CITATION: Brockville (City) v. Information and Privacy Commissioner, Ontario, 2020 ONSC 4413
DIVISIONAL COURT FILE NO.: DC 683/18
DATE: 20200722

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, BOSWELL, and MYERS JJ.

BETWEEN:	
CITY OF BROCKVILLE Applicant	*Alexandra V. Mayeski,* for the City of Brockville
– and –	*Daniel J. Michaluk and Jordan D. Simon,* for Hicks Morley Hamilton Stewart Storie LLP
INFORMATION AND PRIVACY COMMISSIONER, ONTARIO, JOHN DOE, and HICKS MORLEY HAMILTON STEWART STORIE LLP Respondents	*Linda Hsiao-Chia Chen,* for the Information and Privacy Commissioner of Ontario
	Howard Goldblatt, for John Doe
	HEARD at Toronto: January 29, 2020

REASONS FOR DECISION

F.L. MYERS J.

This Application

[1] The City of Brockville, supported by its labour relations counsel Hicks Morley Hamilton Stewart Storie LLP, applies for judicial review of the decision of Adjudicator Wai reported as Information and Privacy Commissioner of Ontario Order MO-3664 dated October 3, 2018.

[2] The adjudicator held that Brockville is required to disclose to the applicant (referred to as John Doe) redacted legal fee invoices from the law firm and other accounting documents that show the cost paid by the city for legal representation in collective bargaining with the Brockville Professional Fire Fighters Association in relation to the negotiation of their 2009-2010 and 2011-2012 collective agreements.

[3] Brockville and Hicks Morley argue that the adjudicator unreasonably concluded that the city is required to disclose the documents and information sought under the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56 (*"MFIPPA"*). They ask the court to quash the adjudicator's decision and refuse Mr. Doe's application.

[4] For the reasons that follow, the application is dismissed.

The Issue

[5] The issue before the adjudicator was quite narrow. Although John Doe had initially requested broader disclosure, by the time the matter came before the adjudicator, Mr. Doe had limited his request. He agreed that the city could redact all information from the legal invoices and documents that he sought other than the bottom-line fee number (inclusive of disbursements and taxes). We were shown copies of the redacted documents. They are completely blacked out except for the fee numbers at the bottom of the pages.

[6] No one objects to the redaction of information from the documents. There was an issue below concerning the application of lawyer client privilege to fee invoices. That issue was not raised before the court.

[7] The only issue raised in this application is whether the law firm's invoices and the city's cost information are excluded from disclosure under the statutory scheme altogether under s. 52(3) of the statute:

> (3) Subject to subsection (4), *this Act does not apply to records* collected, *prepared*, maintained or used by or on behalf of an institution *in relation to* any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. *Negotiations or anticipated negotiations relating to labour relations* or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. [Emphasis added.]

[8] The city and law firm argue that s. 52(3)2 reflects a legislative determination to wholly exclude labour relations documentation from the freedom of information regime. They note that the subsection does not just exclude *information* about labour relations. It is broader and excludes from disclosure all *records* containing such information. That is, they submit that the documents themselves, redacted or not, are not subject to disclosure under this statute. Moreover, they argue that it is perfectly obvious that documents evidencing the cost of the city's side of labour negotiations are documents "prepared...in relation to...negotiations...relating to labour relations". They therefore fall squarely within the exclusion from the statutory scheme as set out in s. 52(3)2.

The Decision

[9] The adjudicator set out the legal principle established by this court in *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 (CanLII) that it is not necessary for a party who relies on the labour relations exclusion to prove

that there is a "substantial connection" between the documents sought and labour relations. Rather the exclusion applies if there is "some connection" to labour relations.[1]

[10] The adjudicator held that although the invoices and other documents were created as a result of labour negotiations, they "do not relate to the *relations* between the city and its workforce". [Emphasis in original.]

[11] The adjudicator considered the purpose of the exclusion in s. 52(3)2 and held that its goal was to remove the public right of access to documents concerning municipal institutions' relations with their workforces.

[12] She also considered the broader purposes of the statute. She noted that s. 1 of the statute provides that exemptions from disclosure under the Act should be limited and specific. She held that limiting disclosure of information about the expenditure of public funds was contrary to the statutory goal of enhancing government accountability through disclosure. She held that to promote the statutory purposes of transparency and accountability it was appropriate to interpret the exclusion from disclosure in s. 52(3)2 as applying only to issues concerning relations among institutions and their workforces.

