IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner),* 2015 BCSC 1471

Date: 20150820
Docket: S136213
Registry: Vancouver

In The Supreme Court of British Columbia In The Matter of The *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241

Between:

Construction and Specialized Workers Union, Local 1611 International Brotherhood of Electrical Workers, Local 213 Operative Plasterers and Cement Masons International Association, Local 919 and Bricklayers and Allied Craftworkers, Local No. 2 (B.C.)

Petitioners

And

Office of the Information and Privacy Commissioner for British Columbia, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Financial Institution Commission, Independent Contractors and Business Association of British Columbia, Trustees of the Sheet Metal Workers' (Local 280) Pension Plan, Trustees of the Pile Drivers, Divers, Bridge, Dock & Wharf Builders' Pension Plan, Trustees of the Operating Engineers' Pension Plan, Trustees of the Cement Masons' Pension Plan (Local 919), Trustees of the BC Labourers' Pension Plan, Trustees of the Local 213 Electrical Workers' Pension Plan, and Trustees of the Plumbers Local 170 Pension Plan, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local 97 Pension Plan, Sheet Metal Workers' International Association, Local 280 and United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 170

Respondents

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Petitioners:	D. Thompson
Counsel for Financial Institutions Commission:	E.W. Hughes J. Blair, Articled Student
Counsel for Independent Contractors and Businesses Association:	R.W. Grant J. Thackeray
Counsel for Information and Privacy Commissioner For British Columbia:	C. Boies Parker
Counsel for Sheet Metal Workers (Local 280) Pension Plan, Plumbers Local 170 Pension Plan, Pile Derivers, Diver, Bridge, Dock & Wharf Builder's Pension Plan, Operating Engineers' Pension Plan, Local 213 Electrical Workers' Pension Plan, Cement Masons' Pension Plan (Local 919), and B.C. Labourers' Pension Plan:	M. Vesely
Counsel for United Association Of Journeymen And Apprentices Of The Plumbing And Pipefitting Industry Of The United States And Canada, Local 170:	D.M. Aaron T. Arsenault
Place and Dates of Trial/Hearing:	Vancouver, B.C. January 15-16, February 4-5 June 22-24, 2015
Place and Date of Judgment:	Vancouver, B.C. August 20, 2015

I. INTRODUCTION

[1] The petitioners, Construction and Specialized Workers Union, Local 1611 ("Local 1611"), International Brotherhood of Electrical Workers, Local 213 ("Local 213"), Operative Plasterers and Cement Masons International Association, Local 919 ("Local 919") and Bricklayers and Allied Craftworkers, Local No. 2 (B.C.) ("Local 2"), are trade unions in British Columbia that represent their members in a number of construction trades.

[2] Each union sponsors negotiated cost, defined benefit pension plans. Local 1611 sponsors the B.C. Labours' Pension Plan, Local 213 sponsors the Electrical Workers' Pension Plan, Local 919 sponsors the Cement Masons' Pension Plan, and Local 2 sponsors both the Bricklayers and Masons Pension Plan as well as the Ceramic Tile Workers Pension Plan. These pension plans are registered and regulated by the Superintendent of Pensions, which is part of the Financial Institutions Commission ("FICOM").

[3] The respondent, Independent Contractors and Business Association of British Columbia ("ICBA"), is an association of non-union employers, which does not have pension plans but instead has a number of retirement savings options it makes available to its members and their employees.

[4] This petition has its basis in three related decisions made pursuant to the *Freedom and Information* and *Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"). The decisions were made in response to freedom of information ("FOI") requests submitted to FICOM by ICBA. The first decision at issue is FICOM's unwritten decision not to give notice to any of the sponsoring unions. The second is the Office of the Information and Privacy Commissioner of British Columbia ("OIPC")'s May 4, 2012 decision to give notice to four sponsoring unions in relation to an upcoming OIPC review process (the "Standing Decision"), but not to give notice to nine others, including the petitioners. The second decision at issue is OIPC's January 28, 2013 decision to release certain information concerning the

pension plans, including those sponsored by the petitioners, to ICBA following that OIPC review process (the "Release Decision").

[5] The United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 ("Local 170") is another construction trade union. It sponsors the Plumbers Local 170 Pension Plan. It, unlike the petitioners, was granted notice pursuant to the Standing Decision and subsequently made submissions during the OIPC review process that culminated in the Release Decision. It was granted standing to make submissions in the within proceeding.

[6] OIPC and FICOM also made submissions on the standard of review in this matter.

II. NATURE OF THE PETITION

[7] The scope of this judicial review is limited to a consideration of the notice that must be given by FICOM and OIPC to third parties pursuant to ss. 23 and 54(b) of *FIPPA*. If the petitioners are unsuccessful, this decision will be followed in later separate proceedings by a substantive challenge on judicial review to the Release Decision.

[8] In particular, the petitioners seek an order setting aside the Release Decision on the basis that notice should have been given to each sponsoring union of those pension plans captured by ICBA's FOI requests, FOI Request No. 2010-29 and 2011-14.

[9] Should the petition be allowed, the petitioners also seek an order to direct the matter back to FICOM with directions to give notice to the petitioners pursuant to s. 23 of *FIPPA* of their status as third parties under the two FOI requests.

[10] The trustees of the seven pension plans named as respondents support the position of the petitioners.

[11] ICBA asks that the petition be dismissed on the grounds that the Release Decision was reasonable. Should the petition be allowed, ICBA argues that the matter should be remitted back to OIPC only with respect to Local 919, because they are the only union which has filed an affidavit in the proceedings.

III. STATUTORY SCHEME

[12] *FIPPA* governs the public's right to access records that are in the control of a public body. FOI requests may be made by members of the public pursuant to s. 5 of *FIPPA*. Upon making a FOI request, the requesting party has a right to the information if it is a record subject to the *FIPPA* unless the public body determines that the record falls within one of the discretionary and mandatory exceptions set out in ss. 12 - 22 of *FIPPA.* Of relevance to this case, ss. 21 - 22 are mandatory exceptions aimed at protecting harm to third party business interests and personal privacy respectively.

[13] The public body's third party notice obligation in relation to the ss. 21 - 22 exceptions is set out in s. 23:

> 23 (1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).
>
> (2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

[14] Upon receipt of s. 23 third party notice, the third party may consent to the release of the information or may make representations to the public body as to why the information should not be disclosed. Parties who do not receive s. 23 third party notice may bring a complaint to OIPC pursuant to s. 42(1)(a) of *FIPPA* with a request for an investigation or audit to ensure that the public body is in compliance with its obligations.

[15] Once the public body has made its decision, s. 52 of *FIPPA* provides that either the FOI applicant or recipients of s. 23 third party notice may ask the commissioner, in practice OIPC, to review the public body's decision.

[16] OIPC's third party notice obligations upon receipt of a request for review are set out in s. 54 of *FIPPA*:

> 54 On receiving a request for a review, the commissioner must give a copy to
>
> (a) the head of the public body concerned, and
>
> (b) any other person that the commissioner considers appropriate.

[17] *FIPPA* sets out a number of dispute resolution tools including OIPC authorized mediation pursuant to s. 55 and an inquiry by OIPC pursuant to s. 56. Significantly, s. 56(3) sets out that in cases where an inquiry is conducted:

> (3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

[18] OIPC explains that by virtue of s. 56(3), the decision to give notice pursuant to s. 54(b) effectively determines who, in addition to the review applicant and the public body, may make submissions at the inquiry.

