Court of Appeal File No.: CA43992
Court Registry: Vancouver

COURT OF APPEAL

BETWEEN:

BRITISH COLUMBIA LOTTERY CORPORATION

APPELLANT

AND:

CHAD SKELTON and THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

RESPONDENTS

NOTICE OF ABANDONMENT

In the matter of the appeal commenced by the Notice of Appeal filed on October 13, 2016 from the order of the Honourable Mr. Justice Sewell pronounced the 14th day of September 2016, at Vancouver, British Columbia.

Take Notice that British Columbia Lottery Corporation, the appellant in the above-noted matter, hereby abandons this Appeal.

Date: November 29, 2016

Solicitor for the Appellant
K. Michael Stephens

This NOTICE OF ABANDONMENT is filed by Hunter Litigation Chambers whose address is: 1040 West Georgia Street, Suite 2100, Vancouver, BC, V6E 4H1.

Telephone number is: 604-891-2400.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20160914
Docket: S159731
Registry: Vancouver

In the Matter of a Petition under the J*udicial Review Procedure Act*, RSBC 1996 c 241, in respect of Order F15-58 made by a Delegate of the Information and Privacy Commissioner for British Columbia on October 15, 2015

Between:

British Columbia Lottery Corporation

Petitioner

And

Chad Skelton and
The Information and Privacy Commissioner for British Columbia

Respondents

Before: The Honourable Mr. Justice Sewell

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	K.M. Stephens S. Ramsay
Counsel for Respondent, The Information and Privacy Commissioner for British Columbia:	T. Hunter A. Hudson
Place and Date of Hearing:	Vancouver, B.C. August 18-19, 2016
Place and Date of Judgment:	Vancouver, B.C. September 14, 2016

[1] **THE COURT:** The petitioner, the British Columbia Lottery Corporation ("BCLC"), brings this petition to set aside an order for disclosure dated October 13, 2013 (the “Disclosure Order”) of what BCLC alleges was a commercially sensitive document made by an Adjudicator of the office of the Information and Privacy Commissioner under section 16 of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")

[2] BCLC is a public body as defined under *FIPPA* and the information in question relates to one of the products that it markets, known as PlayNow.com.

[3] The Disclosure Order, No. F15-58, directs BCLC to disclose a record that sets out BCLC's PlayNow.com lottery product sales for the 2008/2009 fiscal year by forward sortation area ("FSA information") on the grounds that non-disclosure of that information was not justified under ss. 17(1)(b) and 17(1)(d) of *FIPPA*.

[4] Pursuant to *FIPPA*, a public body which declines to make public a document or information sought to be produced from it, has the onus on an administrative inquiry before the Commissioner to prove that one of the exemptions under *FIPPA* applies.

[5] The disclosure order is the second substantive decision of the Office of the Commissioner relating to the production of the FSA information.

[6] On August 25, 2011 under order F11-25 a delegate of the commissioner ordered BCLC to disclose the *FIPPA* information. BCLC sought judicial review of that decision. Mr. Justice Goepel quashed order F11-25 in reasons for judgment dated January 8, 2013 on the grounds of lack of procedural fairness and remitted the matter to the Commissioner for reconsideration. I will have more to say about that decision later in these reasons.

[7] On the reconsideration inquiry BCLC relied on the evidence presented by it at the original inquiry regarding the expectation of probable harm to BCLC if the FSA information was disclosed and supplemented that evidence by tendering a further expert report and additional affidavits from BCLC employees regarding the FSA

information. The applicant for the information filed no evidence on either the first or second inquiries.

[8] The second inquiry took place before an adjudicator acting as the Commissioner's delegate. At the second hearing, the Adjudicator also concluded that neither the opening words of section 17 nor section 17(1)(b) or (c) applied to justify BCLC withholding the FSA information and ordered BCLC to disclose the FSA information. In so doing the Adjudicator rejected BCLC's arguments in support of withholding the FSA information as too speculative. BCLC now seeks judicial review of that decision before this court.

[9] The position of the parties may be stated as follows:

[10] BCLC's position is that the Adjudicator committed reviewable errors by interpreting and applying sections 17, 17(1)(b) and 17(1)(d) in an unreasonably narrow and restrictive fashion by; applying an elevated standard of proof of harm under section 17(1), misconstruing and not taking into account key aspects of BCLC's evidence, and, in substance, requiring BCLC to meet a virtually impossible standard of proof to establish an expectation of harm, that had yet not occurred at the time of the hearing, resulting from disclosure of competitively sensitive information. BCLC also submits that the decision of the Adjudicator was inconsistent with previous decisions made by the Commissioner interpreting section 17 of *FIPPA*.

