IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128

Date: 20191209
Docket: S190619
Registry: Vancouver

In the matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 (as amended) and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (as amended), and in the matter of Order No. F18-51 of the Delegate of the Information and Privacy Commissioner of British Columbia

Between:

British Columbia Hydro and Power Authority

Petitioner

And

Information and Privacy Commissioner for British Columbia and Bob Mackin

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioner:	R. J.C. Deane M. Maniago
Counsel for the Respondent, Information and Privacy Commissioner for British Columbia:	T. Hunter A. Hudson
Place and Date of Hearing:	Vancouver, B.C. September 17 and October 4, 2019
Place and Date of Judgment:	Vancouver, B.C. December 9, 2019

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Introduction

[1] This is a judicial review of a decision of the Information and Privacy Commissioner (the "Commissioner" or "Respondent") regarding the disclosure of personal information under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*].

[2] The respondent Bob Mackin (the "Applicant") is a journalist. He made a request to British Columbia Hydro and Power Authority ("BC Hydro" or the "Petitioner") pursuant to *FIPPA* to access certain information. *FIPPA* applies to BC Hydro because it is a "public body" as defined in Schedule 1 of *FIPPA*. BC Hydro responded to the request but withheld the names of certain employees. BC Hydro also withheld other information but those issues are not before me. The Applicant's access request related to BC Hydro's anticipated dam and hydroelectric generating station on the Peace River in northeastern BC, also known as "Site C".

[3] A delegate of the Commissioner (the "Delegate") was asked to review BC Hydro's decision to withhold the employees' names. The Delegate held that the exceptions to disclosure in ss. 19 and 22 of *FIPPA* did not apply in the circumstances and required that the employees' names be disclosed: *British Columbia Hydro and Power Authority (Re)*, 2018 BCIPC 55 (the "Decision").

[4] BC Hydro challenges the Decision, arguing the Delegate erred by applying the incorrect legal tests and misapprehending the record. BC Hydro relies on the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and *FIPPA*, ss. 19 and 22. BC Hydro requests that I set aside the Decision and remit the matter to the Commissioner for reconsideration.

[5] Although served, the Applicant did not file a response in this proceeding and made no submissions before me. The Commissioner responded to the judicial review.

[6] The production orders are stayed until the judicial review is completed: *FIPPA*, s. 59.

[7] If it is successful, BC Hydro is not seeking costs against the Commissioner.

Statutory Framework

[8] In British Columbia, *FIPPA* governs requests for access to documents held by public bodies. The purposes of *FIPPA* are set out in s. 2. Section 2 requires a balancing between the dual purposes of *FIPPA*: accountability through access to public records and protection of individuals' right to privacy. Section 2 provides:

> ***Purposes of this Act***
>
> **2** (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[9] In the definition section in Schedule 1, *FIPPA* defines personal information as follows:

> "**personal information**" means recorded information about an identifiable individual other than contact information;
>
> "**contact information**" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[10] Section 19 is discretionary and authorizes a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to threaten an individual's "safety or mental or physical health":

> **Disclosure harmful to individual or public safety**
>
> 19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[11] Section 22 is mandatory. It requires a public body to refuse to disclose personal information when disclosure would be an unreasonable invasion of a third party's personal privacy:

Disclosure harmful to personal privacy

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

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment, occupational or educational history,

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

(j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under the Financial Information Act,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure, in respect of

(i) a licence, a permit or any other similar discretionary benefit, or

(ii) a degree, a diploma or a certificate,

reveals any of the following with respect to the applicable item in subparagraph (i) or (ii):

(iii) the name of the third party to whom the item applies;

(iv) what the item grants or confers on the third party or authorizes the third party to do;

(v) the status of the item;

(vi) the date the item was conferred or granted;

(vii) the period of time the item is valid;

(viii) the date the item expires, or

(j) the disclosure, in respect of a discretionary benefit of a financial nature granted to a third party by a public body, not including personal information referred to in subsection (3) (c), reveals any of the following with respect to the benefit:

(i) the name of the third party to whom the benefit applies;

(ii) what the benefit grants to the third party;

(iii) the date the benefit was granted;

(iv) the period of time the benefit is valid;

(v) the date the benefit ceases.

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless

(a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information, or

(b) with respect to subsection (3) (h), either paragraph (a) of this subsection applies or the applicant could reasonably be expected to know the identity of the third party who supplied the personal recommendation or evaluation, character reference or personnel evaluation.

(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

[12] The burden to prove s. 22(4) applies (the disclosure of a third party's personal information is *not* an unreasonable invasion of the third party's personal privacy) is on the applicant, here the Commissioner. The burden to prove the elements of s. 19 are satisfied (the disclosure is harmful because it could reasonably be expected to threaten an individual's "safety or mental or physical health") is on the public body, here BC Hydro: *FIPPA*, s. 57; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 [*Community Safety*].

