Date: 1999 10 25
Docket: CV 07718

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE CANADIAN BROADCASTING CORPORATION
and LEE SELLECK

Appellants

-and-

THE COMMISSIONER OF THE NORTHWEST TERRITORIES,
THE MINISTER OF PUBLIC WORKS AND SERVICES OF
THE GOVERNMENT OF THE NORTHWEST TERRITORIES,
NOVA CONSTRUCTION (1987) LTD.,
AUYUITTUQ DEVELOPMENT INC.,
GRINNELL PROPERTIES LTD.,
and INUVIALUIT DEVELOPMENT CORPORATION

Respondents

REASONS FOR JUDGMENT

[1] This is an appeal pursuant to the *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c.20 (the "Act"). The appellants seek access to certain government documents, specifically leases of commercial and residential space. The relevant department head has refused access to certain portions of those documents. I am told that this is the first time that provisions of the Act have come under judicial scrutiny. The Act only came into force in 1996.

Overview of Legislation:

[2] The Act is similar in many respects to access to information legislation enacted in other Canadian jurisdictions. Its purposes are set out in a statement of purposes contained as s.1 of the Act:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records held by public bodies;
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
>
> (c) specifying limited exceptions to the rights of access;
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> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made under this Act.

[3] Canadian jurisprudence is consistent in holding that the general philosophy behind this type of legislation is full disclosure of information. Access, not secrecy, is the dominant purpose insofar as it relates to government documents. The provisions of the Act must be given a liberal and purposive construction. The legislation recognizes that there are legitimate privacy interests that must be respected but any exceptions to the rule of disclosure must be clearly delineated in the legislation. Reference can be made to certain passages from the reasons of LaForest J. in *Dagg v. Canada* (1997), 148 D.L.R. (4th) 385 (S.C.C.), in discussing the federal legislation in this area (at pages 399 and 403):

> ...The appellant correctly points out that under the *Access to Information Act*, access is the general rule. It is also true that exceptions to that rule must be confined to those specifically set out in the statute and that the government has the burden of showing that information falls into one of those exceptions...
>
> 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....
>
> Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible....
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad

> right of access to "any record under the control of a government institution" (s.4(1)(b)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.
>
> Even though LaForest J. made these comments as part of a dissenting judgment they are valid nonetheless. Cory J., writing for the majority in *Dagg*, specifically approved of this approach to the interpretation of this type of legislation.

[4] The procedure stipulated by the Act requires the person making the request (the applicant) to direct it to the public body that has control of the documents in question. Section 5(1) of the Act provides for a presumptive right of access: "A person who makes a request ... has a right of access to any record in the custody or control of a public body..." There is a burden placed on the "head" of the public body in question to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay" : s.7(1). Within 30 days of the request (subject to extension) the applicant is to be told whether he or she is entitled to access to all or part of the record sought or whether access is refused and, if so, the reasons for the refusal: s.9(1).

[5] An applicant who is refused access may ask for a review by the Information and Privacy Commissioner: s.28.1. The Commissioner is a public officer appointed by the Commissioner of the Northwest Territories upon the recommendation of the Legislative Assembly: s.61(1). The Commissioner is empowered to conduct a review and may examine the record in question: s.34. The Commissioner, after conducting a review, issues a report containing recommendations: s.35. The head of the public body then may follow the recommendations of the Commissioner or may make any other decision the head considers appropriate: s.36.

[6] A third party, whose interests and privacy may be at stake in any information request, is entitled to be given notice once the request is made: s.26(1). The third party may also ask the Commissioner to review a decision to give access to a record that affects that party's interests: s.28(2).

[7] Either an applicant or an interested third party may appeal a decision made by the head of a public body to this Court: s.37(1). It is important to note that the appeal is from the head's decision, not the Commissioner's review. The Court has wide appellate powers. Section 38(1) of the Act provides that the Court "shall make its own determination of the matter".

History of these Proceedings:

[8] In 1997, the appellant Lee Selleck, a reporter with the co-appellant Canadian Broadcasting Corporation, made five separate applications to the Government of the Northwest Territories for disclosure of information pursuant to the Act. Specifically the requests focused on leases of offices, apartments and residential housing of 15 years or longer duration entered into by the government since 1985. The public body in question was the Department of Public Works and Services. The Information and Privacy Co-Ordinator for the department sent notice to interested third parties. The documents were identified as a number of lease agreements, amendments and renewals of those agreements. The department indicated that it was not prepared to release the substantive portions of these documents, those portions containing information as to rents payable, the term, and the calculation of additional rents payable as some formula of operating and maintenance costs. That was the very information the appellants sought.

