IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnaby (City) v. British Columbia (Information and Privacy Commissioner),* 2023 BCSC 948

Date: 20230605
Docket: S228818
Registry: Vancouver

Between:

City of Burnaby

Petitioner

And

British Columbia Information and Privacy Commissioner and David Hayre

Respondents

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.K. Lovett, K.C.
Counsel for the Respondent, British Columbia Information and Privacy Commissioner:	A.R. Hudson
The Respondent, David Hayre:	No Appearance
Place and Date of Hearing:	Vancouver, B.C. May 15, 2023
Place and Date of Judgment:	Vancouver, B.C. June 5, 2023

INTRODUCTION

[1] This judicial review concerns whether the petitioner, City of Burnaby (the "City"), is required to provide certain information to the respondent, David Hayre, arising from his freedom of information request. The requested information related to the lands owned by the City. The City provided some information; however, some information was withheld relating to some of the City's lands that is, in turn, related to its plans for future development projects.

[2] In September 2022, an Adjudicator appointed by the respondent, British Columbia (Information and Privacy Commissioner) ("OIPC"), ordered that the City disclose the withheld information.

[3] Mr. Hayre did not respond to this proceeding, nor did he attend at this hearing. However, OIPC's counsel has attended on this judicial review to provide limited submissions to the Court regarding the Adjudicator's decision to compel disclosure by the City.

[4] For the reasons discussed below, I conclude that the Adjudicator's decision to compel production by the City to Mr. Hayre of the redacted information is unreasonable and should be set aside.

BACKGROUND FACTS

[5] On January 24, 2020, Mr. Hayre made an access request to the City pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*]. Mr. Hayre sought "a list of all properties owned by [the City] in Burnaby and any properties that it may own in the province of B.C. Canada."

[6] On February 25, 2020, the City responded to Mr. Hayre's request attaching a 66-page spreadsheet entitled "List of City of Burnaby – City Owned Properties". The spreadsheet included many rows/columns indicating a municipal address and/or the property identifier (PID) for a number of properties owned by the City. However, in 421 rows/columns, the municipal addressees and/or PIDs for those listed properties were redacted (the "Properties").

[7] The City took the position that it could withhold the redacted information relating to the Properties under s. 17(1) of *FIPPA*. Subsection 17(1) of *FIPPA* provides that a public body, such as the City, can refuse to disclose information which, if disclosed, could “reasonably be expected to harm [its] financial or economic interests”.

[8] On March 30, 2020, Mr. Hayre asked the OIPC to review the City’s decision to withhold the information, pursuant to s. 52 of *FIPPA*.

[9] As provided in s. 55 of *FIPPA*, the OIPC attempted to mediate the dispute between the City and Mr. Hayre, without success.

[10] Accordingly, pursuant to s. 56 of *FIPPA*, the OIPC appointed an Adjudicator to conduct an inquiry in writing regarding Mr. Hayre's information request and the City’s withholding of certain information in its reply to that request (the “Inquiry").

[11] The process under the Inquiry was as follows: on April 4, 2022, the OIPC issued a Notice of Written Inquiry; on May 26, 2022, the City filed its initial submissions and two supporting affidavits, being the Affidavit of Edward W. Kozak sworn May 25, 2022 and the Affidavit of Dave Critchley sworn May 26, 2022; on June 29, 2022, Mr. Hayre filed his response submissions; on July 9, 2022, Mr. Hayre filed further response submissions; and, on July 27, 2022, the City filed its reply to Mr. Hayre’s response submission together with the Affidavit of Johannes Schumann sworn July 27, 2022.

[12] Mr. Hayre did not file any affidavit evidence in the Inquiry.

[13] Accordingly, the evidence before the Adjudicator included that of Mr. Critchley, the City’s “General Manager Community Safety” and Director of Public Safety and Community Services. Mr. Critchley managed the Lands and Realty program that was part of the Public Safety and Community department. In addition, Mr. Kozak’s evidence was given in his capacity as the City’s General Manager, Planning and Development. The only other evidence before the OIPC was the

unredacted version of the City's spreadsheet which was accepted on an *in camera* basis in the Inquiry.

LEGISLATIVE REGIME

The Scheme of *FIPPA*

[14] The purpose of *FIPPA* is to make public bodies more accountable to the public and to protect personal privacy by, among other things, giving the public a right of access to records and specifying "limited exceptions" to the right of access: *FIPPA,* ss. 2(1)(a) and (c).

