**NBRIOR- 2006-18**

**IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3**

**Between:** **Shannon Hagerman,**
the petitioner

**And:**

**Bruce Fitch, Minister of Energy**
the Minister
**and**

**New Brunswick Power Holding Corp.**
(hereafter NB Power)

## RECOMMENDATION

1. This referral, filed on March 23, 2006 arises out of an access to information request by the petitioner dated November 7, 2005. The petitioner, Shannon Hagerman is a reporter with the Telegraph Journal, but was employed in November 2005 with the Daily Gleaner, the daily newspaper in the provincial capital region. The November 7, 2005 request for information sought information relating to the refurbishment of the Point Lepreau nuclear reactor and states as follows:

> I am requesting, under the N.B. Right to Information Act, all records held by N.B. Power and the Department of Energy related to the refurbishment of the Point Lepreau nuclear reactor. Please exclude reports that have already been publicly released from this request.

> The documents requested should include, but not be limited to, all correspondence and documentation dealing with the refurbishment project, including a copy of the contract with Atomic Energy of Canada Ltd. I am particularly interested in all records dealing with negotiated performance guarantees, construction deadlines and potential penalties if the project is not completed on time.

2. The Minister's response, dated February 8, 2006, provides in relevant part as follows:

> The New Brunswick Power Group of Companies ("NB Power") has advised that they are unable to release any information in accordance with section 6(c) of the *Act*, which states:
>
> > "*…its release would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract."*
>
> After reviewing NB power's position in this matter, I am therefore unable to grant your request. I have attached a letter from NB Power that provides a more detailed explanation of their decision not to release this documentation.

3. The response enclosed from NB Power provided in relevant part as follows:

> It is the opinion of legal counsel that the contract with Atomic Energy of Canada Ltd. is not releasable under s.6(c) of the Act, as such disclosure would result in financial loss to AECL, and also jeopardize negotiations for contracts or agreements. Release of the subject documents and the information contained therein would reasonably be expected to interfere with AECL's contractual or other negotiations, and its ongoing commercial and contractual relationships, with a large number of domestic and foreign entities.
>
> In addition, such disclosure would result in a financial gain to one of AECL's competitors or customers. Release of the document and the information within would reasonably be expected to prejudice the competitive position of AECL. AECL carries on its commercial activities, such as the sale and/or refurbishment of CANDU nuclear reactors and power plants, the sale of heavy water, and the provision of services to nuclear facilities in an intensively competitive marketplace. Disclosure of the information in the subject document would make available to AECL's competitors and potential customers, many confidential aspects of AECL's business (both its strength and its weaknesses), commercial strategies, and planning processes. This information would be of use to both AECL's competitors in countering AECL's commercial strategies and efforts in the marketplace and to its potential customers in exposing aspects of AECL's business strategies that could be exploited during commercial negotiations.

4. I met, on May 9th and 11th 2006, with NB Power officials and reviewed *in camera*, under subsection 7(4) of the Act, the many records pertaining to this access request. The Minister's officials had previously indicated that none of the pertinent documents were in the Minister's possession and that NB Power

officials themselves were best able to respond to the petition in detail. NB Power's director of communications very helpfully compiled many relevant records into various binders, grouped chronologically according to the grounds of exemption invoked.

5. Following the *in camera* review, I expressed concern that some of the documents reviewed appeared to have been matters of public record already. While the initial right to information request had asked to exclude such documents, it was not immediately clear to me whether the petitioner was in receipt of these records. NB Power officials undertook to review the records I had so identified and to release consensually those which had already been made public. At the same time they undertook to offer further clarification of the grounds invoked and the harm which might flow to AECL from disclosure of the records requested.

6. During the *in camera* review it also became clear that while the Minister's official response to the complaint relied solely upon paragraph 6(c) of the Act as a ground for refusing disclosure, that in fact NB Power was of the view that other grounds of exemption applied as well. Thus certain documents were tagged as being exempted by virtue of paragraphs 6(a), (d) or (f). I raised questions with NB Power officials regarding the grounds invoked with respect to certain documents and they undertook to consider these and respond in detail to the questions and to invite AECL to do the same where appropriate.