[11] The position of the Office of the Commissioner is that the Adjudicator concluded that BCLC had not provided sufficient evidence to demonstrate that it was authorized to refuse to disclose the F.S.A. information pursuant to any of the provisions of section 17 it relied upon. The Commissioner submits that the Adjudicator decision was based on her interpretation of those provisions and her assessment of the evidence before her and was one that was reasonable. The Commissioner says that BCLC has not demonstrated any grounds on which the disclosure order can be reviewed or set aside in this court.

[12] For the reasons that follow I have decided that the petition must be dismissed.

Background

[13] The decision was a re-hearing of the Commissioner's order F11-25. In that decision Mr. Chad Skelton, a journalist, requested the total value of lottery products purchased for the fiscal years 2008 through 2009 through of BCLC's online gaming website, PlayNow.com. Mr. Skelton requested that BCLC organize these figures by forward sortation area, that is, the first of three characters of a postal code.

[14] BCLC refused to disclose the FSA information to Mr. Skelton, relying on section 17, 17(1)(b) and 17(1)(d) of *FIPPA*, on the basis that such disclosure would harm BCLC's financial and economic interests.

[15] In the 2011 decision the Commissioner held that BCLC was not authorized under any of the provisions of section 17 of *FIPPA* to refuse to disclose the records to Mr. Skelton. As I have already indicated, BCLC sought judicial review of the 2011 decision. In *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12, this court set aside the 2011 decision on the grounds that the Commissioner failed to take expert evidence tendered by BCLC into account, which in the view of the court constituted a breach of natural justice. In his reasons Mr. Justice Goepel did not address the Commissioner's interpretation and application of *FIPPA*, and in particular of section 17 of *FIPPA*.

[16] Mr. Justice Goepel directed that a new inquiry should take place if Mr. Skelton indicated that he still wanted the records. Justice Goepel found that a new OIPC inquiry was required rather than the court deciding the section 17 issues because the expert evidence tendered by BCLC must be weighed and considered and in his view that weighing and considering was the proper function of the person conducting the inquiry on behalf of the Commissioner. Subsequent to the decision in *Skelton*, Mr. Skelton confirmed that he still wanted production of the records and accordingly a new inquiry was conducted.

[17] The Adjudicator who issued the decision under review in this case was therefore tasked with reviewing the decision of BCLC to withhold the FSA information requested by Mr. Skelton.

[18] At the inquiry under review in this petition the Adjudicator was presented with arguments from BCLC that ss. 17, 17(1)(b) and 17(1)(d) of *FIPPA* authorized it to refuse to disclose the records to Mr. Skelton. The relevant provisions of section 17 read as follows:

> Disclosure harmful to the financial or economic interests of a public body:
>
> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> ...
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value.
>
> ...
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> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party.

[19] The Adjudicator found that BCLC had failed to justify withholding the records under any of the provisions of section 17 and accordingly, in compliance with section 4 of *FIPPA,* BCLC must produce the records to Mr. Skelton.

[20] Section 4 of *FIPPA* sets out the the right of the public to access information:

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

[21] Section 17 of *FIPPA* is found in division 2 of *FIPPA* and accordingly is an exception to the general rule that records in the possession of a government are accessible to members of the public.

[22] The parties agree that the decision of the Adjudicator must be reviewed on a reasonableness standard. The reasonableness standard was described in *Dunsmuir v. New Brunswick*, 2008 SCC 9 as follows:

> 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.

[23] In my view all aspects of the Adjudicator's decision are subject to a reasonableness standard of review. This includes the Adjudicator's interpretation of section 17 of *FIPPA* as well as her analysis of the legal principles applicable to her decision. The Supreme Court of Canada considered this question in *McLean v. British Columbia*, 2013 SCC 67, paras 40-41 as follows:

> [40] The bottom line here, then, is that the Commission holds the interpretative upper hand: Under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> [41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is unreasonable. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

[24] BCLC submits that the decision is unreasonable for the following reasons:

> 1. The Adjudicator made findings of fact which were wholly unsupported by the evidence before her and rejected the uncontroverted evidence before her without giving any adequate reasons for so doing.
>
> 2. That although the Adjudicator correctly stated the applicable legal test to be applied to interpreting section 17 of *FIPPA*, she failed to apply that test in reaching her conclusions, and instead applied a test which made it virtually impossible for BCLC to prove the grounds necessary to withhold disclosure of the records; and
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> 3. The Adjudicator departed from previous decisions of the office of the Information and Privacy Commissioner that on similar facts had upheld the right to withhold disclosure of similar records.

