OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 04-07

MINISTRY OF WATER, LAND AND AIR PROTECTION

Errol Nadeau, Adjudicator
March 11, 2004

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Summary: The applicant requested access to records concerning the public body's response to a complaint relating to the protection of a stream. The public body released records but refused to provide information that would reveal the identity of a third-party complainant. The public body is required by s. 22 to refuse to disclose the disputed information.

Key Words: duty to assist – respond openly, accurately and completely – personal privacy – unreasonable invasion – consented to disclosure – investigation – violation of law – supplied in confidence – fair determination of rights.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 4(1), 6(1), 15(1)(d), 22, 23, Schedule 1.

Authorities Considered: B.C.: Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-20, [2002] B.C.I.P.C.D. No. 20; Order 02-33, [2002] B.C.I.P.C.D. No. 33.

1.0 INTRODUCTION

[1] By letter dated February 11, 2003, the applicant submitted a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Ministry of Water, Land and Air Protection ("Ministry") for:

> any and all information in the custody and control of the Ministry of Water, Land and Air Protection with regard to Hairsine Creek complaints and [a named

> employee's] inspection of November 21, 2002 including but not limited to memos, correspondence, general advice, e-mails, field notes, photos, telephone calls for the period October 1, 2002 to present.

[2] The Ministry responded by providing copies of the requested records, but withholding some information from the records under ss. 15 and 22 of the Act. The applicant requested that this Office review the Ministry's decision to withhold the severed information.

[3] As the matters at issue were not resolved in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law, and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUES

[4] The issues arising from the request for review in this case are:

1. Is the Ministry authorized by s. 15 to refuse to disclose the disputed information?

2. Is the Ministry required by s. 22 to refuse to disclose the disputed information?

[5] Section 57(1) provides that, at an inquiry into a decision to refuse an applicant access to all or part of a record, 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. The Ministry has the burden of proof regarding s. 15.

[6] Under section 57(2), if the record, or part, to which the applicant is refused access contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. The applicant has the burden of proof regarding s. 22.

3.0 DISCUSSION

[7] **3.1 Procedural Matters** – I will begin by dealing with four procedural matters.

In-Camera Submissions

[8] First, portions of the Ministry's submission, including exhibits and affidavits, were made *in camera*. The applicant has argued that these *in camera* submissions make it "difficult and somewhat unfair to the Applicant to respond to the issue of whether the third party would be exposed to harm" by the disclosure of the third party's personal information.

[9] Portions of the *in camera* submissions were made to establish that a third party would be exposed unfairly to harm if the third party's personal information was disclosed

to the applicant. As the applicant has the onus to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, I take the applicant's point that it would be somewhat unfair to expect the applicant to rebut *in camera* evidence and argument of harm to the third party. It may be appropriate in some circumstances for the Commissioner, or his delegate, to consider *in camera* evidence of unfair exposure to harm. Although the evidence of exposure to harm is relevant to the matter at issue, it is not necessary for me to consider it to come to a decision in this case, and I have not done so.

[10] I find portions of the evidence before me to have been properly submitted *in camera*. That is, evidence of the identity of the third party, evidence that the information withheld from the applicant is the personal information of the third party and evidence that the third party has not consented to the disclosure of his or her personal information. To disclose this evidence would reveal the information in dispute in this inquiry.

[11] As discussed below, I have considered *in camera* evidence that the third party intended to make his or her complaint to the Ministry in confidence. The third party was given notice of this inquiry and the opportunity to make submissions, but has chosen not to do so.

Records in Dispute

[12] Second, in reply to the applicant's initial submission, the Ministry sought to clarify the records, and the information withheld from those records, that are under consideration in this inquiry. Subsequent to the applicant's request for review by this Office, and prior to this inquiry, the Ministry had released additional information from two of the records previously released to the applicant. For clarity, the four records in dispute in this inquiry are as follows:

1. A record entitled "COORS SCRATCH SHEET", with information severed from the record, as initially released to the applicant;

2. A record entitled "Conservation Officer Service Enforcement Officer Details – V4", with information severed from the record, as initially released to the applicant;

3. The first page of a printout of a string of emails to and from a Conservation Officer with the last message dated January 27, 2003, with information severed from the record, as subsequently released to the applicant; and

4. A single page printout of a string of emails to and from a Conservation Officer with the last message dated November 12, 2002, with information severed from the record, as subsequently released to the applicant.

