IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *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

Date: 20180703
Docket: S174456
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97 Pension Plan, Sheet Metal Workers' International Association, Local No. 280, Sheet Metal Workers (Local 280) Pension Plan, Construction and Specialized Workers Union, Local 1611, B.C. Labourers Pension Plan, International Brotherhood of Electrical Workers, Local 213, Local 213 Electrical Workers' Pension Plan, Operative Plasterers and Cement Masons International Association, Local 919, Cement Masons' Pension Plan (Local 919), Bricklayers and Allied Craftworkers, Local No. 2 (B.C.), Bricklayers and Masons Pension Plan, Ceramic Tile Workers Pension Plan, International Union of Operating Engineers, Local 115, Operating Engineers Pension Plan, Construction Maintenance and Allied Workers Canada, Carpentry Workers' Pension Plan of B.C., Pile Drivers, Divers, Bridge, Dock and Wharf Builders' Pension Plan, Pile Drivers, Bridge, Dock and Wharf Builders Local Union 2404, Plumbers Local 170 Pension Plan, Island Sheet Metal Workers' and Roofers Pension Plan, Heat and Frost Local Union 118 Pension Plan, and Victoria Mechanical Industry Pension Plan

Petitioners

And:

Office of the Information and Privacy Commissioner for British Columbia (OIPC), Independent Contractors and Business Association (ICBA), and the Superintendent of Pensions

Respondents

Before: The Honourable Madam Justice J. A. Power

On judicial review from: An order of the Office of the Information and Privacy Commissioner for British Columbia (OIPC), dated April 10, 2017 (*Order F17-16*, 2017 BCIPC 17).

Reasons for Judgment

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Counsel for Respondent Independent Contractors and Businesses Association (ICBA):	R. W. Grant, Q.C. and J. Thackeray
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Counsel for Respondent the Superintendent of Pensions:	S. Wilkinson
Place and Date of Hearing:	Vancouver, B.C. October 30 - November 2, 2017
Place and Date of Judgment:	Vancouver, B.C. July 3, 2018

I. INTRODUCTION

[1] The petitioners are a group of unions in the construction industry, and union pension plans, in British Columbia. They seek judicial review of a decision of the Office of the Information and Privacy Commissioner of British Columbia (OIPC).

[2] The respondent Independent Contractors and Business Association (ICBA) requested access to information that 16 union-sponsored plans filed with the Office of the Superintendent of Pensions. The Superintendent withheld some of the information sought but an OIPC adjudicator ordered the Superintendent to disclose the information to the ICBA.

[3] The petitioners argue that based on the adjudicator's findings the decision was unreasonable in that she applied too burdensome a test for proof of harm and causation of harm. The respondent Superintendent of Pensions agrees with and adopts the argument of the petitioners and made some additional comments.

[4] The respondent ICBA argues that the adjudicator's decision was reasonable and should not be disturbed.

[5] For the reasons that follow, I have concluded that the petitioners should succeed.

II. BACKGROUND FACTS

[6] In order to provide sufficient context for this decision, I will briefly describe the procedural history that led up to this judicial review.

[7] The Financial Institutions Commission (FICOM) is a regulatory agency of the Government of British Columbia. FICOM is responsible for administering the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30 (*PBSA*), the legislation that regulates registered pension plans in the Province of British Columbia. The Office of

the Superintendent of Pensions, one of the respondents in this matter, is in turn located within FICOM.

[8] Section 38 of the *PBSA* requires the administrators of the petitioner union pension plans to disclose certain information to the Superintendent of Pensions in order to allow the Superintendent to ensure that the plans comply with the requirements of the *PBSA*. As a result, the petitioner unions and union pension plans were required to provide documentation relating to their pension plans to FICOM each year.

[9] FICOM is listed within Schedule 2 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 (*FIPPA*), and as a result, records in the possession of the FICOM may be subject to requests for access to information under the *FIPPA*.

[10] An access to information request was received by FICOM on November 9, 2010 for the disclosure of pension plan filing documentation. The request was made by the ICBA, another of the respondents in this petition. A second similar request was made by the ICBA in 2011. In the ICBA's 2011 request, it asked for disclosure of the following records and information relating to the unions' pension plans:

a) Number of members, past year;

b) Number of members, current pension year;

c) Average age of present employees;

d) Average annual hours worked;

e) Average annual pension paid;

f) Average monthly accrued pension for current year for present employees;

g) Current pension plan contribution (dollars per hour);

h) Surplus/unfunded liability for previous actuarial valuation report filed; and

i) Surplus/unfunded liability for most recent actuarial valuation report filed.

[11] FICOM released some of the pension plan filings requested by the ICBA, but it also withheld some information on the basis that the disclosure of the information could harm the interests of a third party, pursuant to the exemption for disclosure laid out in s. 21 of the *FIPPA*. Based on this exemption, FICOM declined to release:

a) The amount of average pension paid to employees (extracted from the most recently filed actuarial valuation report);

b) The amount of average accrued monthly pension to which employees are entitled (extracted from the most recently filed actuarial valuation report);

c) The amount of surplus or underfunded liability owed to the pension plan as of the previously filed actuarial valuation report; and

d) The amount of surplus or underfunded liability owed to the pension plan as of the most recently filed actuarial valuation report.

[12] The ICBA sought a review of FICOM's decision not to release these four kinds of information. On January 18, 2012, FICOM agreed to reconsider its earlier decision, and gave notice to the pension plans that it planned on releasing all of the responsive records (including these four kinds of records previously deemed exempt under s. 21 of the *FIPPA*) to the ICBA.

