

**ANNOTATED ACCESS TO
INFORMATION ACT**
(CURRENT AS OF SEPTEMBER 30, 1999)

Information Law and Privacy Section

Justice Canada

FOREWORD

It is our pleasure to provide you with our revised annotation of the *Access to Information Act*, R.S., 1985, c. A-1. We ask you to note that the annotations have been placed in chronological order in most instances, so that you may easily follow the evolution of the caselaw. However, we have also made an effort to group some judicial decisions together, even when they are not in chronological order, where such cases are inter-related or where they are contradictory.

The annotations of the *Access to Information Act* are current as of September 30, 1999. The legislation, including Schedules I and II, is also current as of September 30, 1999.

The annotations are not subject to solicitor-client privilege and may be distributed freely.

Readers are reminded that this administrative consolidation of the *Access to Information Act* has been prepared for convenience of reference only and has no official sanction.

You are encouraged to notify us of any errors or omissions.

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ANNOTATED ACCESS TO INFORMATION ACT

(CURRENT AS OF SEPTEMBER 30, 1999)

An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada

SECTION 1

Short title

1. This Act may be cited as the *Access to Information Act*.

Legislative History: 1980-81-82-83, c.111, Sch. I “1”.

SECTION 2

Purpose

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Legislative History: 1980-81-82-83, c. 111, Sch. I “2”.

JURISPRUDENCE

Principles of the ATIA

Since the basic principle of the statute is to codify the right of public access to government information two things follow: first, that such public access ought not to be frustrated by the Courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether it be a private corporation, citizen or the Government.

Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce), [1984] 1 F.C. 939 (T.D.).

This section provides a right of access pursuant to the following principles:

1. that government information should be available to the public;
2. that necessary exceptions to the right of access should be limited and specific;
3. that decisions of the disclosure of information should be reviewed independently of government;
4. that the Act is intended to complement and not replace existing procedures for access to government information that is normally available to the general public.

Moreover, “the general rule is disclosure, the exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it.” Accordingly, failure on the part of the head of an institution to determine what, if any, material fell within the exception in para. 21(1)(b) constituted improper exercise of discretion in view of the purpose of the Act. As well, failure to engage in the severance examination mandated by s. 25 is a fatal error in law.

Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265 (C.A.).

See also: ATIA ss. 25, 46.

The Court applied the principles enunciated in *Maislin* to determine that the burden of persuasion must rest upon the party resisting disclosure.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 (T.D.).

See also: *Northern Cruiser Co. v. R.* (1991), 47 F.T.R. 192 (F.C.T.D.).

See also: ATIA ss. 4, 20(1)(b), 47.

Scope of section 2

The provisions of s. 2 of the statute are wide enough to permit, perhaps even require, the Court to review the exercise of the discretion involved in exempting the records in question.

Rubin v. Canada (Solicitor General) (1986), 1 F.T.R. 157 (F.C.T.D.).

Wording of request

The requester had sought access to a document called a “Notice of Compliance” regarding products which had been approved by the respondent Department in 1952. However, the form entitled “Notice of Compliance” had not been developed by the Department at that time. The applicant argued that since the form did not exist at that time, the requester was not entitled to any documents. The Court disagreed and held that the head must be entitled to respond on the basis of the words used in the request in the ordinary sense.

Ciba-Geigy Canada Ltd. v. Canada (Minister of National Health and Welfare) (1986), 11 C.P.R. (3d) 981 (F.C.T.D.).

See also: *Horseman v. Canada (Minister of Indian Affairs and Northern Development)*, T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

Purpose of the ATIA

The purpose of the ATIA is to codify the right of access held by the Government. It is not to codify the Government’s right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute.

Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 (T.D.).

The statement which establishes the interpretation of the purpose of the Act in *Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce)*, [1984] 1 F.C. 939 (T.D.) and *Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 63 (T.D.) is equally applicable to the *Privacy Act*.

Davidson v. Canada (Solicitor General), [1987] 3 F.C. 15 (T.D.); aff’d [1989] 2 F.C. 341 (C.A.).

The Act contains a clause setting out the purpose of this legislation. The existence of such a clause is quite rare and therefore significant. It is thus clear from this statement of principles that the purpose of the Act is to give the public greater access to government records. On the other hand, the necessary exceptions to this wide access must be specific and limited, since “decisions on the disclosure of government information should be reviewed”.

Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment), [1987] 1 F.C. 610 (T.D.).

See also: *Noël v. Great Lakes Pilotage Authority Ltd.*, [1988] 2 F.C. 77 (T.D.).

The definition of personal information in s. 3 of the *PA* is set out in two parts: the first sets out what is to be included and the second sets out the exclusions. Where it was argued that the purpose of the exclusion provisions in s. 3 *PA* was to require disclosure of information relating to the dispensing of government privileges or largesse and, hence, that any permit or licence referred to in para. 3(1) should be publicly available, the Court held that such a broad interpretation was not in keeping with the purpose of either the *ATIA* or the *PA*.

Canada (Information Commissioner) v. Canada (Minister of Fisheries and Oceans), [1989] 1 F.C. 66 (T.D.).

See also: *PA* s. 3.

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. While the *Access to Information Act* recognizes a broad right of access to any record under the control of the government, the overarching purposes of the Act must be considered in determining whether an exemption to that general right should be granted.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

All exemptions must be interpreted in light of the subs. 2(1) of the *ATIA* purpose clause. Where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes the least on the public's right to access.

Rubin v. Canada (Minister of Transport) (1997), 221 N.R. 145 (F.C.A.).

When Parliament explicitly sets forth the purpose of an enactment, it is intended to assist the Court in the interpretation of the Act. The *ATIA* must be guided by the subs. 2(1) purposive clause which is to provide greater access to government records. Since subs. 4(1) confers a general right of access, exemptions must be specific and limited.

Canada (Information Commissioner) v. Canada (Immigration and Refugee Board) (1997), 140 F.T.R. 140 (F.C.T.D.).

See also: *ATIA* s. 16(1)(c). *PA* s. 22(1)(b).

Spirit of section 2

The respondent was acting within the spirit of s. 2 of the Act in making available to the requesters not just the specific document requested, notably a contract, but ancillary

documentation or information, such as indices, tables of contents and lists of schedules which relate to the contract but which were not in existence at the time of the contract. Ancillary documentation would facilitate the ability to understand the government information requested.

Saint John Shipbuilding Limited v. Canada (Minister of Supply and Services) (1988), 24 F.T.R. 32 (F.C.T.D.); aff'd (1990), 67 D.L.R. (4th) 315 (F.C.A.). Although this decision was appealed, this issue was not dealt with by the appellate court: *Saint John Shipbuilding Limited v. Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4th) 315; 107 N.R. 89 (F.C.A.).

Governments records

The plain meaning of subs. 2(1) and 4(1) gives access, subject to many exceptions, to any record, or information in a record, which happens to be within the custody of the Government, regardless of the means by which that custody was obtained.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

Government information

The terms upon which the Government contracts to spend public funds is “government information” which according to subs. 2(1) should be available to the public and any exception to that right must be “limited and specific”.

Northern Cruiser Co. v. R. (1991), 47 F.T.R. 192 (F.C.T.D.).

Guide to the interpretation of the Act

Subsection 2(1) which sets forth the purpose of the Act is not merely descriptive. It provides a guide to the interpretation of the operative provisions of the Act. When Parliament has been explicit in setting forth the purpose of an enactment and principles to be applied in construing it, such purpose and principles must form the foundation on which to interpret the operative provisions of the Act.

Canada (Information Commissioner) v. Canada (Prime Minister), [1993] 1 F.C. 427 (T.D.).

“Government information” vs “control of information”

Nothing in the *ATIA* suggests that it is only information pertaining to the Government and the workings of Government that is government information for the purposes of the *ATIA*. Subsection 2(1) suggests that government information means all information in records under the control of a government institution. The focus should not be on “government information”, but

on “control”. The scheme of the Act does not support the proposition that third party information in the possession of a government institution acting as agent for the third party is not subject to the Act.

Canada Post Corp. v. Canada (Minister of Public Works), [1993] 3 F.C. 320 (T.D.); aff’d [1995] 2 F.C. 110 (C.A.) (see below).

It appears from a combined reading of s. 4 and s. 2 that the information that the Government has under its control falls into the category of “government information”. It also appears clear from these two provisions that Parliament intended the Act to apply liberally and broadly with the citizen’s right of access to such information being denied only in limited and specific exceptions. It is also very significant in this respect that subs. 4(1) contains a “notwithstanding clause” which gives the Act an overriding status with respect to any other Act of Parliament.

Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 (C.A.).

To note: See *Dagg v. Canada (Minister of Finance)* (below) regarding the issue of paramountcy.

Non-relevant information

The government institution is only obliged to search for records relevant to the request and likewise is only obliged to disclose relevant information.

Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.).

To note: Compare with *X v. Canada (Minister of National Defence)* (see below).

The fact that information is not directly related to an access request is not a basis for exemption under the Act.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.).

Right of access is not absolute

It will be seen from the provisions of subs. 2(1) and 4(1) that although the Act creates a right of access, the right is not absolute. It must be examined in the light of other provisions of the Act and the exemptions contained therein.

Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391 (T.D.); rev’d [1994] 2 F.C. 707 (C.A.).

To note: The decision of the Federal Court of Appeal was affirmed by the Supreme Court of Canada in [1996] 1 S.C.R. 6.

Recourse cannot be made to subs. 2(1) *ATIA* for documents which are excluded from the Act under s. 69 *ATIA*.

Gogolek v. Canada (Attorney General), [1996] F.C.J. No. 154 (QL) (F.C.T.D.), T-2491-94, decision dated February 7, 1996.

No paramouncy of the *Access to Information Act* over the *Privacy Act* or vice versa

Both statutes regulate the disclosure of personal information to third parties. Section 4(1) of the *Access to Information Act* states that the right to government information is “subject to this Act”. Section 19(1) of the Act prohibits the disclosure of a record that contains personal information “as defined in s. 3 of the *Privacy Act*”. Section 8 of the *Privacy Act* contains a parallel prohibition, forbidding the non-consensual release of personal information except in certain specified circumstances. Personal information is thus specifically exempted from the general rule of disclosure. Both statutes recognize that, in so far as it is encompassed by the definition of “personal information” in s. 3 of the *Privacy Act*, privacy is paramount over access.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

SECTION 3

Definitions

3. In this Act,

“alternative format” «*support de...*»

“alternative format”, with respect to a record, means a format that allows a person with a sensory disability to read or listen to that record;

“Court” «*Cour*»

“Court” means the Federal Court—Trial Division;

“designated Minister” «*ministre...*»

“designated Minister”, in relation to any provision of this Act, means such member of the Queen’s Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of that provision;

“foreign state” «*État...*»

“foreign state” means any state other than Canada;

“government institution” «*institution*»

“government institution” means any department or ministry of state of the Government of Canada listed in Schedule I or any body or office listed in Schedule I;

“head” «*responsable...*»

“head”, in respect of a government institution, means

- (a) in the case of a department or ministry of state, the member of the Queen’s Privy Council for Canada presiding over that institution, or
- (b) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

“Information Commissioner” «*Commissaire...*»

“Information Commissioner” means the Commissioner appointed under section 54;

“record” «*document*»

“record” includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

“sensory disability” «*déficience sensorielle*»

“sensory disability” means a disability that relates to sight or hearing;

“third party” «*tiers*»

“third party”, in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

Legislative History: R.S., 1985, c. A-1, s. 3; 1992, c. 21, s. 1.

JURISPRUDENCE

Head of a government institution

It is the institution head who must decide whether to disclose the record. In s. 3 the “head” is specifically and expressly defined as the Minister in the case of a department. Section 73 gives the Minister the power to delegate “by order”. The Minister of Environment Canada had not delegated any powers to the Regional Director when he made his decision. His decision was therefore set aside.

Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment), [1987] 1 F.C. 610 (T.D.).

“Third party” / Canada Post Corporation

Canada Post Corporation (CPC) is not listed in Schedule I to the Act. Therefore, the records under its control are not subject to disclosure under the Act. In this sense, it is in a position analogous to any private citizen or corporation in so far as the Act is concerned. Since CPC was neither the person that made the request nor a government institution, it was clearly a third party.

Canada Post Corp. v. Canada (Minister of Public Works), [1993] 3 F.C. 320 (T.D.); aff'd [1995] 2 F.C. 110 (C.A.).

SECTION 4

Right to access to records

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who

(a) is a Canadian citizen, or

(b) a permanent resident within the meaning of the Immigration Act,

has a right to and shall, on request, be given access to any record under the control of a government institution.

Extension of right by order

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

Records produced from machine readable records

(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

Legislative History: R.S., 1985, c. A-1, s. 4; 1992, c. 1, s. 144(F).

JURISPRUDENCE

Wording of request

The requester had sought access to a document called a “Notice of Compliance” regarding products which had been approved by the respondent Department in 1952. However, the form entitled “Notice of Compliance” had not been developed by the Department at that time. The applicant argued that since the form did not exist at that time, the requester was not entitled to any documents. The Court disagreed and held that the head must be entitled to respond on the basis of the words used in the request in the ordinary sense.

Ciba-Geigy Canada Ltd. v. Canada (Minister of National Health and Welfare) (1986), 11 C.P.R. (3d) 981 (F.C.T.D.).

See also: *Horseman v. Canada (Minister of Indian Affairs and Northern Development)*, T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

Interpretation of the purpose of the legislation

The specific language of s. 4 reinforces the interpretation of the purpose of the legislation as enunciated in *Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce)*, [1984] 1 F.C. 939 (T.D.).

Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 (T.D.).

Prevalence of the right to access

Section 4 of the Act creates a right to access which prevails over any other Act of Parliament. The notwithstanding provision clearly overrides any provision of the *Immigration Act, 1976* which might restrict disclosure of Immigration Appeal Board records as a result of decisions by the Board to hold *in camera* hearings or to seal its files.

Canada (Information Commissioner) v. Canada (Immigration Appeal Board), [1988] 3 F.C. 477 (T.D.).

Access to information request by an organization

An objection was raised that an organization identified as an applicant on the access application form did not meet either of the two criteria of s. 4. It appears however that the application was signed by an individual, that legal action was taken in his name and that two preliminary conferences were concluded by two orders on which his name was given as the applicant. The objection could not be sustained.

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 (T.D.).

To note: This case was decided before the enactment of an extension order which extended the right of access to all individuals and corporations present in Canada.

See: *ATIA Extension Order, No. 1*, SOR/89-206.

Proof of necessary status to evoke the right to access

The third party has the vested right to ensure that the head of a government institution denies the requested records until the head can prove that the requester is qualified to be given access. Those who object to the disclosure of information are entitled to cross-examine Government officials to ensure that a person who seeks to evoke the right conferred by subs. 4(1) has the necessary status.

Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1990] 1 F.C. 652 (T.D.); aff'd (1990), 113 N.R. 399 (F.C.A.).

Proof that requester is qualified under the Act

It is the responsibility of the government institution to ensure that requesters meet the qualifications set out in the Act.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

Neither the Act nor the Regulations stipulates the nature or sufficiency of the proof that must be submitted in order to show a requester's qualifications. However, the proof should be such as would reasonably satisfy the respondent that the requester is qualified under the Act.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

Meaning of "under the control"

Any record in the possession of a government institution is "under its control" within the meaning of subs. 4(1) because it is within the institution's power to produce. The records submitted to the Department by an Indian Band in order for the Band to comply with various regulatory and statutory "Government" requirements should be considered to be "government information". Thus, copies of their financial statements submitted to the Department are under government control and could be made the subject of an access to information request.

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (T.D.).

See also: *Horseman v. Canada (Minister of Indian Affairs and Northern Development)*, T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

The plain meaning of subs. 2(1) and 4(1) gives access, subject to many exceptions, to any record, or information in a record, which happens to be within the custody of the Government, regardless of the means by which that custody was obtained.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

The issue is whether information of a commercial nature concerning a third party, but in the custody or possession of a government institution acting as agent for the third party, is within the control of the government institution and is therefore subject to disclosure.

The scheme is that all information in the hands of the Government is subject to the Act except information expressly excluded. The manner in which information comes into the possession of a government institution is not a consideration in deciding whether or not the information is subject to disclosure under the Act. The fact that a government institution has possession of

records, whether in a legal or corporeal sense, is sufficient for such records to be subject to the Act.

Canada Post Corp. v. Canada (Minister of Public Works), [1993] 3 F.C. 320 (T.D.); aff'd [1995] 2 F.C. 110 (C.A.) (see below).

It is the duty of the courts to give subs. 4(1) a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature. It is not in the power of the Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning.

It appears from a combined reading of s. 4 and s. 2 that the information that the Government had under its control fell into the category of "government information". It also appears clear from these two provisions that Parliament intended the Act to apply liberally and broadly with the citizen's right of access to such information being denied only in limited and specific exceptions. It is also very significant in this respect that subs. 4(1) contains a "notwithstanding clause" which gives the Act an overriding status with respect to any other Act of Parliament.

Canada Post Corp. v. Canada (Minister of Public Works) [1995] 2 F.C. 110 (C.A.).

The simple material possession of records by the defendant brought those records under the control of the defendant. The Court relied on *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.).

Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance), [1998] F.C.J. No. 1745 (QL) (F.C.T.D.), T-912-98, order dated November 20, 1998.

See also: ATIA ss. 23, 44, 48.

Right of access is not absolute

Although the Act creates a right of access under subss. 2(1) and 4(1), the right is not absolute. It must be examined in the light of other provisions of the Act and the exemptions therein contained.

Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391 (T.D.); rev'd [1994] 2 F.C. 707 (C.A.).

To note: The decision of the Federal Court of Appeal was affirmed by the Supreme Court of Canada in [1996] 1 S.C.R. 6.

Specificity in requests

There must be a degree of specificity in request for documents, but only to the extent that the document or record requested is reasonably identifiable. The Band Membership Rules were adequately described and identifiable as such.

Horseman v. Canada (Minister of Indian Affairs and Northern Development), T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

Burden on party invoking exemptions

In a third party application the party opposing disclosure bears the burden of showing that clear grounds exist to justify exempting the documents in issue from disclosure to the requester.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: *ATIA* ss. 17, 20(1)(a), 20(1)(b), 20(1)(c), 44, 68.

No right to particular format

Under the *ATIA*, a person may seek access to information, but he has no right to dictate that the information be provided to him in a particular format.

Tolmie v. Canada (Attorney General), [1997] 3 F.C. 893 (T.D.).

See also: *ATIA* ss. 12, 41, 68.

Access to original document refused

The decision, under para. 8(2)(a) of the *ATIA Regulations*, to refuse access to the original record does not depend upon the extent of information severed from a record. That decision depends upon judgment exercised in discretion of or on behalf of the head of the institution concerned. Unless that decision is unreasonable, the Court will not intervene.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: *ATIA* ss. 20(1)(b), (c), (d), 49. *ATIA Regulation* s. 8(2)(a).

Purpose of request irrelevant

Although the circumstances of a request for access may influence how the Department head exercises his or her discretion, the particular purpose for which a requester seeks information has no relevance to whether there is any special entitlement to the information.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

See also: *ATIA* ss. 23, 25.

Intent of complainant irrelevant

Arguments to the effect that the complaint was frivolous, vexatious and filed for illicit purposes were rejected. The Act does not speak of screening complaints in light of the intent or purposes of a complainant. Any person whose request for government information is not met, or is not met in a reasonable time, may file a complaint with the Commissioner who then has a duty to investigate the complaint.

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: *ATIA* ss. 34, 37, 63.

Paragraph 4(1)(a)

Refusal to adjourn motion *sine die*

After noting that a Canadian citizen has a right of access to records under the control of a government institution under para. 4(1)(a) *ATIA*, the Court refused to adjourn a motion for direction *sine die* or for a minimum of six months. The Court also noted the Associate Chief Justice's rules of practice in refusing the application.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1996] 116 F.T.R. 131 (F.C.T.D.).

SECTION 5

Publication on government institutions

5. (1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

(c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

(d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

Bulletin

(2) The designated Minister shall cause to be published, at least twice each year, a bulletin to bring the material contained in the publication published under subsection (1) up to date and to provide to the public other useful information relating to the operation of this Act.

Descriptions in publication and bulletins

(3) Any description that is required to be included in the publication or bulletins published under subsection (1) or (2) may be formulated in such a manner that the description does not itself constitute information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act.

Publication and bulletin to be made available

(4) The designated Minister shall cause the publication referred to in subsection (1) and the bulletin referred to in subsection (2) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access thereto.

Legislative History: 1980-81-82-83, c. 111, Sch. I “5”.

SECTION 6

Request for access to record

6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

Legislative History: 1980-81-82-83, c. 111, Sch. I “6”.

JURISPRUDENCE

Specificity in requests

The degree of specificity of a request must be such that the document or record is reasonably identifiable.

Horseman v. Canada (Minister of Indian Affairs and Northern Development), T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

See also: ATIA ss. 4, 20(1), 28, 44.

Adequate search

The Court found, on the basis of the affidavit submitted by the respondent, that an adequate search of the Department’s records had been conducted.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: ATIA ss. 10, 15, 49, 50.

SECTION 7

Notice where access requested

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

Legislative History: 1980-81-82-83, c. 111, Sch. I “7”.

JURISPRUDENCE

Content of notice of refusal

Sections 7 and 10 require that an institution which refuses access give a written notice to the requester of all the provisions of the Act relied upon in refusing the request. There is no indication that relevant section numbers must be linked to specific deletions and certainly nothing requiring that they be written directly on the released document. However, the practice of indicating the exemption within the body of the documents disclosed is commendable and should continue where there is no danger of revealing the substance of protected information.

Vienneau v. Canada (Solicitor General), [1988] 3 F.C. 336 (T.D.).

Late notices not affecting decisions to release / “Shall” directory only

The appellant argued that the respondent’s failure to give the notices provided for under para. 7(a) and subss. 9(1), 27(1), (4) and 28(1) within the statutory time limits rendered the decisions to release of no legal effect. The Court rejected that argument. The word “shall” in those provisions is directory only, not mandatory. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give notice. To interpret the notice provisions as mandatory would result in a denial of the release of the information to the requesters. In addition, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they did not object to receiving late notices.

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: ATIA ss. 9, 27, 28.

SECTION 8

Transfer of request

8. (1) Where a government institution receives a request for access to a record under this Act and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, subject to such conditions as may be prescribed by regulation, within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

Deeming provision

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

Meaning of greater interest

(3) For the purpose of subsection (1), a government institution has a greater interest in a record if

- (a)** the record was originally produced in or for the institution; or
- (b)** in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.

Legislative History: 1980-81-82-83, c. 111, Sch. I “8”.

SECTION 9

Extension of time limits

9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

- (a)** the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
- (b)** consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
- (c)** notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Legislative History: 1980-81-82-83, c. 111, Sch. I “9”.

JURISPRUDENCE

Review of extension of time limits

On a preliminary motion, the Court held that if a refusal to disclose is a prerequisite for the Court to exercise jurisdiction under s. 42 of the Act, then the Court is required to decide whether there has been a refusal in each case.

Where the application is based on an allegedly unauthorized extension under s. 9, that inquiry consists of determining whether the extension was properly taken under s. 9 or whether it amounts to a deemed refusal pursuant to subs. 10(3). The Court must therefore be able to review the extension of time itself and the reasons given even where the material requested had already been released.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1989] 1 F.C. 3 (T.D.).

See also: ATIA ss. 10, 49.

The Court accepted jurisdiction to make a series of declarations as to the shortcomings of the respondent Department in its administration of the Act and concluded that a 120-day time extension was not justified under subs. 9(1).

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 514 (T.D.).

See also: ATIA s. 10.

To note: See below for a different approach taken by the Court.

No review of extension of time limits / Disclosure within extension of time limits

The Federal Court does not have a mandate to review the decision by the head of an institution under subs. 9(1) to extend the time limit for responding to a request for access to a record. The Court can entertain an application by a private party only under s. 41, and then only when access has been refused.

Furthermore, in this case, it was clear by subs. 9(1) that an extension of time for a response by the head of an institution was not a refusal of access because access was given before the extended time period had expired.

X v. Canada (Minister of National Defence), [1991] 1 F.C. 670 (T.D.).

See also: *ATIA* ss. 10, 49.

Failure to give access within time limits / Deemed refusal followed by delayed performance

The applicant was informed by the Department that an extension of the statutory time limit would be necessary, pursuant to para. 9(1)(b). He received the requested records after the expiration of the extension. He sought an order from the Court directing the respondent to provide in writing a detailed explanation as to why his Department failed to respond within the time limits set out in the Act and what remedies would be undertaken by the Department so as to try to prevent the repetition of such a situation in the future.

The Court stated that it will not countenance dilatoriness on the part of any government institution but rejected the application on the basis that no actual refusal remained to be addressed. Although there was a deemed refusal pursuant to subs. 10(3), it was followed by performance, albeit delayed performance.

X v. Canada (Minister of National Defence), T-1112-89, decision dated June 15, 1990, F.C.T.D., not reported.

See also: *ATIA* ss. 10, 49.

Failure to give access within time limits / Deemed refusal tantamount to actual refusal / Impact on right to raise exemptions

Complaints were initiated by the requester and the Information Commissioner following the respondent institution's failure to meet the extensions of time for the production of the documents. Further non-compliance by the institution resulted in the Commissioner applying for judicial review under para. 42(1)(a) of the *ATIA*.

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial. The Court stated that the failure to disclose a record within the time limits prescribed by the Act constituted a deemed refusal which placed the parties in the same position as if there had been refusal under s. 7 and subs. 10(1) *ATIA*.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In

the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'g in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: ATIA ss. 30, 35, 36, 37, 41, 42.

Late notices not affecting decisions to release / "Shall" directory only

The appellant argued that the respondent's failure to give the notices provided for under para. 7(a) and subss. 9(1), 27(1), (4) and 28(1) within the statutory time limits rendered the decisions to release of no legal effect. The Court rejected that argument. The word "shall" in those provisions is directory only, not mandatory. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give notice. To interpret the notice provisions as mandatory would result in a denial of the release of the information to the requesters. In addition, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they did not object to receiving late notices.

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: ATIA ss. 7, 27, 28.

See also annotations under s. 10 ATIA.

SECTION 10

Where access is refused

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Legislative History: 1980-81-82-83, c. 111, Sch. I “10”.

JURISPRUDENCE

Content of notice of refusal

Sections 7 and 10 require that an institution which refuses access give a written notice to the requester of all the provisions of the Act relied upon in refusing the request. The relevant section numbers are to be provided in the letter of notice. There is no indication that relevant section numbers must be linked to specific deletions and certainly nothing requiring that they be written directly on the released document.

However, the practice of indicating the exemption within the body of the documents disclosed is commendable and should continue where there is no danger of revealing the substance of protected information.

Vienneau v. Canada (Solicitor General), [1988] 3 F.C. 336 (T.D.).

The notice by which the head of a government institution refuses to communicate some of the requested records meets the requirements of this provision if it refers to the provisions on which the various exemptions are claimed.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: *ATIA* ss. 6, 15, 49, 50; *PA* s. 16(1).

Review of extension of time limits to determine if there is a deemed refusal

On a preliminary motion, the Court held that if a refusal to disclose is a prerequisite for a Court to exercise jurisdiction under s. 42 of the Act, then the Court is required to decide whether there has been a refusal in each case.

Where the application is based on an allegedly unauthorized extension under s. 9, that enquiry consists of determining whether the extension was properly taken or whether it amounted to a deemed refusal. The Court concluded that it must be able to review the extension of time itself and the reasons given even where the material requested had already been released.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1989] 1 F.C. 3 (T.D.).

See also: *ATIA* ss. 9, 49.

Review of extension of time limits / Unjustified extensions / Deemed refusals to give access

At the hearing of the application, the respondent conceded that the extensions of time limits were unjustified. The Court reviewed the matter, concluded that the unjustified extensions amounted to deemed refusals to disclose the requested records pursuant to subs. 10(3) of the Act and granted the declaratory relief sought by the Information Commissioner.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 514 (T.D.).

See also: *ATIA* s. 9.

No review of extension of time limits / No deemed refusal to give access / Disclosure within extension of time limits

The Federal Court can entertain an application by a private party only under s. 41, and then only when access has been refused. There had been an extension of time limits as allowed by subs. 9(1). There had been neither refusal of access nor deemed refusal of access under subs. 10(3). Access was given within the extended time limits.

X v. Canada (Minister of National Defence), [1991] 1 F.C. 670 (T.D.).

See also: *ATIA* ss. 9, 49.

Failure to give access within the time limits / Deemed refusal followed by delayed performance

The applicant was informed by the Department that an extension of the statutory time limit would be necessary, pursuant to para. 9(1)(b). He received the requested records after the expiration of the extension. He sought an order from the Court directing the respondent to provide in writing a detailed explanation as to why the Department failed to respond within the time limits set out in the Act and what remedies would be undertaken by his Department so as to try to prevent the repetition of such a situation in the future.

The Court stated that it will not countenance dilatoriness on the part of any government institution but rejected the application on the basis that no actual refusal remained to be addressed. Although there was a deemed refusal pursuant to subs. 10(3), it was followed by performance, albeit delayed performance.

X v. Canada (Minister of National Defence), T-1112-89, decision dated June 15, 1990, F.C.T.D., not reported.

See also: *ATIA* ss. 9, 49.

