COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Office of the Information and Privacy Commissioner for British Columbia v. Airbnb Ireland UC,* 2024 BCCA 333

Date: 20240925
Docket: CA49249

Between:

The Office of the Information and Privacy Commissioner for British Columbia

Appellant
(Respondent)

And

Airbnb Ireland UC

Respondent
(Petitioner)

And

The City of Vancouver

Respondent
(Respondent)

FILE SEALED (IN PART)

Before: The Honourable Mr. Justice Fitch
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 4, 2023 (*Airbnb Ireland UC v. Vancouver (City)*, 2023 BCSC 1137, Vancouver Docket S220590).

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Place and Date of Hearing:	Vancouver, British Columbia April 17, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 25, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Justice Winteringham

Summary:

The Information and Privacy Commissioner (the "IPC") appeals from the judicial review of its decision requiring the City to release certain requested information about short-term rental accommodation licensees gathered by the City pursuant to its agreements with Airbnb. The judge set aside and remitted the IPC's decision and ordered that the IPC give notice to licensees in advance of its reconsideration. The IPC submits that the judge erred in finding that the adjudicator's interpretation of s. 22 of the Freedom of Information and Protection of Privacy Act was unreasonable, and erred in finding that notice of the request should have been provided to all licensees.

Held: The appeal is allowed in part. The order requiring notice is set aside so that the IPC may issue its own decision on whether notice is appropriate in the circumstances. The judge's order remitting the matter for reconsideration is maintained.

Reasons for Judgment of the Honourable Justice Skolrood:

[1] This appeal is from the decision of a Supreme Court justice quashing and remitting a review decision made by a delegate of the Information and Privacy Commissioner for British Columbia (the "IPC"), which required the City of Vancouver (the "City") to release certain information it received from Airbnb Ireland UC ("Airbnb") regarding short-term rental accommodations ("STRs"). The judge's reasons are indexed at 2023 BCSC 1137 [*RFJ*].

Background

[2] Airbnb is a company established under the laws of the Republic of Ireland. It operates an online platform that facilitates the booking of STRs by guests directly from hosts. There are a number of hosts (the "Hosts") operating STRs in the City.

[3] In April 2018, the City amended its bylaws relating to STRs. Pursuant to the new bylaws, Hosts must: (i) be individuals; (ii) obtain a license (the "STR License"); and (iii) operate their STRs solely from their principal residences. Accordingly, each STR License is issued to individual Hosts in their own names and lists the Host's home address.

[4] On April 10, 2018, the City and Airbnb entered into a Memorandum of Understanding ("MOU") pursuant to which Airbnb agreed to provide the City with certain information pertaining to the Hosts, including their names, STR License numbers, home addresses, and email addresses to aid in the enforcement of the bylaws. Such information was deemed by s. 1.9 of the MOU to be "Personal Information" under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*].

[5] The City publicly discloses information on its Open Data Portal about the STR Licences issued, such as the status of the licence and whether the applicable fee has been paid. However, the City decided to not post STR Hosts' names or STR addresses. The City made this decision based on reports of safety risks associated with disclosure of Hosts' names and addresses.

[6] In March 2019, a requester (the "Requester") submitted two information requests to the City:

a) The first request sought information shared by Airbnb with the City between November 1, 2018 and March 15, 2019 comprised of Airbnb Hosts' names, STR licence numbers and their STR addresses; and

b) The second request sought information relating to STR licence numbers and addresses for all STR's, not limited to Airbnb, listed on the City's Open Data Portal during the same period.

[7] The City treated the two requests as a single request (the "Request"). The information requested is contained in two Excel files referred to as Spreadsheet A, which contains information relating to the first request, and Spreadsheet B, which contains information relating to the second request. The Request encompasses information about a large number of Hosts, accounting for almost 20,000 entries.

[8] In June 2019, the City denied the Request pursuant to ss. 15(1)(f) and (l), 19(1)(a), 21(1), and 22(1) of *FIPPA*. The Requester then sought a review by the IPC.