[15] Under s. 3(1) of *FIPPA*, the Act applies to all records "in the custody or under the control of the public body", subject to certain enumerated categories of records to which *FIPPA* does not apply.

[16] Section 4 sets out the public's right to access information:

> 4(1) Subject to subsections (2) and (3), a person who makes a request under section 5 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information that is excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.
>
> (3) The right of access to a record is subject to the payment of fees, if any, required under section 75.

[17] Section 57(1) of *FIPPA* states that, at an inquiry, "it is up to the head of the public body to prove that the applicant has no right of access to the record or part." Thus, the default rule under *FIPPA* is that public body records are to be released, unless the public body establishes that the records (or parts of the records) are excepted from disclosure under *FIPPA.*

[18] This right of access promotes meaningful political participation by citizens and ensures that government remains accountable to the citizenry: *Vancouver*

Whitecaps FC LP v. British Columbia (Information and Privacy Commissioner), 2020 BCSC 2035 [*Vancouver Whitecaps*] at para. 41.

The Relevant Exceptions to Disclosure

[19] The *sole* issue addressed by the Adjudicator at the Inquiry was whether s. 17(1) of *FIPPA* authorized the City to withhold the information in dispute.

[20] Under s. 57(1) of *FIPPA,* the City had the burden of proving that Mr. Hayre had no right of access to the information withheld under s. 17(1), in that disclosing the information could "reasonably be expected to harm the financial or economic interests of [the City]."

[21] Subsections 17(1)(a)–(f) of *FIPPA* provides non-exhaustive examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1):

> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[22] The circumstances in s. 17(1)(a)–(f) are not standalone provisions that are to be read apart from the opening words in s. 17(1). In any of those specific circumstances, the public body must still prove that disclosure could reasonably be expected to cause financial or economic harm: see Order F19-03, *British Columbia Pavilion Corporation (Re)*, 2019 BCIPC 4 at para. 22; Order F22-35, *E-COMM*

Emergency Communications for British Columbia Inc. (Re), 2022 BCIPC 39 at para. 33.

[23] The City does not contend that the information relating to the Properties comes within any of the above specific examples. It relies solely on the opening words of s. 17(1) of *FIPPA*.

[24] The relevant law arising under s. 17(1) of *FIPPA* is not in dispute and the parties agree that the Adjudicator properly identified the legal principles that apply:

a) The standard of proof required by s. 17(1) is a reasonable expectation of probable harm or "a middle ground between that which is probable and that which is merely possible": *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 [*Merck*] at paras. 194 and 201; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54 [*Ontario (Community Safety*)];

b) The City must prove that disclosure of the specific information at issue will result in a risk of harm that goes “well beyond the merely possible or speculative”. The City does not, however, need to prove on a balance of probabilities that the disclosure will in fact result in such harm or that it is even probable: *Merck* at para. 206; *Ontario (Community Safety)* at para. 52; *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 [*BC Hydro*] at paras. 87-88; Order F22-01, *Langford (City) (Re)*, 2022 BCIPC 1 at para. 12; Order F22-46, *British Columbia (Office of the Premier) (Re)*, 2022 BCIPC 52 at para. 23;

c) The inquiry is contextual and the quality of evidence needed will depend on the nature of the issue and the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Ontario (Community Safety)* at para. 54;

d) General speculative or subjective evidence will not suffice: Order F08-03, *British Columbia (Public Safety & Solicitor General) (Re)*, [2008] B.C.I.P.C.D. No. 6, 2008 CanLII 13321 at para. 27;

e) It is the release of the information in dispute that must give rise to the reasonable expectation of harm; or, in other words, there must be a "direct link" between the disclosure and the apprehended harm: *Merck* at para. 219; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875 at para. 43; and

f) The disclosure of the information in dispute must be treated as disclosure to the world: Order 03-25, *British Columbia Hydro and Power Authority, Re*, [2003] B.C.I.P.C.D. No. 25, 2003 CanLII 49204 at para. 24.

THE DECISION

[25] On September 20, 2022, the Adjudicator issued her decision in the Inquiry: Order F22-44, *Burnaby (City) (Re)*, 2022 BCIPC 50 (the "Decision").

