IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Ministry of Justice) v. Maddock,* 2015 BCSC 746

Date: 20150423
Docket: 14-3365
Registry: Victoria

In the matter of the decisions of the Office of the Information and Privacy Commissioner, Order F14-22 and Order F14-23, dated 23 July 2014 and In the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Ministry of Justice

Petitioner

And:

Jeremy Maddock and Victoria Times Colonist

Respondents

Before: The Honourable Mr. Justice MacKenzie

On judicial review from a decision of the Office of the Information and Privacy Commissioner, Order F14-22, July 23, 2014

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:	J. Penner J. Tuck
Appearing on his own behalf:	J. Maddock
Counsel for the Office of the Information and Privacy Commissioner:	T. Hunter A. Hudson
Place and Date of Hearing:	Victoria, B.C. April 22 and 23, 2015
Place and Date of Judgment:	Victoria, B.C. April 23, 2015

[1] **THE COURT:** The Ministry of Justice (the "Ministry") brings this petition for judicial review of a decision by a delegate of the Office of the Information and Privacy Commissioner (the "Commissioner").

[2] In the decision under review, dated July 23, 2014, the Commissioner adjudicator granted the application of Mr. Jeremy Maddock for disclosure of the names of the employees of the Civil Forfeiture Office, a program within the Ministry, pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "*FIPPA*").

[3] The Ministry asks this court to set the decision aside and remit Mr. Maddock's application to the Commissioner for rehearing.

[4] Both the Commissioner and Mr. Maddock appear as respondents to the petition. With respect to the role of the Commissioner in these proceedings, the Ministry accepts that the Commissioner has standing to explain the record, address a preliminary issue of mootness, and make submissions on the portions of the record subject to a sealing order that I made at a previous hearing on February 3, 2015.

[5] Furthermore, the Ministry accepts the Commissioner's position to "frame the issues in the overall context of the factual situation and the case law, without directly defending the decision on its merits." I should begin by noting that I am satisfied that the Commissioner has not transgressed the principle of tribunal impartiality through its participation in this judicial review, and its submissions on this petition have assisted the court in adjudicating this issue in a fully informed manner.

[6] By way of brief background, the *Civil Forfeiture Act*, S.B.C. 2005, c. 29, authorizes the director of the Civil Forfeiture Office to forfeit to the Province property that is an instrument or the proceeds of unlawful activity. According to the Ministry, the majority of the property forfeited is connected to illegal drugs and money laundering. The property, once forfeited, is sold and the Ministry says the proceeds

are used to fund the Civil Forfeiture Office, compensate victims of crime, and fund crime prevention initiatives.

[7] Civil forfeiture does not require a criminal charge or conviction. Moreover, if the property in question is valued at less than $75,000, the Act provides for an "administrative forfeiture process" that does not require recourse to the Supreme Court, unless a notice of dispute is filed.

[8] The following chronology of the proceedings leading up to this judicial review is disclosed in the record:

1. On September 21, 2012, Mr. Maddock made a request under the *FIPPA* for records regarding the name and professional background of the director of the Civil Forfeiture Office, a list of the personnel, their titles, and the organizational structure of the office, and a list of the policies and procedures.

2. On October 16, 2012, the Civil Forfeiture Office responded to the request of Mr. Maddock, withholding the records of the identifying information of the Civil Forfeiture Office's director and staff in their entirety.

3. On October 29, 2012, the Civil Forfeiture Office reconsidered its decision, releasing the name of the director, while continuing to withhold the other requested information.

4. On November 5, 2012, Mr. Maddock wrote to the Commissioner requesting a review of this decision.

5. On April 18, 2013, during mediation, the Civil Forfeiture Office released additional information to Mr. Maddock, including the titles of the office's employees.

6. On April 30, 2013, Mr. Maddock requested that the matter proceed to inquiry, pursuant to s. 56 of the *FIPPA*.

[9] Mr. Maddock and the Ministry provided written submissions to the Commissioner and the inquiry proceeded on August 15, 2013.

[10] As the parties today and yesterday have noted, the Commissioner in fact issued two decisions that were the original subject of the petition: Order F14-23, brought by a Mr. Shaw, a reporter with the *Victoria Times Colonist* newspaper at that time, and Order F14-22, brought by Mr. Maddock. Both the Commissioner and the Ministry agree that the first decision is now moot, as the *Victoria Times Colonist* has not filed a response and has confirmed it is not proceeding. Mr. Maddock takes no position on this issue. As the Commissioner is no longer enforcing this particular order, and given the positions of the parties, I agree that there is no practical reason to consider this decision.