[13] Thirteen of the sixteen pension plans that received notice of the planned release objected to this decision. Making use of s. 53 of the *FIPPA*, they asked the Office of the Information and Privacy Commissioner (OIPC) to review this decision to release the requested information. The OIPC is another respondent in this matter.

[14] The OIPC reviewed FICOM's decision to release the requested information, and on January 28, 2013 it agreed with FICOM that the records should be released. OIPC concluded that s. 21 of the *FIPPA* did not apply, and that the release of the records would not harm third party interests. This decision, Order F13-02, can be found at *Financial Institutions Commission (Re)*, 4 C.C.P.B. (2d) 116, 2013 BCIPC 2 (CanLII).

[15] Following the release of Order F13-02, a petition for judicial review of the decision pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 was filed in this Court. My colleague, Madam Justice Maisonville, concluded in *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner)*, 2015 BCSC 1471 that the decision of the OIPC was flawed on procedural fairness grounds. Specifically, Madam Justice Maisonville concluded at para. 128 that an implicit decision of the OIPC (i.e. not to give notice to some unions that a request for review under s. 54 of the *FIPPA* had been received) was unreasonable.

[16] As a result of Madam Justice Maisonville's decision, the matter was referred back to the OIPC, and it decided to rehear the matter.

[17] On April 27, 2015, the ICBA made a further access to information request to FICOM. In this request, the ICBA sought release of the same information that it had sought in 2010 and 2011, but updated to account for the passage of time. On May 15, 2015, FICOM decided to this time withhold this information, based on the rationale that s. 21 of the *FIPPA* (i.e., that disclosure would be harmful to the business interests of a third party) did apply.

[18] With the consent of the parties, the 2010/2011 request and the new 2015 request were combined together to be heard as one inquiry by the OIPC. After having received submissions, the OIPC released a decision on April 10, 2017, requiring FICOM to release the records requested by the ICBA. This decision, Order F17-16, can be found at *Office of the Superintendent of Pensions (Re)*, 34 C.C.P.B. (2d) 124, 2017 BCIPC 17 (CanLII). This is the decision that is the subject of the judicial review before this Court.

[19] I note that although there were initially two separate petition proceedings challenging the adjudicator's decision, these proceedings were consolidated by a consent order signed by Master Caldwell on October 23, 2017.

III. STANDARD OF REVIEW

Determining Appropriate Standard of Review

[20] It is common ground among the parties that the applicable standard of review of the OIPC's decision is reasonableness.

[21] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 34, 39, the Supreme Court of Canada established the presumption of a reasonableness standard where an administrative decision-maker engaged in the interpretation of its home statutes. The Supreme Court of Canada has identified four categories of issues which call for the application of a correctness standard instead of a reasonableness standard: i) constitutional questions regarding the division of powers; ii) issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise"; iii) "true questions of jurisdiction or *vires*"; and iv) issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 24). The parties in this case did not argue that any of these categories of issues applied to this review.

[22] It is also open to judicial review courts to engage in a contextual analysis to determine if the presumption of reasonableness has been rebutted: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 22. There is, however, no need to engage in this kind of contextual analysis to determine the standard of review in this case. Jurisprudence of this Court (*University of British Columbia v. Lister*, 2017 BCSC 41, rev'd 2018 BCCA 139 (but affirming on the issue of the standard of review: paras. 22-24)) as well as jurisprudence of the Supreme Court of Canada (*Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information & Privacy Commissioner)*, 2014 SCC 31 at paras. 26-27 ["*Community Safety*"]) has already established that the appropriate standard of review for administrative decisions relating to access to information and privacy requests is reasonableness.

The Meaning of "Reasonableness"

[23] Since the standard of review is reasonableness, it is necessary to assess whether the impugned decision meets this standard, and is indeed "reasonable".

[24] The Supreme Court of Canada discussed what the reasonableness standard means in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. In their jointly written reasons for the majority, Bastarache and LeBel JJ. explained that 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."

[25] In *Dunsmuir*, the Supreme Court also discussed the concept of deference within the context of the reasonableness standard. The majority wrote:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of

> deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" ... [at para. 48].

[26] Canadian jurisprudence on the reasonableness standard has been consistent since *Dunsmuir* that deference is owed to administrative decision-makers. For example, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 18, Abella J. (writing for the Court) accepted that "perfection is not the standard" when applying the reasonableness standard. As explained by LeBel J. in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para 41, "[t]he reviewing court's role is not to re-assess the relevant factors and substitute its own view." It is also not the role of a judicial review court to engage in a "treasure hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34 at para. 54.

[27] This deference is not, of course, so unbounded as to mean "subservience" or "blind reverence" (*Dunsmuir* at para. 48). As noted by our Court of Appeal in *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174 at para. 59, "[s]upervisory jurisdiction over inferior tribunals is a core function of a superior court." Even though deference is a well-established principle of administrative law, judicial review continues to play an important role in preserving the rule of law. In short, judicial review courts owe deference, not a rubber-stamp.

[28] In light of Rothstein J.'s decision in *Alberta Teachers* (para. 47), I reject Local 170's argument that the presumption of deference should be applied with "qualification" and that the reasonableness standard should be applied with a "caveat".