[9] The appellants then applied for a review by the Information and Privacy Commissioner. The Commissioner recommended that the documents be released but with certain portions deleted. Specifically, she recommended the deletion of those sections of each document which relate specifically to rents payable (including additional rent) and those sections dealing with the calculation of operating and maintenance costs. She was of the opinion that those sections come within the exemptions stipulated in the Act for the protection of third party commercial and financial interests. The department head then decided to implement the Commissioner's recommendations and proposed to release the documents but edited as recommended.

[10] The appellants now appeal to this Court. Notice of the appeal was given to all potential interested third parties. Four of those parties were added as respondents to this appeal.

Standard of Review on Appeal:

[11] Earlier I made reference to s.38(1) of the Act:

> 38. (1) On an appeal, the Supreme Court shall make its own determination of the matter and may examine in private any record to which this Act applies in order to determine whether the information in the record may be withheld under this Act.

[12] No one appearing on the appeal questioned the standard of review. The appeal proceeded on the basis of it being an application of first instance. No reference was made to the reasons provided by the Information and Privacy Commissioner for her recommendations (although those reasons were before me as part of the appeal documents). Perhaps everybody assumed that those reasons were irrelevant since it is the department head's decision that is under appeal. But, in this case, the head adopted the Commissioner's recommendations; obviously, therefore, her reasons cannot be totally ignored.

[13] Many cases have held that even when there is an unrestricted right of appeal it is not a blanket warrant to completely re-try the case. Even where an appeal can be considered as a hearing *de novo*, the decision appealed from may be afforded some deference: see Jones & deVillars, *Principles of Administrative Law* (2nd ed., 1994), at page 451. After all, there must be some point to the fact that the Legislature chose to describe this process as an "appeal".

[14] Where an administrative tribunal (and I think the Commissioner comes within that category) is not protected by a privative clause, and its enabling statute provides for a broad right of appeal, then one might expect that the tribunal's decisions would be entitled to little or no consideration — "deference" as the case law terms it. But recent decisions of the Supreme Court of Canada have emphasized that deference may still be called for even if there is a broad right of appeal. In *Pezim v. British Columbia* (1994), 114 D.L.R. (4th) 385 (S.C.C.), the Court elaborated on the extent of deference owed to decisions of specialized tribunals on issues falling within their expertise even if the decisions are not protected by a privative clause and are subject to a right of appeal. For those kinds of tribunals, deciding those kinds of issues, the standard of review is reasonableness. Unless the decision under review is unreasonable, the reviewing court should not interfere with it. But *Pezim* was dealing with a securities commission that had powers to adjudicate and enforce its decisions and to set policies.

[15] Cases from some other jurisdictions have dealt specifically with the standard of review taken by officials such as the Commissioner under access to information legislation. In Ontario, for example, the standard of review was also put as that of reasonableness: *Ontario (Workers' Compensation Board) v. Ontario* (1998),

41 O.R. (3d) 464 (C.A.). But, under the Ontario legislation, while there is no privative clause there is also no statutory right of appeal. The Ontario Commissioner, as an officer of the legislature, is empowered to make binding decisions on access to information requests. This is a more extensive power than that allocated to the Commissioner under the territorial Act.

[16] The purposes of the Act, as recited above in s.1, are to make public bodies more accountable to the public and to protect personal privacy by, among other things, providing for an independent review of decisions made under the Act. Presumably that is a reference to the Commissioner. Yet the Commissioner, while empowered to review, can only make recommendations. The government is free to ignore those recommendations. The head of the public body may "make any other decision the head considers appropriate": s.36(a). So, could it be that the legislature intended to create a position that performs inconsequential functions (irrespective of the expertise that the Commissioner may develop in analyzing and applying the Act)? I think a broader question to ask is whether an independent review can be at all meaningful if there is no enforcement power or where the results of that review bind no one.

[17] Based on my analysis of the role of the Commissioner, and the fact that it is the department head's decision that is the focus of the appeal, the recommendations and report of the Commissioner, insofar as they were adopted by the head, are entitled to little or no deference. All counsel agree that the issues in this case are ones of statutory interpretation. It seems to me that a Court is in as good, if not a better, position than the Commissioner, and certainly the head of the public body, to interpret the statute. This case fits into what was described in *Pezim* as the "correctness end of the spectrum". In other words, the head of the public body must be correct as a matter of law in his or her decision. The statutory right of appeal allows this Court to make its own determination of the matter under appeal.

Issues and Onus of Proof:

[18] The issues on this appeal deal with the exemptions from disclosure for third party information. A "third party" is defined as someone other than an applicant or a public body: s.2. The specific exemptions pertinent to this case are found in s.24(1) of the Act*:*

> 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant...