The Delegate's Decision

Section 22(4)(e)

[13] In her Decision, the Delegate set out the background and then discussed the various provisions BC Hydro relied on to withhold information from the Applicant. Many of these provisions are not in issue in this judicial review.

[14] The Delegate explained s. 22 requires public bodies to refuse disclosure of personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. She noted employee names are personal information. Her analysis regarding s. 22(4)(e) was as follows:

> [86] Section 22(4)(e) applies to personal information about a public body employee's position, functions or remuneration. Information that relates to job duties in the normal course of work related activities falls into s. 22(4)(e).
>
> [87] The employee names appear in a briefing note, a letter and powerpoint slide relating to the RFQ. Their names simply identify them as evaluation committee members and their position within BC Hydro. The records are normal operational documents. I find that s. 22(4)(e) applies to the names. As s. 22(4)(e) applies to the employee names, BC Hydro is not required or authorized to withhold the names under s. 22(1) and I will not consider the remainder of the s. 22 analysis.
>
> [Footnote omitted.]

[15] The Delegate concluded s. 22(4)(e) applied to the employees' names because the names simply identified them as evaluation committee members and their positions within BC Hydro, and the records were normal operational documents: Decision at para. 87. Because s. 22(4)(e) applied, the disclosure of the

personal information was not an unreasonable invasion of a third party's personal privacy.

[16] As a result, the Delegate found BC Hydro was not authorized or required to withhold the employees' names under s. 22(1) of *FIPPA*: Decision at para. 87

Section 19(1)(a)

[17] The Delegate's analysis with respect to s. 19(1)(a) of *FIPPA* was more comprehensive. As a preliminary matter, the Delegate permitted BC Hydro to rely on s. 19(1)(a) despite raising this issue for the first time at the inquiry stage. The Delegate stated BC Hydro was using s. 19(1)(a) to withhold the names of employees who evaluated the request for qualifications ("RFQ") responses. She stated this section authorizes public bodies to refuse to disclose information which could reasonably be expected to threaten anyone's safety or mental or physical health: Decision at para. 63.

[18] BC Hydro relied upon two affidavits at the inquiry before the Delegate. The first was Affidavit #1 of Doug Powell made on June 20, 2018. Mr. Powell is BC Hydro's security project manager and security lead for Site C. The second was Affidavit #1 of Brian Knofe made on June 21, 2018. Mr. Knofe is BC Hydro's project director for the Site C main civil works contract.

[19] Mr. Powell gave evidence to establish the employees' safety or mental or physical health was threatened. He deposed that:

a) On July 16, 2015, BC Hydro held a public information meeting at the Stonebridge Hotel in Dawson Creek. At that meeting, a protester ripped down display maps, overturned two tables, and screamed obscenities at staff. The police arrived shortly thereafter and encountered another man, who was masked and had two knives on his person. According to witnesses, this man was waving a knife and threatening the police. The police tried using pepper spray but it was ineffective. The police fatally shot the man.

b) In response to this tragic death, a "hacktivist group" stated online that it would avenge this police shooting. The July 23, 2015 rally against Site C, set to take place outside the BC Hydro corporate office in downtown Vancouver, was cancelled over fears the event would become violent.

c) There have been incidents where Site C employees were subjected to direct physical threats. For example, a speedboat encircled a working excavator and disrupted the employees' work.

d) At public meetings, individuals have made veiled threats of future violence using such phrases as "watch your back" and "blow them up".

e) In October 2017, BC Hydro employees discovered one of the stop signs located within the construction zone at Site C had been shot. Employees observed two bullet holes on the sign. Mr. Powell's office determined the shots came from across the river from a high-powered weapon.

f) Another sign was found around the same time which had also been shot at several times. Other similar incidents were documented in Mr. Powell's affidavit.

g) Site C employees are working in a very emotionally charged environment, which is menacing and threatening from a workers' perspective. Many employees do not feel safe.

h) BC Hydro is extremely concerned about the release of individual employee names as this will put those individuals at risk for targeted violence by extreme opponents to the Site C project. This would increase the risk of mental distress for these employees.

[20] Mr. Powell also gave evidence regarding steps BC Hydro has taken as a result of physical and verbal threats. He deposed that:

a) BC Hydro does not publish the Site C office information on employees' business cards.

b) In the past, BC Hydro refused to release the names of Site C employees, with the exception of those who are the "public face" of the project.

c) BC Hydro increased security measures throughout its operations and provided basic personal safety training to all Site C employees, including training for self-defence.

[21] The Applicant supported his submissions with website printouts.

[22] At para. 63 of the Decision, the Delegate articulated the legal test as follows: "BC Hydro must prove that the likelihood of threat to anyone's safety or mental or physical health resulting from disclosure of the disputed information is 'well beyond' or 'considerably above' a mere possibility." Relying on *Community Safety*; and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 [*Merck Frosst*], the Delegate found the "test is contextual and depends on the seriousness of the possible consequences and the probability of the harm occurring": Decision at para. 63.