7. I pause here also to remind the Minister and the Corporation of the duty imposed upon them by section 5 of the Act which requires written notice of reasons for refusal. The Courts have stressed the need for Ministers to provide timely and complete responses in order to comply with section five.[1] Lax practices in these matters may eventually have repercussions on a given department's ability to raise additional grounds belatedly. For the time being, however, it is good to remind ourselves of the need to comply fully with the requirements of section 5 in every case.

8. Following the meeting of May 11th, I received confirmation on May 31, 2006 that NB Power has no objection to the release of a number of documents which were already in some respect a matter of public record. These documents have been identified as follows:

    1) A project history of the proposed Refurbishment of PLGS
    2) Lepreau Performance and Planning for the Future
    3) PUB decision
    4) Point Lepreau Refurbishment Review – Dr. Robin Jeffrey
    5) Project Risk Mitigation Strategy – Contracts Discussion (release slides 3-15 taken from PUB presentation of May 2001)

[1] *Weir v. New Brunswick (Minister of Health and Community Services)* (1992), 130 N.B.R. (2d) 202 (Q.B.), Russell, J.

9. Other documents exempted and for which NB Power has maintained its position include:

    1) Two copies of an NB Power presentation on the Retubing and Refurbishing Agreements;
    2) A letter of September 9 2004 from Robert Van Adel to David Hay on Delaying the Refurbishment/Retube of Lepreau; and
    3) The Omnibus amending agreement itself.

10. Numerous other documents have been withheld as well as privileged documents under paragraph f) of the Act which exempts legal opinions and solicitor client communications. This ground has been invoked alongside paragraph a), c) and d) exemptions to cover communications between NB Power's solicitors and their lead negotiator, or Crown corporation staff, as well as exchanges by written correspondence and e-mail directly between NB Power's solicitors and AECL's lawyers. These exchanges at times enclose term sheets to govern the negotiations and various iterations of the agreements themselves prior to the approval and execution of the final text of the Omnibus agreement. All documents are considered exempt by NB Power from the strictures of section 2 of the Act.

11. The further submission of NB Power with respect to the September 9, 2004 correspondence between CEOs is that it is exempt under paragraphs 6a) and c). NB Power submits that:

    > …it falls under exclusion 6a – confidentially protected by law as Mr. Von Adel specified in his closing paragraph the information was being shared on a confidential basis. In addition, the information contained in the letter is proprietary to AECL and technical in nature. The release of this information to competitors of AECL would cause financial loss per section 6c of the *Right to Information Act.*

12. Finally, NB Power submits that the contract between AECL and itself, the Omnibus Amending Agreement, is exempt from disclosure on the basis that its release would:

    1) disclose information the confidentiality of which is protected by law (6a RTI);
    2) would cause financial loss or gain to a person or department, or would jeopardize the negotiations leading to an agreement (6c RTI)

13. NB Power concurs with all the arguments made by AECL objecting to the release of the contract and other specified documents and submits that the refurbishment project would be jeopardized if AECL's enterprise is adversely affected through the release of the contract.

14. AECL was asked to provide submissions in response to the right to information request, and in response to this petition. They have done so in a letter of May 26, 2006 enclosing their earlier submissions of January 6, 2006. AECL's submissions from last January are, in all relevant aspects, substantially the same as those set out by NB Power in paragraph 3 above. Its May 26, 2006 letter provides further clarification of how its interests, protected under paragraph c) of the Act, may be affected by the release of the contract or other documents. AECL submits as follows:

1) AECL is the developer of the CANDU® nuclear reactor and one of the business purposes of AECL is to market goods and services relating to CANDU® reactors throughout the world.
2) AECL operates as a commercial enterprise and generates sales through contracts with domestic and international clients.
3) Competition in the nuclear services industry is very intense and customers are very aggressive with respect to price and commercial terms and conditions that apply to the provision of goods and services. Pricing commitments are particularly sensitive.
4) In the course of its commercial activities, AECL negotiates with numerous electrical utilities, governments and private and public enterprises. Agreement on prices and other terms and conditions of a contract is reached through negotiations, which involve various compromises and decisions relating to the appropriate allocation of risk in the context of the specific transaction, and which are reflected in the prices to be paid by the customer.
5) The disclosure of negotiating positions and examples of proposed contract terms would present a significant financial disadvantage to AECL and a significant advantage to potential customers or competitors of AECL. The types of concerns which would arise include, but are not limited to, the following:
    A. Potential customers may treat the terms and conditions ultimately discussed with NB Power in this case as the "starting point" for negotiations;
    B. Potential customers may take inflexible positions on revised terms on the basis of the information showing the proposed terms discussed with NB Power, which could give future customers an unfair advantage in negotiations that would result in financial loss to AECL.