IV. THE DECISION UNDER REVIEW

[29] Although the petitioners accept that the appropriate standard of review is reasonableness, they argue that the decision-maker's conclusion did not reach this standard, and that her decision was unreasonable.

[30] In order to assess the reasonableness of the decision, it is necessary to look at the nature of the information that was sought, and the statutory framework that was applied to order the release of the information.

Nature of the Information Sought

[31] The information sought by the ICBA concerns details about the union pension plans provided by the plan administrators to the Superintendent of Pensions. Specifically, the ICBA is seeking access to an Excel spreadsheet that contains a breakdown of i) the amount of average pension paid to union employees; ii) the amount of average accrued monthly pension to which union employees are entitled; iii) the amount of surplus or underfunded liability owed to the pension plan as of the previously filed actuarial valuation report; and iv) the amount of surplus or underfunded liability owed to the pension plan as of the most recently filed actuarial valuation report.

Statutory Framework

[32] Under the *FIPPA*, the starting point is that all information held by public bodies is subject to release. This starting point is consistent with the stated purposes of the *FIPPA*, found at s. 2, which includes "giving the public a right of access to records".

[33] However, the right of access is limited by a list of exceptions intended to protect personal privacy rights and also prevent the release of information where doing so would be contrary to public policy. For example, under s. 15 of the *FIPPA*, the disclosure of a record can be refused where doing so would harm a law

enforcement matter or prejudice the defence of Canada. Similarly, under s. 16 of the *FIPPA*, disclosure of information can be refused if doing so could reasonably be expected to harm intergovernmental relations entered into by the Province of British Columbia.

[34] The petitioners in this case rely on s. 21 ("disclosure harmful to business interests of a third party") as the listed exception for why this information should not be released. Additionally, Mr. Aaron, counsel for one of the groups of petitioners, also relies on s. 22 ("disclosure harmful to personal privacy") as another listed exception that should prevent disclosure.

[35] The arguments made before me focused on the applicability of s. 21, and whether the release of the information would be harmful to the business interests of a third party. As a result, these reasons will first look at whether the decision-maker's conclusion on this issue was reasonable. I will later return to the application of s. 22, and the personal privacy exemption.

Section 21 Exemption - Harmful to the Business Interests of a Third Party

[36] Section 21(1) sets out a framework to be applied when considering whether a record should be exempt from disclosure for being harmful to the business interests of a third party. I will only include the relevant provisions:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> [...]
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> [...]

> (iii) result in undue financial loss or gain to any person or organization, or
>
> [...]

[37] Section 57(3)(b) of the *FIPPA* specifies that where a third party claims that information should not be released under s. 21, this third party bears the burden of proof. As a result, the burden was on the petitioners to show that the s. 21 exception should apply.

[38] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, the Supreme Court of Canada had occasion to comment on the "third party information" exemption found at s. 20 of the federal *Access to Information Act*, R.S.C. 1985, c. A-1. Although this provision comes from the federal access to information legislation, and the case before me concerns British Columbia's provincial equivalent, the *Merck Frosst* case nevertheless provides important insights to this judicial review.

[39] In *Merck Frosst*, the Court accepted that the standard of proof needed for a public body to refuse disclosure because it would do damage to a third party is a "reasonable expectation of probable harm" (at paras. 192, 206). Later, in *Community Safety* at para. 50, the Supreme Court concluded that this standard also applied to the Ontario provincial equivalents of the harm-based exemptions found in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. The "reasonable expectation of probable harm" test has been accepted and incorporated in decisions of this Court considering *FIPPA* exemptions: see e.g. *Lister* at para. 55.

[40] Cromwell J. described the "reasonable expectation of probable harm" standard in this way (at para. 196 of *Merck Frosst*):

> ... while 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.

[41] Justice Cromwell went on the write (at para. 199) that to meet this standard, a third party must "show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur."

[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.

[44] The decision-maker accepted and adopted the "reasonable expectation of probable harm" standard in her decision: *Office of the Superintendent of Pensions (Re)*, 2017 BCIPC 17 (CanLII) at para. 43. As I understand the positions of the parties, it is common ground that the "reasonable expectation of probable harm" standard is the correct approach to be applied in this case. The conflict centres on whether, given the findings of fact made by the decision-maker, she made an unreasonable conclusion in finding that this standard had not been met.

[45] Before I discuss the "reasonable expectation of probable harm" standard, I will continue my explanation of the statutory framework, and how the s. 21 "disclosure harmful to business interests of a third party" exception operates.

[46] The British Columbia OIPC has developed three elements that must be established in order for the s. 21 "harm to third party business interests" exception to apply. As expressed by the decision-maker at para. 21 of the decision under review:

> [21] ... In order to properly withhold information under s. 21(1), the following three elements must be established:
>
> - Disclosure would reveal the type of information listed in 21(1)(a);
> - The information was supplied, explicitly or implicitly, in confidence, pursuant to s. 21(1)(b); and
> - Disclosure of the information could reasonably be expected to cause the type of harm set out in s. 21(1)(c).

[47] This framework was not disputed by the petitioners.

Adjudicator's Application of Statutory Framework to Facts

[48] The decision-maker accepted that the first element of the "harm to third party business interests" test had been satisfied. She concluded that the data fields requested by the ICBA would reveal financial information of or about the union pension plans. She did not accept that the requested data fields were "of or about" the unions themselves, or that the release of the record would reveal trade secrets of a third party.