[25] As I have indicated, BCLC relied in the hearing before the Adjudicator on opinion evidence from Mr. Paul Lauzon, an expert in marketing and market research. Mr. Lauzon prepared two reports that were admitted into evidence before the adjudicator. The first report is dated April 13, 2011. This report was before the Adjudicator in the original hearing on August 25, 2011 and was the report that Mr. Justice Goepel had ruled ought to have been accepted as an expert report at the original hearing. As I have already indicated, however, Mr. Justice Goepel did not direct what weight, if any, should be given to the report and expressly left that question to the Commissioner or Commissioner's delegate conducting the re-hearing.

[26] BCLC also relied on a supplemental report for Mr. Lauzon dated November 14, 2014 and affidavits from Karen Gray, a senior manager of eMarketing for BCLC, and Cameron Adams, director of product and business development of BCLC.

[27] Mr. Lauzon's two expert reports and the affidavits were the only evidence before the Adjudicator on the re-hearing, which was conducted in writing.

[28] BCLC summarized the basis of its claim to have the 2015 decision quashed at paragraph 5 of its memorandum of argument, which I have attempted to paraphrase above. I will address each of these arguments in these reasons. However, I do note that these complaints are put forward as a series of reviewable errors alleged to have been made by the Adjudicator. However, I think that the law is clear that my task is to determine whether the decision was unreasonable. Legal errors are not, in and of themselves, grounds for judicial intervention; unless they render the Adjudicator's decision unreasonable: *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, paras. 73-74. I will return to this topic later in my reasons.

[29] In its memorandum of argument BCLC reviewed the evidence before the Adjudicator in some detail. I will not repeat what was set out in that memorandum. I do, however, accept that the evidence before the Adjudicator was capable of supporting the conclusion that the records in question fell within the provisions of section 17 of *FIPPA*.

[30] Not surprisingly, the evidence filed by BCLC before the Adjudicator was to the effect that the records contained valuable proprietary information that would cause financial harm to BCLC if disclosed.

[31] BCLC relied on the introductory words contained in section 17 and subsections (b) and (d) to justify withholding the records before the Adjudicator.

[32] Though each of the three provisions of s. 17 was dealt with separately it is important to note that section 17 required BCLC to establish a single proposition to the satisfaction of the Adjudicator, that is that disclosure of the records could reasonably be expected to harm its financial or economic interests. The subsections of section 17 in issue in this hearing, subsections (b) and (d), are statutory examples of how that harm could be demonstrated by the public body in question; in this case, BCLC.

[33] The Adjudicator began her reasons by considering and rejecting Mr. Skelton's reliance on section 25 of *FIPPA*, that is, that disclosure of the records was clearly in the public interest. She then proceeded to address BCLC's arguments and evidence with respect to the provisions of section 17 beginning with her analysis of the applicability of section 17(1)(b).

[34] At paragraph 23 of her reasons the Adjudicator set out what I consider to be a reasonable summary of BCLC's position before her with respect to that subsection.

[35] At paragraphs 25 to 27 of her reasons she set out the scheme of section 17 and made reference to what both parties agreed is the correct legal test for assessing whether information can be withheld under section 17.

[36] The Adjudicator quoted from *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31, which in turn applied the leading case of *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, which I will address later in these reasons. At paragraph 54 of *Ontario v. Ontario* the court said:

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

[37] I pause here to note that the Supreme Court of Canada in the above quoted passage made clear that the inquiry as to whether the evidence established the risk of harm well beyond the mere possibility is contextual and requires an analysis of that evidence by the person conducting the inquiry.

[38] The Adjudicator then turned her attention to section 17(b). In my view the Adjudicator correctly summarized BCLC's argument as to why disclosure should be withheld under section 17(1)(b) and considered the evidence tendered in support of that argument.

[39] On this ground BCLC placed primary reliance on the opinion evidence of Mr. Lauzon who explained how possession of the information would be of benefit to BCLC's competitors and gave an estimate of the cost that those competitors would have to incur to obtain similar information through their own research or other sources.