*The statutory provisions*

15. The relevant provisions of the Act provide as follows:

**2** Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.

…

**6** There is no right to information under this Act where its release

*(a)* would disclose information the confidentiality of which is protected by law;

…

*(c)* would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract;

…

*(d)* would violate the confidentiality of information obtained from another government;

…

*(f)* would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

16. I propose to first comment upon the legal advice and solicitor client privilege exemption in paragraph f) and then deal succinctly with the paragraph a) and d) exemptions. I will then deal at greater length with the paragraph c) exemption and its application to the contract and other documents.

17. No objection has been raised with respect to the application of section 2. NB Power is a Crown Corporation within the meaning of the definition of "department" under the *Right to Information Act* and the application of the Act to it is well settled in the jurisprudence. I note that AECL is also a Crown Corporation created by federal statute. However, the federal *Access to Information Act* does not apply to it. AECL does not acquire any distinct immunity or privilege as a result of the limited scope of the federal legislation. In this application, and for the reasons outlined below, its interests and standing are similar to those of any other private corporation doing business with a provincial Crown Corporation.

*Legal advice and solicitor client privilege*

18. There are relatively few New Brunswick cases dealing with the interpretation of paragraph 6f), the exemption for legal advice and solicitor client privilege. In *Mackin v. New Brunswick (Attorney General)* [1996] N.B.J. No. 557, Madam Justice Larlee upheld an exemption invoked by the A.G. with respect to an out-of-province legal opinion. A complaint of contempt of court had been laid against the Attorney-General and, so as to avoid advice from staff reporting to the AG, an opinion was requested from the Deputy Attorney General of Alberta. The advice received was that the facts of the case would not support proceedings for contempt. Judge Mackin, who had laid the

complaint, was informed of the outcome of the opinion and given part of the text of the opinion in a letter from New Brunswick's deputy Attorney -General and he sought to obtain a copy of the full text of the opinion. The court held that the exemption applied notwithstanding the fact that it was an out-of-province opinion and that disclosing the result of the opinion did not amount to waiver of privilege over the opinion letter itself.

19. I find it helpful to consider case-law regarding the interpretation of similar provisions under the Ontario statute. The wording of the Ontario statute is slightly different, but similar in that it contains two branches, one being a statutory exemption in favour of law officers of the Crown and the second being a reference to the common law privilege attaching to communications between solicitor and client.

20. In Order PO-1937, Adjudicator Donald Hale, in a decision of August 9, 2001 described the application of the exemption under the Ontario statute in these terms:

> As noted above, the Ministry takes the position that all of the records remaining at issue are exempt from disclosure under the discretionary exemption in section 19, which reads:
>
> > A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.
>
> Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.
>
> …
>
> At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).
>
> This privilege has been described by the Supreme Court of Canada as follows:
>
> > … all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship …
> >
> > (*Descôteaux v. Mierzwinski*, supra, at 618, cited in Order P-1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> … the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P1409)

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729).

21. This case and others distinguish solicitor-client privilege from litigation privilege which is aimed not at protecting a relationship, but seeks instead to protect the adversarial process. In *Attorney General of Ontario v. Big Canoe, Inquiry Officer* 62 O.R. (3d) 167 (leave to appeal to SCC denied SCC file no. 29572), the Ontario Court of Appeal quoted with approval the following analysis distinguishing both types of privilege:

> [10] The distinctions between the two types of privilege were thoroughly canvassed in General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (C.A.). At pp. 330-31 O.R., the following summary appears:
>
> > R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> …
>
> [11] What is clear now, but perhaps [was] not so clear in 1987, is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