[11] In the decision that is under review, the adjudicator held the following:

1. The Ministry was not authorized to refuse access to the names of the Civil Forfeiture Office employees;

2. The Ministry was required to refuse access to all of the information in the résumé of the former director of the Civil Forfeiture Office; and

3. The Ministry was required to provide Mr. Maddock with an unsevered copy of the personnel list by September 5, 2014.

[12] The Ministry does not challenge the second determination by the adjudicator concerning the information in the former director's résumé. It only challenges the first and third determinations concerning the names of the employees of the Civil Forfeiture Office.

[13] I pause here to note that at the time of the inquiry, there were six individuals employed at the Civil Forfeiture Office, but since then I have been advised three new individuals have been hired and a number of existing employees have been promoted within the office. A total of eight persons are currently employed at the Civil Forfeiture Office. Three of those names have now been released to

Mr. Maddock, and five remain withheld. The Ministry has disclosed the names of the director, the deputy director, and the assistant deputy director. The remaining names Mr. Maddock seeks disclosure of are two program managers and three other staff members who, according to the Ministry, perform an administrative role within the Civil Forfeiture Office.

[14] Before delving into the decision under review, it is worthwhile to outline the statutory provisions at issue. The *FIPPA* is the home statute of the Commissioner and its dual purposes are set out in s. 2(1), that is, "to make public bodies more accountable to the public and to protect personal privacy." Both Mr. Maddock and the Commissioner submit that the protection of personal privacy is not at issue in this particular review as the statutory provisions invoked by the Ministry concern safety and security, not privacy.

[15] Rather than resisting the application on the basis of the protection of privacy, the Ministry has refused to disclose the names of the Civil Forfeiture Office employees on the basis that doing so would endanger their life, physical safety, or mental or physical health, relying on recognized exceptions to the freedom of information provisions under Part 2 of the *FIPPA*.

[16] In this regard, s. 15(1)(f) provides:

> 15. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person,

Section 19(1)(a) provides:

> 19. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health …

[17] The purposes of the *FIPPA* are specified in s. 2, and the relevant purposes include the following:

> (a) giving the public a right of access to records,
>
> …
>
> (c) specifying limited exceptions to the rights of access …

[18] These two purposes underlie this judicial review. The Commissioner takes the position that the freedom of information provisions under the *FIPPA* generally create a default right to any record in the possession of a public body, unless the public body can show that the record falls into one of the statutory exceptions, which include ss. 15(1)(f) and 19(1)(a). This is captured in s. 57 of the *FIPPA* which provides as follows:

> 57. (1) 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.

[19] I pause here to note that there is no issue that the adjudicator in this case properly acknowledged the burden of proof was on the Ministry. Moreover, there is no issue that what is sought by the applicant here is part of a record as defined in the *FIPPA*.

[20] Turning to the position of the parties, in the petition and written argument, the Ministry initially set out four grounds upon which it says the adjudicator erred in her decision. The Ministry has, however, abandoned any allegation of procedural unfairness and the parties now agree that the standard of proof was correctly articulated by the adjudicator. Given the position taken by the parties, the only issues that remain today for my determination are: one, whether the adjudicator erred by failing to accept that the affidavit of Mr. Prophet, the strategic lead of corporate security and risk for the Ministry, qualified as expert evidence; and secondly, by failing to appropriately weigh the nature of the interests protected by ss. 15(1)(f) and 19(1)(a).

[21] It is clear that the first is the primary ground of the Ministry's argument. The Ministry contends that the opinion evidence of Mr. Prophet, a security expert who works for the Ministry, was given no weight by the adjudicator, an error which the Ministry says resulted in an unreasonable decision on her behalf. The Commissioner, in reply, submits that the reasons clearly indicate that the adjudicator accepted and considered Mr. Prophet's evidence. The Commissioner says the adjudicator only rejected Mr. Prophet's opinion to the extent that it went to the ultimate issue of whether disclosure of the Civil Forfeiture Office employees' names could reasonably be expected to threaten their safety or their mental or physical health under s. 19 of the *FIPPA*, or endanger their life or physical safety under s. 15. Mr. Maddock takes a similar position.

