by the Ministry to select a successful proponent and arrive at these contracts, the Ministry provided prospective contractors with information. That information included the total number of health care staff hours required under the contract. Proponents then

> submitted their contract proposals, the Ministry assigned points for various components of the proposals and then selected a successful proponent. The parties then entered into a contract. The request for proposals process was undoubtedly competitive, although the Ministry was not required to select the proponent which made the lowest proposal. The evidence also indicates that, under the process, the Ministry could ask potential contractors to alter and resubmit contract proposal information and that the Ministry actually did this for at least one of the contracts under consideration in this inquiry.

[13] The Ministry and the Petitioner submitted to the Commissioner that the proposal process indicated that the contract terms were supplied by the Petitioner and were not negotiated between the Ministry and the Petitioner. The Commissioner did not accept this submission because he found it was not supported by the evidence.

[14] The affidavit evidence before the Commissioner referred to contract negotiations between the Petitioner and the Ministry. The affidavit of Jill Schmidt contained this bald assertion:

4. ...I supplied that Information during contract negotiations. Further that Information that I supplied to the Ministry appears unchanged in those contracts and amendments thereto.

[15] Similar statements were made in the affidavits of Colin Richardson and Bob Riches. The affidavit of Ron Williams said this on the subject:

3. During negotiations with respect to [sic] Agreement, the goal of the Public Body was to ensure that an appropriate level of service was provided, and that the cost of providing such services was kept at a reasonable level. In the negotiations with the Third Party at the Public Body's Regional Office I had requested that the Third Party reduce the amounts originally supplied by the Third Party. The Third Party then returned with other amounts and the Ministry agreed to pay those amounts. The amounts supplied by the Third Party were agreed to by the Ministry and were set out in the Agreement.

4. The Information at issue in this inquiry [*sic*] of financial information supplied by Jill Schmidt, President of the Third Party, to the Public Body during negotiations. The Information supplied by the Third Party to the Public Body appears unchanged in the Agreement.

[16] The Commissioner was not provided with copies of the Ministry's Request for Proposals or any of the Petitioner's proposals. He had no other evidence before him which distinguished or explained which contract terms were actually negotiated and which consisted of merely incorporating information from the Petitioner.

[17] At page 9 of his decision, the Commissioner concluded:

> I am unable to conclude based on such evidence that the Disputed Information in this inquiry was "supplied" to the Ministry within the meaning of

> s. 21. Statements in the affidavits that most of the information which constitutes the essential payment terms of these contracts was so supplied and remained unchanged in the contracts, do not discharge the Ministry's burden of proof, because they do not answer the question of whether the information was the subject or product of negotiations, which was the context for the relationship between the Ministry and the contractors. The evidence makes it clear that the request for proposal process allowed for, and resulted in, give and take between the Ministry and successful proponents. The evidence also clearly establishes the parties engaged in contract negotiations. The fact that disputed information may have been delivered to the Ministry in a document prepared by a contractor and then incorporated in the same form in a contract does not - in light of the evidence of the parties' negotiation of contract terms - establish that the information was supplied and *not* the subject or product of negotiations. The nature of the disputed information here suggests that it is precisely the kind of information which would be negotiated and that it is not (directly or by inference) discrete or immutable third party business information. In these circumstances, I find that the Ministry has not discharged its burden of proof in relation to the supply element in s. 21(1)(b) of the *Act*.

Issues

[18] The Petitioner takes issue with the above conclusion for two reasons:

(a) The Commissioner suggested that the Petitioner delivered information which was prone to change and did change in some way, simply because it was delivered in the midst of a larger negotiation process. This was in contradiction to the affidavit evidence, and required information delivered during a negotiation to be discrete and immutable in order to be "supplied", which is a significant departure from the intention of the legislators and the case law; and

(b) Regardless of whether the contracts were negotiated or not, an accurate inference could have been made by the Commissioner of underlying, confidential information supplied by the Petitioner.

[19] The Ministry takes issue with the Commissioner's conclusion because it alleges that he equated a negotiated contract with one where all the terms had been created jointly, which was not what happened here.

[20] Both the Petitioner and the Ministry characterize the Commissioner's alleged errors as errors in law, or alternatively, errors of mixed fact and law. BCNU and the Commissioner characterize the allegations as pertaining to errors in fact, or alternatively, errors of mixed fact and law.

[21] The significance of whether the Commissioner's error could be characterized as one of law, fact, or mixed law and fact is that this will dictate the standard of review to be applied. Errors in law are usually at the end of the spectrum where correctness is the standard. Errors in fact are usually at the opposite end of the spectrum where the standard is one of patent unreasonableness. Errors of mixed fact and law lie somewhere in between, perhaps subject to a standard of *reasonableness simpliciter*.

[22] Therefore the issues for me to decide are:

1. what is the standard of review to be applied by this Court; and

2. did the Commissioner err in his finding that the Petitioner had not supplied the Disputed Information within the meaning of section 21(1)(b) of the ***Act***?