[23] The Delegate found there was an insufficient connection between the disclosure of the employees' names and a threat to those employees' safety, or mental or physical health. The Delegate's analysis is set out in paras. 76–79:

> [76] There is no suggestion that particular employees have been targeted because of their association with Site C. The incidents described by the Security Manager were directed generally at the Site C project. There is nothing to suggest that the names and identities of the employees present at the time were relevant to the incidents. Rather, it was the employees' physical proximity to the project which caused them to be in harms-way.
>
> [77] In addition, the incidents occurred at the work site and at a public forum in Dawson Creek on Site C. It is understandable that those locations might be lightning rods for opponents of the project as those are the locations directly impacted by the dam. No evidence was provided, however, that anything remotely similar has occurred at BC Hydro's offices where the procurement assessment presumably takes place and records of the type of issue here are dealt with.

> [78] Further, the employees whose names are withheld were responsible for procurement of one aspect of the project and they are not near the top of BC Hydro's corporate structure. It seems more likely that if anyone were to be the target of animosity related to Site C, it would be the board of directors or senior management, yet BC Hydro has not kept their names from the public and there is no evidence that they have been harassed.
>
> [79] Lastly, I have no evidence from the employees whose names are in issue about how disclosure might threaten their mental health, which might support the application of s. 19(1)(a).
>
> [Footnote omitted.]

[24] The Delegate concluded BC Hydro did not satisfy its burden under s. 19(1)(a) of *FIPPA*. BC Hydro was not authorized under s. 19(1)(a) of *FIPPA* to refuse to disclose the employee names: Decision at para. 80.

Grounds of Review

[25] The Petitioner asserts the Delegate's Decision was unreasonable and frames the grounds as follows:

i. Did the Delegate err in law by construing s. 19 of *FIPPA* as requiring the apprehended harms to be virtual certainties before the public body was entitled to exercise a discretion to refuse disclosure of the employees' names?

ii. When applying s. 19, did the Delegate misapprehend the evidence by considering irrelevant factors and ignoring relevant evidence?

iii. Was it an error of law for the Delegate to find s. 22(4)(e) applied to the employee names that were redacted, resulting in a decision that it was not an unreasonable invasion of privacy to release the information?

[26] I must also determine the standing of the Commissioner on judicial review and the standard of review.

[27] If the Petitioner is successful, the Decision is remitted back to the Commissioner for reconsideration.

Standing of the Commissioner

Position of the Parties

[28] The Petitioner argues the Commissioner, as the adjudicator at the inquiry stage, is not entitled to defend the merits of the Decision. The Petitioner argues the Commissioner may explain the record but counsel for the Commissioner cannot provide any arguments in defence of the merits of the Delegate's Decision.

[29] The Delegate's inquiry and the Decision were made under s. 56 of *FIPPA*. The Petitioner asserts the process under s. 56 is an adjudicative process which involves the Commissioner adjudicating a dispute between two adversarial parties. A s. 56 review is judicial or quasi-judicial in function. Whatever policy or advisory functions the Commissioner has, it does not transform a s. 56 review into an inquisitorial or investigative process.

[30] The Petitioner argues the Commissioner should not be allowed to enter the fray. It certainly should not be allowed to bootstrap the original Decision with additional arguments provided by the Commissioner on judicial review. To do so would jeopardize the perceived impartiality of the Commissioner.

[31] The Petitioner argues that to ensure public confidence in the Commissioner's ability to be objective, participation in the judicial review must be limited. I therefore should not consider paras. 51 to 117 of the Commissioner's written submissions.

[32] The Commissioner argues whether a tribunal has standing on judicial review to defend the merits of its Decision is a matter of discretion for the reviewing court. This discretion must be determined on a case-by-case basis: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para. 57 [*Ontario Energy Board*]; *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 at para. 51 [*Thibeau*].

[33] The Commissioner emphasizes that the Applicant is not participating in this judicial review. Consequently, unless the Commissioner is permitted to address the merits of the Decision, there will be no party able to comment on BC Hydro's submissions.

[34] The Commissioner argues access to information proceedings are partly inquisitorial, which weighs in favour of the Commissioner making submissions on the merits of the Decision at the judicial review: *Ontario Energy Board* at para. 59; *Thibeau* at para. 52. The Commissioner further points out it has special knowledge and expertise with respect to the access to information regime. This weighs in favour of granting greater participation by counsel for the Commissioner without offending the principle of finality: *Ontario Energy Board* at paras. 53 and 68.

Analysis

[35] The leading authority on the role of a tribunal on judicial review is *Ontario Energy Board*, where the Supreme Court of Canada reasoned:

> [43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.
>
> …
>
> [57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.
>
> [58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.
>
> [59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:
>
> > (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[36] In terms of bootstrapping, the Court stated:

> [63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[37] The Court noted that tribunals may offer interpretations of their reasons and/or conclusions and may make arguments that were implicit in the original decision but should not "have the unfettered ability to raise entirely new arguments on judicial review": *Ontario Energy Board* at para. 69.