Legislative Framework

[9] Section 2 of *FIPPA* identifies two key purposes: to make public bodies more accountable to the public, and to protect personal privacy. Section 2 further sets out a number of measures intended to facilitate the achievement of those purposes (ss. 2(1)(a)–(e)).

[10] Part 2, Division 1 of *FIPPA* identifies access rights to records containing personal information, establishes the process for submitting requests for records, and sets out the obligations of public bodies in responding to access requests.

[11] Part 2, Division 2 establishes a number of exceptions pursuant to which disclosure of records may be refused. The sections relied on by the City in denying the Request are:

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,

…

(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

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, or

…

21 (1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

…

> **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.

[12] The exceptions related to third parties' business and personal privacy interests, contained in ss. 21 and 22, are subject to a notice regime set out in ss. 23 and 24. Under s. 23, if a public body intends to give access to a record that there is reason to believe contains information that might be excepted from disclosure under ss. 18.1 [harmful to rights of an Indigenous people], 21, or 22, notice must be given to the third party which then has an opportunity to make representations concerning the proposed disclosure. Under s. 24, if, after giving notice to the third party, the public body decides to order disclosure of a record, the public body must give notice of its decision to the third party which then can seek a review by the IPC.

[13] The regime in ss. 23 and 24 concerns the duty of a public body to give notice in response to a request. Also relevant is s. 54, which sets out the obligations of the IPC to give notice of a review:

> **54** On receiving a request for a review, the commissioner must give a copy to
>
> (a) the head of the public body concerned, and
>
> (b) any other person that the commissioner considers appropriate.

The IPC Review

[14] Airbnb was given notice of the review application and was granted leave to make representations.

[15] The IPC Adjudicator released her review decision on December 17, 2021 for reasons indexed at 2021 BCIPC 76 [*Adjudicator's Reasons*]. With respect to ss. 15(1)(f) and 19(1)(a) of *FIPPA*, the Adjudicator found that, with one exception, the City and Airbnb had not established that there was a reasonable expectation that releasing the records sought in the Request could threaten anyone's life, physical safety, or physical or mental health. The one exception was in respect of an

individual, referred to in an affidavit submitted by the City, who had been stalked by someone who accessed their personal information through online databases.

[16] The Adjudicator similarly found that the City and Airbnb had not established that there was a reasonable expectation that disclosure could result in harm to property, under s. 15(1)(l).

[17] With respect to s. 21(1) [third party business interests], the Adjudicator found that disclosure of Airbnb Hosts' names and STR addresses, as set out in Spreadsheet A, could reasonably be expected to result in undue financial loss to Airbnb and undue financial gain to Airbnb's competitors. The City was therefore required to refuse disclosure of that information. However, the Adjudicator found that the STR Licence numbers recorded in Spreadsheet A were not covered by the s. 21 exception because it was not established that disclosure could reasonably be expected to cause harm.

[18] With respect to s. 22(1) [unreasonable invasion of personal privacy], the Adjudicator held that the STR addresses listed in Spreadsheet B (i.e., addresses for all licenced STRs in the City) were not personal information, but rather "contact information" i.e., "information to enable an individual at a place of business to be contacted and [which] includes the…business address…of the individual" (*FIPPA* Schedule 1). The Adjudicator said:

> [119] While the addresses in Spreadsheet B are the STR operators' home addresses, they are also the addresses where their businesses operate. The fact that a location is a home does not mean that it cannot also be a business if the context reveals that is how it is being used. In this case, the addresses are where the STR operators' customers come to receive the services they have paid the STR operator to provide. In addition, the City's submissions establish that an STR operator provides their address to the City because it is a requirement of obtaining a licence to operate a business at that specific address. The STR operator declares the address of their business on their licence application.

[19] The Adjudicator also held that STR Licence numbers were not excepted from disclosure because, pursuant to s. 22(4)(i)(i), they relate to "a licence, permit or any

other similar discretionary benefit", and thus disclosure would not be an unreasonable invasion of a third party's personal privacy.