[13] In conclusion, the adjudicator held:

> ...I find that the city collected, prepared, maintained or used [the records] to manage its accounts or expenses rather than in relation to labour relations negotiations. Given the nature of the records, I find section 52(3)2 does not apply to exclude them from the scope of the *Act*.

The Applicant's Submissions

[14] The city submits that whether reviewed on the basis of correctness or reasonableness, the decision must be reversed. It points out that s. 52(3) provides an outright exclusion from the statutory scheme. It is not one of many

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[1] I note that the *Toronto Star* case dealt with the labour relations exception in s. 65(5.2) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. The parties agree that there is no meaningful difference between that section and the statutory provision in issue before us.

"exemptions" that are set out in the body of the statute such as the exemption for lawyer client privilege that was in issue below. The city submits that before one considers whether an exemption might apply, the document in issue has to be caught by the basic disclosure obligation set out in s. 4(1) of the statute. A record that is excluded from the Act under s. 52(3) is not subject to disclosure at all.

[15] The city points to the purpose of the labour relations exclusion from freedom of information regimes identified by Sachs J. in *Ontario (Ministry of Community and Social Services) v Doe*, 2014 ONSC 239 (CanLII) appeal dismissed on other grounds 2015 ONCA 107 (CanLII):

> 37. On first reading of the bill, the Hon. David Johnson, then chair of the Management Board of Cabinet, stated that the proposed amendments to the Act were "to ensure the confidentiality of labour relations information": see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Leg. 1st Sess. (October 4, 1995), (Hon. Allan K. McLean). On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations documents will be exempt from disclosure under the changes to the Act:
>
> > Yes. This change brings us in line with the private sector. *Previously, orders under the Act made some internal labour relations information available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) which could impact negatively on relationships with bargaining agents.* That meant that unions had access to some employer labour relations information while the employer had no similar access to union information: see Ontario, management Board Secretariat, Bill seven information package, employee questions and answers, (November 10, 1995). On first reading of the bill, the Hon. David Johnson, then chair of management and board of cabinet, stated that the proposed amendments to the act were "to ensure the confidentiality of labour relations information": see Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (November 10, 1995). [Emphasis added.]

[16] However, despite recognizing the statutory purpose of avoiding disclosure of information that could *"impact negatively on relationships with bargaining agents"* counsel argues that in light of the low hurdle of establishing only "some connection" between labour relations and the documentation at issue, the court ought to avoid balancing the disclosure in relation to the statutory purpose. Counsel submits that the adjudicator erred in doing so.

[17] In considering the statutory purpose, the adjudicator found that the documents at issue were "only tangentially related" to labour relations. The city submits that "tangentially related" is still "related" and this satisfies the "some connection" standard from *Toronto Star*.

[18] The city argues that by failing to hold that documents disclosing lawyers' fees were related to labour relations and thereby excluded from the statutory scheme, the adjudicator's reasons were internally incoherent and also failed to recognize the legal limits on the scope of review available to her. Both of these submissions are grounds for review on a reasonableness standard under the Supreme Court of Canada's recent decision concerning judicial review *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) that is discussed below.

[19] Counsel for the city also argues that the adjudicator's reasons are insufficient because she declined to follow a precedent decision without adequately explaining why contrary to *Vavilov* at para 131. There is no doubt that the adjudicator declined to follow a decision of another adjudicator who reached an opposite conclusion on indistinguishable facts in OM-2810. While the city acknowledges that the decision was not strictly binding on the adjudicator under the doctrine of *stare decisis*, nevertheless, it submits that the adjudicator's decision is unreasonable by failing to adequately justify the different outcome.

[20] Counsel for Hicks Morley argues that from a labour relations perspective, the disclosure of the cost of labour relations to the city is asymmetrical. That is, public sector labour negotiations include a fight for the "hearts and minds of the public". Allowing the union to obtain access to the employer's cost of the negotiation under the statute is not balanced by an equal opportunity for the employer to know the union's cost of the process. Just as the union might want to make public statements regarding the excessive amounts being spent by the city to contest its fire fighters' demands, the city

should be entitled to counter by disclosure of the union's expenditures. This is the type of concern referred to by the Minister on introducing the labour relations exclusion quoted by Sachs J. above.