[19] At the completion of an inquiry, OIPC must make an order pursuant to s. 58. At that point, the order is final unless challenged by judicial review, in which case it is stayed until the review is completed.

IV. BACKGROUND FACTS

[20] On November 9, 2010, ICBA sent a FOI request to FICOM for disclosure of pension plan filings for 16 different pension plans. On April 21, 2011, ICBA narrowed its request to only include the following data sets from the pension filings:

(1) the number of members in the past year;

(2) the number of members in the current pension year;

(3) the average age of present employees;

(4) the average annual hours worked;

(5) the current pension plan contribution (dollar figure);

(6) the average annual pension paid;

(7) the average accrued monthly pension for the present employees;

(8) the surplus/unfunded liability from the previous valuation report; and

(9) the surplus/unfunded liability from the current valuation report.

[21] There is no dispute that FICOM is a public body as set out in Schedule 1 of *FIPPA* and that the information requested is subject to *FIPPA*. ICBA had made similar requests for the same information in the past, and in those instances, FICOM had provided it to ICBA without providing s. 23 notices to either the pension plans or their sponsoring unions.

[22] On June 24, 2011, FICOM released all the data sets related to two consenting pension plans, but withheld the four data sets, numbered above as (6)-(9), for the other 14 pension plans. It did so pursuant to s. 21 of *FIPPA*.

[23] On July 12, 2011, counsel for ICBA wrote to OIPC for a review of FICOM's decision. A s. 55 mediation session was convened with ICBA and comments were later invited from the pension plans.

[24] On January 18, 2012, FICOM released the information it had earlier withheld. In its letter notifying the pension plans of this decision, FICOM stated that it had decided to release the information on the basis that it did not believe that the third part of the s. 21 test, harm to third party interest, could be met. In the Release Decision at para. 47, the adjudicator summarized that FICOM decided to release the information on the basis that the passage of time would have, in its view, reduced any threat posed by disclosure.

[25] On February 13, 2012, counsel for 12 of the pension plans, joined by counsel for a 13th plan and its sponsoring union, International Association of Bridge,

Structural, Ornamental and Reinforcing Ironworkers, Local 97 ("Local 97"), sought an OIPC review of FICOM's decision. The three other pension plans did not seek a review.

[26] On receipt of the request, OIPC opened its file on the matter. OIPC then gave s. 54 written notices to the trustees of the thirteen pension plans and to ICBA, but did not give notice to any of the sponsoring unions.

[27] Shortly thereafter and without receiving s. 54, or s. 23, notices, Local 170 and then Local 97 wrote to OIPC seeking standing. They were later joined by Sheet Metal Workers' International Association, Local 280 ("Local 280") and Pile Drivers, Divers, Bridge, Dock & Wharf Builders, Local 2404 ("Local 2404"). The unions' request for standing were supported by the pension plans, unopposed by FICOM, but challenged by ICBA.

[28] OIPC adjourned its review decision until the issue of standing was addressed. The parties were given until April 27, 2012 to make written submissions on the issue.

[29] On May 4, 2012, the OIPC adjudicator, Jay Fedorak (the "Adjudicator") issued the Standing Decision. The Adjudicator wrote:

> This letter concerns the requests for standing in this inquiry of the following trade unions: Local 170 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97; the Sheet Metal Workers International Association, Local No. 280; and the Pile Drivers, Bridge, Dock and Wharf Builders Local Union 2404 (collectively referred to as "the unions"). I note that the public body and the third party trustees of the pension plans ("trustees") consent to granting standing to the unions, but the applicant objects. The applicant objects on the basis that the unions do not have sufficient interest in the outcome of the inquiry, their case has no merit, and that there has been an inordinate delay in their asserting their rights, and this delay has prejudiced the interests of the applicant.
>
> Counsel for the trustees submits that the trustees and the unions have distinct interests in protecting the information from disclosure and the trustees are not in the best position to advance the interests of the unions. She also submits that the unions did not become aware of the applicant's request until

> the trustees contacted them to obtain assistance in explaining how disclosure of the information at issue could harm the unions that sponsor the Plans.
>
> The inquiry will be determining the application of s. 21(1) of FIPPA. One of the provisions at issue is whether s. 21(1)(c)(iii) applies, that is whether disclosure would result in undue financial loss or gain to any person or organization. The trustees suggest that disclosure could cause undue financial loss for the unions.
>
> Without commenting on the merits of the submissions of the respective parties on this issue, I find that the question as to whether disclosure of the information at issue would result in financial loss to the unions is at least arguable. I also agree that the unions themselves are in the best position to argue this point. The applicant has not convinced me that the modest delay required to facilitate the participation of the unions would prejudice the applicant's interests. I find that, on balance, permitting the participation of the unions will best serve the interests of administrative fairness.
>
> The Registrar will issue s. 54 letters inviting the participation of the unions and will contact all parties to communicate the new submission dates.

[30] Pursuant to s. 54 of *FIPPA*, notifications were then provided to the four unions who had provided submissions regarding the Standing Decision: Local 170, Local 97, Local 280 and Local 2404 (the "Notified Unions"). The substantive submissions of all four Notified Unions, opposing the disclosure, were then admissible as part of the review decision. FICOM, the pensions and ICBA also provided written submissions. None of the other sponsoring unions, including the petitioners, received notification.

[31] On January 28, 2013, the Adjudicator, who had since become the OIPC Assistant Commissioner, issued the Release Decision. The merits of his decision are not before me; however, the following excerpts are relevant to the arguments advanced by the parties at bar:

> [1] This case involves a decision of the Financial Institutions Commission ("FICOM") in response to a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The Independent Contractors and Business Association ("ICBA") requested copies of pension plan filings for 16 pension plans that trade unions had sponsored. FICOM withheld some of the information under s. 21 of FIPPA, on the grounds that disclosure would harm the business interests of the pension plans. The ICBA requested a review of this decision from the Office of the Information and Privacy Commissioner ("OIPC").

> [2] FICOM subsequently, changed its decision to apply s. 21 of FIPPA and gave the trustees of the 16 pension plans formal notice under s. 23 of FIPPA that it would release the information in full. Trustees of 13 of the 16 pension plans ("Trustees'') objected to the disclosure of the information about their pension plans and requested that the OIPC review the decision of FICOM to release the information. When the matter proceeded to inquiry, the 13 unions, whose pension plan information is at issue ("Unions"), requested standing at the inquiry. The OIPC approved their request for standing.
>
> …
>
> [58] In summary, while I accept that there may be some circumstances in which information about a pension plan may be appropriately withheld under s. 21(1), the arguments and evidence that the Trustees and Unions have provided in this case to not meet the requisite standard for establishing that disclosure of this information could be reasonably expected to cause significant harm to their competitive position; interfere significantly with their negotiating position; or cause them undue financial loss. Therefore, I find that s. 21(1)(c)(i) and (iii) do not apply to the information.
>
> Conclusion
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> [59] I find that s. 21(1) of FIPPA does not require FICOM to refuse to give the ICBA access to the information.