22. I adopt the foregoing analysis of the Ontario Court of Appeal and that of Inquiry Officer Hale as instructive for the purposes of this petition. While the paragraph 6 f) exemption in the *Right to Information Act* appears to deal only with solicitor client privilege and not litigation privilege, I am satisfied that under the New Brunswick statute the phrase “Communications as between solicitor and client” encompasses both aspects of the privilege. At common law, litigation privilege has traditionally been considered a subset of solicitor client privilege and this interpretation is consistent with the approach taken to the federal statute, which also makes no express reference to litigation

privilege[2]. In any event, the exemption invoked in respect of the documents requested here does not involve an assertion of litigation privilege, but raises instead issues of solicitor client privilege. The distinction and the case-law however are helpful in defining further the scope of solicitor client privilege.

23. The paragraph 6f) exemption has been invoked in this case as the principal ground for exempting most of the responsive records identified by NB Power. The final contract itself is not considered solicitor client work product and its content is allegedly exempted under paragraph 6c), but all the various iterations of the final contract and the exchanges between solicitors and negotiators and between solicitors and NB Power's staff have been exempted on this basis. This includes correspondence to and from NB Power's in–house counsel, lawyers retained in the Toronto firm of Tory, Tory for the purpose of these contract negotiations, the lead negotiator, Calin Rovinescu, hired by NB Power on this contract, senior executives at NB Power seeking advice and providing instructions concerning the negotiation process and exchanges with AECL's lawyers and executives.

24. The petition therefore gives rise to several important and novel issues regarding the application of New Brunswick's *Right to Information Act*. Can solicitor-client privilege attach to a term sheet regarding a department's negotiation strategy in contract negotiations of this kind, if in fact the negotiations were directed entirely by lawyers hired by the Crown for this purpose? Does solicitor client privilege attach to correspondence or advice given by Mr. Rovinescu, NB Power's chief negotiator, a leading Canadian business executive reputed for his skills as a deal-maker, but who is a lawyer by training and experience? Does it attach also to briefing notes prepared by NB Power executives who sat at the negotiation table and summarized for management and negotiators, the work and progress of lawyers in the room?

25. Generally, solicitor client privilege is an important principle in a democratic society which respects the rule of law. Canadian courts have given the privilege a broad interpretation and have been loathe to admit any encroachment upon this principle[3], particularly in respect of Crown briefs

[2] *Blank v. Canada (Minister of Justice)* 2004 FCA 287

[3] See *Pritchard v. Ontario* 2004 SCC 31 where the Supreme Court of Canada held:

> In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:
>
> > ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> ...

prepared in a prosecutorial or criminal law function[4].

26. However, the courts have also held that the *Right to Information Act* must be given a purposive interpretation, in keeping with the view that it codifies the citizen's right to access information and not the government's right to refuse access[5]. Generally the view of New Brunswick courts has been that persons doing business with government should be prepared to have their business dealings made public[6]. It is no doubt true that too robust an interpretation of the solicitor client privilege could in some cases lead to abuse where large segments of public sector activity could be shielded from public scrutiny or review, by handing the work over to lawyers and exempting all work-product under the cloak of solicitor-client privilege. The law guards against this by closely defining what constitutes a solicitor client relationship. The Supreme Court's recent jurisprudence has made it clear that if a solicitor client relationship exists, than the privilege can only be displaced in cases of absolute necessity. If it is demonstrated that the relationship is at root one in which legal advice is being sought and proffered, then the mantle of protection will be thrown large. However it is not every business exchange or dealing involving a solicitor or lawyer that will attract the protection of this privilege.

27. Several cases outline the many roles which lawyers may play, particularly in-house counsel, where solicitor client relationships do not arise and privilege can not be claimed. They have helpfully reduced the application of the privilege to a four part test as follows:

> In order to be subject to common law solicitor-client privilege, it must be established that there is:
>
> 1. a written or oral communication; **and**
>
> 2. the communication must be of a confidential nature; **and**

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> Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively: see *Lavallee, supra*, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

See also the very recent decision of the supreme Court in *Goodis v. Ontario (Ministry of Correctional Services),* 2006 SCC 31, where the court confirms that solicitor-client privilege can only be displaced in cases of absolute necessity and defines the meaning of this test, paras.20 and 21.

