Court File No. 797/92
Date: May 10, 1995

ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT

MCMURTRY C.J.O.C., STEELE AND SAUNDERS JJ.

B E T W E E N:	)	
	)	
WORKERS' COMPENSATION BOARD	)	Jeff G. Cowan, for the Applicant
	)	
Applicant	)	*S. Scharbach*, for the Attorney General of Ontario, Intervener
- and -	)	
	)	T. Curry and K. Douglas, for Employees' Advocacy Council, Canadian Manufacturers' Association and Council of Ontario Construction Associations, Interveners
TOM MITCHINSON, ASSISTANT INFORMATION AND PRIVACY COMMISSIONER (ONTARIO)	)	
	)	William S. Challis and Gerald J. Fahey, for the Respondent
Respondent	)	
	)	**HEARD:** March 21 & 22, 1995

BY THE COURT:

This is an application for judicial review and an order quashing an order of the Assistant Information and Privacy Commissioner (the Commissioner) which directed the applicant to release five records pursuant to a request by a requester under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (the Act). The requester when asked to do so made no submissions to the Commissioner and although notified did not appear before this court.

The applicant (WCB) administers the Workers' Compensation Act, R.S.O. 1990, c. W.11 (the WC Act). The Workers' Compensation system provides no-fault accident insurance benefits to injured workers. The system is totally financed by the employers. Under s. 119 of the WC Act, every employer must register with the WCB with its name and address and annually file statements among other things of the wages of its employees. Every employer must file an Employer's Statement of Payroll. The Board issues a notice of assessment based on the information supplied on that statement. The board may increase an employer's assessment based on experience rating, payroll adjustments, industry classification changes and merit/demerit rating systems. An employer's assessment may be adjusted on the basis of the employer's accident record. Experience rating is used primarily as an incentive for improved occupational safety. The employer with a good record will pay less and an employer with a poor record will pay more.

The WCB has administered five different experienced rated programs. They are as follows:

(a) Workwell program which is designed to promote health and safety in Ontario workplaces by levying additional assessments on employers that do not maintain safe and healthy environments.

(b) New Experimental Experience Rating ("NEER") plan which encourages employers to invest time and money in making the workplace safer and therefore reducing injury.

(c) Voluntary Experience Rating ("VER") plan which recognizes high and low cost experience of firms. A comparison is made between individual firms through their three-year average cost rate. This plan was discontinued as of January 1, 1992, when all experience rated plan employers were transferred to NEER.

(d) CAD-7 experience which is in effect for the construction industry.

(e) Demerit penalty program under s. 103(8) (formerly R.S.O. 1980, c. 539, s. 91(7)) which is intended for those employers whose accident costs and frequency of lost time injuries are consistently poorer than average. The record for a three-year period and life time are used in determining the firm's eligibility for this penalty:

On or about May 14, 1991, the WCB received a request under the Act, for the year 1990, for the names, addresses and any other available information for any companies who have been penalized, fined, penalty rated or were charged additional funds by the WCB under the programs known as NEER, CAD-7, Workwell, VER and the s. 91(7) penalties program. The scope of the request was immense. Potentially 18,000 employers might have been involved in the five programs.

The WCB denied access. This refusal was appealed by the requester who is a consultant who conducts a practice working on behalf of the employers towards the refunding of the fines, penalties and surcharges charged by the WCB.

During the course of mediation, the request was narrowed to:

(a) The NEER, CAD-7 and VER programs; the names, addresses and amounts of surcharge, penalty or fine for the 50 companies with the highest penalties ratings for the year 1991 (which will be referred to as records 1, 2 and 3); and

(b) Workwell and s. 91(7) programs: only the names and addresses of the 50 companies with the highest penalties, fines or penalty ratings, for the year 1990 (which will be referred to as records 4 and 5).

The WCB agreed to create five records (the "records") responsive to this narrowed request of the five programs from data already existing in its computer data banks but refused to release such records. The Commissioner then asked the parties to make submissions respecting the appeal to him. No oral evidence was taken. The Commissioner had before him only the written submissions of the WCB and 59 affected persons and five employer associations all in opposition to the release of the records. The requester did not file a submission. In other words, there were only objections to and no material supporting the release of the records.

The Commissioner stated that the records at issue in this appeal are:

Record 1 — A six-page computer-generated list of the names, addresses and surcharge amount of 50 employers in the NEER program, ordered by surcharge amount from greatest to least.

Record 2 — A three-page computer-generated list of the names and surcharge amounts for 50 employers in the CAD 7 program, ordered by amount of surcharge from greatest to least: and 50 pages containing the addresses of the employers on the list.

Record 3 — A three-page computer-generated list of the names and surcharge amount for 50 employers under the VER Program, ordered by surcharge amount from greatest to least: and 50 pages containing the addresses of the employers on the list.