[32] The thirteen pension plans, Local 170, Local 97 and Local 280 then filed judicial reviews of the Release Decision, all of which are to be heard together pending the outcome of the judicial review proceeding at bar.

[33] In early 2013, ICBA sent a new FOI request to FICOM requesting the same information about the pensions for a subsequent year (the "Subsequent Request"). On or about July 19, 2013, FICOM sent s. 23 notices to all the sponsoring unions. This was the first time that the petitioners had been invited, by either FICOM or OIPC, to make submissions regarding the release of pension plan information. The petitioners in this application applied to become respondents in the ongoing judicial review proceedings, but are not in a position in that review to raise their concerns regarding the failure to grant them standing. FICOM ultimately refused the Subsequent Request.

V. ISSUE BEFORE THIS COURT

[34] The petitioners argue that:

a) FICOM erred in law, exceeded its jurisdiction and breached the rules of natural justice by not providing third party notice pursuant to s. 23 of *FIPPA*, which would have enabled the petitioners to provide submissions on why disclosure of the records sought by ICBA would be harmful to the petitioners, and

b) OIPC erred in law, exceeded its jurisdiction and breached the rules of natural justice by not providing notice pursuant to s. 54(b) of *FIPPA* to the petitioners in order that they could participate in the inquiry held by OIPC.

[35] Local 170 agrees with this submission of the petitioners and advances additional submissions in relation to the standard of review.

[36] ICBA seeks dismissal of this judicial review arguing that no further unions need be given notice, that it is likely that each sponsoring union had notice in any event, and that the views of the Notified Unions would have been sufficient to advance the perspectives and arguments of all the unions. ICBA takes the position that reasonableness is the standard of review that is to be applied and that the Adjudicator's discretionary decision not to issue notice falls within the range of acceptable decisions.

[37] FICOM seeks dismissal of this judicial review as against it, arguing that its decision is not properly the subject of this review.

VI. PRELIMINARY ISSUES

a) OIPC's Standing to Make Submissions

[38] OIPC sought standing to make submissions on the statutory interpretation and standard of review issues in these proceedings. It submits that a consideration of the standard of review applicable to s. 54, which is triggered on every request for review, is of real importance to OIPC's day-to-day functioning.

[39] As a consequence of the decision of our Court of Appeal in *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494, there is a larger role to be taken by tribunals in judicial reviews. As discussed by Bauman C.J.B.C. at paras. 38 - 54, while a tribunal's standing on judicial review was traditionally limited to issues of jurisdiction, this scope has been expanded in the reasonableness context:

> [40] However, this Court stated in *B.C.G.E.U.* that different considerations are in play when the issue before the reviewing in court is the reasonableness of the decision. …
>
> …
>
> [52] The need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits, if:
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> a) the tribunal is strictly adjudicative in function, rather than also inquisitorial or investigative (*Leon's Furniture* at paras. 20-21);
>
> b) the matter will be referred back to the tribunal for reconsideration if the petitioner is successful; or,
>
> c) the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision (*Children's Lawyer* at para. 42);
>
> [53] On the other hand, the need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits, if:
>
> a) there is no other respondent able and willing to defend the merits (*Pacific International Securities* at para. 41);
>
> b) there is a challenge to the legality of procedural policies or guidelines that have been formally adopted by the tribunal;
>
> c) a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal.
>
> [54] I consider this last factor to be a modernization of Mr. Justice Taggart's statement for this Court in *B.C.G.E.U.* (at 153), adopted by Mr. Justice LaForest for the Supreme Court of Canada in *Paccar* (at 1016), that "the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area". At the time *B.C.G.E.U.* and *Paccar* were decided, in the late 1980s, courts were considerably less deferential to administrative tribunals than they

> are today. In that context, a liberal approach to tribunal standing on technical matters made sense because courts demanded to be convinced of the reasonableness of tribunal decisions. In today's more deferential context, it will less often be necessary to hear from tribunals on technical matters.
>
> [Emphasis added.]

Ultimately, Bauman C.J.B.C. summarized at para. 51 that the decision to allow a tribunal to defend the merits of its decision is a discretionary one that requires an appropriate balance between maintaining tribunal impartiality and the need for a fully informed adjudication on review.

[40] On the basis of this jurisprudence, I find that OIPC does have standing to make submissions on the standard of review, as well as on the record and on the legislation. However, OIPC does not have standing to make any submissions aimed at bolstering the substantive reasonableness of the decisions at issue.

b) Admissibility of Mr. Jay Fedorak's Affidavit

[41] OIPC sought to tender into evidence the affidavit of the Adjudicator, Mr. Fedorak, made on January 6, 2014.

[42] This was in response to Local 170's argument that the Adjudicator, in delivering his Release Reasons, unreasonably thought that he had given notice to all thirteen unions. That additional argument has its basis in para. 2 of the Release Reasons, where the Adjudicator wrote:

> When the matter proceeded to inquiry, the 13 unions, whose pension plan information is at issue ("Unions"), requested standing at the inquiry. The OIPC approved their request for standing.

[43] In his affidavit, Mr. Fedorak deposes that he had "inadvertently stated" that all thirteen unions had been given standing and insists that he was aware at all times that he had only given notice to the four Notified Unions. Counsel for OIPC refers to the statement as an "error". Counsel for ICBA referred to it as a "typo".

[44] In his affidavit, Mr. Fedorak also confirmed which records he had reviewed as part of his decision-making process, stated his awareness of the facts of the case

and indicated materials that he had not been provided with. The affidavit was deposed to after the commencement of this judicial review proceeding.

[45] The general rule is that decision makers cannot review an entered order, or related reasons, unless there had been a slip in drawing it up or an error in expressing the manifest intention of the court; however, this general rule is applied in a flexible manner in the administrative law context: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 861 - 862.

[46] In *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, the court reviewed the admissibility of affidavit evidence from the decision maker on judicial review:

> [46] The judges of the Federal Court have previously stated that a tribunal or a decision-maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. Canada (Minister of National Revenue)*, 2006 FC 130, 289 F.T.R. 15, Dawson J. wrote at paragraph 22 of her reasons:
>
> > I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.
>
> [47] See to the same effect *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, 29 Imm. L.R. (3d) 208, at para. 15; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717, [2006] F.C.J. No. 914, at para. 3; *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, [2006] F.C.J. No. 1482, at para. 13. Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target.

[47] I find Mr. Fedorak's affidavit evidence to be inadmissible as it seeks to add additional information about his reasoning when coming to the Release Decision. It does not merely provide a correction of the reasons delivered.

[48] In any event, the sentence at issue, when construed in context and even without consideration of the affidavit, clearly identifies that the Adjudicator was making a reference to those unions that had been granted standing to make submissions before him. Those were four in number, not thirteen. I, therefore, do

not accept that the reference to thirteen unions in the Release Decision rendered that decision unreasonable.

c) Admissibility of Ms. Tracey Reed's Affidavit

[49] The petitioner sought to tender into evidence the affidavit of Ms. Tracey Reed, legal assistant to counsel for the petitioners, made on January 12, 2015. As exhibits to her affidavit, Ms. Reed attached the various s. 23 notices sent to each of the unions by FICOM in relation to ICBA's Subsequent Request.