[26] At para. 27 of the Decision, the Adjudicator states:

> [27] The City does not make any submissions about the information in the *Redacted* column of the spreadsheet. Having reviewed the record, I do not see how disclosure of this information could reasonably be expected to harm the City's financial or economic interests. Therefore, I conclude that s. 17(1) does not apply to the information withheld under the *Redacted* column heading.

[27] At para. 28 of the Decision, the Adjudicator states that the City relies on its "past experiences" as the basis for its position. Examples are set out in the Affidavits of Mr. Critchley and Mr. Kozak.

[28] At para. 29 of the Decision, the Adjudicator discusses those examples, citing the statements in the Affidavits where property owners sought prices above fair market value where the owners:

- "became aware that the City had targeted their property for development;"
- "learned [the property] was targeted for City acquisition;"
- "learned of the City's plans to purchase his property;" and
- "became aware that the City wanted to buy his property."

[Endnotes omitted.]

[29] At para. 30 of the Decision, the Adjudicator states:

> [30] The managers describe another example where a property owner refused to consider any offers at the current fair market value but they do not explain why the owner refused to do so. The managers say that in 22 other examples, property owners sought compensation above fair market value upon learning of the City's "acquisition objectives."

[30] The heart of the Adjudicator's Decision relates to the question as to whether the City had established a "direct link" between disclosure and potential harm. She found the City had not, stating:

> [31] The City's evidence shows that when a property owner learns that the City wants to buy their property, that knowledge can reasonably be expected to cause them to refuse to sell unless they get more than fair market value. I can see how some property owners may simply not want to sell their property to the City regardless of the price. However, the City has not established a direct link between that kind of response by property owners and disclosure of the municipal addresses and PIDs at issue in this inquiry.
>
> [32] Disclosing the municipal addresses and PIDs would allow a property owner advance notice of the City's interest in their property. In my view, it <u>is reasonable to conclude that a property owner may seek prices above market value or refuse to sell regardless of when the property owner learns of the City's interest in their property</u>. The City has not satisfactorily explained how the timing of when the property owner learns of the City's interest would alter the property owner's refusal to sell or desire to seek more than fair market value when the negotiation actually begins. In fact, the City's evidence demonstrates that <u>even without the kind of advance knowledge that the information in dispute conveys, property owners often demand more than fair market value once they learn of the City's interest in their property</u>. I do not see, and the City does not explain, how advance notice of the City's interest would alter the negotiations between the City and the property owner. In my view, <u>the risk of property owners seeking prices above fair market value or refusing to sell is inevitable and would not result from disclosure in response to the applicant's FIPPA access request</u>.
>
> [33] For these reasons, I find that there is <u>not a direct link between disclosure of the municipal addresses and PIDs and property owners seeking prices above fair value or refusing to sell</u>. I am not persuaded that disclosing

> the municipal addresses and PIDs could reasonably be expected to harm the City's financial or economic interests.
>
> [Emphasis added.]

[31] Accordingly, the Adjudicator concluded that the City had not met its burden of proof to establish that s. 17(1) applies to the information in dispute. Pursuant to s. 59(1) of *FIPPA,* the Adjudicator ordered the City to give Mr. Hayre access to the information in dispute, with a copy to the OIPC Registrar of Inquiries, by November 3, 2022: Decision at paras. 34–35.

[32] Pursuant to s. 59 of *FIPPA*, the Adjudicator's Decision and resulting order is now stayed pending the completion of this judicial review.

ANALYSIS

The OIPC's Submissions

[33] I have accepted, as did the City, that the OIPC's counsel has standing at this hearing to make submissions in relation to: the record of proceedings, including the *in camera* portions of the record; the applicable standard of review; the applicable case law, in order to frame the issues in the overall context of the facts; and, the appropriate remedy on judicial review.

[34] In doing so, I acknowledge the OIPC's role in maintaining its impartiality while also facilitating this judicial review, particularly given that Mr. Hayre has chosen not to participate: *Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44 at paras. 41–69; *18320 Holdings Inc. v. Thibeau,* 2014 BCCA 494 at paras. 51–53; *British Columbia (Ministry of Justice) v. Maddock,* 2015 BCSC 746 at para. 5; and *Vancouver Whitecaps* at para. 6. In my view, the OIPC's counsel has remained within these parameters in terms of his submissions, which have been helpful.