Judicial Review Decision

[20] Airbnb brought the application for judicial review. The City was named as a respondent to Airbnb's petition and it filed a response to petition supporting the relief sought by Airbnb. The IPC filed a response to petition in which it took no position on the substantive relief sought by Airbnb, however it reserved the right to oppose that relief if granted expanded standing at the judicial review hearing. The judge in fact granted the IPC expanded standing as the Requester did not participate in the proceeding and there was no other party making arguments in support of the IPC decision (*RFJ* at para. 43).

[21] Airbnb sought judicial review on three grounds:

a) the Adjudicator's interpretation of ss. 15 and 19 of *FIPPA* was unreasonable in that it imposed a higher standard of proof to establish risk of harm than what was required by the sections;

b) the Adjudicators interpretation that Hosts' home addresses are business rather than personal information and therefore outside of the exception set out in s. 22(1) was unreasonable; and

c) the IPC breached its duty of procedural fairness by failing to notify the Hosts of the Request and provide them with an opportunity to address the disclosure of their information.

[22] The judge held:

a) the standard of review applicable to the Adjudicator's interpretation and application of ss. 15, 19, and 22 of *FIPPA* is reasonableness (*RFJ* at para. 44);

b) it was not unreasonable for the Adjudicator to find on the evidence before her that the risk of harm resulting from disclosure did not rise to the level required under ss. 15 and 19. However, the judge noted that other evidence of harm to Hosts, beyond the specific evidence led about the stalking victim, may be important to the analysis;

c) the Adjudicator's "binary" approach to s. 22 and the failure to consider the context in which Hosts' principal residence addresses were required to be disclosed was unreasonable. The judge specifically rejected the Adjudicator's analysis that by virtue of a principal residence being used as a place of business, that address loses its character as personal information (*RFJ* at paras. 67–70); and

d) the judge observed that Hosts are inherently affected by the IPC's decision because "it is their personal information and privacy interests at stake if the Records are disclosed." The Adjudicator recognized that the evidence from the stalking victim met the standard of reasonable expectation of probable harm and it was reasonable to infer that analogous evidence may have come from other Hosts had they been notified. The judge found that the IPC was under a duty to provide notice to all Hosts of the Request, and an opportunity to participate, before making its decision on disclosure (*RFJ* at paras. 80–81).

[23] The judge therefore quashed the decision of the Adjudicator and remitted the matter for reconsideration, after proper notice of the Request is provided to the Hosts (*RFJ* at para. 85). The judge also awarded Airbnb its costs against the IPC.

Issues on Appeal

[24] This appeal was brought by the IPC which alleges three errors on the part of the judge:

a) in finding that notice of the request should have been provided to all STR licensees;

b) in finding that the Adjudicator's determination that STR licensee addresses are not personal information pursuant to s. 22 of *FIPPA* was unreasonable. The IPC submits that the judge applied a correctness rather than a reasonableness standard of review; and

c) in awarding Airbnb its costs against the IPC.

[25] Airbnb and the City take the position that the judge did not err in requiring notice to the Hosts or in his determination that Hosts' home addresses are personal information. Airbnb also submits, as a preliminary objection to the IPC's arguments, that the IPC has exceeded the proper scope of its participation in the proceeding and thus the Court should decline to entertain the IPC's arguments on the notice issue. On the issue of costs, Airbnb submits that the question is moot as it never sought costs from the IPC.

Standard of Review

[26] On an appeal from a judicial review, this Court's task is to determine if the reviewing judge correctly identified and applied the standard of review: *University of British Columbia v. Lister,* 2018 BCCA 139 at para. 20. To do so, this Court will effectively step into the shoes of the lower court and focus on the administrative decision under review: *Najaripour v. Brightside Community Homes,* 2024 BCCA 250 at para. 24; *Crook v. British Columbia (Director of Child, Family and Community Service),* 2020 BCCA 192 at para. 35.