[50] The petitioners submit that this decision to provide them with s. 23 notice demonstrates *ex post facto* that the petitioners also have a right to s. 23 notification in relation to ICBA's initial requests. In making this submission, the petitioners acknowledge that FICOM was originally unaware of the petitioners' interests and so it was not unreasonable for FICOM to have failed to give notice at the time. The issue, they argue, is based on a denial of procedural fairness.

[51] Judicial review is generally conducted on the basis of the record before the initial decision maker: *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 at paras. 19, 23. Additional evidence is admitted only for the limited purposes of showing a lack of jurisdiction or a denial of natural justice: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17.

[52] Ms. Reed's affidavit was not before the Adjudicator. Further, on the facts of this case, while arguments based on natural justice have been raised, the evidence of a subsequent FICOM decision, made years after the decision in issue and in the shadow of judicial review proceedings that have yet to be settled, is not probative of a denial of natural justice in the first instance. I find Ms. Reed's affidavit evidence to be inadmissible.

VII. REVIEW OF FICOM'S DECISION

[53] FICOM argues that its decision is not the decision under review; rather, OIPC's Standing Decision and Release Decisions are those that are properly before

this Court. If the petitioners thought that they should have received s. 23 notices, then the appropriate remedy would have been a complaint to OIPC pursuant to s. 42(1)(a) of *FIPPA*. A complaint that the petitioners have never made.

[54] The petitioners argue that FICOM's failure to issue s. 23 notices to any of the sponsoring unions is a breach of procedural fairness. They also argue that as they do not fit within the scope of parties permitted to request an OIPC review pursuant to s. 52, it is therefore open to this court to provide a remedy. In respect to s. 42(1)(a), they submit that this section cannot be read so as to protect s. 23 decisions of the public body from review.

[55] OIPC's submissions on the statutory scheme note that s. 23 sets out the process under which the public body has a duty to give notice and that s. 42(1)(a) allows OIPC to resolve complaints that a *FIPPA* duty had not been performed. OIPC confirmed that the petitioners have not made a complaint on this issue.

[56] Before addressing the issue of procedural fairness, I must first determine whether FICOM's decision is properly before this Court. It is a general requirement of administrative law that internal administrative remedies must be exhausted before the court will exercise its discretion to issue a remedy on judicial review: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 593. This is particularly so where the statutory scheme sets out a complex statutory review process: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33 at para. 11.

[57] In *Cook v. The Insurance Corporation of British Columbia*, 2014 BCSC 1289 at paras. 58 - 60, Justice Steeves notes that the collection, use and disclosure of information is "highly regulated" under *FIPPA*, that OIPC is granted extensive powers and order making authority and that *FIPPA* contains an "extensive set of procedures for the adjudication of issues related to personal information." He concludes:

> [61] The above clearly represents a detailed and comprehensive adjudication process, including investigations, mediations and reviews, under *FIPA*.

[58] In *Morton v. H&R Block Canada Inc.*, 2007 BCSC 1093, Justice Burnyeat also stressed OIPC's comprehensive role in determining *FIPPA* compliance:

> [24] Assuming that a specific question of law was set out, it is also apparent that there are other more appropriate opportunities for Ms. Morton to address the question she is posing and a more appropriate avenue for that question to be determined. The question of whether the Block Privacy Agreement complies with the provisions of the *Personal Information Protection Act*, R.S.B.C. 2003, c. 63 lies with the Commissioner appointed under the *Freedom Information Protection of Privacy Act* or under the *Federal Personal Information Protection Electronic Documents Act (Canada).* If Ms. Morton is concerned about what she is required to have her clients sign is not in accordance with the legislation, then she can follow up with a complaint regarding the Block Privacy Agreement.

[59] As noted above, the petitioners firstly argue that FICOM's *ex post facto* s. 23 notifications are evidence that the petitioners should have received initial s. 23 notifications. I have found that *ex post facto* evidence to be inadmissible.

[60] The petitioners also argue that had they received s. 23 notifications from FICOM, then they would have been guaranteed s. 54 notifications from OIPC and so would have benefited from a more favourable burden of proof and also would have been able to put a "full record" before OIPC. This is important, they submit, because the s. 23 notification process requires a mandatory notice to third parties whereas the s. 54 notification process engages a discretionary decision as to those parties OIPC considers to be "appropriate". Accordingly, the failure to issue s. 23 notifications was a violation of their opportunity to be fully heard. Further, they submit that to leave the initial FICOM decision undisturbed would be to allow a miscarriage of justice into the future.

[61] With respect, I do not agree with the petitioners' submissions. Firstly, s. 42(1)(a) provides a statutory basis of review where a party disputes the scope of s. 23 notifications. OIPC's submissions confirm that this section is available as described by FICOM. It is true that public bodies are subject to more mandatory duties while OIPC has been granted discretionary powers of review over those duties; however, the fact that OIPC's supervisory powers are discretionary indicates

that they should be given deference, not pre-emptively judged by this Court. It would be inappropriate for this Court to intervene in OIPC's statutory powers of oversight over public bodies subject to *FIPPA* prior to OIPC having had the opportunity to consider and render a decision on the issue.

[62] Further, I do not consider that the process for review established by *FIPPA* is deficient in the ways discussed. For instance, reviews before OIPC are not conducted "on the record", or in any way limited to the information initially put before the public body, FICOM in this case. OIPC has the ability, in s. 54, to send out further third party notices and solicit further submissions. A full record can therefore be put before OIPC regardless of which parties received a s. 23 notification from the public body.

[63] As to the risk that the existing decision has created a dangerous precedent and a miscarriage of justice into the future, FICOM has already demonstrated a willingness to recognize the unions' interests and issued s. 23 notices following the receipt of a subsequent FOI request accordingly. Should it fail to do so in the future, the petitioners could then approach it with its desire to become involved with the proceedings, and ultimately, s. 42(1)(a) could be invoked.

[64] Finally, to the extent that the petitioners' arguments are aimed at an appropriate remedy, if I determine that the issue should be remitted to OIPC, then OIPC has the discretionary powers necessary to determine whether it is most appropriate in the circumstances for it to re-hear the issue directly or for it to remit the matter to FICOM with directions. There is no cause or need for this Court to intervene in that discretionary decision.

[65] In conclusion, I find that FICOM's decision not to issue s. 23 notifications is not properly before this Court. Instead, the focus in this review must be on OIPC's decisions.

VIII. REVIEW OF OIPC'S DECISIONS

a) Positions of the Parties

[66] The petitioners and Local 170 argue that OIPC's failure to issue s. 54 notices to every sponsoring union amounts a breach of procedural fairness in light of the Standing Decision. They are supported in this position by the pension plans, which, in brief oral submissions, stressed that since each pension plan and each sponsoring union are separate entities, lines of communication vary widely as between them and so it is important that notice be given to each entity.

[67] ICBA argues that OIPC's decision to not issue s. 54 notices to all the unions is a discretionary decision reviewable on a standard of reasonableness and that the record of the case reveals reasonable grounds for this decision.

b) Standard of Review applicable to s. 54(b) of *FIPPA*

[68] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 62, the determination of the appropriate standard of review is a two-step process. The first step is to assess whether jurisprudence has already determined the issue. If it has not, the court must engage in an analysis of the factors that would determine the appropriate standard of review: see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 53.