[21] Hicks Morley argues that the adjudicator erred by importing a form of "primary purpose" test into s. 52(3)2 to allow her to weigh and assess the degree of connection between the purpose for the creation of the documents sought and labour relations. It argues that a purpose that may not be the primary purpose for the creation of a document may still amount to "some connection" to labour relations. Hicks Morley notes that the adjudicator relies on case law that preceded the *Toronto Star* case and another adjudicator's decision that expressly declined to follow *Toronto Star* in favour of a form of primary purpose test. In this case, Hicks Morley submits, the adjudicator was required to assess the documents "as a whole" and determine whether they were related to labour relations. Instead, it submits, she decontextualized the documents – extracting out only the fee numbers – thereby ignoring that the fees were incurred in labour relations negotiations and the documents would not exist but for the labour relations advice provided by the law firm to the city.

Standard of Review

[22] The standard of review on an application for judicial review is presumptively reasonableness. Nothing in the *Judicial Review Procedure Act*, RSO 1990, c J.1 indicates a legislative intention to the contrary. See *Vavilov* at para. 23.

[23] Hicks Morley argues that the institution of labour relations is a general area of law that is "of central importance to the legal system as a whole and outside the adjudicator's specialized are of expertise". As such, *Vavilov* at para. 58 *et seq.* provides for review on a correctness standard.

[24] I do not agree that "labour relations" in the abstract is a sufficiently discrete and generalized body of law for which the rule of law requires a heightened standard of judicial review. The mere invocation of "labour law" does not make an issue a general question of law of central importance to the legal system as a whole. There are no legal implications for a wide variety of other statutes and contexts apart from freedom of information that may be affected by this decision. Requests under freedom of information legislation,

such as *MFIPPA*, often arise in particular legal contexts, including criminal law, housing, public health, social benefits, planning and land use, and many other areas. Sometimes a question of importance to the entire legal system may be involved, such as, for example, certain issues of lawyer client privilege. But, for the adjudication to concern matters "of central importance to the legal system," something more must be shown than that another area of law is part of the context in which a request arises.

[25] The issue on appeal does not implicate the entire "institution of labour relations". It does not involve a general principle of labour law. Indeed, it does not involve any general principle of law of importance to the legal system as a whole: it concerns the proper construction of provisions of *MFIPPA*, one of the adjudicator's "home statutes". The standard of review is therefore reasonableness.

[26] As set out above, the principal argument advanced by the city is that, on proper statutory interpretation, law firm invoices for labour relations advice must fall within the words "prepared... in relation to... negotiations... relating to labour relations". As such, the documents are excluded from the municipal freedom of information regime. The city argues that once one understands the proper interpretation of the statute, it becomes apparent that the adjudicator's decision falls outside the exclusion imposed by the Legislature and cannot be reasonable.

[27] However, the city's approach does not follow *Vavilov's* prescription for conducting a reasonableness review. The city would have the court interpret the statute first and then compare the court's "correct" interpretation to the outcome reached by the adjudicator. *Vavilov* emphasizes that the proper approach to a reasonableness review follows the opposite tack.

[28] In *Vavilov*, at paras. 82 and 83, the Supreme Court directs that the focus of judicial review is on the decision itself. The court is reviewing the reasons and the outcome. At para. 84 of *Vavilov*, the Supreme Court directed that a reviewing court begins by examining the tribunal's reasons with "respectful attention". The court's goal is to understand the reasoning process followed by the decision maker to arrive at her conclusion. At para. 85, the Court instructed:

> ...a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[29] At para. 93 of *Vavilov*, the Supreme Court noted:

> Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision.

[30] At para. 94 of *Vavilov*, courts are reminded to read the decision maker's reasons in light of the history and context of the proceedings. The reviewing court might consider such things as: the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body.

[31] In conducting a judicial review application, the court does not determine the correct statutory interpretation and then look to see if the tribunal "got it right". Rather, the goal is to consider what the tribunal did in light of the reasons it provided to determine if the outcome satisfies the well-understood hallmarks of a reasonableness review: transparency, intelligibility, and justification.

[32] Statutory interpretation may indeed impose legal limits on the reach of the tribunal. But a reviewing court must guard against searching at the outset to define "legal limits". Doing so risks re-imposing a form of jurisdictional hurdle under an outmoded theory of judicial review that the Supreme Court finally laid to rest in *Vavilov* at para. 65. On the other hand, a tribunal cannot interpret a statute to provide itself with powers that the Legislature does not intend it to have. *Vavilov* instructs the court to review the tribunal's reasons to consider whether the it properly justified the interpretation that it adopted in light of the surrounding context. See paras. 108 to 110.