[27] The parties agree that the judge properly identified reasonableness as the standard of review applying to the IPC's interpretation of s. 22 of *FIPPA*, but they disagree on the judge's application of that standard. They also disagree on the standard of review applicable to the question of whether the IPC was required to give notice to the Hosts. I will return to this issue below.

[28] As for the judge's decision on costs, such awards are discretionary, and will only be interfered with if it can be demonstrated that the judge misdirected themselves on the applicable law, made an error in principle, made a palpable error

in assessing the facts, or otherwise made an award that is so clearly wrong as to amount to an injustice: *Gichuru v. Purewal,* 2021 BCCA 91 at para. 13.

Discussion

The role of the IPC

[29] I will first address Airbnb's argument that the IPC has gone beyond the permissible bounds of argument for a statutory tribunal in an appeal proceeding.

[30] As a starting point, Airbnb does not challenge the decision of the judge to grant the IPC expanded standing in the judicial review proceeding. In *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 [*OEB*], the Supreme Court of Canada held that such a decision falls within the discretion of the reviewing judge. In exercising that discretion, the judge is "required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality" (at para. 57).

[31] Justice Rothstein, for the majority, identified three factors that may inform the exercise of discretion (at para. 59):

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
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> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[32] This Court has held that where a statutory tribunal participates as a party in a judicial review proceeding in the Supreme Court, it has the right to initiate an appeal:

British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023 BCCA 168 at paras. 38–48.

[33] However, even where a tribunal is granted expanded participatory rights, there may still be limits to the arguments it can advance. Specifically, a tribunal will not be permitted to engage in improper "bootstrapping." The concept of bootstrapping is related to the principle of finality, which holds that a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision. Bootstrapping occurs where the tribunal "seeks to supplement what would otherwise be a deficient decision with new arguments on appeal" (*OEB* at paras. 49, 64).

[34] A tribunal will also not be permitted to raise wholly new arguments on review or appeal. This restriction will not, however, limit the ability of a tribunal to offer interpretations of its reasons, make arguments that were implicit in the original reasons, or respond to arguments made by a counterparty (*OEB* at paras. 68–69).

[35] Justice Rothstein in *OEB* also cautioned tribunals to be cognizant of the tone they adopt on review of their decisions, to preserve confidence in their impartiality. He cited (at para. 71) Justice Goudge in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005) 75 O.R. (3d) 309, 2005 CanLII 11786 (C.A.):

> [61] …if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary.

[36] Airbnb submits that it is improper for the IPC to address the question of notice to Hosts because it did not deal with that issue in its review decision. Specifically, the Adjudicator gave no reasons for not providing notice of the Request to Hosts. Airbnb argues that the IPC is bootstrapping by now attempting to explain why it

proceeded as it did. Airbnb says this gives rise to issues about the IPC's impartiality, which is of particular concern given the judge's order remitting the matter for reconsideration by the IPC.

[37] Airbnb submits further that the IPC is advancing arguments for which there is no evidence. For example, Airbnb says there is no evidence to support the IPC's arguments that no Hosts sought to participate in the review process or raised concerns about their procedural rights, that providing notice to the Hosts would unduly burden the IPC, or that Airbnb is best situated to provide notice given its contractual relationship with Hosts. Finally, responding to the IPC's argument that the order below requiring notice to 20,000 individuals would have "significant implications" for its operations, Airbnb submits that the IPC's appeal is improperly motivated by its own institutional interests. On this point, Airbnb cites *Saskatchewan Labour Relations Board v. SCH Maintenance Services Ltd*., 2021 SKCA 151 [*SCH Maintenance*], where the Court dismissed, for lack of standing, an appeal brought by the Labour Relations Board from a decision of a chambers judge ordering the board to produce a disputed ballot in a union certification matter. The Court held that the Board was improperly and "assiduously promoting its own interests" (at para. 33).