[22] The Ministry also submits that the adjudicator failed to take into account the nature of the interests protected by the exceptions under ss. 15 and 19, namely safety and security, and appropriately weigh the seriousness and importance of these interests against the limited public interest of disclosing the employees' identities. In response, the Commissioner submits that given the default rule under the freedom of information provisions is disclosure, the role of the adjudicator in this inquiry was not to balance the interests at stake under 15 and 19 with the public interest in disclosure. According to the Commissioner, the only role of the adjudicator was to determine whether the harm the public body alleges meets the exceptions set out in ss. 15 and 19 of the *FIPPA*.

[23] I agree with the Commissioner that there is no apparent requirement in the *FIPPA* for the adjudicator to balance the potential security and safety consequences of disclosure under ss. 15 and 19 with the public interest in disclosure.

[24] In this case, the adjudicator's task was simply to determine whether the Ministry had met its onus of showing a reasonable expectation of probable harm under either or both of ss. 15(1)(f) and 19(1)(a). I am therefore unable to agree with the Ministry that the Commissioner's failure to appreciate what the Ministry considers

to be the limited public interest in the disclosure of the names of the employees constitutes, in and of itself, a reviewable error.

[25] However, it is important for me to acknowledge that I accept and understand completely the comments of counsel for the Ministry when he says this particular disclosure issue and the matter of the safety of Civil Forfeiture Office employees is a matter of great significance to the Director. There is no doubt all public servants should be able to conduct their business and discharge their duties in a safe and secure environment. I am also of the view that when the adjudicator's reasons are considered in their entirety, she, too, was alive to the significance and seriousness of this issue.

[26] Accordingly, this leaves the issue of the expert evidence of Mr. Prophet. The overarching question, of course, remains the overall reasonableness of the adjudicator's decision. The parties are in agreement the standard of review of the decision of the Commissioner is reasonableness: see *Dunsmuir v. New Brunswick*. 2008 SCC 9; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322. That standard was described by the Supreme Court of Canada in *Dunsmuir* at para. 47 as follows:

> 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[27] The expert evidence of Mr. Prophet was contained in an affidavit attached to the submissions of the Ministry. The adjudicator noted the Ministry's position that Mr. Prophet is "an expert on security in the context of the justice community in British

Columbia," and that his affidavit should be accorded deference by the adjudicator as expert evidence.

[28] At paragraph 14 of her decision, the adjudicator correctly summarized the law on expert opinion evidence and set out the criteria for admissibility under *R. v. Mohan*, [1994] 2 S.C.R. 9. The adjudicator also noted at paragraph 15 of her decision that the rules of evidence in administrative proceedings are "flexible" and expert evidence may still be admitted in such proceedings, even if the evidence does not meet the *Mohan* criteria.

[29] At paragraph 16, the adjudicator found Mr. Prophet has specialized knowledge and experience regarding the security situation of the Ministry. As such, it is common ground between the parties here that Mr. Prophet was found to be a properly qualified expert.

[30] The adjudicator also found that his evidence in general was relevant to the issues before her, namely, whether disclosure of the names of the Civil Forfeiture Office employees could reasonably be expected to threaten their safety or mental or physical health under s. 19 of the *FIPPA*, or endanger their life or physical safety under s. 15. Further, the adjudicator noted there is no exclusionary rule that would render the expert opinion inadmissible. However, the adjudicator went on to find that Mr. Prophet's opinion evidence failed to meet the criteria of necessity, as explained in *Mohan*. The adjudicator embarks on her analysis at paragraph 18 of her decision:

> There is nothing scientific, technical or particularly complex about the matters in this inquiry, so I do not consider the strategic lead's opinions to be necessary to my deliberations or understanding of the evidence. I will be able to draw my own inferences and reach my own conclusions based on the facts as I find them after considering all of the evidence and argument.

[31] The adjudicator then turned to a previous decision of the Commissioner, where deference was given to the expert evidence of a psychiatrist. The adjudicator distinguished this previous decision from the case before her, concluding that deference to the expert opinion evidence of Mr. Prophet was not necessary to decide "the very matters at the heart of this case."

[32] The adjudicator then concluded her analysis with respect to Mr. Prophet's expert opinion at paragraph 20 of her decision:

> In conclusion, I do not find that the strategic lead's opinions qualify as expert evidence. However, I recognize that he is very knowledgeable in the area of security and risk within the Ministry and that his evidence is relevant and useful to my analysis. So, I will consider his evidence but will give no weight to his opinions on the actual issues that I must decide, namely, whether disclosure of the CFO employees' identities could reasonably be expected to threaten their safety or mental or physical health (s. 19) or endanger the life or physical safety of a law enforcement officer or any other person (s. 15).

