Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1805

Appeal PA-990219-1

Ontario Hydro

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NATURE OF THE APPEAL:

Ontario Hydro (now Ontario Power Generation Inc.) (for simplicity, both referred to interchangeably as Hydro in this order) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the three most recent reports of the World Association of Nuclear Operators (WANO) respecting Hydro's nuclear electrical generating facilities (the facilities). After notifying and receiving submissions from WANO, Hydro decided to withhold the responsive records on the basis of the exemptions at sections 13 (advice to government), 17 (third party commercial information) and 18 (economic interests of an institution) of the Act. The requester (now the appellant) appealed Hydro's decision to this office.

Subsequently, WANO wrote to this office stating (among other things):

- WANO objects to the Commissioner's jurisdiction in this matter because the issue of the release of the Records is a matter that falls within the exclusive jurisdiction of the Parliament of Canada; and

- The jurisdiction of the Commissioner to determine this matter must be determined initially by the Commissioner.

Further to the above, WANO served a notice of constitutional question on the Attorneys General for Canada and Ontario under section 109(1) of the Courts of Justice Act, in which it questioned the constitutional application of the Act to the records. In this notice, WANO describes the records as "relating to the safety and reliability of [the facilities]" of Hydro, "which records are in the custody or control of [these] facilities." WANO seeks a determination from this office that the facilities are works within the exclusive jurisdiction of the Parliament of Canada and that the Act therefore has no application to the records.

In response to the notice of constitutional question, the Attorney General for Canada notified this office and WANO that it "will not be intervening in this proceeding at this time."

I then sent a Notice of Inquiry setting out the issues in the appeal, including the constitutional issue raised by WANO, to Hydro, WANO, the appellant, the Canadian Coalition for Nuclear Responsibility, Energy Probe, the Power Workers' Union, the Atomic Energy Control Board, the Attorney General for Canada, and the Attorney General for Ontario. I attached a copy of WANO's notice of constitutional question to the Notice of Inquiry. I received representations from Hydro, WANO and the appellant only. Hydro took no position on the constitutional issue. I then sent a copy of each of WANO's and the appellant's representations on the constitutional issue to the other party, seeking representations in reply. Both parties submitted additional representations on this issue.

In its representations, Hydro stated that it is no longer claiming the application of the exemptions at sections 13 and 17, and therefore is relying only on section 18 as a basis for withholding the records. Since section 17 is a mandatory exemption, if I find that the Act applies, I will consider its application, despite the fact that

Hydro is no longer relying on it. However, in that event, I will not consider the application of section 13 to the records, since that exemption is discretionary.

THE RECORDS:

There are three records at issue in this appeal, which are described as follows:

Record 1	"Trip Report: Probabilistic Risk Assessment (PRA) Assist to Ontario Hydro Nuclear" dated January 28, 1999, with cover letter to Hydro from WANO. WANO describes this report as "detailing the results of a technical support mission to assist [Hydro] with the development and application of risk technology at its nuclear facilities."
Records 2/3	Two Final Reports of "WANO-AC's 1998 Peer Review of Pickering Units 5-8" dated May and June 1998, with cover letters to Hydro from WANO dated February 10 and 26, 1999.

DISCUSSION:

DOES THE ACT APPLY TO THE RECORDS?

Summary of WANO's position

WANO takes the position that because the records are in the custody or under the control of the facilities, and because the facilities have been declared to be works for the general advantage of Canada, the records are subject to the exclusive jurisdiction of the Parliament of Canada. On this basis, WANO submits that the Act is "constitutionally inapplicable to the facilities because its application bears upon the vital part of federal jurisdiction over the [facilities], namely the production of nuclear power and the operational aspects of the [facilities]."

It is not in dispute that Hydro is designated as an institution in Regulation 460 under the Act, or that the facilities are operated by Hydro. The issue raised by WANO is whether the Act applies to the records to the extent that they relate to the facilities, and to the extent that they are in the custody or under the control of the facilities.

Jurisdiction to determine the applicability of the Act

None of the parties takes issue with my jurisdiction to determine the constitutional applicability of the Act. I will briefly address this issue in any event.

The jurisdiction of a tribunal to interpret and apply the Canadian Charter of Rights and Freedoms has been the subject of much judicial debate. However, it is well settled that a tribunal has the jurisdiction to determine whether or not its home statute applies in particular circumstances, based on constitutional division of powers principles. In Cooper v. Canada (Canadian Human Rights Commission) (1996), 140 D.L.R. (4th) 193 (S.C.C.), Lamer C.J., stated (at 205):

> The de facto equivalence between refusals to apply and declarations of invalidity decisively demonstrates that tribunals, when they refuse to apply their enabling legislation under s. 52 of the Constitution Act, 1982, are improperly exercising the role of the courts. As a result, the decisions of this Court which authorize tribunals to overstep their constitutional role, in my opinion, are in serious need of revision. Furthermore, although the case at bar concerns the implied power to decide Charter questions, I would even go so far as to say that tribunals cannot be expressly given the power to consider the constitutionality of their enabling legislation, for the same reasons.
>
> However, I must emphasize that this conclusion does not detract from the power of the Commission to determine whether complaints fall within federal jurisdiction according to the division of powers. As my colleague La Forest J. notes in his separate reasons, there is an important conceptual difference between the [Canadian Human Rights] Commission's interpreting its enabling legislation in light of the division of powers, and the Commission's questioning the validity of that legislation in light of the Charter. When it performs the former role, the Commission is merely determining whether it has jurisdiction over a matter, because the clear intent of Parliament was that the Commission should only operate within the confines of federal jurisdiction [emphasis added].

Based on Cooper, I find that I have the jurisdiction to determine the constitutional applicability of the Act in the circumstances of this appeal, based on division of powers principles.

Division of powers: general principles

In Canada the distribution of legislative power between the federal Parliament and the provincial legislatures is mainly set out in sections 91 and 92 of the Constitution Act, 1867. Section 91 lists the kinds of laws which are competent to the federal Parliament, and section 92 lists the kinds of laws which are competent to the provincial legislatures. Both sections give legislative authority in relation to "matters" coming within "classes of subjects" [P.W. Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1997) (looseleaf), p. 15-5].

There are two main steps in the process of deciding the constitutional applicability of a provincial statute based on the division of powers. The first step is to identify the "matter", or "pith and substance" of the statute. The second step is to assign the matter to one of the "classes of subjects" or "heads of legislative power" [Hogg, p. 15-6].

If the statute is determined to fall within a provincial head of legislative power under the Constitution Act, 1867, the general rule is that it is valid and applicable, even if it impacts on federal matters. The exception to this rule is where the provincial law affects a federal matter to what may be described as "an unacceptable degree" (see discussion below). This principle is often referred to as "interjurisdictional immunity". If an otherwise valid provincial statute is found to affect a federal matter to an unacceptable degree, it may be "read down", so that it is interpreted as not applying to the federal matter [Hogg, pp. 15-8, 15-10, 15-25].

Questions to be decided

Based on the above, there are three main questions to be decided in order to reach a conclusion on the constitutional issue raised by WANO:

(a) What is the "matter" or "pith and substance" of the Act?

(b) Under what "class of subjects" or "head of legislative power" does the matter fall?

(c) Does the Act affect the federal interest in the facilities to an unacceptable degree?

(i) Matter" or "pith and substance" of the Act

The purposes of the Act are set out in section 1, which reads:

> The purposes of this Act are,
>
> (1) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The term "institution" is defined in section 2(1) as follows:

> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

Thus, the Act is designed to provide a right of access to information held by Ontario government ministries, agencies and other bodies, and to protect the privacy of individuals in relation to personal information held by these organizations. This, in my view, is the "matter" or "pith and substance" of the Act.

(ii) "Class of subject" or "head of legislative power" of the Act

Section 92(13) of the Constitution Act, 1867 reads:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,
>
> . . . . .
>
> 13. Property and Civil Rights in the Province.

The Act regulates public access to information in the custody or under the control of Hydro (Part II), as well as collection, use, disclosure and retention of, and access to, personal information (Part III). It is concerned with "basic social values", that is, rights of access to government information and rights of privacy in the context of the Ontario government and its ministries and agencies [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 at 780 (Div. Ct.)]. The Supreme Court of Canada has described the purpose of access to information legislation generally as follows:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry . . . Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable . . . [Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 at 403 per La Forest J. (dissenting on other grounds)].

In my view, this places the Act within the section 92(13) head of power, that is "Property and Civil Rights in the Province." As a result, I conclude that the Act is valid provincial legislation. Therefore, the Act applies to the records in this appeal, unless I find that it affects the federal interest in the facilities to an unacceptable degree.

(iii) Does the Act affect the federal interest in the facilities to an unacceptable degree?

The federal matter: Parliament's declaration regarding atomic energy

Jurisdiction over facilities for the generation and production of electrical energy generally lies with the provinces, based on section 92A(1)(c) of the Constitution Act, 1867. However, section 92(10)(c) of the Constitution Act, 1867 authorizes Parliament to declare local works and undertakings to be for the general advantage of Canada. Parliament has made such a declaration in relation to atomic energy. Section 18 of the federal Atomic Energy Control Act (AECA) reads:

> All works and undertakings constructed
>
> (a) for the production, use and application of atomic energy,
>
> (b) for research or investigation with respect to atomic energy, and
>
> (c) for the production, refining or treatment of prescribed substances, are, and each of them is declared to be, works or a work for the general advantage of Canada.

In Ontario Hydro v. Ontario (Labour Relations Board) (1993), 107 D.L.R. (4th) 457, the Supreme Court of Canada described the nature and extent of Parliament's interest in the facilities, based on the AECA declaration:

> . . . A work subject to a declaration thus falls within the exclusive legislative power of Parliament, and provincial jurisdiction over the work is ousted . . . Laws of general application in the province (such as taxation) will, of course, apply to the work, but these cannot touch an integral part of Parliament's jurisdiction over the work. The province cannot legislate respecting the work qua work . . . [this would include] the power not only to construct, repair and alter such a work but its management as well . . .
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> . . . . .
>
> . . . [T]he legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management . . . [at 478, 481 per La Forest J., L'Heureux-Dubé and Gonthier JJ. concurring] [emphasis in original].

Thus, La Forest J., with three judges concurring in the result, characterized the federal interest in the facilities as extending broadly to their "operation and management". This contrasts with the arguably narrower characterization of the federal interest articulated by the minority of the court (Iacobucci J., Sopinka and Cory JJ. concurring), as follows:

> . . . [T]he uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns [at 517].

For the purposes of this analysis, I am bound to adopt the majority view of the protected sphere of exclusively federal jurisdiction as comprising the operation and management of the facilities.

To what extent can provincial legislation affect a federal matter?

The courts have developed principles to assist in determining when a provincial statute impinges on a federal matter within the exclusive jurisdiction of Parliament. In Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail) (1988), 51 D.L.R. (4th) 161, Beetz J., writing for the Supreme Court of Canada in holding that Quebec's Occupational Health and Safety Act was inapplicable to Bell Canada's federal undertaking, articulated what is known as the "vital part" test:

> . . . [W]orks, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property; provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction...
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> . . . . .
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> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it [at 169, 244].