Previous Requests for Records

[13] Third, the applicant's initial submission alleges that the Ministry has not been properly responsive to previous requests for records made by the applicant. In its reply submission, the Ministry argues that its responses to the applicant's previous requests are not under review in this inquiry and "are completely irrelevant to the decisions under review here."

[14] I accept the Ministry's position on this matter and have not considered the evidence regarding previous dealings between the parties in deciding the merits on the issues set out in Part 2 of this Order. I note, however, that both parties have included in their submissions assertions from which I can infer that a somewhat adversarial relationship exists between the parties, *e.g.*, the applicant's allegations above and a portion of one of the affidavits included with the Ministry's submission.

Adequate Search

[15] Finally, in his initial submission, the applicant provided evidence and argument that the Ministry's search for records was not accurate and complete. The Ministry replied that the adequacy of its search for records is not under review in this inquiry.

[16] Again, I accept the Ministry's position on this matter and am making no finding or order in regard to the adequacy of the Ministry's search for records. However, given the right of access to records emphasized in ss. 2(1)(a), 4(1) and 6(1) of the Act, and the context of the issues in dispute in this inquiry, I consider it appropriate to make general comments on a public body's duty to assist applicants. I find that I have jurisdiction to consider the evidence and submissions regarding this issue for the purpose of making such comment and do so in Part 3.4 of this Order.

[17] **3.2 Disclosure Harmful to Law Enforcement** – The Ministry refused to disclose the information in dispute in this inquiry under both ss. 15 and 22 of the Act. Both parties provided careful argument as to whether the Ministry is authorized by s. 15 to refuse to disclose the disputed information. In its submissions, the Ministry, which has the onus of proof, relied exclusively on s. 15(1)(d). It authorizes the Ministry to refuse to disclose information if disclosure could reasonably be expected to "reveal the identity of a confidential source of law enforcement information".

[18] As I have decided that the Ministry is required by s. 22 to refuse to disclose the disputed information, it is not necessary for me to decide whether s. 15 authorizes the Ministry to refuse to disclose the disputed information.

[19] I have considered both parties' s. 15 submissions regarding "a confidential source" as their arguments on this issue are linked to their submissions on s. 22.

[20] **3.3 Disclosure Harmful to Personal Privacy** – The central issue is whether the Ministry is required to refuse to provide personal information that would identify

a third-party complainant. The Ministry clearly identifies the information in dispute at p. 3 of its initial submission:

> The Public Body has severed from the Records, and withheld from the Applicant, those parts of the Records that it believes can reasonably be expected to reveal the identity of the Third Party (who is a person who complained to the Public Body about environmental impacts of the Applicant's gravel pit operations). This includes directly identifying information, as well as indirectly identifying information, such [as] location information (including a residential address). This information has been withheld under sections 22(1) … .

[21] Section 22(1) requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy. The relevant potions of s. 22 in this case read as follows:

> **22**(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> …
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> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
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> (f) the personal information has been supplied in confidence,
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> …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (a) the third party has, in writing, consented to or requested the disclosure,
>
> … .

[22] In Order 01-53, [2001] B.C.I.P.C.D. No. 56, the Information and Privacy Commissioner set out the process for interpreting and applying s. 22. This approach has been applied in numerous subsequent decisions and I have applied that approach in deciding this case.

Personal Information

[23] There appears to be no dispute that the issue in this case is whether the identity of the third-party complainant can be released to the applicant. There also appears to be no dispute that the identity of the third party, or information that would identify the third party, is the third party's personal information. This is clear from the submissions of the parties and the definition of "personal information", set out in Schedule 1 of the Act:

> **"personal information"** means recorded information about an identifiable individual;

[24] The Ministry has also argued, and has led *in camera* evidence to establish, that information that would allow the applicant "to make accurate inferences about the third party's identity" should come within the definition of "personal information". I do not consider it necessary to apply the test of "permitting accurate inferences" in the context of personal information, since I am satisfied that the definition of "personal information", as applied in previous cases, is sufficient to encompass the information to which the Ministry has argued this test should apply. I find specifically that all the information in dispute in this case is about an identifiable individual and is, therefore, the third party's personal information.

Consent of the Third Party

[25] Although led in the context of s. 22(2)(e), the Ministry provided evidence, in the affidavit of Robert Gordon and the *in camera* Exhibit "A" to the affidavit, that the Ministry sought the consent of the third party to the Ministry disclosing his or her identity. Although not explicitly set out in the submission of the Ministry, I take it that this was in the context of s. 23 of the Act, which provides for consultation with a third party if a public body is considering releasing information to an applicant that might be excepted from disclosure under ss. 21 or 22 of the Act.