[33] It is at this juncture that the Ministry and the Commissioner diverge in their interpretation of the adjudicator's reasons. The Ministry says that it was unreasonable for the adjudicator to proceed with her analysis under ss. 19 and 15 of the *FIPPA* "unaided by evidence from a witness with expertise in assessing and dealing" with threats faced by the Civil Forfeiture Office staff. The Ministry goes on to submit that the adjudicator acted unreasonably when she decided the question of threats or endangerment to Civil Forfeiture Office staff "without reference to Prophet's specialized knowledge and expertise" and that this "evidence was necessary for the adjudicator to appreciate the matters in issue."

[34] The Commissioner, and Mr. Maddock, says that while the adjudicator did not accept the necessity of the expert opinion in determining the ultimate issues, namely, whether the facts were sufficient to satisfy the exceptions under ss. 19 and 15, contrary to the position advanced by the Ministry, it is clear the adjudicator did not disregard the evidence of Mr. Prophet or decide the issue "unaided" by his evidence, but rather considered and analyzed this evidence in detail in her reasons.

[35] The adjudicator's treatment of Mr. Prophet's evidence is set out at paragraphs 32 to 35 of the decision. While the adjudicator noted that Mr. Prophet's evidence failed to include "examples or details of threats to the CFO and its staff," she acknowledged that Mr. Prophet referred to reports, news articles, and his experiences regarding the safety risk to individuals working in the North American justice system in general, including police, judges, prosecutors, lawyers, correctional officers, and probation workers.

[36] The adjudicator summarized the types of threats that Mr. Prophet says justice officials in British Columbia face. She also summarized some of Mr. Prophet's personal experiences with safety and security in the justice system that he set out in his affidavit, as well as his assertion that the Ministry's Criminal Justice Branch has seen an increase in security-related files between 2007 and 2012. Moreover, the adjudicator noted the recommendations Mr. Prophet deposed he had made to the Ministry regarding safety risks to certain Ministry employees.

[37] At paragraph 35, the adjudicator considered Mr. Prophet's evidence specific to Civil Forfeiture Office employees. She quoted Mr. Prophet's assertion that he has dealt with the Civil Forfeiture Office in recent years in dealing with security issues relating to their staff, but she also noted Mr. Prophet provided no particulars about these issues.

[38] Nevertheless, the adjudicator went on to quote the following opinions expressed in Mr. Prophet's affidavit. First, at paragraph 24 of the affidavit, Mr. Prophet deposed:

> Based on my experience dealing with security issues for the Ministry of Justice, I believe that CFO staff are confronted with the same level of risk in relation to their personal safety as prosecutors. It is for that reason that the Ministry applies the same security measures to CFO staff whose identities are made public through the filing of their affidavits in court as it does to provincial prosecutors. However, CFO staff whose identities have not been made publicly [sic] do not enjoy the same security protection. As such, their health and safety will be threatened if their identities are revealed through a FOI request.

Second, at paragraph 26 of the affidavit, Mr. Prophet deposed:

> In my view, the safety risk to CFO staff in British Columbia may be higher than it is in relation to many other staff in the justice system. I say that because CFO staff are seen "going after" the clubhouses of organized crime, including the Hells Angels, and other assets, including cash, of known offenders. In the organized crime community, successfully committing a criminal act against CFO employees and going to jail for such an act may be seen as a badge of honour in that community. It would be a way of trying to climb the organization hierarchy of such organizations.

[39] As such, despite the conclusions of the adjudicator with respect to the admissibility of Mr. Prophet's evidence at the outset of the decision, it is clear, in my view, she did in fact admit and consider this evidence. In fact, the adjudicator noted at paragraph 46 of her decision that:

> The strategic lead's evidence provides context about the justice system environment in which the CFO carries out its activities.

[40] In this regard, this adjudicator was doing just what Mr. Justice Goepel said that she was entitled to do in *B.C. Lottery Corporation v. Skelton*, 2013 BCSC 12, that is, even if the Commissioner decided the specific evidence did not meet the *Mohan* criteria, "given the relaxed rules of evidence in administrative proceedings, she could at her discretion admit it in any event" (para. 64).