Record 4 — A four-page computer-generated list of the names and addresses of all 45 employers covered by the Workwell program, ordered by surcharge amount from greatest to least. This record does not contain the actual amounts of surcharge.

Record 5 — A three-page computer-generated list of the names of fifty employers subject to the s. 91(7) program, ordered by surcharge amount from greatest to least; and a one-page document containing the addresses of the employers on the list. This record does not contain the actual amounts of surcharge.

He then referred to the WCB's responsibility to operate a no-fault benefits scheme and outlined the relevant programs of the WCB as follows:

> Under this system, each employer pays a premium/ contribution to the Board, based on the type of industry the employer is engaged in, the size of its payroll, and other criteria. Benefits paid to workers injured on the jobs are paid out of funds pooled from all employers.
>
> The WCA permits the implementation of a system of experience rating. Under experience rating, an employer's assessment is adjusted

on the basis of the employer's accident record, which may consist of accident costs or both costs and frequency of accidents. Experience rating is used primarily as an incentive for improved occupational safety, since an employer with a good record will pay less and one with a poor record will pay more.

The WCA also permits the Board to impose surcharges (additional contributions) on employers that do not maintain safe and healthy environments, or employers who contravene safety regulations. The Board may surcharge or refund an employer based on payroll adjustments, changes in industry classification, the merit/demerit rating, experience rating of the employer, and other factors. Employers are required to supply the Board with certain information by completing various forms. The formulae and criteria used by the Board to calculate surcharges or refunds is known in the industry, and the WCA provides an appeal mechanism for employers disputing the surcharges.

At the time of the appellant's request, the Board administered the five experience related programs which are the subject of these appeals.

Under the NEER program, a firm's accident cost and/or frequency record is compared to the average for the industry in which it is registered. If its record is better than the industry average, it receives a refund on its initial assessment; if the firm's experience is worse than the industry's average, a surcharge is levied.

The CAD 7 program is restricted to employers in the construction industry. Under this program, the expected accident costs and the expected number of injuries are determined on the basis of the employer's payroll and assessments. These expected values are then compared to their firm's actual accident costs and actual number of injuries to determine refunds and surcharges.

Under the Workwell program, the Board identifies employers who have particularly poor accident records for their rate group in terms of accident cost, accident frequency and/or accident severity. The evaluation process involves on-site visits by Board evaluators who review the occupational health and safety program at the work site, examine documentation, observe the employer's practices and procedures in action, tour the work site and conduct random interviews with workers. Employers who do not meet the required standards are given 90 days to improve health and safety shortfalls prior to re-evaluation. If, at the conclusion of the second evaluation,

> the employer fails to achieve the standards, an additional levy is applied.
>
> The s. 91(7) program is intended for employers whose accident costs and frequency of lost time injuries are consistently poorer than average. The record for a three-year period is used in determining the employer's eligibility for this penalty.
>
> The VER program recognizes high or low-cost experience of employers within a rate group classification: (Employees are divided into rate groups based on the end product manufactured or service provided.) A comparison is made between an individual employer's three-year average cost rate and three-year average cost rate of all the eligible employers in the rate group. VER then reduces or increases an individual employers' rate of assessment, based on its accident record. (The Board has advised that this plan was discontinued, effective January 1, 1992, when all VER program employers were transferred to the New Experimental Experience Rating Plan).

The Commissioner ordered that the WCB disclose to the applicant the names, addresses and surcharge amounts from employers listed in Records 1, 2 and 3 and only the names and addresses of the employers listed in Records 4 and 5.

The issues before the Commissioner were:

A. Whether the mandatory exemption provided by ss. 17(1)(a) and/or (c) of the Act applies to any of the records.

B. Whether the mandatory exemption provided by s. 17(2) of the Act applies to any of the records.

C. If the answer to Issues A and/or B is yes, whether the provisions of s. 23 of the Act apply in the circumstances of this appeal.

The relevant provisions of the Act are as follows:

> 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> . . . . .
>
> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour

> relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency ...
>
> (2) a head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
>
> . . . . .
>
> 23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The Commissioner stated that in order to qualify for exemption under s. 17(1)(a) and/or (c), the following three-part test must be satisfied:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the Board in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in s. 17(1)(a) and/or (c) will occur.
>
> Failure to satisfy the requirements of any part of this test will render the s. 17(1) claim invalid (Order 36).

Counsel for all parties conceded that this was the proper test and we are of the opinion that it is correct. However, counsel for the Commissioner submitted that it had been properly applied and the other parties denied that it had.

Part 1

The Commissioner decided that the information in Records 1, 2, and 3 contain the amount of surcharge levy or penalty that the named employers were assessed under the WC Act and that this was financial information and satisfied the first part of the test.