[26] It is clear from this evidence that the third party has explicitly declined to consent to the disclosure of his or her identity and that s. 22(4)(a) does not apply in this case. I also accept the evidence cited in the previous paragraph as confirmation that the third party intended to make his or her complaint to the Ministry in confidence.

Investigation into a Possible Violation of Law

[27] The Ministry argues, and has provided evidence, that all of the information that it has withheld from the applicant was compiled as part of an investigation of a possible violation of law, specifically, s. 35(1) of the federal *Fisheries Act*, and that disclosure of the personal information is not necessary to prosecute the violation or to continue the

investigation. On that basis, the Ministry argues that disclosure of the personal information is presumed to be an unreasonable invasion of the third party's personal privacy under s. 22(3)(b).

[28] I accept the Ministry's evidence, presented primarily in the affidavit of David Webster, that the third party made a complaint under s. 35(1) of the federal *Fisheries Act*, that contravention of s. 35(1) would constitute a violation of that Act, that the Ministry had authority to investigate such complaints, that the Ministry conducted an inspection of the site of the alleged violation, that no prosecution resulted from the complaint and inspection and that the matter was concluded with a warning letter to the applicant.

[29] The applicant acknowledges that the personal information was compiled as a result of a phone call from the third party, "which initiated an investigation into a possible violation of law." However, the applicant contends that the personal information was collected before the investigation actually commenced and was therefore not collected as part of the investigation.

[30] While that may be true of the initial contact between the third party and the Ministry, it cannot be properly argued with respect to the ongoing contacts, which the evidence establishes occurred during the course of the investigation. It follows that, if the Act requires the third party's personal information recorded during the course of the investigation to be withheld, then the initial contact information must also be withheld.

[31] Moreover, the Ministry has cited Order 02-20, [2002] B.C.I.P.C.D. No. 20, as precedent for the proposition that a complaint that initiates an investigation into a possible violation of law is part of the investigation and can properly be characterized as being compiled as part of the investigation. I find that this proposition applies on the facts of this case.

[32] Therefore, I find that s. 22(3)(b) applies, such that disclosure of the personal information in dispute is presumed to be an unreasonable invasion of the third party's personal privacy.

[33] The applicant has argued that this presumption "must be seen as resulting from concerns that revealing the personal information would compromise or otherwise interfere with an investigation into a possible violation of law." The applicant submits that knowledge of the identity of the complainant would not change the applicant's exposure to prosecution and that there is no logical reason to support the presumption in the circumstances.

[34] The Ministry responds that "the presumption under s. 22(3)(b) is not rebutted merely because there is no ongoing or [further] contemplated law enforcement investigation." The Ministry argues that the presumption exists more to serve privacy interests than law enforcement interests and makes the point that it is found in s. 22 rather than in s. 15.

[35] I accept the Ministry's position on this point. The s. 15 grounds for refusing to disclose information are discretionary and apply to any information that would harm law enforcement. Section 22 is limited to personal information and its proscription against disclosure that would constitute an unreasonable invasion of personal privacy is mandatory.

Supplied in Confidence

[36] Both parties argued in some detail, under both ss. 15 and 22, whether the third party's identity was supplied in confidence. I find that the evidence presented in this case, including the *in camera* evidence referred to above, establishes that the personal information was provided in confidence.

Exposure to Harm

[37] As stated above, the Ministry made *in camera* submissions to establish that a third party would be exposed unfairly to harm if the third party's personal information was disclosed to the applicant. There is no need to make a finding on this issue to come to a decision in this case.

Fair Determination of the Applicant's Rights

[38] The applicant has argued that the personal information in question is relevant to a fair determination of the applicant's rights because it will assist the applicant in his dealings with the Ministry to know who has concerns with his activities.

[39] The Ministry argues that the word "rights" in s. 22 means legal rights and not other interests such as assisting the applicant in his dealings with the Ministry. Previous orders, which restrict "rights" to legal rights, are consistent with the Ministry's interpretation of s. 22(2)(c) *e.g.*, Order 02-33, [2002] B.C.I.P.C.D. No. 33.

[40] I accept the Ministry's argument that the applicant's dealings with the Ministry are not "rights" within the context of s. 22(2)(c) as interpreted in previous orders. On that basis, I find that the personal information in consideration here is not relevant to a fair determination of the applicant's rights.