[38] In *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, Justice Slatter said the following about the Commissioner's participation in a judicial review:

> [30] The *Personal Information Protection Act* gives the Commissioner a wide ranging responsibility to implement the *Act*, to develop privacy policy, to educate, and to investigate and adjudicate upon complaints. After a complaint is made, carriage of the complaint effectively passes to the Commissioner. If the Commissioner concludes that the complaint warrants further proceedings, the Commissioner's staff prosecutes the complaint, and a delegate appointed by the Commissioner will rule on it. For better or for worse, the Commissioner wears many hats, and he is not merely an adjudicator detached from the dispute itself. The Commissioner is very close to being a true party. It is unrealistic to think that the original complainant would have the resources or the motivation to resist the application for judicial review. If the Commissioner does not resist the judicial review application, no one will.

[39] Having reviewed the authorities, I have determined I should exercise my discretion and allow the Commissioner to make arguments on the merits of the

Decision before me. Since the judicial review application would otherwise be unopposed, I find it will be helpful to allow the Commissioner to explain the access to information regime to this Court, as well as the Commissioner's particular role within that regime. It can also make arguments on what the Delegate found and what was implicit in the Delegate's Decision.

[40] Apart from one area, which I point out when addressing the issues, I find the Commissioner did not descend into the fray. Therefore this approach does not transgress the principle of tribunal impartiality: *British Columbia (Ministry of Justice) v. Maddock,* 2015 BCSC 746 at paras. 4–5 [*Maddock*].

[41] I am exercising my discretion to allow the Commissioner to comment on the merits of the Decision before me.

Standard of Review

[42] At common law, there are two standards of review: correctness and reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. The *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] statutorily determines standards of judicial review in some circumstances in B.C. The *ATA* does not apply to the present case. Therefore the common law governs the standard of review.

[43] At common law, there is a presumption of deferential review when an administrative decision-maker interprets its home statute or a statute closely related to its functions: *Dunsmuir* at para. 54. The presumption of deferential review is rebutted where the question falls into a category to which the correctness standard applies. As set out in *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55 and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras. 22 and 24, the four categories are:

i. constitutional questions;

ii. questions of law that are of central importance to the legal system as a whole and that are outside of the decision-maker's expertise;

iii. questions regarding the jurisdictional lines between two or more competing specialized tribunals; and

iv. the exceptional category of true questions of jurisdiction.

[44] Both parties agree the above exceptions do not apply in the case before me. They agree the standard of review of the Commissioner's interpretation of *FIPPA* is reasonableness because the Commissioner is interpreting its own home statute.

[45] The Supreme Court of Canada discussed the meaning of the reasonableness standard in *Dunsmuir* at para. 47. Justices Bastarache and LeBel explained that the standard of reasonableness is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[46] The parties' submissions on the standard of review are consistent with the jurisprudence. Reasonableness is the standard I will apply: *Dunsmuir*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67.

Section 22(4)(e)

Position of the Parties

[47] The Delegate held that the disclosure of the employees' names was not an unreasonable invasion of privacy pursuant to s. 22(4)(e) of *FIPPA*. BC Hydro argued the Delegate should not have relied on s. 22(4)(e) because it was not referred to by the Applicant in his submissions. The Commissioner argued the Applicant did refer to s. 22(4)(e).

[48] BC Hydro argued the Delegate found that the redacted names (i.e., the names themselves) were information about the employees' position, functions, or remuneration with the public body. BC Hydro argued a name in itself cannot be information about a person's position, function, or remuneration. As a matter of pure statutory interpretation, the Delegate's Decision was therefore unreasonable.

[49] The Commissioner argued the Delegate found that s. 22(4)(e) applied to the identifiable information (i.e., the employees' names) that was redacted. The Commissioner argued s. 22(4)(e) must be read with its preamble which states: "A disclosure of *personal information* is not an unreasonable invasion of a third party's personal privacy if…" (Emphasis added). The Delegate found that s. 22(4)(e) applied to the identifiable information that was redacted so that it was not an unreasonable invasion of privacy to release the names.

[50] BC Hydro also argued that reference to the "name" of the third party is absent from s. 22(4)(e). BC Hydro argued that if the Legislature intended for s. 22(4)(e) to include names, presumably it would have said so. The maxim of statutory interpretation *expressio unius est exclusio alterius*, the express mention of one thing excludes all others, applies: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at ss. 8.89 to 8.106.

[51] The Commissioner argued that statutory context is important. Counsel set out a number of sections within s. 22(4) which do not contain the word "name" but which must, to provide context, be interpreted as including names.