[38] The IPC submits that it is entirely appropriate for it to address the notice issue in this Court. It notes that no party raised the question in the review proceeding of whether Hosts should be given notice of the Request. Airbnb and the City then argued on judicial review that such notice was required, and the IPC responded to those arguments. It is not apparent from the judge's reasons addressing the notice issue that any objection was raised by either Airbnb or the City about the IPC's right to do so. The IPC submits that without its submissions the Court will be deprived of the benefit of hearing both sides of the matter in dispute.

[39] In my view, the IPC has not strayed into impermissible territory by addressing the issue of notice to Hosts. The circumstances of this case fall within the first factor identified by Rothstein J. in *OEB,* i.e., where there is no other party providing opposing arguments which are necessary to permit fully informed adjudication.

In this regard, the question of whether the IPC was required to give notice of the Request to Hosts involves the interpretation of *FIPPA*, specifically s. 54, which governs the IPC's notice obligations in connection with a review. The IPC is well placed to provide submissions on the proper interpretation of that provision of its home statute, with which it can be expected to have a "particular" and "habitual" familiarity: *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 54 [*Dunsmuir*]; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.,* 2016 SCC 47 at para. 33. Indeed, as I will return to below, this issue should have been addressed at first instance in the review proceeding before the Adjudicator.

[40] Further, the IPC did not raise the notice question as a new issue in the judicial review proceeding. Rather, it made submissions in response to arguments advanced by Airbnb which had not been raised in the review proceeding. Again, Rothstein J. recognized the appropriateness of a tribunal responding to such arguments in *OEB* (at para. 68).

[41] I do not agree with Airbnb that the IPC is improperly pursuing its own institutional self-interest in bringing this appeal. Again, it was Airbnb that raised the notice issue, not the IPC. The *SCH Maintenance* decision does not assist Airbnb. There, the board brought an appeal to challenge the jurisdiction of a chambers judge to order production of a disputed ballot, which was not an issue raised by either of the parties to the labour dispute. Justice Ottenbreit held that the appeal fell outside the analytical framework established by the Supreme Court of Canada in *OEB* because the board was not "merely contributing to a fully informed adjudication of issues raised by the parties" but was rather pursuing its own interests (at para. 33). Justice Ottenbreit characterized the board's appeal as effectively creating an improper jurisdictional dispute between two decision-making bodies:

> [38] The appeal by the Board strikes at the very heart of our legal system. That system consists of various levels of adjudicative bodies providing citizens and, in our federal system, government bodies, forums to determine disputes that arise between them. There is a hierarchy of adjudicative bodies, each of which sits in appeal or review of the tribunal or court lower in the hierarchy, and each of which has prescribed jurisdiction and obligations

> based either or both on statute law, the common law or, in the case of superior courts, inherent jurisdiction.
>
> [39] That system does not allow a tribunal at one level of the hierarchy to directly challenge a decision of an adjudicative body higher in the hierarchical sphere that the tribunal considers to have failed to accord with its views on an issue. Implicit in this system is the premise that there is no internecine struggle between bodies at differing levels in the adjudicative hierarchy. The Board's appeal is just such a conflict; it is not merely participating in an appeal commenced by SCH or the Union, but it commenced one where none existed.

[42] That is not the situation here. The IPC's appeal on the notice issue does not challenge the jurisdiction of the Supreme Court. Instead, it concerns the IPC's own authority to determine who should receive notice pursuant to s. 54 of *FIPPA*.

[43] In my view, the circumstances of this case fall squarely within the principles established by *OEB*, and the IPC has not "crossed the line" in addressing the notice issue. That said, I agree with Airbnb that certain of the arguments advanced by the IPC are not supported in the evidence and therefore cannot be sustained. I will return to this point below.

Did the judge err in ordering notice to all STR licensees?