Standard of Review

[35] The presumptive standard of review of the Adjudicator's decision is reasonableness, as the issue here is not a general question of law of central importance to the legal system as a whole: *Canada (Minister of Citizenship and*

Immigration) v. Vavilov, 2019 SCC 65 [*Vavilov*] at paras. 16, 58–62 and 72. Relevant principles from *Vavilov* include:

a) Reasonableness is concerned with the decision-making process and its outcomes toward considering whether the decision, read as a whole, bears the hallmarks of reasonableness—justification, transparency, and intelligibility of a decision (paras. 15 and 81);

b) A reasonable decision is one that is based on an internally coherent and rational chain of analysis (paras. 102–104);

c) A decision must be justified in light of the legal and factual constraints in relation to the facts and the law, and must be consistent with the context and the overall scope and purposes of the statutory scheme, and any specific constraints imposed within the statute (paras. 105–110);

d) The decision maker must assess the evidence before them. Reasonableness may be jeopardized when the decision maker has fundamentally misapprehended or failed to account for the evidence before it (paras. 125–126);

e) The review process puts the reasons first and pays respectful attention to them (para. 84); and

f) Before a decision can be set aside as being unreasonable, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision; they must be more than superficial or peripheral to the merits of the decision (para. 100).

[36] Reasons should be read holistically and a review is not a “line by line treasure hunt for error”; however, the decision must meaningfully account for the central issues and concerns raised: *Vancouver Whitecaps* at para. 33-34.

[37] The onus lies with the City to demonstrate the unreasonableness of the decision: *Vavilov* at para. 100.

Discussion

[38] The City places considerable emphasis on the context that informed its position that disclosure of the information relating to the Properties would be harmful to it and its citizens. In particular, the City points to its powers as being derived from the *Local Government Act,* R.S.B.C. 2015, c. 1 and the *Community Charter,* S.B.C. 2003, c. 26.

[39] Section 1(2) of the *Community Charter* recognizes that municipalities require:

> (a) adequate powers and discretion to address existing and future community needs;
>
> (b) authority to determine the public interest of their communities within a legislative framework that supports balance and certainty in relation to the differing interests of their communities;
>
> (c) the ability to draw on financial and other resources that are adequate to support community needs;
>
> (d) authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes, and
>
> (e) authority to provide effective management and delivery of services in a manner that is responsive to community needs.

[40] Like many municipalities in the Lower Mainland, Burnaby has had significant growth in its population in recent years. It has an Official Community Plan (OCP) to provide a framework to manage future growth to meet the ever changing and increasing needs of its citizens. Not surprisingly, some aspects of meeting that future growth include providing a greater amount and mix of housing, including affordable housing, and also, community services and facilities for its citizens, such as parks and community infrastructure.

[41] The gravamen of the City’s submissions before the Adjudicator and now on this review is as follows:

> … The redacted information consists of street addresses and associated Parcel IDs that relate to <u>properties that are currently the subject of land acquisition projects where [the City] has targeted adjacent or proximate</u>

> properties for acquisition and land assembly. What this means is that all of the withheld information identifies properties targeted for parkland expansion or development with respect to as yet incomplete land assemblies (some of the targeted adjacent properties have not yet been purchased).
>
> [The City] took the position that, if this information is disclosed (given its past experiences when land assembly goals became known to a property owner), there is a reasonable expectation that [the City] would suffer economic, financial, and other harms, as well as harm to its ability to negotiate the purchase of these targeted properties at fair market value.
>
> All of the withheld property descriptions are ones associated with active land assembly sites, i.e., sites where there are other properties associated with and identified for assembly that have not yet been purchased by [the City]. If the withheld information is disclosed, it can be discerned from the groupings of these properties that properties adjacent or in close proximity to them are likely targeted or identified for land acquisition by the City.
>
> [Emphasis added.]

[42] The undisputed evidence before the Adjudicator included Mr. Critchley and Mr. Kozak affidavits, that established the past and current experience of the City regarding its land assembly efforts:

a) The City has an exceptionally active land assembly and development program and its Planning Department is responsible for identifying property for acquisition or land assembly and development plans based on the OCP;

b) The City's four town centres have been targeted for higher density development within its borders. The City has identified certain properties in reasonable proximity to these areas for assembly and acquisition. The goal is either to create higher density housing or to expand existing parkland; and

c) Like any actor in the real estate market, the City seeks to pay fair market value for any properties it might acquire, including for any land assembly. For the City in particular, this motivation is driven by the City's accountability to its taxpayers and to be fiscally responsible with public monies.