Analysis

[33] This case turns on the meaning and scope of the exclusion in s. 52(3)2 of documents relating to labour relations. Statutory interpretation starts with Professor Driedger's "modern approach" described by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[34] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (CanLII), at para. 44, Zarnett JA gave a practical description of the application of the modern approach as follows:

> The modern approach to statutory interpretation instructs a court to consider the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Belwood Lake Cottagers Association Inc. v. Ontario (Environment and Climate Change)*, 2019 ONCA 70, at para. 39, citing *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 9-12, and *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at p. 41. While there is a presumption that the plain meaning of a statute's words reflect Parliament's intention, that plain meaning is only one aspect of the modern approach: *Belwood Lake*, at para. 42. The court must read statutory provisions in their entire context. This involves considering "the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue": *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 34.

[35] In my view, the adjudicator's reasons demonstrate an intelligible and justifiable approach to her analysis and interpretation of the statute in this case. As noted by the city, the purpose of the exclusion recognized by Sachs J. in *Ontario (Ministry of Community and Social Services) v Doe* involves an

assessment of whether the provision in issue might upset the delicate balance of labour relations by impacting negatively on employers' relationships with bargaining agents.

[36] However, in the same case Sachs J. went on to note a countervailing statutory purpose. She wrote:

> 39. ...Excluding records that are created by government institutions in the course of discharge of public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act. The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act, but not under [the analog to s. 52(3).]

[37] Ensuring accountability for public expenditures is a core focus of freedom of information legislation. In the *Ministry of Community and Social Services* case, this court upheld the decision of an adjudicator *declining* to apply the labour relations exclusion to documents where doing so would undermine the goal of enhancing fiscal transparency and the disclosure sought would not cause any identifiable harm to labour relations. In this case, the adjudicator dealt with both the purpose of the labour relations exclusion and the overriding policy under the statute favouring transparency concerning government expenditures of public funds.

[38] The city submits that the adjudicator erred by applying the interpretive rules set out in s. 1 of the statute in a case where the statute does not apply. I disagree. In my view, in discussing the desirability of narrow construction of exceptions to disclosure, the adjudicator was setting out her understanding of the context and historic place of the competing statutory objectives to guide her interpretation under the modern approach to statutory interpretation.

[39] Moreover, nothing in the *Toronto Star* case forbids a consideration of the competing statutory purposes in interpreting the proper reach of s. 52(3)2. No doubt a "substantial connection" is not required to invoke the exclusion in the subsection. The "some connection" standard still must involve a connection

that is relevant to the statutory scheme and objects understood in their proper context. It is very significant that there was no evidence adduced before the adjudicator that would help her understand how the release of legal fee figures from negotiations would have any effect on labour relations, let alone an unbalanced or destabilizing effect. Counsel's invocation before us of phrases such as "the hearts and minds of the public" and "knowledge is power", while interesting and emotive, are not a substitute for admissible evidence establishing an actual, identifiable risk of prejudice to labour relations.

[40] In all, the decision of the adjudicator, that the connection between labour relations and accounting documents detailing public expenditures by a municipality is not enough to meet the "some connection" standard, follows the proper approach to statutory interpretation. Whether I would have reached the same result notwithstanding, the reasons are internally coherent, demonstrate a rational chain of analysis, and one that is justified in relation to the facts and law that constrain the decision maker. Approached with respectful attention under *Vavilov,* I readily defer to the adjudicator's decision.

[41] Moreover, in my view, the adjudicator gave ample reasons for declining to follow the decision in OM-2810. The decision in that case on indistinguishable facts is directly contrary to the outcome driven by the adjudicator's interpretation of the statute and its application on the facts. At para. 132, *Vavilov* directs that when a court is first confronted with conflicting administrative decisions, it is not for the court to direct a "correct" outcome. Rather, it is for the tribunal to reach a proper consensus recognizing that over time, if conflicting decisions persist so that there are competing strands of case law that cannot be reconciled, it may become more difficult for a court to defer to one or the other interpretation. In the meantime, I simply note that the freedom of information disclosure obligations of every municipality in Ontario are affected by this issue and the ratepayers of each deserve to know that they will be treated alike. It is the proper role of the court to defer to the tribunal as an institution while it considers how to resolve any inconsistencies of legal interpretation as cases develop.

[42] Accordingly, the application is dismissed. The parties agreed that there would be no costs.

F.L. Myers J.

I agree

D.L. Corbett J.

I agree

Boswell J.

Release Date: July 23 2020

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