[40] The Adjudicator, however, rejected the central argument of BCLC on this ground, that is, that any information that would help competitors to obtain market share, assess the market segment size, or reveal the probability of a commercial activity, has monetary value. Instead, she found that for information to have the monetary value contemplated in section 17(1)(b) there must be a reasonable likelihood of independent monetary value in the information.

[41] At paragraph 41 of her reasons the Adjudicator accepted that BCLC has grey market competitors and that those competitors could use the records to determine in which FSAs the highest PlayNow.com revenue was being generated in 2008 and 2009, and that as a result it was possible that the competitors could use the information to focus their marketing to lure away some of BCLC's online customers.

[42] However, as I read her decision, the Adjudicator was of the view that evidence about what the competitors might do with the information was insufficient to establish that the information had independent monetary value. She went on to find that there was insufficient evidence to show that there was any market for the information and she was doubtful that those competitors would value the information in the manner suggested by Mr. Lauzon. Mr. Lauzon had valued the information by estimating the cost of replicating that information independently at around $2 million. In the end, the Adjudicator decided that BCLC had not established that there was a

reasonable likelihood that the competitors would see the information as valuable and so would pay or offer any consideration to acquire it.

[43] BCLC's main criticism of the Adjudicator's reasons on this ground is that she appeared to require BCLC to quantify the value of its financial loss. BCLC says that the Adjudicator, in effect, put it in the position of having to establish that someone would pay for the information to be able to rely on section 17(1)(b). It says that the Adjudicator's interpretation of section 17(1)(b) is inconsistent with other decisions of the Commissioner and is incompatible with the purpose of the legislation and inconsistent with the law as set out in *Merck Frosst*.

[44] I agree that the Adjudicator interpreted section 17(1)(b) as requiring a body to establish that there was a reasonable likelihood that its competitors would regard the information as sufficiently valuable that they would pay or offer compensation or consideration to acquire it. However, the issue before me is not whether the Adjudicator correctly interpreted section 17(1)(b) but whether her construction of that section was reasonable. As I understand her reasons the Adjudicator focused on the specific information before her and concluded for a number of reasons that it was unlikely that BCLC's competitors would find that information sufficiently valuable to offer any consideration for it. In so doing she had regard to the requirement in the subsection that the information have monetary value.

[45] I am unable to conclude that this was an unreasonable construction of the subsection. The Adjudicator based her conclusion on her interpretation of section 17(1)(b) and on her assessment of the expert evidence before her. In my view these are matters on which the court should grant considerable deference to the Adjudicator. BCLC has not persuaded me that either conclusion was unreasonable.

[46] BCLC also focused its submissions on this point on what it characterized as the unreasonableness of the Adjudicator in rejecting credible, uncontradicted evidence, referring in its written submissions to some decisions of the Court of Appeal which have held that in certain instances it is unreasonable for a trier of fact

to reject credible evidence without giving sufficient reasons for doing so if that evidence is uncontradicted.

[47] However, in my view, what the Adjudicator actually decided was that she was not persuaded that the information in question had independent value. She quite rightly pointed out that BCLC had not established that there was any market in any such information; and by that I mean the specific information in question. In addition, she took the dated nature of the information, which went back to 2008 and 2009, into account in determining whether it had independent value.

[48] The argument advanced by BCLC on this issue involved a close examination of the Adjudicator's reasons and recitation of what it submits were reviewable errors made by her. However, in my view that analysis did not address the central question before me; that, is has BCLC demonstrated that the decision was unreasonable? I respectfully agree with comments of my colleague, Mr. Justice MacKenzie, in *British Columbia (Ministry of Justice) v. Maddock*, 2015 BCSC 746, that recitation of alleged legal errors does not address that central question.

[49] At paragraphs 45 to 47 of *Maddock*, Mr. Justice MacKenzie said:

> [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 (CanLII) at para. 37.
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> [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:
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> > 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.

[50] With regard to the Adjudicator's treatment of the expert evidence, counsel for the Office of the Commissioner referred me to *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16. In that decision Mr. Justice Gascon emphasized that courts should grant considerable deference a tribunal's assessment of expert evidence. At paragraph 105 His Honour said:

> 105 In my opinion, the Court of Appeal should not have intervened in this regard. The qualification of an expert and the assessment of the probative value of his or her testimony or opinion are evidentiary issues that require deference, especially given that s. 123 of the *Quebec Charter* confers considerable flexibility on the Tribunal in such matters. It is not open to a reviewing court to carry out its own assessment of the probative value of an expert’s testimony or opinions simply because it disagrees with the Tribunal’s assessment.