[43] The City's evidence is that the redactions related to the Properties, which were associated with active land assembly sites, including in relation to other properties not yet purchased by the City but which had been targeted for acquisition to complete the planned land assembly.

[44] The City's evidence also addressed the potential risk of harm arising from disclosure of the details of the Properties. At para. 7 of his affidavit, Mr. Critchley stated that, if disclosed, a person could "[discern]… from the groupings of [the Properties] that properties adjacent or in reasonable proximity to them are likely targeted or identified for land acquisition by the City". Mr. Critchley stated that if disclosure was made, the City may be required to pay more than fair market value for these adjacent or proximate properties that the City may seek to acquire or alternatively, the City may not be able to acquire them at all.

[45] In support of the City's argument regarding the consequences of disclosure, the City's evidence included reference to some 27 examples or situations where the owners of targeted properties demanded beyond fair market value once learning of the City's plans for acquisition. At para. 27 of his affidavit, Mr. Critchley said, in relation to these examples, that it was:

> … clear that the identification of properties targeted by the City for acquisition as part of a planned land assembly has in the past resulted in the property owners seeking purchase prices that are well beyond fair market value and the City having to pay those prices because of the property's importance to planned high-density development or expansion of greenspace. …

[46] One extreme example cited by the City occurred in relation to land that was to be assembled for an overpass project and pump station. Mr. Critchley states that the City made an offer to purchase for $10.8 million, which represented a premium for the site based on appraised values. However, when the property owner became aware of the development objectives, he counteroffered at $66.9 million. Other examples are situations where the City has acquired a number of lots and are seeking to acquire other adjacent lots to complete the land assembly.

[47] In that event, the Decision at para. 18 summarized the City's evidence as to the types of harms that could reasonably be expected if it is unable to purchase the other properties for its land assemblies:

> - The City may not be able to increase low-income rental housing in the City, which may cause harm to the workforce as workers may not be able to afford to live in the City.
> - The City may not be able to realize the construction jobs that would result from the construction of higher density housing on the targeted lands.
> - The City may not be able to realize the increase in its tax base that would result from higher density development.
> - The City anticipates receiving "Density Bonus funds" from developers in exchange for approving higher density developments on the land it has targeted for development. The City uses these funds for acquiring community amenities and developing affordable housing. It may not be able to realize these funds if it is unable to assemble the targeted properties.
> - The City may not be able to increase parkland, which would harm its ability to develop sustainably and achieve its climate change targets.
>
> [Endnotes omitted.]

[48] As the Adjudicator notes at para. 22 of the Decision, Mr. Hayre did not dispute the potential for harm if disclosure was made. I also read the Decision in that the Adjudicator seemingly accepted the City's stated concerns regarding the risk of harm, being that the City could face asking prices well beyond fair market value after approaching a property owner (para. 31).

[49] The OIPC's counsel submits that the Decision was grounded in the finding that the City had not established any "direct link" between those stated concerns and the Properties in question. At para. 31, the Adjudicator stated that many property owners may refuse to sell or sell only at inflated prices simply because the City has expressed an interest in their properties, in that those positions were not linked to information regarding the Properties. I agree that that is a fair reading of the Decision in that the Adjudicator refers to a property owner taking such a position "regardless of when the property owner learns of the City's interest in their property" and that the risk of property owners seeking higher prices is "inevitable": para. 32.

[50] However, the City argues that the Adjudicator's decision speaks simply to knowledge of when property owners learn that the City is interested in buying their property, and that the Adjudicator speculates that mere knowledge of such an interest can be reasonably expected to cause a property owner to refuse to sell unless they receive more than fair market value. In that respect, the Adjudicator found that the City may be faced with unreasonable sale prices or refusals to sell in any event, such that no "direct link" was established.

[51] However, the City further says that the Adjudicator focused on advance knowledge of the City's interest, rather than the *impact* of knowledge—not just of the City's interest—*but of the purpose for which it seeks to acquire the property,* i.e., as part of an active land assembly package for future development or parkland. Finally, the City says that disclosure of the information relating to the Properties provides owners of adjacent or proximate lands with a "virtual roadmap" in that anyone can then determine, with a high degree of certainty, where a land assembly is planned and, determine how critical the purchase of their property is to the land assembly package so as to provide leverage for negotiating purposes.