In Bell Canada, and in the more recent Ontario Hydro, the court held that where a federal undertaking is concerned, jurisdiction over labour relations will fall to the federal government, on the basis that labour relations are a vital and integral part of the management of an undertaking. Speaking for the majority in Ontario Hydro, La Forest J. stated (at 478):

> A declaration incorporates a work as a functioning unit . . ._For my part, I am at a loss to see how one can have exclusive power to operate and manage a work without having exclusive power to regulate the labour relations between management and the employees engaged in that enterprise.__That is what this Court has repeatedly stated; see . . . Bell Canada . . .

In Ontario v. Canadian Pacific Ltd. (1993), 13 O.R. (3d) 389 at 396-397 (C.A.), affirmed [1995] 2 S.C.R. 1028 (without written reasons), the court explained its view of the effect of Bell Canada:

> In his reasons for judgment Beetz J. . . . found that on its face the Act principally dealt with working conditions, labour relations and management of undertakings. Because those matters are an essential part of the very management and operation of the undertakings which are governed by the provisions of the Act, he concluded that the Act aimed at, and regulated, "the management and operations of the undertakings" over which the legislature had jurisdiction. Because control and management of its operations were integral and essential to the federal undertaking, Beetz J. held that Parliament's exclusive jurisdiction over Bell excluded the application to Bell of a provincial statute which governed labour relations and working conditions. . .
>
> What I take from Bell Canada is that a provincial statute which as a whole bears essentially upon the management and control of an undertaking does not and cannot apply to a federal undertaking . . .
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> . . . [T]he rule of Canadian constitutional law is that undertakings within the exclusive jurisdiction of Parliament usually are subject to provincial statutes of general application. The only exception to that rule which could be applicable in this case is the exception which applies when the provincial statute taken as a whole bears essentially upon the management and control of the undertakings to which the provisions of the statute are directed.
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> . . . . .
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> The inquiry does not end with determining only the purpose of the legislation. It must go further. If, in order to accomplish its purpose, the principal effect of the legislation is the regulation and management of an undertaking then the legislation itself is inapplicable to a federal undertaking. On the other hand, merely because some provisions of a provincial statute could be seen as regulating the management or operation of undertakings and therefore inapplicable to a federal undertaking, the legislation as a whole would not be inapplicable to the federal undertaking if, taken as a whole, it is aimed at a subject within the provincial sphere of legislative competence.

In Canadian Pacific, the court was asked to decide whether or not a federal undertaking, an interprovincial railway, was bound by the Ontario Environmental Protection Act (EPA). In particular, the company operating the railway, under the section 223 of the federal Railway Act, was required to keep its right-of-way free from "dead or dry grass, weeds and other unnecessary combustible matter." In order to meet its Railway Act obligation, the company conducted a controlled burning of dry grass on its railway in the town of Kenora. Some smoke escaped into residential areas, causing a nuisance to the residents, and the company was charged with discharging a contaminant into the natural environment under section 13(1)(a) of the EPA. The court held that the EPA validly applied to the company, for the following reasons (at 394, 397-398):

> . . . Because controlled burning is not essential to right-of-way maintenance, s. 13(1)(a) itself cannot be said to be directed at the management of the railway, nor can it be said to

> impinge upon an integral part of its operation. It cannot prevent the [company] from carrying out its statutory mandate . . .
>
> . . . . .
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> The purpose of the EPA is set out in s. 2. It is to provide for the protection of the natural environment of Ontario. As noted above, the legislation is intra vires the province. If the EPA, read as a whole, seeks to carry out that purpose by regulating the management and control of undertakings within the province then, pursuant to Bell Canada, it would not apply to the [company].
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> . . . . .
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> Notwithstanding the fact that it contains some provisions which may purport to regulate management of undertakings, a reading of the EPA as a whole demonstrates to me that it is not about management of undertakings. The EPA is a complex, many-faceted attempt to protect the environment of Ontario in a great number of ways and from many points of view. It applies not only to persons managing works or undertakings, but also applies to individuals engaged in the widest spectrum of human activity. It provides for investigation, research, studies, education, dissemination of information, and training in matters relating to the environment and its protection in the broadest sense. It deals specifically with a broad range of matters including motors, vehicles, water, ice shelters, waste and its management, sewage systems, litter, and spills of pollutants . . .
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> Because the EPA, when read as a whole, is not aimed at management, in my view, the decision of the Supreme Court of Canada in Bell Canada does not make it inapplicable to the [company] . . . [emphasis added]

A more recent judgment of Ontario's Divisional Court in Canadian Pacific Railway Co. v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2000] O.J. No. 500 considered the applicability of employers' injured worker re-employment obligations under section 54 of the Workers' Compensation Act to a federal railway undertaking. Swinton J., writing for the court, began by examining the Bell Canada and Canadian Pacific (1993) cases, in light of the principle articulated by Beetz J. that the provincial law does not apply if it deals with the "basic, minimum and unassailable content" of a federal head of power. While provincial laws frequently circumscribe a particular exercise of decision making powers by managers of a federal undertaking, "it is only when the provincial law intrudes on the vital and essential operations of the federal undertaking that it is inapplicable" (pp. 4-6).

Swinton J. (at pp. 4-5) contrasted the compensatory nature of workers' compensation legislation with the more intrusive nature of the occupational health and safety legislation at issue in Bell Canada:

> Beetz J. noted that provincial workers' compensation laws which incorporate a compensatory scheme have been held applicable to federal undertakings. However, Quebec's Act respecting occupational health and safety . . . in issue in that case, contained detailed preventive measures, including rights to protective re-assignment for workers, the

right to refuse unsafe work, joint health and safety committees, and enforcement mechanisms. He characterized the Act in this way:

> . . . in entering the field of prevention of accidents in the workplace, as the legislator has the power to do, and in using, as probably could not be avoided in prevention matters, means such as the right of refusal, protective re-assignment, detailed regulations, inspection and remedial orders to 'establishments' within the Act, . . . the legislator could not fail to enter directly and massively into the field of working conditions and labour relations on the one hand and, on the other - though these are two elements of the same reality - into the field of management and operation of undertakings. In so doing, the legislator precluded itself from aiming at and regulating federal undertakings by the Act. (at 798)

Canadian Pacific argued that section 54 of the Workers' Compensation Act interfered with its ability to manage its operations in a like manner, by removing its ability to make the ultimate determination of whether an employee could safely return to work and giving this authority to the Workers' Compensation Board. In support of this argument, Canadian Pacific referred the court to the importance of safety considerations in its operations, including its obligations to comply with a range of safety rules.

The court rejected this position. Swinton J. noted that in order to trigger the right to return to work under section 54, the worker must be capable of performing suitable work safely. In the case under review, there was no evidence on the record to suggest that there was any interference with the company's ability to operate safely and efficiently as a result of the operation of the impugned provision of the statute. As a result, section 54 was found to be an integral part of the workers' compensation scheme that did not interfere with the vital and essential parts of the operation of the federal undertaking.

Several principles emerge from these authorities. Provincial legislation of general application may apply to federal undertakings, provided they do not affect a "vital and integral" or "vital and essential" part of the undertaking, including its operation and management. Where provincial legislation is not aimed as a whole at the management of an undertaking, but can be seen as merely regulating or circumscribing some aspect of the enterprise or a particular exercise of management decision making, it is not inapplicable for that reason alone. To be inapplicable, the effect of the provincial statute on the federal undertaking must relate to the "basic, minimum and unassailable content" of the federal head of power; in other words, it must relate to the "vital and essential" management and operation of the undertaking.

Working conditions, labour relations and occupational health and safety rules are examples of areas considered integral to the management and operation of federal undertakings, such that a provincial statute which bears essentially on these areas can have no application. These spheres of activity are, by their very nature, vital and essential aspects of the management and operation of the enterprise. Provincial laws purporting to regulate these areas cannot apply because they enter directly and massively into the basic content of federal jurisdiction in both their purpose and their effect.

Workers' compensation and environmental protection laws, on the other hand, are in a different category. Both in purpose and effect, statutes of this nature may be said to have some limited impact on the management of an undertaking, in that they regulate or circumscribe certain kinds of decision making within the enterprise and/or prescribe consequences in relation to certain kinds of activities. However, neither type of law is directed at or affects vital aspects of the management of a federal undertaking. Workers' compensation statutes are designed to create new legal rights in lieu of civil causes of action and provide ancillary remedies integral to the compensatory schemes. Environmental protection laws are designed to protect the environment in a variety of ways across a wide spectrum of human activities. In neither case is the core content of exclusive federal jurisdiction impinged in any vital or essential respect.

To the extent that the safe management of the operation is a core component of a federal undertaking, provincial legislation of general application, which touches on a safety issue in a particular case, but which is neither aimed at controlling nor itself affects the safe management of the operation, is valid and applicable to the federal undertaking.

Does the Act affect a "vital" and "integral" or "essential" part of the operation and management of the facilities?

WANO submits:

> The purpose of the Records and the WANO programmes under which they are completed is to increase the margin of safety and decrease the risks of a nuclear accident by promoting the highest levels of safety and reliability in the operation of nuclear facilities in Ontario and throughout the world.
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> . . . . .
>
> [Hydro] requests WANO's peer review and technical support services on an ongoing basis. The records at issue in this appeal and other WANO documents are used by [Hydro] nuclear personnel to improve operations of the Facilities and to implement [Hydro's] commitment to WANO's mission. The Records play a vital role in the day-to-day management and operation of the Facilities and fall squarely within the "vital part" of federal jurisdiction articulated by Justice LaForest in Ontario Hydro.
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> The Records also fall within the narrower conception of the federal interest articulated by Iacobucci J. and by Lamer C.J. in Ontario Hydro. The Records are precisely directed to "the fact of nuclear production, with all its attendant safety, health and security concerns". The production of nuclear power and means for maximizing safety and reliability of that production is what WANO is all about.
>
> [Hydro] operates nuclear electrical generating Facilities and has chosen to be a member of WANO. [Hydro's] membership in WANO does not bear upon [Hydro's] non-nuclear business nor does it bear upon [Hydro's] production of electrical energy by other means.

> WANO's services and the reports created by WANO relate only to nuclear power and are distributed by WANO only to nuclear personnel with the [Hydro] organization. The Records are not within the custody or control of [Hydro] generally but rather are within the custody or control of the Facilities and those nuclear personnel charged with supervisory responsibility for the production of nuclear power.
>
> As a result, the Records engage a vital part of the federal interest in nuclear energy and, as such, are beyond the reach of provincial legislation that bears upon the federal interest.
>
> . . . . .
>
> The [Act] is constitutionally incapable of applying to the Facilities because that application (i.e. the decision whether or not to order public disclosure of documents in the custody and control of the Facilities which pertain directly to the fact of nuclear production and the operation of the Facilities) bears upon the Facilities in what makes them specifically of federal jurisdiction. The case for excluding the application of the [Act] on this appeal is even stronger than the case for reading down the provincial statute in Ontario Hydro . . .
>
> The application of the [Act] does more than "incidentally affect" the Facilities because that application directly bears upon [Hydro's] ability to maintain the confidentiality of the Records. An order disclosing the Records to the public can only be made by an actor exercising the exclusive federal jurisdiction over the Facilities . . .