Failure to give access within time limits / Deemed refusal tantamount to actual refusal / Impact on right to use exemptions

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial.

It explained the procedure to be followed by the Commissioner where a federal institution fails to disclose a record within the time limit prescribed by the Act. In these cases, under the terms of subs. 10(3), there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of s. 7 and subs. 10(1) *ATIA*. The Commissioner may then initiate a complaint and notify the head of the institution. He then conducts the investigation in the course of which the institution is given a reasonable opportunity to make representations and for the purposes of which the Commissioner has the powers prescribed by ss. 36 and 37. The Commissioner's powers are such that he may, at the beginning of the investigation, compel the institution to explain the reasons for its refusal.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'd in part (1996), 120 F.T.R. 207 (F.C.T.D.) (see below).

See also: *ATIA* ss. 30, 35, 36, 37, 41, 42.

In the given circumstances, there was not a deemed refusal on the part of the institution but rather a final release of information which was late. A late release of requested information does not remove the institution's right to invoke exemptions and exclusions as foreseen by the Act, as long as the Information Commissioner retains the opportunity to review the appropriateness of the exemptions and exclusions and to receive the institution's comments.

Canada (Information Commissioner) v. Canada (Minister of National Defence) (1996), 120 F.T.R. 207 (F.C.T.D.).

Meaning of “specific provision of this Act”

The term “specific provision of the Act” means that there must be a reference to the reason for refusal in the notice. In the context of s. 15, the head of the institution need only indicate that access is refused because disclosure would be injurious to (a) the conduct of international affairs, (b) the defence of Canada or any state allied or associated with Canada, or (c) the detection, prevention or suppression of subversive or hostile activities. There is no need to refer to the descriptive paragraphs of subs. 15(1) which are illustrative only.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1990] 3 F.C. 22 (T.D.).

See also: *ATIA* ss. 15, 50.

See also annotations under s. 16 PA.

SECTION 11

11. (1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

- (a) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation;
- (b) before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and
- (c) before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced.

Additional payment

(2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

Where a record is produced from a machine readable record

(3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

Deposit

(4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

Notice

(5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

(a) give written notice to the person of the amount required; and

(b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

Waiver

(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

Legislative History: R.S.,1985, c. A-1, s. 11; 1992, c. 21, s. 2.

JURISPRUDENCE

Enforcement of the application fee

The regulations for an application fee are expected to be enforced in a uniform and consistent manner. However, the enforcement of the application fee is a matter which must be left to each department. According to the Court, requests which are not accompanied by the requisite \$5.00 are not applications within the terms of the statute and therefore not the subject of a refusal which can be adjudicated upon by the Court.

Rubin v. Canada (Minister of Employment and Immigration), [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85, decision dated October 4, 1985.

Improper use of fees reviewable

The improper use of fees may be considered as a “constructive refusal of access” which could be reviewed under s. 41.

Rubin v. Canada (Minister of Finance) (1987), 9 F.T.R. 317 (F.C.T.D.).

See also: ATIA s. 41.

Deposit required

Where the head of an institution requests a deposit amounting to fifty per cent of the total chargeable fees before proceeding further with the access request, the Court held that such deposit was reasonable given the magnitude of the necessary searches.

Rubin v. Canada (Minister of Finance) (1987), 9 F.T.R. 317 (F.C.T.D.).

See also: *ATIA* s. 41.

Decision to release reversible

A decision under the *ATIA* to release documents to a party may be revised prior to their actual release. It is not irreversible and does not constitute a waiver that may be used to force the release of documents that are properly protected from disclosure.

Wells v. Canada (Minister of Transport) (1995), 63 C.P.R. (3d) 201 (F.C.T.D.).

Third party can pursue judicial review even though formal request never filed

Even though the requester never filed a formal request under the *ATIA* (since its letter never mentioned the *ATIA*, a formal access request form was never used and the administrative fees were never paid), the prothonotary held that the third party could pursue an application for judicial review under s. 44 *ATIA*. He considered the process followed by the government institution after its receipt of the request for information and the fact that the Department's enabling statute did not provide any other means of disclosing information.

Hydro-Quebec v. Canada (National Energy Board) (1997), 133 F.T.R. 34 (F.C.T.D.).

To note: Compare with *Rubin v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85, decision dated October 4, 1985 (see above).

SECTION 12

Access to record

12. (1) A person who is given access to a record or a part thereof under this Act shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof.

Language of access

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

Access to record in alternative format

(3) Where access to a record or part thereof is to be given under this Act and the person to whom access is to be given has a sensory disability and requests that access

be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format

- (a) forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or
- (b) a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the person's right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.

Legislative History: R.S., 1985, c. A-1, s. 12; R.S., 1985, c. 31 (4th Supp), s. 100(E); 1992, c. 21, s. 3.

JURISPRUDENCE

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Hydro-Quebec v. Canada (National Energy Board) (1997), 133 F.T.R. 34 (F.C.T.D.).

To note: Compare with *Rubin v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85, decision dated October 4, 1985.

No right to particular format

Under the *ATIA*, a person may seek access to information, but he has no right to dictate that the information be provided to him in a particular format.

Tolmie v. Canada (Attorney General), [1997] 3 F.C. 893 (T.D.).

See also: *ATIA* 4, 41, 68.

Subsection 12(1)

***ATIA* Extension Order**

A third party has a vested right to have its information withheld from unqualified requesters, unless and until the head of the institution provides evidence which proves that the requester is qualified to be given access and which may be tested by cross-examination by the applicant third party.

Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1990] 1 F.C. 652 (T.D.); aff'd (1990), 113 N.R. 399 (F.C.A.).

See also: *ATIA* s. 4.

Decision to release reversible

A decision under the *ATIA* to release documents to a party may be revised prior to their actual release. It is not irreversible and does not constitute a waiver that may be used to force the release of documents that are properly protected from disclosure.

Wells v. Canada (Minister of Transport) (1995), 63 C.P.R. (3d) 201 (F.C.T.D.).

SECTION 13

Information obtained in confidence

13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

- (a) the government of a foreign state or an institution thereof;
- (b) an international organization of states or an institution thereof;
- (c) the government of a province or an institution thereof; or
- (d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

- (a) consents to the disclosure; or
- (b) makes the information public.

Legislative History: 1980-81-82-83, c. 111, Sch. I "13".

JURISPRUDENCE

Responsibility of head

Under subs. 13(1), the head of a government institution must simply determine whether information was obtained in confidence and, if so, must refuse to disclose the records unless the material is determined, under subs. 13(2), to be no longer confidential.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.).

Indian Band Councils not “government” / Section 15 *Canadian Charter of Rights and Freedoms*

Section 13 cannot be interpreted so as to include Indian Band Councils. The applicant had argued that band councils administer authority and powers delegated by the *Indian Act* which are similar to, if not greater than, those of a municipal government. The applicant had also argued that the First Nation to which he belonged had a right under s. 15 of the *Charter* to equality before and under the law and equal protection and benefit of the law without discrimination based on race or ethnic origin.

The Court held that the terms “band council” may not be read into the language of s. 13 *ATIA* as para. 13(1)(d) clearly defines what constitutes a municipality for the purpose of non-disclosure of information. (See full text of decision for analysis of s. 15 of the *Canadian Charter of Rights and Freedoms*.)

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs) (1996), 116 F.T.R. 37; 41 Admin. L.R. (2d) 232 (F.C.T.D.); aff’d [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999 (see below).

The Court of Appeal dismissed the appellants’ appeal against the decision of DIAND to disclose information submitted to the latter by their respective First Nations. The Court ruled that (1) the s. 15 *Charter* protection applies to individuals, not governments; (2) more evidence needed to be adduced to show that an Indian band is a government of the same nature as those referred to in s. 13; (3) there was no evidence that the exclusion of Indian bands in s. 13 was related to the subs. 15(1) *Charter* grounds of discrimination, particularly race or ethnic origin.

The Court further ruled that this was not a case where fiduciary obligations arose. The case concerns whether certain information should be disclosed under the *ATIA*. In that regard, the government is acting pursuant to a public law duty.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs), [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999.

See also: *ATIA* s. 20(1)(b).

The applicant, an Indian Band, had argued that s. 13 *ATIA* ought to be interpreted to include Indian Band Councils, or equal protection for Band Council governments ought to be read into the section. The Court held that the applicant’s submission had to fail as the information had not been obtained by the respondent Department in confidence. The Court also held that because of its finding regarding s. 13 *ATIA*, there was no need to address the applicant’s argument that the Band’s rights under s. 15 of the *Canadian Charter of Rights and Freedoms* had been violated. However, in *obiter*, the Court stated that the applicant could not have succeeded with such an argument. The Court declared: “If the applicant is claiming to be a government within the meaning of para. 13(1)(d) of the Act, then it cannot claim likewise, the protection of s. 15 of the *Charter*, protection which is afforded to individuals, not governments.”

Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997), 132 F.T.R. 106 (F.C.T.D.); aff'd [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999 (see below).

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The Court further ruled that this was not a case where fiduciary obligations arose. The case concerns whether certain information should be disclosed under the *ATIA*. In that regard, the government is acting pursuant to a public law duty.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs), [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999.

See also: *ATIA* s. 20(1)(b).

See also: *ATIA* ss. 2, 4, 15, 19, 50, 52; *PA* s. 19.

Role of Court

The Court must determine whether the information was received in confidence and must be satisfied that it was so stipulated. It must also be satisfied that consent to the release of that information had been denied.

Hoogers v. Canada (Minister of Communications) (1998), 83 C.P.R. (3d) 380 (F.C.T.D.).

See also: *ATIA* 16(1)(c), 19, 49, 50.

See also annotations under s. 19 PA.

Subsection 13(2)

“May” means “may”

Subsection 13(2) does not require the release of records containing information which has been made public. Subsection 13(2) merely permits the government to release such documents as a limited exception to the general rule against disclosure. In the general structure of the scheme however, if those documents are not to be released, the head of the government institution must be able to give reasons justifying the decision not to release.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.).

To note: The Court of Appeal decision annotated under para. 15(1)(h).

SECTION 14

Federal-provincial affairs

14. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information

(a) on federal-provincial consultations or deliberations; or

(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

Legislative History: 1980-81-82-83, c. 111, Sch. I “14”.

JURISPRUDENCE

Reasonable expectation of harm / Information already public

Section 14 of the Act, under which the exception was claimed, uses the words “could reasonably be expected to”. The Court was bound by the decision *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.), in which the Federal Court of Appeal interpreted those words, as used in para. 20(1)(c), as meaning that the exception to access must be based on a “reasonable expectation of probable harm”.

The decision to be made under s. 14 is confined to the formulation of an opinion as to whether or not disclosure of information could reasonably be expected to be injurious. Section 14 does nothing other than empower the making of a decision that documents which fall into a category are exempt from the general rule of disclosure and permits confidentiality if they do.

Consideration of the press’ handling of information may be relevant to an assessment of probable injury. The jurisprudence indicates that once information is public from another source the release of the same information by the Government will be less likely to cause harm. The Government would have to show specific reasons why its release of the same information would cause harm. An expectation, not based on all available and relevant information, is not the reasonable expectation called for by s. 14.

As stated by the Court in *Ternette v. Canada (Solicitor General)*, [1992] 2 F.C. 75 (T.D.), in order to make it possible for the Court to review without difficulty the basis upon which the decision had been made to refuse access or release to the applicant, a desirable procedure is to set out on each page for which exemption from disclosure is sought, the specific injurious effect the release of that page would be likely to cause.

Canada (Information Commissioner) v. Canada (Prime Minister), [1993] 1 F.C. 427 (T.D.).

See also annotations under s. 20 PA.

SECTION 15

International affairs and defence

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

(d) obtained or prepared for the purpose of intelligence relating to

(i) the defence of Canada or any state allied or associated with Canada, or

(ii) the detection, prevention or suppression of subversive or hostile activities;

(e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

(f) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;

(g) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

(i) relating to the communications or cryptographic systems of Canada or foreign states used

(l) for the conduct of international affairs,

(ii) for the defence of Canada or any state allied or associated with Canada, or

(ii) in relation to the detection, prevention or suppression of subversive or hostile activities.

Definitions

(2) In this section,

“defence of Canada or any state allied or associated with Canada” «*défense...*»

“defence of Canada or any state allied or associated with Canada” includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada;

“subversive or hostile activities” «*activités...*»

“subversive or hostile activities” means

- (a) espionage against Canada or any state allied or associated with Canada,
- (b) sabotage,
- (c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,
- (d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,
- (e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and
- (f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Legislative History: 1980-81-82-83, c. 111, Sch. I “15”.

JURISPRUDENCE

Third party cannot argue s. 15 applies

The appellant sought to have certain extracts of a contract between the appellant and the respondent protected. The appellant’s interest in this case was one of a third party.

Under s. 15 of the Act, the respondent (i.e. the head of the government institution) has the discretionary authority to refuse to disclose any record if its release could reasonably be expected to be injurious to the defence of Canada. The respondent did not purport to act under that section of the Act but under s. 20. Although the matter was related to a defence contract, the review by the Court was limited to the considerations set out in s. 20 of the Act and the matter of national security was irrelevant to the hearing.

Saint John Shipbuilding Limited. v. Canada (Minister of Supply and Services) (1988), 24 F.T.R. 32 (F.C.T.D.); aff’d (1990), 67 D.L.R. (4th) 315 (F.C.A.).

Content of notice of refusal

Subsection 10(1) does not require a Minister, when giving notice of a refusal founded on s. 15 of the Act, to specify the particular paragraph or paragraphs of that section which are relevant to the refusal.

In the context of s. 15, the reason for refusal is based on the probable injury which will occur, not on the specific type of document involved.

What is required from subs. 10(1), in the context of s. 15, is that the requester be given notice that access is refused because disclosure would be injurious to (1) the conduct of international affairs, (2) the defence of Canada or any state allied or associated with Canada, or (3) the detection, prevention or suppression of subversive or hostile activities. The requester need not be told which specific paragraph is involved.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1990] 3 F.C. 22 (T.D.).

Unreasonable conclusion / 50-year old documents

On the evidence put before the Court, it appeared unreasonable to conclude that documents which bore the dates of 1941 or 1942 and related to a time when Canada was engaged in a world war, could reveal anything pertinent to the conduct of Canada's international relations and its national defence over 50 years later in time of peace.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

Whether exemption reasonable

The Court must form its own opinion in determining whether the explanations provided by the head of the government institution for refusing to disclose the requested records are reasonable.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.).

See also: ATIA ss. 2, 4, 13, 19, 50, 52; PA ss. 21, 49.

The Court is not entitled to order disclosure simply because it would have reached a conclusion different from that of the head of the government institution.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

Exercise of discretion under s. 15

It is not a fettering of discretion to seek advice from the government departments most knowledgeable and directly involved with the situation at hand. In fact, not to do so would be irresponsible. Provided that the individual who is responsible for exercising the discretion in fact turns his or her mind to the issues and weighs and considers all the facts, there is no fettering of discretion.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.).

To note: The Court of Appeal decision annotated under para. 15(1)(h).

See also annotations under s. 21 PA

Subsection 15(1)

Cumulative exemptions

In the case of information received from a foreign State and made public by that State, the head of the Canadian government institution called upon to apply this Act may still avail him or herself of the other provisions of the statute. All of the notes may be dealt with under s. 15 despite the additional protection afforded to documents which may also fall to be considered under subs. 13(1). In the case of information received from a foreign State and made public by that State, the head of the Canadian government institution called upon to apply this Act may still avail him or herself of the other provisions of the statute.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.).

To note: The Court of Appeal decision annotated under para. 15(1)(h).

Paragraph 15(1)(h)

Status of diplomatic notes rather than the content of their information

The institution seeking to exempt diplomatic notes could reasonably do so because they are diplomatic notes and not necessarily on the basis of the information contained in the notes.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.); aff'd [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999 (see below).

The Court of Appeal was satisfied that there was sufficient evidence upon which the Motions Judge could reasonably conclude that the diplomatic notes contained specific information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs. The Court stressed that there is no “class exemption” for diplomatic notes. Under subs.

15(1), there must be evidence that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade), [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999.

Severability of diplomatic notes

The Court of Appeal held that the four diplomatic notes were properly treated as a single dialogue and properly dealt with as one package. The Court was of the view that in these circumstances there should not be any severance.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade), [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999.

See also: ATIA s. 25.

Injury test / Release of diplomatic notes

Harm is more than speculative when a foreign state is specifically asked about the release of diplomatic notes and answers that it does not want the notes to be made public. This statement alone justifies non-disclosure despite the fact that some of the information contained in one of the notes had already been accessed by the applicant. To release these documents would be a diplomatic breach. To act contrary to a direct request from a foreign state would be a diplomatic breach. To do so would harm the reputation of Canada in the international community as a state which deals fairly with its counterparts. Additionally, as the entire international diplomatic process relies on integrity and trust, Canada would, if it released diplomatic notes without concern for the opinions of foreign states affected, harm its own ability to function effectively on the international level.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.); aff'd [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999.

Assessment of injury

In assessing the injury to be expected on release of the diplomatic notes it was proper for the respondent to consider normal diplomatic practice as this would be the best standard by which to judge probable harm.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.); aff'd [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999.

Scope of obligation

Once a state requests that diplomatic correspondence remain confidential there is no need for the Canadian government to assess the reasons of that country, it is sufficient if the country has made the request of the Canadian government. Indeed, it would be a diplomatic lapse were the Canadian government to sit in judgement of the rationale of the foreign state except in the most extreme circumstances.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.).

SECTION 16

Law enforcement and investigations

16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the record came into existence less than twenty years prior to the request;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Security

(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(a) on criminal methods or techniques;

(b) that is technical information relating to weapons or potential weapons; or

(c) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

Policing services for provinces or municipalities

(3) The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.

Definition of “investigation”

(4) For the purposes of paragraphs (1)(b) and (c), “investigation” means an investigation that

- (a) pertains to the administration or enforcement of an Act of Parliament;
- (b) is authorized by or pursuant to an Act of Parliament; or
- (c) is within a class of investigations specified in the regulations.

Legislative History: 1980-81-82-83, c. 111, Sch. I “16”; 1984, c. 21, s. 70.

JURISPRUDENCE

Paragraph 16(1)(b)

Information relating to investigative techniques

The exemption set out in para. 16(1)(b) fulfils the requirements of being necessary, limited and specific as those words are used in s. 2.

The respondent had to convince the Court that the information withheld referred, as claimed, to investigative techniques. The Court was satisfied that the contents of the affidavit, which had been filed with the Court in a sealed envelope, justified the application of the exemption.

Rubin v. Canada (Solicitor General) (1986), 1 F.T.R. 157 (F.C.T.D.).

Paragraph 16(1)(c)

Investigation in subparagraph 16(1)(c)(iii) refers to specific investigation

The requester sought access to the communications between the Privy Council Office and the Information Commissioner regarding prior requests to the Privy Council Office.

The applicability of both para. 16(1)(c) and s. 35 of the Act as grounds for sheltering the requested information from disclosure was in issue.

The Court held that subparas. 16(1)(c)(i) and (ii) are intended to be invoked in particular investigations or where a specific confidential source may be revealed. In subpara. 16(1)(c)(iii), the investigation referred to is a specific investigation where the disclosure of particular information would be injurious to the conduct of that specific investigation. The Court ruled that para. 16(1)(c) is not a procedural provision that justifies confidentiality in respect of the investigative process of the Information Commissioner.

Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391 (T.D.).

To note: The order of the Trial Division was set aside. See *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (C.A.) (below).

Since the Federal Court of Appeal concluded that subs. 35(2) does deny a right of access to the requested information, it held that there was no need to examine the question of whether para. 16(1)(c) applied to the requested information.

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.).

To note: The decision of the Federal Court of Appeal was affirmed by the Supreme Court of Canada in [1996] 1 S.C.R. 6.

“Conduct of lawful investigations” / Injury to specific investigation

The Court must consider the stated purpose of the Act as set out in subs. 2(1) when defining the ambit of para. 16(1)(c). It was Parliament’s intention that para. 16(1)(c) be construed narrowly. The Court found that para. 16(1)(c) should be interpreted to refer to something specific about the development or progress of a particular investigation. The injury cannot be to the general investigative process, but must be to a particular investigation being undertaken or about to be undertaken. The Court added that as for future investigations, it is possible that information may affect an investigation that has not yet been undertaken but is about to be undertaken. An example is if a criminal investigation was also going to be undertaken as a result of an accident but had not yet begun. To apply to the future, the exemption must be limited, specific and known.

To note: Due to its reasons on the interpretation of para. 16(1)(c), the Court of Appeal found it unnecessary to deal with the question of whether the evidentiary and threshold requirements necessary to prove reasonable expectation of probable harm under para. 16(1)(c) were met in this case.

Rubin v. Canada (Minister of Transport) (1997), 221 N.R. 145 (F.C.A.); rev’d (1995), 105 F.T.R. 81 (F.C.T.D.) (see below).

The applicant had requested the Post-Accident Safety Review Report of an airplane crash. The report had been done after an airline “Nationair” had voluntarily agreed to have Transport Canada conduct a review of the accident. The Department invoked para. 16(1)(c) for part of the requested records, arguing that release of this report would lead to other companies refusing to

participate in such reviews, given the voluntary nature of the review process. The Court agreed with the Department. It held that para. 16(1)(c) is not restricted to a specific investigation but relates to records that fall within the general language of that paragraph. This exemption contemplates a situation in which the disclosure of information may reasonably be expected to be injurious to the conduct of lawful investigations in the future. The injury may therefore be to a general investigative process and not only to a particular investigation. The Court concluded that the evidence submitted by the respondent met the requirements of the injury test in para. 16(1)(c) in that there was a reasonable expectation of probable harm from disclosure to the conduct of lawful investigations under the review program.

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 (F.C.T.D.).

Paragraph 16(1)(c) can be relied upon only where there is specific and significant evidence of injury to a specific lawful investigation that has been undertaken or that is about to be undertaken. The onus is on the head of the institution to establish, on a balance of probabilities, that there is a reasonable expectation of probable harm to disclose the specific information. The Court followed the decision in *Rubin v. Canada (Minister of Transport)* (1997), 221 N.R. 145 (F.C.A.).

Canada (Information Commissioner) v. Canada (Immigration and Refugee Board) (1997), 140 F.T.R. 140 (F.C.T.D.).

See also: ATIA s. 2.

To note: Given his decision on para. 16(1)(c), the Trial Judge found it unnecessary to deal with the issue of the evidentiary requirements necessary to prove reasonable expectation of probable harm that disclosure would cause.

The Court must determine whether there was a reasonable expectation of injury at the time the applications for request were made and be satisfied that the records sought were in connection with a lawful investigation. The Court relied on *Rubin v. Canada (Minister of Transport)* (1997), 221 N.R. 145 (F.C.A.) with respect to the interpretation of the words “conduct of lawful investigations”.

Hoogers v. Canada (Minister of Communications) (1998), 83 C.P.R. (3d) 380 (F.C.T.D.).

See also: ATIA ss. 13, 19, 49, 50.

Undertaking of confidentiality not overriding ATIA

The undertaking of confidentiality between the interviewer and the interviewees was conditional on the notes remaining under the control and possession of the interviewer. Once the notes were provided to the Immigration and Refugee Board upon its request, the notes were under the control of the institution. The assurances of confidentiality did not override specific provisions of the Act.

Canada (Information Commissioner) v. Canada (Immigration and Refugee Board) (1997), 140 F.T.R. 140 (F.C.T.D.).

See also: *ATIA* s. 2.

Public interest test

The applicant argued that the *ATIA* requires a public interest test under para. 16(1)(c) in deciding whether or not to disclose records. The Court held that the *ATIA* does not set up an obligation to consider the public interest as an independent step in the analysis leading to the decision whether or not to disclose under para. 16(1)(c). Nevertheless, the public interest in maintaining confidential reviews outweighed the public's right of access contemplated in subs. 2(1) *ATIA*. It was in the public interest to maintain the confidentiality of the records that had been requested.

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 (F.C.T.D.); rev'd (1997), 221 N.R. 145 (F.C.A.) (see below).

Given the Court's remarks on the importance of respecting the purpose of the *ATIA* as set out in subs. 2(1), the Court found it unnecessary to comment on whether the public interest is an independent step in the process of determining whether there is a reasonable expectation of probable harm. The Court was in general agreement with the method adopted by the Trial Judge.

Rubin v. Canada (Minister of Transport) (1997), 221 N.R. 145 (F.C.A.).

See also: *ATIA* s. 2.

When can exemptions be raised

The government institution was not bound by the exemption it initially raised since the Information Commissioner had the opportunity to investigate the new grounds of exemption it ultimately relied upon.

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 (F.C.T.D.).

Subsection 16(4)

Meaning of "investigation"

The Post-Accident Safety Review conducted under the authority of the Minister of Transport fell within the generality of the language of s. 4.2 of the *Aeronautics Act*. Therefore, it was an "investigation" within the meaning of subs. 16(4) in that it pertained to the administration of an Act of Parliament or was authorized by or pursuant to an Act of Parliament.

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 (F.C.T.D.).

See also annotations under s. 22 PA.

SECTION 17

Safety of individuals

17. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

Legislative History: 1980-81-82-83, c. 111, Sch. I “17”.

JURISPRUDENCE

Non-application / Related type of information

The applicant, a third party, argued that product monographs and other documents filed by the applicant with the respondent should not be disclosed on the basis of s. 17. The respondent did not purport to act under that section and it was therefore not relevant to the application.

Furthermore, the applicant’s evidence simply did not support its submission that disclosure of these records could reasonably be expected to threaten the safety of individuals. Treasury Board’s Interim Policy Guide on the Act states that the s. 17 exemption will normally apply to information supplied by or about informants.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff’d (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also annotations under s. 25 PA.

SECTION 18

Economic interests of Canada

18. The head of a government institution may refuse to disclose any record requested under this Act that contains

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;
- (b) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution;
- (c) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or

(d) information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person, including, without restricting the generality of the foregoing, any such information relating to

(i) the currency, coinage or legal tender of Canada,

(ii) a contemplated change in the rate of bank interest or in government borrowing,

(iii) a contemplated change in tariff rates, taxes, duties or any other revenue source,

(iv) a contemplated change in the conditions of operation of financial institutions,

(v) a contemplated sale or purchase of securities or of foreign or Canadian currency, or

(vi) a contemplated sale or acquisition of land or property.

Legislative History: 1980-81-82-83, c.111, Sch. I “18”.

JURISPRUDENCE

Actual proof of prejudice not required

Paragraph 18(b) envisages a test of reasonable expectation of prejudice; it does not require actual proof of prejudice.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: ATIA ss. 20(1)(b), (c), (d), 20(6), 25.

Protection of competitive position of government institution

In the current climate of fiscal restraint, protection of the competitive position of the government institution is an important public policy concern. In the result, the Minister’s discretion under para. 18(b) had been properly exercised.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: ATIA ss. 20(1)(b), (c), (d), 20(6), 25.

Paragraph 18(d)

Legitimate claims to income tax deductions / No injury to financial interests of government and no undue benefit

The applicant made a request to the Minister of Finance for the disclosure of all materials relating to the interpretation of “religious order”, one of the terms defining the scope of the entitlement to the “clergy residence” deduction of para. 8(1)(c) of the *Income Tax Act*. The Minister relied on para. 18(d) in combination with s. 21(1) ATIA to exempt the information.

The Court found that non-disclosure was justified under subs. 21(1) and, therefore, that it was unnecessary to determine whether the claim under para. 18(d) had been properly made. It nevertheless stated, in *obiter*, that the words “injurious to the financial interests of the Government of Canada” and “undue benefit” in para. 18(d) cannot be interpreted to include revenue loss resulting from an increase in the legitimate claims to a deduction under the ITA. However, disclosure of documents that contain analyses by officials of various options for amending the ITA may be refused on the ground that the information is related to “a contemplated change in ... taxes” as provided for in subpara. 18(d)(iii) if disclosure would cause a loss of revenue to the government or would unduly benefit particular individuals. With respect to the para. 18(d) exemption, the Court will require clear proof that the Minister has reasonable grounds to believe that there was a reasonable expectation of probable harm of the prescribed kinds should there be disclosure.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: ATIA ss. 21(1)(a), (b), 23, 24, 41, 49.

SECTION 19

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

- (a)** the individual to whom it relates consents to the disclosure;
- (b)** the information is publicly available; or
- (c)** the disclosure is in accordance with section 8 of the *Privacy Act*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “19”.

JURISPRUDENCE

Conditions of disclosure

Section 19 prohibits voluntary disclosure of personal information by heads of Government. However, it does permit disclosure in accordance with s. 8 *PA*.

Canada v. Bélanger, [1988] R.J.Q. 105 (C.A.).

See also: *PA* s. 8.

Scope of the definition of “personal information”

The Court ruled that the particular hearing notes did not contain “personal information”. Despite the wide scope of the definition of “personal information” it is doubtful that anything expressed by a decision maker in the course of consultations or deliberations can be regarded as “personal information” about an individual. This is because nothing that is recorded by a decision maker in the course of deliberations is intended to inform. Furthermore, whatever the “views” or “opinions” expressed by a decision maker about someone in the course of deliberations, these cannot be said to be the “views” or “opinions” of the decision-maker unless and until they find their way into the reasons which are eventually given for the decision.

Canada (Privacy Commissioner) v. Canada (Labour Relations Board), [1996] 3 F.C. 609; (1996), 118 F.T.R. 1; 41 Admin. L.R. (2d) 49 (F.C.T.D.).