[49] The decision-maker also accepted that the second element of the "harm to third party business interests" test had been satisfied, because she found that the requested information had been supplied by the pension plans to the FICOM. She also accepted that the majority of the information supplied had been provided in confidence. As a result, she decided that the second element of the test had also been met (with the exception of dollars-per-hour contribution rates, which she concluded were publically accessible).

[50] I would pause, prior to moving on to the decision-maker's consideration of the third and final element of the "harm to third party business interests" test, to make a few comments. Although the parties had presented arguments to the decision-maker on whether the first two elements of the test were met before she made her decision, in my view these arguments are not relevant to the question now before me. In the context of the petition before me, neither the petitioners nor the respondents challenge the decision-maker's analysis on the first two elements of the test. The focus of the petition is the decision-maker's decision on the third element of the "harm to third party business interests": whether the disclosure of the information could reasonably be expected to cause the type of harm set out in s. 21(1)(c). I will not, therefore, comment on the reasonableness of the decision-maker's consideration of the first two elements.

[51] I now turn to the main issue before me, of whether the release of the information satisfied the third element of the test, that is, whether the release created a reasonable expectation of harm.

[52] The decision-maker correctly articulated the standard provided by the Supreme Court of Canada when determining whether the release of information creates a reasonable expectation of harm. Citing *Merck Frosst* and *Community Safety*, she appropriately identified the standard as "a reasonable expectation of probable harm" and "a middle ground between that which is probable and that which is merely possible."

[53] Before moving to the essence of her harm analysis, the decision-maker briefly noted that she rejected the petitioners' submissions on two matters. First, she rejected the argument that an applicant's motives are relevant to an analysis under s. 21 of the *FIPPA*. Citing other OIPC decisions, she noted that the *FIPPA* does not impose any requirement on requesters of information to explain or justify their requests. Second, she rejected the petitioners' arguments that the release of the

dollars-per-hour contribution rates could reasonably be expected to cause harm, because this information was already publically available.

[54] The decision-maker divided her analysis (as it relates to s. 21) into three parts. First, she looked at the first tranche of s. 21(1)(c)(i), and whether the release of the record could "harm significantly the competitive position" of the petitioners. Second, she looked at the second tranche of s. 21(1)(c)(i), and whether the release of the record could "interfere significantly with the negotiating position" of the petitioners. Third, she looked at s. 21(1)(c)(ii), and whether the release of the record could "result in undue financial loss or gain to any person or organization". I will review each of the three portions of her analysis in turn.

Application of Statutory Framework to Facts: "Harm Significantly the Competitive Position"

[55] In her decision, the OIPC adjudicator canvassed the arguments of the petitioners for why the release of the record would cause significant harm to their competitive positions. She noted their arguments that there is an adversarial relationship between the petitioners and the ICBA, and that the release of the record would provide the ICBA with a greater ability to fine-tune employee retirement products to lure workers away from the unions' defined benefit pension plans. She noted the petitioners' arguments that the information contained in the record could be mischaracterized to present the pension plans as being less healthy than they actually are, and that there is evidence from past news articles showing that the ICBA has in fact used this kind of information in the past in this manner. She also noted the ICBA's submissions that the petitioners had provided no evidence that the release of the record could lead to pension plan members misapprehending the vitality of the plans and consequently leaving the plans. The ICBA had noted that it had asked for and received records of this kind in the past from FICOM, and there was no evidence that harm occurred as a result.

[56] The decision-maker then began her analysis. She stated in her decision that she accepted that disclosure of the information would give the ICBA the ability to generate comparisons and criticize the union-sponsored pension plans, if it chose to do so. However, she noted that the petitioners had not provided evidence of workers actually having quit their unions and pension plans in response to the past disclosure of similar information to the ICBA. The decision-maker also noted that the petitioners had not provided evidence about why or how often union members typically quit, and there was no evidence from workers who had actually left the unions about what factors had influenced their decisions.

[57] The adjudicator wrote that although she was not suggesting there was any requirement to prove that the alleged harm had occurred in the past in order to meet the standard of harm for s. 21, the absence of such information was an element she had weighed.

[58] The decision-maker wrote she accepted that if the ICBA opted to use the record as the petitioners feared, then this may very well influence workers' decisions. She went on to conclude, however, that this will not be the only thing they consider, and each individual worker will make these decisions based on their own particular circumstances.

[59] The decision-maker wrote that she was unpersuaded that union members would be swayed by ICBA messaging based on information gleaned from the disputed record, or that pension plan members would depart before first seeking clarification from their pension plan administrators or unions.

[60] The decision-maker also concluded that it could not really be said the ICBA even "competes" with the pension plans, because the services provided by the pension plans and the ICBA were so different. She noted that while the pension plans provided services directly to union members, by contrast ICBA Benefit

Services Ltd. assists ICBA member employers to obtain voluntary retirement products, which those employers can in turn chose to offer to their employees.

[61] The OIPC adjudicator also rejected the argument that the record, once released, could be used by rival unions who compete with the petitioner unions. After considering a BC Labour Relations Board decision provided to her by one of the petitioners (*Construction, Maintenance and Allied Workers Canada v. British Columbia Regional Council of Carpenters*, 2015 CanLII 88792 (BC LRB)), she concluded that this kind of competition appeared to be the accepted norm between unions, and therefore did not rise to the level of "significant" harm as required by the language of s. 21(1)(c)(i).

[62] For these reasons, the decision-maker concluded that the first tranche of s. 21(1)(c)(i) was not engaged, and the release of the record could not be reasonably expected to significantly harm the competitive position of the petitioners.