[4] See *Big Canoe, supra* and *Blank v. Canada (Minister of Justice)* 2004 FCA 287, particularly paras. 45-58
[5] *Weir*, supra.
[6] *Gillis v. Chairman of the New Brunswick Electric Power Commission* 37 N.B.R. (2d) 66 (N.B.Q.B.) Barry, J. at para. 12: "If a person or firm wishes to keep their contracts secret, then such should not do business with the Provincial Government. What a government does is public business as it is the money of the public which is being expended."

3. the communication must be between a client (and his agent) and a legal advisor; **and**

4. the communication must be directly related to seeking, formulating or the giving of legal advice[7].

28. Having reviewed the case-law and the many records exempted I find that the Corporation has validly invoked the paragraph 6f) exemption with respect to virtually all of the records with respect of which it is claimed. I find however, that it is not applicable to the briefing notes prepared by Rod Eagles over the months of negotiation with respect to the course of negotiations themselves. Mr. Eagles is an executive with NB Power. It appears from the notes themselves that they were prepared as an update for Mr. Eagles and the negotiating team itself, and possibly as a reporting mechanism to management regarding the conduct of negotiations. No doubt they served several purposes. It is difficult in these matters to draw a line between what constitutes a communication between solicitor and client and what pertains to the business of running the utility. However, in fairness I have no compelling evidence before me regarding the confidential nature of these documents, other than the general context of these very sensitive negotiations, nor any convincing evidence that the 3rd or 4th criteria of the test should apply here in any event. The documents do not appear to be directed to counsel, nor to have arisen in the context of a solicitor client relationship for the purpose of seeking legal advice. I would recommend that this series of briefing notes therefore be released to the petitioner.

29. The same is true with respect to the negotiation strategy document and the "Retubing and Refurbishment Agreements Presentation", two versions of a powerpoint presentation summarizing the objectives of the negotiations, one of which includes a term sheet governing the negotiations. These documents are not themselves communicative in nature, in that they are not addressed to any one. They clearly constitute a consensus direction provided by management to the negotiation team for the purpose of securing the most advantageous contract possible. Initially, the powerpoint presentation documents were labeled as exempt on the basis of paragraph 6 c). Later, NB Power invoked 6 f) as well, noting that the documents had been prepared by their external legal counsel "as a tool to frame negotiations of the refurbishment contract between AECL and NB Power". There is nothing however in the documents themselves, or in the negotiation strategy document that speaks to a need or desire for legal advice, nor an offer of legal advice, nor even "advice as to what should prudently and sensibly be done in the relevant legal context"[8], to quote the British Court of Appeal. These are inherently commercial and business strategy documents, prepared in anticipation of negotiations with AECL. In my view NB Power and the

[7] *Ministry of Health Case*, Order P-1137, February 29, 1996, Anita Fineberg, Inquiry Officer, (OIPC)
[8] *Balabel v. Air India, supra.*

Minister have failed to satisfy the onus upon them of proving that the paragraph 6 f) exemption should attach to these documents.

*Confidentiality of information obtained from another government*

30. To my knowledge, the paragraph 6d) exemption has not yet been considered in any New Brunswick case. A similar exemption was upheld however in a case involving Ontario Hydro and the AECL.

31. On July 24, 2001, Tom Mitchinson, Assistant Commissioner OIPC, held that Ontario Hydro could invoke a similar exemption under the *Freedom of Information and Protection of Privacy Act* with respect to exchanges with AECL[9]. In that case AECL had been commissioned by the US government to conduct a study to ascertain the feasibility of using MOX fuel containing weapons-grade plutonium in CANDU reactors. AECL established study groups to review and study various aspects of this option, and these bodies held meetings between 1995 and 1998. Ontario Hydro along with federal government and foreign government officials and other public and private sector nuclear industry agencies was represented on these study groups.