I am not persuaded by WANO's submissions. In my view, freedom of information laws fall into a category of legislation akin to workers' compensation and environmental protection statutes. While the Act contains some provisions which arguably could be said to regulate management of government institutions, the Act as a whole is not about the management of institutions. Like the EPA, it is a complex and multi-faceted scheme to ensure the public's right of access to information and the protection of individual privacy. The Act deals with all recorded information of whatever sort within the custody or under the control of government institutions in the province and sets up a delicately balanced regime of rights and obligations in relation to those information holdings. As the Divisional Court stated in describing the Act and the Commissioner's role in John Doe (at 781-783):

> The commissioner is also given administrative and adjudicative responsibility for access to government information on the one hand, and the protection of individual privacy on the other. Under the scheme of the Act, the commissioner is responsible for five overlapping and integrated activities: reviewing government decisions concerning the dissemination of information; investigating public complaints with respect to government practices in relation to the use and disclosure of personal information; reviewing government administrative and records management practices; conducting research and giving advice on issues related to access and privacy; and educating the public concerning privacy and access issues.
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> The operation of this comprehensive statutory scheme has been documented in annual reports provided by the commissioner to the Legislative Assembly pursuant to s. 58 . . .

> The report reflects requests for information in the hands of over 180 ministries, boards, commissions, and agencies. The diversity of the commission's responsibilities in relation to the release of government documents is reflected in the various bodies whose information practices it supervises including: the Assessment Review Board, Criminal Injuries Compensation Board, Ontario Municipal Board, Office of the Public Complaints Commissioner, Public Trustee, Ontario Human Rights Commission, the Ontario Council on University Affairs, Child and Family Service Review Board, Liquor Licence Board, Ontario Film Review Board, Ontario Parole Board, Ontario Science Centre and the Royal Ontario Museum.
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> . . . The wide range of the commissioner's mandate is beyond areas typically associated with the court's specialized expertise . . . The statute calls for a delicate balance between the need to provide access to information and the right to protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.

As noted earlier, the overarching purpose of the legislation is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. "Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable..." (Dagg per La Forest J. at 403). In other words, access to information laws, by their very nature, are designed not to impinge on the management or operations of government institutions or "undertakings", but to make them "effective, responsible and accountable." Specifically, access to information laws do not purport to affect how an institution or undertaking is operated or managed, but are designed to ensure that, however the institution's goals are accomplished, there is an appropriate degree of responsibility and accountability within the statutory limits of the access to information regime. While it is true that a decision concerning the disclosure or non-disclosure of the records of an undertaking may be made by the management of the undertaking, this does not make the fact of disclosure or non-disclosure a vital or essential part of the undertaking in its management or operation.

WANO argues that because the records relate to safety of the facilities, and "play a vital role in the day-to-day management and operation of" the facilities, they "fall squarely within the 'vital part' of federal jurisdiction articulated by Justice La Forest in Ontario Hydro." I accept that the records relate to the safety of the facilities. However, this is not determinative of the constitutional issue. The question is whether or not the regulation of the dissemination of the records is essential to the management and control of the facilities in production of nuclear power. Although it is clear that the topic of the records is safety, the question of whether or not they are disclosed to the public is not essential to nuclear production generally, or to safety, health or security concerns specifically. The Act does not purport to control how Hydro operates the facilities, or how it manages safety, health or security concerns in their operation.

The effect of the Act on the facilities stands in stark contrast with the effect of labour relations on those works, as found in Ontario Hydro. In that case, La Forest J. stated that he was "at a loss to see how one can have exclusive power to operate and manage a work without having exclusive power to regulate labour relations between management and the employees engaged in that enterprise" [at 478]. Lamer C.J., who agreed with La Forest J. on this point, stated that past cases of the Supreme Court of Canada (including Bell Canada) "emphasize the intimate link between the power to regulate an industrial activity, which authority usually extends to making laws respecting labour relations" [at 467]. Later, he states:

> . . . The jurisdiction to regulate a work and its related integrated activity prima facie includes jurisdiction to make laws respecting its labour relations. Here, the employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities clearly fall within Parliament's jurisdiction over labour relations. Their "normal or habitual activities" are intimately related to the federal interest in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interest in health, safety and security, matters completely within the daily control of those operating nuclear facilities . . .(at 469)

In my view, it cannot be said that there is an "intimate link" between the power to regulate the production of nuclear power, and the power to make laws respecting the dissemination of records. Determining the disclosure or non-disclosure of records does not directly effect how the facilities are managed. Regulating the dissemination of records of the facilities is not comparable in its effect to regulating the activities of those individuals who directly control the health, safety and security of the facilities.

Based on the above, I find that the Act does not affect a "vital and integral" or "vital and essential" part of the operation and management of the facilities. Therefore, I do not accept WANO's argument that the Act is constitutionally inapplicable to the records for this reason.

WANO has not referred me to any federal statutes which might be in actual operational conflict with the provisions of the Act governing access to records of this nature. Consequently, I do not intend to consider any issues based on a possible federal constitutional paramountcy argument.

THIRD PARTY INFORMATION

Introduction

Because Hydro has withdrawn its section 17(1) claim, WANO bears the onus of establishing the requirements of this exemption.

Section 17(1) of the Act reads, in part:

> 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, each part of 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 institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur [Orders 36, P-373].

Part One: Type of information

WANO submits that the information in the records qualifies as "technical information". The appellant concedes that the records "may . . . contain . . . technical information."

Previous orders of this office have defined "technical information" in section 17(1) as follows:

> . . . The Concise Oxford Dictionary (8th ed.) defines "technical", in part, as follows:
>
> > of or involving or concerned with the mechanical arts and applied sciences.

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally,

technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act (see, for example, Order P-454).

Having considered the representations of the parties, and having reviewed the records, I am satisfied that certain portions of the records contain "technical" information relating to the nuclear facilities. However, much of the information in the records does not fit within these categories. For example most, if not all, of the information in Records 2 and 3 under the headings "Purpose and Scope" and "Organization and Administration" does not qualify as "technical" information. Therefore, part one of the three-part test has been met only with respect to certain portions of the records. For the reasons set out below, dealing with parts 2 and 3 of the test for exemption under section 17(1), it is not necessary for me to specify precisely which portions of the records contain information which satisfies part 1 of the test, and which do not.

Part Two: Supplied in confidence

Supplied

WANO submits:

> Previous Commissioner's Orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the affected party.
>
> The Commissioner has found that for information to have been "supplied" it must be the same information as that originally provided by the affected party. The Commissioner has held that the content of contracts negotiated between a third party and an institution generally will not qualify as having been "supplied" by the third party. (Orders P-36, P-251 and P-1105).
>
> Most of the information contained in the Peer Reports is the same information originally provided by WANO to [Hydro].
>
> The findings of the peer review team are communicated to [Hydro] at the exit interviews and in the interim report. This information is then repeated in the Peer Reports.
>
> The Peer Reports do contain [Hydro's] responses detailing the corrective action it will take to address the areas for improvement identified by the peer review team.
>
> WANO expects [Hydro] will take corrective action in response to the issues identified by the peer review team. In some circumstances there may be a dialogue between WANO and [Hydro] as to the appropriateness of the Facility's proposed response.

> However, the corrective action proposed by [Hydro] is not arrived at through negotiations between [Hydro] and WANO but rather is [Hydro's] direct response to the specific information communicated to it by WANO. The Peer Reports document [Hydro's] response. The response it not in any sense a negotiated agreement between WANO and [Hydro].
>
> The disclosure of [Hydro's] intended corrective action would reveal information supplied by WANO. Such disclosure would permit the drawing of accurate inferences with respect to the information actually supplied by WANO.
>
> [Hydro's] responses are inextricably linked to the issues and problems identified by WANO. Disclosure of [Hydro's] responses would reveal the issues and problems themselves. In these circumstances, the Commissioner has found that information contained in records would reveal information "supplied" by an affected party, within the meaning of section 17(1) of the [Act] (Orders P-203, P-218).
>
> . . . . .
>
> All of the information contained in the Trip Report is information provided by WANO to [Hydro] to assist [Hydro] in the application of PRA methodology.

To summarize, the information in the records was created in the following manner: (i) WANO gathered information from Hydro through interviews with Hydro staff, observations of the facilities and reviews of Hydro documents; (ii) WANO reviewed and analysed this information, identified issues and problems, and developed insights into the causes of those problems; (iii) WANO, by way of the records, reported the results of its analysis to Hydro, including its findings and recommendations; and (iv) Hydro provided information which was added to the records in the form of its response to the issues and problems identified by WANO.

In order to understand the significance of the Hydro/WANO arrangement for the application of the section 17(1), it is useful to understand the purpose of the exemption and the mischief it is intended to address within the context of access to information legislation. Section 17 of the Act is designed to protect the "informational assets" of businesses or other organizations which provide information to government institutions. This exemption does not protect "informational assets" of government institutions. Information of that nature is covered by section 18, which I will consider later in this order when dealing with Hydro's submissions. As stated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> In the course of discharging their responsibilities to the public, governmental institutions collect substantial amounts of information about the activities of business firms. Some of this information, such as trade secrets, constitutes a valuable asset, and disclosure would impair a firm's ability to compete effectively in the marketplace.
>
> . . . . .

> . . . disclosure should not extend to what might be referred to as the informational assets of a business firm -- its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm . . .
>
> . . . [W]e believe that the exemption should refer broadly to commercial information submitted by a business to the government . . .
>
> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

As I found above, some of this information qualifies as technical information. However, the originating source of the technical information in the records is Hydro: specifically, Hydro's staff, documents and the nuclear facilities themselves. While WANO, in one sense, may be said to have supplied information relating to "issues and problems" identified by WANO in the course of its reviews, to the extent that this information constitutes technical information, it is derived from, and relates to, Hydro's nuclear facilities, and not the operations or undertaking of WANO or any other party.

None of the information contained in the report, including the identification of issues and problems, can properly be characterized as the informational assets of WANO. While WANO may bring some measure of independence and expertise to the peer review process, the exercise is essentially no different than that performed in the past by a combination of Hydro personnel and outside industry experts. The fact that Hydro engages a contractor or other external agency to perform what is essentially the same function performed in the past by a blend of inside and outside experts cannot convert information derived from Hydro through that exercise into information supplied by a third party within the meaning of section 17(1). If that were the case, then whenever a government institution wished to avoid its obligations under the Act to disclose reports on technical aspects of its internal operations, it could engage an outside contractor to perform the internal review and, as part of such an arrangement, agree that any report generated would be "supplied" to the institution in confidence. This would amount to a colourable attempt to avoid the strictures of the exemptions and defeat the letter and spirit of the right of access under Act. While there is no indication that this was the intended purpose of the WANO/Hydro peer review process, I find that it generally falls within this category of arrangement.