To note: This case is under appeal.

Onus of proof / Personal information

Section 48 of the *Access to Information Act* places the onus on the government to show that it is authorized to refuse to disclose a records. The Act makes no distinction between the determination as to whether a record is *prima facie* personal information and whether it is encompassed by one of the exceptions. As a result, it is clear that even where it has been shown that the record is *prima facie* personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in para. 3(j) *Privacy Act*.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

Non-disclosure clause approved by Canadian Human Rights Commission approved by Court

The applicant sought access under the *ATIA* to an agreement that had been approved by the Canadian Human Rights Commission in *Tymchyshyn v. Canadian Pacific Ltd.* The Court held that the agreement (which was the result of a complaint filed against Canadian Pacific by a diabetic) was protected under s. 19 *ATIA*. The Court also stated that, in the absence of any abuse, a non-disclosure clause approved by the Commission must be observed both by the Court and by the government authorities.

Grimard v. Canada (Canadian Human Rights Commission) (1994), 93 F.T.R. 251 (F.C.T.D.); aff'd [1998] F.C.J. No. 685 (QL) (F.C.A.), A-642-94, decision dated May 11, 1998 (see below).

The Federal Court of Appeal found that subs. 19(2) did not apply because the individual to whom the agreement related had not properly expressed his consent to disclosure. In addition, the Court saw no reason to intervene in the decision of the Trial Judge who relied on s. 48 of the

Canadian Human Rights Act to reject the argument that it was necessary to disclose the agreement in the name of public interest.

Grimard v. Canada (Canadian Human Rights Commission) [1998] F.C.J. No. 685 (QL) (F.C.A.), A-642-94, decision dated May 11, 1998.

Name itself not personal information

For s. 19 to apply, more than just the name itself is required.

Hoogers v. Canada (Minister of Communications) (1998), 83 C.P.R. (3d) 380 (F.C.T.D.).

See also: *ATIA* ss. 13, 16(1)(c), 49, 50.

Subsection 19(1)

Views and opinions expressed in official capacity

Personal views in a letter written by a union official on behalf of union employees opposing an application for a federal grant by a Public Utilities Commission were found to be personal information within the meaning of para. 3(e) *PA* and therefore exempt from disclosure pursuant to subs. 19(1). However, other identifying particulars like the author's name and position which related to his authority to write on behalf of the union were not. The remaining correspondence was considered not to be personal information as the author had made these statements on behalf of the union.

Robertson v. Canada (Minister of Employment and Immigration) (1987), 13 F.T.R. 120 (F.C.T.D.).

See also: *ATIA* s. 47; *PA* ss. 3, 8.

Purpose of subsection 19(1)

What Parliament intended by the incorporation of a section of the *PA* in subs. 19(1) of the *ATIA* was to ensure that the principles of both statutes would come into play in determining whether to release personal information.

The intent of subs. 19(1) of the *ATIA* is to protect the privacy of individuals who may be mentioned in otherwise releasable material.

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 (T.D.).

List of names of masters and deck watch officers exempt from compulsory pilotage on the Great Lakes

The respondent, relying on subs. 19(1) *ATIA* and pursuant to paras. (b) and (i) of the definition of “personal information” in s. 3 of the *PA*, refused to disclose the list of names of masters and deck watch officers who were exempt from compulsory pilotage on the Great Lakes, because the list would contain personal information on the individuals in question, in particular information regarding their employment history, and merely disclosing their names would reveal information about them.

The Court concluded that disclosure of the names alone would not reveal any employment history, apart from the fact that the individuals in question had made at least ten passages in the Great Lakes pilotage area during the three years in question.

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 (T.D.).

Opinions about performance of government employees

Paragraph (j) of the definition of “personal information” in s. 3 of the *PA* does not create an exception to the general rule of privacy where government employees are concerned. Accordingly, a report which is the product of a publicly-funded study of a publicly-operated institution can be disclosed, but the opinions about the training, experience or competence of individuals are to be deleted as constituting personal information exempt from disclosure under s. 19 of the Act. The disputed information does not relate to the employees’ positions or functions, but to their performance.

The Court held that there was no indication that the qualitative evaluations of an employee’s performance were ever intended to be made public.

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 (T.D.).

Names of permit recipients

The names of all applicants requesting permission under the Seal Protection Regulations were correctly exempted under s. 19 *ATIA*. The information did not fall under the exception of para. 3(1) *PA* from the definition of personal information.

Canada (Information Commissioner) v. Canada (Minister of Fisheries and Oceans), [1989] 1 F.C. 66 (T.D.).

Financial statements of small group

Information about small groups may, in some cases, constitute personal information. However, the mere fact that one can divide the group's assets by the number of its members does not support such a finding. To hold otherwise would be to distort the intention of the personal information exemption.

Nothing in the records requested indicated that information about identifiable individuals could be obtained from the general data in financial statements of the Indian Band in question. Even if such information could be extracted from the statements, to protect them from disclosure on that basis would be an unwarranted extension of s. 19.

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (T.D.).

Security classifications of temporary help

The applicant sought the security classifications of "call-ups", being the individuals who are hired by temporary agencies to work for the Government. The respondent had been criticized by the Privacy Commissioner for releasing the names of these individuals.

The respondent refused to release any other information. The Court ordered disclosure of these individuals' security classifications. It held that such classifications related to positions, not to individuals. In the alternative, it held that such information fell under the exception of para. 3(k) PA.

Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (T.D.).

Remuneration of chairmen, heads and presiding officials

The applicant sought information that included the specific remuneration of various chairmen, heads, and presiding officials. The Court concluded that to disclose such specific remuneration would destroy the privacy of individuals which Parliament has prescribed by limiting disclosure to salary range (subpara. (j)(iii) of the definition of "personal information" in s. 3 PA).

The Court held that such specific remuneration was personal information under s. 19 ATIA.

Rubin v. Canada (Clerk of the Privy Council) (1993), 62 F.T.R. 287 (F.C.T.D.).

Departmental sign-in logs

The applicant had sought access to copies of departmental sign-in logs, which were completed by Department of Finance employees whenever they worked after regular business hours. He was provided with copies of these “sign-in” logs, but all identifying references were removed.

At the Trial Division, the Court held that the identifying information, such as an employee’s name, identification number and signature, could not be exempted under s. 19 *ATIA*. The Court ruled that the requested information could not be protected under paras. 3(b), (c) or (i) *PA*. The Trial Court further held that whether information falls within the residual ambit of the definition of “personal information” is to be determined by whether the predominant characteristic of the information sought is personal or professionally related. The Court based this criterion on the assumption that “all information emanating from the government inevitably discloses, at least indirectly, both personal information regarding individuals and information about the government, or policies or positions within the government”.

Dagg v. Canada (Minister of Finance) (1993), 70 F.T.R. 54 (F.C.T.D.); rev’d [1995] 3 F.C. 199; (1995), 124 D.L.R. (4th) 553; 181 N.R. 139 (C.A.) (see below).

The Court of Appeal rejected the “predominant characteristic test” to characterize the information in question. The requested information was held to be personal information pursuant to para. 3(i) *PA* as it related to identifiable individuals. The sign-in logs specified the whereabouts of individuals at specific times. The Court rejected the argument that para. 3(j) *PA* applied, after considering the purpose of the sign-in logs, which was to know where individuals were should an emergency arise.

Dagg v. Canada (Minister of Finance), [1995] 3 F.C. 199; (1995), 124 D.L.R. (4th) 553; 181 N.R. 139 (C.A.); rev’d [1997] 2 S.C.R. 403. (See below).

The proper question to be asked is whether the disclosure of the names themselves, i.e., without the time entries or signatures, would disclose information about the individual. On a plain reading, it is obvious that it would. Even if the Minister disclosed only the names of the employees listed on those logs, the disclosure would reveal that certain identifiable persons attended their workplace on those days. The disclosure of the names would thus “reveal information about the individual” within the meaning of the second part of para. 3(i) *PA*.

The number of hours spent at the workplace is generally information “that relates to” the position or function of the individual, and thus falls under the opening words of para. 3(j). While the Court recognized that employees may sometimes be present at their workplace for reasons unrelated to their employment, it was prepared to infer that, as a general rule, employees do not stay late into the evening or come to their place of employment on the weekend unless their work requires it. Sign-in logs therefore provide information which would at the very least permit a general assessment to be made of the amount of work which is required for an employee’s particular position or function.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

Names of medical practitioners who have had their prescribing privileges restricted

Disclosure of the names of medical practitioners in Nova Scotia who have had their prescribing privileges restricted or revoked would reveal personal information about the individual. Those names constitute “personal information”, as provided in para. 3(i) *PA*. Refusing to disclose such information is justified pursuant to subs. 19(1) *ATIA*.

Subsection 19(1) is subject to subs. 19(2). In this case, the evidence indicated that there had not been any consent within the meaning of para. 19(2)(a), and that the information sought was not publicly available within the meaning of para. 19(2)(b). Since neither para. (a) nor (b) of subs. 19(2) applied in this instance, the remaining issue was whether disclosure of the “personal information” was appropriate in light of para. 19(2)(c), which makes reference to s. 8 *PA*. The Court concluded that the public interest did not “clearly” outweigh the potential invasion of privacy.

Mackenzie v. Canada (Minister of National Health and Welfare) (1994), 88 F.T.R. 52 (F.C.T.D.).

Indian band’s financial information / Relationship between the *Privacy Act* and the *Access to Information Act*

Names of persons who were debtors to an Indian Band, or who were lenders to a Band, or for whom the Band had become guarantors or the names of other individuals who had been involved in similar transactions, were held by the Court to constitute personal information under para. 3(b) *PA*. This information had correctly been exempted under subs. 19(1) *ATIA*.

The Court stated that the discretionary benefits referred to in para. 3(e) *PA* are those conferred by a government institution. Such was not the case here.

The Court further rejected the argument that disclosure of the requested information would be permitted under paras. 8(2)(a), 8(2)(k) or 8(2)(m) *PA*. As such, the information could not be disclosed under para. 19(2)(c) *ATIA*.

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527 (T.D.).

Corporation not an identifiable individual

The applicant does not qualify as an identifiable individual. The words “identifiable individual” mean a human being, since it is only a human being that can possess all the very personal characteristics and experiences enumerated in paras. 3(a), (b), (c), (d) and (e) of the *Privacy Act*.

The comment made by Jerome A.C.J. in *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.) that "...information about small groups may, in some cases, constitute personal information" were made in the context of an argument that Band financial statements should be considered personal information of each member of the Band.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 27, 44. *PA* s. 3.

Members of Parliament pensions

The requester had asked under the *ATIA* for the names of Members of Parliament who were receiving pensions and the amounts of the pensions received. The information was exempted under s. 19 (personal information) by PWGSC. The requester complained to the Information Commissioner who agreed that the amounts were exempt but disagreed that the names of the pension recipients were exempt from release. The Court held that the names of retired MPs who receive pension benefits is personal information which would be exempt from disclosure under subs. 19(1) *ATIA*. However, the Court ordered the names released because much of the information was publicly available; their release was consented to by a number of MPs (78 consented, 88 refused, 98 failed to reply); or because the public interest outweighed the privacy interest protected. The Court interpreted the word "may" in subs. 19(2) *ATIA* to mean "shall". If one of the conditions in subs. 19(2) exists then the head of the institution must release the personal information. The head has no discretion to refuse to release the information.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164; (1996), 70 C.P.R. (3d) 37 (T.D.).

Subsection 19(2)

"May" means "may"

Under subs. 19(2) *ATIA*, the head of a government institution has a discretion to disclose personal information in certain circumstances. A decision is not immune from judicial oversight merely because it is discretionary. Abuse of discretion may be alleged but where the discretion has been exercised in good faith, and, where required, in accordance with principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

The head of a government institution has the discretion under subs. 19(2) to withhold personal information.

Terry v. Canada (Minister of National Defence) (1994), 30 Admin. L.R. (2d) 122; 86 F.T.R. 266 (F.C.T.D.).

The word “may” in subs. 19(2) sets out a discretionary exception to the exemption from disclosure, not a mandatory one.

Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.).

The Judge stated, in *obiter*, “as I read s. 19(2), there is no obligation imposed on the respondent to disclose information even if the individual to whom it relates consents to the disclosure”.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), T-426-95, decision dated June 23, 1995, F.C.T.D., not reported.

The Court approvingly referred to the *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 268 (T.D.). It agreed with the ruling of that decision that “The applicant submits that the information requested may be excepted from the s. 19 exemption pursuant to both paragraphs 19(2)(b) and (c)...Paragraph 19(2)(c) provides an exception if ‘the disclosure is in accordance with s. 8 of the *Privacy Act*’ ...by using the word ‘may’ rather than the word ‘shall’, Parliament intended this provision to operate as a discretionary exemption as opposed to a mandatory exemption”.

Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade), [1996] F.C.J. No. 903 (QL) (F.C.T.D.), T-1681-94, decision dated June 27, 1996.

“May” means “shall”

The Court concluded that while subs. 19(2) is, through use of the word “may”, permissive in form it nonetheless imposes a duty on the head of the institution to release personal information when the conditions identified therein are fulfilled.

Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 (T.D.).

See s. 12 PA for further information on this case.

The requester had asked under the ATIA for the names of Members of Parliament who were receiving pensions and the amounts of the pensions received. The information was exempted under s. 19 (personal information) by PWGSC. The requester complained to the Information Commissioner who agreed that the amounts were exempt but disagreed that the names of the pension recipients were exempt from release. The Court held that the names of retired MPs who receive pension benefits is personal information which would be exempt from disclosure under subs. 19(1) ATIA. However, the Court ordered the names released because much of the information was publicly available; their release was consented to by a number of MPs (78 consented, 88 refused, 98 failed to reply); or because the public interest outweighed the privacy interest protected. The Court interpreted the word “may” in subs. 19(2) ATIA to mean “shall”. If

one of the conditions in subs. 19(2) exists then the head of the institution must release the personal information. The head has no discretion to refuse to release the information.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164; (1996), 70 C.P.R. (3d) 37 (T.D.).

Names, addresses, rental charges

The applicant sought access to the names of NCC tenants and the addresses of properties that the tenants rented from the NCC, as well as the rents paid. The Court held that the rental arrangements were “discretionary benefits of a financial nature” under para. 3(1) *PA* and therefore did not constitute personal information under s. 19 *ATIA*. In *obiter*, the Court stated that even if this information was personal, it would be in the public interest to disclose it.

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 (T.D.).

See also annotations under ss. 3 and 8 *PA*.

Duties of the institution

In specific circumstances, it may be difficult to ascertain whether the exceptions in subs. 19(2) apply to the personal information which has been exempted. However, in such cases, it would not be sufficient for the heads of government institutions to simply state that they are unaware or that they do not know if the exceptions apply. Rather, they should be in a position to state what activities and initiatives were undertaken in this regard.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.).

Names of medical practitioners who have had their prescribing privileges restricted

Disclosure of the names of medical practitioners in Nova Scotia who have had their prescribing privileges restricted or revoked would reveal personal information about the individual. Those names constitute “personal information”, as provided in para. 3(i) *PA*. Refusing to disclose such information is justified pursuant to subs. 19(1) *ATIA*.

Subsection 19(1) is subject to subs. 19(2). In this case, the evidence indicated that there had not been any consent within the meaning of para. 19(2)(a), and that the information sought was not publicly available within the meaning of para. 19(2)(b). Since neither paras. (a) nor (b) of subs. 19(2) applied in this instance, the remaining issue was whether disclosure of the “personal information” was appropriate in light of para. 19(2)(c), which makes reference to s. 8 *PA*. The Court concluded that the public interest did not “clearly” outweigh the potential invasion of privacy.

Mackenzie v. Canada (Minister of National Health and Welfare) (1994), 88 F.T.R. 52 (F.C.T.D.).

Indian band's financial information / Relationship between the *Privacy Act* and the *Access to Information Act*

Names of persons who were debtors to an Indian Band, or who were lenders to a Band, or for whom the Band had become guarantors or the names of other individuals who had been involved in similar transactions, were held by the Court to constitute personal information under para. 3(b) PA. This information had correctly been exempted under subs. 19(1) ATIA.

The Court stated that the discretionary benefits referred to in para. 3(e) PA are those conferred by a government institution. Such was not the case here.

The Court further rejected the argument that disclosure of the requested information would be permitted under paras. 8(2)(a), 8(2)(k) or 8(2)(m) PA. As such, the information could not be disclosed under para. 19(2)(c) ATIA.

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527 (T.D.).

Inadvertent previous release of information

The applicant sought disclosure of information relating to an offence committed by a Canadian soldier while on service in Croatia, namely: (1) a transcript of the charge; (2) a copy of subsequent disposition; and (3) a copy of the punishment.

The Court held that the requested information was personal information within the meaning of s. 3 PA. It held that para. 3(j) PA was very specific and should be interpreted narrowly. The Court did not agree with the applicant that the information was publicly available such that para. 19(2)(b) ATIA applied since disclosure to the media had occurred inadvertently and for only one document.

Terry v. Canada (Minister of National Defence) (1994), 30 Admin. L.R. (2d) 122; 86 F.T.R. 266 (F.C.T.D.).

Sign-in logs not publicly available

Sign-in logs which are signed by government employees when entering and exiting office buildings after hours are not “publicly available” for the purposes of para. 19(2)(b) ATIA. The head of the government institution had properly exercised his discretion regarding whether or not this information should be disclosed.

Dagg v. Canada (Minister of Finance), [1995] 3 F.C. 199; (1995), 124 D.L.R. (4th) 553; 181 N.R. 139 (C.A.); rev'd [1997] 2 S.C.R. 403.

Disclosure of MP's pensions prior to hearing / Where individual consents to disclosure

The Minister of Public Works and Government Services refused to disclose records concerning persons receiving or entitled to receive pensions under the *Members of Parliament Retiring Allowances Act*. Public Works and Government Services Canada filed a confidential affidavit with the Federal Court. The affidavit included a list of all former Members of Parliament who had consented to their names being disclosed. The Information Commissioner applied to the Federal Court pursuant to s. 47 *ATIA* and Rule 327 of the *Federal Court Rules* to have the list become part of the public record. He relied on subs. 19(2) of the *ATIA* which grants a government institution discretion to disclose personal information with the individual's consent. The Court held that the issue whether the list should be part of the public record should be determined by the Judge who hears the application for review. In *obiter*, the Justice stated "as I read s. 19(2), there is no obligation imposed on the respondent to disclose information even if the individual to whom it relates consents to the disclosure".

Canada (Information Commissioner) v Canada (Minister of Public Works and Government Services), T-426-95, decision dated June 23, 1995, F.C.T.D., not reported.

How discretion is to be exercised

The Court ruled that it was insufficient for the Department to withhold the information from disclosure on the sole ground of the mandatory exemption contained in subs. 19(1). Rather, the Department should have applied the subs. 19(2) discretionary exemption which required two decisions: (1) the factual decision, and (2) the discretionary decision. Since the Department's refusal to disclose was not based on this exercise of discretion, the Court ordered that the two *ATIA* requests be referred back to the Department for review and re-determination by a proper exercise of the discretion granted under subs. 19(2), because of para. 8(2)(k) *Privacy Act*.

Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade), [1996] F.C.J. No. 903 (QL) (F.C.T.D.), T-1681-94, decision dated June 27, 1996.

Public interest determination / Failure to give extensive reasons for decision

The Minister properly examined the evidence and carefully weighed the competing policy interests. He was entitled to conclude that the public interest did not outweigh the privacy interest. For the Court to overturn this decision would not only amount to a substitution of its view of the matter for his but also do considerable violence to the purpose of the legislation. The Minister's failure to give extensive, detailed reasons for his decision did not work any unfairness upon the appellant.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

See also annotations under ss. 3 and 8 PA.

SECTION 20

Third party information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

- (a) trade secrets of a third party;
- (b) 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;
- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

Methods used in testing

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

Preliminary testing

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

Disclosure if a supplier consents

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

Disclosure authorized if in public interest

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public

safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

Legislative History: 1980-81-82-83, c. 111, Sch. I “20”.

JURISPRUDENCE

Subsection 20(1)

Head of a government institution

Subsection 20(1) provides that the head of a government institution shall refuse to disclose records in certain cases. In s. 3 the “head” is specifically and expressly defined as the Minister in the case of a department. Section 73 gives the Minister the power to delegate “by order”. The Minister of Environment Canada had not delegated any powers to the Regional Director when the Regional Director made his decision. The decision of the Regional Director was therefore set aside.

Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment), [1987] 1 F.C. 610 (T.D.).

Third party interest

The appellant had suggested that the material that had been ordered to be released had been in some respect different from what had been requested.

According to the Court, the appellant’s interest, as third party intervenor in a request for information, was limited to those matters set out in subs. 20(1). It had no status to object to the fact that the Government may have given more or less than that for which it had been asked.

Saint John Shipbuilding Limited v. Canada (Minister of Supply and Services) (1990), 67 D.L.R. (4th) 315; 107 N.R. 89 (F.C.A.).

Motivation of the requesters

The right of access is available to every member of the public and cannot be restricted by considerations of motive or occupation. The only way motivation could be relevant is in order to establish a reasonable expectation of harm to third parties under para. 20(1)(c) or (d).

Intercontinental Packers Limited v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 142 (F.C.T.D.); aff’d on different grounds (1988), 87 N.R. 99 (F.C.A.).

To note: Consider also the Federal Court of Appeal's decision in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.).

See also: *Prud'homme v. Canada (Canadian International Development Agency)* (1994), 85 F.T.R. 302 (F.C.T.D.); *Bitove Corp. v. Canada (Minister of Transport)* (1996), 119 F.T.R. 278 (F.C.T.D.).

No exemption considered under s. 20 / No notice under s. 28 / No right of review

Where a head of a government institution concludes that a record should not be exempted under s. 20 *ATIA* and therefore does not give notice to the third party under subs. 28(5) (now subs. 28(1)), then the third party has no right of review under s. 44 *ATIA*.

Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368 (T.D.).

ATIA prevails over confidentiality clause

A confidentiality clause in an Agreement will not prevent the Court from granting access to the terms of the Agreement if disclosure does not contravene paras. 20(1)(c) and (d). It may affect the relationship of the contracting parties, but will not affect any third party making an access request pursuant to the law.

Canada (Canadian Broadcasting Corp.) v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(c), (d).

Paragraph 20(1)(a)

Information disclosed in a product monograph is not trade secret

The Court concluded that a document which indicated the drug manufacturer's intention to change the dosage size of a product was not a trade secret. This information was disclosed in a product monograph and was no longer a secret, trade or otherwise.

In *obiter*, the Court accepted the respondent's argument that the term "trade secret" should be reserved for more technical production information.

Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare) (1989), 20 F.T.R. 73; 30 C.P.R. (3d) 473 (F.C.T.D.).

Information which is disclosed in a product monograph is no longer a secret. The product monograph is widely distributed to health professionals and it thus cannot be argued that the information is known only to those few to whom it necessarily must be confided.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

The opposition to the disclosure based on para. 20(1)(a) was set aside. The only information which had been proposed to be released and that could have been considered to have been a trade secret was already public since it was part of the product monograph disclosed on its label.

Matol Botanical International Inc. v. Canada (Minister of National Health & Welfare) (1994), 84 F.T.R. 168 (F.C.T.D.).

Interpretation of “trade secret ”

Given the wording of paras. 20(1)(a) and (b), the term “trade secrets” must be given a reasonably narrow interpretation. A trade secret must be something probably of a technical nature which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.

Société Gamma Inc. v. Canada (Secretary of State) (1994), 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.).

Paragraph 20(1)(b)

Information of confidential nature / Standards / Failure to prove

Confidentiality should be determined in accordance with an objective test. It is not sufficient that the applicant considered the information to be confidential, it must also have been kept confidential by both parties.

The evidence indicated that much of the contested information had in fact been disclosed or was available from other sources to which the public had access. Thus, while the applicant had met the second part of the two-fold test set out in para. 20(1)(b) in demonstrating that it consistently treated the entire report in question confidentially, it failed to meet the first test since it did not prove that, by objective standards, the requested information had been of a confidential nature.

Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce), [1984] 1 F.C. 939 (T.D.).

See also: *DMR & Associates v. Canada (Minister of Supply & Services)* (1984), 11 C.P.R. (3d) 87 (F.C.T.D.); *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)* (1989), 20 F.T.R. 73; 30 C.P.R. (3d) 473 (F.C.T.D.).

Referring to *Maislin*, *supra*, and other decisions, both Canadian and American, which dealt with the confidentiality of records, the Court concluded that the information requested (namely the names of masters and deck watch officers who were exempt from compulsory pilotage on the Great Lakes) was not confidential information under para. 20(1)(b).

The Court concluded that there was no evidence that the information had been consistently treated in a confidential manner and it had not been established that disclosure of the information would cause any permanent injury. Further, the information could have been obtained by observation, albeit with more effort by the requester.

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 (T.D.).

Since the Indian Band and the Minister had not satisfied the onus of proving that expenditure plans and cash flow statements of the Band were confidential and consistently treated as confidential (such that para. 20(1)(b) ATIA would apply), the information was ordered disclosed.

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527 (T.D.).

Information of confidential nature in an objective sense

Paragraph 20(1)(b) requires that the requested information be confidential in nature by some objective standard. The requested reports failed that test. Meat inspection audit reports were produced by public authorities, spending public funds, in order to protect the public. They must therefore be presumed to contain public information. In addition, the information in the audit reports had been available from other sources to which the public had access.

Intercontinental Packers Limited v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 142 (F.C.T.D.); aff'd on different grounds (1988), 87 N.R. 99 (F.C.A.).

See also: Comments by the Federal Court of Appeal on para. 20(1)(b) in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.).

Simply because a document is marked “confidential” and its confidential nature stressed at the time it was voluntarily submitted to the Government does not make it so in the objective sense. The CFL resisted disclosure of a brief it had submitted containing proposals for government action. In rejecting the contention of confidentiality, the Court held that the “reasonable man” could not expect that his private approaches to Government for special action in his favour would remain confidential forever, especially when what was sought involved the approval of Parliament.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

Non-application of paragraph 20(1)(b)

Paragraph 20(1)(b) relates only to confidential information which was supplied to a government institution by a third party. None of the information in the requested audit reports had been supplied by the appellant. Rather they contained judgements made by government inspectors on what they had observed. Paragraph 20(1)(b) could not be relied on in this case.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.).

Actual number of jobs created / Confidentiality not proven

The requester had sought access to the actual number of jobs that had been created in enterprises which had received funding from ACOA and which had participated in a survey detailing this information. The Court held that para. 20(1)(b) had been correctly applied by ACOA. The Court stated that “given that the companies are commercial entities, information pertaining to their operations, including internal employment data, constitutes commercial information within the meaning of para. 20(1)(b) *ATIA*”. The Court held that the evidence established that the information concerning the actual number of jobs was private and confidential in nature. The Court noted that to find otherwise would lead to the result that the companies which had volunteered to participate in the survey would find their information public, while the same information for the 4,500 companies that did not participate in the survey would remain protected. Not only would this be unfair, but it would discourage companies from voluntarily providing information of this nature in the future.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 (F.C.T.D.); rev'd [1999] F.C.J. No. 1723 (QL) (F.C.A.), A-292-96, judgment dated November 17, 1999 (see below).

The Information Commissioner's appeal from the decision of the Trial Division was allowed. The onus incumbent upon the Agency under s. 48 *ATIA* required the production of actual direct evidence which was needed to prove original and continuing confidentiality of the information. In the instant case, there was no such evidence supporting a finding of confidentiality in respect of each of the companies concerned. The unsworn statements made to the Information Commissioner by 24 of the companies could not be treated as evidence even as to the confidentiality of the information of those companies let alone as to the confidentiality of the information of all the other companies. The undertaking of confidentiality made Price Waterhouse to the companies surveyed cannot be determinative of disclosure obligations under the *ATIA*. Such information was part of a government record subject to the Act.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency, [1999] F.C.J. No. 1723 (QL) (F.C.A.), A-292-96, judgment dated November 17, 1999.

See also: *ATIA* ss. 35, 44.

Non-application of paragraph 20(1)(b) / Terms of negotiated contract with government

The applicant, who leased space to a federal agency, objected to the decision of the respondent to disclose the names and addresses of all landlords in Atlantic Canada who leased space to any and all federal departments, including the start and termination date of all leases, the amount of leased space and the appropriate rental rates for each leased space.

The Court concluded that a term of a lease negotiated between the applicant and respondent was not information supplied to the Government. Paragraph 20(1)(b) of the Act was therefore inapplicable to the facts of this case.

Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services), [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994.

Term of ground lease protected

Participation rent, which was a provision of a ground lease, was held by the Court to have been provided to the National Capital Commission in confidence by the third party.

The Court ordered that this information be disclosed to the requester one year from the date of the decision.

Perez Bramalea Ltd. v. Canada (National Capital Commission), [1995] F.C.J. No. 63 (QL) (F.C.T.D.), T-2572-91, T-611-92, T-1393-93, decision dated July 18, 1995.

To note: In this case, the ground lease, which was the document which authorized the National Capital Commission to “lease the ground” to a third party, was considered to have been supplied in confidence. However, the premises lease, which authorized the National Capital Commission to rent office space from the third party, was not considered to have been supplied in confidence. Compare with case above *Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994.