> (b) financial, commercial, scientific, technical or labour relations information
>
> (i) obtained in confidence, explicitly or implicitly, from a third party, or
>
> (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
>
> (c) information the disclosure of which could reasonably be expected to
>
> (i) result in undue financial loss or gain to any person,
>
> (ii) prejudice the competitive position of a third party,
>
> (iii) interfere with contractual or other negotiations of a third party, or
>
> (iv) result in similar information not being supplied to a public body...
>
> Subsection (2) provides for disclosure of third party information by consent or where some other statutory instrument authorizes it. Neither is relevant to this appeal.

[19] The respondent government and the third parties argue that (a) the information to be deleted from the documents come within the terms of s.24(1)(b)(i), that is that it constitutes financial or commercial information obtained in confidence; and, (b) the release of that information could reasonably be expected to result in one or more of the harmful results listed in s.24(1)(c)(i), (ii), or (iii). The Commissioner held in her report that the information sought was subject to protection under s.24(1)(b)(i) as having been obtained in confidence and also under s.24(1)(c)(ii) as its disclosure could prejudice the competitive positions of the third parties.

[20] The question of the onus of proof, that being the burden to establish the application of one of the statutory exemptions, was the subject of some discussion at the hearing before me. The Act sets out who bears the onus in different situations when a review is conducted by the Commissioner:

> 33. (1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

> (2) On a review of a decision to refuse an applicant access to all or part of a record that contains personal information about a third party, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations.
>
> (3) On a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> > (a) in the case of personal information, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and
> >
> > (b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

These provisions also apply on an appeal: s.38(2).

[21] The appellants take the position that the onus lies on either the government or the third parties, depending on whether the decision appealed from is characterized as a decision to refuse access to part of a record (as per s.33(1) above) or as a decision to give access to all or part of a record containing third party information (as per s.33(3)(b) above). Since the information is not "personal information" as that term is defined in the Act, neither subsection (2) nor subsection (3)(a) apply.

[22] The respondents contend that the government bears the onus because it refused access to part of a record. I agree. The third parties are not seeking to prevent the disclosure of information that the government agreed to release. That would be the situation where the third party bears the onus as reflected in subsection (3). Here the appellants seek access to part of a record that the government refused to release. So, in conformity with the overarching aims of the legislation, the burden is placed on the government to justify the non-disclosure on the basis of the statutory exemptions.

[23] The onus in this case is nothing more or less than the burden of persuasion — the burden of establishing that the statutory criteria are met. This is accomplished not through speculation or by making assumptions but by the presentation of evidence. The quality of that evidence must be, as described in other cases, "detailed and convincing": see *Ontario (Workers Compensation Board) v. Ontario*, *supra*, at page 476. This phrase can be used to describe the quality and cogency of the

evidence required to satisfy the burden of proof generally in civil cases. In the circumstances of this case, if the evidence lacks detail and is unconvincing, then the respondent government has failed to meet the onus and the information must be disclosed. The difficulty here, of course, is that the government must rely by and large on evidence presented by the third parties.

Evidence:

[24] Affidavits were filed on this appeal on behalf of the respondents.

[25] On behalf of the government, an affidavit was filed by Michael Oram, an official with the Department of Public Works and Services. Mr. Oram attests to the practices within the department in dealing with leases for commercial and residential properties. He states that it is standard practice to issue a Request for Proposals ("RFP") as required. All of the leases in question on this appeal, to the best of his knowledge, were entered into as a result of proposals received by the department in response to specific requests.

[26] The RFP process is not a tender call. Proposals are evaluated on a number of criteria, price being merely one of them. The government's financial administration directive with respect to contracting contains the title "Importance of Confidentiality" and then the following:

> A department should establish rules to maintain confidentiality whether using the proposal request or tender invitation method to enter into contracts.

[27] I was informed that the Department of Public Works and Services has no written rules respecting confidentiality. The only exception is the instruction given by department officials at proposal openings. This instruction, meant to be given to any proposers present at the opening, contains the following:

> At this opening, we will only announce and record the proponent's name and address. All other information is considered confidential. No other questions will be entertained at this opening.

[28] I was not told, and it was not in the evidence, whether the RFP's issued relating to these leases contained any written undertakings or admonitions respecting confidentiality. I was not told how many requests were issued and how many proposals were received in response to those requests. It was undisputed,

however, that parts of the information in the successful proposals were incorporated into the lease documents, usually as schedules outlining operating and maintenance expenses. Mr. Oram states in his affidavit that, as a matter of practice, department officials treated the information in proposals as confidential. He says that both the submissions made in response to an RFP and the terms of any resulting contract are considered confidential by departmental staff and by the government in general.