[51] In my view these principles, and the comments that I have just quoted, apply to the Adjudicator's treatment of the expert evidence in this case. Reading her reasons as a whole I conclude that she was not persuaded by BCLC's evidence that there was well beyond a mere possibility that the competitors would find the information sufficiently valuable to offer a consideration for it. In my view that conclusion was one which was within a range of reasonable options and is therefore not subject to review by this court.

[52] In summary, BCLC has not established that the Adjudicator's decision on section 17(1)(b) was outside the range of reasonable outcomes on the facts and the law and there is therefore no basis on which this court can interfere with it.

The Adjudicator's treatment of sections 17 and 17(1)(d)

[53] The Adjudicator dealt with section 17 and 17(1)(d) together in the next section of her reasons, dealing firstly with section 17(1)(d). In my view it was appropriate for her to proceed in that manner because the opening words of section 17 provide for

residual power to withhold information even if that information does not fall into any of the specific categories as set out by the legislature in section 17(1)(a) to subsection (f). The Adjudicator therefore proceeded to first of all consider whether the information fell within any of the specific instances of information that might be withheld and then went on to consider the residual provisions of the introductory words of section 17.

[54] At paragraph 51 of her decision the Adjudicator concluded that she was not satisfied that BCLC had shown that there was a reasonable likelihood that the information was competitively valuable. In so doing she stated that her reasons for finding that the information was not likely to have monetary value applied equally to section 17(1)(d). I take this to mean that the Adjudicator's analysis of whether BCLC had established grounds for withholding the information under section 17(1)(b) also applied to her analysis of section 17(1)(d). In particular, the Adjudicator's analysis focused on a question of whether BCLC had established beyond more than a possibility that the information had value and that that analysis also applied to the question whether it was likely that the competitors would in fact utilize the information to the detriment of BCLC as suggested in its arguments before her.

[55] In paragraphs 52 and 53 of her decision dealt with a hypothetical finding that the information would result in financial gain to grey market competitors. This hypothesis was contrary to her previous finding on this issue. BCLC submitted that the Adjudicator’s decision on this point was unreasonable because it ignored evidence from Mr. Lauzon to the contrary. However, as I read her decision, the Adjudicator did not base her decision that s17 (1) (d) did not apply on this reasoning.

[56] Having dealt with the subsections in issue, that is subsections (b) and (d), the Adjudicator turned her attention to the question of whether BCLC had established that there was a reasonable expectation of economic harm to it if the information was disclosed apart from whether the information fell with ss. (b) or (d).

[57] The test applied in paragraph 57 of the Adjudicator's decision on this point is, in my view, entirely consistent with the test reiterated in *Merck Frosst*, 2012 SCC 3, paras 203-206:

> [203] As noted earlier, the word "likely" is a good fit with the statute's text of "could reasonably be expected to". The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted: Sullivan, at pp. 99 ff., and M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 32 ff. By resorting to the shared meaning rule, I would interpret "could reasonably be expected to" in the English version and "*risquerait vraisemblablement*" in the French version as meaning "likely", a standard considerably higher than mere possibility, but somewhat lower than "more likely than not". This sense is captured by the long-standing test enunciated by the Federal Courts: "reasonable expectation of probable harm".
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> [204] This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: See *Air Atonabee*, at p. 277, quoting *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests*, [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.
>
> [205] Health Canada applied an unduly onerous test of probability of harm. For example, an officer at Health Canada at the relevant time deposed that, in deciding whether disclosure could be expected to be prejudicial to a third party, the financial loss or the prejudice to a third party's competitive position must be "immediate" and "clear". This approach is not, in my respectful view, consistent with the language of s. 20(1)(c).
>
> [206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

[58] Based on her review of the evidence and *FIPPA* the Adjudicator concluded that BCLC had not established that disclosure of the information would result in a

risk of harm that went well beyond the possible. In my view she applied the correct legal test and reached a conclusion on that test that was within a range of acceptable, possible outcomes on the facts and the law.

[59] BCLC also submits that the Adjudicator did not follow previous decisions of the Commissioner dealing with the scope and interpretation of section 17 of *FIPPA* and that her decision overall was unreasonable on that ground. I would reject this argument for essentially the same reasons that I have rejected BCLC's other submissions. In the first place the Adjudicator was not, strictly speaking, bound by previous decisions of the Commission. In addition, in my view the Adjudicator's analysis of previous decisions must be accorded the same deference as her interpretation of her own statute. I am not persuaded that the Adjudicator's treatment and analysis of those earlier decisions was unreasonable. In this regard I generally accept the analysis of the earlier decisions set out in the written arguments filed by the respondent and elucidated upon in oral submissions.