Confidential information

Whether information is confidential will depend upon its content, its purposes and the circumstances in which it was compiled and communicated.

The information at issue related not to any public funds, but to the financial holdings of a group of private individuals. Those funds had been held in trust for the Band by the federal government. Therefore, financial information passed between the parties in the context of that fiduciary relationship. In any similar situation, information is subject to a duty of confidence.

The fact that members are entitled to review the records did not in any way reduce their confidentiality.

Indian reserves are private property. To post information on a reserve is not to make it available to the public at large.

The provision of information to accountants and consultants did not endanger its confidentiality since by the terms of their employment these professionals have a duty of confidence to the Band.

The Court held that audited financial statements (in particular the statements which dealt with Band funds) which had been provided to the Government under the *Indian Act* was confidential information which had been treated confidentially by the third party within the meaning of para. 20(1)(b).

The Court held that certain information regarding grants and contributions should not be considered to be confidential as such information concerned public funds. However, the Court held that since this information was not reasonably severable, it need not be disclosed.

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (T.D.). The reasons of this case apply to the following decisions: *Omeasoo v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 3 F.C. 153 (T.D.); *Ermineskin Band of Indians v. Canada (Minister of Indian and Northern Affairs)* (1988), 15 F.T.R. 42 (F.C.T.D.); *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1988), 18 F.T.R. 32 (F.C.T.D.); *Louis Bull Band of Indians v. Canada (Minister of Indian and Northern Affairs)* (1988), 18 F.T.R. 33 (F.C.T.D.); *Blackfoot Tribe of Indians v. Canada (Minister of Indian Affairs and Northern Development)* (1988), 18 F.T.R. 34 (F.C.T.D.) and *Stoney Tribe of Indians v. Canada (Minister of Indian Affairs and Northern Development)* (1988), 18 F.T.R. 36 (F.C.T.D.).

Requirements under paragraph 20(1)(b) / Cannot argue information confidential to another party

To meet the requirements of para. 20(1)(b), the information at issue must be:

- (1) financial, commercial, scientific or technical information as those terms are commonly understood,
- (2) confidential information in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated,
- (3) be supplied to a government institution by the third party,
- (4) be treated consistently in a confidential manner by the third party.

Where the record consists of comments of public inspectors based on their review of the records maintained by a third party, the principle established in *Canada Packers Inc.* applies and the information is not to be considered as provided by the third party.

The Court addressed two subsidiary matters related to confidentiality. First, some of the records in issue originated with other third parties and it was suggested by the applicant that other third parties might be adversely affected by disclosure of the records. The Court held that even if

other third party interests may be involved that does not provide a basis for classifying information here in issue as confidential in the relationship between the applicant and the Department. Second, the applicant felt unfairly treated by the proposed disclosure of information about the applicant where the record's existence was unknown to the applicant before the request and on which the applicant had no opportunity to comment. The Court admitted that there was a legislative void which Parliament could address by an amendment. The Court suggested that the Department could also address this problem by ensuring in the future that copies of internal records, which are compiled as part of a regulatory process, be provided to any third party whose interests are dealt with in the records so that they may respond.

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Where confidentiality test met

The applicant sought records which contained information on market and site analysis and financial projections. The requester and applicant agreed that this information was financial or commercial information supplied to the Government by third parties that had consistently treated the information in a confidential manner. The issue between the parties was whether the information was confidential within the meaning of para. 20(1)(b) *ATIA*.

The Court concluded that the information was confidential. The Court based its conclusion on the fact that the requested records related to planned and projected commercial operations, that it was not available from any other source and that it was communicated to the respondent not only in a reasonable expectation of confidence that it would not be disclosed, but with an express provision that the information not be referred to or disclosed without permission. The Court added that the fact that the information was submitted to the respondent in order to obtain its financial assistance could not, by itself, justify its disclosure, as long as the requirements of para. 20(1)(b) were met.

Keddy v. Canada (Atlantic Canada Opportunities Agency) (1992), 50 C.P.R. (3d) 484; 66 F.T.R. 227 (F.C.T.D.).

Bid or proposals for government contracts

The applicant objected to the disclosure of proposals, bids and a contract for the provision of translation services.

Whether information is confidential must be decided objectively. The material being considered for release cannot be regarded as confidential by its intrinsic nature.

The Court stated: "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.

Société Gamma Inc. v. Canada (Secretary of State) (1994), 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.).

Treating the information as confidential at least up until the time the contract is awarded or the project abandoned serves the public benefit, ensuring competitive bidding. Whether those same factors are as relevant at the time the request for access is made may be questioned. After proposals submitted in a public tender process are considered and contracts awarded or the process abandoned, the public interest may well dictate disclosure of the tender bids, if sought.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: ATIA ss. 20(1)b), (c), (d), 25, 44.

Requirements to meet confidentiality test

In order for information to be considered to be confidential, three requirements must be met:

- (1) The information must not be available from other sources otherwise accessible by the public nor obtainable by observation or independent study by a member of the public acting on his own.
- (2) The information must originate and be communicated in circumstances giving rise to a reasonable expectation of confidence that it will not be disclosed.
- (3) The information, whether required by law or supplied gratuitously, must be communicated in the context of a relationship which is either fiduciary or not contrary to the public interest and which will be fostered “for public benefit by confidential communication”.

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

See also: *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 665 (T.D.) below where the Court was of the view that these criteria were not to be taken as “superadded conditions” but rather were to be considered as “comments instructive” in determining whether the information sought was confidential or not.

Confidential nature of the information / Impact of disclosure

The Court adopted the approach stated in *Air Atonabee* regarding the interpretation of para. 20(1)(b) and held that the information was exempt from disclosure.

The amount of an import quota is commercial information. Even if a more narrow meaning had been ascribed to the term “confidential” so as to limit it to only information which had an independent market or cost value, the quota figure would still have been commercial information in even the strictest meaning of that term since it had an independent market value.

The Court was satisfied, on the basis of the comments enunciated in *Air Atonabee, supra*, case that the information sought was of a confidential nature. The applicant had contended that the public interest did not require a relationship to be fostered by preserving confidential lines of communication because, even if Government would breach the confidentiality of the information originally provided to it, the information requested would continue to be submitted by the third party in order to receive something of substantial financial benefit—an import allocation quota. The Court rejected this argument and concluded that while the impact of disclosure on the Government’s ability to collect information in the future may be relevant, it was merely an indicia of the confidential nature of the information and not a condition precedent. The Court also held that there was a public interest in this case in maintaining the confidentiality because (1) an undertaking had been given that the information would be kept confidential; (2) similar relationships with other importers were being kept confidential; and (3) in these circumstances disclosure of the information would amount to an unfair market intervention by Government. Therefore, the Government was bound by its undertaking unless the public interest required disclosure pursuant to subs. 20(6).

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 (T.D.).

Information publicly available

A number of decisions establish that the information must be confidential in its nature by some objective standard which takes into account the content of the information, its purposes, and the conditions under which it was prepared and communicated. Even though the information at issue may have been considered to be scientific or technical, to the extent that it had been reproduced in the product monograph, it was publicly available and it cannot be said to have been confidential and to have been treated consistently in a confidential manner.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff’d (1992), 45 C.P.R. (3d) 390 (F.C.A.).

The product monograph of a drug is not exempt from disclosure under this provision of the *ATIA*.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

Information contained in the product monograph of a drug is publicly available and, therefore, not confidential within the meaning of para. 20(1)(b).

Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1990] 1 F.C. 652 (T.D.); aff'd (1990), 113 N.R. 399 (F.C.A.).

Audit of air carrier exempted / Obvious financial advantage to competitor if released

The Court held that a record (called the Minimum Equipment List or MEL) which was used to assess and audit an air carrier's operations, was exempt under para. 20(1)(b) *ATIA*. The MEL is purely and simply a technical document, and constitutes a written record of the ability of an aircraft to fly without certain equipment. Airline companies expended a good deal of expertise and expense in developing this information. The MEL is a document which could be advantageously pirated if not held in the strictest confidence. There would also be an obvious financial advantage to a competitor if the record were published, for the competitor would gain all of the advantages without any effort or expense.

Wells v. Canada (Minister of Transport) (1995), 103 F.T.R. 17 (F.C.T.D.).

Band Council resolutions

Paragraph 20(1)(b) *ATIA* did not apply to the particular band council resolutions as these resolutions did not fall within the definition of financial, commercial, scientific or technical information.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs) (1996), 116 F.T.R. 37; 41 Admin. L.R. (2d) 232 (F.C.T.D.); aff'd [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999 (see below).

The appellants' appeal was dismissed. The fact that documents contain references to land does not make the information "financial" information.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs), [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999.

See also: *ATIA* s. 13.

Band Council resolutions / Indian land registry

The applicant had argued that the requested information concerning Band land records, including Band Council Resolutions, should be exempted under paras. 20(1)(b), (c) and (d) *ATIA*. The applicant elaborated upon the steps which the Band had taken to ensure that the information remain confidential. The applicant further argued that the requested information was of a financial or commercial nature on land holdings as it related to agricultural leases, timber use, land for private businesses and potential mining use.

Nonetheless, the Court held that para. 20(1)(b) *ATIA* did not apply. It stated, “Regarding information that must be reported to the Department, such as information regarding land transfers, there is no presumption of confidentiality. The applicant’s mere expectation that the communications would remain confidential when submitted to the Department is not enough. The case law on the issue of confidentiality is clear that the test to be met is an objective, and not purely subjective one. The Department did not treat the information as confidential, and provided no assurances that it would not be disclosed.”

Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997), 132 F.T.R. 106 (F.C.T.D.); aff’d [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999 (see below).

The appellants’ appeal was dismissed. The fact that documents contain references to land does not make the information “financial” information.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs), [1999] F.C.J. No. 1822 (QL) (F.C.A.), A-721-96, judgment dated November 23, 1999.

See also: *ATIA* s. 13.

Standard for “confidential information”

The Court was not satisfied, on the basis of the standard for “confidential information” as set out in *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.) that all of the information in the Proposal was available only from the applicant and not from sources otherwise accessible to the public. Some of the Proposal information would qualify as not being otherwise available to the public, and some of it would not. The Court dealt with this by severing the information

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 25, 44.

Duty of reasonable severability and para. 20(1)(b)

The respondent had an obligation, pursuant to s. 25 of the Act, to disclose any part of the Proposal that did not contain, and could reasonably be severed from any part that did contain, information described in para. 20(1)(b) that it was required to refuse to disclose.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 25, 44.

Failure to discharge obligation to refuse to disclose

An institution fails to discharge its obligation under s. 20 to refuse to disclose confidential information when it places on the third party the onus of establishing that the information should not be disclosed where the information, on its face, is clearly confidential. While it is true that on review under subs. 44(1) the burden is on the applicant seeking to restrain disclosure, the actual responsibility to refuse to disclose the information under s. 20 is that of the head of the institution.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1), (c), (d), 25, 44.

Meaning of “third party”

The Department’s submission that the evaluation report had not been supplied to it by the applicant, a third party, but rather by a “fourth party”, a consultant retained by the Department to evaluate the applicant’s Proposal, was rejected. The terms “third party” as defined in s. 3 include any party other than the requester or the government institution concerned.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 25, 44.

The opinions contained in the letter were opinions from the Canada Mortgage and Housing Corp. related to an audit it had conducted. Therefore, they were not opinions supplied to a government institution by a “third party” as that term is defined in s. 3 of the *ATIA*.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(b), (c), (d), 27, 44. *PA* s. 3.

Names of builders not “financial, commercial, scientific or technical information”

Even if third party could be interpreted to include the applicants for Canada Mortgage and Housing Corp. assistance, the names of the builders of the projects could not qualify as “financial, commercial, scientific or technical information” “as those terms are commonly understood” pursuant to the test enunciated in *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(b), (c), (d), 27, 44. *PA* s. 3.

Standard of proof / Balance of probabilities

The Court was unable to find, on a balance of probabilities, that the information was confidential and that it had been treated consistently in a confidential manner by the applicants.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: ATIA ss. 19(1), 20(1)(b), (c), (d), 27, 44. PA s. 3.

Record not “supplied to” government institution

The requested record did not fall within the ambit of para. 20(1)(b) as it was not supplied to the government institution but rather was generated or produced by it.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: ATIA ss. 18, 20(1)(b), (c), (d), 20(6), 25.

Confidentiality regime applies unless advised otherwise

That the respondent did not seek assurances that the third parties consistently treated the information as confidential before refusing to disclose the information did not undermine the respondent’s grounds for considering that the confidentiality regime applicable by its policy, from the time the information was received, would continue to be applicable and relied upon by the third parties concerned, unless they were to advise otherwise.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: ATIA ss. 4, 20(1), (c), (d), 41, 49. ATIA Regulations s. 8(2)(a).

Third party information inadequately obliterated / Information still protected

The fact that the applicant was able to discern the contents of page one of the Minutes that were intended to be severed but were inadequately blacked out did not relieve the respondent from its obligation to refuse to disclose the para. 20(1)(b) information.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: ATIA ss. 4, 20(1), (c), (d), 41, 49. ATIA Regulations s. 8(2)(a).

Previous disclosure / Duty to examine document

The fact that information may have been disclosed by the release of other documents as a result of a previous access request does not vary the responsibility of the government institution to consider the particular document now requested in light of the Act.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: *ATIA* ss. 4, 20(1), (c), (d), 41, 49. *ATIA Regulations* s. 8(2)(a).

Paragraphs 20(1)(b) and (c)

Wording of request

The requester had sought access to a document called a “Notice of Compliance” regarding products which had been approved by the respondent Department in 1952. However, the form entitled “Notice of Compliance” had not been developed by the Department at that time. The applicant argued that since the form did not exist at that time, the requester was not entitled to any documents. The Court disagreed and held that the head must be entitled to respond on the basis of the words used in the request in the ordinary sense.

Ciba-Geigy Canada Ltd. v. Canada (Minister of National Health and Welfare) (1986), 11 C.P.R. (3d) 981 (F.C.T.D.).

Terms of negotiated lease

Terms of a negotiated lease is not financial or commercial information “supplied to the government” and therefore cannot be exempted under para. 20(1)(b) *ATIA*. The Court also held that the evidence submitted by Halifax Developments was “couched in generalities and [fell] significantly short of establishing a reasonable expectation of probable harm” to its competitive position or other negotiations.

Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services), [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994.

To note: Decision below in *Perez Bramalea Ltd. v. Canada (National Capital Commission)*, [1995] F.C.J. No. 63 (QL) (F.C.T.D.), T-2572-91, T-611-92, T-1393-93, decision dated July 18, 1995.

Term of ground lease protected

Participation rent, which was a provision of a ground lease, was held by the Court to have been provided to the National Capital Commission in confidence by the third party.

The Court ordered that this information was to be disclosed to the requester one year from the date of the decision.

Perez Bramalea Ltd. v. Canada (National Capital Commission), [1995] F.C.J. No. 63 (QL) (F.C.T.D.), T-2572-91, T-611-92, T-1393-93, decision dated July 18, 1995.

To note: In this case, the ground lease, which was the document which authorized the National Capital Commission to “lease the ground” to a third party, was considered to have been supplied in confidence. However, the premises lease, which authorized the National Capital Commission to rent office space from the third party, was not considered to have been supplied in confidence.

To note: Compare with *Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994.

Negotiation of a lease / Pearson International Airport

Documents relating to the negotiation of a lease between parties with respect to goods and services were exempted from disclosure under paras. 20(1)(b) and (c) *ATIA*. The Court found that much of the information had been given to the Government in confidence. The Court also recognized that the requested information would be of great assistance to the applicant’s competitors. Since it was also established that very little of the requested information had been made public in a court case, the Court ordered that none of the requested documents be disclosed.

Bitove Corp. v. Canada (Minister of Transport) (1996), 119 F.T.R. 278 (F.C.T.D.).

To note: Compare with cases:

1. concerning leases: *Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994 and *Perez Bramalea Ltd. v. Canada (National Capital Commission)*, [1995] F.C.J. No. 63 (QL) (F.C.T.D.), T-2572-91, T-611-92, T-1393-93, decision dated July 18, 1995;
2. concerning competitors: *Prud’homme v. Canada (Canadian International Development Agency)* (1994), 85 F.T.R. 302 (F.C.T.D.) and *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.);
3. concerning documents that were produced in Court: *Chandran v. Canada (Minister of Employment and Immigration)* (1996), 115 F.T.R. 275 (F.C.T.D.).

Reasonable expectation of probable harm / Unfair press coverage

The appellant and other companies wished to have exempted from disclosure certain meat inspection audit reports on the basis of paras. 20(1)(c) and (d) of the Act.

The Court rejected the test enunciated in *Piller Sausages & Delicatessens Ltd. v. Canada (Minister of Agriculture)*, [1988] 1 F.C. 446 (T.D.) concerning the evidence required to support the application of paras. 20(c) and (d), which held that it must describe a direct causation between disclosure and harm. The Court noted that the words “could be reasonably expected to” does not imply any distinction between direct and indirect causality. Paragraph 20(c) or (d) require “a reasonable expectation of probable harm” to be applicable.

The evidence did not sustain the fear of unfair press coverage or the effect that such coverage might have. The appellant had not met the onus of establishing that the reports should not be released.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.).

With respect to reports referring to plants which had been sold, the Court stated that it was not likely that the appellant would suffer loss from disclosures relating to plants with which it no longer had any connection: *Gainers Inc. v. Canada (Minister of Agriculture)* (1988), 87 N.R. 94 (F.C.A.) and *Burns Meats Ltd. v. Canada (Minister of Agriculture)* (1988), 87 N.R. 97 (F.C.A.).

Reasonable expectation of probable harm / Information re: import quota

The respondents established that a reasonable expectation of probable harm existed regarding the information relating to import quota. The information requested was exempted from disclosure under para. 20(1)(c).

The exemption under para. 20(1)(d), which was raised by the third party, was rejected by the Court. The evidence was not sufficient to establish a reasonable expectation that any particular contract or negotiations would be affected by disclosure.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 (T.D.).

Reasonable expectation of probable harm / Failure to prove / Contract with the government

This case concerned a request for documents regarding the payment of a subsidy by the Government to the third party as operator of a ferry. The third party objected to the release of clauses which permitted the Minister of Transport to terminate the contract. The applicant claimed that if the terms of the cancellation clause became known to the critics of the ferry service, then lobbyists might pressure the Minister to terminate the contract.

The applicant must show a reasonable expectation of probable harm in the release of the documents. The Court was not satisfied that the applicant had met this burden of proof.

The Court concluded that whether the Minister decided to terminate the contract—and therefore harm the applicant's financial interest—was no more likely if these clauses of the contract were no longer secret.

The Court found that what was at issue was “a contract made for the expenditure of public funds in connection with the provision of a service to the members of the public”. This was not a case involving trade secrets or confidential information about a private individual or company or where such information would affect negotiations between private third parties. In the Court's view, the terms upon which the government contracts to spend public funds is *prima facie* “government information” and any exception should be “limited and specific”.

Northern Cruiser Co. v. R. (1991), 47 F.T.R. 192 (F.C.T.D.).

The evidence submitted by the applicant was couched in generalities and fell significantly short of establishing a reasonable expectation of probable harm to its competitive position or other negotiations.

Halifax Developments Ltd. v. Canada (Minister of Public Works and Government Services), [1994] F.C.J. No. 2035 (QL) (F.C.T.D.), T-691-94, decision dated September 7, 1994.

Reasonable expectation of material financial loss or competitive prejudice / Failure to prove

The applicant failed to prove that the disclosure of records relating to the evaluation and approval of a new drug would cause it harm. Neither was there any indication as to the degree of harm such disclosure would cause, or history as to how negative publicity had affected its business in the past. No evidence had been adduced to support a reasonable expectation that disclosure would result in material financial loss or prejudice its competitiveness.

Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare) (1989), 20 F.T.R. 73; 30 C.P.R. (3d) 473 (F.C.T.D.).

To note: In coming to this conclusion, the Court was of the view that the applicant had failed to meet the evidentiary burden set down in *Piller Sausages & Delicatessens Ltd. v. Canada (Minister of Agriculture)*, [1988] 1 F.C. 446 (T.D.). However, in a subsequent Federal Court of Appeal decision, the appellate Court held that, to establish a reasonable expectation of probable harm, the applicant need not prove direct causation between disclosure and harm since the wording of this section implied no distinction between direct and indirect causality: *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.).

Harm / Failure to prove

An affidavit which described in the most general way certain consequences that could ensue from disclosure of a brief fell short of meeting the burden of proving the harm that disclosure would cause.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

Probable harm / General misunderstandings / Speculation

The apprehensions about general misunderstandings that might arise from disclosure, either concerning safety in its operations or about use by persons adverse in interest did not raise more than speculation about probable harm.

However, some of the information, including personal information and references to identified particular aircraft that may be used by competitors to the disadvantage of the applicant, was exempted from disclosure pursuant to para. 20(1)(c).

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Reasonable expectation of material financial loss or competitive prejudice / Failure to prove / Contract with the government

The applicant argued that its contract with the Government contained unique phrasing and clauses which, if disclosed, could be used by its competitors to its prejudice. The Court held that what the applicant had established was a possibility of prejudice to its competitive position. It did not show a reasonable expectation of probable harm to meet the test established in *Canada Packers (supra)*.

Saint John Shipbuilding Limited v. Canada (Minister of Supply and Services) (1990), 67 D.L.R. (4th) 315; 107 N.R. 89 (F.C.A.).

Reasonable expectation of probable harm / Advantage to requester in collecting information from public sources does not meet standard of harm

A proper interpretation of para. 20(1)(c) requires a reasonable expectation of probable harm. The estimates of injury provided in this instance were simply not sufficient to establish a reasonable expectation of harm within the meaning of para. 20(1)(c).

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

The applicant argued that access to the requested information would confer an advantage upon the requester by saving him time and expense of collecting the information from several other public sources. The Court was not persuaded by this argument. The appellant itself had made this information publicly available by releasing the product monograph. The appellant did not demonstrate that additional harm would flow to it from the release of the same information under the provisions of the Act.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

Loss of potentially \$300,000 from “publicizing material” not financial loss

The applicant was able to demonstrate that it had lost revenues of approximately \$300,000 from the publicizing of reports similar to the reports which had been requested under the *ATIA*. The respondent argued that this loss was a fraction of one percent of the applicant’s annual sales. The loss in revenues was also over a period of just three months in a limited geographical area. The Court agreed with the respondent that the loss that could be suffered by the applicant was not a material financial loss.

Burns Meats Ltd. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 137 (F.C.T.D.).

Harm / Failure to prove / “Negative information” in report

The fact that the requested records contained “negative information” with respect to the applicant’s drug was not sufficient to exempt the records from disclosure under para. 20(1)(c).

Glaxo Canada Inc. v. Canada (Minister of National Health & Welfare) (1992), 41 C.P.R. (3d) 176 (F.C.T.D.).

Reasonable expectation of material financial loss or competitive prejudice / Failure to prove

The applicant had established a possibility that the release of negative information about its company would have a negative impact on its company, but it did not establish a reasonable expectation of financial loss or prejudice to its competitive position. It was not sufficient evidence to exempt the records from disclosure under para. 20(1)(c).

Matol Botanical International Inc. v. Canada (Minister of National Health & Welfare) (1994), 84 F.T.R. 168 (F.C.T.D.).

Contract with the government / Requester is competitor

The Court agreed with the decision made by CIDA in holding back clauses of a contract between the Agency itself and a company specializing in airplane spraying. To disclose this information to the requester would have amounted to a release of this information to the requester’s main competitor. The Court took into account the third party’s exceptional savoir-faire in the field of airplane spraying and its consultant services.

Communication to the requester of the requested information could reasonably have been expected to have resulted in a probable harm to the third party.

Prud’homme v. Canada (Canadian International Development Agency) (1994), 85 F.T.R. 302 (F.C.T.D.).

General financial success or lack of it not a criterion

The general financial success or lack of it, of any third party has no significance in relation to the decision to refuse to disclose requested information.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: *ATIA* ss. 4, 20(1)(b), (d), 41, 49. *ATIA Regulations* s. 8(2)(a).

Paragraphs 20(1)(c) and (d)

Insufficient proof of “reasonable expectation of probable harm”

The applicant did not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal by simply affirming by affidavit that disclosure “would undoubtedly result in material financial loss and prejudice” to the applicant or would “undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings”. These affirmations are the very findings the Court must make if paras. 20(1)(c) and (d) are to apply. Without further explanations based on evidence that establishes that those outcomes are reasonably probable, the Court is left to speculate and has no basis to find the harm necessary to support application of these provisions.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(d), 25, 44.

Construction contract

Records relating to a construction contract were ordered released by the Court, since the applicant had not demonstrated that the relevant documents were exempt from disclosure under para. 20(1)(c) or (d) *ATIA*.

Swagger Construction Ltd. v. Canada (Minister of Public Works and Government Services) (1996), 112 F.T.R. 152 (F.C.T.D.).

Mistake of fact scenario not indicative of probable harm

The applicant’s concern that the respondent’s coining of the projects as “Tridel projects” would lead to a wrongful conclusion about the applicant’s involvement was not substantiated. All the respondent could do was to use the facts which had been supplied to it.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(d), 27, 44. *PA* s. 3.

Increased notoriety not a factor

Whatever damage the past release of a document other than the record at issue may have caused occurred six years ago and the applicant’s submission that it would not like any more notoriety is insufficient to meet the evidentiary requirements of para. 20(1)(c).

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(d), 27, 44. *PA* s. 3.

Band Council resolutions / Indian Land Registry

The applicant had argued that the requested information concerning Band land records, including Band Council resolutions, should be exempted under para. 20(1)(b), (c) and (d) *ATIA*. The applicant elaborated upon the steps which the Band had taken to ensure that the information remain confidential. The applicant further argued that the requested information was of a financial or commercial nature on land holdings as it related to agricultural leases, timber use, land for private businesses and potential mining use.

Nonetheless, the Court held that the test for either para. 20(1)(c) or (d) *ATIA* had not been met by the applicant. It held: “In order for these documents to qualify for the exemption, the applicant must establish a ‘reasonable expectation of probable harm’ from the release of the information. Thus far, the applicant has made a case for a possible, and not probable harm- and this does not meet the test for either of the exempting paragraphs.”

Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997), 132 F.T.R. 106 (F.C.T.D.).

To note: The Court of Appeal dismissed the applicant’s appeal from the Trial Division decision. The Court dealt with para. 20(1)(b), and did not examine paras. 20(1)(c) and (d).

See also: *ATIA* ss. 13, 20(1)(b).

Amounts at stake in litigation

The evidence was sufficient to demonstrate the magnitude of the amounts at stake in the United States litigation that could reasonably be expected to be the subject of settlement negotiations.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: *ATIA* ss. 18, 20(1)(d), 20(6), 25.

Reasonable expectation of probable harm / Standard of proof / Affidavit

The Court reiterated the test required under paras. 20(1)(c) and (d) (reasonable expectation of probable harm) and the required standard of proof (balance of probabilities).

The affidavits were insufficient as they merely confirmed the probability of harm without giving any evidence of the reasonable expectation of probable harm. Evidence was necessary as the reasonable expectation of probable harm was not self-evident.

Canada (Canadian Broadcasting Corp.) v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 (F.C.T.D.).

See also: *ATIA* ss. 20(1), 20(1)(d).

ATIA prevails over confidentiality clause

A confidentiality clause in an Agreement will not prevent the Court from granting access to the terms of the Agreement if disclosure does not contravene paras. 20(1)(c) and (d). It may affect the relationship of the contracting parties, but will not affect any third party making an access request pursuant to the law.

Canada (Canadian Broadcasting Corp.) v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 (F.C.T.D.).

See also: ATIA ss. 20(1), 20(1)(d).

Paragraph 20(1)(d)

Actual negotiations / Translation services

This paragraph must be distinguished from the prejudice of the competitive position of a third party. This paragraph refers to an obstruction to those (actual) negotiations and not just the increase of competition for a third party which might flow from disclosure. The applicant failed to prove that disclosure of a proposal or bid for translation services met this test.

Société Gamma Inc. v. Canada (Secretary of State) (1994), 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.).

Probability of harm / Definition of “interference”

“Interference” is used in the sense of “obstruct”. What is required from para. 20(1)(d) is the probability and not mere possibility or speculation that disclosure of the information might interfere with its contractual or other negotiations.

Saint John Shipbuilding Limited v. Canada (Minister of Supply and Services) (1990), 67 D.L.R. (4th) 315; 107 N.R. 89 (F.C.A.).

Proof of “reasonable expectation of probable harm” / Affidavits

The applicant did not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal by simply affirming by affidavit that disclosure “would undoubtedly result in material financial loss and prejudice” to the applicant or would “undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings”. These affirmations are the very findings the Court must make if paras. 20(1)(c) and (d) are to apply. Without further explanations based on evidence that establishes those outcomes are reasonably probable, the Court is left to speculate and has no basis to find the harm necessary to support application of these provisions.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: ATIA ss. 20(1)(b), (c), 25, 44.

Reasonable expectation of probable harm / Daily business operations

The Court reiterated the test required under para. 20(1)(d): reasonable expectation that actual contractual negotiations other than daily business operations will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems are insufficient to meet that test. The mere heightening of competition which might flow from disclosure is also insufficient.

Canada (Canadian Broadcasting Corp.) v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 (F.C.T.D.).

See also: ATIA ss. 20(1), 20(1)(c).