[29] Affidavits were also filed on behalf of the respondent third parties. Nova Construction (1987) Ltd. is the landlord in five long-term lease agreements with the government for residential property in Rae Edzo, Lake Harbour, Hall Beach, Clyde River and Igloolik. Auyuittuq Development Inc. is the landlord in a long-term lease agreement with respect to property in Pangnirtung. Grinnell Properties Ltd. is the landlord in four lease agreements for properties in Igloolik, Cape Dorset, Arctic Bay and Pond Inlet. Finally, the Inuvialuit Development Corporation, through a subsidiary, is the landlord in three lease agreements respecting commercial properties in Aklavik, Inuvik and Tuktoyaktuk. These are not the only entities who have leased space to the government but they are the ones who responded to these proceedings.

[30] The affidavits filed on behalf of the third parties are similar in content. They make the following points:

1. The leases were the result of responding to an RFP from the department.

2. The proposers understood that the RFP submissions and any part of those submissions incorporated into the lease documents would be kept confidential.

3. The industry practice is to keep such information confidential.

4. Each of the third parties periodically bids on tenders and submits proposals in response to government

requests for commercial and residential properties. If information regarding rental amounts and operating and maintenance costs became public then they would be placed at a disadvantage with respect to competitors. This is how it was put in the affidavit of Mike Mrdjenovich on behalf of Nova Construction:

Nova periodically bids on government tenders and RFP's, and intends to bid on new tenders and RFP's as they become available. If the provisions of the lease agreements and schedules thereto, which deals with rental amounts and operating and maintenance costs, were released to the Appellant and subsequently made public, Nova would be placed at a disadvantage with respect to competitors and potential competitors. Nova operates in a small, highly competitive environment and its reliance on the confidentially of financial information in the lease agreements, is an important element in maintaining a competitive edge. Should a competitor become aware of rental amounts and operating and maintenance costs with respect to the lease agreements, it would seriously affect Nova's position when submitting proposals on future RFP's of a similar nature. For example, a competitor knowing the financial details of the lease agreements, and knowing industry conditions at the time future proposals were submitted, in particular, interest rates, would be able to make a reasonable assessment of what Nova would bid on a future contract, therefore being in a position to underbid Nova. Thus, the release of the information referred to, could reasonably be expected to prejudice the competitive position and interfere with contractual or other negotiations of Nova, and therefore cause undue financial loss.

5. The lease agreements contain provisions for the renegotiation of rents at set times during the term of the agreement. Release of the information sought could jeopardize these negotiations and result in a disadvantage to

> these landlords by "driving down" rents. Again I quote Mr. Mrdjenovich's affidavit:
>
> > The release of information with respect to rental amounts and operating and maintenance costs in the lease agreement could reasonably be expected to result in rental prices being "driven down" on future lease agreements, as competitors with full knowledge of existing lease agreements, would fiercely underbid in an attempt to secure a contract. The marketplace, thus changed, would place Nova at a distinct disadvantage when negotiating new rental amounts from time to time under the terms of the present lease agreements. Therefore, release of rental amounts and operating and maintenance costs in the lease agreements could be reasonably expected to interfere with the contractual negotiations of Nova and cause undue financial loss.

[31] What is notable about these affidavits is that they all contain a statement of fact (that the third parties operate in a highly competitive environment) but none of them provide detailed evidence as to the level of competition. I do not know whether, for example, each lease was the result of a separate RFP or if there were comprehensive RFP's covering requirements in a number of communities. With respect to each lease, how many competing proposals were received? Are these companies the only available providers of property for rent in some of these communities? One may assume that competitors would use whatever information they could get their hands on to underbid each other in a competitive market, but, that is different from being asked to assume that there are competitors in each of these marketplaces. Do these companies even compete with each other? There is nothing in the evidence to answer these questions.

[32] Counsel for the third parties submitted that one can safely assume that there is competition because the government called for proposals. I do not agree. The government's regulations require the issuance of a tender or an RFP for every contract (unless it is one made directly under the authority of the Executive Council). There may only have been one submission in response to a particular RFP or there may have been many. I do not even know if the department directed any RFP to specific potential contractors, or whether it issued any RFP to the public at large. I note that the term "request for proposal" includes the solicitation of a proposal by public advertisement or private invitation: see s.1 of the *Government Contract Regulations,* R.R.N.W.T. 1990, c. F-3. I do know that

the communities across the north vary greatly in size and in the level of economic activity. I also know that government plays a significant if not predominant role in the economic life of most northern communities. Thus, whatever private economic interests are present are no doubt actively interested in dealing with government on these types of long-term arrangements. But, having made these general comments, I still do not know whether there is in fact a highly competitive environment, as the third parties assert, or if the arguments about competition are being made in a vacuum.

[33] There was also an affidavit from the appellant Selleck. In it he describes why he seeks the information in question. This explanation is interesting but quite unnecessary. The right of access is available to every member of the public. There is nothing in the Act to suggest that an applicant needs to justify a request or that access should somehow depend on the motive for making the request. The only possible way for motive to be relevant would be in establishing a reasonable expectation of harm to a third party if a request for access came from that party's business competitor: *Intercontinental Packers Limited v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (F.C.T.D.), aff'd on other grounds (1988), 87 N.R. 99 (F.C.A.). That is not a factor here.