Accordingly, I am unable to find that any of the information contained in the report can be considered to have been supplied to Hydro by WANO within the meaning of section 17(1). That being the case, any consideration of the confidentiality of the arrangements between WANO and Hydro becomes unnecessary.

Part Three: Reasonable expectation of harm

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

In order to discharge the burden of proof under part three 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 section 17(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, I stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated

> "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, WANO must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b) and (c) of section 17(1).

With reference to the harm alleged at section 17(1)(a), WANO submits:

> Disclosure of the Peer Review Reports will interfere with WANO's ability to schedule and conduct peer reviews at nuclear plants worldwide.
>
> As stated, participation in WANO's peer review programme is entirely voluntary. WANO only conducts peer reviews at the request of individual nuclear plants. The scheduling of peer reviews and the intervals between peer reviews is subject to negotiation.
>
> WANO peer reviews are not designed to be one time exercises. Public disclosure will make the scheduling of peer review reports more difficult. As a result, fewer peer reviews will be conducted and the margin of safety of nuclear plants worldwide will be reduced.

In support of this position, WANO relies primarily upon its assertion that the effectiveness of its role in improving the safety of nuclear facilities worldwide is dependent upon the confidence of peer review participants, including the facilities and their employees alike, in the confidentiality of the communications in the peer review process. WANO states:

> If the Reports are disclosed to the public then the quality of WANO's interaction with the facilities will inevitably deteriorate and less information will flow to the peer review teams. The Facilities will be less willing to request peer reviews for two reasons: (1) the Reports will be less useful to Facilities in identifying the root causes of problems that threaten the safety of their operations and (2) a desire to avoid the publicity attendant on the release of Reports that primarily highlight areas for improvement and offer an incomplete picture of the Facility's entire operation.

WANO refers to the confidentiality expectations described in its Peer Review Guidelines and to the experience of its United States member, the Institute of Nuclear Power Operations (INPO) in conducting peer reviews in the past. WANO submits that when INPO peer review reports were made public in the

past, they provided an overall description of the plants' operations, whether positive or negative, and that this "masked" the real issues confronting a particular plant. Consequently, INPO adopted a format for peer reviews that focussed only on areas that could be improved based on INPO performance standards and objectives. This is also the format adopted by WANO. WANO argues that "a combination of less candour in the review process and increased publicity focussing on areas for improvement, measured against WANO's standards of excellence would make it difficult for the Facility to continue participation in the peer review programme" and ultimately diminish "the safe operation of nuclear facilities throughout the world."

WANO submits that these consequences are not limited to Ontario, and states that disclosure "will interfere with [its] ability to schedule and conduct peer reviews at nuclear facilities throughout the world" [WANO's emphasis]. WANO has provided copies of letters from the directors of its regional centres in Tokyo and Moscow referring specifically to this request for Hydro's peer review reports, both of which express concerns that release of these reports would set a precedent resulting in some nuclear power stations in their regions "not volunteering for" or "not scheduling" initial or subsequent peer reviews.

Essentially the same reasons are cited in support of WANO's claim that section 17(1)(b) applies. WANO submits that the reluctance of members to participate in peer review programs will result in lost opportunities to share operating experiences and, consequently, lost opportunities to enhance safety and reliability. To the extent that WANO's effectiveness is diminished, WANO argues, members will withdraw financial support by refusing to participate in fee for service peer reviews and other technical support services and this will detrimentally affect WANO's ability to provide these services and to maximize safety and reliability of nuclear operations worldwide.

Finally, in support of its claim that section 17(1)(c) applies, WANO submits that disclosure of the reports will result in similar information (i.e., the reports themselves) no longer being supplied to Hydro, as this will have a chilling effect on WANO's ability to obtain necessary and detailed information from the facilities and their employees. WANO refers to the fact that its Director has written to Hydro's president advising that, until the issue of disclosure of the records in this appeal is resolved, it will be retaining all copies of its reports on the Bruce Nuclear 5-8 peer reviews and all future reports at its Atlanta center, where Hydro staff might attend to view their contents. WANO says that the Commissioner should not take into account the fact that the Act no longer applies to future reports outside the scope of this request, suggesting that this would represent an unprincipled basis for any decision by the Commissioner to order this material disclosed.

WANO's submissions on harm under section 17(1) are highly speculative. In my view, the harms described in paragraphs (a), (b) and (c) do not logically flow from the scenarios described, and there is no substantial evidence in support of WANO's position.

First, I do not accept, either on faith or as a matter of logic, that the prospect of public disclosure of peer review reports would tend to result in nuclear facilities or their employees becoming less candid in the information and assistance provided to WANO in conducting its peer reviews. On the contrary, it is equally, if not more plausible that the prospect of subsequent public scrutiny would provide a substantial

incentive for both the facilities and their employees to be open, honest and forthright in facilitating the peer review process, lest their non-cooperation, reticence or laxity in identifying issues and problems be exposed to the light of day. An accountable review process is likely to lead to the early identification and correction of problems and the avoidance of a public catastrophe, and thus produce greater confidence in a system designed to ensure public health and safety. Where issues of such great importance to the general populace are involved, as in the area of the safe operation of a nuclear facility, public scrutiny of safety reviews is more likely to enhance responsibility and accountability, and improve the workings of a system fraught with legitimate public safety concerns.

I note that this is not a case involving a regulatory inspection to determine whether a particular facility is meeting the minimum operating standards established by the Atomic Energy Control Board, upon which its continuing licence to operate depends. Rather, it is a process designed to measure the performance of a facility against standards of excellence established by WANO and its membership. I am unable to accept that employees and management of Hydro's nuclear facilities would have an incentive to be less forthcoming in the latter case, where there are no regulatory consequences of failing to meet the highest standards, than in the former case where there are such consequences, merely because of the prospect of public scrutiny of the resulting reports. To assume that those charged with the responsibility for ensuring that WANO's standards are achieved or improved upon would be less forthcoming is to take a cynical view of the management and employees of these facilities which is simply not supported by the material before me. In short, I am not satisfied that the objectives of the peer review process should logically stand to be frustrated by the prospect of public scrutiny.

Second, WANO asks me to accept that nuclear facilities, including Hydro, would withdraw from the peer review process if the reports were made public. The material WANO has provided suggests that its peer reviews are superior to internal reviews because they facilitate the sharing of experience and expertise among facilities throughout the world and provide an independent and objective viewpoint not available through the internal review process. It does not stand to reason that either a facility subject to a particular peer review, or other facilities in general, would be inclined to withdraw from the WANO peer review process, and lose the benefits which the WANO reviews purport to offer, simply because a report concerning the subject facility may be publicly disclosed. In my view, the facilities' interests in securing the benefits of WANO's expert and independent peer reviews would outweigh the speculative nature of WANO's perceived concerns that the reports will, by reason of the prospect of public scrutiny alone, become less reliable.

I note that WANO's local directors in Paris, Tokyo and Moscow have expressed concern about the prospect of members in those centres refusing to participate in WANO peer reviews should Hydro's reports be disclosed. I cannot accept this as persuasive evidence. First, the disclosure of records in other jurisdictions would presumably be governed by the laws of those jurisdictions, and not by the outcome of this appeal in Ontario. In any event, the laws of those other jurisdictions are not before me. Second, it is not otherwise explained how disclosure in Ontario would affect the willingness of facilities to participate in peer reviews in those other jurisdictions, nor is it apparent how an outcome in Ontario would drive an outcome in another jurisdiction. Third, the only evidence before me of any experience with the disclosure of

peer review reports does not bear out this or any other of WANO's concerns. Instead, the evidence suggests that the peer review process would be largely unaffected.

Internal peer review reports conducted by Hydro for the years 1992, 1994 and 1995 were the subject of an access request and, on appeal to this office, the reports were ordered disclosed pursuant to Order P-1190, which was upheld by the Divisional Court in 1996. Leave to appeal from the Divisional Court's decision was refused by the Court of Appeal for Ontario [Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)]. Notwithstanding these disclosures and the obvious prospect that future reports might similarly be disclosed pursuant to an access request, Hydro considered these sufficiently useful to engage in further peer reviews conducted by WANO with similar objectives and procedures. As I will discuss in relation to Hydro's submissions below, there is no evidence before me to indicate that the peer review process was compromised as a result of disclosure, whether by virtue of a chilling effect on employees, a reluctance of the facility to participate in the process, diminution in the safety of any facility, or otherwise. WANO's representations fall far short of establishing a reasonable expectation of probable harm as described in paragraphs (a), (b) or (c) of section 17(1).

As a result, I find that part three of the three-part test has not been met. In view of this finding and my finding that part two of the test has not been established, section 17(1) cannot apply.

ECONOMIC INTERESTS OF ONTARIO

Introduction

Hydro claims that the records are exempt under sections 18(1)(a), (c) and (d) of the Act. Those sections read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(a): Information that belongs to an institution and has monetary value

In order for a record to qualify for exemption under section 18(1)(a) of the Act, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

As I noted in my discussion of section 17(1), I am satisfied that some of the information in the records constitutes "technical" information.

In Order M-654, former Adjudicator Holly Big Canoe stated with respect to part 3 of the test for exemption under the municipal counterpart to section 18(1)(a):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . . [emphasis in original].

In my Order PO-1763, I stated the following with respect to the phrase "belongs to" in section 18(1)(a) of the Act:

> The Assistant Commissioner [in Orders P-1114 and P-1281] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the

> courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, Lac Minerals Ltd. v. Int. Corona Resources Ltd. (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].

The Williams Commission Report described how the purpose of the valuable government information exemption is to protect the informational assets of government institutions to the same extent that similar information of non-governmental interests would be protected by the third party exemption for trade secrets and other commercial information:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions . . . on a charge back basis. . . . In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

Hydro submits:

> The information contained in the records is "technical information" as defined in Order P-463, as it involves information prepared by engineers and other experts in the field of operation of nuclear power generation plants. The records describe the operation, management and maintenance of nuclear power generation facilities.
>
> The records are in the custody and control of [Hydro].
>
> As described above . . . a confidential peer review process is essential to the reliability and safety of nuclear facilities. Improved reliability and safety of nuclear facilities increases the productivity of nuclear generation, and precludes the need to burn more expensive fossil fuel, thereby reducing the kilowatt per hour costs of producing power. Therefore, the information in the Bruce and Pickering Peer Review reports has monetary value to [Hydro].

The appellant submits:

> . . . While the documents may contain scientific or technical information, I do not believe that they would meet the remaining criteria of the exemption; these documents do not

> [contain] trade secrets or any other type of information in which Hydro has a proprietary interest and which has monetary value or potential monetary value.
>
> I have been asked to comment on the applicability of the analysis in Order P-270 ... to the documents in this Appeal. In Order P-270, the Commissioner found that subsection 18(1)(a) applied to certain agendas and minutes of meetings of the Senior Ontario Hydro/AECL Technical Information Committee relating [to] a Hydro research project. In the circumstances of that appeal, the Commissioner was satisfied that the record contained scientific and commercial information with monetary value which Hydro intended to sell and that disclosure of the information would imperil Hydro's ability to sell the information, thus resulting in undue financial loss to Hydro.
>
> The records in this Appeal are entirely different. Hydro and WANO are not engaged in a joint venture with the aim of developing any new technology for profit. As WANO itself notes, it is a non-profit organization whose mission is to maximize safety and reliability of nuclear power plant operation. In my submission, the reports of WANO would not contain any information which has monetary or potential monetary value.