[52] BC Hydro argued that in coming to her conclusion, the Delegate misunderstood the meaning of the word "about" in s. 22(4)(e). The Commissioner argued the word "about" is ambiguous. Its meaning is affected by its context: *Wagner v. Croft*, 1910 CarswellOnt 305 at para. 2 (Div. Ct.); *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 at paras. 38–40 and 43. The Commissioner argued the word "about" has a broad meaning, admitting many different interpretations. The word "about" indicates a relationship or connection between one subject matter and another.

[53] Lastly, BC Hydro pointed out that it provided all the information requested apart from the individual employees' names. The records were disclosed and are understandable in the absence of the redacted names. Once the Delegate

determined that s. 22(4)(e) applied, she did no further analysis. As a result, she did not engage in any balancing between access and the privacy rights of individuals.[1]

Analysis

[54] The issue before the Delegate was whether disclosure of employees' names was an unreasonable invasion of their personal privacy. Section 22 provides a number of factors that must be considered if withholding information under subsections (1) to (3).

[55] Section 22 is an exception to the general rule mandating disclosure. Section 22(1) contains a mandatory exception to disclosure where the disclosure will result in an unreasonable invasion of a third party's personal privacy. Section 22(4) lists circumstances were the disclosure of personal information is not unreasonable. The Supreme Court of Canada held that exceptions to disclosure are to be narrowly construed in the access to information context if the meaning is not clear: *Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71 at para. 18.[2]

[56] The Delegate found that s. 22(4)(e) applied to the identifiable information that was redacted, so that it was not an unreasonable invasion of privacy to release the names. The Delegate is owed significant deference because this is an interpretation of the Commissioner's home statute. I must be careful not to apply a correctness

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[1] Section 2 of *FIPPA* also requires a balancing between access to public records and an individual's right to privacy. The presumption is in favour of disclosure and transparency but these considerations must be weighed against individuals' right to privacy.

[2] The circumstances enumerated in s. 22(4) are not exceptions to disclosure, they are exceptions to s. 22(1), which is itself an exception to disclosure. The Supreme Court of Canada articulated this point as follows:

> [18] It is true that exceptions to disclosure have generally been narrowly and I did say in Québec (Communauté urbaine), that "when the legislature makes a general rule and lists certain exceptions, the latter must be regarded as exhaustive and so strictly construed". However, that rule of interpretation applies only where the *Act* needs to be construed. As McDonald J.A. of the Federal Court of Appeal said in applying the Access to Information *Act*, the *Act* must not be interpreted where no purpose is served by doing so (*Rubin* at para. 24):
>
> > It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the *Act* in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it.

standard when the Delegate's interpretation of s. 22(4)(e) need only be within a range of reasonable interpretations open to her.

[57] I agree with the Commissioner that the Applicant essentially raised and relied on s. 22(4)(e) in para. 91 of his submissions before the Delegate. The Applicant is not a lawyer and his submissions were drafted using the words "about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff…" This provides me with a sufficient basis to conclude the Applicant relied on s. 22(4)(e).

[58] In any event, the Delegate was obliged to consider all of s. 22(4) when coming to her Decision because s. 22(4) contains mandatory circumstances where disclosure will not unreasonably invade personal privacy. This reasoning is supported by s. 56 of *FIPPA*. Section 56 requires the Commissioner to determine all questions of fact and law arising in the course of an inquiry. I therefore dismiss this objection by the Petitioner.

[59] In terms of the Commissioner's submissions on the word "about", the Delegate did not analyse or explain the meaning of the word "about" in her analysis. This analysis is not implicit in her Decision. The Commissioner is advancing a new argument, is attempting to recast the Decision, and is expanding upon the initial reasoning of the Delegate. This is impermissible and I disregard the Commissioner's submissions regarding the word "about".

[60] In terms of the maxim *expressio unius est exclusio alterius*, from a review of the relevant provisions the Legislature was alive to the necessity of referring to an individual's name in certain circumstances. For example, s. 22(3)(j) states:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[61] The legislation also refers to the names of third parties in some parts of s. 22(4). For example, s. 22(4)(i) provides that:

> a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (i) the disclosure, in respect of [a license, permit or similar discretionary benefit or a degree, diploma or certificate] reveals any of the following
>
> …
>
> (iii) the name of the third party to whom the item applies …

[62] Section 22(4)(j)(i) applies in the context of the public body conferring discretionary benefits of a financial nature to a third party. If "the name of the third party to whom the benefit applies…" is revealed, the disclosure of the name is not considered an unreasonable invasion of a third party's privacy.

[63] The Legislature expressly referred to names of third parties in certain provisions and failed to do so in s. 22(4)(e). This supports the inference that the Legislature turned its mind to this issue. Since it did not refer to "names" in s. 22(4)(e), it may be that the Legislature deliberately chose to exclude a reference to names of third parties in this provision.

