## CHAPTER 5 – LEGAL SERVICES

## SUMMARY OF REASONS ON CASES IN THE ANNUAL REPORT 2004-2005

***The Information Commissioner of Canada v. Transportation Accident Investigation and Safety Board, Nav Canada and The Attorney General of Canada,*** 2005 FC 384, Court files T-465-01, T-888-02, T-889-02, T-650-02, Snider J., March 18, 2005

### Nature of Proceedings

These were four (4) applications for judicial review brought pursuant to paragraph 42(1)(a) of the *Access to Information Act* (the "ATIA").

### Factual Background

The Information Commissioner sought judicial review of the decisions of the Executive Director of the Canadian Transportation Accident Investigation and Safety Board (hereinafter, the "TSB") to refuse to disclose requested records. In addition, the Information Commissioner sought an order declaring that subsection 9(2) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2, infringes paragraph 2(b) of the *Canadian Charter of Rights and Freedom*s.

The records at issue consist of tapes and transcripts of communications between air traffic control and aircraft personnel ("ATC communications") with respect to the provision of aeronautical services in relation to four separate airplane collisions or crashes, namely the Clarenville Occurrence (T-465-01), the Penticton Occurrence (T-650-02), the Fredericton Occurrence (T-888-02), and the St. John's Occurrence (T-889-02). ATC communications are merely an exchange of information related to the provision of aeronautical services.

In each case, TSB maintained the position that ATC communications are personal information within the meaning of subsection 19(1) of the ATIA and that disclosure of the ATC communications is not warranted under subsection19(2) of the ATIA. Nav Canada intervened in these applications to raise and argue third-party exemptions pursuant to paragraphs 20(1)(b) and (d) of the Act. More specifically, Nav Canada argued that the ATC communications either fit the criteria in paragraph 20(1)(b), either as commercial or technical information, or are records the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

### Issues Before the Court

The issues as defined by the court are as follows:

1) Do ATC communications constitute "personal information" as defined in section 3 of the *Privacy Act,* thus preventing disclosure under subsection 19(1) of the ATIA?

2) Did the TSB err in determining that disclosure of the ATC communications was not warranted by subsection 19(2) of the ATIA?

3) Does subsection 20(1) of the ATIA prohibit the disclosure of ATC communications?

4) Can the personal information in the ATC communications reasonably be severed from the remaining information pursuant to section 25 of the ATIA?

5) Does subsection 9(2) of the *Radiocommunication Act* infringe paragraph 2(b) of the Charter and, if so, is such an infringement justified under sectiion1 of the Charter?

**Findings**

1) Do ATC communications constitute "personal information" as defined in section 3 of the *Privacy Act* (*ergo* subsection 19(1) of the ATIA)?

The court first stated that there are three criteria for meeting the definition of personal information: a) the information must be "about" an individual; b) the individual must be identifiable; and c) the information must be recorded.

The court agreed with the Information Commissioner that the records at issue are recordings of transactions and that the information contained therein is almost exclusively technical. It was held that the information "when viewed in context" may be "personal information or information about the individuals", in this case, these individuals are either: i) ground crew / flight specialists and ii) air crew.

The court went on to determine "the nature of the communications" by considering the purpose for which the communications are made or used. She noted that, in the event of an aviation occurrence, ATC communications become very important, i.e. "in the hands of the TSB, these tapes become much more than a "transaction; they are used as part of the TSB investigation". It indicated that the TSB, in the course of an investigation, must examine how individuals involved did their jobs and/or contributed to the occurrence. The court concluded that ATC communications are "about" the individuals involved in that:

> "the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong."

But are these individuals identifiable? The court concluded that, even though names of individuals are not used, these people can be identified by knowing the aircraft, the location and operating initials of the controller and voices. The court concluded:

> "I am persuaded that the individuals involved in the ATC communications are identifiable. Perhaps not with 100% accuracy but sufficiently to meet the requirement of section 3 of the *Privacy Act*."