Hydro has not established that any of the information contained in the records "belongs to" it in the sense described above. Hydro's representations in this respect are vague, without any reference to particular passages in the records which might contain information which it claims to own. Consequently, I am not persuaded that Hydro has any proprietary interest in the records in the traditional intellectual property sense. Further, I am not persuaded that the information is in the nature of a trade secret that the courts would protect from misappropriation as confidential business information deriving its value from not being generally known [see Lac Minerals Ltd. v. Int. Corona Resources Ltd., above].

Even if I were to accept that some of the information contained in the reports may ultimately manifest itself in the safer operation of Hydro's nuclear facilities, with resultant productivity gains and/or cost savings in electrical energy production, this is insufficient to establish intrinsic or marketable value in the information itself in the sense described in Order M-654 and the Williams Commission Report. There is nothing before to indicate that the fruits of either Hydro's or WANO's research or expertise, as reflected in the information contained in the reports, could be sold to other public or private sector entities or would be considered valuable to them. Rather, this information is in the nature of an efficiency report particular to Hydro's specific operations, with no apparent use or application to any other facility, and no market or other competitive demand that would give it intrinsic value. Any so-called "value" to which Hydro refers is too remote to bring the information within the language of the exemption.

Accordingly, I am not satisfied that the records qualify for exemption under section 18(1)(a).

Section 18(1)(c): Prejudice to economic interests or competitive position

In Order P-1190 [upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), above], Assistant Commissioner Tom Mitchinson stated the following with respect to the purpose of this section:

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.

Hydro submits that there is a reasonable expectation of prejudice to its economic interests and competitive position arising from the following:

> a. Impairment of [Hydro's] ongoing relationship with [WANO,] a world renowned independent peer review organization will jeopardize [Hydro's] reputation and its ability to finance itself.
>
> (b) Likewise, impairment of this relationship could reasonably be expected to increase premiums to be paid for nuclear liability insurance.
>
> (c) Third parties that [Hydro] may wish to contract or enter into joint ventures with and who in confidence could expect to review WANO information will consider the exclusion of [Hydro] from WANO as a clear negative factor.
>
> (d) Under the new restructuring of the Ontario electricity industry, U.S. competitors will have an enhanced ability to compete in Ontario. However, U.S. competitors are not subjected to public disclosure of their peer review evaluations. In the United States, the Institute of Nuclear Power Operators (INPO) Reports have been kept confidential on the basis that the benefits of confidentiality exceed the need for open review of nuclear power issues. In RE Southern California Edison Co. (April 8, 1992) the California Public Utilities Commission had to consider the release of INPO reports which were not prompted by a safety event, but part of regular, periodic reviews relating to extended outages. The Commission considered the overriding benefits of confidentiality to be

> firstly, encouraging utilities to pursue critical self-analysis without fear of unnecessary regulation, or public embarrassment and secondly, encouraging individuals to come forward with useful criticisms free of fear of reprisal or peer disapproval. The Commission stated that "We accept that in general the free flow of information can promote plant reliability and safety, which are recognizable public benefits. Curtailment of information would, in the long run, hinder the efforts of utilities and of the Commission."
>
> U.S. utilities do not, then, have any similar threat to their relationships with their outside peer evaluation teams which will adversely affect their potential profit margins or their ability to raise money.

Hydro also relies on its submissions under section 18(1)(a) for the purpose of section 18(1)(c).

The appellant submits:

> The exemption under subsection 18(1)(c) does not apply as the provision of the information requested . . . cannot reasonably be expected to prejudice Hydro's economic interests or competitive position. I have been asked to comment on the applicability of Order P-1190. . . to the records at issue in this appeal. That Order also concerned the release of peer evaluation reports regarding Hydro's nuclear operations. In that case, the Commissioner found that disclosure of the evaluation reports could be reasonably expected to prejudice Hydro's economic interest and/or competitive position with respect to its current and potential negotiations, and that the records thus qualified for exemption under subsection 18(1)(c) of the Act. It is difficult for me to comment on the applicability of Order P-1190 in the circumstances of this appeal, because I have not had the advantage of reading the Peer Evaluation Reports which are the subject of this Appeal and I do not know what negotiations, if any, Hydro is currently engaged in. I submit that Hydro must provide detailed and convincing evidence of any prejudice to it in order to bring itself within this exemption . . .

In Order P-1190, Assistant Commissioner Mitchinson stated the following with respect to peer review reports relating to Hydro's nuclear facilities, and the application of section 18(1)(c):

> With respect to prejudice to both its economic interests and its competitive position, Hydro states that at this time it is under considerable pressure to reduce the cost of producing power and to open itself up to competition in power generation. It argues that unduly critical public releases may harm two initiatives in which it is currently engaged.

> Hydro describes current negotiations with potential private sector partners regarding one of its nuclear plants, and submits that unduly critical public releases could reasonably be expected to raise concerns with these potential partners.
>
> Hydro also points out that it is involved in ongoing international negotiations which could lead to a multimillion dollar contract. In Hydro's view, because the peer evaluation reports do not provide a balanced picture of safety at its nuclear power plants, these reports could be used by others in the industry in an attempt to gain a competitive advantage. According to Hydro, its United States competitors are not required to disclose comparable peer evaluation reports prepared by the INPO.
>
> I have intentionally been somewhat vague regarding the details of these ongoing negotiations, so as not to disclose facts which could have an impact on these discussions. Hydro has provided me with more detailed evidence than I have included in this order.
>
> In my view, based on the evidence provided to me in this appeal, I find that Hydro has established that disclosure of the evaluation reports could reasonably be expected to prejudice its economic interest and/or competitive position with respect to its current and potential negotiations, and I find that the five records qualify for exemption under section 18(1)(c) of the Act.

In Order P-1190, Hydro had provided the Assistant Commissioner with detailed, specific representations relating to current and future contractual negotiations, supporting its position that disclosure could reasonably be expected to prejudice its economic interests and/or competitive position. By contrast, in this appeal, Hydro has provided only generalized assertions, which are lacking in the requisite detail. In my view, Hydro has failed to establish that the consequence of disclosure as set out in section 18(1)(c) could reasonably be expected to occur.

More particularly, Hydro's claim that disclosure of the reports would impair Hydro's relationship with WANO is founded primarily on its assertion that the reports are required to be kept confidential pursuant to Hydro's agreement with WANO. I have been referred to several provisions of this agreement which discuss these confidentiality obligations, one of which appears on the cover page of each peer review report and reads as follows:

> CONFIDENTIALITY NOTICE: Copyright - 1998 World Association of Nuclear Operators (WANO). All rights reserved. Not for sale. This document is protected as an unpublished work under the copyright laws of all countries which are signatories to the Berne Convention and the Universal Copyright Convention. Unauthorized reproduction is a violation of applicable law. Translations are permitted. This document and its contents are confidential and shall be treated in strictest confidence. In particular, without the permission of both the individual utility and the applicable WANO Regional governing Board, this document shall not be transferred or delivered to any third party and its

> contents shall not be disclosed to any third party or made public, unless such information comes into the public domain otherwise than in consequence of a breach of these obligations. Furthermore, the circulation of this document must be restricted to those personnel within the WANO member organizations who have a need to be informed of the contents of the document.

These obligations are qualified by the proviso that the report is to be kept confidential "unless such information comes into the public domain otherwise than in consequence of a breach of these obligations." It is apparent that Hydro's confidentiality obligations arise in respect of voluntary disclosure, and not disclosure pursuant to the compulsion of law imposed by an access to information regime. In my view, the proviso referred to above would relieve Hydro of any breach of this agreement should disclosure be required by operation of law. In any event, I have not been referred to any provision in the agreement that would require Hydro's expulsion from membership in WANO in the event that disclosure were made, whether voluntarily or pursuant to the requirements of an access to information regime.

Further, as I found earlier in rejecting WANO's claim that section 17(1) applied, I am not persuaded that WANO's commercial or competitive interests relative to its other members would be threatened by disclosure of reports relating to Hydro's nuclear facilities. Consequently, I am unable to identify a substantial interest upon which WANO could or would wish to base a decision to expel Hydro from membership based solely on the fact of disclosure of these reports. Indeed, to the extent that any legitimate basis might be advanced for inserting confidentiality requirements in the WANO/Hydro agreement, these would appear to have been designed for Hydro's benefit, not WANO's. Accordingly, I am unable to accept that disclosure of the reports pursuant to the requirements of an access to information statute would fundamentally threaten Hydro's relationship with WANO or result in Hydro's expulsion from that organization.

Since I am unable to accept at face value Hydro's assertion that disclosure of the reports will jeopardize its relationship with WANO, I am also unable to accept the arguments based on this assertion that such impairment would jeopardize Hydro's reputation or its ability to finance itself, or would result in increased premiums to be paid for nuclear liability insurance. In any event, I have not been given persuasive information concerning the impact of WANO membership and WANO peer reviews (in preference to Hydro's previous peer reviews) on the enhancement of Hydro's reputation for nuclear safety, Hydro's ability to finance itself, or the premiums paid for nuclear liability insurance. In the absence of detailed and convincing evidence to support these arguments, I am left with generalized assertions that amount, at most, to speculation as to possible harm to Hydro's economic interests or competitive position.

Finally, I am not convinced that disclosure is likely to decrease the safety of Hydro's nuclear facilities by compromising the peer review process. As a result of Order P-1190 and the judgments of the Divisional Court and the Court of Appeal on judicial review, similar records to those at issue were disclosed to the public. Hydro has not provided me with any evidence to indicate that the peer review process was significantly compromised as a consequence of public disclosure, either through a "chilling effect" on

employees or otherwise. Indeed, in the face of this order and its endorsement by the courts, Hydro proceeded with a modified peer review program with similar objectives and procedures.

In my view, it is equally plausible that disclosure would enhance, rather than harm, Hydro's competitive position relative to other suppliers, by demonstrating to the public that detailed and comprehensive safety reviews of Hydro's nuclear facilities are being conducted, and that Hydro proposes to take specific corrective action to improve safety and achieve the standards of excellence established by WANO.

As a result, I find that this exemption does not apply.

Section 18(1)(d): injury to financial interests/ability to manage the Ontario economy

Hydro submits:

> The disclosure of the records could reasonably be expected to affect the financial interests of the Government of Ontario or its ability to manage the economy of Ontario for the following reasons:
>
> - The Province is the sole shareholder of [Hydro].
> - The Government of Ontario's ability to manage the economy of Ontario should depend upon the strength of that economy and that in turn will depend to some extent on the Province's return on its investment in [Hydro] and the continued employment of [Hydro's] employees.
> - Under the new Energy Competition Act, [Hydro] will compete with other utilities to supply power in the North American marketplace.
> - [Hydro] will need to finance its operations in order to compete in this new marketplace.
> - The safe and reliable production of nuclear energy is also a key component of [Hydro's] ability to finance itself.
> - The safety and reliability of the nuclear facilities in turn depends upon an independent peer review evaluation process.
> - A thorough and accurate peer evaluation process depends for its success on the confidentiality of the information supplied both by the employees and the peer evaluators.