[64] Despite the reference to names in certain parts of the legislation and not in s. 22(4)(e), the jurisprudence is clear that the legal maxim *expressio unius est exclusio alterius* is but one consideration. As stated by the Supreme Court of Canada in *Jones v. A.G. of New Brunswick* (1974), [1975] 2 S.C.R. 182 at 195–196 [*Jones*]: "This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions." *Jones* was cited with approval in *Whitehorse (City) v. Darragh*, 2009 YKCA 10 at para. 40. Similarly, Justice Maisonville in *Langley (Township) v. Vancouver Ready Mix Inc*., 2015 BCSC 1048 at para. 79, citing *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271, reasoned that:

> [T]he intention, or purpose, of the enacting body is at issue, and so presumptions about how legislation is drafted and associated textual tools, such as the implied exclusion principle, have some role to play. However,

> these tools are not determinative and must be considered "in the spirit of searching for the purpose broadly targeted."

[65] More recently Justice Savage in *Li v. Roa*, 2019 BCCA 265 cautioned against over reliance on the maxim:

> [76] Although courts often rely on implied exclusion reasoning, they also often reject it. The force of the implication depends on the strength and legitimacy of the expectation of express reference. As noted by the Saskatchewan Court of Appeal, its application calls for "a considerable measure of caution lest too much be made of it": *Dorval v. Dorval*, 2006 SKCA 21 at paras. 13-14.

[66] I must therefore be careful not to place too much emphasis on this legal maxim.

[67] I note that "personal information" is a defined term under *FIPPA*. It means "recorded information about an identifiable individual…" Sections 22(2), (3), and (4) set out how to determine whether a disclosure of a particular type of personal information constitutes an unreasonable invasion of a third party's personal privacy. It cannot be personal information if it does not disclose information about an identifiable individual. Without a name, or some other information that identifies a particular individual, it is not personal information.

[68] A person's position, function, or remuneration, without a name attached, is not personal information because alone, in most circumstances, they will not identify a particular individual. To be information about an identifiable individual, the individual's name is required.

[69] I agree with the Commissioner that s. 22(4)(e) can be read with its preamble, "A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if…" In that context, s. 22(4)(e) provides that information about an *identifiable individual* which relates to that individual's position, function or remuneration as an officer, employee or member of a public body does not, if disclosed, constitute an unreasonable invasion of that individual's privacy. In other words, one interpretation of s. 22(4)(e) is that the disclosure of the names is not an

unreasonable invasion of personal privacy because the information is about an identifiable individual's position, function or remuneration.

[70] Although the issue could have been more thoroughly canvassed, it was reasonable for the Delegate to find s. 22(4)(e) applied to the identifiable information (i.e., the employees' names) that were redacted. The Delegate could reasonably come to this conclusion by reading s. 22(4)(e) with its preamble. Although s. 22(4)(e) does not specifically contain the word "name", by implication it can be interpreted as including the word "name". That is what transforms the information into information about an identifiable individual.

[71] Tribunals are entitled to a "margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir* at para. 47. Courts are not entitled to set aside administrative decisions just because the court disagrees with the result: *Maddock* at para. 45. It was within the range of acceptable and rational solutions to find that it was not an unreasonable invasion of privacy for BC Hydro to release the names of the employees pursuant to s. 22(4)(e).

[72] In addition, it appears the employees' names fit under the definition of "contact information" in Schedule 1 of *FIPPA*:

> **"contact information"** means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[73] As stated earlier in this decision, "personal information" means "recorded information about an identifiable individual other than contact information": *FIPPA*, Schedule 1, Definitions. Therefore, if the employees' names are contact information, they are not personal information. If the employees' names are not personal information, s. 22(1) does not apply and the disclosure of the employees' names is not unreasonable, regardless of whether any of the circumstances in s. 22(4) apply.

[74] Employee's names and positions have been found to be contact information: *British Columbia (Finance) (Re)*, 2019 BCIPC 21; *British Columbia (Children and*

Family Development) (Re), 2018 BCIPC 41. However, the Delegate did not consider this issue and it was not argued on judicial review. This is likely because the information was not being sought to contact the individuals at their place of business. Either way, it does not affect the result as I have found the Delegate's Decision that s. 22(4)(e) applied to require disclosure of the employees' names was reasonable.

Section 19

Position of the Parties

[75] Section 19 authorizes a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to threaten an individual's "safety or mental or physical health."

[76] BC Hydro provided evidence of actual physical and verbal violence, including threats of future violence. In these circumstances, BC Hydro argued the release of individual names would put its Site C employees at risk for targeted violence. BC Hydro is concerned that if disclosed, employees' names would be disseminated on social media, increasing the risk of negative effects on employees' mental health and well-being.

[77] BC Hydro argued that while the Delegate cited the correct legal test, she required an inappropriately high standard of proof regarding threats to security. As stated by BC Hydro, the Delegate "committed precisely the error identified by the Supreme Court of Canada in *Merck Frosst*: she interpreted the 'could reasonably be expected' test as requiring evidence that the apprehended harms had actually occurred, or that there is a near certainty that the harms will occur": Petitioner's submissions at para. 42.