The Information Commissioner's argument that it is relevant to consider whether an individual has "a reasonable expectation of privacy, when determining whether or not information constitutes personal information", was rejected. In the court's view, "the question of whether someone holds an expectation of privacy may well enter into a subsequent analysis of whether, in spite of information being personal, it should be disclosed pursuant to subsection 19(2) of the ATIA. But, it is not relevant for a determination of whether information is "personal information" as contemplated by section 3."

Further, the court stated that, if there was a requirement that there was a reasonable expectation of privacy, such a reasonable expectation would be found in the circumstances of the case. It held that "the parties to the communications – would not expect strangers to have access to the ATC communications in the manner sought by the Commissioner", even though these individuals would expect ATC communications to be used in the investigation and that the results of the investigation could make reference or include the ATC communications. At paragraph 36, the court wrote: "The information was not obtained by the TSB for the purposes of distributing it to the public at large. . . "

2) Did the TSB err in determining that disclosure of the ATC communications was not warranted by subsection 19(2) of the ATIA?

The court considered whether the information ought to be released pursuant to subsection 19(2) of the ATIA, specifically whether it should be released because it is "publicly available".

The court rejected the Information Commissioner's argument that because parties can intercept or listen to the communications they are publicly available. Why? First, the court rejected the commissioner's argument that listening to ATC communications through scanners is legal. Second, it stated that there was no evidence that these particular ATC communications were heard (except for the Clarenville incident).

Third, it was held that if information is heard one time it does not mean that the information is in the public domain, i.e. "for information to be in the public domain, it must be available on an ongoing basis for use by the "public". "Information that is listened to once is not, without evidence of further ongoing availability, in the public domain or publicly available."

The court further indicated that, "even if I conclude that they were "publicly available" at the time they were made, they are not now available for review in the public domain."

With regard to the Clarenville Occurrence, the court acknowledged that the ATC audio recording and transcript were disclosed twice by the TSB in response to ATIA requests

made by two different journalists. The ATC communications in question were part of a CTV broadcast and were published in a book. It was further acknowledged that the dissemination of the ATC communications with respect to the Clarenville occurrence has been widespread. The Clarenville ATC communications were found to be publicly available.

Nonetheless, the court stated it was reasonable for the TSB to exercise its discretion not to release the information under subsection 19(2) although the information was deemed to be publicly available.

With regard to the fact that the ATC communications in respect of the Penticton Occurrence were before the Supreme Court of B.C. in *Sabourin Estate* v. *Watterodt Estate*, 2004 BCSC 243, and excerpts from the transcript were included in the judgement, the court held that this does not render the information "publicly available", given, *inter alia,* that "it may well be that the audio recording and transcripts themselves are subject to a confidentiality order."

**Paragraph 19(2)(c) of the ATIA?**

The court rejected the commissioner's argument that, because the TSB is authorized to release the information under the TSB Act, paragraph 8(2)(a) authorizes its release under the ATIA. It held that a statutory provision giving a government institution the authorization to disclose information for the purposes of its enabling legislation does not obligate the institution to release the information to the public at large: "neither paragraph 8(2)(a) or (b) is applicable to authorize release of the information in the circumstances before me."

**Sub-paragraph 8(2)(m)(i) of the ATIA?**

The court rejected the Information Commissioner's argument that, pursuant to sub-paragraph 8(2)(m)(i) of the *Privacy Act*, the release is authorized because "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". Result: the TSB took into account a wide range of factors, none of which were irrelevant or extraneous to the statutory purpose, including the availability of the information to persons listening with scanners. The TSB was found to have properly exercised its discretion.

3) <u>Does subsection 20(1) of the ATIA prohibit the disclosure of ATC communications?</u>

Having determined that the ATC communications in issue fit within the definition of "personal information" in subsection 19(1) and that there was no error in the exercise of discretion under subsection 19(2), the court determined that there was no need to consider whether the information was either commercial or technical information warranting exemption under paragraph 20(1)(b) of the ATIA.