Application of Statutory Framework to Facts: "Interfere Significantly to Negotiating Position"

[63] The decision-maker summarized the petitioners' arguments for why the release of the record would interfere significantly with their negotiating position. She said that there were two arguments before her.

[64] First, the release of the information could allow the ICBA to criticize the union pension plans, which could in turn result in plan members leaving the plans. These exits would reduce the size of union membership, which would weaken the unions' bargaining power.

[65] Second, the petitioners argued that the release of the record would hinder the unions' bargaining efforts with employers when renegotiating collective agreements. The argument was that the release of the information would allow employers to know whether proposed contribution increases were necessary to address funding

shortfalls, or merely desired to improve member benefits. The petitioners had argued that the release of the record would undermine their bargaining strategies.

[66] The adjudicator rejected the first argument, writing that she was "not satisfied that disclosure of the specific information at issue in this case could reasonably be expected to result in any consequential number of workers quitting, or refusing to participate in, unions and pension plans." (para. 79)

[67] She also rejected the second argument, based on her conclusion that employers negotiating with the unions would have already had access to the information contained in the record. She pointed to s. 37(5) of the *PBSA* and s. 43 of the *Pension Benefits Standards Regulation*, B.C. Reg. 71/2015 (*PBSR*), as stating that a plan administrator must provide a participating employer, upon request, with records including the plan's two most recent actuarial valuation reports and cost certificates, three most recently filed annual information returns, and three most recently filed audited financial statements.

[68] To provide context for the adjudicator's analysis at this point, I will pause briefly to set out the relevant legislation to which she referred.

[69] Section 37(5) of the *PBSA* states:

> (5) Subject to and in accordance with the regulations, an administrator of a pension plan, after receiving a written request from
>
> (a) a participating employer in the plan,
>
> (b) a trade union whose membership includes or consists of members of the plan, or
>
> (c) a prescribed person,
>
> must provide to the requesting person or body a copy of any prescribed record on payment of a charge not exceeding the reasonable costs incurred in making and providing the copy.

[70] Section 43(4) of the *PBSR* states:

> (4) For the purposes of section 37 (5) of the Act, the following records are prescribed in relation to a pension plan:

> (a) the most recent plan summary referred to in section 29;
>
> (b) the plan text document and any amendments to it;
>
> (c) the record that authorizes the establishment of the plan or under which the plan is established or, if the record applies to more than the establishment of the plan, the portion of the record that applies to the establishment of the plan;
>
> (d) the 3 most recent annual information returns filed in relation to the plan under section 38 (1) (a) of the Act;
>
> (e) the 2 most recent actuarial valuation reports and cost certificates filed in relation to the plan under section 38 (1) (b) of the Act;
>
> (f) the 3 most recent audited financial statements filed in relation to the plan under section 38 (1) (c) of the Act;
>
> (g) each trust deed or trust agreement, insurance contract, bylaw and resolution relating to the plan;
>
> (h) in the case of a non-collectively bargained multi-employer plan, the participation agreement referred to in section 36 (1) (a) of the Act and a list of all of the participating employers who signed that agreement;
>
> (i) the governance policy referred to in section 42 of the Act established in relation to the plan;
>
> (j) the statement of investment policies and procedures referred to in section 43 of the Act established in relation to the plan;
>
> (k) the funding policy referred to in section 44 of the Act established in relation to the plan;
>
> (l) the termination report, if any, filed in relation to the plan, excluding the personal information, as defined in the Freedom of Information and Protection of Privacy Act or the Personal Information Protection Act, as applicable, of individuals other than the person requesting the information;
>
> (m) any report resulting from an inspection made by an authorized person under section 110 of the Act.

[71] The decision-maker indicated that she was not persuaded that the release of the record would impact on negotiations between the petitioner unions and employers, because the employers were already entitled to the content of the record through this legislation. She further indicated that none of the parties disputed the right of participating employers to access the information in dispute.

[72] In her analysis on this point, the adjudicator also noted that union bargaining with employers takes place in the context of a Labour Relations Board protocol involving multi-trade and multi-employer groups, with the parties entering into standard agreements. As a result, both existing and new employers engaged in this process would already have access, during negotiations, to the information contained in the disputed record.

[73] The adjudicator further noted that the petitioners provided no information to support a finding that "the feared interference with their negotiating position would reach the 'significantly' threshold set out in s. 21(1)(c)(i)." (para. 82)

[74] Finally, the decision-maker rejected an argument from the petitioner Local 276 that none of the signatory employers to their collective agreement met the definition of participating employers, because of the way pension contributions are made in their case. However, the adjudicator rejected this argument on the basis that a copy of Local 276's collective agreement was not provided to her to substantiate this claim. She also indicated that she was not persuaded that the disclosure of the pension contribution amount would significantly interfere with Local 276's bargaining position in any event.

Application of Statutory Framework to Facts: "Undue Financial Loss or Gain"

[75] After having looked at the two tranches of s. 21(1)(c)(i) to determine whether there was harm under s. 21, the decision-maker also looked at s. 21(1)(c)(iii) to determine whether the release of the record could reasonably be expected to "result in undue financial loss or gain to any person or organization".

[76] In her analysis on this point, the decision-maker briefly summarized the petitioners' position that the release of the record could reasonably be expected to result in undue financial loss to them and undue financial gain to the ICBA, because if skilled workers are lured away from the unions to the non-union sector, it will erode the union base and result in loss.