[44] The IPC submits that the judge erred in considering the notice issue because it was not raised by either Airbnb or the City in the review process. The IPC argues further that it was in any event not open to Airbnb and the City to rely on the procedural rights of third parties — i.e., the Hosts — to impugn the Adjudicator's decision. With respect to the merits of the judge's decision, the IPC submits that the judge applied the incorrect standard of review. The IPC acknowledges that the correctness standard applies to issues of common law procedural fairness, but submits that the issue here involves the proper interpretation of s. 54 of *FIPPA*, which attracts a reasonableness standard. Finally, the IPC argues that the judge applied the wrong legal test. He considered the notice requirements contained in s. 23 of *FIPPA*, which governs the obligations of public bodies, and not s. 54, which applies to the IPC.

[45] The respondents submit that the judge properly applied a correctness standard of review in respect of the notice issue, in keeping with the well-established principle that no deference is owed to an administrative decision maker on issues of procedural fairness: *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at para. 28.

[46] In my view it is not necessary to determine whether the judge applied the proper standard of review to the Adjudicator's decision on the notice issue because she made no such decision. Both parties acknowledge that the issue of notice to the Hosts was not explicitly dealt with before the Adjudicator. Both also argue that it was the responsibility of the other to raise the issue there. The IPC frames its position in these terms in its factum: "[P]arties to a judicial review are not permitted to lie in the weeds and raise for the first time on judicial review the procedural rights of others who did not attempt to raise the issue with the tribunal themselves."

[47] Airbnb does not dispute that it did not raise the issue of notice before the Adjudicator. However, it submits that the duty to afford parties procedural fairness is not dependant upon a party asking for a fair process. Rather, administrative decision makers have a stand-alone duty to ensure that the principles of procedural fairness are adhered to.

[48] It is not particularly useful at this point, on appeal, to assign "fault" for how this issue was addressed below. Rather, the contrasting arguments serve to underscore that the issue of notice to the Hosts should have been explicitly addressed before the Adjudicator so that she could make a reasoned decision that could then be subject to judicial review on a proper record.

[49] The importance of a first instance determination of proper notice by the IPC is reflected in this Court's interpretation of s. 54 of *FIPPA* in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 [*Guide Outfitters*]:

> [29] By contrast [to ss. 23 and 24], s. 54 of the *Act*, the section under consideration here, is framed in much more general terms. It provides simply

> that the Commissioner, upon receiving a request for review (as occurred here), must afford notification to the head of the public body concerned and any other person that the Commissioner considers appropriate. The emphasized category of parties to whom notice is to be given is phrased in such a way as to afford a fair measure of discretion to the Commissioner. The Commissioner must engage in a process of consideration and analysis to reach an informed decision on such an issue. The use of the terminology "that the Commissioner considers appropriate" is an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision; this of course will inform any decision as to those groups or individuals who should receive notice and be given formal standing at any inquiry. This jurisdiction or mandate given to the Commissioner by the *Act* is, I should say, quite different from the sort of situation found to exist in cases such as *Aquasource*, where the Commissioner was engaged in purely an exercise of the interpretation of legislative provisions. The situation in the instant case also differs from cases where what I might term a pure issue of notice and hearing arises for consideration. That class of case where such a procedural issue is being considered will attract a less deferential standard of review by a reviewing court. While he was in the instant case acting under and considering the parameters of the legislation, the Commissioner was not so much interpreting a legislative provision as deciding who ought to be found to have a sufficient interest in the inquiry proceedings to become a participant in the process.
>
> …
>
> [33] …[The Commissioner] is well situated to appreciate the issues and concerns that have arisen and will arise in the operation of the *Act*. The continuing administration of the *Act* will cause the Commissioner to be alive to issues such as the parameters of likely concern by those who could be potentially affected by decisions relating to the release of information under the *Act*. There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the *Act* requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is appropriate to notify and to allow to formally participate in any inquiry.
>
> [Emphasis in original.]

[50] The Court's comments were made in the context of considering the appropriate standard of review applicable to the Commissioner's decision as to who was entitled to notice under s. 54. I acknowledge, and agree with, Airbnb's point that the law governing standard of review has evolved well past where it stood in 2004, when *Guide Outfitters* was decided. The standard of review analysis is now governed by the framework established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], and related cases.