4) Can the personal information in the ATC communications reasonably be severed from the remaining information pursuant to section 25 of the ATIA?

The court concluded that all of the ATC communications constituted "personal information" and, therefore, section 25 did not apply so as to require that any information be severed.

5) Does subsection 9(2) of the *Radiocommunication Act* infringe paragraph 2(b) of the Charter and, if so, is such an infringement justified under section 1 of the Charter?

Subsection 9(2) of the *Radiocommunication Act* prohibits the use and/or dissemination of radiocommunication aired on public frequencies, in other words, of information otherwise publicly available. The constitutionality of this section was not ruled upon. The court held that subsection 9(2) was only one of the factors considered by the TSB when it decided to refuse to disclose the requested information and that therefore "the constitutional issue raised is not properly the object of these proceedings."

**Outcome**

The four (4) applications for review were dismissed.

**Action taken/Future Action Contemplated**

The Information Commissioner is appealing from Madam Justice Snider's decision (A-165-05).

***Sheldon Blank v. The Information Commissioner of Canada,*** Court file T-1623-04
Federal Court, O'Reilly, J., March 1, 2005

**Nature of Proceeding**

This was an application by the Information Commissioner to strike the applicant's application for an order in the nature of mandamus on grounds of mootness.

**Factual Background**

The applicant, Sheldon Blank, brought an application for a Mandamus Order in an effort to require the Information Commissioner to issue his report to the applicant pursuant to section 37 of the *Access to Information Act*. The applicant submits that his complaint has not been reported on in a timely manner. The Information Commissioner supplied the applicant with that report on February 15, 2004, rendering the application for mandamus moot, and brought an application to strike on grounds of mootness. The applicant urged the court to hear and decide his application nonetheless.

**Issue Before the Court**

The following issue was raised in the proceeding: Should the court exercise its discretion to hear a matter that has become moot?

**Findings**

Three factors must be considered when determining whether the court ought to exercise its discretion to hear a matter that has become moot: 1) the ongoing adversarial relationship between the parties; 2) the concern for judicial economy; and 3) awareness for the court's role.

With respect to the first criterion, the court concluded that issues remained between the parties in respect of other complaints the applicant made under the Act to the Office of the Information Commissioner, in addition to the commissioner's handling of the underlying complaint in this matter. Further, the parties did not agree on whether a mandamus would ever lie against the commissioner.

However, the second and third criteria militate against deciding this moot application. With respect to the second criterion, the court noted that there must be special circumstances for the court to expend its resources on matters that have become academic, none of which are present in this application. In addition, the court noted that several of the criteria required for mandamus to issue would often fall away in a moot case: for instance, the commissioner's legal duty to act, if any, has dissipated; the order sought could have no practical effect; other remedies under the Act have become available; and the balance of convenience cannot said to lie with the applicant as he has already received the very remedy he originally sought by way of mandamus.

As to the third criterion, the court noted that it should not intrude on the legislative function by ruling on the availability of a remedy in a moot case nor interpret legislative provisions in the absence of a proper factual context. The case would be entirely different if there were a live controversy between the parties.

**Outcome**

The Information Commissioner's motion to strike was allowed.

***The Attorney General of Canada* v. *H.J. Heinz Co. of Canada Ltd. and the Information Commissioner of Canada,*** 2004 FCA 171, A-161-03, Federal Court of Appeal, Desjardins J.A., Nadon J.A., Pelletier J.A., reasons for judgment by Nadon J.A., April 30, 2004

**Nature of Proceedings**

This was an appeal brought by the Attorney General of a decision of the Application Judge which allowed a third party, Heinz, to raise an exemption other than section 20 in the context of a proceeding brought pursuant to section 44 of the *Access to Information Act*. The Information Commissioner sought and obtained intervenor status for the purpose of the hearing of the appeal.

**Factual Background**

On June 16, 2000, a request for information was made to the Canadian Food Inspection Agency (hereinafter "CFIA"). Pursuant to section 27 of the ATIA, CFIA advised the third party, Heinz, of its intention to disclose information requested under the *Access to Information Act* and, after receiving representations from Heinz, informed Heinz of its intention to disclose requested records, subject to certain redactions.