[77] In her analysis, the decision-maker indicated that she accepted that the petitioner unions compete with the non-union sector for skilled workers. She wrote that she accepted that if a union member is enticed into the non-union sector, then this will result in a financial loss in the form of lost union dues and union-sponsored pension plan contributions.

[78] The adjudicator concluded that "the probability is very low and that it borders on speculation to think that the average rational worker would decide not to participate in the union and its pension plan because of what the ICBA may say about union-sponsored defined benefit pension plans and the benefits of alternative retirement products like group RRSPs." (para. 87). She went on to write that she was not provided with dollar amounts for any loss of union dues or pension contributions, and was provided no details about how much workers pay in union dues and pension contributions. She wrote that she therefore had no information to be able to "appreciate the magnitude or significance of the financial loss or gain the third parties fear and whether it would be 'undue'." (para. 87).

[79] Turning to a consideration of a consultant report provided by the petitioners about how the information in the disputed record could be used by the ICBA, the adjudicator wrote:

> ... the consultant does not say that access to the information about union-sponsored negotiated contribution defined benefit pension plans would allow the ICBA to modify, fine tune or enhance its group RRSPs or design a different type of retirement product. In fact, no one provides evidence explaining how that is even possible. It is not clear to me that it is possible, given all the information the parties provide about how a negotiated contribution defined benefit pension plan is not at all like other retirement vehicles (it has its own set of financial rules, benefits and drawbacks).
>
> [para. 89]

[80] She also wrote that, even if she accepted that the ICBA's criticism of the pension plans led some workers to leave the unions and join the non-union sector, "there was no information to explain how this would result in a financial gain to the ICBA, undue or otherwise." (para. 90).

[81] The adjudicator also noted that she did not have sufficient information about ICBA Benefit Services Ltd.'s role in the provision of retirement products to ICBA members. She wrote that she could see that the company is involved in arranging for insurers and pension plan providers to offer various retirement savings products to ICBA members. She also acknowledged Local 276's submission that two of the company's directors are also ICBA directors. However, she found that, overall, she had insufficient information to make conclusions regarding how ICBA Benefit Services Ltd.'s finances relate to ICBA's finances.

Adjudicator's Consideration of the "Bricklayers" Decision

[82] The adjudicator closed her decision on the application of s. 21 and the "harmful to business interests of third party" exception by discussing the *Bricklayers* decision.

[83] The decision was a recent judgment of the Ontario Superior Court of Justice (Divisional Court), indexed at *Bricklayers and Stonemasons Union, Local 2 Ontario Pension Plan (Trustees of) v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 3821, leave to appeal to ONCA refused, M46922 (12 December 2016).

[84] The adjudicator noted that after the inquiry closed, some of the applicants brought this decision to her attention, and offered to provide submissions on it. She explained that the decision involved a request under Ontario's *Freedom of Information and Protection of Privacy Act* for actuarial valuation reports filed by two union-sponsored pension plans with the Financial Services Commission of Ontario. The issue, she explained, was whether the records were exempt under s. 17(1) of the Ontario Act, a provision substantially similar to s. 21(1) of British Columbia's *FIPPA*.

[85] In *Bricklayers*, the Information and Privacy Commissioner of Ontario (IPC) had found that while the records had been supplied in confidence, the parties opposed to disclosure had not provided sufficiently detailed and convincing evidence

to substantiate harms under s. 17(1). The IPC ordered the release of the pension plan reports.

[86] A majority of the judges on the Divisional Court panel found the IPC's decision to be unreasonable (with Sachs J. dissenting). Stewart and Horkins JJ. set aside the IPC's order, and remitted the issue for reconsideration.

[87] After noting that the *Bricklayers* decision was not binding on her, the adjudicator considered whether she nevertheless found it persuasive. She agreed with the legal test for assessing a reasonable expectation of harm set out in the judgment, but ultimately distinguished the decision, because she was unable to determine what facts the Divisional Court relied on in making their determination. She wrote (at para. 96):

> [96] However, in other regards I do not find the decision to be persuasive. Section 17 of the Ontario Act is about significant harm to competitive position, significant interference with contractual or other negotiations and undue loss or gain. *Bricklayers* does not reveal what evidence the IPC adjudicator had of a clear and direct connection between disclosure of the specific information and the s. 17 harms alleged. This is the type of evidence that is needed to establish that harm is well beyond the merely possible or speculative. Absent details about the evidence of harm the IPC adjudicator actually had before her, I cannot see sufficiently persuasive similarities to the evidence in the present case. Therefore, I am not persuaded that I should reach the same conclusion as the Court did in *Bricklayers*. I have considered the actual evidence and arguments about harm that are before me in this case.

[88] The adjudicator concluded by reiterating her finding that the record was not exempt under s. 21 of the *FIPPA*. She found that while the information was labour relations information about a third party that was supplied in confidence, the information could not reasonably be expected to result in the harms outlined in ss. 21(1)(c)(i) or 21(1)(c)(iii).

V. ANALYSIS

Reasonableness of Decision on Third Party Harm Exemption

[89] I have concluded that the adjudicator applied too high a bar in deciding whether the disclosure of the information could reasonably be expected to result in the relevant harms. As a result, her decision was unreasonable, and must be set aside.