The appellant submits simply that "there is nothing in the documents in issue which, if disclosed, could reasonably be expected to be injurious to the financial interests of the government of Ontario or the abilityof the government of Ontario to manage the economy of Ontario."

For the same reasons as set out above under section 18(1)(c), I find that Hydro has failed to establish the applicability of the section 18(1)(d) exemption. Hydro's position here depends on its arguments, which I

did not accept, that disclosure could reasonably be expected to prejudice its economic interests or competitive position through harm to the peer evaluation process.

Based on the above, I find that the records are not exempt under section 18(1)(a), (c) or (d) of the Act.

Although I am ordering disclosure of the record on the basis that neither section 17 nor 18 applies, I feel that it would also be useful in the circumstances to consider and make a finding on the public interest override in section 23 of the Act, based on the assumption that the application of the exemption claim at section 18 has been made out. I do not feel that any useful purpose could be served by engaging in the same exercise in relation to the section 17. Since neither the "supplied" test nor the "harms" test has been met, the only connection that the records have with the section 17(1) exemption is that portions contain information which have been described as technical. The application of the section 18 exemption, on the other hand, was found to have been established in Order P-1190 on the basis of different factual circumstances and different submissions involving similar records. It may therefore be informative to examine whether and how section 23 might apply if I had found that this exemption was also established in the case before me.

PUBLIC INTEREST IN DISCLOSURE

Introduction

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, 17, **18**, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

If section 23 applies, it would have the effect of overriding the application of section 18, and the appellant would have a right of access to the records.

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

Representations

The appellant submits:

> The reports at issue in this Appeal address the safety and reliability of Hydro's nuclear power plant operations. History has taught us that when nuclear operations are not run safely, the results can be catastrophic. The public has an enormous stake in decisions being made by Hydro concerning its nuclear operations and . . . Hydro has a duty to be accountable to the citizens of Ontario in the domain of nuclear energy.
>
> The Commissioner has recognized in previous Orders, including Order P-270 and Order P-1190, that there is a compelling public interest in disclosure of nuclear safety-related information. In Order P-270 Commissioner Wright stated as follows:
>
> > In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
> >
> > I believe that [Hydro], with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
> >
> > In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.
>
> In Order P-1190, which, like this Appeal, dealt with peer evaluation reports of Hydro's nuclear operations, Assistant Commissioner Mitchinson adopted Commissioner Wright's comments and found that there was a compelling public interest in disclosure of records concerning nuclear safety. This decision was upheld on judicial review . . .
>
> . . . [T]he public interest in disclosure of the records in issue clearly outweighs the purpose of any of the exemptions relied on by Hydro and WANO. The purpose of both the section 17 and 18 exemptions is to protect the monetary interests of institutions and third parties. When balanced against the public interest in nuclear safety and public accountability for the operation of nuclear facilities . . . the public interest clearly outweighs the purpose of those

> exemptions. I note that Assistant Commissioner Mitchinson found that this was the case in Order P-1190, in the context of peer evaluation reports on Hydro's nuclear facilities and the section 18 exemption. In Order P-270, Commissioner Wright found that the public interest in the disclosure of information relating to nuclear safety clearly outweighed the purposes of section 17.

WANO and Hydro both dispute that there is a compelling public interest in disclosure of the records and argue that, whatever that interest might be, there is a greater public interest in maintaining the confidentiality of the records. Hydro submits:

> There are clear and compelling public interests in the non-disclosure of the peer evaluation reports. These outweigh any offsetting public interest in disclosure. These interests maybe summarized as follows. Confidentiality of peer review process is critical in the following areas:
>
> - **Public safety:** Confidentiality is essential to the reliability and safety of nuclear facilities, both in Ontario and internationally;
> - **Enhancement of the environment:** Confidentiality reduces dependence upon alternative sources of energy which are less environmentally friendly; and
> - **Protection of an interest held by the Province:** Confidentiality enhances [Hydro's] financial position, thereby benefiting its sole shareholder, the Province of Ontario, and its employees.
>
> The Ontario public has a clear and compelling interest in the reliability and safety of nuclear power plants in Ontario. However, its interest also extends to the reliability and safety of nuclear power plants internationally. WANO operates in many countries worldwide, including Eastern Europe and the Far East. As far as we can determine, Ontario would be the first and only jurisdiction not to respect the confidentiality of the WANO process. In order to promote and maintain the confidence of international nuclear utilities and their employees in WANO's ability to protect the evaluation process, international interest in peer evaluations of nuclear facilities worldwide may be jeopardized. In any event, the candour and free flow of information between nuclear power plant employees outside Ontario and WANO team evaluators, vital to the success of the peer evaluation process and ultimately to nuclear reliability and safety, would be compromised by disclosure of peer review reports.
>
> . . . . .
>
> The current requested peer evaluation reports are distinguishable from those ordered released by the Commissioner in Order P-1190. The peer reviews subject to Order P-1190 were produced by an in-house Ontario peer review team. The peer reviews in the current request are produced by a third party, WANO, a leading international peer review organization for nuclear facilities. The public interest in non-disclosure of the reports is significantly more compelling.

The recognition of the overriding public interest in non-disclosure of peer evaluations in promoting a free and frank exchange of information has been recognized by the Ontario Government . . . the California Public Utilities Commission . . . and academic writers . . .

Further, the principle of confidentiality of peer reviews has been recognized in two Canadian cases [Kerr v. Saskatchewan (Minister of Health) (1994), 115 D.L.R. (4th) 588 (Sask. C.A.) and Foley v. Cape Breton Regional Hospital (1996), 137 D.L.R. (4th) 410 (N.S. S.C.)].

. . . [T]he public has other mechanisms to obtain information on the safety and reliability of [Hydro's] nuclear power plants. The recent publication of the IIPA Reports in 1997, the Report of the Select Committee of the Ontario Legislature on Ontario Hydro Nuclear Affairs in 1997, the Independent Panel Review chaired by former Justice Kaufman in 1999, and the prescriptive and transparent licensing process of the AECB and its successor, the Canadian Nuclear Safety Commission, under both the current and pending legislation, respectively, offer an effective mechanism for obtaining information relating to nuclear safety and reliability . . .

The public availability of the basic findings and recommendations of the WANO peer evaluations further distinguishes the current information request from that which was the subject of Order P-1190.

Courts have further accepted a self-critical analysis privilege to protect the following reports from public disclosure:

- Hospital committee reports;
- Internal police department investigations;
- Academic peer reviews;
- Railroad accident investigations;
- Employee evaluations;
- Product safety determinations;
- Equal employment opportunity assessments.

WANO submits:

WANO does not take issue with the conclusion in Order P-270 that there is a compelling public interest in the disclosure of nuclear safety information generally. WANO agrees with Commissioner Wright's observation that **certain** nuclear safety information should generally be publically available. However, it does not follow that there is a compelling public interest in the disclosure of the Records. To the contrary, the public interest requires that the Records remain confidential.

WANO's confidentiality Policy expressly permits the Facilities to release their own summaries of the Reports . . .

This [provision of the Policy] strikes an appropriate balance between the need for public disclosure and the need to maintain the trust and confidentiality essential to the preparation of true and focussed Peer Reports.

Further, there is already ample information in the public domain about the performance and the operations of the Facilities reviewed by WANO for the periods in which the peer reviews at issue were conducted . . .

The Peer Reports do not articulate a body of "nuclear safety information" that is otherwise unavailable to the Facility and to the public.

. . . [T]he Peer Reports generally do not reveal operational problems for the first time but rather confirm what the Facility already knows. The Facility is keenly aware of its operational problems and the areas in which improvements are necessary. The AECB is of course also aware of any regulatory shortfalls . . .

. . . [T]he real value of the Peer Reports is found in the peer review teams' insights into the *root causes* of the Facility's technical and operational problems. The Reports do not focus on regulatory shortfalls but on *why* the Facility is encountering problems and on identifying corrective action required to eliminate those problems. Only by uncovering the root causes of its problems can the Facility maximize the safety and reliability of its operations. The Reports are designed to help the Facility achieve this standard of excellence.

For the reasons stated the peer review process does not work in an atmosphere of public disclosure. The confidentiality of the Peer Reports is essential to the peer review process.

. . . . .

In any event, even if there is a compelling public interest in the Peer Reports (which is denied) this interest cannot outweigh the purpose of the exemption in section 17 of the [Act].

The "compelling public interest" must be the protection of the public from an accident at a nuclear plant. This protection is the purpose of the confidentiality of the Peer Reports.

The Peer Reports are designed to maximize the safety and reliability of the operation of the Facilities. These vitally important objectives cannot be attained in an environment of public disclosure.

> WANO's success in improving safety and reliability worldwide has been recognized within the community of nuclear operators . . .
>
> . . . . .
>
> The Trip Report [Record 1] does not contain *any* information about the performance and the operations of [Hydro's] Facilities. The purpose of the Trip Report is to assist [Hydro] in the application of PRA methodology so that [Hydro] is better positioned to determine the risk significance of activities in the Facilities. These Reports are not concerned with regulatory issues. Trip Reports are premised on the best international practice and not on minimum regulatory requirements . . .

WANO goes on to make submissions on what it considers to be relevant case law. WANO refers to the decision of the California Public Utilities Commission cited by Hydro in its representations under section 18 above, and appears to agree with Hydro that principles drawn from "self-critical analysis privilege" should apply here. WANO also cites United States court decisions in support of its position.

Is there a compelling public interest in disclosure?

In Order P-1398, Inquiry Officer John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Inquiry Officer Higgins's decision in Order P-1398, the Court of Appeal for Ontario in Minister of Finance (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at 342].

In light of the Court of Appeal's comments, I adopt former Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

In Order P-1190, Assistant Commissioner Mitchinson stated:

> It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standards. This simply does not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program

should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.

As far as Hydro's submissions about confidentiality and the openness of its employees are concerned, in my view, it is in the interests of both Hydro and the public to ensure that Hydro continues to receive frank and open input and to report on nuclear safety issues in the most fulsome manner possible. This enables Hydro to represent itself in its commercial ventures as operating nuclear plants as closely as possible to the highest standards of excellence.

Commissioner Tom Wright discussed the issue of nuclear safety and section 23 in Order P-270. This appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the Act. In considering whether there was a compelling public interest in disclosure of nuclear safety related information, he stated:

> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

I agree with Commissioner Wright's comments, and find that there is a compelling public interest in disclosure of records concerning nuclear safety.

On judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636, leave to appeal refused [1997] O.J. No. 694 (C.A.), the Divisional Court upheld Order P-1190, stating:

> The interpretation and application of the various exemptions under the [Act] lie at the heart of the Commissioner's specialized expertise and so the Commissioner's decisions in this regard are entitled to a high degree of curial deference. For this reason we rejected all arguments of [Hydro] save one without calling on [the Commissioner and the requester]. The [Commissioner and the requester] were called upon to answer one question only, namely Did the Commissioner in deciding as to the existence of a compelling public interest take into account the public interest in protecting the confidentiality of the peer review process.
>
> After hearing the respondents we are satisfied that when the Commissioner stated at page 7 of his reasons "I am unable to accept Hydro's position that the results of the peer evaluation program should not be disclosed to the very public whose concerns about nuclear safety the program was designed to allay" that the Commissioner was addressing the argument of Hydro that disclosure of peer review reports would severely compromise the reliability and frankness of future peer reviews. The Commissioner did consider but rejected the argument of Hydro.

In my view, for reasons similar to those of the former Commissioner and the Assistant Commissioner in Orders P-270 and P-1190, there is a compelling public interest in the disclosure of the records at issue in this case. From the perspective of protecting public health and safety and the natural environment, the public has a compelling interest in scrutinizing the safety related activities of Hydro in respect of its nuclear facilities, especially in light of the enormous consequences of inaction. The public's compelling interest extends to ensuring bureaucratic accountability in these areas, engaging in informed discussion and debate, and exercising its democratic rights at the ballot box in order to contribute to the direction that public policy in the nuclear energy arena will take.

In its judgment in Energy Probe v. Canada (Attorney General) (1989), 68 O.R. (2d) 449, leave to appeal refused (1989), 37 O.A.C. 160 (note) (S.C.C.), the Court of Appeal for Ontario recognized the seriousness of nuclear safety issues and the importance of allowing open public debate on these issues. In granting a public interest group standing to challenge the constitutionality of the federal Nuclear Liability Act, Mr. Justice Carthy stated (at pp. 464, 466, 469):

> On the evidence before the court there can be no doubt that there is a risk associated with any nuclear reactor . . .
>
> . . . I have no doubt that the interests expressed [by the appellants] are genuine.
>
> When I see serious individuals, such as the appellants in this case, presenting concerns that are of fundamental significance to all citizens, I have no hesitation in concluding that this is not an abuse of the public interest exception, but rather tends to serve it very well.

Clearly, the two peer review reports (Records 2 and 3) are very similar in nature to the records at issue in Order P-1190, and thus the principles from that decision apply here. Further, I do not accept WANO's submission that the Trip report (Record 1) is distinguishable from the other two records for the purposes of determining whether or not there is a compelling public interest in its disclosure. Record 1 concerns the application of "probabilistic risk assessment" resulting from specific activities, the purpose of which is to assess the likelihood and consequences of an accident at a nuclear facility. There is no question that this document relates directly to the public's ability to consider, assess and make informed political choices with respect to the safety of Hydro's nuclear facilities. The fact that Record 1 deals with "best international practice" as opposed to "minimum regulatory standards" does not alter its essential character. I find no significant qualitative distinction between Record 1 and Records 2/3 for the purpose of the "compelling public interest" analysis.

I do not accept Hydro's submission that there is a compelling public interest in non-disclosure of the records. As I stated above, Hydro has not provided evidence to indicate that public disclosure of the peer review reports at issue in Order P-1190 significantly compromised the peer review process or the safety of the facilities generally, either through a "chilling effect" on employees or otherwise. Thus, I am not convinced that non-disclosure is essential to or would enhance public safety or protection of the environment. In my view, the opposite is true: public scrutiny of the records would enhance, not undermine, the promotion of safety and environmental concerns in this area.

Hydro submits that principles drawn from the so-called "self-critical analysis privilege" should apply here to support the public interest in non-disclosure. I have been referred to several academic articles and two Canadian cases advanced in support of this position. I note that no Ontario court has accepted the existence of such a privilege, and that the U.S. courts have done so only inconsistently and sparingly, usually in the context of specific rules of evidence or production, or legislative schemes expressly recognizing a limited form of privilege in narrowly defined circumstances.

The two Canadian authorities also do not advance Hydro's argument. In Kerr v. Government of Saskatchewan (1994), 115 D.L.R. (4th) 588, the Saskatchewan Court of Appeal determined that a hospital had failed to bring mortality review documents within the requirements of a specific privilege for quality assurance committee documents established under that province's Evidence Act, which parallelled the "Wigmore" criteria for confidential communications. In Re Freedom of Information and Protection of Privacy Act (1996), 137 D.L.R. (4th) 410, the Nova Scotia Supreme Court considered the application of the personal information exemption, under that province's equivalent to section 21 of the Ontario Act. In that case, the court found that portions of a hospital report on patient suicides were exempt from disclosure because they contained personal recommendations and evaluations regarding the attending physicians, which constituted their personal information. The court held that disclosure of this personal information would be an unjustified invasion of privacy. I note that both of these cases involve statutes setting up specific rules regarding the non-disclosure of certain types information, and neither purports to establish a general rule of self-critical analysis privilege.

WANO has referred me to one decision of a U.S. regulatory body and two U.S. court decisions which it says support the view that the interest in maintaining the confidentiality of documents of this nature outweighs any interest in public disclosure. In Re Southern California Edison Co., 43 Cal. P.U.C., 2d 738, 1992 WL 576036, the California Public Utilities Commission rejected the concept of a "self-critical analysis privilege", but still ordered that an INPO report about extended power outages at a nuclear facility should remain confidential. The Commission's reasons were that no actual accident or breach of safety had occurred and there was some material before it indicating that non-disclosure would facilitate the free flow of information about the outages without the personnel involved fearing public embarrassment or peer reprisals. Further, the Commission stated that confidential treatment of the report would still allow it to carry out its business. In my view, it would be useful to set out the Commission's discussion of the factors and material before it in reaching this conclusion:

> Factors Supporting Confidentiality
>
> Although the record does not contain quantitative evidence on the subject, it has been strenuously argued that confidentiality provides an atmosphere critical to the free flow of information about nuclear power plant operations. Disclosure of the INPO reports would hinder the flow of information in two ways. First, it might discourage utilities from pursuing the self-critical analysis that INPO offers, whether for good cause (e.g., fear of unnecessary regulation) or not (e.g., fear of public embarrassment). Second, disclosure might discourage individual respondents from coming forward with useful criticism due to fear of reprisals or peer disapproval.
>
> We accept that in general the free flow of information can promote plant reliability and safety, which are recognizable public benefits. Curtailment of information would in the long run hinder the efforts of the utility and the Commission.
>
> There are parallels between INPO reports and the medical and academic reviews which have been protected in various courts: (1) INPO efforts qualify as self-criticism, (2) the public has a strong interest in the free flow of information, and (3) it is plausible that disclosure would curtail that flow.
>
> The non-disclosure agreements between INPO and the NRC suggest that in some circumstances other agencies have found that confidentiality is in the public interest. Confidential treatment will still allow the Commission to carry out its business.
>
> According to APS and INPO, public disclosure would be misperceived by the public, because INPO's safety standards are higher than NRC's standards.
>
> Factors Supporting Disclosure
>
> The strongest factor supporting disclosure is the general public right to inspect all evidence relevant to matters before a government agency. Public policy should encourage

self-regulation, but those efforts should be made openly, as is done under government regulation.

Non-disclosure of the INPO reports may reduce public confidence in the nuclear power industry and in the Commission. This investigation is not an inquiry into a specific accident of the type for which confidentiality is sometimes necessary. It is a review of the reasonableness of utility actions. Most of the disputed INPO documents cover regular, periodic reviews, not accidents or safety-related events.

The causality between public disclosure of information and subsequent curtailment of the free flow of similar information is difficult to ascertain. The only support for this connection is contained in statements by INPO and utility employees. Reluctance of individuals to participate in INPO reviews may be exaggerated. Power plant workers certainly have a strong and direct interest in safety. INPO reports are already widely distributed among plant managers, other utilities, and regulators, which could reduce the fear of reprisals induced by public disclosure.

APS has claimed that the information needed to review the substantive issues in this proceeding is available, perhaps in alternative form, in other public documents. If this is indeed true, then it is less likely that disclosure of direct quotations would impair the future flow of essential information.

The Commission should give little weight to fears of public misperceptions about standards of excellence. The Commission's own standards of prudence need not coincide with either INPO standards or minimum legal standards of performance. The public deserves thorough explanations of utility performance, not paternalistic reassurances that utility actions reviewed behind closed doors are in the public interest.

Finally, Commission policy on non-disclosure should mirror the intentions of Evidence Code s 911, which prohibits the creation of new privileges.

Conclusion

The concept of public interest can be difficult to define. In the present circumstance, there are not familiar yardsticks to assess long-term public interests or the connection between information flow and confidentiality. However, it is the Commission's duty as the trier of fact to balance these factors using our best judgment.

We find that the factors supporting confidential treatment of the INPO documents outweigh the factors supporting public disclosure. In particular, the benefits of keeping INPO reports confidential exceed the need for open review of nuclear issues especially in the case

> of a review which is not safety related. . . . We will grant the APS motion for protection of the INPO documents.

I have set these passage out in full in order to demonstrate the relative strengths and weaknesses of the evidence and arguments presented in the Edison case, and the basis upon which the Commission ultimately reached its decision. Apart from INPO's assertions, like WANO's in the case before me, there was no empirical evidence in that case linking the disclosure of nuclear review reports to interference in the free flow of information. In contrast, there is no evidence before me to indicate that the disclosure of peer review reports pursuant to Order P-1190 interfered with the decision to engage in, the conduct of, or the free flow of information in the course of, the subsequent WANO peer reviews. In Edison, the Commission recognized that the assumption of a "chilling effect" arising from disclosure may be wrong or exaggerated, and that any possibility of such a result may well be diminished to the extent that similar information has previously been made broadly available within the facility without reprisal, or made publicly in alternative form without hindrance to the review process. In any event, unlike the case before me, the Commission was not dealing with reports directly related to safety concerns, where there would logically be a greater incentive for employees and managers to be forthcoming with pertinent information. Finally, the Commission in Edison was concerned with disclosure in the context of discharging its particular mandate in a ratepayers' application, which could be adequately discharged without public disclosure, and not a case such as this where the principal focus is the application of exemptions from a general right of access to records and disclosure in the public interest. There are other distinguishing features of these cases which I need not delve into here. Given the different contexts and the actual experience of this jurisdiction with the public disclosure of peer review reports, I am not prepared to follow the Edison case example and conclude, on the sole basis of the judgement call made in that case, that any confidentiality interest in the records outweighs the public interest in disclosure in the case before me.

I have also considered the judgment of the Arizona Superior Court in Arizona Public Service Co. v. Arizona Corporation Commission, No. CV91-07813 (Maricopa Cty. Sup. Ct., April 19, 1991). In that case, the court also rejected the concept of self-critical privilege, but concluded on the basis of evidence not recited in the judgment that there was a "clear need" for protection of the INPO evaluation reports provided to its nuclear clients in that case. The court was influenced by its finding that the public regulator which ordered that the records be publicly disclosed was itself in breach of a confidentiality agreement it had entered into with the utility, pursuant to which it had undertaken that any decision to make the records public should require specific grounds based on competent evidence as to the need for disclosure. The regulator had apparently made its disclosure ruling without specifying the appropriate grounds and evidentiary basis. With no indication as to the precise nature of the information contained in those records, or the other evidence tendered by INPO in that case, I am unable to accept this as persuasive authority that there is a substantial public interest in protecting the confidentiality of the WANO peer review.