32. In his decision Commissioner Mitchinson helpfully reviews the jurisprudence dealing with this exemption. He adopted the following passage from a decision of Commissioner Tom Wright:

> Although neither the institution [Ontario Hydro] nor AECL are themselves "governments", as agents of the provincial and federal governments they are capable of conducting "intergovernmental relations" on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.
>
> [Senior Ontario Hydro/AECL Technical Information Committee (SOATIC)] is a joint committee of representatives from the institution and AECL. In its representations, AECL states that the intention in forming SOATIC was to establish a joint technical committee at the senior executive level of both AECL and the institution, in order to conduct a "top down" review of the technical aspects of research and development, engineering and design and operations of the two entities.
>
> In view of the above, I accept that the relations between the institution and AECL, when both bodies are conducting business through SOATIC, are intergovernmental for the purposes of section 15(a) of the *Act*, and that information received by the institution from AECL qualifies as information received from another government or its agencies, for the purposes of section 15(b).[10]

[9] *Ontario Hydro Case* PO-1927-I, July 24, 2001, Tom Mitchinson, Assistant Commissioner (O.I.P.C.)
[10] *Ontario Hydro Case* P-270, February 11, 1992, Tom Wright, Commissioner (O.I.P.C.)

33. The *Right to Information Act* exempts information the disclosure of which "d) would violate the confidentiality of information obtained from another government." The Ontario statute is worded again slightly differently:

> 15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

34. The Ontario case law has developed tests for the applicability of paragraphs a) and b) of the exemption as follows. To ground an exemption under s. 15a) an institution must show:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

35. Under paragraph 15b) the following proof would be required:

1. the records reveal information received from another government or its agencies; **and**
2. the information was received by an institution of government; **and**
3. the information was received in confidence.

36. In my view, the proper interpretation of the paragraph 6d) exemption calls for a combination of the tests applicable under the Ontario statute. The thrust of the exemption is to protect the relationship of trust necessary in relations between sovereign governments. To invoke the exemption a department must therefore establish:

1. the records reveal information received in confidence by the department from another government or its agencies; **and**
2. that disclosure of the information could reasonably be expected to prejudice the conduct of intergovernmental relations

37. While I agree that there may be cases where AECL may interact with NB Power at such a level, I do not believe that the facts of the case before me are analogous to the cases before Commissioner Wright or Assistant Commissioner Mitchinson. It is clear from the records themselves and in fact from AECL's own submissions that its interests, like those of NB Power in this matter, are inherently commercial.

38. I hesitate to find on the facts of this case that AECL is an agent of another government for the purpose of this exemption. I am satisfied, in any event, that the disclosure of the information sought in this case could not reasonably be expected to prejudice relations between the Province and the Government of Canada.

39. Having reviewed the responsive records identified by NB Power, I find that the paragraph d) exemption has no application and is not a valid ground of exemption in this case.

*Confidentiality protected by law*

40. The paragraph a) exception has been invoked by NB Power in its May 31 submission with respect to a letter of September 9, 2004 between Mr. Von Adel of AECL to Mr. David Hay, CEO of NB Power, concerning the delaying of refurbishing or retubing the Lepreau generating station. It has also submitted that the contract itself, the Omnibus Agreement is exempt from disclosure under paragraph a). Exemption for both records is also claimed under paragraph c) of the Act.

41. Counsel for NB Power points out that Mr. Von Adel in his closing paragraph specified that the information in his letter was being shared on a confidential basis. As for the contract, it speaks for itself and all its clauses are binding on the parties.

42. In my view, neither circumstance provides appropriate grounds for invoking the paragraph 6 a) exemption. In *Maritime Highway Corporation v. New Brunswick (Minister of Transportation)* [1998] N.B.J. No. 299, (N.B.Q.B.), Mr. Justice Turnbull rejected a claim by the Minister that contractual terms could serve as the basis of a paragraph 6 a) exemption. The decision states in relevant parts as follows:

> Counsel for the Minister has cited to me an authority that holds that information protected by a contract is information the confidentiality of which is protected by law. I do not agree. Contractual terms are not law. I am of the opinion 6(a) is a reference to statutory or common law. I know of no statute that would prohibit the request for information sought as to what company A has contracted to deliver. The common law test is as set out by the Supreme Court of Canada in Slatuvych (supra). Confidentiality has four tests that must be satisfied:

(1) the communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury which would inure to the relation by the disclosure of the communications must be greater that the benefit thereby gained for the correct disposal of litigation.