[60] I therefore have decided that the petition must be dismissed.

[61] There is one matter that I wish to address with counsel, and that is whether it is appropriate for the sealing order which was made to continue to be in place. Certainly my view is that it should remain in place at least until the appeal period is expired.

[DISCUSSION]

[62] THE COURT: All right. That will then be a provision of my order.

[63] There is no order as to costs.

"Sewell J."

S-159731

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF A PETITION UNDER THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996 c 241, IN RESPECT OF ORDER F15-58 MADE BY A DELEGATE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA ON OCTOBER 15, 2015

BETWEEN

BRITISH COLUMBIA LOTTERY CORPORATION

PETITIONER

AND

CHAD SKELTON and THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT
(Judicial Review of Order F15-58
pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c 241)

THIS IS THE PETITION OF:

British Columbia Lottery Corporation
c/o Hunter Litigation Chambers Law Corp.
2100 – 1040 West Georgia Street
Vancouver V6E 4H1

ON NOTICE TO:

Office of the Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria BC V8V 3K3 (as required by *JRPA* s. 15)

Chad Skelton
Vancouver BC

The Attorney General for British Columbia
Ministry of Attorney General for British Columbia
11th Floor – 1001 Douglas Street
Victoria BC V8V 1X4 (as required by *JRPA* s. 16)

This proceeding is brought for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must

(a) File a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) Serve on the Petitioner

i. 2 copies of the filed Response to Petition, and

ii. 2 copies of each affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner,

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, British Columbia V6Z 2E1

(2)	The ADDRESS FOR SERVICE of the Petitioner is: Hunter Litigation Chambers Law Corp. 2100 – 1040 West Georgia Street Vancouver, BC V6E 4H1 Fax # for service of the Petitioner: n/a Email address for service of the Petitioner: n/a
(3)	The name and office address of the Petitioner's lawyer is: Hunter Litigation Chambers Law Corp. (Attention: K. Michael Stephens/Shannon P. Ramsay) 2100 – 1040 West Georgia Street Vancouver, BC V6E 4H1

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The following relief by way of application for judicial review of Order F15-58, issued by a delegate of the Information and Privacy Commissioner for British Columbia (the "Commissioner"), dated 13 October 2015, requiring the petitioner to disclose certain internet sales information to the respondent Chad Skelton (the "2015 Disclosure Order"):

(a) an order in the nature of *certiorari* quashing and setting aside the 2015 Disclosure Order;

(b) an order and declaration that the 2015 Disclosure Order is ultra vires;

(c) a declaration that the head of the petitioner British Columbia Lottery Corporation may refuse to disclose the sales information to the respondent Chad Skelton pursuant to s 17(1) of the *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165 ("FIPPA");

(d) in the alternative to (c), a direction that the Commissioner reconsider and determine the matter of whether the petitioner may refuse to disclose the

sales information, together with any directions that the Court thinks appropriate for the reconsideration;

(e) costs; and

(f) such further and other relief as this Court considers just and appropriate.

Part 2: FACTUAL BASIS

2. The petitioner British Columbia Lottery Corporation ("BCLC") is an agent of the Government of British Columbia and is authorized under the *Gaming Control Act,* SBC 2002, c 14 to conduct and manage gaming in British Columbia, including internet gaming.

OIPC Order F11-25

3. On 9 April 2010 the respondent Chad Skelton requested under FIPPA disclosure in electronic database format of the total value of lottery products purchased through BCLC's PlayNow.com web site in the 2008-2009 fiscal year or 2009 calendar year by customers in each Forward Sortation Area in British Columbia (the "FSA Information").

4. BCLC denied access to the FSA Information under ss 17(1) and 22(1) of FIPPA, on the basis that the FSA Information provided valuable information which, if made publicly available, could be used by competing internet gaming operators (known as "grey market" operators) to compete against BCLC's internet gaming business, resulting in financial or economic harm to BCLC and the Province and undue financial gain to grey market operators.

5. On 8 June 2010 Mr Skelton requested a review of BCLC's decision by the Office of the Information and Privacy Commissioner. The matter proceeded to an inquiry which was conducted by the Commissioner on written submissions only (the "2011 Inquiry").