[51] However, the fact that the law governing standard of review has changed does not alter the fundamental nature of the Commissioner's authority under s. 54, only the principles that apply to a judicial review of the exercise of that authority. As this Court made clear in *Guide Outfitters*, the IPC is afforded a fair measure of discretion in determining who should receive notice of a review request. Most importantly, in exercising that discretion, the IPC must "engage in a process of consideration and analysis to reach an informed decision" (at para. 29).

[52] As this Court also noted in *Guide Outfitters*, that process of consideration has an obvious factual component (at para. 33). Relevant facts that may inform the analysis include the nature of the records in issue, the number of potentially affected third parties, the practical logistics of providing notice, whether there are alternative means of doing so, and potential institutional resource issues. The IPC has raised some of these points in this appeal and Airbnb fairly makes the point that they are not supported in the evidence. That does not mean, however, that these issues are irrelevant. Rather, it reinforces the point that the notice decision should be made at first instance by the IPC on a proper record.

[53] This view is further supported by a number of issues the parties raised for the first time before the judge or now seek to raise on appeal, including the relationship and interaction of the notice provisions set out in ss. 23 and 54 of *FIPPA*, the standing of Airbnb and the City to rely on the procedural rights of third parties, and whether Airbnb and the City should have provided broader evidence beyond that relating to the stalking victim in order to meet the "reasonable expectation of harm" standard.

[54] Finally, a key challenge presented by the absence of a clear decision and supporting reasons from the Adjudicator on the notice issue is well illustrated by the IPC's submission on the issue of the proper interpretation of s. 22 of *FIPPA*. The IPC argues that the judge erred in his application of the reasonableness standard of review by failing to engage in a "reasons first" analysis of the decision under review as directed by *Vavilov* (at paras. 84–85). There, the Supreme Court stressed that a

reviewing court must "begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (citing *Dunsmuir* at para. 48). Here, if the Court accepted the IPC's position that the reasonableness standard applies to the review of its s. 54 determination (assuming there was such a determination), it is not possible to engage in a "reasons first" reasonableness analysis in the absence of any reasons from the Adjudicator.

[55] Given the absence of an explicit decision of the IPC on the issue of notice to Hosts and the lack of any supporting evidentiary record, it is my respectful view that the judge erred in determining that notice to the approximately 20,000 Hosts was required in advance of the IPC reconsideration that he also ordered. As I will address below, I am of the view that the judge did not err on the substantive point concerning the interpretation of s. 22 and in ordering reconsideration of that issue. However, I would set aside the aspect of his order requiring advance notice to the Hosts, with the result being that it will be for the IPC at first instance to determine who will be provided notice.

[56] Before leaving this issue, I will address briefly the concern raised by Airbnb and the City concerning the potential lack of impartiality of the IPC on a reconsideration given the positions it has taken on appeal. On this point, I will simply say that the IPC is a statutory body whose powers and responsibilities are prescribed by *FIPPA*. If the IPC acts in a manner that does not accord with those statutory powers and responsibilities, or if it breaches its obligation to act fairly and impartially, affected parties may seek judicial review. The Court will not presume such a breach in advance of a reconsideration. Further, I do not find that the tenor or content of the IPC's submissions on this appeal have given rise to impartiality concerns which would require the Court's intervention.

Did the judge err in finding that the IPC's interpretation of s. 22 of *FIPPA* was unreasonable?

[57] As noted above, the parties agree that the judge properly identified the reasonableness standard of review as applying to the Adjudicator's interpretation of s. 22. However, the IPC submits that the judge erred in the application of that standard by improperly substituting his analysis for that of the decision maker. The IPC says that, contrary to the judge's findings, the Adjudicator expressly considered the context in which the STR Licensees' addresses were provided to and held by the City, and accounted for the fact that the Hosts' homes were also being used for business purposes.

[58] The respondents submit that the judge did not substitute his own reasons for those of the Adjudicator, but rather closely considered the Adjudicator's reasons and found that the Adjudicator unreasonably adopted a binary distinction between business contact and personal information without properly considering the impact of disclosure on the privacy rights of Hosts.