43. The third criterion references fiduciary relationships, solicitor client relationships, doctor patient relationships and other such relationships which "in the opinion of the community ought to be sedulously fostered". I find no basis for a common law requirement of confidentiality with respect to any of the records reviewed, and in the absence of any statutory requirement to that effect, this basis for the exemption must fail.

*Cause financial loss or gain, or jeopardize negotiations*

44. The central element of this petition concerns the Corporation's reliance upon the paragraph 6 c) exemption, in particular with respect to the contract itself. The petitioner has asked for all documentation dealing with the refurbishment project but has specifically requested a copy of the contract and documents detailing the performance guarantees. There is a strong public interest in verifying that a public utility has obtained adequate performance guarantees concerning a project of this nature and expense. At the same time, the Corporation has an obligation to protect information the disclosure of which could cause financial loss or gain to AECL, its clients or competitors or which would jeopardize negotiations leading to an agreement or contract.

45. The leading case in New Brunswick on the interpretation of paragraph 6 c) is an early one that arose in Mr. Justice Stevenson's court. The complaint was brought forward by Mr. Joseph Daigle, then leader of the Opposition, who later went on to become Chief Justice of the Province. He brought the case against NB Power, which was then represented by Mr. Paul Creaghan, who also went on to an important judicial career. Mr. Daigle appeared on his own behalf. The case involved a request for a "Work Sampling Study" for the spring 1977 period at the Point Lepreau Nuclear Generating Station carried out by Emerson Consultants Inc. of New York.[11]

46. The Minister had refused to disclose the record requested on the basis that its release "would place certain Contractors in potential jeopardy with regard to public reputation." In rejecting this argument and ordering the Minister to disclose the report, Stevenson, J. held as follows:

[11] *Re Daigle (1980) 30 N.B.R. (2d) 209, Stevenson, J.*

> It is my view, however, that the application of paragraph 6(c) of the Act - so far as the question of financial loss or gain is concerned - must be determined on a narrower ground. In my opinion, to successfully rely on that exclusion, it must be established that the loss or gain would result directly from disclosure of the information. Here the Minister relies on what can only be characterized as a speculative future gain or loss to the contractors.
>
> 18 With respect to the contention that disclosure would cause financial loss to the Power Commission in weakening the position of the Commission in attempting to improve the performance of a specific contractor or in negotiating the settlement of contractual claims or in potential litigation of contractual claims, I need say only this: I cannot accept that any responsible contractor will be less likely to desire to improve his performance when his past performance has been subjected publicly to constructive criticism - logic dictates that the converse would be true. The general reference in Mr. Ganong's affidavit to "the settlement of contractual claims or in potential litigation of contractual claims" is of little evidentiary value. There is no clear evidence that there are in fact outstanding claims which would be affected. More specific evidence is necessary to support exclusion from disclosure on that ground.
>
> 19 It is objected that disclosure of the information could cause financial loss to The Emerson Consultants Inc. in the future. The material in the Study is presented clearly, candidly and objectively. One would expect nothing less from a firm of management consultants. Such a presentation enhances rather than detracts from the ability or reputation of the consultant. If the consultant were to voluntarily disclose the contents of a confidential report, potential clients would have cause for concern. But third parties cannot fault the consultant for a disclosure made not by the consultant but rather compelled by statute. Furthermore, the future possible loss alluded to is wholly speculative and would not be a direct result of the disclosure.

47. Similarly, Mr. Justice Turnbull in his oral reasons in *Maritime Highway Corp.* rejected a paragraph 6 c) exemption on the same basis. That was a case where an unsuccessful bidder for the new four-lane highway construction between Fredericton and Moncton sought access to information concerning the successful bid on a $584 million contract. Five boxes of material had been disclosed to the applicant. In ordering disclosure of the nine remaining boxes of material identified and rejecting the paragraph 6c) exemption the Court held that: “that subsection must have reference to immediate gain or loss and be connected with the scheme and does not protect some future potential of loss”.