6. BCLC withdrew its reliance on s 22(1) and relied only on s 17(1) of FIPPA at the 2011 Inquiry. BCLC tendered affidavit evidence from five deponents including an April 2011 expert report by Mr Paul Lauzon, Senior Vice President, Lottery and Gaming, at

Ipsos Reid, who opined on the value of the FSA Information and the consequences of its disclosure (the "2011 Lauzon Report").

7. In particular, BCLC relied on s 17(1), s 17(1)(b) and s 17(d) of FIPPA as authority to refuse to disclose the information to the Respondent Skelton:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> ...
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> ...
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

8. On 25 August 2011 the Commissioner issued Order F11-25, requiring BCLC to give Mr Skelton access to the FSA Information pursuant to s 58 of FIPPA. In reaching this decision the Commissioner found, among other things, that the 2011 Lauzon Report was "admissible but not as 'expert evidence'" (para 22).

2013 BCSC 12: Order of Goepel J. Setting Aside Order F11-25

9. BCLC sought judicial review of Order F11-25 to this Court pursuant to the *Judicial Review Procedure Act.*

10. On 8 January 2013 the Supreme Court of British Columbia (Goepel J.) set aside Order F11-25 and directed a new hearing if the Respondent Skelton still wished the FSA Information: *British Columbia Lottery Corporation v Skelton*, 2013 BCSC 12. In 2013 BCSC 12, Mr. Justice Goepel found (among other things) that the 2011 Lauzon

Report met the criteria for admissibility as expert opinion evidence, and he directed that it be considered and weighed as such if there was a rehearing.

2014 OIPC Reconsideration Proceedings

11. The Respondent Skelton confirmed that he still wished the FSA Information and accordingly reconsideration proceedings commenced before the Commissioner (the "2014 Reconsideration Inquiry").

12. On 17 November 2014 the Petitioner BCLC delivered initial submissions to the Office of the Information and Privacy Commissioner for British Columbia, relying on evidence from the 2011 inquiry as well as additional evidence, including a supplemental opinion from Mr Lauzon dated November 2014 (the "2014 Lauzon Report"). In the 2014 Lauzon Report Mr Lauzon stated that the opinions expressed in his 2011 Lauzon Report remained the same and he expanded on his opinions, including by describing the relevance and impact of more recent technological advances. BCLC also submitted evidence from its Senior Manager, eGaming Marketing and its Director of Product and Business Development, eGaming, who supported Mr Lauzon's opinion in regard to release of the FSA Information.

13. The Respondent Skelton relied on his written initial submissions from the 2011 Inquiry at the 2014 Reconsideration Inquiry. Mr Skelton did not deliver any evidence with his initial submissions.

14. BCLC and Mr Skelton each delivered reply submissions on 1 December 2014. Neither BCLC nor Mr Skelton delivered evidence in reply.

Order F15-58: OIPC Decision on Reconsideration

15. On 13 October 2015 a delegate of the Respondent Commissioner, Senior Adjudicator E. Barker (the "Adjudicator"), issued the 2015 Disclosure Order (Order F15-58). In the 2015 Disclosure Order the Adjudicator found, among other things, that BCLC is not authorized under sections 17(1), 17(1)(b) or 17(1)(d) of FIPPA to refuse to

disclose the FSA Information. Adjudicator Barker further ordered that BCLC give the applicant access to the FSA Information by 25 November 2015.

16. In Order F15-58 Adjudicator Barker found that Mr Lauzon's evidence was admissible as expert opinion evidence (para 14). The Adjudicator also "accept[ed] that BCLC has grey market competitors and they could use the FSA Information to determine in which FSAs the higher PlayNow.com revenue was generated in 2008-2009", and accepted that it "is possible that BCLC competitors might consider the FSA Information to be a tool to help them decide where to focus their advertising, and that as a result, some PlayNow.com account holders might be lured to the competitors' websites" (para 41).

17. Nevertheless, the Adjudicator concluded that:

(a) despite the fact the FSA Information was financial and commercial information which belonged to BCLC within the meaning of s 17 (paras 29,30), s 17(1)(b) of FIPPA did not apply to the FSA Information because: BCLC did not establish that there is any market for the FSA Information (paras 42, 45); it was "doubtful that BCLC's competitors would value the FSA Information in the way BCLC believes they would" (para 43); and BCLC did not establish the FSA Information has an independent monetary value to grey market operators (paras 43, 44, 46); and

(b) s 17(1)(d) and s 17(1) of FIPPA also did not apply to the FSA Information because: BCLC "has not established that it is reasonable to conclude its competitors will use the information in the way BCLC fears" (para 51); BCLC did not provide information that would allow the Adjudicator to determine the magnitude of the financial gain to a third party so as to characterize that gain as "undue" (para 53); and BCLC's arguments and evidence were "too speculative" (paras 55, 57).