[69] The standard of review applicable to s. 54(b) has already been addressed by the Court of Appeal in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210. *Guide Outfitters* concerned the release of information related to grizzly bear hunting in British Columbia. The *FIPPA* question at issue was the scope of information the Ministry was prepared to release about kills of bears by hunters, and in particular, the physical locations where the bears were killed for sport hunting. The Ministry had released some of the requested information in response to a FOI request, but had withheld other pieces of information under the disclosure exemption in s. 18(b) of *FIPPA*. A review of this decision to OIPC was requested, and s. 54 notice was given to the requesting

parties and to the Ministry. Guide Outfitters, an organization opposed to the release of the information, did not receive s. 54 notice. However, an affidavit sworn by the general manager of Guide Outfitters was put before the OIPC decision maker. OIPC determined that the information should be released and that decision was upheld by the Court of Appeal.

[70] On judicial review, the Court of Appeal engaged in the standard of review analysis and concluded that decisions pursuant to *FIPPA*, s. 54(b) are reviewable on a standard of reasonableness:

> [33] In the instant case there is neither a privative clause nor a right of appeal. The absence of such clauses in itself is not determinative; this is somewhat of a neutral factor. However, the statute is the constituent legislation of the tribunal. This latter circumstance could be said to indicate a more deferential standard of review. The relative expertise of the tribunal also falls to be considered. This area of access to information is a fairly specialized area and one with which the Commissioner will, over time, gain a familiarity. He is well situated to appreciate the issues and concerns that have arisen and will arise in the operation of the *Act*. The continuing administration of the *Act* will cause the Commissioner to be alive to issues such as the parameters of likely concern by those who could be potentially affected by decisions relating to the release of information under the *Act*. There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the *Act* requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is *appropriate* to notify and to allow to formally participate in any inquiry. …
>
> [34] … I am inclined to the view that in assessing any decision of the Commissioner under s. 54(b) of the *Act*, a standard of reasonableness is the appropriate standard of review to be employed by a reviewing court. There is, as I noted, a considerable factual element in any such decision and, because this question also engages in a general way the *audi alteram partem* rule, there is as well a legal aspect to the issue. Because of these mixed elements, factual and legal, the intermediate standard of reasonableness appears to me to be the appropriate standard of review to be adopted by a court on judicial review of such a decision.

[71] The parties are in agreement that by virtue of the reasons in *Guide Outfitters*, the standard of review applicable to decisions made pursuant to s. 54(b) of *FIPPA* is reasonableness. Based on the guidance provided by *Dunsmuir*, *Khosa* and similar cases, I agree that this is so.

c) Procedural Fairness

[72] The petitioners and Local 170 do not dispute that the standard applicable to s. 54(b) is reasonableness; however, they argue that once the Adjudicator determined that four unions should be given notice, it was incumbent on him to consider whether other similarly situated unions also fall within the scope of s. 54(b). By failing to undertake that analysis, or in other words, by failing to re-engage with a consideration of the scope of appropriate notifications in light of his conclusions in the Standing Decision, the Adjudicator committed a breach of procedural fairness.

[73] ICBA argues that the Adjudicator made an implicit decision not to give notice to the other unions. It argues that that decision, while not expressly stated in the Standing Decision, can be inferred. As such, that decision falls within the scope of s. 54(b) and so should be reviewed on a standard of reasonableness as per *Guide Outfitters*. Additionally, ICBA stresses that there is no evidence that the unions did not have actual notice, and therefore, a failure of natural justice cannot be said to have occurred in any event.

[74] Questions of procedural fairness are not governed by the usual standard of review analysis: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 74; see also Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2011) at 221.

[75] Instead, decisions are evaluated on a standard of fairness, as articulated by the court in *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55:

> [52] I agree with the submissions of Seaspan (with which BCFS is in substantial agreement) that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the

> procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[76] Though they are distinct standards, the standard of fairness is comparable to the correctness standard: *Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331:

> [66] In my opinion, the "fairness" analysis does not differ markedly from the application of a correctness standard. In both instances, the authorities suggest that no deference is owed and that the task of the reviewing court is to assess whether the impugned decision maker correctly applied the principles of natural justice and procedural fairness: …

[77] The requirement for notice is "a fundamental element of the duty of fairness at common law", and "where specific notice requirements are set out in the legislation, failure by an agency to comply in material respect may invalidate its decision, whether or not the duty of fairness would have required observance of the particular requirement": Donald J.M. Brown & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters, 2014) at 9:1100, 9:1300.

[78] While notice is fundamental, the requirements of procedural fairness depend on the context of each case, and a lack of formal notice may not amount to a failure of procedural fairness where a party has actual notice: see e.g. *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 at paras. 57 - 61.

[79] The question then is how notions of procedural fairness interact with the reasonableness analysis applicable to s. 54(b) of *FIPPA* by virtue of *Guide Outfitters*.

[80] As in the case at bar, at the core of the dispute in *Guide Outfitters* was a party who did not receive s. 54 notice and who later brought a judicial review of that lack of notice. The issue of procedural fairness and natural justice was also before the court in *Guide Outfitters*:

> [30] Although the learned chambers judge discussed the proper standard of review concerning the decision of the Commissioner when she was assessing the petition for judicial review brought on behalf of the Ministry, she did not engage in any such exercise when discussing the petition for judicial review brought on behalf of the appellants. The argument of the appellants in this Court on this issue is that she was not required to undertake such an analysis because, if she found error on that part of the Commissioner arising from a breach of natural justice, it would then be appropriate for her to order a rehearing to remedy the deficiencies. As I observed above, the issue in this case is not just about natural justice but also concerns a process of consideration that the Commissioner is mandated to perform under the *Act*.

[81] As noted above, *Guide Outfitters* ultimately held that the reasonableness standard applied to the review of "the determination of the Commissioner that no formal notice to or participation by the appellants was required under s. 54 of the *Act*": at paras. 32, 34. This was despite the fact that there was initially no express decision not to give notice to Guide Outfitters. In so holding, the court recognized that the *audi alteram partem* rule, or rule that all sides should be heard, is engaged: at para. 34. It also entered into a consideration of whether the lack of notice had resulted in an injustice that rendered the decision unreasonable: at para. 31.

[82] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 53, the majority of the Court held that where deference is owed and an issue was not raised before the decision maker, an implicit decision can be inferred.

[83] Section 54 of *FIPPA* directs OIPC to give notice to "any other person that the commissioner considers appropriate". OIPC is not required to list every party to which it will not be providing notice. Instead, by virtue of the decisions in *Guide Outfitters* and *Alberta Teachers'*, where a party does not receive notice, this is treated as an implicit decision not to notify that party and that decision will be granted deference so long as it is reasonable. In other words, where a party does not receive notice, this is not treated as a breach of the duty of fairness due to a failure to engage in the consideration required by s. 54. In my view, this must be so regardless of any other s. 54 decisions that may have been made. Of course, the decision not to give notice must also be reasonable in the circumstances of the

case, and particularly, in light of s. 54 standing decisions in this same case. I, therefore, find the argument of the petitioners and Local 170 advocating for a bifurcated test is rather an argument properly directed to whether the decision of the Adjudicator was reasonable in the circumstances.

d) Was the Decision to Exclude Some Unions Reasonable?