[59] In *Vavilov*, the majority of the Supreme Court said that the focus of reasonableness review must be on the actual decision of the administrative decision maker, including both the decision maker's reasoning process and the outcome. Both aspects of the decision will be informed by the context in which it is made (at paras. 83, 89).

[60] I agree with the respondents, and the judge, that the Adjudicator failed to properly consider the context in which Hosts' home addresses are provided to the City and the implications of disclosing that information, particularly alongside the other information ordered disclosed by the IPC. Respectfully, the Adjudicator's analysis was limited to determining that the hosts' addresses constituted business addresses and therefore met the statutory definition of "contact information" under *FIPPA*. As the judge observed, "[t]he Hosts' principal residence addresses are not binarily contact information or personal information" (at para. 68).

[61] The judge referred to the Adjudicator's finding that information concerning residential addresses loses its character as personal information because it is required to obtain an STR licence (at para. 67). In fact, I do not read the Adjudicator's decision as including such a finding, at least not explicitly. Again, the Adjudicator simply applied the statutory definitions of "personal information" and "contact information" and determined that, because the STR addresses were contact information, they were not personal information (*Adjudicator's Reasons* at paras. 118–122). The Adjudicator acknowledged that the STR addresses were also the Hosts' home addresses but held that "[t]he fact that a location is a home does not mean that it cannot also be a business." (At para. 119.) Her reasons do not, however, grapple with the question of whether and how the personal nature of that information, and the important privacy interests implicated, were somehow lost or diminished.

[62] While administrative decision makers are not expected to deploy the same legal techniques as judges, their decisions "must be consistent with the 'modern principle' of statutory interpretation, which focusses on the text, context, and purpose of the statutory provision" (*Vavilov* at para. 92; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 69). *FIPPA* provides for a legislative scheme, one of the principal purposes of which is the protection of personal privacy. Respectfully, the Adjudicator's interpretation of s. 22 is overly formalistic and fails to consider this aspect of the factual and legislative context. As such, her decision lacks the "justification, transparency and intelligibility" which are the hallmarks of reasonableness (*Vavilov* at para. 99; *Dunsmuir* at para. 47).

[63] The City cites a previous decision of the IPC (issued by former Commissioner Flaherty) which discussed the careful balance that must be struck in respect of persons working from their homes:

> The implication of sole proprietorship, partnership, or incorporation for the individual person is the absence of privacy rights in respect of the individual person's *business* activities. A fine distinction may exist, however, in cases where a sole proprietor works at home, thus blurring the line between personal information and business information. In such cases, public bodies must carefully balance the rights of an applicant to obtain information about

> the sole proprietor's business activities with the sole proprietor's right to privacy of his or her personal information.
>
> [Emphasis in original.]

(*British Columbia (Workers' Compensation Board)*, [1994] B.C.I.P.C.D. No. 22-1994).

[64] While the IPC is not bound by its previous decisions (*Vavilov* at para. 129, *North Cowichan (Municipality) v. 1909988 Ontario Limited*, 2021 BCCA 414 at para. 68), the former Commissioner's words are particularly apt in the circumstances of this case. In my respectful view, it is not apparent from the reasons of the Adjudicator that any consideration was given as to how to strike the appropriate balance here.

[65] Accordingly, I would not interfere with the judge's order setting aside the IPC's order directing the City to disclose the STR addresses.

Did the judge err in awarding Airbnb its costs of the judicial review?

[66] In light of Airbnb's position, taken in its factum and reiterated at the hearing of the appeal, that it is not seeking costs from the IPC for the proceeding below, it is not necessary for us to address this issue.

Conclusion

[67] I would allow the appeal to the limited extent of setting aside the Judge's order requiring notice to the Hosts. It is for the IPC at first instance to determine and give reasons for its decision whether notice is appropriate. I would otherwise maintain the order remitting the matter to the IPC for reconsideration.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Justice Winteringham"