[41] It is perhaps unfortunate that the adjudicator framed her analysis of Mr. Prophet's evidence in the context of admissibility under *Mohan*, rather than as a question of the appropriate weight, if any, to be given to this evidence. Be that as it may, there is no question that her reasons considered Mr. Prophet's evidence. As a result, I am not satisfied the adjudicator's decision not to give weight to the opinions expressed by Mr. Prophet on the "actual" issues she had to decide under both ss. 15 and 19 was unreasonable. Even though the adjudicator determined Mr. Prophet had specialized knowledge, she was entitled to apply the *Mohan* criteria to the opinion evidence proffered by Mr. Prophet, and it was open to her to conclude that in these particular circumstances, this opinion evidence did not meet the necessity test outlined in *Mohan*, and as a result give no weight to his opinion evidence on the ultimate issues she had to decide.

[42] What has clouded this analysis, in my view, to some extent, is the adjudicator's reference to the opinions of Mr. Prophet on the issues she decided under ss. 15 and 19, as opposed to what the Commissioner has argued on this review was really only one opinion advanced by Mr. Prophet on the ultimate question of whether disclosure of the names of Civil Forfeiture Office employees could reasonably be expected to threaten their safety or health or endanger their life or safety. This is because both the Ministry and the Commissioner note that

Mr. Prophet expressed opinions in paragraphs 3, 21, and 28 of his affidavit, as well as the opinions expressed in paragraphs 24 and 26. These latter two opinions, I have already noted, were specifically referenced by the adjudicator.

[43] The respondent therefore says that the only reason the word "opinions" was used was because, on the actual or ultimate issue, the adjudicator had to determine two issues, namely, whether the two exemptions relevant to her inquiry were satisfied by the evidence presented. As such, the Commissioner says it is reasonable to conclude that the only opinion the adjudicator gave no weight to was the ultimate opinion contained in the last sentence of paragraph 24 in Mr. Prophet's affidavit, where he opined:

> As such, their health and safety will be threatened if their identities are revealed through a FOI request.

[44] In the end, however, I am of the view that little turns on whether it was only one opinion or more than one opinion that the adjudicator was referring to. As I am satisfied she reasonably concluded the *Mohan* criteria pertaining to necessity was not established, given the evidence that was presented, it was not unreasonable for her to give no weight to Mr. Prophet's opinions on the ultimate issue she had to decide.

[45] Finally, it is important to recognize that on a judicial review, the court is not to second guess the conclusions drawn or reached by the decision-maker, nor can it reweigh the evidence. A court, on judicial review, cannot simply set aside a decision because it might disagree with the result. As the Commissioner has submitted, "the question is not whether the court would have decided the matter the same way, but whether the adjudicator had a tenable basis for deciding as she did." In this regard, deference must be afforded: *Speckling v. B.C. (Workers' Compensation Board)*, 2005 BCCA 80 at para. 37.

[46] As explained by Justice Abella for a unanimous court in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 15:

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

[47] The court in that case explained that a judicial review is an “organic exercise” (para. 14). I also note that judicial review is not "a line-by-line treasure hunt for error": *Communications, Energy and Paperworkers Union, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para. 54. As the Supreme Court of Canada explained, an administrative decision must be approached as an “organic whole” on judicial review, and the reasons must be read in their totality.

[48] With these principles in mind, and having considered the totality of the adjudicator's reasons, I am unable to accept the submission of the Ministry that her determination at paragraph 50 that the Ministry had failed to provide evidence that demonstrates a clear and rational connection between disclosure of the names of the two support staff and a reasonable expectation of a threat to their safety or mental or physical health was unreasonable.

[49] Therefore, given the parameters of the standard of review and the principle that deference must be afforded to the decision reached by this adjudicator, I am not satisfied that her determination that the Ministry had not established that disclosure of the personnel list could reasonably be expected to threaten the safety or mental or physical health of these individuals, as referenced in s. 19(1)(a), or could reasonably be expected to endanger their lives or physical safety, as referenced in s. 15(1)(f), was unreasonable.

[50] So for all of those reasons, the petition is dismissed. In this judicial review, no costs were sought and I am satisfied that there should be no order of costs in this particular matter.

[SUBMISSIONS ON COSTS]

[51] THE COURT: I am satisfied that it is appropriate, given the totality of the circumstances, to exercise my discretion and order no costs.

"B.D. MacKenzie, J."
The Honourable Mr. Justice MacKenzie