[84] *Dunsmuir* at paras. 47 - 49 sets out that the reasonableness standard is a deferential one that acknowledges that some questions will give rise to a range of possible reasonable conclusions and that the reviewing court's task is to determine whether the decision falls within that range.

[85] In *Khosa*, the majority of the Court described the application of this standard as follows:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). <u>There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome</u>.
>
> [Emphasis added.]

[86] Consistent with *Khosa*, OIPC submitted that while s. 54 decision makers have a broad level of discretion, decisions that could only have been made without regard to relevant considerations or on the basis of truly improper considerations would not be reasonable.

[87] The reviewing court may look to the record before the Adjudicator for the purpose of assessing the reasonableness of the decision.

[88] In *Alberta Teachers'*, the majority of the Court set out how the reasonableness standard should be applied in cases where a decision maker's decision is implicit and so accompanied by no reasons:

> [53] However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.

[89] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court held that a reviewing court may look to the record before the Adjudicator for the purpose of assessing the reasonableness of the decision:.

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[90] None of the parties dispute that the decision to send notice to the Notified Unions was reasonable. The key portion of the Standing Decision states:

> Without commenting on the merits of the submissions of the respective parties on this issue, I find that the question as to whether disclosure of the information at issue would result in financial loss to the [four Notified Unions] is at least arguable. I also agree that the [four Notified Unions] themselves are in the best position to argue this point. The applicant has not convinced me that the modest delay required to facilitate the participation of the [four Notified Unions] would prejudice the applicant's interests. I find that, on balance, permitting the participation of the [four Notified Unions] will best serve the interests of administrative fairness.

[91] Here, the decision not to notify the other sponsoring unions was implicit and reasons were not given. This Court's task is therefore to review the record and the circumstances of the case in order to determine whether there "exists a reasonable

basis upon which" the Adjudicator could have decided to include four sponsoring unions and to exclude the others.

[92] OIPC has described its s. 54 consideration process as ongoing (*Ministry of Water, Land & Air Protection* (10 May 2002), Order 01-52, OIPC File Nos. 11174 & 11322 at 11 (B.C. Information and Privacy Commr.)), and so conceptually, the decision not to notify could have taken place at any time during or after the Standing Decision up to the release of the Release Decision. Accordingly, the relevant record includes not only those submissions leading up to the Standing Decision, but also those submissions leading up to and including the Release Decision (the "Record").

[93] Both the petitioners and ICBA agreed that on the Record before the Adjudicator, it can be inferred that the Adjudicator knew that other sponsoring unions existed. FICOM's submissions on the standing issue, that it "has no objection to the participation in this inquiry of unions who are sponsors of any of the related pension plans", and the pension plans' submissions, that "the Plans are each sponsored by a Union", certainly supports such an inference.

[94] In the circumstances of this case, the Adjudicator granted standing to all those unions that made submissions before him. He knew that other unions existed, and he did not grant standing to those unions. There must, therefore, be a reasonable basis on which he did so. No express reason was given to exclude the other unions.

[95] On the face of the Standing Decision and the Release Decision, the only factor differentiating the Notified Unions from the other sponsoring unions is that the Notified Unions applied for standing; however, that alone, in my view, does not amount to a reasonable basis. OIPC has been delegated the discretionary power to send notifications to those that it considers appropriate. In this context, instances will undoubtedly arise where an appropriate party will not be immediately obvious, and the process leading up to the Standing Decision in this case demonstrates that OIPC has put procedures in place to address those instances. This case is not

about those processes. This case is about what the Adjudicator is to do next in light of the fact that he or she determined that one group had been missed and that it would be appropriate to send s. 54 notifications to at least some members of that group. In those circumstances, it cannot be reasonable to differentiate between similarly placed individuals within the group merely on the basis that some applied for standing and others did not. That basis alone would be arbitrary and something more is required. That something more will be shown deference but must be reasonable in the circumstances of the case and must be apparent in the reasons of the Adjudicator or on the record before the Adjudicator.

[96] For instance, in some cases, it may be possible to infer that the Adjudicator had determined that it was not reasonable to send out further s. 54 notifications in light of the fact that the individuals to whom standing had been given are part of a large or undefinable group. In *Guide Outfitters* at para. 25, the court cited from the Commissioner's reasons, which expressed that "[m]any organizations and individuals may feel they are affected by disclosure under the Act of particular information in the custody or control of a public body" and that "[i]t is simply not tenable for every person who has an interest in the outcome of an access request of an inquiry under the Act to have sufficient interest to attract a right of notice and participation". In the case at bar, however, the group identified in the Standing Decision as being "in the best position to argue" an arguable point consists of four unions from a readily ascertainable and small group of thirteen unions.

[97] ICBA submits that the Adjudicator's decision not to include the non-Notified Unions falls within a range of reasonable outcomes for four reasons: a) it was reasonable for the Adjudicator to believe that all unions had been notified by virtue of their relationship with their pension plans, b) the petitioners had actual notice in any event, c) the Adjudicator would have been aware that he would have fulsome submissions from the varied interests that had received notice and the petitioners did not suffer a prejudice due to the lack of knowledge, and d) the adjudicator was aware of ICBA's concerns regarding delays.

i) Delay

[98] Beginning with the delay submission, in the Standing Decision, the Adjudicator's attention had been brought to the issue of delay and his reasons reflect the fact that he had considered the issue and then concluded that the "modest delay" that would be necessary to take submissions was not prejudicial to ICBA's interests. ICBA submits that it can be inferred from this passage that the Adjudicator's decision may have been different had there been more parties seeking standing before him.

[99] The Record shows that the Adjudicator did clearly consider the issue of delay. Had he wished to minimize future delays, it is possible that his decision may have incorporated additional implicit or explicit terms to accomplish that end, such as limits on submission length, directions for cooperative submissions where appropriate or a cap on the number of representative unions that could make submissions. Assuming that his implicit decision did the latter, that is, he decided to impose a four union cap in order to minimize delay, this alone does not provide a reasonable basis for the choice of the four unions that did make submissions as compared to any of the other unions in the same group. What is still required is a reasonable rational for differentiating between the included and excluded unions.

ii) Notice

[100] ICBA's first submission is that it would have been reasonable for the Adjudicator to assume that each of the pension plans would have notified their respective unions, and that therefore, only those interested unions had applied for standing. On this basis, it is submitted, the decision to only grant standing to those four unions who applied for it was a reasonable way of distinguishing between "appropriate" parties.

[101] In support of its argument that the Adjudicator could have inferred notice, ICBA stresses a passage from the pension plans' April 27, 2012 submission to OIPC:

> The Trustees (acting for the members of the Plans) benefit from the Union's advancement of its interests. However, the Trustees are not in the best position to advance those interests. Indeed, the Unions became aware of the request by the Applicant and the current review because the Trustees sought assistance in explaining how disclosure of the requested information could harm the Unions that sponsor the Plans.

[102] It is clear that the Adjudicator considered the paragraph highlighted by ICBA; however, this evidence is silent as to whether the Adjudicator had interpreted it as applying to the other unions. In the Standing Decision, the Adjudicator defines "unions" as the four Notified Unions and then summarized the pension plans' submissions only in relation to those four unions:

> Counsel for the trustees submits that the trustees and the unions have distinct interests in protecting the information from disclosure and the trustees are not in the best position to advance the interests of the unions. She also submits that the unions did not become aware of the applicant's request until the trustees contacted them to obtain assistance in explaining how disclosure of the information at issue could harm the unions that sponsor the Plans.