[78] The Commissioner disagreed that the Delegate applied an inappropriately high standard of proof. The Commissioner argued the Delegate found a number gaps in BC Hydro's evidence. The gaps were as follows:

i. there was no evidence particular employees were targeted as a result of their association with Site C;

ii. there was no evidence suggesting the names or identities of employees were relevant to the incidents described in Mr. Powell's affidavit;

iii. there was no evidence of any incidents at BC Hydro's offices where the employees whose names are at issue work;

iv. there was no evidence BC Hydro's higher level employees, whose names are public, have been harassed; and

v. there was no evidence from the employees whose names are at issue regarding how the disclosure of their names might threaten their mental health.

[79] The Commissioner argued BC Hydro is effectively asking this Court to impermissibly re-weigh or reinterpret the evidence under the pretense of finding legal error. This is the "sin of disguised correctness" that Justice Stratas admonished against in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79.

Analysis

[80] Under s. 19 of *FIPPA*, the head of a public body has discretion to refuse to disclose information to an applicant if that disclosure could "reasonably be expected to threaten anyone else's safety or mental or physical health."

[81] At the hearing before the Delegate, BC Hydro provided affidavit evidence that Site C has been the focus of contentious public debate. BC Hydro asserted that there have been alarming displays of physical and threatened violence. It provided specific evidence of this physical and threatened violence at paras. 20(a) to (h) of the petition, supported by the affidavit of Mr. Powell, the security project manager and security lead at Site C for BC Hydro. Mr. Powell's evidence is set out in paras. 19 and 20 of this decision.

[82] There was evidence that the threats during meetings and at the construction site made some employees feel unsafe. Some felt vulnerable and apprehensive. BC Hydro took the unusual step of not publishing Site C office information on employees' business cards to address these concerns. In the past, BC Hydro refused to release the names of Site C employees, with the exception of those who are the "public face" of the project. BC Hydro increased security measures throughout its operations and provided basic personal safety training to all Site C employees, including training for self-defence, due to its concerns regarding employee security.

[83] The Delegate found there was an insufficient connection between the disclosure of the employees' names and a threat to those employees' safety, or mental or physical health. Therefore, BC Hydro was not authorized under s. 19(1)(a) of *FIPPA* to refuse to disclose the employees' names.

[84] This is an interpretation of the Commissioner's home statute and the Delegate's assessment of the law and the evidence is entitled to deference: *Dunsmuir* at para. 54; *Maddock* at para. 45. The Delegate's interpretation of s. 19 of *FIPPA* need only be reasonable in the context of the evidence.

[85] The burden rests with BC Hydro to establish that the disclosure of the employees' names could result in a reasonable expectation of probable harm: *FIPPA*, s. 57; *Merck Frosst* at para. 195. The test is summarized in *Community Safety*:

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[86] This test is intended to balance the goal of disclosure against the need to avoid harm to third parties resulting from disclosure: *Merck Frosst* at para. 204. A succinct description of what is meant by a "reasonable expectation of probable harm" was articulated by Justice Cromwell, as he then was, at para. 196 of *Merck Frosst*: "[W]hile the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible."

[87] In addition to the Supreme Court of Canada jurisprudence, this Court has provided guidance on this point: *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875. More recently, Justice Powers helpfully summarized this law in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080:

> [42] Justice Cromwell indicated that the "reasonable expectation of probable harm" standard is intended to strike a balance between the important goals of disclosure on one hand, and avoiding harm to third parties resulting from disclosure on the other hand. To achieve this balance, the standard requires harm that is more than simply "fanciful, imaginary or contrived", but the standard does not go so far as requiring proof that the harm is more likely than not to occur (para. 204). In *Community Safety* at para. 59, Cromwell J. and Wagner J. (as he was then) noted that to meet the "reasonable expectation of probable harm" standard, there must only be a reasonable basis for believing that harm will result, and that the standard does not require a demonstration that harm is probable.
>
> [43] In *Community Safety*, the Court wrote that the "reasonable expectation of probable harm" standard should be used wherever the "could reasonably be expected to" language is used in access to information statues (para. 54). Section 21(1)(c) of the *FIPPA* uses the "could reasonably be expected to" language.

[88] The courts have articulated a middle ground: to rely on s. 19(1)(a) of *FIPPA*, the public body does not need to prove the harm will *probably* occur if the information is disclosed. However, the mere *possibility* of harm is also not sufficient. Put another way, the test articulated by the Supreme Court of Canada is that the probability of the harm need only be reasonably expected; the test does not require probable or actual harm: *Community Safety* at para. 54

[89] The Delegate found BC Hydro's evidence did not establish a connection between disclosing employees' names and a threat to those employees' safety, or mental or physical health. For example, she noted that the employees whose names were withheld were not near the top of BC Hydro's corporate structure. The Delegate reasoned that because there was no evidence that higher level employees, the "public face" of the organization, were harassed, there was no basis on which to withhold lower level names.