Disclosure by Another Public Body

[41] Section 22(2) requires that, in determining whether disclosure would unreasonably invade a third party's personal privacy, a public body must consider all the relevant circumstances. The applicant asserts that he knows the identity of the third party and submits that it would therefore not be an unreasonable invasion of the third party's personal privacy for the Ministry to disclose the information.

[42] The applicant bases this assertion on a record released by another public body in response to another of the applicant's requests for records under the Act. This evidence is contained in Schedule I to the applicant's initial submission. In that record, a named

third party is identified as claiming that "[the applicant] has buried a tributary of Hairsine Creek and the ministry is in the process of determining what tributaries were there in the past and what has been done by [the applicant]."

[43] The Ministry made no reply to this assertion and argument.

[44] It appears that the record put forward by the applicant may refer to the same complaint to the Ministry that was the subject of the request for records that initiated these proceedings. However, I am relieved by the evidence submitted by the applicant from determining whether the release of personal information by another public body, whether inadvertent or not, is, in itself, a relevant circumstance.

[45] That evidence includes copies of correspondence with third parties released to the applicant by the other public body. The evidence identifies numerous third parties, both named and unnamed, who were concerned about the applicant's activities on or near the creek and who may have complained to the Ministry. It includes reference to residents of a particular street who "are continuing to monitor the situation."

[46] The applicant has submitted, "If there is a concern with respect to the revelation of [a named third party] as the complainant in this matter, it can be fairly said that the horse has left the barn." The applicant may speculate as he wishes but it appears that the Ministry is constrained by s. 22 from revealing either which horse or the location of the barn.

[47] I find that the disclosure by another public body of the names of third parties who may have complained to the Ministry is not a relevant circumstance in this case.

Findings

[48] I find that:

1. The information in dispute in this case is the personal information of a third party the disclosure of which is presumed under s. 22(3)(b) to be an unreasonable invasion of the third party's personal privacy;

2. None of the relevant circumstances favours disclosure;

3. The applicant has, therefore, not met his burden of proving that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy; and

4. The Ministry is required under ss. 22(1) and 22(3)(b) to refuse to disclose the personal information.

[49] **3.4 Duty to Assist Applicants** – In his initial submission to this inquiry, the applicant's counsel highlighted portions of certain records released by the Ministry to the applicant in response to the request for records under consideration in this inquiry. On

behalf of the applicant, he submitted that this evidence demonstrated that the Ministry had not provided to the applicant all the records that were responsive to the applicant's request for records. Counsel did not specifically ask for an order in this respect but did request "that every effort be made to ensure that [the applicant] has received a complete response to its application."

[50] This request brings into consideration s. 6(1) of the Act, which reads as follows:

> **6**(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Section 6 is commonly referred to as the "duty to assist applicants".

[51] In response, the Ministry objected that "the adequacy of the Public Body's search for records is not under review in this inquiry. (Nor, in any event, can the Applicant necessarily assume that the records mentioned in his initial submission are in the custody or under the control of the Public Body, and/or otherwise encompassed by the Applicant's request.)"

[52] It would, of course, have been preferable, and in the interest of the applicant if he is seeking a timely response, for the applicant to have brought up the issue of adequacy of the search at the time he requested that this Office review the decision of the Ministry to withhold information in regard to his request for records. Presumably, the applicant could have brought his concern regarding the adequacy of the Ministry's search for records to the attention of the Ministry soon after receiving the records the Ministry considered responsive to his request.

[53] My unease with the Ministry's submission in reply is that it gives no indication that the Ministry intends to take any action in response to the concerns raised in the applicant's submission.

Standards Imposed

[54] In Order 00-32, [2000] B.C.I.P.C.D. No. 35, the Commissioner had the following comments regarding the standards imposed by s. 6(1):

> Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 – about the standards imposed by s. 6(1) on a public body's search for records. Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. The question here is whether the Ministry has discharged its s. 6(1) search obligations in light of this.

[55] In fairness to the Ministry, the Commissioner's comments regarding evidence of the adequacy of a public body's search for records refer to the usual case in which the issue is brought at the commencement of the review and inquiry process. Where, as in this case, the issue is first raised in the applicant's submissions at inquiry, I would not expect extensive evidence or argument from the Ministry regarding the adequacy of its search in response to the applicant's request for records. However, the Commissioner's comments highlight that s. 6(1) imposes significant obligations on a public body.