Standard of Review

[23] Bastarache, J. in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)*** (1998), 160 D.L.R. (4th) 193 (S.C.C.) listed four factors to be taken into account when determining whether and to what extent the legislature intended the court to defer to the decision under review. These four factors were followed and applied by Donald, J.A. in ***Aquasource Ltd. v. British Columbia (Information and Privacy Commission)***, [1998] B.C.J. 1927 (B.C.C.A) in deciding the appropriate standard of review for administrative tribunals:

(1) the existence of a privative clause;

(2) the expertise of the tribunal;

(3) the purpose of the Act, and the provision in particular; and

(4) the nature of the problem: whether of law or fact.

[24] The ***Act*** does not contain any privative or finality clause, nor does it contain any right of statutory appeal. The absence of these clauses neither compels deference, nor a more searching standard of review.

[25] In weighing the factor of expertise, the court must characterize the expertise of the tribunal in question, consider its own expertise relative to that of the tribunal, and identify the nature of the specific issue before the administrative decision maker relative to this expertise (***Pushpanathan, supra***, p. 211). In this regard there is overlap with the 4th factor.

[26] In my view, the question before the Commissioner was one of mixed fact and law. He was required to interpret section 21(1)(b) of the ***Act*** and he was required to apply this section to the facts as he found them on the evidence before him. Neither of these functions required any expertise beyond that of this Court in its every day role in interpreting statutes and reading affidavits. Therefore, this factor leads to less deference by the court.

[27] The third factor to consider is the purpose of the ***Act*** as a whole. As found by Donald, J.A. in ***Aquasource (supra)***, the Commissioner's role in these

types of inquiries is to resolve disputes between a party who is seeking information and a party who is withholding information. This is characterized as a bi-polar rather than polycentric form of conflict resolution, and therefore less deference by the Court is required.

[28] The final factor is to consider the nature of the problem, that is, whether it is one of law or fact.

[29] In ***Canada (Director of Investigation and Research) v. Southam Inc.*** (1997), 144 D.L.R. (4th) 1 (S.C.C.), Iacobucci, J. stated:

> ...Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.
>
> ...
>
> ...Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[30] I agree with the submissions of counsel for the Commissioner that the question in the case at bar turned on the Commissioner's assessment of the quality of evidence adduced by the Ministry and the Petitioner on the "supply" issue, and on the Commissioner's application of section 21(2)(b) to this case specific evidence. The Order does not have much precedential value and is best characterized as a question about whether the facts satisfy the legal tests.

[31] Taking all the above factors into account and considering the relative weight of each, I am of the opinion that the appropriate standard of review is *reasonableness simpliciter*.

Reviewable Error

[32] The essence of the Petitioner's complaint is that the Commissioner misinterpreted and misapplied the exceptions to the general proposition that negotiated information in an agreement cannot have been supplied in the context of section 21(1)(b). The exceptions are where the information remains relatively unchanged, or where an accurate inference can be made of underlying, supplied confidential information.

[33] With respect to this latter exception, it was the Commissioner himself who raised it:

> ...(Consistent with these decisions, I have also acknowledged that the "supply" element may be met if

> an accurate inference can be made, from a negotiated agreement, of underlying, supplied confidential information that qualifies under s. 21(1)(a). That argument was not made here.)...

[34] This exception applies to information which by itself may not meet the test for exemption, but because of its close connection to information which is exempted, it should also be exempted. This exception has no application to the Disputed Information in this case.

[35] Turning to the first exception of "relatively unchanged information", it is clear from the Commissioner's decision that he did consider this exception. Firstly, he referred to Order 220-1998 of his predecessor where this exception was applied. Secondly, he analyzed the evidence with a view to determining whether the Disputed Information had been changed or not through the negotiation process. He did not accept the bald statements in the affidavits that the Disputed Information had not changed because those statements were inconsistent, or at least ambiguous, in light of other statements that the contracts had been negotiated. Earlier in his decision he chastised the Ministry for including in its affidavits assertions which were not terribly helpful when unaccompanied by evidence that demonstrated or supported the allegations.

[36] The Petitioner submits that the Commissioner replaced the exception of "relatively unchanged information" with "discrete or immutable third party business information". In my view, the Commissioner's reference to discrete or immutable information must be understood in context. He was explaining that the burden of proof had not been met by the Ministry to show that the Disputed Information was not the product of negotiations, and not original or propriety information that remained unchanged. My reading of this passage is that in the absence of proof, not assertion, the Commissioner was not prepared to draw the inference that the Disputed Information remained unchanged during negotiations. If it had been discrete or immutable information then the only reasonable inference to draw would have been that the Disputed Information had not been changed. As the Disputed Information was not of a discrete or immutable type of information, then it was an equally reasonable inference to draw that the Disputed Information had changed and that the assertion in the affidavits referred to the literal supplying of information by physically delivering the document on which the information was written.

[37] The Commissioner's decision is lengthy and the analysis at times cumbersome, but in my view it does not fall into the realm of unreasonableness. His *ratio decidendi* for finding section 21(1)(b) had not been met was the insufficiency of the evidence. It would have been simple for the Ministry and the Petitioner to have supported the assertions in the affidavits with some documentation of the exchange of communications between the parties during the contract negotiations.

[38] I am inclined to agree with the Commissioner that the Ministry failed to discharge its onus to establish that the criteria in section 21(1) have been met. Therefore the Disputed Information is not exempt from disclosure and should be disclosed forthwith to BCNU.

[39] The petition is dismissed.

"D.A. Satanove, J."
The Honourable Madam Justice D.A. Satanove