[90] As I have said, the adjudicator correctly laid out the framework for considering whether the release of information can reasonably be expected to cause one of the alleged harms (in this case, the harms identified at ss. 21(1)(c)(i) and 21(1)(c)(iii)). She correctly identified the common law guidance applicable to these decisions, from *Merck Frosst* and *Community Safety*.

[91] As I have noted, in *Merck Frosst*, the Supreme Court of Canada accepted that the standard needed for a public body to refuse disclosure because it would do damage to a third party is a "reasonable expectation of probable harm" (paras. 192, 206). In *Merck Frosst*, the Court described the "reasonable expectation of probable harm" standard as follows (at para. 196):

> ... while 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.

[92] In my view, while the adjudicator enunciated this standard, she nevertheless failed to apply it, especially considering all of her findings.

[93] In her decision, the adjudicator accepted that the union sector competes with other actors in the marketplace to attract skilled tradespersons, and that retirement benefits are one tool used in that competition. She accepted that competitors have used similar information compared to the information at issue here to criticize the unions and their pension plans. She accepted that, if the information at issue was disclosed, these competitors would gain the ability to generate comparisons to

criticize the union-sponsored pension plans (para. 57). She accepted that, if competitors used the information at issue in the way feared by the applicants, then workers may well be influenced in their decisions about whether to participate in the unionized versus non-unionized construction sector (para. 60). She also accepted that if union members are enticed into the non-union sector, this will result in a financial loss to the petitioners through the loss of union dues and pension plan contributions (para. 86).

[94] Having made these conclusions, however, the adjudicator decided that the probability was very low that the "average rational worker" would decide not to participate in a union and its pension plan because of criticism levelled by competitors (para. 87). She said that she was not provided with evidence of workers having quit the unions as a result of past disclosure of similar information, or any evidence of why or how often members quit the unionized sector generally (para. 58).

[95] Since Cromwell J's characterization of the appropriate standard lies at the heart of this matter, I will set it out again:

> ... while 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.
>
> [*Merck Frosst* at para.196]

[96] I am persuaded by the petitioners' arguments that, when I consider this standard, based on the other findings that she made in her decision, it was unreasonable for the adjudicator to decide that this standard had not been met. She accepted that the information would provide competitors new ammunition to criticize the union pension plans (para. 57). She accepted that if the information was released, workers could be influenced in their decisions of whether to leave or stay in the plans (para. 60). She accepted that if workers left the plans, the plans and unions would face financial harm (para. 86). It is very clear, in my view, that this is

enough to satisfy the reasonable expectation of harm standard provided in *Merck Frosst*.

[97] It is my view that by requiring the additional evidence she mentioned, the adjudicator was seeking to satisfy a balance of probability standard, rather than a more than simply possible standard. In short, because of the overly demanding threshold of evidence the adjudicator placed on the petitioners to show a reasonable expectation of harm, the adjudicator strayed from the guidance provided by the Supreme Court in *Merck Frosst*. Departing from the clear jurisprudence of Canada's highest court in such a way was unreasonable.

[98] I also conclude that the decision is unreasonable to the extent that it distinguishes the *Bricklayers* decision. The adjudicator wrote that the decision is not persuasive because she could not see "sufficiently persuasive similarities to the evidence" in the case before her, as compared to the *Bricklayers* case.

[99] I respectfully disagree with the adjudicator. In my view, the *Bricklayers* decision is directly applicable to the case at bar.

[100] In *Bricklayers*, a union made an access to information request under Ontario's legislation for information relating to the pension plans of a rival union. The requested information included audited financial statements, annual information returns, investment information summaries, actuarial valuations or other actuarial reports, and member information booklets (para. 17).

[101] The Financial Services Commission of Ontario (FSCO), the custodian of the documents, withheld a number of documents on the basis that they were exempt under s. 17(1) of the Ontario *FIPPA*. Section 17(1) is analogous to s. 21(1) of British Columbia's access to information legislation.

[102] The rival union appealed FSCO's decision to withhold access. The Ontario IPC agreed with the rival union, and ordered the release of the information. The

Ontario IPC noted that the parties could not cite a single instance where a valuation report was obtained by a rival union, and doing so caused harms contemplated in s. 17(1).

[103] The Divisional Court found that the IPC's decision was unreasonable. The majority wrote at para. 66:

> ... it is unreasonable, and perhaps naïve, to reject the expectation that it is more than possible that efforts would be made by individuals or entities provided with access to the information sought in this case to foment discontent among members of target unions and that the harms pointed to by the Applicants, MOF and FSCO would be reasonably expected to occur.

[104] The Divisional Court went on to conclude that it did not matter that the feared harm would flow from the misuse of the information by a rival union, instead of directly from the release of the information itself. The Court also found that it did not matter that the parties could not show that the feared harm had happened before (paras. 67-68).

[105] The Divisional Court concluded that, by applying too burdensome a standard of proof on the parties arguing the third-party harm exception, the decision fell "outside the range of possible, acceptable outcomes defensible in respect of the facts and law and [was] therefore unreasonable." (para. 70).

[106] I find this same reasoning applies to the case before me. I disagree with the adjudicator that *Bricklayers* is distinguishable because there are not "sufficiently persuasive similarities to the evidence in the present case" (para. 96 of 2017 BCIPC 17). It is my view that *Bricklayers* is likely as close to being on all fours with the present case as one could find. In both cases, a rival entity sought disclosure of pension plan information in order to use as fodder to entice plan members into a different scheme. I do not find the fact that the entity requesting the information is a non-union trade association (in the case at bar) rather than a union (in *Bricklayers*) to be a sufficiently principled reason for which to distinguish *Bricklayers*. In any event, should the requested information be released there would be nothing

stopping a rival union from using the information in the same way described in *Bricklayers*.