The Commissioner concluded that because the Records 4 and 5 contained only the names and addresses of employers that they were not commercial, financial or labour relations information or trade secrets and therefore they did not satisfy the first part of the test. We believe that the Commissioner patently erred in this regard. The lists are arranged in descending order based on the amount of penalty and disclosed the rank of an employer relative to others with respect to amount of surcharges for 1990. While this does not disclose the monetary details of the information supplied to the Board, it is based entirely upon such information and it does disclose information that has a direct commercial, financial and labour relations effect. In fact, the requester who asked for the information was in a commercially related business.

Part 2

The Commissioner found that none of the records met the tests for exemption on the basis of confidentiality. He found that the surcharge amounts were not "supplied" to the Board but were calculated by the Board and that such calculations would not disclose the actual information supplied. He also found that the names and addresses of the employers were required by the legislation and therefore it could not be said to have supplied in confidence.

In so far as the WC Act is concerned, we agree with the Commissioner that the information supplied was not given in confidence pursuant to the provisions of the WC Act. The only section of the WC Act that requires non-disclosure is s. 114 which refers only to information obtained as a result of an inspection or inquiry. There is no general provision in the WC Act that provides that the compulsory return forms are to be confidential. However, the registration forms themselves are headed with the words "all information is strictly confidential". In our opinion, this explicitly advises the employers that the information is confidential and gives them an assurance that they can be free and open with the information supplied to the WCB regardless of the statutory requirements. If the names and addresses of all registered employers were requested, we would agree that there was no confidentiality. However, the present request relates not just to names but the particular names derived from the information on the forms. The Commissioner acknowledged that the information in the forms was supplied in confidence. He erred in saying that the names and addresses derived from that information was not confidential. His decision was patently unreasonable.

Part 3

The Commissioner stated that he did not need to decide whether this part of the test had been satisfied. However, he concluded that the test had not been met. He stated as follows:

> I have received representations from the various parties that the release of the records could be expected to result in: significant

prejudice to the employers' competitive position or contractual or other negotiations; undue loss to the employers; and undue gain to others. These representations place heavy emphasis on the possible misuse and/or misinterpretation of the information contained in the records.

The Board states that "the fact that a firm is surcharged . . . does not ipso facto mean that the firm is a poor performer, 'unsafe', a poor risk or makes unsafe products". The Board's concern is that "the fact that a firm is surcharged (and on this list) creates an unnecessary negative image and causes the loss of business, revenue, profitability, and higher costs based on information that is potentially misleading, unfair and in 10% - 50% of the cases, inaccurate. Yet the firm would still be prejudiced by the stigma of being considered an unsafe work place and would have no avenue to vindicate its record with the public, suppliers, customers, etc".

The representations of one of the affected persons state:

> The information in the record (Record 3) can easily mislead anyone who is not very familiar with the W.C.B. and its methods. The [affected party] has one of the 50 largest V.E.R. surcharges . . . but this is not all reflective of our recent accident record. The large surcharge is part of a function of the size of our organization. A much smaller company with a worse record and a higher surcharge rate could have a lower actual surcharge due to a smaller assessable payroll.

This affected person indicates that the surcharge applied to it relates in large part to costs for individuals injured in the past, and submits:

> . . . if the record is released, or if the public learns that the [affected party] was one of the companies with largest V.E.R. surcharges in [a given year], then the public, or members of the public, will believe that the [affected party] has an ongoing, poor record concerning workplace health and safety. [It] will be required to expend further time, money and other resources in order to publicize our actual safety record, in order to correct the impression that would be created by disclosure of the record, or any part.

Whereas the Board and certain affected persons and employer associations have advanced general arguments as to how disclosure

> of an employer's payroll, volume and frequency of accidents, and its safety record might be harmful to its competitive interest, they have failed to bridge the evidentiary gap necessary to establish that disclosure of the records at issue in these appeals would reveal this type of information.
>
> I find the evidence regarding harm that could result from a negative interpretation of the information contained in the records is not sufficient to establish the third part of the section 17(1) exemption test. In my view, the evidence consists of generalized assertions of fact in support of what amounts to, at most, speculations of possible harm.

In our opinion, the Commissioner erred in applying too stringent a test. He stated that:

> To discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in s. 17(1) would occur if the information was disclosed [Order 36].

There is nothing in s. 17(1)(c) that requires "detailed and convincing" evidence. The Act only requires that there be evidence that "disclosure could reasonably be expected" to cause harm which of necessity involves some speculation. This point has been considered and settled by the Federal Court of Appeal in Canada Packers v. Canada, [1989] 1 F.C. 47 at pp. 57 and 60, 53 D.L.R. (4th) 246, where it considered similar wording. There need only be evidence of a reasonable expectation of probable harm which of necessity involves some speculation. The Commissioner had before him a very large number of submissions that harm would be reasonably expected. He recited some of these in his reasons.