[34] Counsel for the appellants urged me to inspect the documents in question (as I am allowed to do under the Act). Counsel for the respondents said it was not necessary for me to do so. Initially I too thought it was not necessary to examine the documents but, on reflection, I concluded I should do so just to be certain what portions of each document were meant to be deleted. I conducted the inspection in private and the documents have been returned to the sealed envelope.

[35] There were 16 documents examined. While the department stated that it intended to delete the provisions in each lease relating to rent payable and the calculation of operating and maintenance costs, there was no indication on the documents themselves as to what exact parts were meant to be deleted. In the future this would be helpful. Each document contains clauses setting out a "base rent" for the property under lease. They also set out estimated operating and maintenance costs (usually in a schedule appended to the lease). In some cases the leases also contain clauses that set out the percentage of the maintenance costs that the lessee is obliged to pay. As I understand the submissions of the respondents, all of these items should be withheld from disclosure.

The Exemptions Claimed Under the Act:

[36] As noted above, the respondents base their claim for an exemption from disclosure on certain subsections of s.24 of the Act. Those subsections provide for exemptions based on the confidential nature of the information and on probable commercial harm to the third parties. Counsel for both the government and the third parties submitted that the purpose of s.24 is to protect private economic interests.

Confidentiality of the Information:

[37] The first ground for the exemption is based on subsection 24(1)(b)(i): "financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly, from a third party". There is no dispute that the information in question comes under the ambit of "financial" or "commercial" information. The dispute is over whether that information is impressed with confidentiality as contemplated by the subsection.

[38] Appellant's counsel submitted that subsection 24(1)(b)(i) is incapable of coherent interpretation. He points to a difference in the meanings conveyed by the English and French versions of the provision. The English version refers to "information ... obtained in confidence, explicitly or implicitly, from a third party". This would suggest that it is the acquisition by the government that is confidential. The French version reads, however, as "des renseignements... qui ont été fournis par un tiers explicitement ou implicitement à titre confidentiel". This would suggest that it is the person supplying the information who must claim confidentiality. Counsel argued that this difference between two equally authoritative versions of the statute makes the provision ambiguous and ultimately meaningless (especially since subsection 24(1)(b)(ii) uses the phrase "supplied by a third party" in the English version while the same phrase, "qui ont été fournis par un tiers", is used in the French version, thus rendering it illogical to think that the wording in the two versions of subsection (i) could mean the same thing).

[39] The government responded to this argument by saying, in effect, that this difference in language does not matter. Where one party supplies certain information, the other party necessarily obtains it. Whether the information is

"supplied" or "obtained", the emphasis should be on the confidential nature of the information. Counsel argued that it is not the act of supplying or obtaining information that is confidential; confidentiality attaches to the information itself.

[40] Counsel for the third parties referred me to certain rules regarding the interpretation of bilingual statutes. Since both versions are equally authoritative, the true meaning of a statute can only be determined by reading both versions together. Counsel referred specifically to what is known as the "shared meaning" rule, as outlined by Prof. Ruth Sullivan in *Driedger on the Construction of Statutes* (3rd ed., 1994), at page 220:

> The basic rule governing the interpretation of bilingual legislation is known as the shared or common meaning rule. Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless this meaning is for some reason unacceptable.
>
> Because the versions of bilingual legislation express the same law, they ought to say the same thing; if they do not, an effort must be made to reconcile them. The best way to reconcile conflicting versions is to identify and adopt a meaning that is shared by both.

[41] Counsel submitted that, in taking the ordinary meaning of the words in both languages within the context of the legislation, the two versions read together combine to give a meaning which is clear and unambiguous. If information is "supplied" in confidence then it is also "obtained" in confidence. Thus there is no difference in meaning.

[42] It seems to me, however, that this is not a "shared" meaning; it is an extended meaning of each version. What both counsel are saying is that the legislation should be read as referring to information "supplied and/or obtained" in confidence.

[43] How can one reconcile two such obviously different words as "obtain" and "supply"? Should it be one or the other or can one discern the true meaning of the legislation without having to distort the plain meaning of either word? I think Prof. Sullivan provides helpful guidance on this point as well (at page 221):

> The courts resolve this problem by thinking of the law enacted by the legislature as distinct from its formulation in the words chosen by the drafter. The law is the abstract rule or provision that the legislation embodies in words — the rule that the legislature "intends" to enact or the

> rule that, all things considered, is appropriate. The words in which the law is expressed may or may not be well chosen; they may be well chosen in one language version but not in the other. The court's job is to construct, or reconstruct, the rule relying on the meaning of both language versions, along with other aids to construction. The two versions are equal in that both must be read and considered in comprehending the rule; they are also equal in that either may be rejected if it fails to accurately express the rule.