[103] However, I do not consider that the paragraph highlighted by the ICBA, when read in context and with the rest of the Record, would have provided a basis from which it could reasonably be inferred that the Adjudicator believed that formal notice was unnecessary since every union had been notified by their respective pension plans. Firstly, the pension plans' April 27, 2012 submission does not define the term "Union" and while that term is used in most instances to refer to all sponsoring unions, the submissions also state in one instance:

> The Trustees take the position that this delay is not inappropriate. The Trustees agree with counsel for Local 170 that the identity of the Applicant is relevant, not only in assessing potential harm, but also in explaining the history of the proceedings and the time it took for the Unions to become formally involved.

And, of course, the Adjudicator would have known that only four unions were formally involved.

[104] Secondly, the April 27, 2012 submission, read in its entirety, indicated that lines of communication between the pension plans and their respective unions are

not clear, consistent or timely. It also stressed the difference between the two types of entities:

> The Trustees of each of the Plans are the legal "Administrator" as that term is used in the Pension Benefits Standards Act of B.C. While the Plans are each sponsored by a Union and while members of that Union are typically members of the Plan it sponsors, the Unions and the Trustees remain separate legal entities and do not operate together. The Trustees owe fiduciary duties to the members of the Plans which requires that they act in the best interests of those members alone. Despite the relationship that each Union has with the Plan, the Trustees do not take direction from nor do they communicate on a daily basis with the Unions. Their roles are distinct as they must be for the Trustees to properly fulfil their fiduciary duties.

[105] Finally, those portions of the Record coming from the unions themselves contradict a finding of an inferred belief that every union had been notified by their pension plan. Submissions from four different unions were before the Adjudicator. Both Local 97 and its sponsored pension plan have the same counsel and shared submissions were accordingly made to clarify Local 97's standing on April 13, 2012. Local 170, in submissions on April 12, 2012, stated that it had "recently become aware" of the proceedings. Neither Local 280 nor Local 2404 provided any explanation as to how they had been notified of the proceedings; however, Local 280 stated in its initial submission on April 23, 2012, that it had had the opportunity to review both Local 97's and Local 170's submissions, while Local 2404 stated in its initial submissions on April 25, 2012, that it had had the opportunity to review only Local 170's submissions.

[106] In summary, the Record does not expressly state that every pension plan had notified every sponsoring union. Instead, the Record stresses, at multiple locations including in the April 27, 2012 submission from the pension plans as excerpted above, the differences between the unions and the pension plans. Additionally, while it is possible to infer from Local 97's submissions that that union has close lines of communication with its pension plan, all other unions were individually represented and their submissions imply that communication, where it is flowing,

appears to be flowing on an *ad hoc* basis as between unions, not as between pension plans and unions.

[107] Overall, I do not find that there is basis in the Record for a finding that the Adjudicator could have inferred that all the unions had received notice of the proceedings and that only those interested had made formal standing submissions.

[108] In a related vein, ICBA submits that the unions had actual notice as demonstrated by the fact that they have not denied it, and that therefore, it would have been reasonable to exclude them. The petitioners counter that upon being notified of the Subsequent Request, which was the first official notification they had received, the petitioners acted promptly, within 30 days, to retain counsel and engage in judicial review proceedings.

[109] The issue of actual notice arises most often in the procedural fairness context as noted above. That context involves a distinct set of considerations as is summarized in *Edmonton Police Service* at paras. 57 - 61.

[110] Here however, *Guide Outfitters* held that a reasonableness analysis applies to the decision not to give notice. Therefore, the guidance provided in *Newfoundland and Labrador Nurses' Union* at para. 15 and *Alberta Teachers' Association* at para. 53 also applies. As per those cases, the question is whether, in the circumstances of the case, the Record reveals a reasonable basis for the decision. So in order to justify an inferred decision, the basis must have been known to the decision maker.

[111] Assuming, without deciding, that all the unions did know that their pension plans were engaged in OIPC proceedings, the Adjudicator had the same information. By virtue of the Standing Decision, he had been made aware that a group of appropriate individuals had been missed. He was under a statutory duty to notify those parties that he considered appropriate. I found above that the Record does not disclose a basis upon which he could have inferred that all unions had

been notified. So regardless of those individuals' state of actual knowledge, it was incumbent upon the Adjudicator to send s. 54 notifications to "appropriate" parties unless he had before him a reasonable reason to do otherwise.

[112] In *Guide Outfitters* at para. 35, the court considered the issue of whether actual notice was given as relevant to the reasonableness of the decision to decline to issue formal notice. In that case, actual notice was apparent on the record and evidence from the Guide Outfitters was before the decision maker. It is, therefore, distinguishable from the case before me in that the decision maker would have known of the lack of knowledge.

[113] Even if I am incorrect and there was a basis on which notice could have been inferred, the court in *Guide Outfitters* considered the issue of notice in tandem with the issue of injustice, which I will address below.

iii) Adequately Represented/Injustice

[114] This brings me to ICBA's final submission: that it can be inferred on the Record that the Adjudicator decided to exclude the non-Notified Unions on the basis that he had concluded that all views would be adequately represented by the four Notified Unions, or in other words, that all the unions were essentially in the same position as those that had been granted standing. This is somewhat related to ICBA's submission that the petitioners did not suffer a prejudice as all views were in fact adequately represented.

[115] The unions submit that there is no basis in the Record from which the Adjudicator could have inferred that the four unions that came forward would appropriately represent the views of all the unions or upon which he could have inferred the evidence that would have been led.

[116] The issue of injustice, while often addressed in the procedural fairness context, is a factor considered in *Guide Outfitters* at paras. 31, 35 as contributing towards the reasonableness of the decision not to give notice in that case. In particular, the evidence in that case revealed that Guide Outfitters not only had

actual notice of the proceedings, but had also submitted evidence, in the form of an affidavit from its General Manager, for consideration by the decision maker. There was also a significant amount of overlap between the positions that would have been submitted by Guide Outfitters and those that were in fact submitted by the Ministry in that case.

[117] In the case at bar, the Record does not support an inference that the parties had proactively organized themselves to ensure that all relevant views were advanced. Instead, two unions submitted somewhat overlapping submissions, while the others first applied for and then received standing, only to realize that their interests would be adequately represented by the other unions. For example, Local 280 submitted on June 8, 2012:

> It was the intent of my client to provide a fulsome submission on why Local 280 objects to the release of the information sought by the ICBA. However, having had the opportunity to review the June 7, 2012 submissions provided by UA Local 170, and by Local 97, it appears little more can be added to those submissions.

[118] On the basis of those submissions, it would be reasonable to infer that some of the unions would have shared positions; however, the Record contains evidence of some potentially relevant differences as between the unions. Of particular note is the information in the Record as to how many members were in each pension plan. As per the spreadsheet attached to ICBA's FOI request, which was before the Adjudicator as part of the Record, in 2005, most of the plans had at least 200 members and one had more than 5,000; however, the Ceramic Tile Workers' Pension Plan is notable as having only 41 members. The Ceramic Tile Workers' Pension Plan is sponsored by Local 2, one of the petitioners in this case.