ATIA prevails over confidentiality clause

A confidentiality clause in an Agreement will not prevent the Court from granting access to the terms of the Agreement if disclosure does not contravene paras. 20(1)(c) and (d). It may affect the relationship of the contracting parties, but will not affect any third party making an access request pursuant to the law.

Canada (Canadian Broadcasting Corp.) v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 (F.C.T.D.).

See also: ATIA ss. 20(1), 20(1)(c).

Subsection 20(2)

Product or environmental testing / Meat inspection audit reports

Meat inspection audit reports are the product of an inspection process, not environmental or product testing. The audit reports which produced them is a regularly conducted overview of plant conditions and inspection systems, not a test of product quality. This is not, therefore, the kind of information which must automatically be disclosed under subs. 20(2).

Gainers Inc. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 133 (F.C.T.D.); aff'd on different grounds: (1988), 87 N.R. 94 (F.C.A.).

Subsection 20(6)

Discretion given to the head of the institution

In a review under s. 44 of a decision to disclose meat audit inspection reports, the Trial Judge found that if the information at issue did fall within para. 20(1)(c) or (d), it could nonetheless be disclosed pursuant to subs. 20(6).

The Federal Court of Appeal held that the Trial Judge erred in so concluding. Since the head of the institution had not invoked paras. 20(1)(c) or (d), there was no need to consider disclosure in the public interest under subs. 20(6). It was therefore improper for the Court to exercise the Minister's discretion in his stead.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.). For the reasons of the Trial Judge, see *Gainers Inc. v. Canada (Minister of Agriculture)* (1988), 87 N.R. 94 (F.C.A.).

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Providing notice to third parties

When an institution refuses to disclose information on the basis of s. 20 and the matter proceeds to Court the institution is required to provide notice to third parties. Where there are a large number of third parties the notice can be provided through newspaper advertisements.

Canada (Information Commissioner) v. Canada (Minister of National Revenue), T-956-95, decision dated May 24, 1995, F.C.T.D., not reported.

Exercise of discretion / Public interest / Severability

The Court found no reason to conclude that the decision of the Minister's delegate not to rely on the discretionary authority to disclose under subs. 20(6) and not to sever under s. 25 was other than reasonable. The situation was distinguished from *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 (C.A.) in that the record at issue was quite slim and the para. 20(6) review as well as the severability examination could reasonably have been carried out between the time of the receipt of the request and its rejection (approximately one month).

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: ATIA ss. 18, 20(1)(b), (c), (d), 25.

SECTION 21

Advice, etc.

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

- (a) advice or recommendations developed by or for a government institution or a minister of the Crown,
- (b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,
- (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
- (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

Exercise of a discretionary power or an adjudicative function

(2) Subsection (1) does not apply in respect of a record that contains

- (a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or
- (b) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

Legislative History: 1980-81-82-83, c. 111, Sch. I “21”.

JURISPRUDENCE

Decision-making process

This was an application to review the respondent’s decision to refuse to disclose excerpts from certain meetings of the Executive Committee of the CRTC.

On a procedural point, the Court considered the validity of the decision-making process of the CRTC and was satisfied that the process was valid. The Court stated that it could not uphold the application of para. 21(1)(b) unless the decision-making process was valid.

The Court upheld the use of para. 21(1)(b) *ATIA* by the CRTC. It noted that confidentiality in the communication between Committee members in the preparation of a decision is absolutely essential, and para. 21(1)(b) clearly sets out an entirely proper and specific exemption in that respect. The Court held that while para. 21(2)(a) removed the Executive Committee’s reasons for decisions from the scope of para. 21(1)(b), preparatory notes and communications resulting in the reasons for decision could be exempt pursuant thereto.

Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission, [1986] 3 F.C. 413 (T.D.).

Discretion given to the head of the institution

The applicant sought a review of the respondent's decision to withhold minutes of its Executive Committee meetings. Although the Court expressed surprise that the respondent insisted on exempting all of the minutes sought by the applicant, it nevertheless rejected the application based on *Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission*, [1986] 3 F.C. 413 (T.D.).

Re Rubin and President of CMHC (1987), 36 D.L.R. (4th) 22 (F.C.T.D.); rev'd [1989] 1 F.C. 265 (C.A.) (see below).

The Federal Court of Appeal overturned the lower Court's decision. The F.C.A. held that the respondent's decision was invalid because:

(1) the respondent's delegate had failed to perform the severance examination mandated by section 25; and

(2) the respondent's delegate failed to "enter into the necessary examination of the material requested in order to decide what did not fit squarely within the four corners of para. 21(1)(b) ATIA. The discretion given to the institutional head is not unfettered. It must be used in a manner which accords with the conferring statute."

Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265 (C.A.).

Effect of paras. 21(1)(a) and (b) / Protection of wide range of documents / Factual information disclosed

The combined effect of paras. 21(1)(a) and (b) is to exempt from disclosure a very wide range of documents generated in the internal policy processes of a government institution. Documents containing information of a factual or statistical nature, or providing an explanation of the background to a current policy or legislative provision, may not fall within these broad terms. However, most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within para. (a) or (b) of subs. 21(1). The ATIA thus leaves to the heads of government institutions the discretion to decide which of the broad range of documents that fall within these paragraphs can be disclosed without damage to the effectiveness of government. There is very little role for the Court found in overseeing the exercise of this discretion. In the case at bar, the Court was satisfied, after examining the withheld material, that, with three exceptions, it fell within paras. 21(1)(a) and (b). The information that did not fall within paras. 21(1)(a) and (b) was clearly factual in nature.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: *ATIA* ss. 18, 23, 24, 41, 49.

SECTION 22

Testing procedures, tests and audits

22. The head of a government institution may refuse to disclose any record requested under this Act that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits.

Legislative History: 1980-81-82-83, c. 111, Sch. I “22”.

JURISPRUDENCE

Confidential character of a test

Government institutions are authorized under s. 22 *ATIA* to protect the confidential character of information relating to tests. In this case the evidence indicated that the test in question was used frequently. It was important that the confidential character of the test be preserved to ensure that future candidates did not benefit unfairly.

The original transcript of the “in basket” test which the applicant took, as well as related documents, is not personal information under s. 3 *PA*. To include these documents in the definition of personal information under s. 3 *PA* would, in effect, render s. 22 *ATIA* inoperative.

Bombardier v. Canada (Public Service Commission) (1990), 44 F.T.R. 39 (F.C.T.D); aff’d A-684-90, decision dated March 20, 1992, F.C.A., not reported.

SECTION 23

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

Legislative History: 1980-81-82-83, c. 111, Sch. I “23”.

JURISPRUDENCE

Common law to decide if privilege exists

As solicitor-client privilege is not defined in the Act, it is necessary to refer to the common law for the background on the issue. There exists a solicitor-client relationship between the lawyers of the Department of Justice and the executive branch of the Government of Canada, which includes the various Departments. Once this relationship has been established it must be demonstrated that each document to which access is denied by virtue of this provision meets the criteria of confidentiality—that it is either for the purpose of legal advice or in contemplation of litigation.

Weiler v. Canada (Minister of Justice), [1991] 3 F.C. 617 (T.D.).

Scope of solicitor-client privilege

The records in question were protected from disclosure under the scope of the solicitor-client privilege. The party claiming privilege must satisfy the test in *Solosky v. R.*, [1980] 1 S.C.R. 821. The burden falls on the moving party to demonstrate that each and every document falls squarely within the scope of the rule. The party in question must show that:

- (a) the information was communicated by or to a government lawyer in order to provide senior government officials with advice on the legal consequences of proposed governmental activities; and
- (b) the information was and is confidential and was treated as such both at the initial communication and since that time.

Wells v. Canada (Minister of Transport) (1995), 63 C.P.R. (3d) 201 (F.C.T.D.).

Waiver of privilege

The Museum of Nature, on the recommendation of the Department of Justice, ordered a special forensic audit to be carried out by the accounting firm of Peat Marwick and Thorne. The purpose of the report was to determine whether it was prudent to litigate against the Professional Institute of the Public Service of Canada (PIPSC). In the course of his official audit functions, the Auditor General asked for and was given access by the Museum to the forensic audit. PIPSC sought disclosure of the audit under the *ATIA*.

The Court held that the forensic audit had been obtained for the dominant purpose of litigation. The dominant purpose of a document is to be assessed as of the time at which it was brought into existence.

However, the Court held that the Museum had waived the privilege by disclosing the report for a review by the Auditor General in the course of the preparation of his annual report. The Court

reasoned that since the Auditor General acts as a “public watchdog”, he must be looked upon as a third party vis-à-vis the government entities he is called upon to audit. In terms of solicitor-client privilege, disclosure of an otherwise privileged document to the Auditor General in the course of an audit was wholly inconsistent with an intent to maintain the privilege and as such amounted to a waiver.

The Museum had argued that the release of the report to the Auditor General was not voluntary. The Court held that there was no evidence that the Auditor General had invoked any of his statutory powers to compel the Museum to disclose the report. Nor was there any indication that the Auditor General would have resorted to any such powers if the Museum had refused disclosure on the grounds of privilege. Even if the Auditor General had wanted to use his statutory powers, it was not clear that he possessed the power to actually compel the production of the report.

Professional Institute of the Public Service of Canada v. Canadian Museum of Nature (1995), 63 C.P.R. (3d) 449 (F.C.T.D.).

Communications between lawyer and client privileged, including facts found in such communications

There are two types of decisions that must be made when invoking this exemption:

- (1) A factual decision must be taken as to whether or not the requested information is subject to solicitor-client privilege.
- (2) If it is decided that the record is indeed privileged, then a discretionary decision must be made as to whether or not the privileged information ought nevertheless to be disclosed.

In defining the scope of solicitor-client privilege, one must refer to the common law. The solicitor-client privilege extends to the substantive rule of law. The Court quoted extensively from the decisions in *Descôteaux v. Mierwinski*, [1982] 1 S.C.R. 560 and *Susan Hosiery v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27. In *Susan Hosiery*, the Court held that “communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the material created for the lawyer’s brief in the other case are privileged. However, the facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if otherwise the party would be bound to give discovery of them.” The Court stated that there is a “continuum of communications” and emphasized that “all communications between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance falls under the protection of solicitor-client privilege”.

Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.).

Scope of solicitor-client privilege / Solicitor's accounts

Solicitor-client privilege is a substantive rule of law, and its breadth is not meant to vary depending on whether it is invoked for the purposes of the *Access to Information Act* or in some other context. More specifically solicitor's accounts are privileged, and this would apply under the *Access to Information Act* as well as other contexts.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.) (see below).

Any communications between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. An exception to the privilege relates to that information which is not a communication but is rather evidence of an act done by counsel or a mere statement of fact. It follows that a solicitor's bills of accounts (also known as a statement of account, legal bills, legal account, solicitor's account or billing accounts) are protected by solicitor-client privilege as they are merely a necessary extension of the negotiations of the financial terms of the relationship with the solicitor. However, a lawyer's trust accounts and other accounting records (e.g. money held in trust for a client, trust account ledgers, general ledgers, bank reconciliation ledgers, execution of an agreement for the purchase or sale of property) are not so privileged as they relate to acts done by counsel.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

See also: *ATIA* ss. 4, 25.

Solicitor-client privilege not to be interpreted narrowly

There is no basis for construing solicitor-client privilege narrowly under the *ATIA* so as to exclude solicitors' accounts or portions of them from the privileged categorization. The fact that the solicitor-client privilege is not affected by the subs. 2(1) principle that exemptions are to be interpreted narrowly does not constitute an important new principle justifying an award of costs under subs. 53(2).

Stevens v. Canada (Prime Minister), [1997] F.C.J. No. 467 (QL) (F.C.T.D.), T-2419-93, order dated April 2, 1997.

See also: *ATIA* s. 53.

Inadvertent release / Waiver of solicitor-client privilege

There is ample authority to the effect that inadvertent release does not necessarily constitute waiver.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.) (see below).

The Court of Appeal was satisfied that the Trial Judge's analysis of the waiver and discretion issues was correct. The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

See also: *ATIA* ss. 4, 25.

Disclosure of privileged information from government department to government department

In general, with respect to solicitor-client privilege as between government institutions, the release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.).

Partial disclosure of information / No unfairness

In the context of disclosure under the *ATIA*, the partial disclosure of privileged information cannot be taken as an attempt to cause unfairness between parties, or to mislead the applicant or a court, nor is there indication that it would have that effect. The disclosure of portions of the solicitor's accounts does not constitute waiver of solicitor-client privilege.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.) (see below).

The Trial Judge's analysis of the waiver and discretion issues was correct. The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be determined according to all the circumstances, including the conduct of the party and the presence of an intent to mislead the court or another litigant. This approach is appropriate, particularly in light of s. 25 of the Act which allows the disclosure of portions of privileged information. To find that the operation of s. 25 would result in waiver of the privilege would abrogate the discretionary power given to the head of the institution under s. 23. Such a finding would distort the expected result, i.e. to attempt to balance the rights of individuals to access to information, on the one hand, while maintaining confidentiality where other persons are entitled to that confidentiality on the other hand.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

Exercise of discretion / Factors to consider

While nothing prevents an applicant from explaining to the head of the government department why information should be disclosed in a particular case and nothing prevents the head of the

department from taking such submissions into account, there is no obligation to do so under s. 23. All that need be considered by the head of the government institution is whether to waive the right, in whole or in part, to maintain the confidentiality of information that is subject to solicitor-client privilege.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.) (see below).

The Court of Appeal was satisfied that the Trial Judge's analysis of the waiver and discretion issues was correct. The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances.

The Court was of the view that the Government had released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But is it the Government *qua* client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

See also: ATIA ss. 4, 25.

Incorporation of common law doctrine of solicitor-client privilege

Section 23 incorporates the common law doctrine of solicitor-client privilege. That being the case, it is necessary for the government head to determine, before considering the operation of the Act, whether a document is subject to the privilege. This preliminary question is to be determined not in the context of the Act, but in the context of the common law. If the document is subject to privilege, then the discretionary decision under s. 23 is done in the context of the ATIA along with its philosophical presuppositions.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.).

See also: ATIA ss. 4, 25.

***Amicus curiae* / No solicitor-client relationship**

Section 23 did not apply to the statements of concurrence concerning the bill of costs of the *amicus curiae*. The relationship between the *amicus curiae* and the Supreme Court was not a solicitor-client relationship within the meaning of s. 23. Even if the solicitor-client privilege did exist, it did not apply to the statements of concurrence as "only the detail of [the *amicus curiae*'s] professional acts were deemed to be confidential".

Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance), [1998] F.C.J. No. 1745 (QL) (F.C.T.D.), T-912-98, order dated November 20, 1998.

See also: *ATIA* ss. 4, 44, 48.

Scope of privilege / Identity of client not relevant

The identity of the client is irrelevant to the scope or content of the solicitor-client privilege. Whether the client is an individual, a corporation or a government body there is no distinction in the degree of protection offered by the rule. A government is not granted less protection by the privilege than would any other client. Being a public body, it may have a greater incentive to waive the privilege, but the privilege is still its to waive.

Stevens v. Canada (Prime Minister) (1997), 144 D.L.R. (4th) 553; 72 C.P.R. (3d) 129 (F.C.T.D.); aff'd [1998] 4 F.C. 89 (C.A.).

See also: *ATIA* ss. 4, 25.

No disclosure of legal opinion

Since one of the documents withheld was a legal opinion provided by the Department of Justice on the scope of para. 8(1)(c) of the *Income Tax Act*, it fell within the s. 23 exemption. Even though the opinion was given 15 years ago, it dealt with issues that were of continuing vitality. Therefore, there was no obvious error in the exercise of the discretion not to disclose it.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: *ATIA* ss. 18, 21(1)(a), (b), 24, 41, 49.

See also annotations under s. 27 PA.

To note: For decisions on disclosure of s. 23 information for the purposes of preparing for argument, see annotations under s. 47.

SECTION 24

Statutory prohibitions against disclosure

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

Review of statutory prohibitions by Parliamentary committee

(2) Such committee as may be designated or established under section 75 shall review every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.

Legislative History: 1980-81-82-83, c. 111, Sch. I “24”.

JURISPRUDENCE

Taxpayer information / No disclosure / Risk of identifying taxpayers

Subsection 241(1) of the *Income Tax Act*, which is the subject-matter of a s. 24 *ATIA* exemption, forbids any official from knowingly disclosing taxpayer information. However, the s. 214(1) definition of taxpayer information excludes information that “does not directly or indirectly reveal the identity of the taxpayer to whom it relates”. The Court found that the Minister had properly withheld from disclosure taxpayer information as defined in that provision on the ground that there was a real risk that disclosure of the information withheld would indirectly reveal the identity of the taxpayer claimants.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: *ATIA* ss. 18, 21(1)(a), (b), 23, 41, 49.

Subsection 24(2)

Review of statutory prohibitions / Parliament’s intention

Parliament intended that the invocation of provisions in other statutes to prevent disclosure under the *ATIA* be made as restrictive as possible by requiring that Parliament itself mandate resort to such provisions through s. 24.

Canada (Information Commissioner) v. Canada (Immigration Appeal Board), [1988] 3 F.C. 477 (T.D.).

SECTION 25

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

Legislative History: 1980-81-82-83, c. 111, Sch. I “25”.

JURISPRUDENCE

Deletion of exempt information does not constitute refusal

Where an institution determines that a record is exempt from disclosure because it contains exempt information but releases portions that can be reasonably severed, each such deletion of exempt information does not constitute a “refusal”.

Vienneau v. Canada (Solicitor General), [1988] 3 F.C. 336 (T.D.).

See also: ATIA ss. 7, 10(1).

Information not easily severable

Information regarding grants and contributions from public funds contained in an Indian band’s audited financial statements was not reasonably severable because (1) without the rest, the two or three lines of information would be worthless and (2) the effort required to sever would not be “reasonably proportionate to the quality of access it would provide”.

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (T.D.).

See also: ATIA ss. 4, 19, 20(1)(b); PA s. 3.

Severed snippets not reasonable

Severance by a surgical process resulting in the disclosure of disconnected snippets of information is unreasonable as such disclosure does not result in the reasonable fulfillment of the Act. Such an approach is troublesome because (1) what is disclosed may “be meaningless or misleading as the information it contains is taken totally out of context” and (2) what remains “may provide clues to the contents of the deleted portions”. With respect to personal information, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than to disclose certain parts thereof.

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 (T.D.).

See also: ATIA s. 19; PA s. 3.

Head required to consider severance

Once the head of an institution has determined that some of its records are exempt, he is required to consider whether any part of the material can reasonably be severed. Since this section uses the mandatory “shall”, the head of the institution is required to engage in this severance exercise and failure to do so constitutes an error in law which is fatal to the validity of the decision.

Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265 (C.A.).

Reasonable severance defined

Reasonable severance has been accomplished where a document with deletions remains meaningful and there has been no distortion of the original text. The fact that there may be speculation, in the media for example, as to what has not been disclosed, is an irrelevant consideration.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

See also: *ATIA* ss. 4, 20(1).

See also: *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Duty of severability and para. 20(1)(b)

The respondent had an obligation, pursuant to s. 25 of the Act, to disclose any part of the Proposal that did not contain, and could reasonably be severed from any part that did contain, information described in para. 20(1)(b) that it was required to refuse to disclose.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 44.

Solicitor-client privilege and severance of facts

In applying the common law definition of solicitor-client privilege together with s. 25 to a record, the Court held that when the head of the institution has refused to disclose information on the basis of the s. 23 solicitor-client privilege exemption, and where the Court determines that solicitor-client privilege is applicable, it will be infrequent that s. 25 should apply to sever part of the record, making it releasable. Although the facts contained within a communication between a solicitor and his/her client may not themselves be privileged, the document within which they are contained is privileged.

The Court recognized that it could be argued, in a case where the facts contained within a solicitor-client privileged document are not privileged in and of themselves, that such would be an appropriate case for the Minister to sever this portion of the document and exercise his/her discretion under s. 23 of the Act to release this portion of information.

The Court further stated that “In theory, under the Act this would be permissible, as section 23 is a discretionary exemption rather than a mandatory exemption so although the factual portion of a communication may be ‘privileged’ ..., section 23 gives the Minister the discretion to release it, and section 25 gives the Minister the authority to sever and release parts of the record.”

However, in the opinion of the Court, “if the Minister chooses to exercise his/her discretion to retain solicitor-client privilege and therefore refuses disclosure of the information, that would not constitute an improper exercise of discretion. The concept of solicitor-client privilege is well established in our common law, and the reasons behind it remain of utmost importance today.”

Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.).

Decision not to sever reasonable

The Court was satisfied that the Minister’s delegate had considered both subs. 20(6) and s. 25. There was no reason to conclude that the decision of the Minister’s delegate not to rely on the discretionary authority to disclose under subs. 20(6) and not to sever under s. 25 was other than reasonable. The situation was distinguished from *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 (C.A.) in that the record at issue was quite slim and the para. 20(6) review as well as the severability examination could reasonably have been carried out between the time of the receipt of the request and its rejection (approximately one month).

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (F.C.T.D.).

See also: ATIA ss. 18, 20(1)(b), (c), (d), 20(6).

Solicitor’s accounts

The release of portions of the records (i.e. legal accounts) was appropriate given s. 25 of the ATIA which allows for the disclosure of portions of privileged information. It would be a perverse result if the operation of s. 25 were to abrogate the discretionary power given to the head of the institution under s. 23 of the Act.

Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.).

See also: ATIA ss. 4, 23.

Severability of diplomatic notes

The Court of Appeal held that the four diplomatic notes were properly treated as a single dialogue and properly dealt with as one package. The Court was of the view that in these circumstances there should not be any severance.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade), [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999; aff’g (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.).

See also: ATIA s. 15.

SECTION 26

Refusal of access where information to be published

26. The head of a government institution may refuse to disclose any record requested under this Act or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by a government institution, agent of the Government of Canada or minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

Legislative History: 1980-81-82-83, c. 111, Sch. I “26”.

SECTION 27

Notice to third parties

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

- (a) trade secrets of a third party,
- (b) information described in paragraph 20(1)(b) that was supplied by a third party, or
- (c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Waiver of notice

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

Contents of notice

(3) A notice given under subsection (1) shall include

- (a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);
- (b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and
- (c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

Extension of time limit

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in

section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Legislative History: 1980-81-82-83, c. 111, Sch. I “28”.

JURISPRUDENCE

Institution not to be bound by grounds in its original decision / No reason need be specified for decision to disclose

The respondent’s decision to disclose records seemed to be based at different stages on different grounds. Those changes did not demonstrate exemplary administrative practices. Nevertheless, the respondent ought not to be bound by the grounds identified in its original decision.

Unlike the situations in *Ternette* and *Davidson* where the Court was concerned with decisions not to disclose records and the reasons specified for those decisions, the concern here was with decisions to disclose records. No reason needs to be specified for a decision to disclose. The Act requires it.

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

To note: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (C.A.); *Ternette v. Solicitor General of Canada*, [1984] 2 F.C. 486 (T.D.).

Late notices not affecting decisions to release / “Shall” directory only

The appellant argued that the respondent’s failure to give the notices provided for under para. 7(a) and subss. 9(1), 27(1), (4) and 28(1) within the statutory time limits rendered the decisions to release of no legal effect. The Court rejected that argument. The word “shall” in those provisions is directory only, not mandatory. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give notice. To interpret the notice provisions as mandatory would result in a denial of the release of the information to the requesters. In addition, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they did not object to receiving late notices.

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: *ATIA* ss. 7, 9, 28.

Providing notice to third parties

When an institution refuses to disclose information on the basis of s. 20 and the matter proceeds to Court the institution is required to provide notice to third parties. Where there are a large number of third parties the notice can be provided through newspaper advertisements.

Canada (Information Commissioner) v. Canada (Minister of National Revenue), T-956-95, decision dated May 24, 1995, F.C.T.D., not reported.

No standing to initiate review of other parties' interests

The applicant's argument that the failure to provide the organizations listed in Appendix A of the Record with the s. 27 notice vitiated the decision to disclose, was rejected. The Court found that the applicant had no standing, on a s. 44 application, to initiate a review of the interests of other unserved parties including the issue of whether they should have been served. In this s. 44 application, it was Tridel Corporation's interests that were under review, not those of the listed organizations.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: ATIA ss. 19(1), 20(1)(b), (c), (d), 44.

SECTION 28

Representations of third party and decision

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

Representations to be made in writing

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

Contents of notice of decision to disclose

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Disclosure of record

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Legislative History: 1980-81-82-83, c. 111, Sch. I “28”.

JURISPRUDENCE

Requirements of government in providing notice

Where an institution sets out in the notice the exemptions which it feels apply and provides copies of such exemptions, it has complied with this section. It is not required to provide a “detailed analysis of what was required to establish the applicability of those exemptions”.

Ermineskin Band of Indians v. Canada (Minister of Indian and Northern Development) (1988), 18 F.T.R. 27 (F.C.T.D.).

See also: ATIA ss. 20(1)(b), 22, 44.

Condition precedent in issuing notice

The essential condition precedent to the issuance of a notice under this paragraph is that the head of the institution has reason to believe that disclosure of the record might be contrary to s. 20. The preliminary decision that information is not covered by s. 20 is not reviewable under s. 44. It is, however, subject to the more limited common law right of review (the Court adopted the test laid down by Lord Wilberforce in *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*, [1976] 3 All ER 665 (C.A.) at 681-682).

Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368 (T.D.).

See also: *Horseman v. Canada (Minister of Indian Affairs and Northern Development)*, T-2863-86, decision dated March 30, 1987, F.C.T.D., not reported.

See also: ATIA ss. 20(1), 44.

Late notices not affecting decisions to release / “Shall” directory only

The appellant argued that the respondent’s failure to give the notices provided for under para. 7(a) and subss. 9(1), 27(1), (4) and 28(1) within the statutory time limits rendered the decisions

to release of no legal effect. The Court rejected that argument. The word “shall” in those provisions is directory only, not mandatory. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give notice. To interpret the notice provisions as mandatory would result in a denial of the release of the information to the requesters. In addition, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they did not object to receiving late notices.

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: *ATIA* ss. 7, 9, 27.

SECTION 29

Where the Information Commissioner recommends disclosure

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

- (a) the person who requested access to the record; and
- (b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

Contents of notice

(2) A notice given under subsection (1) shall include

- (a) a statement that any third party referred to in paragraph (1)(b) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and
- (b) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Legislative History: 1980-81-82-83, c. 111, Sch. I “29”.

SECTION 30

Receipt and investigation of complaints

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

- (a) from persons who have been refused access to a record requested under this Act or a part thereof;

- (b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;
- (c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;
- (d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;
- (d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;
- (e) in respect of any publication or bulletin referred to in section 5; or
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

Complaints submitted on behalf of complainants

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

Information Commissioner may initiate complaint

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

Legislative History: R.S., 1985, c. A-1, s. 30; 1992, c. 21, s. 4.

JURISPRUDENCE

Disclosure of Information Commissioner's recommendations

The applicants sought an injunction prohibiting the Information Commissioner from publishing or providing to the requester a copy of his report of findings or recommendations. Alternatively, they sought an order barring the requester from making any public disclosure of the report. The prohibition and the interim interlocutory injunction were not granted. The requirements for granting an injunction, i.e. serious issue, irreparable harm to the applicants and a balance of convenience were not met. The Court also held that the material relating to the investigation of the complaint in the affidavits and exhibits should be kept confidential, citing subs. 35(1) *ATIA*.

Canada (Attorney General) v. Canada (Information Commissioner) (1996), 119 F.T.R. 77 (F.C.T.D.).

Relationship between R. 1612 and 1613 *Federal Court Rules* and *ATIA* / Production of documents / Investigation

The applicants sought, pursuant to R. 1612 of the *Federal Court Rules*, the production of documents related to the Information Commissioner's investigation. The Commissioner's objection to production, based on R. 1613, was allowed. Rules 1612 and 1613 do not extend to documents of the Commissioner which are precluded from disclosure by the *ATIA*. The responsibility for investigating complaints is that of the Commissioner under s. 30 and the process of investigation is clearly a matter for his determination under s. 34 which provides that the Commissioner may determine the procedure to be followed in the performance of any of his duties or functions. In addition, under subs. 63(1), the decision of what information to disclose to parties against whom complaints are made is a decision based on the Commissioner's opinion of what is necessary to carry out an investigation or to establish the basis for the findings and recommendations of a report under the Act. Absent a strong case that the disclosure already made does not reasonably meet those objectives, the Court may not intervene to direct the Commissioner that the discretion vested in him has not been properly exercised and that he must disclose further information.

The Court found that the decision in *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (C.A.) (upheld by the Supreme Court of Canada in [1996] 1 S.C.R. 6) was conclusive of the issue. The Court stated: "If that sort of information [i.e. information arising in the course of the Information Commissioner's investigation] may not be compelled to be provided in review proceedings set out by the Act itself [i.e. the *ATIA*], because of the provisions of the Act against disclosure, as *Rubin* teaches, those provisions should be similarly applied to preclude disclosure in judicial review proceedings initiated to review the decision of the Commissioner as a result of an investigation, with a view to setting it aside."

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: *ATIA* ss. 34, 37, 63.

Intent of complainant irrelevant

Arguments to the effect that the complaint was frivolous, vexatious and filed for illicit purposes were rejected. The Act does not speak of screening complaints in light of the intent or purposes of a complainant. Any person whose request for government information is not met, or is not met in a reasonable time, may file a complaint with the Commissioner who then has a duty to investigate the complaint.