In turn, Heinz applied for judicial review of CFIA's decision to release the requested records pursuant to section 44 of the ATIA. In its Notice of Application, the sole exemption raised by Heinz was the purported application of section 20 of the ATIA. Subsequently, and after obtaining a broad confidentiality order, Heinz made written and oral arguments raising, in addition to section 20, the personal information exemption found at section 19.

The Application Judge concluded that portions of the records intended to be disclosed be redacted based on subsection 20(1) of the Act. However, more notable, is the Application Judge's conclusion that a third party can invoke section 19 as a basis for refusal within the context of a section 44 proceeding. In reaching this conclusion, the Application Judge reasoned that the decision in *Siemens Canada Ltd.* v. *Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575 (F.C.A.) was binding.

**Issues Before the Court**

At issue is whether a third party within the meaning of the *Access to Information Act*, may raise an exemption other than subsection 20(1) within the context of section 44 Application for Judicial Review.

Likewise, at issue is a novel argument raised at the hearing of the appeal, namely that the Federal Court of Appeal is bound by the principle of stare decisis to its previous ruling in *Siemens Canada Ltd.* v. *Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575 (F.C.A.).

**Findings on Each Issue**

The Attorney General argued that only when records fall within the purview of section 20 do the notice provisions of section 27 come into play and that the third party's entitlement to make submissions is limited to why the records intended to be released should not be disclosed based on the section 20 exemption.

Similarly, the Information Commissioner, as intervenor, argued that:

> ". . . sections 20, 27, 28, 29, 25(2)(c) and 44 form a complete code governing the notification and review processes relating to third parties and, consequently, must be read as limiting the availiability of remedies open to the Federal Court under section 51 of the Act." [paragraph 29]

Further, the Information Commissioner submitted that the effect of allowing third parties to raise exemptions other than those found in section 20 would be to circumvent the protection given by the ATIA to the access requester. For example: the requester would be denied *inter alia* the right to request an investigation by the Information Commissioner and/or the right to commence judicial review proceedings under sections 41 and 42.
[paragraph 30]

In turn, Heinz cited as authority the decision in *Siemens Canada Ltd*. v. *Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575 (F.C.A.), arguing that the court was bound by the principle of *stare decisis* to accept that section 44 does not preclude raising exemptions other than section 20 of the ATIA.

In turn, the Attorney General pointed to the Court of Appeal's decision in *Saint John Ship Building Ltd.* v. *Canada* (1990), 107 N.R. 89 and invited the Federal Court of Appeal to reconsider the decision in *Siemens*.

After reviewing the Memoranda of Fact and Law filed in *Siemens,* the Federal Court of Appeal was satisfied that the issue of whether a third party could, on a section 44 application, seek to prevent the disclosure of records on the basis of exemptions other than those contained in subsection 20(1) of the Act was clearly before the court in *Siemens*. [paragraph 52]

The court noted that the ". . . Court has clearly stated that we will not overrule a prior decision unless the decision is manifestly wrong, i.e. that the Court overlooked a relevant statutory provision or a case that ought to have been followed." [paragraph 54]

While the court indicated that it perceived as very appealing and forceful the argument that, in a section 44 application, a third party's right to object to disclosure of records is limited to the records found in subsection 20(1) of the Act, the court concluded that the decision in *Siemens* was decisive of the issue and could not be distinguished from the case at bar. Further, the court held that "it cannot be said that the court's decision in that case [*Siemens*] is "manifestly wrong". [paragraph 56]

**Outcome**

Based on the foregoing, the Court of Appeal dismissed the Attorney General's appeal with costs.

**Action Taken**

The Attorney General of Canada has sought and successfully obtained leave to appeal to the Supreme Court of Canada on December 17, 2004 (SCC file 30417). The Information Commissioner was granted leave to intervene in this appeal.