[119] The Release Decision states:

> [9] … Nevertheless, the Trustees do not make any argument that s. 22 of FIPPA, which requires that a public body refuse to disclose personal information, if to do so would constitute an unreasonable invasion of third party privacy, applies. Since s. 22 is a mandatory exemption, if the information at issue constituted third-party personal information, I would have to consider the application of s. 22, and the burden of proof would be on the

> party seeking disclosure to demonstrate that s. 22 did not apply. I find, however, that because the information consists of only average amounts, the information at issue is not about identifiable individuals.

[120] It is impossible to predict exactly what the non-Notified Unions would have submitted had they had the opportunity; however, Mr. Thompson for the petitioners submits, on behalf of Local 2 in particular, that his clients would have raised the issue of whether the information sought, while in the aggregate, may have effectively amounted to personal information for those unions sponsoring the smaller plans.

[121] Further Mr. Thompson submits on behalf of the petitioners that even where positions may have overlapped, additional salient facts or evidence could have been put before the Adjudicator had other unions been given the opportunity to make submissions. He notes the many instances in the Release Decision where the Adjudicator referenced a lack of sufficient evidence on key matters, for example:

> [52] … There is no evidence before me that knowledge of the specifics of these particular plans would have any further impact in rendering these plans less attractive.
>
> …
>
> [54] … If past disclosures can be distinguished from the current situation, such that it is likely that different effects would ensue, that has not been explained to me.
>
> [55] Therefore, I find the contention of the Unions that they will lose members as merely speculative and lacks objective evidential support. …
>
> [56] … The Trustees and Unions did not explain how anticipated communication of the disputed information to the plan members could constitute "undue" harm.
>
> [57] … I agree that, in some circumstances, it could harm the negotiating position of the union, if the employer were aware of the details of a financial plan over which the parties were negotiating. ... Without some more concrete evidence of how the disclosure of this particular data may affect a real set of negotiations, I find that the Trustees and Unions have not established, on a balance of probabilities, a reasonable expectation that disclosure of the information will be likely to interfere significantly with the negotiating position of any third party.

[122] Mr. Chris Feller, the Business Manager and Secretary-Treasurer of Local 919, deposed he would have argued, had he been given the opportunity, as follows:

3. If I had been provide[d with] that opportunity, I would have attested to the following facts:

a. I am often approached by Local 919 members, particularly our younger members, with concerns about both the cost and viability of our pension plan. These younger members often talk about how they can have more cash in their jeans by working non-union, because while non-union employers' total wage package is less than in our collective agreement, non-union employers tend to have, lower benefit costs, and re-direct some of that money into higher wages. They also ask me why they should have to pay to subsidize the pension plan of the older members.

b. The more information about Local 919's pension plan that is known to non-union employers, the more they can tailor their own benefit plans to try and attract our members to work non-union.

c. The job market for cement masons is very competitive, with non-union employer's always trying to recruit qualified cement masons to work for them. If these non-union companies obtain information on our pension plan and its solvency and funding liabilities, they will gain a competitive advantage in their pursuit of our members. In a time of dramatic labour shortages, when Owners and General Contractors decide to utilize Local 919 because we can supply the necessary manpower, any attrition in our membership could have dire consequences on our ability to obtain work in the future.

d. Our pension plan is solely trusteed, meaning that our unionized contractors are not privy to the state and health of our pension plan. Local 919 treats this information as highly confidential, and certainly does not share it with our contractors. Knowledge of the health of our pension plans would most definitely affect collective bargaining, as it would give financial information to the contractor side of the table that would enable them to combat our bargaining position as related to the need to increase pension contributions. It would, in effect, tie one hand behind Local 919's back during collective bargaining.

e. While our current collective agreement has a duration of 2010 to 2014, it is only now being ratified by the parties. This means that even if the data to be released might be considered by some to be stale-dated and therefore not harmful, given the length of duration of the collective agreement and how long it takes to negotiate the collective agreement, this is simply not. true.

f. The requested information, if released, would still have caused financial harm during the 2010-2014 collective bargaining cycle. Additionally, the release of such information, even

> considerably after the fact, would allow the contractors to go back and test the positions put forward by Local 919 in bargaining, thereby giving unwarranted access into bargaining strategy

[123] ICBA submits that the fact that only one of the petitioning unions filed an affidavit on this review is further evidence that the positions of the unions overlap. However, I accept that the decision to submit only one affidavit in these proceedings was made on the basis of efficiency and proportionality. This Court has not been tasked to review and reconsider the merits of the Release Decision. Affidavits attesting to potential positions on the merits do not need to comprehensively discuss every submission that will be made but rather are properly aimed at speaking to the issue of injustice within the reasonableness analysis.

[124] I agree with Mr. Thompson that there is no evidence in the Record that would allow the Adjudicator to have concluded that the four Notified Unions were in the position to, or had otherwise arranged to put themselves in the position to, represent the views, positions and evidence of all the sponsoring unions. Rather, there is evidence of at least one clearly distinct union and of a lack of coordination between those unions which did make submissions. Accordingly, it is not possible to infer that the Adjudicator made the decision to exclude the nine non-Notified Unions on the basis of a reasonable belief that all relevant views would be represented by the four Notified Unions.

[125] Further, unlike in *Guide Outfitters*, the evidence of the excluded parties had not been fully put before the decision maker by other means. A review of the affidavits in the Record reveals that at least some of the evidence proposed by Mr. Feller would not have been before the Adjudicator.

[126] I discussed above the interaction in *Guide Outfitters* between a finding of actual notice and the court's consideration of injustice. That court concluded that the decision not to give notice was reasonable in part on the basis of a finding that the record revealed actual notice since "any deficiencies suggested to exist by the

appellants were more apparent than real". Importantly, the court found that "all relevant points of view were placed before [the decision maker] for consideration". In the case at bar, I have found that all relevant points of view were not placed before the decision maker. I have also found that a finding of actual notice cannot be inferred on the basis of the Record. If I am incorrect and actual notice has relevance, then when considered in the context of this case, I find that actual notice would not compensate for the injustice caused by a failure to give formal notice to the petitioners

[127] In summary, despite the very able submissions of Ms. Thackeray for ICBA, I am not satisfied that the Record or the circumstances of this case reveals a reasonable basis to distinguish between those sponsoring unions that were granted standing and those that were not granted standing. The decision to exclude the petitioners and other non-Notified Unions on the facts of this case was therefore arbitrary and so unreasonable.

IX. APPROPRIATE REMEDY

[128] I have found that the Standing Decision was reasonable. However, in light of the Adjudicator's holding in that decision, I have found that OIPC's subsequent implicit decision not to give s. 54 notice to the petitioners, and other similarly situated unions, was unreasonable.

[129] The Release Decision was therefore decided on an incomplete record and should be set aside. I refer the matter back to OIPC for resolution pursuant to *FIPPA*. In so doing, it should re-direct its mind to the appropriate recipients of s. 54 notice in light of its Standing Decision and the direction provided in these reasons.

X. COSTS

[130] In the event that counsel is unable to reach an agreement respecting costs, counsel may, within 60 days of the release of this judgment, arrange to address costs by contacting the Registry.

"The Honourable Madam Justice Maisonville"