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.)

See also: *ATIA* ss. 34, 37, 63.

Commissioner's standing

Had the judicial review matter proceeded, the Information Commissioner would have been properly excluded as a party respondent. The Court relied on *Canada (Human Rights Commission) v. Canada (Attorney General)*, [1994] 2 F.C. 447 (C.A.):

the federal board, commission or tribunal whose decision is subject to review is not a proper party respondent but may be an intervenor in judicial review proceedings, not to argue the merits of the decision made, but to deal with questions of jurisdiction and process.

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: *ATIA* ss. 34, 37, 63.

Deemed refusal tantamount to refusal / Investigation / Exemptions

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial.

The Court explained the procedure to be followed by the Commissioner where a federal institution fails to disclose a record within the time limit prescribed by the Act. In these cases, under the terms of subs. 10(3), there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of s. 7 and subs. 10(1) *ATIA*. The Commissioner may then initiate a complaint and notify the head of the institution. He then conducts the investigation in the course of which the institution is given a reasonable opportunity to make representations and for the purposes of which the Commissioner has the powers prescribed by ss. 36 and 37. The Commissioner's powers are such that he may, at the beginning of the investigation, compel the institution to explain the reasons for its refusal.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigations, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'g in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: *ATIA* ss. 10, 35, 36, 37, 41, 42.

SECTION 31

Written complaint

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall, where the complaint relates to a request for access to a record, be made within one year from the time when the request for the record in respect of which the complaint is made was received.

Legislative History: 1980-81-82-83, c. 111, Sch. I “31”.

SECTION 32

Notice of intention to investigate

32. Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

Legislative History: 1980-81-82-83, c. 111, Sch. I “32”.

SECTION 33

Notice to third parties

33. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof and receives a notice under section 32 of a complaint in respect of the refusal, the head of the institution shall forthwith advise the Information Commissioner of any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.

Legislative History: 1980-81-82-83, c. 111, Sch. I “33”.

SECTION 34

Regulation of procedure

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

Legislative History: 1980-81-82-83, c. 111, Sch. I “34”.

JURISPRUDENCE

Relationship between R. 1612 and 1613 *Federal Court Rules* and *ATIA* / Production of documents / Investigation

The applicants sought, pursuant to R. 1612 of the *Federal Court Rules*, the production of documents related to the Information Commissioner's investigation. The Commissioner's objection to production, based on R. 1613, was allowed. Rules 1612 and 1613 do not extend to documents of the Commissioner which are precluded from disclosure by the *ATIA*. The responsibility for investigating complaints is that of the Commissioner under s. 30 and the process of investigation is clearly a matter for his determination under s. 34 which provides that the Commissioner may determine the procedure to be followed in the performance of any of his duties or functions. In addition, under subs. 63(1), the decision of what information to disclose to parties against whom complaints are made is a decision based on the Commissioner's opinion of what is necessary to carry out an investigation or to establish the basis for the findings and recommendations of a report under the Act. Absent a strong case that the disclosure already made does not reasonably meet those objectives, the Court may not intervene to direct the Commissioner that the discretion vested in him has not been properly exercised and that he must disclose further information.

The Court found that the decision in *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (C.A.) (upheld by the Supreme Court of Canada in [1996] 1 S.C.R. 6) was conclusive of the issue. The Court stated: "If that sort of information [i.e. information arising in the course of the Information Commissioner's investigation] may not be compelled to be provided in review proceedings set out by the Act itself [i.e. the *ATIA*], because of the provisions of the Act against disclosure, as *Rubin* teaches, those provisions should be similarly applied to preclude disclosure in judicial review proceedings initiated to review the decision of the Commissioner as a result of an investigation, with a view to setting it aside."

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: *ATIA* ss. 30, 37, 63.

SECTION 35

Investigations in private

35. (1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

Right to make representations

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(a) the person who made the complaint,

(b) the head of the government institution concerned, and

(c) where the Information Commissioner intends to recommend under subsection 37(1) that a record or a part thereof be disclosed that contains or that the Information Commissioner has reason to believe might contain

(i) trade secrets of a third party,

(ii) information described in paragraph 20(1)(b) that was supplied by a third party, or

(iii) information the disclosure of which the Information Commissioner could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party,

the third party, if the third party can reasonably be located, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Legislative History: 1980-81-82-83, c. 111, Sch. I “35”.

JURISPRUDENCE

No actual direction evidence of confidentiality

The Information Commissioner wrote to over 600 companies that had participated in a survey. The Commissioner stated in each letter that if the company did not respond to the letter, that such lack of response would be taken as consent that the company did not object to the disclosure of information which concerned it and which a government institution had protected by virtue of para. 20(1)(b) *ATIA*. In *obiter*, the Court stated: “[I]n light of the factual background of this case, I have grave reservations concerning the notion that a default or failure to respond to the letter of the Information Commissioner would constitute a valid consent to the disclosure of the information.”

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 (F.C.T.D.); rev’d [1999] F.C.J. No. 1723 (QL) (F.C.A.), A-292-96, judgment dated November 17, 1999 (see below).

The Information Commissioner’s appeal from the decision of the Trial Division was allowed. The onus incumbent upon the Agency under s. 48 *ATIA* required the production of actual direct evidence which was needed to prove original and continuing confidentiality of the information. In the instant case, there was no such evidence supporting a finding of confidentiality in respect of each of the companies concerned. The unsworn “representations” made to the Information Commissioner by 24 of the companies could not be treated as evidence even as to the confidentiality of the information of those companies let alone as to the confidentiality of the information of all the other companies.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency, [1999] F.C.J. No. 1723 (QL) (F.C.A.), A-292-96, judgment dated November 17, 1999.

See also: *ATIA* ss. 20(1)(b), 44.

Communications with Information Commissioner protected

The applicant sought a review of the decision of the Privy Council Office (PCO) not to disclose communications between the Office of the Information Commissioner and PCO relating to a previous access request by the applicant. The Court recognized that s. 35 *ATIA* is wide enough to protect from disclosure representations made by government institutions to the Information Commissioner as well as communications by the Information Commissioner to a government institution if they deal with submissions made by the institution. However, the Court held that this section ceased to apply at the conclusion of the investigation.

Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391 (T.D.); rev'd [1994] 2 F.C. 707 (C.A.) (see below).

The Court of Appeal took a different view of subs. 35(2) *ATIA*. It recognized that this provision had two distinct purposes. By its opening portion, the subsection ensures that persons referred to in subparas. (a) to (c) must have a reasonable opportunity to make representations. The words which follow these subparagraphs expressly deny the right of "...access to...representations made to the Commissioner". The denial of access was unqualified. The Court of Appeal further held that ss. 61, 62 and 65 reinforce its interpretation of subs. 35(2) that representations to the Commissioner remain secret even after the completion of an investigation.

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.); aff'd by the Supreme Court of Canada [1996] 1 S.C.R. 6.

Disclosure of Information Commissioner's recommendations

The applicants sought an injunction prohibiting the Information Commissioner from publishing or providing to the requester a copy of his report of findings or recommendations. Alternatively, they sought an order barring the requester from making any public disclosure of the report. The prohibition and the interim interlocutory injunction were not granted. The requirements for granting an injunction, i.e. serious issue, irreparable harm to the applicants and a balance of convenience were not met. The Court also held that the material relating to the investigation of the complaint in the affidavits and exhibits should be kept confidential, citing subs. 35(1) *ATIA*.

Canada (Attorney General) v. Canada (Information Commissioner) (1996), 119 F.T.R. 77 (F.C.T.D.).

Deemed refusal tantamount to refusal / Investigation / Exemptions

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial.

The Court of Appeal explained the procedure to be followed by the Commissioner where a federal institution fails to disclose a record within the time limit prescribed by the Act. In these cases, under the terms of subs. 10(3), there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of s. 7 and subs. 10(1) *ATIA*. The Commissioner may then initiate a complaint and notify the head of the institution. He then conducts the investigation in the course of which the institution is given a reasonable opportunity to make representations (subs. 35(2)) and for the purposes of which the Commissioner has the powers prescribed by ss. 36 and 37. The Commissioner's powers are such that he may, at the beginning of the investigation, compel the institution to explain the reasons for its refusal.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; *aff'g* in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: *ATIA* ss. 10, 30, 36, 37, 41, 42.

SECTION 36

Powers of Information Commissioner in carrying out investigations

36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

- (a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
- (b) to administer oaths;
- (c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;
- (d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;
- (e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and
- (f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Evidence in other proceedings

(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under this Act, or in a review before the Court under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Witness fees

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Return of documents, etc.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

Legislative History: R.S., 1985, c. A-1, s. 36; R.S., 1985, c. 27 (1st Supp.), s. 187.

JURISPRUDENCE

Powers of Commissioner / Deemed refusal / Impact on right to raise exemptions

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial.

The Court of Appeal explained the procedure to be followed by the Commissioner where a federal institution fails to disclose a record within the time limit prescribed by the Act. In these cases, under the terms of subs. 10(3), there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of s. 7 and subs. 10(1) *ATIA*. The Commissioner may then initiate a complaint and notify the head of the institution. He then conducts the investigation in the course of which the institution is given a reasonable opportunity to make representations (subs. 35(2)) and for the purposes of which the Commissioner has the powers prescribed by ss. 36 and 37. The Commissioner's powers are such that he may, at the beginning of the investigation, compel the institution to explain the reasons for its refusal.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'd in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: ATIA ss. 10, 30, 35, 36, 41, 42.

SECTION 37

Findings and recommendations of Information Commissioner

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

(b) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

Matter to be included in report to complainant

(3) Where a notice has been requested under paragraph (1)(b) but no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

Access to be given

(4) Where, pursuant to a request under paragraph (1)(b), the head of a government institution gives notice to the Information Commissioner that access to a record or a part

thereof will be given to a complainant, the head of the institution shall give the complainant access to the record or part thereof

(a) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(b) in the matter; or

(b) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(b), if that notice is given, unless a review of the matter is requested under section 44.

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

Legislative History: 1980-81-82-83, c. 111, Sch. I “37”.

JURISPRUDENCE

Disclosure of Information Commissioner’s recommendations

The applicants sought an injunction prohibiting the Information Commissioner from publishing or providing to the requester a copy of his report of findings or recommendations. Alternatively, they sought an order barring the requester from making any public disclosure of the report. The prohibition and the interim interlocutory injunction were not granted. The requirements for granting an injunction, i.e. serious issue, irreparable harm to the applicants and a balance of convenience were not met. The Court also held that the material relating to the investigation of the complaint in the affidavits and exhibits should be kept confidential, citing subs. 35(1) *ATIA*.

Canada (Attorney General) v. Canada (Information Commissioner) (1996), 119 F.T.R. 77 (F.C.T.D.).

Commissioner’s recommendations not subject to judicial review

The respondents’ motion to strike out the applicants’ originating notice of motion for judicial review of the Commissioner’s report and recommendation was allowed. (1) While the Court was not persuaded that the function of the Commissioner (i.e. the preparation of a report with non-binding recommendations following an investigation) is beyond the Court’s jurisdiction in relation to judicial review, the Court was satisfied that the application for judicial review became moot by reason of the Minister’s decision not to implement the Commissioner’s recommendation. (2) The merits of the Commissioner’s recommendations are not a matter for the Court. Unless the application and supporting affidavits demonstrate that the Commissioner acted unlawfully, or that his recommendation was clearly unreasonable or that the minimal standard of fairness had not been met, the Court may not intervene.

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: *ATIA* ss. 30, 34, 63.

Powers of Commissioner / Deemed refusal / Impact on right to raise exemptions

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial.

The Court of Appeal explained the procedure to be followed by the Commissioner where a federal institution fails to disclose a record within the time limit prescribed by the Act. In these cases, under the terms of subs. 10(3), there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of s. 7 and subs. 10(1) *ATIA*. The Commissioner may then initiate a complaint and notify the head of the institution. He then conducts the investigation in the course of which the institution is given a reasonable opportunity to make representations (subs. 35(2)) and for the purposes of which the Commissioner has the powers prescribed by ss. 36 and 37. The Commissioner's powers are such that he may, at the beginning of the investigation, compel the institution to explain the reasons for its refusal.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'd in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: *ATIA* ss. 10, 30, 35, 36, 41, 42.

SECTION 38

Annual report

38. The Information Commissioner shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.

Legislative History: 1980-81-82-83, c. 111, Sch. I "38".

SECTION 39

Special reports

39. (1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

Where investigation made

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 37 have been followed in respect of the investigation.

Legislative History: 1980-81-82-83, c. 111, Sch. I “39”.

SECTION 40

Transmission of reports

40. (1) Every report to Parliament made by the Information Commissioner under section 38 or 39 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

Reference to Parliamentary committee

(2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

Legislative History: 1980-81-82-83, c. 111, Sch. I “40”.

SECTION 41

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Legislative History: 1980-81-82-83, c. 111, Sch. I “41”.

JURISPRUDENCE

Fee required

Applications which are not accompanied by the requisite fee “are not applications within the terms of the statute and therefore not the subject of a refusal which can be adjudicated upon by the Court”.

Rubin v. Canada (Minister of Employment and Immigration), [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85, decision dated October 4, 1985.

See also: *ATIA* s. 11; *ATIA Regulations*, s. 7.

Requester suspicious not all records received

In spite of the fact that the respondent was not helpful to the requester in connection with his request, the Court declined to act where no evidence existed in support of an application, other than the requester’s suspicion that documents existed and were not being disclosed.

Creighton v. Canada (Office of the Superintendent of Financial Institutions), T-2048-89, decision dated April 25, 1990, F.C.T.D., not reported.

Review of fees

Where the applicant sought a review of the institution’s decision to demand a deposit before proceeding further with his request, the Court held that the phrase “a review of the matter” was wide enough to permit it to deal with an application based on the possibility that the “fee mechanism has been misused in such a way as to constitute a constructive refusal of access...” (In his reasons, however, Jerome A.C.J. assumed for the purposes of argument that this section allows him this latitude and he prefaces his comments with the caveat that he makes no formal determination in this regard.)

Rubin v. Canada (Minister of Finance) (1987), 9 F.T.R. 317 (F.C.T.D.).

See also: *ATIA* s. 11.

Government institution not bound by original exemptions claimed where opportunity to investigate still exists

The applicant had requested the “Nationair Post-Accident Safety Review Report”. The respondent had refused to release the report under para. 20(1)(b) *ATIA*. The applicant complained to the Information Commissioner. A year after the request had been received, the respondent added two new exemptions, para. 16(1)(c) and para. 20(1)(c) *ATIA*. The applicant complained to the Information Commissioner about the respondent adding new exemptions. The Commissioner upheld the total exemption of the report under para. 16(1)(c) *ATIA*.

The Court distinguished between the facts of this case and *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (C.A.) (see annotation under s. 16 PA). The *Davidson* decision stands for the rationale that it is only where the Commissioner is denied an opportunity to investigate the grounds ultimately relied upon before the Court that the head of the government institution cannot rely on other sections of the Act. It is only in such situations that the head of the government institution is bound by his or her initial choice of exemptions. The Court held that such was not the case here.

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 (F.C.T.D.).

The Information Commissioner had properly determined that the respondent was entitled to raise, during the course of his investigation, an additional ground of exemption.

Tolmie v. Canada (Attorney General), [1997] 3 F.C. 893 (T.D.).

See also: ATIA ss. 4, 12, 68

The Court of Appeal affirmed the Trial Division's decision that the Commissioner's application for judicial review had been premature on the ground that the Commissioner had not investigated the merits of the refusal to give access at the time of the hearing at trial. The Court stated that the failure to disclose a record within the time limits prescribed by the Act constituted a deemed refusal which placed the parties in the same position as if there had been refusal under s. 7 and subs. 10(1) ATIA.

A government institution cannot invoke discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of this investigation, which constitutes the first of two safeguards, the second being judicial review. In the instant case, as this first step had not yet been undertaken, if the government institution intended to invoke any discretionary exemptions, it would have to do so during the Commissioner's investigation.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'g in part (1996), 120 F.T.R. 207 (F.C.T.D.).

Affidavits / Right to cross-examination / Interlocutory motion

The Trial Judge properly exercised his discretion in holding that a party which claims that his right to a full cross-examination on the affidavits of the adverse party's witnesses had been breached must raise this issue by interlocutory motion under Federal Court Rule 332.1 rather than during the hearing of the review application.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'g in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: ATIA ss. 30, 35, 36, 37, 42.

Head of institution's decision subject to review

It is the decision of the head of the agency responsible for maintenance of government records that is subject to review under s. 41 of the Act, not the decision of the Information Commissioner who has investigated a complaint about that decision.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: ATIA ss. 4, 20(1)(b), (c), (d), 49.

The Act confers on the Information Commissioner the power to investigate refusals to disclose and to make recommendations to the head of the government institution. Since the Commissioner's recommendations are not legally binding the decision reviewed by the Court under s. 41 is the Minister's, not the Information Commissioner's. However, while the Court is required to review the Minister's decision on a standard of correctness it is appropriate to have regard to the report and recommendations of the Information Commissioner.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: ATIA ss. 18, 21(1)(a), (b), 23, 24, 41, 49.

See also annotations under s. 41 PA.

SECTION 42

Information Commissioner may apply or appear

42. (1) The Information Commissioner may

- (a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;
- (b) appear before the Court on behalf of any person who has applied for a review under section 41; or
- (c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

Applicant may appear as party

(2) Where the Information Commissioner makes an application under paragraph (1)(a) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

Legislative History: 1980-81-82-83, c. 111, Sch. I "42".

JURISPRUDENCE

Notice of refusal

The Court has jurisdiction to deal with an application regarding the adequacy of a notice of refusal since a review of the notice is a review of the refusal.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1990] 3 F.C. 22 (T.D.).

See also: *ATIA* ss. 10, 15, 50.

Intervenor status for Somalia Commission of Inquiry / *Federal Court Rules* apply

Notwithstanding the fact that nothing in the *ATIA* speaks to the issue of intervention, the Court allowed the Somalia Commission to become an intervenor in the application for review filed by the Information Commissioner. The Court was satisfied that the *Federal Court Rules* and the Practice Rules established by the Associate Chief Justice applied to the proceedings. The Somalia Commission enjoyed all of the rights of a party to the proceedings except the right to file affidavits for evidence, the right to appeal and the right to receive costs.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1996] 116 F.T.R. 131 (F.C.T.D.).

Premature application by Information Commissioner

The Court of Appeal affirmed the decision of the Trial Judge that the Commissioner's application for judicial review had been premature. The Commissioner could not properly apply to the Trial Division for review as he had not fulfilled the condition precedent required in para. 42(1)(a), namely, that the investigation of the merits of the exemptions applied by the institution be complete. Such an investigation cannot be limited to obtaining the institution's response as to whether it will provide access or not.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (QL) (F.C.A.), A-785-96, judgment dated April 19, 1999; aff'g in part (1996), 120 F.T.R. 207 (F.C.T.D.).

See also: *ATIA* ss. 10, 30, 34, 36, 37, 41.

Standing of requester / Intervenor or party

The issue turned on the standing of the requester when a subs. 42(1) application for review is filed by the Information Commissioner. Subsection 42(2) specifically provides that the requester shall be entitled to appear as a party. The Court therefore has no discretion to deal with the

requester except as a party. The requester was granted the same rights as the other parties in the subs. 42(1) but with some restrictions.

Canada (Information Commissioner) v. Canada (Minister of Industry), [1999] F.C.J. No. 567 (QL) (F.C.T.D.), T-394-99, order dated April 26, 1999.

Right of reply by way of affidavit

The function of the affidavit filed by the Information Commissioner at the initial stage of a s. 42(1) application is to establish the fact and extent of non-disclosure. Once non-disclosure has been established, the onus of justifying non-disclosure lies with the respondent whose affidavit material sets out the basis of the refusal. The Information Commissioner should then have the right to submit an affidavit in reply rather than applying for leave to file reply evidence.

Canada (Information Commissioner) v. Canada (Minister of Industry), [1999] F.C.J. No. 567 (QL) (F.C.T.D.), T-394-99, order dated April 26, 1999.

Simultaneous filing of affidavits

The Court held that the Information Commissioner and the added party under subs. 42(2) should file their affidavits simultaneously, in the same manner as multiple defendants are called upon to file their statements of defence simultaneously.

Canada (Information Commissioner) v. Canada (Minister of Industry), [1999] F.C.J. No. 567 (QL) (F.C.T.D.), T-394-99, order dated April 26, 1999.

Subsection 42(2)

Requester's right to intervene

The requester complained to the Information Commissioner who agreed with the respondent that the amounts of pension benefits received by MPs were exempt from disclosure pursuant to subs. 19 *ATIA* but disagreed that the names of the pension recipients were exempt from release. The Department refused to comply with the recommendation. The Commissioner received the requester's consent to initiate and bear the expenses of the judicial review. The Information Commissioner brought an application to review the decision of the Department not to disclose the information in question. The requester applied pursuant to subs. 42(2) *ATIA* and filed a notice of intervention under Federal Court Rule 1611. The Court held it had no jurisdiction to hear the intervenor's request. Rule 319 sets out the criteria that must be met to grant the Court jurisdiction to hear issues raised in an application for judicial review. Since the requester did not file a motion under Rules 319 and 321.1, he cannot circumvent this process by raising arguments during the discovery process or by serving a notice of intervention. Nor can the Commissioner's counsel grant that jurisdiction to the Court by deeds or by consent because parties cannot consent to the jurisdiction of a court if that court does not already possess the jurisdiction to hear the matter.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164; (1996), 70 C.P.R. (3d) 37 (T.D.).

See also annotations under s. 42 of the PA.

SECTION 43

Notice to third parties

43. (1) The head of a government institution who has refused to give access to a record requested under this Act or a part thereof shall forthwith on being given notice of any application made under section 41 or 42 give written notice of the application to any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.

Third party may appear as party

(2) Any third party that has been given notice of an application for a review under subsection (1) may appear as a party to the review.

Legislative History: R.S., 1985, c. A-1, s. 43; 1992, c. 1, s. 144(F).

JURISPRUDENCE

Indirect notice to third parties

A government institution can seek an order of the Court to use newspaper advertisements, rather than direct mailings to notify (in this case over 100,000) individuals and corporations of a request under s. 20 third party information.

Canada (Information Commissioner) v. Canada (Minister of National Revenue), T-956-95, decision dated May 24, 1995, F.C.T.D., not reported.

Reversal of decision by government institution

The respondent processed an access request concerning third party information in the usual manner, i.e: review, notification to third party, second review. The respondent concluded that the information was exempted pursuant to s. 20 of the ATIA. Three years later, the respondent reviewed the records a second time and reversed its decision regarding some of the information.

The Court held that the second decision was null and void. The ATIA only allows the institution to make one decision, with regard to one access request.

Matol Botanical International Inc. v. Canada (Minister of National Health & Welfare) (1994), 84 F.T.R. 168 (F.C.T.D.).

See also annotations under ss. 41, 44 ATIA.

SECTION 44

Third party may apply for a review

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Notice to person who requested record

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

Person who requested access may appear as party

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Legislative History: R.S., 1985, c. A-1, s. 44; R.S., 1985, c. 1 (4th Supp.), s. 45(F).

JURISPRUDENCE

Evidence not subject to disclosure

Notwithstanding the dismissal of the applications in the meat-packing cases, evidence filed in confidence by order of the Court and the cross-examinations thereon conducted in confidence by order were not subject to disclosure.

F.W. Fearman Company Ltd. v. Canada (Minister of Agriculture), T-1118-85, decision dated July 6, 1988, F.C.T.D., not reported.

No extension of time

On an application under Federal Court Rule 324, the Court held that the Act did not make provision for extending the time prescribed under s. 44 nor did the *Federal Court Rules* provide any assistance in this regard. (In any event, if there was authority, the supporting material was inadequate.)

J.M. Schneider Inc. v. R. (1986), 12 C.P.R. (3d) 90 (F.C.T.D.).

The statutory period under subs. 44(1) of the *ATIA* is a strict one and the Federal Court has no jurisdiction to waive the time limit prescribed therein nor to extend it after it has expired. Subsection 44(1) should be interpreted in a manner consistent with the plain meaning of its terms.

Bearskin Lake Air Service v. Canada (Department of Transport) (1996), 119 F.T.R. 282 (F.C.T.D.).

To note: Compare with *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (F.C.T.D.) below.

No discretion to extend time limit except in exceptional circumstances

If the main purpose of the Act is to be served, the time limit fixed by subs. 44(1) must, in the ordinary course, be construed as it was by Strayer J. in *J.M. Schneider Inc. v. Canada* (1986), 12 C.P.R. (3d) 90 (F.C.T.D.) that is, the time limit is to be strictly applied. While the Court may have discretion, upon application, to extend the time for filing or to allow an amendment to an existing application in an exceptional case, unless the case be truly exceptional, it will dismiss the application.

It is necessary to demonstrate how a review of the decision to disclose would serve “to ensure the proper workings of that Act [*ATIA*], and the better attainment of its objects” if the Court is to be persuaded that the case is exceptional and warrants the exercise of discretion.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 25.

Application of *Federal Court Rules* to extend time limit

The Court, acting in accord with Rule 5, may, in an appropriate case, provide for an extension of time by analogy to what it may do in regard to a regular application for judicial review under subs. 18.1(2) of the *Federal Court Act*, and Rule 1614. Similarly, in an appropriate case, the Court may allow an amendment to the original application under subs. 44(1) by analogy to Rules 424 and 427.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 (F.C.T.D.).

See also: *ATIA* ss. 20(1)(b), (c), (d), 25.

When review under section 44 available

Review under subs. 44(1) is available only if a notice of a decision to disclose a record has been given under para. 28(1)(b). The essential condition precedent to the issuance of a s. 28 notice is that the head of the institution has reason to believe that disclosure of the record might be

contrary to s. 20. The preliminary decision of whether or not to proceed under s. 28 is not reviewable under s. 44 and is only subject to a more limited common law right of review.

Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368 (T.D.).

See also: ss. 20(1), 28 *ATIA*.

Hearsay evidence

Where an affidavit filed in support of an application contained only hearsay evidence, the Court dismissed the application, holding that such an affidavit “must be confined to such facts as the witness is able of his own knowledge to prove”.

Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare, Health Protection Branch) (1988), 22 C.P.R. (3d) 177 (F.C.T.D.).

See also: *ATIA* s. 20(1).

The Information Commissioner’s appeal from the decision of the Trial Division was allowed. The onus incumbent upon the Agency under s. 48 *ATIA* required the production of actual direct evidence which was needed to prove original and continuing confidentiality of the information. In the instant case, there was no such evidence supporting a finding of confidentiality in respect of each of the companies concerned. The unsworn “representations” made to the Information Commissioner by 24 of the companies could not be treated as evidence even as to the confidentiality of the information of those companies let alone as to the confidentiality of the information of all the other companies.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency, [1999] F.C.J. No. 1723 (QL) (F.C.A.), A-292-96, judgment dated November 17, 1999.

See also: *ATIA* ss. 20(1)(b), 35.

Where head decides to disclose information

Where the head of the institution, considering all the relevant information before him or her, concludes that the information requested does not fall under s. 20 of the *ATIA*, notice to the third party is not required, will not be ordered by the Court and no right to apply for review under s. 44 accrues.

Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (1988), 18 F.T.R. 32 (F.C.T.D.); *Twinn v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 368 (T.D.); *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Change in exemptions by department

The respondent originally exempted the requested information under subs. 20(1) but informed the third party that the records would be released pursuant to subs. 20(6) *ATIA*. The applicant commenced procedures for a review of the respondent's decision based on the respondent's assessment of public interest disclosure under subs. 20(6) *ATIA*. The respondent then informed the applicant that as a result of a review of additional documents and a draft confidential affidavit, it had decided that s. 20 *ATIA* did not apply to the requested documents.

The Court stated that the respondent was not bound by its original grounds for disclosure. Unlike the situations in *Ternette v. Solicitor General of Canada*, [1984] 2 F.C. 486 (T.D.) and *Davidson v. Canada (Solicitor General)*, [1987] 3 F.C. 15 (T.D.); aff'd [1989] 2 F.C. 341 (C.A.), the decision here was to disclose records. No reason need be specified for disclosure as the Act requires it.

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

De novo review / Detailed review of records

The Court's function is to consider the matter *de novo* including, if necessary, a detailed review of the records in issue, document by document. Only in circumstances where disclosure is refused by the head, or where proposed release is opposed by a third party on grounds which do not meet the statutory requirements for refusal, might a detailed review of the documents be unnecessary.

Air Atonabee Limited v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

Burden of proof

On a third party application under s. 44, the party opposing disclosure bears the burden of showing that clear grounds exist to justify exempting the documents in issue.

Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce), [1984] 1 F.C. 939 (T.D.); *DMR & Associates v. Canada (Minister of Supply & Services)* (1984), 11 C.P.R. (3d) 87 (F.C.T.D.); *Intercontinental Packers Limited v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (F.C.T.D.); aff'd on different grounds (1988), 87 N.R. 99 (F.C.A.) and *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)* (1989), 20 F.T.R. 73; 30 C.P.R. (3d) 473 (F.C.T.D.).

The burden of persuasion rests upon the party resisting disclosure: *Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce)*, [1984] 1 F.C. 939 (T.D.). Here, it is the s. 44(1) applicant.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: ATIA ss. 19(1), 20(1)(b), (c), (d), 27. PA s. 3.