18. In support of the finding that BCLC had not established there was any market for the FSA Information, the Adjudicator stated that "there was no evidence that suggests

that grey market operators would spend any of their own money or offer any consideration to acquire the FSA Information" (para 42), and the "evidence did not establish that there is a market for the FSA Information" (para 45). For the same reason that the Adjudicator found the FSA Information did not have "independent monetary value" she was also "not convinced ... the information is 'competitively valuable'" (para 51).

PART 3: LEGAL BASIS

19. The Commissioner's delegate committed the following reviewable errors:

(a) the Commissioner's delegate erred in the interpretation and application of s 17(1), s 17(1)(b) and s 17(1)(d) of FIPPA, and in particular:

(i) erred in the interpretation and application of the concept of reasonable expectation of harm for the purposes of s 17(1) of FIPPA;

(ii) imposed a standard of proof higher than required by s 17(1) of FIPPA;

(iii) erred in her interpretation and application to the FSA Information of the phrase "that has, or is reasonably likely to have, monetary value" in s 17(1)(b); and

(iv) erred in her interpretation and application to the FSA Information of the phrase "information the disclosure of which could reasonably be expected to result in ... undue financial loss or gain to a third party" in s 17(1)(d);

(b) the Commissioner's delegate erred in:

(i) concluding that the evidence was insufficient to establish a reasonable expectation of probable harm within the meaning of s 17(1) FIPPA;

(ii) concluding that the evidence was insufficient to establish "monetary value" within the meaning of s 17(1)(b) FIPPA; and

(iii) concluding that the evidence was insufficient to establish an "undue financial gain" within the meaning of s 17(1)(d) FIPPA;

(c) the Commissioner's delegate erred in requiring that BCLC meet a virtually impossible standard of proof for the application of s 17(1), s 17(1)(b) and s 17(1)(d), in that it (among other things):

(i) effectively requires BCLC to obtain evidence from its competitors – the very parties BCLC expects would benefit from the disclosure of the information – as to whether and how those competitors would use BCLC's information to BCLC's competitive disadvantage and to the competitors' advantage, and the financial advantage that would accrue to those competitors, in order for BCLC to successfully rely on s 17(1), and

(ii) requires BCLC to quantify with precision the financial loss to BCLC arising from an event – disclosure of the subject information – which has not occurred because the public body does not publicly disclose this type of information and has refused to disclose the information in reliance on the s 17(1) exemption provisions of FIPPA,

which is an incorrect and unreasonable construction and application of s 17(1), s 17(1)(b) and s 17(1)(d) of FIPPA;

(d) the Commissioner's delegate erred by disregarding relevant evidence, and by making findings of fact and inferences which were not supported by the evidence and were inconsistent with the uncontroverted expert evidence and other evidence admitted by the Commissioner's delegate at the 2014 Reconsideration Inquiry; and

(e) such further and other grounds as counsel may advise.

20. BCLC pleads and relies upon:

(a) the *Supreme Court Civil Rules*;

(b) the *Judicial Review Procedure Act,* RSBC 1996, c 241 as amended;

(c) the *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165 as amended;

(d) applicable administrative law principles;

(e) the inherent jurisdiction of this Honourable Court; and

(f) such further and other authority as counsel may advise.

Automatic Stay of Order F11-25 Consequent Upon Judicial Review

21. BCLC pleads and relies upon FIPPA s 59(2), pursuant to which the commencement of this judicial review application acts as an automatic stay of Order F15-58 in accordance with the terms of s 59.

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Skye Armstrong, sworn 23 November 2015; and

2. Such further and other material as counsel may advise.

The Petitioner estimates that the hearing of the Petition will take two days.

Date: 24 November 2015 "Hunter Litigation Chambers"

HUNTER LITIGATION CHAMBERS
(per: K. Michael Stephens/Shannon P. Ramsay)
Solicitors for the petitioner

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of the Petition.

[ ] with the following variations and additional terms:

_____

_____

_____

Date:

_____

_____
Signature of [ ] Judge [ ] Master