Discharging the Duty

[56] In my view, the obligations under s. 6(1) continue until they are reasonably satisfied, quite apart from the remedy of formal inquiry proceedings. I am supported in this position by the further comments of the Commissioner in Order 00-32 referred to above:

> An applicant should not have to initiate the review process under the Act in order to ensure that a public body has discharged its s. 6(1) duty. The Act requires a public body to meet the above-described search standards – and its other duties under s. 6(1) – at the time it responds to an applicant. It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response – including during the review and inquiry processes – will be relevant to any order I might make.

[57] The Ministry must respond "adequately and completely" to the applicant's request. Here the applicant has presented evidence that establishes a reasonable basis for inferring that certain records responsive to his request may have been in the custody and control of the Ministry at the time the applicant made his request for records, and that those records may have been overlooked in the Ministry's search for records responsive to his request.

[58] If such records exist, the applicant is entitled to copies of them, subject to the exceptions in Part 2 of the Act. The applicant is also entitled to such response from the Ministry as would have been appropriate had the applicant presented his evidence of the possible existence of additional responsive records soon after the Ministry's initial release of records to him. This would be for the Ministry to review the evidence presented by the applicant and, if the questions raised through that evidence were not considered during the Ministry's previous search for responsive records, to take appropriate action sufficient to satisfy the requirement to provide an accurate and complete response to his original request for records. That quite possibly could include a search for additional records.

[59] This is not to suggest that the obligations under s. 6(1) are so open-ended that a public body can never be considered to have properly concluded its search for records. However, this section requires that a public body must "make every reasonable effort to assist applicants and to respond without delay". These words apply, not only to the public body's initial response to a request for access to records, but also to subsequent

evidence of the possibility of unreleased responsive records, particularly when that evidence itself arises from the records released by the public body to the applicant.

[60] Therefore, in light of such evidence being produced by the applicant in the course of these proceedings, together with a request that "every effort be made to ensure" that the applicant has received a complete response to his application, it is not sufficient for the Ministry to take the position that the adequacy of the Ministry's search is not under review in this inquiry.

No Order Required

[61] I accept the Ministry's position that it would be inappropriate to assume that the records mentioned in the applicant's initial submission are in the custody or under the control of the Ministry or are necessarily encompassed by the applicant's request. Nor do I take any adverse inference from the applicant's allegations regarding the Ministry's responses to previous requests for records from the Ministry.

[62] However, it would also be inappropriate for the Ministry to simply assume that the records mentioned in the applicant's initial submission are not in the custody or under the control of the Ministry or are not necessarily encompassed by the applicant's request. In my view, the Ministry has an obligation under the Act to act on the information presented and the request made by the applicant. It would have been sufficient, for the purpose of these proceedings, for the Ministry to have confirmed its intention to do so.

[63] That said, I decline to make any finding with respect to whether, at the time it responded to the applicant's access request, the Ministry met its duty to "make every reasonable effort to assist" the applicant and to "respond without delay … openly, accurately and completely" to the applicant. There is insufficient evidence before me to support any finding and the Ministry has not had a reasonable opportunity to be heard on this issue. There is also no evidence that the Ministry has not responded, or will not soon respond, to the applicant's request, made in submission to this inquiry, that every reasonable effort be made to ensure that the applicant has received a complete response to his application.

[64] Therefore, I am making no order, nor should one be necessary, with regard to the Ministry's obligations under s. 6(1) of the Act. Many previous orders have outlined the standard that must be met in order for a public body's search efforts to be considered reasonable.

[65] In summary, my comments regarding the Ministry's obligations under s. 6(1) are not about a new issue being brought during the inquiry proceedings. Rather, they are about a public body's continuing obligation when presented with evidence that additional records that are responsive to the applicant's request may exist. That obligation extends to "every reasonable effort to assist … and to respond without delay … openly, accurately and completely." This is a fundamental principle of the Act, as is the protection of personal information, and cannot be disregarded or dismissed by a public body, either prior to, or at any stage of, the review and inquiry process.

[66] Should any additional records be released to the applicant in response to evidence put forward in the applicant's submissions to this inquiry, such records would likely be subject to the same findings in respect of the personal information of the third-party complainant. However, I am making no finding with respect to records that were not under consideration in this inquiry.

4.0 CONCLUSION

[67] For the reasons given above, under s. 58 of the Act, I require the Ministry to refuse to disclose the information it withheld under s. 22 of the Act.

[68] For the reasons given above, it is not necessary for me to make an order with respect to s. 6 or 15 of the Act.

March 11, 2004

ORIGINAL SIGNED BY

Errol Nadeau
Adjudicator