Court's review of Minister's decision

While it is acceptable for a Court to review the discretion which a Minister has exercised, it is improper for a Court in the first instance to exercise the Minister's decision in his or her stead.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.).

Federal Court Rules / Cross-examination

There are no special procedures or rules of court dealing with applications under this section. Furthermore, there is nothing in the rules or procedures of the Federal Court permitting cross-examination or examination of a potential witness in advance of the hearing of an application.

Ermineskin Band of Indians v. Canada (Minister of Indian and Northern Affairs) (1988), 15 F.T.R. 42 (F.C.T.D.).

De novo review / Procedural defects to be cured at hearing

Since the Court conducts a trial *de novo* under this section, any procedural defects which may have been present when the decision to disclose was made will be cured at the hearing. Where the applicant alleged that the third parties had been denied procedural fairness, the Court considered the evidence and found no error which would amount to a breach of fairness.

Ermineskin Band of Indians v. Canada (Minister of Indian and Northern Development) (1988), 18 F.T.R. 27 (F.C.T.D.) (app'd: *Stoney Tribe of Indians v. Canada (Minister of Indian Affairs and Northern Development)* (1988), 18 F.T.R. 36 (F.C.T.D.)); *Blackfoot Tribe of Indians v. Canada (Minister of Indian Affairs and Northern Development)* (1988), 18 F.T.R. 34 (F.C.T.D.).

See also: ATIA ss. 20(1)(b), 22, 28.

De novo review / Federal Court Act judicial review not proper remedy

Section 18.5 of the *Federal Court Act* bars any application for judicial review where a statutory right of appeal exists. Since the word "appeal" may include a trial *de novo*, and since the remedy under s. 44 involves a review in the nature of a trial *de novo*, it follows that a judicial review based on s. 18.1 of the *Federal Court Act* cannot be invoked. However jurisdictional issues can be considered under s. 44 reviews.

Canada Post Corp. v. Canada (Minister of Public Works) (1993), 68 F.T.R. 235 (F.C.T.D.).

Jurisdiction of Court to entertain grounds other than s. 20(1) exemptions

The Court's role under a subs. 44(1) is not limited to a review of whether any of the subs. 20(1) exemptions are applicable. The Court can entertain additional grounds that can be made regarding the proposed release of information. In this case, the applicant's arguments based on paras. 2(d), 11(a), (d) and s. 7 of the *Charter* as well as its argument based on the unconstitutionality of the document, were rejected.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(b), (c), (d), 27. *PA* s. 3.

No standing to initiate review of other parties' interests

The applicant's argument that the failure to provide the organizations listed in Appendix A of the Record with the s. 27 notice vitiated the decision to disclose, was rejected. The Court found that the applicant had no standing to initiate a review of the interests of other unserved parties including the issue of whether they should have been served. In this s. 44 application, it was Tridel Corporation's interests that were under review, not those of the listed organizations.

Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 F.T.R. 185 (F.C.T.D.).

See also: *ATIA* ss. 19(1), 20(1)(b), (c), (d), 27. *PA* s. 3.

Third party can pursue judicial review even though formal request never filed

Even though the requester never filed a formal request under the *ATIA* (since its letter never mentioned the *ATIA*, a formal access request form was never used and the administrative fees were never paid), the prothonotary held that the third party could pursue an application for judicial review under s. 44 *ATIA*. He considered the process followed by the government institution after its receipt of the request for information and the fact that the Department's enabling statute did not provide any other means of disclosing information.

Hydro-Quebec v. Canada (National Energy Board) (1997), 133 F.T.R. 34 (F.C.T.D.).

To note: Compare with *Rubin v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85, decision dated October 4, 1985.

***De novo* review / Restriction on right of intervention not applicable**

The rule restricting the right of intervention of administrative tribunals to questions of jurisdiction only does not apply since the nature of the s. 44 recourse is a *de novo* recourse. The Department was fully entitled to inform the Court of its position with respect to the disclosure of the record.

Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance), [1998] F.C.J. No. 1745 (QL) (F.C.T.D.), T-912-98, order dated November 20, 1998.

See also: ATIA ss. 4, 23, 48.

Right of government institution to appear before Court

Sections 44 and 48 of the Act leave no doubt that a government institution may participate fully in the discussions concerning the disclosure or non-disclosure of the information. Where disclosure is refused, the government institution has the burden, under s. 48, of demonstrating the validity of its refusal. Therefore, s. 48 allows the institution to be part of the discussion. When a government institution agrees to disclose, it is s. 44 that applies. It would be illogical to allow the government institution to participate fully only when it refuses disclosure.

Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance), [1998] F.C.J. No. 1745 (QL) (F.C.T.D.), T-912-98, order dated November 20, 1998.

See also: ATIA ss. 4, 23, 48.

Federal institution / Proper standing as defendant / De novo review

A federal institution has standing to participate fully, as a party defendant, in a s. 44 review. The Court distinguished the ATIA s. 44 review from the s. 18.1 review under the *Federal Court Act*, and relied on *Canada Post Corp. v. Canada (Minister of Public Works)* (1993), 68 F.T.R. 235 (F.C.T.D.).

Aliments Prince Foods Inc. v. Canada (Department of Agriculture and Agri-Food), [1997] F.C.J. No. 247 (QL) (F.C.T.D.), T-1817-98, order dated February 19, 1999.

To note: This case is under appeal.

SECTION 45

Hearing in summary way

45. An application made under section 41, 42 or 44 shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “45”.

SECTION 46

Access to records

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

Legislative History: 1980-81-82-83, c. 111, Sch. I “46”.

JURISPRUDENCE

Purpose

This section was enacted so that the Court would have the information and material necessary to ensure that the discretion given to the administrative head has been exercised within proper limits and on proper principles.

Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265 (C.A.).

See also: ATIA ss. 2, 21, 25.

See also annotations under s. 45 PA.

SECTION 47

Court to take precautions against disclosing

47. (1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.

Disclosure of offence authorized

(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

Legislative History: 1980-81-82-83, c. 111, Sch. I “47”.

JURISPRUDENCE

Preparation of case / No disclosure to counsel

The majority of the Court held that while s. 47 empowers the Court to grant access to counsel for the purpose of arguing the application on the undertaking that counsel will not disclose the

information to anyone including his client, this was not a case where a confidentiality order was appropriate. What constitutes the minimum standard of disclosure will be a question of facts in each case. Where it is the nature of the information collected rather than its specific content which is at issue in the main proceeding to have the contested documents disclosed, counsel need not see the actual information at issue in order to prepare adequately for the application.

Hunter v. Canada (Consumer and Corporate Affairs), [1991] 3 F.C. 186 (C.A.); rev'g (1990), 29 C.P.R. (3d) 321 (F.C.T.D.).

Disclosure to counsel for the purposes of arguing the access case on its merits, subject to an undertaking by counsel of non-disclosure and appropriate security clearance, was denied. In reconciling the s. 47 duty of non-disclosure with the duty of fairness, the Court must consider (a) the explanation of counsel as to why the information is necessary to make effective argument and (b) the kind of information at issue. Depending on the circumstances of the case, knowing the section under which confidentiality is claimed and having some idea of the nature of the documents in question may be sufficient for counsel to advance his or her case.

Steinhoff v. Canada (Minister of Communications) (1996), 114 F.T.R. 108; 69 C.P.R. (3d) 477 (F.C.T.D.).

Preparation of case / Disclosure to counsel

Exceptions to the rule that court proceedings be public must be kept to the minimum of absolute necessity. In applications where the issue is confidentiality, the proceedings cannot be held in public. Furthermore, in order to permit counsel for the requester to argue his client's case effectively, the Court allowed counsel access to the document on his undertaking not to disclose the contents thereof, even to his client.

Maislin Industries Limited v. Canada (Minister for Industry, Trade & Commerce), [1984] 1 F.C. 939 (T.D.).

See also: ATIA ss. 2, 4, 20(1)(b).

The applicant's counsel was allowed to examine the documents upon his undertaking not to disclose the contents to anyone including his clients.

Robertson v. Canada (Minister of Employment and Immigration) (1987), 13 F.T.R. 120 (F.C.T.D.).

Where an affidavit filed in an application contains personal information, it will nevertheless be disclosed to counsel in order that his client's case be effectively argued. Even so, the Court will look at the nature of the information to be released and so its determination will vary with the circumstances of each case.

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 (T.D.).

The respondent was ordered to provide to applicant's counsel more detailed information concerning documents which the respondent refused to disclose on the ground of solicitor-client privilege. Counsel for the applicant had sought access to those documents in order to argue that they were not privileged. The respondent was required to prepare a list of the documents for which the alleged solicitor-client privilege pertains, disclosing the addressee of the documents, the addressor, the date, the title and a brief description of why solicitor-client privilege is claimed.

Blank v. Canada (Minister of the Environment), [1999] F.C.J. No. 571 (QL) (F.C.T.D.), T-1111-98, order dated April 27, 1999.

Third party information / No access to confidential affidavit for purposes of preparing case

The confidential affidavit which refers to information not disclosed to the applicant should not be made available to the applicant nor be struck from the record. In addition, the Court refused to order that all copies of the documents to which access is sought be filed with Court. There was no evidence that the National Research Council's responsibility to preserve the document and the copies of it pending determination of the application for review had not been met.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 546 (QL) (F.C.T.D.), T-146-98, order dated April 27, 1998.

No disclosure to applicant / Incorporation of rules governing production of documents for purposes of actions improper

The Court dismissed the applicant's motion to obtain further information concerning documents which the respondent refused to disclose on the ground that they were subject to solicitor-client privilege. The Court held that (1) the respondent did not need to demonstrate that a *prima facie* claim for privilege existed since the privileged nature of the documents had already been challenged by the filing of an application for review; (2) preliminary motions, in general, are discouraged in judicial review applications such as those provided for under the *ATIA* and *PA* because of the summary nature of those applications; (3) importing the requirements that pertain to an affidavit of documents filed pursuant to Federal Court Rule 223 for purposes of an action into applications for judicial review under the *ATIA* and *PA* would add an unnecessary step to the procedure under those Acts. The Court concluded that, on the basis of the record, the additional information sought was not necessary to enable the applicant to properly pursue his application.

Peet v. Canada (Minister of Natural Resources), [1999] F.C.J. No. 886 (QL) (F.C.T.D.), T-827-99, order dated June 4, 1999.

See also: *PA* s. 3.

Court to take reasonable precautions

This section requires the Court in any proceedings arising under s. 41 or s. 42 to take every reasonable precaution to avoid disclosure of the record that is the subject-matter of the application. This unusual procedure was referred to in *Maislin*.

Canada (Information Commissioner) v. Canada (Prime Minister), [1993] 1 F.C. 427 (T.D.).

Intervenor status for Somalia Commission of Inquiry / Federal Court Rules apply

Notwithstanding the fact that nothing in the *ATIA* speaks to the issue of intervention, the Court allowed the Somalia Commission to become an intervenor in the application for review filed by the Information Commissioner. The Court was satisfied that the *Federal Court Rules* and the Practice Rules established by the Associate Chief Justice applied to the proceedings. The Somalia Commission enjoyed all of the rights of a party to the proceedings except the right to file affidavits for evidence, the right to appeal and the right to receive costs.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1996] 116 F.T.R. 131 (F.C.T.D.).

Ex parte process essential

While under s. 46 *PA* there is a discretion as to whether to receive representations *ex parte*, that section also requires that when the head of the institution does not indicate whether the information exists, the Court is to take every reasonable precaution to avoid the disclosure of any information that the head of the government institution is authorized to refuse to disclose or any information as to whether personal information exists. To satisfy the requirements of s. 46, reception of the evidence on an *ex parte* basis is an essential process for the Court to examine and satisfy itself of the basis for any refusal to disclose any information. This is now an accepted process for *Privacy Act* and *Access to Information Act* proceedings.

Ruby v. Canada (Royal Canadian Mounted Police), [1998] 2 F.C. 351 (T.D.).

To note: This case is under appeal.

See also: *PA* ss. 8, 16, 18, 19, 22, 26, 47, 48, 49, 52.

In camera hearing premature

The applicant's motion to have the proceedings heard *in camera* was premature. Such a request should be made orally at the beginning or during the hearing if such precautions are found to be necessary. The prothonotary also rejected motions to have the affidavit treated as confidential (the affidavit had already been filed as part of the public record) and to have the material to be filed treated as confidential.

Canards du Lac Brome Ltée v. Canada (Department of Agriculture and Agri-Food), T-1829-98, order dated March 5, 1999, not reported.

See also annotations under s. 46 PA.

SECTION 48

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Legislative History: 1980-81-82-83, c. 111, Sch. I “48”.

JURISPRUDENCE

Minister’s decision / Manner of review by Court

The head of a government institution, pursuant to s. 48, has the burden of establishing that he or she is “authorized to refuse” to disclose a requested record. The Minister satisfied this burden when he showed that the information in the sign-in logs constituted “personal information”. Once that fact was established, the Minister’s decision to refuse to disclose pursuant to subpara. 8(2)(m)(i) of the *Privacy Act* may only be reviewed on the basis that it constituted an abuse of discretion. The Minister did not have a “burden” to show that his decision was correct because that decision is not reviewable by a court on the correctness standard. The Minister weighed the conflicting interests at stake. The fact that he stated that the appellant failed to demonstrate that the public interest should override the privacy rights of the employees named in the sign-in logs was therefore irrelevant.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

Onus of proof / Personal Information

Section 48 of the *Access to Information Act* places the onus on the government to show that it is authorized to refuse to disclose a record. The Act makes no distinction between the determination as to whether a record is *prima facie* personal information and whether it is encompassed by one of the exceptions. As a result, it is clear that even where it has been shown that the record is *prima facie* personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in para. 3(j) *Privacy Act*.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

Right of government institution to appear before Court

Sections 44 and 48 of the *ATIA* leave no doubt that a government institution may participate fully in the discussions concerning the disclosure or non-disclosure of the information. Where disclosure is refused, the government institution has the burden, under s. 48, of demonstrating the validity of its refusal. Therefore, s. 48 allows the institution to be part of the discussion. When a government institution agrees to disclose, it is s. 44 that applies. It would be illogical to allow the government institution to participate fully only when it refuses disclosure.

Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance), [1998] F.C.J. No. 1745 (QL) (F.C.T.D.), T-912-98, order dated November 20, 1998.

See also: *ATIA* ss. 4, 23, 44.

See also annotations under s. 47 PA.

SECTION 49

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Legislative History: 1980-81-82-83, c. 111, Sch. I “49”.

JURISPRUDENCE

Review of discretionary decision

Both the French and English versions impart the same meaning: the Court shall order the disclosure of a record if it finds that the applicant has a right to disclosure. However, that right is not absolute, it is subject to the head of the government institution’s discretion to disclose it.

Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission, [1986] 3 F.C. 413 (T.D.).

The provisions of s. 2 of the *ATIA* are wide enough to permit, perhaps even require, the Court to review the exercise of the discretion involved in exempting the records in question.

Rubin v. Canada (Solicitor General) (1986), 1 F.T.R. 157 (F.C.T.D.).

See also: *ATIA* ss. 2, 16.

Court's jurisdiction / Delayed access

On a preliminary motion to dismiss applications for review pursuant to s. 42, it was held that the Court's jurisdiction to review a decision is not dependent on the existence of an outstanding refusal to disclose records and may, in some circumstances, include review of cases of delayed access, even where the records are subsequently produced.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1989] 1 F.C. 3 (T.D.).

See also: *ATIA* ss. 9, 10.

Where an extension of time had been fixed by a government institution and disclosure was not made within that period of time, but prior to the hearing, the Court has jurisdiction to grant the declaratory relief sought.

Canada (Information Commissioner) v. Canada (Minister of External Affairs) (1988), 18 F.T.R. 278 (F.C.T.D.).

To note: For judgements that find to the contrary, see below.

The respondent had failed to disclose the requested information within the extended time period. The applicant requested the Court to require the respondent to provide a detailed explanation as to why he had failed to respond in time and a judgement "that the Minister was deemed to have refused to give access to records by reason of subs. 10(3) *ATIA*". The Court held that it could not award "judgement" because there was no actual refusal to disclose.

X v. Canada (Minister of National Defence), T-1112-89, decision dated June 15, 1990, F.C.T.D., not reported.

See also: *ATIA* ss. 9, 10.

In the absence of a genuine claim for refusal of access, a refusal which is still continuing at the time of the hearing, the Court has no jurisdiction in the matter.

X v. Canada (Minister of National Defence), [1991] 1 F.C. 670 (T.D.).

See also: *ATIA* ss. 9, 10.

Failure to search / Refusal

The applicant argued that the respondent had not adequately searched for "keys" and requested the Court to order a new search. The Court stated that "it is arguable, although I need not and do not make any finding on the point, that a total failure to make a search or an adequate search might, if proven, be tantamount to a refusal to disclose".

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: *Creighton v. Canada (Office of the Superintendent of Financial Institutions)*, T-2048-89, decision dated April 25, 1990, F.C.T.D., not reported.

Mandamus

Sections 49 and 50 set out the applicable remedies under the *ATIA*. *Mandamus* has no application in respect of matters dealt with by this Act.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: *ATIA* ss. 6, 10, 15, 50; *PA* ss. 48, 49.

Court's jurisdiction / Mandatory and discretionary exemptions

Since the Government conceded that the Minister, acting through an officer, erred on the record in deciding that the whole record was exempt, should the Court

- (a) refer the request back to the Department to be predetermined or;
- (b) make a determination on its own whether a portion of the requested documents, if any, should be released.

Section 49 *ATIA* requires that if the Court has determined that the head of the institution was not authorized to refuse to disclose the record, the Court shall make an order to disclose the information, subject to conditions that the Court deems appropriate or shall make such other order as the Court deems appropriate. Before the Court can make any order under this section, it must first determine that the head was not authorized to refuse disclosure. Usually, such a determination entails a document by document review. In this case, the Court did not have to conduct a document by document review to satisfy the first part of the test; i.e. to determine whether or not the Minister was authorized to refuse to disclose the record.

Therefore, the Court could make an order either

- (a) that the Minister disclose the record or part thereof; or
- (b) that the Minister disclose the record or part thereof with any conditions that the Court orders;
or
- (c) any other order that the Court deems appropriate.

If the exemption under the *ATIA* is mandatory, the Court will review the record to make a factual decision as to whether the material comes within the description of the exemption. If the Court determines that the Minister was not authorized to refuse disclosure, then the Court may make

the appropriate order. If the Court determines that the material falls within the description of the exemption, that is the end of the review.

If the exemption is discretionary, then there are two decisions to be reviewed:

- (a) first, the Court must make a factual determination as to whether the requested information falls within the description of the exemption. If no, the Court can make an order in the same manner as for mandatory exemptions. If the Court determines that the requested information does fall within the description of the exemption, then the Court must proceed to step (b);
- (b) once the Court determines that the requested information falls with the exemption, then the Court must also review the discretionary decision of the head of the institution. If the discretion is properly exercised, then the Court should uphold the decision. If the discretion was not properly exercised, then the Court should refer the matter back to the Department.

In the present case, the Court ordered the Department to re-review the records.

Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 (T.D.).

In the case of mandatory exemptions, the Court is called upon to decide only if the information falls within the scope of the exemption. If it does not, the Court will order disclosure. In the case of discretionary exemptions, the role of the Court is to decide not only whether the information falls within that described in the relevant exemptions, but also if it does, whether the head of the institution lawfully exercised the discretion not to disclose it. However, in this latter case, the Court must not decide how *it* would have exercised the discretion, but merely review on administrative law grounds the legality of the exercise of that discretion by the Minister, in light of the overall purpose of the statute and of the particular exemption. Where discretion has been exercised unlawfully, the normal remedy will be to remit the matter to the head of the government institution for a redetermination in accordance with the Court's reasons.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 771 (QL) (F.C.T.D.), T-2144-97, order dated May 19, 1999.

See also: *ATIA* ss. 18, 21(1)(a), (b), 23, 24, 41.

Court's powers / When Court will substitute its opinion for that of Minister

Under s. 49 *ATIA* the reviewing Court is to determine whether the refusal to disclose by the head of a government institution was authorized. If the information does not fall within one of the exceptions to a general right of access, the head of the institution is not "authorized" to refuse disclosure, and the Court may order that the record be released pursuant to s. 49. In making this determination, the reviewing Court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. S. 49 only permits the Court to overturn the decision of the head of the institution where that person is "not authorized" to withhold a record.

Where the requested record constitutes personal information, the head of the institution is authorized to refuse and the *de novo* review power set out in s. 49 is exhausted.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

Role of Court / Factual determination

Where disclosure is refused under subss. 13(1), 19(1) or para. 16(1)(a), the Court must determine that the head of the institution was not authorized to refuse disclosure. This is a factual determination based on a review of the material and a comparison with the provisions of the *ATIA*.

Hoogers v. Canada (Minister of Communications) (1998), 83 C.P.R. (3d) 380 (F.C.T.D.).

See also: *ATIA* ss. 13, 16(1)(c), 19, 50.

Court not to intervene

The decision to refuse to disclose para. 20(1)(c) information is one based upon the judgment of the head of the institution. Unless that decision can be said to be unreasonable, the Court should not intervene in the exercise of the discretion.

Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

See also: *ATIA* ss. 4, 20(1)(b), (c), (d), 41. *ATIA Regulations* s. 8(2)(a).

See also annotations under s. 48 PA.

SECTION 50

Order of Court where reasonable grounds of injury not found

50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Legislative History: 1980-81-82-83, c. 111, Sch. I “50”.

JURISPRUDENCE

Adequacy of content of notice of refusal

Pursuant to this section, the Court has jurisdiction to deal with an application concerning the adequacy of the content of a notice of refusal since a review of the notice is a review of the refusal.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1990] 3 F.C. 22 (T.D.).

See also: ATIA ss. 10, 15, 42.

Mandamus

Sections 49 and 50 set out the applicable remedies under the ATIA. *Mandamus* has no application in respect of matters dealt with by this Act.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: ATIA ss. 6, 10, 15, 49. PA ss. 48, 49.

Scope of judicial review

The scope of judicial review under s. 50 is more limited than it is under s. 49. Under s. 50, the Court can only order disclosure if it determines that the head did not have reasonable grounds to refuse disclosure.

X v. Canada (Minister of National Defence) (1992), 58 F.T.R. 93 (F.C.T.D.).

See also: ATIA ss. 6, 10, 15, 49. PA s. 21.

Role of Court

It is not the role of the Court to examine the process by which a decision taken under this Act is reached. The Court's role is to merely consider the reasonableness of an expectation of harm.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1997), 143 D.L.R. (4th) 746; 71 C.P.R. (3d) 447 (F.C.T.D.); aff'd [1999] F.C.J. No. 673 (QL) (F.C.A.), A-200-97, judgment dated May 6, 1999.

Where either s. 15 or para. 16(1)(c) is applied to refuse to disclose, the Court must determine if reasonable grounds existed for the head of the institution to refuse to disclose.

Hoogers v. Canada (Minister of Communications) (1998), 83 C.P.R. (3d) 380 (F.C.T.D.).

See also: ATIA ss. 13, 16(1)(c), 19, 49.

See also annotations under s. 49 PA.

SECTION 51

Order of Court not to disclose record

51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

Legislative History: 1980-81-82-83, c. 111, Sch. I “51”.

SECTION 52

Applications relating to international affairs or defence

51. (1) Any application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason of paragraph 13(1)(a) or (b) or section 15 shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear such applications.

Special rules for hearings

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(a) be heard *in camera*; and

(b) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

Ex parte representations

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “52”.

JURISPRUDENCE

Cross-examination of deponents

Unless weighty and exceptional circumstances are established, the requester cannot cross-examine the deponents of the secret affidavits produced by the respondent pursuant to this provision.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.).

See also: *ATIA* ss. 2, 4, 13, 15, 19, 50; *PA* s. 51(3).

SECTION 53

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Legislative History: 1980-81-82-83, c. 111, Sch. I “53”.

JURISPRUDENCE

Solicitor-client privilege

The solicitor-client privilege and waiver principles that arose in this case did not qualify as important new principles in relation to the *ATIA*. They are issues which apply in other contexts as well as in the *ATIA* context. In addition, the fact that the solicitor-client privilege is not affected by the subs. 2(1) principle that exemptions are to be interpreted narrowly does not constitute an important new principle. Nor does the issue respecting the exercise of discretion under s. 23.

Stevens v. Canada (Prime Minister), [1997] F.C.J. No. 467 (QL) (F.C.T.D.), T-2419-93, order dated April 2, 1997.

See also: *ATIA* s. 23.

Discretionary award of costs unwarranted

The Court rejected the applicant’s argument that it should exercise its discretion to award costs even if no important new principles were raised. (1) The complexity of the case did not favour the applicant as opposed to the respondent since both had to contend with complex issues; (2) the amelioration of hardship is not a relevant consideration in the award of costs under the *ATIA*; (3) the ambiguity of the respondent’s position regarding the identity of the client in the solicitor-client relationship does not justify a discretionary award of costs (although it would have been a factor in reducing or eliminating an award to a successful party).

Stevens v. Canada (Prime Minister), [1997] F.C.J. No. 467 (QL) (F.C.T.D.), T-2419-93, order dated April 2, 1997.

See also: *ATIA* s. 23.

See also annotations under s. 52 *PA*.

SECTION 54

Information Commissioner

54. (1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.

Tenure of office and removal

(2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons.

Further terms

(3) The Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years.

Absence or incapacity

(4) In the event of the absence or incapacity of the Information Commissioner, or if the office of Information Commissioner is vacant, the Governor in Council may appoint another qualified person to hold office instead of the Commissioner for a term not exceeding six months, and that person shall, while holding that office, have all of the powers, duties and functions of the Information Commissioner under this or any other Act of Parliament and be paid such salary or other remuneration and expenses as may be fixed by the Governor in Council.

Legislative History: 1980-81-82-83, c. 111, Sch. I “54”.

SECTION 55

Rank, powers and duties generally

55. (1) The Information Commissioner shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of Information Commissioner under this or any other Act of Parliament and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

Salary and expenses

(2) The Information Commissioner shall be paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of

that Court, and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this or any other Act of Parliament.

Pension benefits

(3) The provisions of the Public Service Superannuation Act, other than those relating to tenure of office, apply to the Information Commissioner, except that a person appointed as Information Commissioner from outside the Public Service, as defined in the Public Service Superannuation Act, may, by notice in writing given to the President of the Treasury Board not more than sixty days after the date of appointment, elect to participate in the pension plan provided in the Diplomatic Service (Special) Superannuation Act, in which case the provisions of that Act, other than those relating to tenure of office, apply to the Information Commissioner from the date of appointment and the provisions of the Public Service Superannuation Act do not apply.

Other benefits

(4) The Information Commissioner is deemed to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “55”.

SECTION 56

Appointment of Assistant Information Commissioner

56. (1) The Governor in Council may, on the recommendation of the Information Commissioner, appoint one or more Assistant Information Commissioners.

Tenure of office and removal of Assistant Information Commissioner

(2) Subject to this section, an Assistant Information Commissioner holds office during good behaviour for a term not exceeding five years.

Further terms

(3) An Assistant Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding five years.

Legislative History: 1980-81-82-83, c. 111, Sch. I “56”.

SECTION 57

Duties generally

57. (1) An Assistant Information Commissioner shall engage exclusively in such duties or functions of the office of the Information Commissioner under this or any other Act of Parliament as are delegated by the Information Commissioner to that Assistant Information Commissioner and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

Salary and expenses

(2) An Assistant Information Commissioner is entitled to be paid a salary to be fixed by the Governor in Council and such travel and living expenses incurred in the performance of duties under this or any other Act of Parliament as the Information Commissioner considers reasonable.

Pension benefits

(3) The provisions of the *Public Service Superannuation Act*, other than those relating to tenure of office, apply to an Assistant Information Commissioner.

Other benefits

(4) An Assistant Information Commissioner is deemed to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “57”.

SECTION 58

Staff of the Information Commissioner

58. (1) Such officers and employees as are necessary to enable the Information Commissioner to perform the duties and functions of the Commissioner under this or any other Act of Parliament shall be appointed in accordance with the *Public Service Employment Act*.

Technical assistance

(2) The Information Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of those persons.

Legislative History: 1980-81-82-83, c. 111, Sch. I “58”.

SECTION 59

Delegation by Information Commissioner

59. (1) Subject to subsection (2), the Information Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this or any other Act of Parliament except

(a) in any case other than a delegation to an Assistant Information Commissioner, the power to delegate under this section; and

(b) in any case, the powers, duties or functions set out in sections 38 and 39.

Delegations of investigations relating to international affairs and defence

(2) The Information Commissioner may not, nor may an Assistant Information Commissioner, delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part of a record by reason of paragraph 13(1)(a) or (b) or section 15 except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting those investigations.

Delegation by Assistant Information Commissioner

(3) An Assistant Information Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Assistant Information Commissioner may specify, any of the powers, duties or functions of the Information Commissioner under this or any other Act of Parliament that the Assistant Information Commissioner is authorized by the Information Commissioner to exercise or perform.

Legislative History: 1980-81-82-83, c. 111, Sch. I “59”.

SECTION 60

Principal office

60. The principal office of the Information Commissioner shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Legislative History: 1980-81-82-83, c. 111, Sch. I “60”.