In addition, representations were made by the WCB itself to the effect that

(1) information that a firm may have a poor safety record and higher costs is considered a trade secret by business;

(2) the information is of commercial nature and that the Commissioner had recognized this in a prior Order No. 76 relating to a list of dairy producers' names and addresses;

(3) the information is of commercial nature because it relates to business practices, expenses of the firms and that such knowledge is critical to any party doing business with the firm for the information that a firm is "unsafe" and is liable for higher assessment is strictly the financial information of the firm.

There were many other representations that the information of a safety record of a firm could be harmful and, particularly, in the public tendering process or in labour relations.

Clearly the decision of the Commissioner was wrong because he applied the wrong test and came to a patently unreasonable answer. There was an onus on the head of the WCB to show reasonable expectation of harm but here the evidence was overwhelming and there was absolutely no evidence before the Commissioner to indicate that there was no harm.

The Commissioner also found that the records were not exempt under s. 17(2) of the Act, which provides:

> 17(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The primary issue is whether a payment by employees pursuant to an assessment under the WC Act could be described as a tax. Badges of taxation are present. An assessment is imposed under the authority of the legislature for a public purpose. It is imposed by a public body. The employer has no option but to pay it and it is enforceable by law: see Les Ecclésiastiques de St. Sulpice de Montréal v. Montreal (City) (1889), 16 S.C.R. 399 at p. 403; Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd., [1933] 1 D.L.R. 82 at p. 85, [1933] A.C. 168 (P.C.); Lawson v. Interior Tree, Fruit and Vegetable Committee, [1931] S.C.R. 357 at p. 363; and Canada (Attorney General) v. Registrar of Titles of Vancouver Land Registration District, [1934] 3 W.W.R. 165 (B.C.C.A.).

There are sound policy reasons for keeping confidential information supplied by taxpayers to government. Those reasons were recognized by both the Management Board of Cabinet and the Standing Committee of the legislature when each were considering amendments to the Act. While the same considerations should apply to information supplied under the WC Act, neither the Management Board nor the Committee directed their minds to that statute.

In cases involving workers' compensation legislation, courts have on occasion assumed that an assessment under such legislation is a tax: see Workmen's Compensation Board v. Canadian Pacific Railway (1919), 48 D.L.R. 218, [1920] A.C. 184 (P.C.), and New Brunswick (Workmen's Compensation Board) v. Bathurst Lumber Co., [1923] 4 D.L.R. 84 at p. 92, 50 N.B.R. 246 (C.A.). In one case the parties admitted it was a tax: Royal Bank v. Nova Scotia (Workmen's Compensation Board), [1936] S.C.R. 560, [1936] 4 D.L.R. 9. We were referred to no decision where a court has held that an assessment under workers' compensation legislation was a tax.

In Massey-Ferguson Industries Ltd. v. Saskatchewan, [1981] 2 S.C.R. 413 at p. 432, 127 D.L.R. (3d) 513 at p. 528, the Supreme Court of Canada was considering provincial legislation which provided for a levy on distributors of farm implements to provide a fund to compensate farmers for losses suffered due to delay in repairs of implements. The issue was whether the legislation was ultra vires the provincial legislature because it was indirect taxation. In giving the decision of the Supreme Court of Canada, Chief Justice Laskin said at p. 528:

> I am not persuaded that the assessments to create and maintain a compensation fund should be characterized as taxes within s. 92(2) of the British North America Act, 1867. The levies, as monetary exactions, are liquidating premiums to satisfy farmers' claims under s. 6D and the policy of the Act is to relate the assessments to the compensation awards and to administrative expenses. They are designed to support a limited form of insurance for the benefit of farmers who purchase agricultural implements, related to their use of such implements. There is here no collection of money to go into a consolidated revenue fund which is then chargeable with satisfying awards of compensation. Although the scheme is a public one, created under a public statute, its beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged.

That passage was relied on by the Commissioner in deciding there was no exemption under s. 17(2) of the Act in this case.

The legislation under consideration in Massey-Ferguson was similar but not identical to the WC Act. In the WC Act there is resort to the consolidated revenue fund in certain circumstances (s.100). Before making the remarks quoted above, Laskin C.J.C. had expressed the opinion that if the assessments were taxes they were no less direct taxes than the assessments which had been held to be direct in the C.P.R. case and the Royal Bank case. The passage relied on by the Commissioner may have been obiter but it was obiter of the Supreme Court of Canada.

In our view this court on judicial review should not intervene in the decision of the Commissioner based on the Massey-Ferguson decision.

There is no point in referring the matter back to the Commissioner to determine whether or not s. 23 (the public interest) should be applied. There was no evidence before him upon which he could so conclude.

The application is allowed and the decision is quashed. Only the intervenors, other than the Attorney General, asked for costs. There will be no costs.

McMURTRY C.J.O.C.
STEELE J.
SAUNDERS J.

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REASONS

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