[44] What is the rule that the legislature intended to enact? Section 24 provides for exemptions from the disclosure requirements of the Act. The entire section is directed toward prohibiting the disclosure of confidential information relating to the business interests of a third party. The information is in the possession of the government. It is information that is by and large supplied by the third party. All of the various subsections of s.24 suggest this. So, in my opinion, the crucial question is not whether the information is obtained or supplied; it is whether the information can be said to be confidential. That confidentiality can arise either explicitly or implicitly.

[45] While the differences between the English and French versions are regrettable (not to mention inexplicable), they do not undermine the focal point of the exemption: the protection of confidential information. In this case, the question is whether the provisions in each lease dealing with rents and operating and maintenance costs are information impressed with confidentiality.

[46] The statute speaks of explicit or implicit confidence. There was no evidence before me that the government made any express promise of confidentiality when it issued its requests for proposals. There is nothing in the lease agreements that speaks of confidentiality. The proposals were not in evidence so I do not know if there was an explicit claim to confidentiality. The respondents argue, however, that confidentiality can be implied from the circumstances in which the information was provided or by the nature of the information itself.

[47] I agree that the circumstances can implicitly give rise to a situation of confidentiality. The evidence on this appeal shows that, even though the department has no written rules as to confidentiality, its personnel operate under the assumption that information received from proposers is to be treated confidentially. Similarly, the proposers operate under the assumption that information conveyed to government in a proposal would be treated confidentially. There is a mutual understanding as to the usual practice.

[48] The Federal Court of Canada has issued numerous judgments relating to this issue. Those were issued in relation to the equivalent section of the federal access to information legislation and provide useful guidance. The federal statute is worded differently but, in my opinion, aims for the same objective. The specific provision is found in subsection 20(1)(b) of the *Access to Information Act*, R.S.C. 1985, c.A-1: "the head of a government institution shall refuse to disclose any record requested under this Act that contains ... financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party..."

[49] The Federal Court has held that the test for confidentiality should be determined on an objective basis: *Maislin Industries Ltd. v. Canada (Minister of Industry)* (1984), 80 C.P.R. (2d) 253 (F.C.T.D.). Whether information is confidential will depend upon its content, its purposes, and the circumstances in which it was complied. It seems to me that the same test applies when, as here, the respondents contend that information has been supplied and obtained in a situation of implicit confidentiality. Merely saying it is confidential does not make it so. In *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.), MacKay J. outlined what have been described as "indicators" of confidentiality (at page 210):

> a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship betwen government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

See also *Re Information Commissioner of Canada & Minister of External Affairs* (1990), 72 D.L.R. (4th) 113 (F.C.T.D.).

[50] I am satisfied, in reference to the criteria outlined above, that information supplied as part of a proposal meets the test for confidentiality. Information as to maintenance and operating costs (including insurance or mortgage costs) is not readily available to outsiders from other sources. Appellants' counsel submitted that such information would not be hard to estimate for a competitor and some (such as taxes, land lease costs, and utilities) are accessible through public records. That may be so but it is the overall operational cost figures that would not be available and that comprise a significant part of the value of any proposal to the government as lessee.

[51] I have already indicated my view that the information contained in the proposals originated and was communicated in a reasonable expectation of confidentiality arising from government practice. Further, with respect to the third criterion, the information was communicated in the context of a commercial relationship, that of requester and proposer, which had as its ostensible aim the procurement of leased property at good value for the government. Thus it is a relationship that can be fostered for public benefit by confidential communications.

[52] So far I have been referring to information supplied in the proposal submitted in response to the government's RFP. In my opinion it is confidential information. There is contrary authority from the Federal Court that should be noted. In *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58 (F.C.T.D.), the applicant sought to prevent disclosure of information contained in proposals, submitted in response to government requests, which led to contracts for translation services. The court ordered disclosure and made the following comments (per Strayer J. at page 63):

> One must keep in mind that these proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.

[53] There is much to be said for this observation. I note, however, that the judgment also makes reference (at page 64) to certain portions of the proposals being deleted

from the disclosure package and refers to information as to price, personnel and equipment. Thus, while the points expressed by Strayer J. are valid ones, the specific context in which they were made do not necessarily contradict my conclusion as to the confidentiality of this information.

[54] These comments raise another issue, that being whether information once incorporated into a contract is now subject to disclosure. The third parties argue that confidential information does not change its character just because it is incorporated into a contract. With respect to the information relating to operating and maintenance costs, supplied in the proposals and incorporated into the lease documents, I agree. But can the same be said for the rental rates stipulated in the lease documents? The third parties argue that it can.