[90] While the Delegate acknowledged she had "no doubt that frontline employees have concern for their safety", she was less sympathetic to employees who work at BC Hydro's offices "where the procurement assessment presumably takes place": para. 77. As she stated at para. 80: "I am not satisfied that disclosing the names of the employees involved in the administration processes related to the RFQ, could reasonably be expected to threaten their safety, or physical or mental health under s. 19(1)(a)."

[91] The Delegate was not persuaded by the incidents of threatened and actual violence nor the concerns BC Hydro has for its employees as outlined by Mr. Powell. She was not persuaded this amounted to the type of harm required to bring the public body within the exception in s. 19. In support of her Decision, the Delegate stated:

> i. There is no suggestion that particular employees have been targeted because of their association with Site C (para. 76).
>
> ii. There is nothing to suggest that the names and identities of the employees present at the time [of the various incidents] were relevant to the incidents. Rather, it was the employees' physical proximity to the project which cause them to be in harms-way (para. 76).

[92] The Delegate concluded that employees who work at BC Hydro's offices were likely safe because no threats or violence had occurred at BC Hydro's offices. She assumed the employees whose names were redacted worked at BC Hydro's offices.

[93] The Delegate was alive to the relevant jurisprudence. The Delegate correctly stated that "BC Hydro must prove that the likelihood of threat to anyone's safety or mental or physical health resulting from disclosure of the disputed information is 'well beyond' or 'considerably above' a mere possibility": Decision at para. 63. She properly examined the evidence to establish it was more than speculative. However, the Delegate did not apply the *Merck Frosst* concept of the middle ground between what is probable and what is possible, the "reasonable expectation of probable harm" test. She did not state what BC Hydro need *not* prove to rely on s. 19(1)(a)—actual physical harm or that harm would probably occur if the names were disclosed. Her reasoning suggested actual physical harm at a particular worksite must be proven. However, there "need only be a reasonable basis for believing that harm will result": *United Association of Journeymen* at para. 42. A third party "need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed": *Merck Frosst* at para. 196.

[94] While she employed some of the correct terminology, the Delegate's interpretation of s. 19(1)(a) required the apprehended harm to rise to the level of either a near certainty or to have already occurred in a similar context (i.e., at the head office). This was an unreasonable interpretation for two reasons. First, according to the Supreme Court of Canada, a public body is not required to prove the disclosure of the information will actually result in harm or even probable harm. Second, requiring actual harm to occur does not permit public bodies to be proactive in preventing harm to their employees or other third parties. Surely, a public body need not wait for actual harm to put protective measures in place to protect the privacy of their employees when their physical safety or emotional well being is at stake.

[95] The Commissioner noted the Delegate found a number of gaps in BC Hydro's evidence. The Commissioner argued the "Court may conclude that the Adjudicator's discussion at paras. 76-79 was not an exhaustive account of the evidence needed to find in BC Hydro's favour, but was simply meant to illustrate the kind of evidence that

the adjudicator might have expected BC Hydro to provide": Commissioner's submissions at para. 68.

[96] I find the Delegate's Decision, when read as a whole, required evidence from BC Hydro of actual harm to meet its burden under s. 19(1)(a). She correctly found BC Hydro had to establish more than speculation but her judgment implied the Petitioner had to establish some employees were physically hurt or employees suffered from mental health issues before bringing itself within the discretion available in s. 19(1)(a). By expecting BC Hydro to demonstrate that harm would likely result if the names were disclosed, the Delegate imposed an unduly high onus on the Petitioner.

[97] I am also troubled by the Delegate's comment that there was no evidence proffered from employees regarding how the disclosure of their names might threaten their mental health. Had these employees sworn or affirmed affidavits articulating how their mental health has been affected, not only would this disclose their names, it would also be an invasion of privacy of employees' sensitive medical information. It was unreasonable to expect such evidence in the circumstances. It would defeat the purpose of s. 19(1)(a).

[98] By imposing such a high onus on BC Hydro, the Delegate's interpretation of s. 19 was unreasonable. I find the Delegate's application of s. 19(1)(a) is not within the range of possible, acceptable outcomes and is not defensible in respect of the facts and the law.

[99] The Decision should be remitted back to the Commissioner to determine this issue at the facts, applying the proper legal test.

[86] Given my conclusion regarding s. 19(1)(a), I need not say more regarding whether the Delegate misapprehended the evidence in relation to s.19.

Disposition

[100] For all of the above reasons, I partially allow the judicial review and set aside the Delegate's order under s. 19(1)(a) of *FIPPA*.

[101] I remit the matter back to the Privacy Commissioner to make the appropriate order(s) in accordance with these reasons.

[102] All parties will bear their own costs.

"D. MacDonald J."