[107] The adjudicator noted that *Bricklayers* was not binding on her. That is true. The principle of judicial comity is typically bounded by the understanding that it applies to judges of the same court operating at the same level. As was stated by Smart J. in *R. v. Sipes*, 2009 BCSC 285 at para. 10: “It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so.” Although the Divisional Court in *Bricklayers* was not a decision of a British Columbia court, it was nevertheless ruling on a matter involving a very similar statutory framework and legal principles. It is, therefore, highly persuasive both to this court and by extension to the adjudicator.

[108] Additionally, I note that there seems to be some emphasis placed on cross-jurisdictional consistency even within decisions of British Columbia OIPC. In her decision, the adjudicator cited (at footnote 15) the 2003 decision of Information and Privacy Commissioner Loukidelis, indexed at *University of British Columbia, Re*, 2003 CanLII 49166 (BC IPC) (Order 03-02).

[109] In *University of British Columbia, Re*, Commissioner Loukidelis engaged in a review of the policy considerations underlying s. 21(1) of the *FIPPA*, the third party harm exception. In doing so, he referred extensively to s. 17(1) of the Ontario *FIPPA*, saying that the two provisions were similar. Commissioner Loukidelis quoted at length from an Ontario Commission report produced before the enactment of the Ontario *FIPPA* in 1980 (para. 34). Commissioner Loukidelis drew on the Ontario report to comment on the meaning of provisions in the equivalent British Columbia legislation (para. 35).

[110] I draw from this decision the fairly uncontroversial proposition that provincial information and privacy adjudicators make reference to commentary and decisions

from other jurisdictions, in the same way that judges will often draw on reasoning from other courts.

[111] Leave to appeal *Bricklayers* was denied by the Ontario Court of Appeal. The decision is the law in that province.

[112] Finally, as noted in argument by the Office of the Superintendent of Pensions, if the decision of the Commissioner is upheld there will be a disparity in the protection provided to financial information of private registered pension plans between those registered in British Columbia as opposed to Ontario. Although this argument was more developed in argument before me than before the Commissioner, it seems to be a fairly common sense proposition.

[113] In my view, where possible, it is preferable to encourage consistency in the application of legal decision-making between jurisdictions. As a result, while the decision in *Bricklayers* is not binding on the adjudicator, or indeed on me, it is in my view a preferable outcome that the law in our provinces does not conflict.

[114] In conclusion, I find that it was unreasonable for the adjudicator to decide that the disclosure of the information could not reasonably be expected to harm significantly the competitive position of the petitioners, interfere significantly with the negotiating position of the petitioners, or result in undue financial loss on the part of the petitioners. The petitioners have argued that there is a reasonable expectation that the release of the records will cause these harms by allowing the ICBA or other parties ammunition in their efforts to lure away members. Based on the record before me, and the findings of the adjudicator on other points, I accept that there is a reasonable expectation of these harms. Indeed, the petitioners can point to evidence of the ICBA having made use of similar information in the past to criticize the union plans. A June 19, 2003 article in the *Vancouver Sun* states:

> Funding deficits were highlighted by the Independent Contractors and Building Association, which represents the open shop or non-union

> construction industry, when it obtained the actuarial valuations for 17 trade union pension plans.

[115] In coming to this conclusion, I also note the September 22, 2015 opinion from George & Bell Consulting, in which three actuaries wrote "we believe that the information resulting from the FOI request may directly weaken the financial strength of the union plans, reduce member appreciation of these plans, obfuscate the membership's understanding of these plans, and possibly improve the competitiveness of the ICBA's Group RRSP ..."

[116] I am satisfied that there was ample evidence to find a reasonable expectation that the disclosure of the records would cause harm to the petitioners. To conclude otherwise was unreasonable.

Reasonableness of Decision on Personal Privacy Exemption

[117] As I have said, most of the argument before me focused on whether the adjudicator acted unreasonably in deciding that the third party harm exemption did not apply.

[118] However, counsel for some of the petitioners also argue that the adjudicator acted unreasonably in deciding that the exemption found at s. 22 of the *FIPPA* did not apply.

[119] This section states, in part, that "[t]he 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."

[120] In her decision, the adjudicator wrote:

> [106] The information in dispute is aggregate and average information, and the third parties' evidence and arguments do not establish how disclosing information of this type would reveal precise information about an individual. Even if only one person retires per year, the average paid to all retired members is not going to reveal what that any one individual receives. At most it will reveal an approximation or estimate.

> [107] In my view, by its very nature, aggregate and average information is about a group, not any specific individual. There was no evidence that the groups in question are of a sufficiently small size that one could conceivably use the information in dispute to determine any particular individual's age, annual hours worked, accrued monthly pension entitlements or actual monthly pension payments.

[121] On this point, I conclude that the decision-maker's conclusions are reasonable, and should not be disturbed.

VI. CONCLUSION

[122] For the reasons outlined above, I would grant the relief sought by the petitioners and set aside Order No. F17-16. I would remit the matter to the Office of the Information and Privacy Commissioner of British Columbia for redetermination by another adjudicator in a manner consistent with these reasons.

[123] Costs may be spoken to if they are not agreed to by the parties.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power