[55] Each lease contains a figure for base rent. Some of them also contain figures for an "additional rent" based on all or a percentage of operating and maintenance expenses. Counsel for the respondent government drew a distinction between the "rent" (a figure based on negotiations as between the government and each lessor after receipt and evaluation of proposals) and the operating and maintenance costs (whether designated as "additional rent" or in some other way). Her submission was that rent was not information obtained by the government in confidence (although it may still not be disclosable under other parts of s.24). Counsel for the appellants argued that there should be no expectation of confidentiality concerning the actual rents negotiated and incorporated into the agreements.

[56] In my opinion, the base rents set out in each document do not constitute confidential information within the purview of subsection 24(1)(b)(i). They are amounts arrived at through negotiation after receipt and evaluation of proposals. They do not depend on information relating to operating and maintenance costs. While the base rents may have been proposed by the third parties, in the sense that they may have been contained in the proposals submitted by them, they are still contract prices negotiated and agreed to by the parties.

[57] In *Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services*), [1994] F.C.J. No. 2035 (F.C.T.D.), the court was asked to review a decision to release, in response to a request, information relating to leases of property to the federal government, including the terms of the leases, the amount of space leased, and the rental rates for each space. McGillis J. held that the rental rates were not exempt from disclosure. In doing so she concluded that, since the rental rates were negotiated between the parties, a negotiated term is not information "supplied" to government as per s.20(1)(b) of the federal statute. I

respectfully agree. The base rent negotiated as a term of a lease is not information either obtained by or supplied to the government in confidence.

[58] I note that the Information and Privacy Commissioner, on her review of this matter, had the *Halifax Development* case before her but held that it was not directly applicable as the federal legislation is worded quite differently. She made this comment in the context of her discussion of the exemption provided by subsection 24(1)(c), not that provided by subsection 24(1)(b)(i). I will discuss ss. 24(1)(c) next but, in the context of ss. 24(1)(b)(i), in my respectful opinion the *Halifax Development* case is relevant and helpful.

[59] I therefore conclude that (a) the base rent figure contained in each lease is not exempt from disclosure pursuant to ss. 24(1)(b)(i), but (b) operating and maintenance costs, whether set out separately or as part of an additional rent component, are exempt from disclosure. Since s.24 says that the head *shall* refuse disclosure if any exemption is established, then I conclude that the head was justified in refusing access to the information relating to operating and maintenance costs.

Probable Commercial Harm:

[60] The respondents also contend that the information sought, including rental rates, are exempt under the provisions of one or more of subsections (i), (ii) and (iii) of section 24(1)(c) of the Act. These subsections provide that the head shall refuse to disclose information if the disclosure could reasonably be expected to (i) result in undue financial loss or gain to any person, or (ii) prejudice the competitive position of a third party, or (iii) interfere with contractual or other negotiations of a third party. It is interesting to note that, unlike other similar legislation (such as that in Ontario), there is no qualification that the information itself be of a confidential nature, as is the case under ss.24(1)(b), merely that its disclosure could result in the type of harm described. One may be tempted to ask how the disclosure of non-confidential information could result in harm but evidently no one asked that of the legislators or the drafters of this legislation.

[61] Counsel are in agreeement that the phrase “could reasonably be expected to” as used in ss. 24(1)(c) means a reasonable expectation of probable harm: *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988) , 53 D.L.R. (4th) 246 (Fed. C.A.). I take this to mean something more than speculation about harm or a mere possibility of harm. Since I have already held that information relating to

operating and maintenance costs is exempt from disclosure, this discussion will be confined to the question of the release of rental rate information.

Undue Financial Loss or Gain:

[62] The respondents appear to take a cumulative approach to the three types of harm outlined above. In effect they say that, if there is prejudice to the third parties' competitive position and if outsiders could interfere with their contractual negotiations, then one can assume undue financial loss. But I do not think one can read any assumptions into the statute. These are distinct types of harm. The burden on the government here is to establish that release of this information could reasonably be expected to result in undue financial loss or gain. Just establishing prejudice to one's competitive position does not necessarily lead to the conclusion that undue financial loss is probable. The most that the third parties can say is that competitors could underbid them on future proposals or "drive down" the market by offering lower rents on other properties thereby forcing these parties to settle for lower rents when terms are periodically renegotiated.

[63] It seems to me that the word "undue" is used in subsection 24(1)(c)(i) for the very purpose of distinguishing between mere financial losses or lower returns (caused say by not getting a contract or by having to renegotiate a rent not as high as the previous one) and financial losses that are unfair, improper, inappropriate, or excessive; in other words, "undue". I do not think this exemption is meant to shield third parties from lower profit margins. The word "undue" must have some meaning beyond that of mere loss of income in the sense of less profit.

[64] No evidence has been put before me to show how release of this information, including rental rates, could reasonably result in undue financial loss. All that I have been told is that I can assume that, with better informed competitors, these third parties will suffer losses. This is too much of a generalization. I find that the exemption under this heading has not been established.