Finally, I have been referred to the decision of the U.S. Federal Court of Appeals in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F. 2d (D.C. Cir. 1992) dealing with section 4 of the U.S. Freedom of Information Act, the equivalent of the third party exemption at section 17(1)(c) of the Ontario Act. The records at issue in that case were reports of the operations of a private nuclear facility provided

voluntarily to the Nuclear Regulatory Commission in confidence. As I have previously found, section 17(1)(c) has no application in this case. The records before me relate to Hydro's own operations as a public body subject to the Act, not those of an arm's length third party held by a public body as regulator. The Critical Mass case does not advance WANO's and Hydro's arguments that the public interest override at section 23 does not apply in this case.

The thrust of Hydro's and WANO's submissions appear to engage most closely, at least in theory, principles underlying the section 13 "advice to government" exemption. I note that in its original decision denying access to the records, Hydro claimed section 13, as well as section 17, but later withdrew both of these exemption claims. Section 13(1) reads as follows:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is "to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making", so that ". . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure" [Orders 24, P-1363 and P-1690]. Section 13(2) also contains two important exceptions, as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

I point out this provision to show that, despite the existence of an exemption designed to protect information which, if disclosed, may have a chilling effect on the consultation and advice giving process, there is demonstrable public interest in making available factual information and reports on the performance and efficiency of programs within an institution. In my view, if the issue under section 13 of the Act were before me in this appeal, each of the reports in question could be so characterized.

Both Hydro and WANO refer me to the Ministry of the Environment's "Policy and Guidelines on Access to Environmental Evaluations", dated July 1996, which reflects an approach of respecting the confidentiality of self-initiated environmental assessments, specifically in relation to Ministry inspectors and investigators who have alternative sources of information, in order to encourage their use as a tool of promoting environmental protection. WANO submits that, while this policy does not affect existing rights or obligations afforded under the Act, it should be taken into account in the balancing exercise under section 23.

I have been given no information on the effectiveness of this policy in promoting either self-initiated inspections or environmental protection. However, it is common sense that Hydro has a substantial interest in performing peer reviews using internal personnel and external consultants, as it has in the past, or using the services offered through WANO membership. In my view, the principle reflected in the Ministry policy is of little weight in my overall assessment for the purpose of striking a balance between the public interest in disclosure and the public interest in non-disclosure.

Both Hydro and WANO indicate that disclosure will set a precedent which will in turn compromise the peer review process not only in Ontario, but in other locations throughout the world in which WANO is engaged. As I have said, I do not accept the assertion that disclosure could reasonably be expected to generally compromise the peer review process in Ontario or elsewhere. Whatever precedent has been set in Ontario arose out of the Assistant Commissioner's Order P-1190, not the case before me, and it has not been demonstrated that Order P-1190 has had the consequences which Hydro and WANO suggest would inevitably follow. In any event, the laws of other jurisdictions, which have different traditions, and which may or may not treat records of this nature differently, are not before me.

I accept that the public may have other ways of obtaining some information respecting the safety of Hydro's nuclear facilities, including by way of Hydro releasing to the public a summary of the results. I note that other mechanisms for disclosure of related information existed at the time of Order P-1190 and the subsequent court decisions upholding the order. Further, I am not convinced that the existence of other disclosure mechanisms diminish in any substantial way the public interest in scrutinizing the results of these comprehensive safety reviews. Non-disclosure of the records at issue in this case would deprive the public of a valuable tool with which to test the thoroughness and integrity of nuclear safety reviews generally.

The fact that, as WANO submits, the reports do not reveal operational problems for the first time, but rather confirm what the facilities and the Atomic Energy Control Board already know, does not advance the positions of WANO or Hydro. The public may not be aware of the nature and extent of safety problems that Hydro, WANO and the Board already know. There is certainly a compelling public interest in disclosure of previously unknown problems; and, to the extent that these problems are already known, there is a compelling public interest in being able to compare this information with other available information, and to scrutinize Hydro's responses to these safety issues. In addition, it is important for the public to be fully aware not only of the nature of the problems and the responses, but of the root causes as well, by having a more complete picture of the safety issues at the facilities. As I have said, this information will contribute greatly to bureaucratic and democratic accountability in this critical area of public concern.

Accordingly, I find that there is a compelling public interest in disclosure of the records at issue.

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the section 18(1) exemption?

The purposes of section 18(1) of the Act are described in the Williams Commission Report:

> There are a number of governmental institutions (in particular, Crown corporations) engaged in the supply of goods and services on a competitive basis . . . In our view, the commercially valuable information of institutions . . . should be exempt from the general rule of public access to the same extent that similar information of non- governmental organizations is protected under the statute.

The purposes of section 17(1) of the Act (the commercial exemption for non-governmental organizations) were articulated in the Williams Commission Report:

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

The purpose of section 18(1)(c) in particular was expanded upon in Order P-1190, where Assistant Commissioner Mitchinson said:

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

The purpose of section 18(1)(d) was articulated in Order P-1398 by former Inquiry Officer John Higgins, as follows:

> Generally speaking, section 18 is intended to protect certain interests, economic and otherwise, of the Government of Ontario and other government institutions. Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", I find that section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.
>
> In my view, the inclusion of this reference to the government's ability to manage the economy has important implications relating to the purpose of this exemption. No democratic government has full control of the economy it supervises, but one can expect that such a government will "manage" the economy using the tools normally available (i.e. legislation, tax measures, grants, agreements, etc.). In considering scenarios which might "be injurious to" the government's ability to "manage the economy", I have concluded that

> many of these would likely be related to some kind of serious threat to Ontario's economic security. It follows, therefore, that the inclusion of the reference to the government's ability to "manage the economy" means that this exemption is, among other things, aimed at avoiding or minimizing serious threats to Ontario's economic security.

It is clear that the Legislature intended that the public interest in protecting public sector businesses by way of the section 18 exemption should yield in circumstances where disclosure of the information is in the public interest because it relates to matters of health and safety and environmental protection. In discussing whether or not the proposed commercial information exemption should be subject to a "public interest override", the Williams Commission stated:

> . . . In short, if the public interest in disclosure of matters relating to environmental protection, public health and safety and consumer protection is not explicitly stated, it is likely to appear in strained interpretations of other phrases in the exemption. For this reason, we recommend the adoption of a limitation of this kind . . . We recommend that the limitation make express reference to the public interest in such matters as the protection of the environment, consumer protection and public health and safety (p. 317).

Although ultimately the Legislature did not incorporate specific language in the section 23 public interest override referring the public interest in environmental protection, public health and safety and consumer protection, in my view, it is reasonable to assume that in adopting more general language in section 23, the Legislature intended that the override could apply in these types of circumstances, among others. This view is reinforced by the findings of the former Commissioner and the Assistant Commissioner in Orders P-270 and P-1190 with regard to nuclear safety records.

The Legislature also recognized the significant weight which should be attributed to information concerning environmental protection and public health and safety matters. Section 11(1) of the Act reads:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Section 18(2) of the Act reads:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless...

I do not suggest that either section 11 or 18(2) apply in the circumstances of this case; however, it is clear that the Legislature recognized the special importance of environmental protection and public health and safety information, and indicated that in certain circumstances it must be disclosed despite any other exemption in the Act.

In R. v. Canadian Pacific Ltd. (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, Crimes Against the Environment [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
> >
> > . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .

In R. v. Hydro-Québec (1997), 151 D.L.R. (4th) 32 at 99, 102 (S.C.C.), the court stated:

> . . . [P]ollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, . . . it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time . . . the stewardship of the environment is a fundamental value of our society.

In addition, the Supreme Court of Canada has recognized the important public interest in allowing the public to scrutinize the activities of government through access to information legislation:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry . . . Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable . . . [Dagg v. Canada (Minister of Finance), above, at 403, per La Forest J. (dissenting on other grounds)].

Applying section 23 in a case where I have found the exemptions do not apply requires me to make certain assumptions. I will assume that the reports contain technical information valuable to Hydro and that disclosure would diminish or deprive Hydro of an unspecified measure of that value, which Hydro asserts lies in anticipated (but by no means certain) productivity gains, cost savings, competitiveness and/or

profitability associated with the enhanced safety and reliability of its operations [section 18(1)(a)]. Hydro has cited specific examples such as its ability to finance itself and the cost of premiums for nuclear liability insurance, among others. I will also assume that disclosure could be expected to prejudice Hydro's economic interests or competitive position for largely the same reasons, but again with nothing approaching any degree of specificity in actual outcome or the extent of any impact [section 18(1)(c)]. Finally, I will assume that these economic consequences will flow through to the government of Ontario as Hydro's sole shareholder, resulting in a commensurate impact on the financial interests of the government of Ontario and its ability to manage the economy [section 18(1)(d)]. In this latter respect, it is important to bear in mind that Hydro is but one of a multitude of factors affecting Ontario's financial interests and ability to manage the economy, so that any economic or competitive impact Hydro might itself anticipate would largely be dissipated in its impact on the government.

While I am prepared to make these assumptions, I am not prepared to assume that any impacts would be particularly severe. To use nuclear liability insurance premiums as a simple but representative example, WANO peer reviews are only one of many factors to which I have been referred that "may" be an underwriting consideration in determining insurance premiums. Even then, WANO reviews might be taken into account, if at all, only as an additional consideration after a "base" rate based on actual "exposure" were determined. Other more concrete measures such as engineering and regulatory performance evaluations would likely be considered first. Moreover, there is no indication in the material that, apart from the presumed benefit of independence, WANO peer reviews are necessarily considered more reliable or "economically attractive" than Hydro's earlier internal peer review process. To the extent, therefore, that nuclear liability insurance premiums may be considered as an economic measure of safety and reliability, which is the cornerstone of all of Hydro's section 18(1) arguments, any economic consequences that I might assume (contrary to my actual finding) could arise from disclosure would be modest, at best.

In the circumstances of this case, the public interest in protecting the business or economic interests of public organizations is clearly outweighed by the compelling public interest in disclosure of these records for the purposes of scrutinizing the safety related activities of Hydro in respect of its nuclear facilities, in the interests of protecting public health and safety and protecting the natural environment. Therefore, I find that section 23 would apply to override the application of section 18.

As I found above, Hydro has not met the onus of proving the application of section 18(1) to the records. However, even if Hydro discharged its burden, the interests sought to be protected at section 18(1) would have been clearly outweighed by the compelling public interest in disclosure.

ORDER

1. I order Hydro to disclose the records to the appellant no later than **August 17, 2000**, but not earlier than **August 14, 2000**.

2. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the material disclosed to the appellant pursuant to Provision 1.

Original signed by: July 13, 2000
David Goodis
Senior Adjudicator