[52] I agree with the City that the Adjudicator misapprehended the City's evidence and the import of that evidence. The Adjudicator's reference to "timing" issues in para. 32 is indicative of her error in focus. The import of the evidence was not *when* a property owner may become aware of the City's interest in certain lands, but the *reasons* for that interest and an owner's appreciation as to how critical the City's acquisition may be to its overall land assembly ambitions.

[53] Contrary to the Adjudicator's discussion in the Decision, the critical point of the evidence was that a property owner would then not only know that the City was interested in purchasing their property, but also have evidence about the City's likely assembly plans for their property and other properties, and how far along the City had progressed in its land acquisition toward that goal. If a property owner becomes armed with that knowledge, the City's evidence established that there was considerably *more risk* that a property owner may ask for an increased sale price or

refuse to sell at all. In addition, the “disclosure to the world” would also inevitably increase the risk of other third parties entering the fray to purchase the remaining properties in the yet uncompleted land assembly, seeking to acquire “leverage” in relation to the City as a means for profit.

[54] There was no consideration by the Adjudicator of what the impact of disclosure of the withheld information—i.e., specific land that has already been purchased for a land assembly purpose—would reasonably be expected to be if property owners had that specific knowledge as well as knowledge of the City's plans and intentions with respect to the property, which is what the City's affidavits address. Rather, the Adjudicator focused on wording used by Mr. Critchley and Mr. Kozak in relation to the examples only, and focused on the specific words used by then in describing the reasons for the property owner’s responses in asking for higher prices (paras. 29–30).

[55] However, those examples were framed more broadly in the affidavit evidence and simply informed the overarching evidence of Mr. Critchley and Mr. Kozak that the requests by those owners for sale prices beyond fair market value arose where those owners became aware that the City was seeking not just to purchase, but to purchase the property for *land development, land assembly or parks purposes*. This was the evidence that the Adjudicator failed to address; rather, she focused on the examples themselves outside of the context provided by the City’s overall evidence, thus missing the importance of that evidence when considered as a whole.

[56] In particular, before discussing the specific examples of harm already experienced by the City by an owner learning of its plans, Mr. Critchley and Mr. Kozak both stated:

> 17. The City’s concerns are not speculative. <u>It has suffered economic and other harm in the past when property owners became aware that their properties had been identified for land assembly acquisition by the City</u>. These property owners have either refused to sell their property, redeveloped their property, or demanded excessive prices for their sale. When this happens, the City is unable to proceed with land assembly acquisitions in the area for years, and in some instances decades, unless there is some accountably justified reason for paying over market value.

[Emphasis added.]

[57] In the Decision, the Adjudicator mentioned many of the examples cited by the City but did not even mention Mr. Critchley and Mr. Kozak's evidence as quoted above.

[58] I disagree with the OIPC that the City is asking the Court to speculate about how property owners would react if armed with knowledge of the Properties. The City's evidence is not speculative, just as Mr. Critchley and Mr. Kozak state.

[59] I have no doubt that many owners may react to the City, if approached, by asking for prices beyond fair market value or refusing to sell at all, just as stated by the Adjudicator. However, the import of the City's evidence is that there is an *increased risk* of a property owner doing so if he or she is knowledgeable about how critical their property is in the context of the City's plans and intentions for that property. That increased risk was actually experienced by the City many times in the past.

[60] In addition, although not a separate ground for this judicial review, an elevated risk of increasing the leverage that might be exerted by a property owner in a purchase negotiation if a person is armed with full knowledge of the City's ambitions accords with common sense. Human behavior, particularly in the real estate market, tells us that people maximize their position with information and knowledge. A purchaser will typically attempt to buy property for the least amount possible; a seller will attempt to sell for the maximum amount possible.

[61] When persons enter into negotiations to purchase or sell real property, each side has a variety of considerations that inform positions taken in those negotiations. General contract principles are such that arm's length parties are not required to disclose to the other side all information in their possession that bear upon how they approach the negotiation exercise. For example, a property owner may have just lost his job and is facing foreclosure; however, he is not required to disclose that in

negotiating a sale of his property, because if he did, a purchaser would normally be inclined to drive a harder bargain to their benefit.