SECTION 61

Security requirements

61. The Information Commissioner and every person acting on behalf or under the direction of the Commissioner who receives or obtains information relating to any investigation under this or any other Act of Parliament shall, with respect to access to and the use of that information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of that information.

Legislative History: 1980-81-82-83, c. 111, Sch. I “61”.

JURISPRUDENCE

Relationship between s. 61 and subs. 35(2)

This section served to reinforce the Federal Court of Appeal’s interpretation of subs. 35(2) *ATIA* where the Court held that communications between the Office of the Information Commissioner and a government institution are protected from disclosure even after the investigation is completed.

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.); aff'd by the Supreme Court of Canada [1996] 1 S.C.R. 6.

SECTION 62

Confidentiality

62. Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

Legislative History: 1980-81-82-83, c. 111, Sch. I “62”.

JURISPRUDENCE

Relationship between s. 62 and subs. 35(2)

This section served to reinforce the Federal Court of Appeal’s interpretation of subs. 35(2) *ATIA* where the Court held that communications between the Office of the Information Commissioner and a government institution are protected from disclosure even after the investigation is completed.

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.); aff'd by the Supreme Court of Canada [1996] 1 S.C.R. 6.

SECTION 63

Disclosure authorized

63. (1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

- (a) that, in the opinion of the Commissioner, is necessary to
 - (i) carry out an investigation under this Act, or
 - (ii) establish the grounds for findings and recommendations contained in any report under this Act; or
- (b) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Disclosure of offence authorized

(2) The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against any law of Canada or a

province on the part of any officer or employee of a government institution if in the opinion of the Commissioner there is evidence thereof.

Legislative History: R.S., 1985, c. A-1, s. 63; R.S., 1985, c. 27 (1st Supp.), s. 187.

JURISPRUDENCE

Relationship between R. 1612 and 1613 *Federal Court Rules* and ATIA / Production of documents / Investigation

The applicants sought, pursuant to R. 1612 of the *Federal Court Rules*, the production of documents related to the Information Commissioner's investigation. The Commissioner's objection to production, based on R. 1613, was allowed. Rules 1612 and 1613 do not extend to documents of the Commissioner which are precluded from disclosure by the ATIA. The responsibility for investigating complaints is that of the Commissioner under s. 30 and the process of investigation is clearly a matter for his determination under s. 34 which provides that the Commissioner may determine the procedure to be followed in the performance of any of his duties or functions. In addition, under subs. 63(1), the decision of what information to disclose to parties against whom complaints are made is a decision based on the Commissioner's opinion of what is necessary to carry out an investigation or to establish the basis for the findings and recommendations of a report under the Act. Absent a strong case that the disclosure already made does not reasonably meet those objectives, the Court may not intervene to direct the Commissioner that the discretion vested in him has not been properly exercised and that he must disclose further information.

The Court found that the decision in *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (C.A.) (upheld by the Supreme Court of Canada in [1996] 1 S.C.R. 6) was conclusive of the issue. The Court stated: "If that sort of information [i.e. information arising in the course of the Information Commissioner's investigation] may not be compelled to be provided in review proceedings set out by the Act itself [i.e. ATIA], because of the provisions of the Act against disclosure, as *Rubin* teaches, those provisions should be similarly applied to preclude disclosure in judicial review proceedings initiated to review the decision of the Commissioner as a result of an investigation, with a view to setting it aside."

Canada (Attorney General) v. Canada (Information Commissioner), [1998] 1 F.C. 337 (T.D.).

See also: ATIA ss. 30, 34, 37.

SECTION 64

Information not to be disclosed

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting

on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

Legislative History: 1980-81-82-83, c. 111, Sch. I “64”.

SECTION 65

No summons

65. The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Legislative History: R.S., 1985, c. A-1, s. 65; R.S., 1985, c. 27 (1st Supp.), s. 187.

JURISPRUDENCE

Relationship between s. 65 and subs. 35(2)

This section served to reinforce the Federal Court of Appeal’s interpretation of subs. 35(2) *ATIA* where the Court held that communications between the Office of the Information Commissioner and a government institution are protected from disclosure even after the investigation is completed.

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.); aff’d by the Supreme Court of Canada [1996] 1 S.C.R. 6.

SECTION 66

Protection of Information Commissioner

66. (1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

- (2) For the purposes of any law relating to libel or slander,
- (a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged; and
 - (b) any report made in good faith by the Information Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

Legislative History: 1980-81-82-83, c. 111, Sch. I “66”.

SECTION 67

Obstruction

67. (1) No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner’s duties and functions under this Act.

Offence and punishment

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

Legislative History: 1980-81-82-83, c. 111, Sch. I “67”.

SECTION 67.1

Obstructing right of access

- 67.1 (1) No person shall, with intent to deny a right of access under this Act,
- (a) destroy, mutilate or alter a record;
 - (b) falsify a record or make a false record;
 - (c) conceal a record; or
 - (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

Offence and punishment

- (2) Every person who contravenes subsection (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding \$10,000, or to both; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding \$5,000, or to both.

Legislative History: 1999, c. 16, s. 1.

SECTION 68

Act does not apply to certain materials

68. This Act does not apply to

- (a) published material or material available for purchase by the public;
- (b) library or museum material preserved solely for public reference or exhibition purposes; or
- (c) material placed in the National Archives of Canada, the National Library, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions.

Legislative History: R.S., 1985, c. A-1, s. 68; R.S., 1985, c. 1 (3rd Supp.), s. 12; 1990, c. 3, s. 32; 1992, c. 1, s. 143(E).

JURISPRUDENCE

Purpose

According to the Court, this section was not intended to deny access to any government record that is available from another source.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

See also: ATIA ss. 4, 17, 20(1)(a), 20(1)(b), 20(1)(c), 44.

Material published subsequent to request for access

The requested records—a computer readable version of the Revised Statutes of Canada—became available to the public in CD-ROM format and on the Internet after the applicant had made his request. The Court found that since the records were now available in electronic format, they were exempt from disclosure under para. 68(a).

Tolmie v. Canada (Attorney General), [1997] 3 F.C. 893 (T.D.).

See also: ATIA ss. 4, 12, 41.

No right to particular format

Under the ATIA, a person may seek access to information, but he has no right to dictate that the information be provided to him in a particular format.

Tolmie v. Canada (Attorney General), [1997] 3 F.C. 893 (T.D.).

See also: ATIA ss. 4, 12, 41.

SECTION 69

Confidences of the Queen's Privy Council for Canada

69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

- (a) memoranda the purpose of which is to present proposals or recommendations to Council;
- (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) agenda of Council or records recording deliberations or decisions of Council;
- (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
- (f) draft legislation; and
- (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

Definition of "Council"

(2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(3) Subsection (1) does not apply to

- (a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or
- (b) discussion papers described in paragraph (1)(b)
 - (i) if the decisions to which the discussion papers relate have been made public, or
 - (ii) where the decisions have not been made public, if four years have passed since the decisions were made.

Legislative History: R.S., 1985, c. A-1, s. 69; 1992, c. 1, s. 144(F).

JURISPRUDENCE

Distinction between exemptions and exclusion

Subsection 69(1) employs clear and unambiguous language where it states that the Act does not apply to confidences of the Queen's Privy Council for Canada. A distinction must be drawn between the exempting provisions (ss. 13-26) and the exclusionary provisions of ss. 68 and 69.

There is no discretionary power vested in a government institution to make such confidences accessible to the public.

Gogolek v. Canada (Attorney General), [1996] F.C.J. No. 154 (QL) (F.C.T.D.), T-2491-94, decision dated February 7, 1996.

See also: *ATIA* s. 2(1).

SECTION 70

Duties and functions of designated Minister

70. (1) Subject to subsection (2), the designated Minister shall

- (a) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;
- (b) prescribe such forms as may be required for the operation of this Act and the regulations;
- (c) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations; and
- (d) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

Exception for Bank of Canada

(2) Anything that is required to be done by the designated Minister under paragraph (1)(a) or (c) shall be done in respect of the Bank of Canada by the Governor of the Bank of Canada.

Legislative History: 1980-81-82-83, c. 111, Sch. I “70”.

SECTION 71

Manuals may be inspected by public

71. (1) The head of every government institution shall, not later than July 1, 1985, provide facilities at the headquarters of the institution and at such offices of the institution as are reasonably practicable where the public may inspect any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public.

Exempt information may be excluded

(2) Any information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act may be excluded from any manuals that may be inspected by the public pursuant to subsection (1).

Legislative History: 1980-81-82-83, c. 111, Sch. I “71”.

SECTION 72

Report to Parliament

72. (1) The head of every government institution shall prepare for submission to Parliament an annual report on the administration of this Act within the institution during each financial year.

Tabling of report

(2) Every report prepared under subsection (1) shall be laid before each House of Parliament within three months after the financial year in respect of which it is made or, if that House is not then sitting, on any of the first fifteen days next thereafter that it is sitting.

Reference to Parliamentary committee

(3) Every report prepared under subsection (1) shall, after it is laid before the Senate and the House of Commons under subsection (2), be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

Legislative History: 1980-81-82-83, c. 111, Sch. I “72”.

SECTION 73

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

Legislative History: 1980-81-82-83, c. 111, Sch. I “73”.

JURISPRUDENCE

Delegation order of previous Minister need not be renewed

The order of the previous Minister designating officials to make decisions under the Act need not be renewed by the incoming Minister.

Omeasoo v. Canada (Minister of Indian Affairs and Northern Development), [1988] 3 F.C. 153 (T.D.).

See also: ATIA s. 20(1)(b).

Head of a government institution

Subsection 20(1) provides that the head of a government institution shall refuse to disclose records in certain cases. In section 3 the “head” is specifically and expressly defined as the Minister in the case of a department. Section 73 gives the Minister the power to delegate “by order”. The Minister of Environment Canada had not delegated any powers to the Regional Director when the Regional Director made his decision. The decision of the Regional Director must be set aside.

Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment), [1987] 1 F.C. 610 (T.D.).

No improper delegation

The appellant’s argument that the Minister had improperly delegated to departmental officials the decisions to grant access or not was rejected. The Minister approved the recommendations made by the departmental officials over his own signature. The Court was in agreement with the Trial Judge’s reasons that “...the practice of departmental officials making recommendations to their Minister is entirely consistent with the requirements of the Act and of the delegating instruments” ((1992), 41 C.P.R. (3d) 512 (F.C.T.D.)).

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

SECTION 74

Protection from civil proceeding or from prosecution

74. Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown or any government institution, for the disclosure in good faith of any record or any part of a record pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

Legislative History: 1980-81-82-83, c. 111, Sch. I “74”.

SECTION 75

Permanent review of Act by Parliamentary committee

75. (1) The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

Review and report to Parliament

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

Legislative History: 1980-81-82-83, c. 111, Sch. I “75”.

SECTION 76

Binding on Crown

76. This Act is binding on Her Majesty in right of Canada.

Legislative History: 1980-81-82-83, c. 111, Sch. I “76”.

SECTION 77

Regulations

77. (1) The Governor in Council may make regulations

- (a) prescribing limitations in respect of records that can be produced from machine readable records for the purpose of subsection 4(3);
- (b) prescribing the procedure to be followed in making and responding to a request for access to a record under this Act;
- (c) prescribing, for the purpose of subsection 8(1), the conditions under which a request may be transferred from one government institution to another;
- (d) prescribing a fee for the purpose of paragraph 11(1)(a) and the manner of calculating fees or amounts payable for the purposes of paragraphs 11(1)(b) and (c) and subsections 11(2) and (3);
- (e) prescribing, for the purpose of subsection 12(1), the manner or place in which access to a record or a part thereof shall be given;
- (f) specifying investigative bodies for the purpose of paragraph 16(1)(a);
- (g) specifying classes of investigations for the purpose of paragraph 16(4)(c); and
- (h) prescribing the procedures to be followed by the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner in examining or obtaining copies of records relevant to an investigation of a complaint in respect of a refusal to disclose a record or a part of a record under paragraph 13(1)(a) or (b) or section 15.

Additions to Schedule I

(2) The Governor in Council may, by order, amend Schedule I by adding thereto any department, ministry of state, body or office of the Government of Canada.

Legislative History: R.S., 1985, c. A-1, s. 77; 1992, c. 21, s. 5.

SCHEDULE I

(Schedule I is current as of September 30, 1999. Please note that this administrative consolidation of Schedule I has been prepared for convenience of reference only and has no official sanction.)

(Section 3)

GOVERNMENT INSTITUTIONS

Departments and Ministries of State

Department of Agriculture and Agri-Food

Ministère de l'Agriculture et de l'Agroalimentaire

Department of Canadian Heritage

Ministère du Patrimoine canadien

Department of Citizenship and Immigration

Ministère de la Citoyenneté et de l'Immigration

Department of the Environment

Ministère de l'Environnement

Department of Finance

Ministère des Finances

Department of Fisheries and Oceans

Ministère des Pêches et des Océans

Department of Foreign Affairs and International Trade

Ministère des Affaires étrangères et du Commerce international

Department of Health

Ministère de la Santé

Department of Human Resources Development

Ministère du Développement des Ressources humaines

Department of Indian Affairs and Northern Development

Ministère des Affaires indiennes et du Nord canadien

Department of Industry

Ministère de l'Industrie

Department of Justice

SCHEDULE I

Department of National Defence

Ministère de la Défense nationale

Department of National Revenue (now known as **Canada Customs and Revenue Agency**, as of November 1st, 1999)

Ministère du Revenu national (maintenant connu sous le nom de *Agence des douanes et du revenu du Canada*, depuis le 1^{er} novembre 1999)

Department of Natural Resources

Ministère des Ressources naturelles

Department of Public Works and Government Services

Ministère des Travaux publics et des Services gouvernementaux

Department of the Solicitor General

Ministère du Solliciteur général

Department of Transport

Ministère des Transports

Department of Veterans Affairs

Ministère des Anciens combattants

Department of Western Economic Diversification

Ministère de la Diversification de l'économie de l'Ouest canadien



SCHEDULE I

Other Government Institutions

Atlantic Canada Opportunities Agency

Agence de promotion économique du Canada atlantique

Atlantic Pilotage Authority

Administration de pilotage de l'Atlantique

Atomic Energy Control Board

Commission de contrôle de l'énergie atomique

Bank of Canada

Banque du Canada

British Columbia Treaty Commission

Commission des traités de la Colombie-Britannique

Business Development Bank of Canada

Banque de développement du Canada

Canada Council

Conseil des Arts du Canada

Canada Deposit Insurance Corporation

Société d'assurance-dépôts du Canada

Canada Employment Insurance Commission

Commission de l'assurance-emploi du Canada

Canada Industrial Relations Board

Conseil canadien des relations industrielles

Canada Information Office

Bureau d'information du Canada

Canada Lands Company Limited

Société immobilière du Canada limitée

Canada Mortgage and Housing Corporation

Société canadienne d'hypothèques et de logement

Canada-Newfoundland Offshore Petroleum Board

Office Canada — Terre-Neuve des hydrocarbures extracôtier

Canada-Nova Scotia Offshore Petroleum Board

Office Canada — Nouvelle-Écosse des hydrocarbures extracôtiers

SCHEDULE I

Canada Ports Corporation

Société canadienne des ports

Canadian Advisory Council on the Status of Women

Conseil consultatif canadien de la situation de la femme

Canadian Artists and Producers Professional Relations Tribunal

Tribunal canadien des relations professionnelles artistes-producteurs

Canadian Centre for Management Development

Centre canadien de gestion

Canadian Centre for Occupational Health and Safety

Centre canadien d'hygiène et de sécurité au travail

Canadian Commercial Corporation

Corporation commerciale canadienne

Canadian Cultural Property Export Review Board

Commission canadienne d'examen des exportations de biens culturels

Canadian Dairy Commission

Commission canadienne du lait

Canadian Environmental Assessment Agency

Agence canadienne d'évaluation environnementale

Canadian Film Development Corporation

Société de développement de l'industrie cinématographique canadienne

Canadian Food Inspection Agency

Agence canadienne d'inspection des aliments

Canadian Forces

Forces canadiennes

Canadian Government Specifications Board

Office des normes du gouvernement canadien

Canadian Grain Commission

Commission canadienne des grains

Canadian Human Rights Commission

Commission canadienne des droits de la personne

SCHEDULE I

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Canadian International Development Agency

Agence canadienne de développement international

Canadian International Trade Tribunal

Tribunal canadien du commerce extérieur

Canadian Museum of Civilization

Musée canadien des civilisations

Canadian Museum of Nature

Musée canadien de la nature

Canadian Polar Commission

Commission canadienne des affaires polaires

Canadian Radio-television and Telecommunications Commission

Conseil de la radiodiffusion et des télécommunications canadiennes

Canadian Security Intelligence Service

Service canadien du renseignement de sécurité

Canadian Space Agency

Agence spatiale canadienne

Canadian Transportation Accident Investigation and Safety Board

Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports

Canadian Transportation Agency

Office des transports du Canada

Copyright Board

Commission du droit d'auteur

Correctional Service of Canada

Service correctionnel du Canada

Defence Construction (1951) Limited

Construction de défense (1951) Limitée

Director of Soldier Settlement

Directeur de l'établissement de soldats

SCHEDULE I

The Director, The Veterans' Land Act

Directeur des terres destinées aux anciens combattants

Economic Development Agency of Canada for the Regions of Quebec

Agence de développement économique du Canada pour les régions du Québec

Energy Supplies Allocation Board

Office de répartition des approvisionnements d'énergie

Ethics Counsellor

Conseiller en éthique

Farm Credit Corporation

Société du crédit agricole

The Federal Bridge Corporation Limited

La Société des ports fédéraux Limitée

Federal-Provincial Relations Office

Secrétariat des relations fédérales-provinciales

Fisheries Prices Support Board

Office des prix des produits de la pêche

Fraser River Port Authority

Administration portuaire du fleuve Fraser

Freshwater Fish Marketing Corporation

Office de commercialisation du poisson d'eau douce

Grain Transportation Agency Administrator

Administrateur de l'Office du transport du grain

Great Lakes Pilotage Authority

Administration de pilotage des Grands Lacs

Gwich'in Land Use Planning Board

Office gwich'in d'aménagement territorial

Gwich'in Land and Water Board

Office gwich'in des terres et des eaux

Halifax Port Authority

Administration portuaire de Halifax

SCHEDULE I

Hazardous Materials Information Review Commission

Conseil de contrôle des renseignements relatifs aux matières dangereuses

Historic Sites and Monuments Board of Canada

Commission des lieux et monuments historiques du Canada

Immigration and Refugee Board

Commission de l'immigration et du statut de réfugié

International Centre for Human Rights and Democratic Development

Centre international des droits de la personne et du développement démocratique

International Development Research Centre

Centre de recherches pour le développement international

The Jacques-Cartier and Champlain Bridges Inc.

Les Ponts Jacques-Cartier et Champlain Inc.

Laurentian Pilotage Authority

Administration de pilotage des Laurentides

Law Commission of Canada

Commission du droit du Canada

The Leadership Network

Le Réseau du leadership

MacKenzie Valley Environmental Impact Review Board

Office d'examen des répercussions environnementales de la vallée du MacKenzie

Medical Research Council

Conseil de recherches médicales

Merchant Seamen Compensation Board

Commission d'indemnisation des marins marchands

Millennium Bureau of Canada

Bureau du Canada pour le millénaire

Montreal Port Authority

Administration portuaire de Montréal

National Archives of Canada

SCHEDULE I

The National Battlefields Commission

Commission des champs de bataille nationaux

National Capital Commission

Commission de la capitale nationale

National Energy Board

Office national de l'énergie

National Farm Products Council

Conseil national des produits agricoles

National Film Board

Office national du film

National Gallery of Canada

Musée des beaux-arts du Canada

National Library

Bibliothèque nationale

National Museum of Science and Technology

Musée national des sciences et de la technologie

National Parole Board

Commission nationale des libérations conditionnelles

National Research Council of Canada

Conseil national de recherches du Canada

National Round Table on the Environment and the Economy

Table ronde nationale sur l'environnement et l'économie

Natural Sciences and Engineering Research Council

Conseil de recherches en sciences naturelles et en génie

Northern Pipeline Agency

Administration du pipe-line du Nord

Northwest Territories Water Board

Office des eaux des Territoires du Nord-Ouest

Office of Privatization and Regulatory Affairs

Bureau de privatisation et des affaires réglementaires

SCHEDULE I

Office of the Comptroller General

Bureau du contrôleur général

Office of the Co-ordinator, Status of Women

Bureau de la coordonnatrice de la situation de la femme

Office of the Correctional Investigator of Canada

Bureau de l'enquêteur correctionnel du Canada

Office of the Inspector General of the Canadian Security Intelligence Service

Bureau de l'inspecteur général du service canadien du renseignement de sécurité

Office of the Superintendent of Financial Institutions

Bureau du surintendant des institutions financières

Pacific Pilotage Authority

Administration de pilotage du Pacifique

Parks Canada Agency

Agence parcs Canada

Patented Medicine Prices Review Board

Conseil d'examen du prix des médicaments brevetés

Pension Appeals Board

Commission d'appel des pensions

Petroleum Compensation Board

Office des indemnisations pétrolières

Petroleum Monitoring Agency

Agence de surveillance du secteur pétrolier

Prairie Farm Rehabilitation Administration

Administration du rétablissement agricole des Prairies

Prince Rupert Port Authority

Administration portuaire de Prince-Rupert

Privy Council Office

Bureau du Conseil privé

Public Service Commission

SCHEDULE I

Public Service Staff Relations Board

Commission des relations de travail dans la fonction publique

Quebec Port Authority

Administration portuaire de Québec

Regional Development Incentives Board

Conseil des subventions au développement régional

Royal Canadian Mint

Monnaie royale canadienne

Royal Canadian Mounted Police

Gendarmerie royale du Canada

Royal Canadian Mounted Police External Review Committee

Comité externe d'examen de la Gendarmerie royale du Canada

Royal Canadian Mounted Police Public Complaints Commission

Commission des plaintes du public contre la Gendarmerie royale du Canada

St. John's Port Authority

Administration portuaire de St-John's

Sahtu Land and Water Board

Office des terres et des eaux du Sahtu

Sahtu Land Use Planning Board

Office d'aménagement territorial du Sahtu

The Seaway International Bridge Corporation, Ltd.

La Corporation du Pont international de la voie maritime, Ltée

Saguenay Port Authority

Administration portuaire du Saguenay

Saint John Port Authority

Administration portuaire de Saint-Jean

Security Intelligence Review Committee

Comité de surveillance des activités de renseignement de sécurité

Sept-Îles Port Authority

Administration portuaire de Sept-Îles

SCHEDULE I

Social Sciences and Humanities Research Council

Conseil de recherches en sciences humaines

Standards Council of Canada

Conseil canadien des normes

Statistics Canada

Statistique Canada

Statute Revision Commission

Commission de révision des lois

Toronto Port Authority

Administration portuaire de Toronto

Treasury Board Secretariat

Secrétariat du Conseil du Trésor

Trois-Rivières Port Authority

Administration portuaire de Trois-Rivières

Vancouver Port Authority

Administration portuaire de Vancouver

Veterans Review and Appeal Board

Tribunal des anciens combattants (révision et appel)

Yukon Surface Rights Board

Office des droits de surface du Yukon

Yukon Territory Water Board

Office des eaux du territoire du Yukon

SCHEDULE II

(Schedule II is current as of September 30, 1999. Please note that this administrative consolidation of Schedule II has been prepared for convenience of reference only and has no official sanction.)

(Section 24)

Act	Provision
Aeronautics Act <i>Loi sur l'aéronautique</i>	subsections 4.8(1) and 6.5(5)
Anti-Inflation Act, S.C. 1974-75-76, c. 75 <i>Loi anti-inflation, S.C. 1974-75-76, ch. 75</i>	section 14
Atomic Energy Control Act <i>Loi sur le contrôle de l'énergie atomique</i>	section 9
Business Development Bank of Canada Act <i>Loi sur la Banque de développement du Canada</i>	section 37
Canada Labour Code <i>Code canadien du travail</i>	subsection 144(2)

**Canada-Newfoundland Atlantic
Accord Implementation Act, S.C.
1987, c. 3**

section 119

*Loi de mise en œuvre de l'Accord
atlantique Canada — Terre-Neuve,
S.C. 1987, ch. 3*

SCHEDULE II

Act	Provision
Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28 <i>Loi de mise en œuvre de l'Accord Canada — Nouvelle-Écosse sur les hydrocarbures extracôtiers, L.C. 1988, ch. 28</i>	sections 19 and 122
Canada-Nova Scotia Oil and Gas Agreement Act, S.C. 1984, c. 29 <i>Loi sur l'Accord entre le Canada et la Nouvelle-Écosse sur la gestion des ressources pétrolières et gazières, S.C. 1984, ch. 29</i>	section 53
Canada Pension Plan <i>Régime de pensions du Canada</i>	section 104
Canada Petroleum Resources Act <i>Loi fédérale sur les hydrocarbures</i>	section 101 sections 51(1) and 167
Canada Transportation Act <i>Loi sur les transports au Canada</i>	
Canadian Environmental Assessment Act <i>Loi canadienne sur l'évaluation environnementale</i>	subsection 35(4)
Canadian Environmental Protection Act <i>Loi canadienne sur la protection de l'environnement</i>	sections 20 and 21

SCHEDULE II

Act	Provision
Canadian Human Rights Act <i>Loi canadienne sur les droits de la personne</i>	subsection 47(3)
Canadian International Trade Tribunal Act <i>Loi sur le Tribunal canadien du commerce extérieur</i>	sections 45 and 49
Canadian Ownership and Control Determination Act <i>Loi sur la détermination de la participation et du contrôle canadiens</i>	section 17
Canadian Security Intelligence Service Act <i>Loi sur le Service canadien du renseignement de sécurité</i>	section 18
Canadian Transportation Accident Investigation and Safety Board Act <i>Loi sur le Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports</i>	subsections 28(2) and 31(4)
Competition Act <i>Loi sur la concurrence</i>	subsection 29(1)
Corporations and Labour Unions Returns Act <i>Loi sur les déclarations des personnes morales et des syndicats</i>	section 18

SCHEDULE II

Act	Provision
Criminal Code <i>Code criminel</i>	sections 187, 193 and 487.3
Criminal Records Act <i>Loi sur le casier judiciaire</i>	subsection 6(2) and section 9
Customs Act <i>Loi sur les douanes</i>	section 107
Defence Production Act <i>Loi sur la production de défense</i>	section 30
Department of Human Resources Development Act <i>Loi sur le ministère du Développement des ressources humaines</i>	Section 33.5
Department of Industry Act <i>Loi sur le ministère de l'Industrie</i>	subsection 16(2)
Energy Administration Act <i>Loi sur l'administration de l'énergie</i>	section 98
Energy Efficiency Act <i>Loi sur l'efficacité énergétique</i>	section 23
Energy Monitoring Act <i>Loi sur la surveillance du secteur énergétique</i>	section 33

SCHEDULE II

Act	Provision
Energy Supplies Emergency Act <i>Loi d'urgence sur les approvisionnementnements d'énergie</i>	section 40.1
Excise Tax Act <i>Loi sur la taxe d'accise</i>	section 295
Family Allowances Act <i>Loi sur les allocations familiales</i>	section 18
Hazardous Products Act <i>Loi sur les produits dangereux</i>	section 12
Income Tax Act <i>Loi de l'impôt sur le revenu</i>	section 241
Industrial Research and Development Incentives Act, R.S.C. 1970, c. I-10 <i>Loi stimulant la recherche et le développement scientifiques, S.R.C. 1970, ch. I-10</i>	section 13
Investment Canada Act <i>Loi sur Investissement Canada</i>	section 36
Mackenzie Valley Resource Management Act <i>Loi sur la gestion des ressources de la vallée du MacKenzie</i>	Paragraph 30(1)(b)
Marine Transportation Security Act <i>Loi sur la sûreté du transport maritime</i>	subsection 13(1)

SCHEDULE II

Act	Provision
Motor Vehicle Fuel Consumption Standards Act <i>Loi sur les normes de consommation de carburant des véhicules automobiles</i>	subsection 27(1)
Old Age Security Act <i>Loi sur la sécurité de la vieillesse</i>	section 33
Patent Act <i>Loi sur les brevets</i>	section 10, subsection 20(7), and sections 87 and 88
Petroleum Incentives Program Act <i>Loi sur le programme d'encouragement du secteur pétrolier</i>	section 17
Railway Safety Act <i>Loi sur la sécurité ferroviaire</i>	subsection 39(8)
Shipping Conferences Exemption Act, 1987 <i>Loi dérogatoire de 1987 sur les conférences maritimes</i>	section 11
Softwood Lumber Products Export Charge Act <i>Loi sur le droit à l'exportation de produits de bois d'œuvre</i>	section 20
Special Import Measures Act <i>Loi sur les mesures spéciales d'importation</i>	section 84

SCHEDULE II

Act	Provision
Statistics Act <i>Loi sur la statistique</i>	section 17
Telecommunications Act <i>Loi sur les télécommunications</i>	subsections 39(2) and 70(4)
Trade-marks Act <i>Loi sur les marques de commerce</i>	subsection 50(6)
Transportation of Dangerous Goods Act, 1992 <i>Loi de 1992 sur le transport des marchandises dangereuses</i>	subsection 24(4)
Yukon Quartz Mining Act <i>Loi sur l'extraction du quartz dans le Yukon</i>	subsection 100(16)