Prejudice to Competitive Position:

[65] The respondents submit that where information can be used by competitors then it results in prejudice to the third parties' competitive position. I accept, as I said before, the general proposition that if information is available then a competitor will undoubtedly try to use that to its advantage. But even if I work from that

assumption, that does not mean that I can assume that prejudice is the probable result. That depends on the specific market, the number and type of competitors, the manner in which the government organizes and issues its requests for proposals, and whether one can reasonably conclude that by knowing what rent the government is paying now could realistically assist in devising a rental rate in the future that will be the most competitive. It also ignores the fact that price is merely one factor in the evaluation of proposals.

[66] Counsel for the third parties submitted that detailed and convincing evidence has been presented (in the form of statements such as those of Mr. Mrdjenovich quoted previously). He compared it favourably to the type of evidence presented in the *Re Information Commissioner* case (*supra)*. I respectfully disagree with counsel's estimation of the quality of the evidence presented.

[67] The evidence put forward on behalf of the third parties speaks in general terms about operating in a small and highly competitive environment. Yet, as I noted previously, I have no evidence as to how competitive that environment actually is (in reference to government requests in general or to the requests relating to these properties in particular). I am given nothing but conclusionary statements. This can be contrasted with the type of evidence in the *Re Information Commissioner* case. There the court was provided with affidavits from different sources clearly establishing why and how the information sought in that case could prejudice the party's competitive position. There was detailed evidence as to the level of competition and the strategic value to competitors of the information sought. The evidence submitted to me falls far short of that type of detail. It is, to borrow a phrase from the *Halifax Development* case, couched in generalities and falls significantly short of establishing a reasonable expectation of probable harm.

[68] I find that the exemption pursuant to subsection 24(1)(c)(ii) has not been established with respect to release of the rental rates. I make no finding with respect to the operating and maintenance costs (the "additional rent" rates) since I have already held those to be exempt from disclosure under subsection 24(1)(b)(i). I think the respondents' argument may be stronger that release of the operating and maintenance costs (as opposed to rents) could reasonably be expected to prejudice the third parties' competitive positions but, again, better evidence would have to be provided.

Interference with Contractual Negotiations:

[69] The exemption provided by subsection 24(1)(c)(iii) may be distinguished from that relating to prejudice to the third party's competitive position. This exemption refers to an obstruction to actual negotiations and not just the increase of competition for a third party which may flow from disclosure: see *Société Gamma Inc. (supra).*

[70] An example is provided by a case referred to by the government's counsel, *Perez Bramalea Ltd. v. National Capital Commission*, [1995] F.C.J. No. 63 (F.C.T.D.). There a commercial landlord sought to prevent the disclosure of its agreements with the N.C.C. Among those was an occupancy lease for office space. The landlord sought to delete information relating to rents in the lease on the basis that, if other prospective tenants knew how much rent the N.C.C. were paying, then they would demand the same rates. Thus release of that information could prejudice the landlord in its negotiations with those prospective tenants. Simpson J. agreed and ordered that information to be deleted. But, and this is the significant point, she ordered the information to be released after one year since the evidence established that as a reasonable estimate of the time required to rent the rest of the space.

[71] On this point I agree with the submissions of appellants' counsel. The purpose of this subsection must be to prevent disclosure of information that could result in interference with negotiations with others, not with the government, since government is already aware of what the documents contain. It therefore cannot be to protect the third parties in their negotiations with government.

[72] In this case the most the evidence points to is a generalized concern that, if this information is released, the third parties would face increased competition when it came time to negotiate with the government or other potential lessees. My comments with respect to the general nature of the evidence can be repeated here. The third parties can point to no specific negotiations that may be interfered with in any sense other than in the sense that there will be stronger competition. In my opinion, this does not meet the test for exemption under this subsection.

Conclusions:

[73] The head of the public body in this case decided to release the documents requested but with the provisions relating to rent payable and the calculation of operating and maintenance costs deleted from each document. This appeal is therefore allowed in part. I hereby order the head to disclose the documents but edited so as to delete those portions dealing with operating and maintenance costs only. Such portions are exempt from disclosure pursuant to subsection 24(1)(b)(i) of the Act. Those portions relating to rents payable are not to be deleted. They are not exempt under the Act.

[74] Because I had no precise indication what parts of each lease the department planned to delete, I have prepared a list itemizing each lease and the portions to be deleted from each. The list is attached as Appendix "A" to these reasons. If further directions are required, counsel may speak to me. The original documents may be retrieved from the Clerk by counsel for the government so as to facilitate disclosure.

[75] The Act is silent on the question of costs of an appeal. If counsel are unable to agree, again they may speak to me.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, NT
this 25th day of October, 1999.

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