[62] It is in this context where the City's undisputed evidence is that disclosure of the information regarding the Properties would, indirectly, result in effective disclosure of confidential information held by the City relating to its intentions and plans for future development; information that any property owner would not otherwise have. In addition, if the City were not a public body, the City would not be required to disclose its internal plans in any acquisition negotiation because the other side of the negotiations would likely use that information as leverage for their own benefit and to the detriment of the City's bargaining strategy. The City's evidence was that this very dynamic happened in the 27 examples and negatively affected their ability to acquire the target properties at all or without payment of elevated sale prices beyond what would otherwise have occurred.

[63] The Adjudicator also seems to be of the view that to establish harm, the City would have to prove that, but for the active land assembly site knowledge, property owners would not seek more than market value or refuse to sell. The OIPC's counsel suggests that the City could have introduced evidence to that effect, without specifics of what type of evidence that might be. In substance, the Adjudicator applied a higher test that is the "reasonable expectation of probable harm" test required under *Merck*.

[64] I agree with the City is not required to prove what might be in a property owner's mind before and after the City's interests become known, leaving aside the practicality issue relating to obtaining such proof. This is not the test for harm in this case. The City was not required to prove that an actual delta or difference arose between a scenario where the City sought to purchase a property when a property owner was not armed with the information and when it was armed with the information. All that the City had to show was a "reasonable basis for believing that harm will result" from the disclosure that went beyond speculation or conjecture, not that harm would result or even was probable: *BC Hydro* at paras. 93–94.

[65] The City also points out that Mr. Hayre's response submissions to the Inquiry as to why he wants the information make the very point that he sought this information to *increase his and other property owner's negotiating leverage* if approached by the City to acquire their properties for land assembly purposes. Mr. Hayre's submissions to the Adjudicator were that he wanted "more transparency" from the City regarding its future plans for land assemblies so that he, and other owners in those areas, could use that information to negotiate a higher price when approached by the City (what he described as the "real" fair market value).

[66] Mr. Hayre stated in his submissions:

> The City is holding property owners hostage and preventing people from selling their property at Fair Market Value due to the lack of transparency, withholding information and not upgrading the OCP.
>
> …
>
> [The City] in their submission admits that there are 22 different Land assembly locations where they are trying to buy properties and do not want the current owners [to] know of their plans. [The City] has no right in forcing and deceiving these property owners.
>
> …
>
> We are hoping that the [OIPC] will provide us with the required information so that Property Owners can justly be compensated and that [the City] ceases to abuse its Police powers at the expense of the general public and residents of Burnaby. Disclosure would mean transparency and forthright justice to all.

[67] In summary, I conclude that the Adjudicator erred by misapprehending the City's evidence toward the issue of whether there was a direct link between disclosure of the information relating to the Properties and the anticipated harm arising from higher sales prices or refusals to sell, thus hampering the City's ambitions regarding its targeting of other properties for assembly purposes. The evidence was not speculative and did meet the requirement of proving a reasonable expectation of probable harm, as required under s. 17(1) of *FIPPA*.

DISPOSTION AND REMEDY

[68] I find that the Adjudicator's decision should be quashed as unreasonable. In doing so, I decline to set aside the Adjudicator's decision and remit the matter back to the OIPC for reconsideration pursuant to my authority under the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, s. 7.

[69] I have considered the authorities referred to by the OIPC in support of the proposition that the matter should be remitted, being *Testa v. W.C.B. (B.C.),* [1989] B.C.J. No. 665 at 689-90; *Cactus Cafe Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch),* 2011 BCCA 414 at paras. 28-33; and, *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 at para. 51.

[70] I have also considered the case authority referred to by the City, being *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 354. In that case, this Court quashed an OIPC decision without remitting the matter back to the OIPC where the issue concerned whether an adjudicator had properly interpreted the statute. Justice B. MacKenzie found the adjudicator's reasoning to be flawed and quashed the decision. While no express reasons for declining to remit the matter back to the OIPC were given at para. 110, MacKenzie J. can reasonably be seen as unconvinced of the utility in doing so.

[71] In these circumstances, I also conclude that this is one of those "limited scenarios" per *Vavilov* at para. 142, in which remitting the matter would not be appropriate, given that the outcome is inevitable and remitting the case would serve no useful purpose.

[72] The City does not seek any costs award as against the OIPC and I agree that no costs award should result.

"Fitzpatrick J."