48. Canadian court decisions and decisions of Information and Privacy Commissioners elsewhere interpret comparable provisions in the very same manner. For instance, a recent decision of the Nova Scotia Review Officer dealt with exemptions based upon subparagraph 481(1)c) (i) of the *Municipal Government Act* which contains similar exemptions to the duty of disclosure

of public records in the Municipal sector[12]. The case involved a request for access to a contract with a private company retained to build and operate a new landfill in the Province. In dismissing the claim for exemption and recommending disclosure of the contract as a whole the Review Officer summarized the law in Canada as follows:

> According to s. 481(1)(c)(i), the Third Party must show that disclosure of the Contract would "harm significantly" the competitive position of or "interfere significantly" with the negotiating position of the Third Party. This harm must be proven and a standard is required as evidenced in several court cases:
>
> > "… the legislators, in requiring a 'reasonable expectation of harm' must have intended that there be more than a possibility of harm to warrant refusal to disclose a record." [*Chesal v. Attorney General of Nova Scotia*(2003) NSCA 124 at para. 38]
> >
> > There must be "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [*Lavigne v. Canada (Office of the Commission of Official Languages)* (2002) S.C.C. 53 at para. 58]
>
> The Federal Court believes evidence of harm
>
> > "must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever." [*Canada (Information Commissioner of Canada) v. Canada (Prime Minister)* (T.D.), [1993] 1 F.C. 427, 1992 CanLII 2414(F.C.)]

49. I am also guided in this matter by the recent decision of Mr. Justice Edmond Blanchard of the Federal Court of Canada in *C.I.B.C. v. Canada (Canadian Human Rights Commission)* 2006 FC 443, April 24, 2006. In that case the Commission had conducted an Employment Equity Compliance Report on the CIBC. An access to Information request was filed seeking disclosure of that report. The bank objected to its disclosure on several grounds including the exemption in paragraph 20(1)c) of the Federal Access to Information act which is virtually the same as paragraph 6 c) of the New Brunswick Act. In rejecting the claim for exemption on this basis Blanchard, J. affirmed as follows:

> The jurisprudence establishes that a party relying on paragraph 20(1)(*c*) to resist disclosure of information must adduce evidence of harm that could reasonably be expected to be caused by the disclosure. The Federal Court of Appeal in *Saint John Shipbuilding Ltd. v. Canada(Minister of Supply and Services*), (1990), 67 D.L.R. (4th) 315, set the threshold at "probable harm" and also held that the burden of proof, on a balance of probabilities, rests with the Applicant. The Court

[12] *Municipality of the District of West Hants Case*, Report FI-06-13(M), June 20, 2006, Dwight Bishop, N.S. Review Officer

> of Appeal further stated that speculation or mere possibility does not meet the required standard. That is, the Applicant cannot meet its burden of proof by simply affirming by affidavit that disclosure would cause the requisite harm for the purposes of a paragraph 20(1)(*c*) exemption. Additional evidence is needed to establish probable harm: see *SNC-Lavelin Inc. v. Canada(Minister of Public Works)*(1994), 79 F.T.R. 113 (T.D.); and *Canadian Broadcasting Corp. v. National Capital Commission*, [1998] F.C.J. No. 676 (QL) (T.D.).[13]

50. Having regard to the submissions provided by NB Power and the additional submissions obtained from AECL itself, and having regard to the documents in respect of which the exemption is claimed, I find that there is nothing to distinguish this case from the many other cases which have rejected claims for exemption based upon speculative claims of future potential loss by businesses that do business with government. As a result, I am respectfully of the view that the claim for exemption based on paragraph 6 c) is unfounded.

***Recommendation***

51. **In conclusion I recommend that the exemptions claimed with respect to paragraph 6 f) be upheld with the exception that: i) the briefing notes of various dates prepared by Rod Eagles concerning the contract negotiations, ii) the negotiation strategy document itself and iii) the two versions of the Powerpoint presentation entitled "Retubing and Refurbishing Agreements Presentation", including the term sheet, be disclosed to the petitioner. I recommend further that the exemptions based on paragraphs 6 a), c) and d) of the Act should fail and that consequently the correspondence dated September 9, 2004 from Robert Van Adel, and the final copy of the Omnibus Agreement itself should also be disclosed to the petitioner.**

**Dated at Fredericton, New Brunswick this 12th day of July, 2006.**

**Bernard Richard, Ombudsman**

[13] *CIBC v. Canada*, supra at para. 110. See also Janssen-Ortho Inc. v. Canada (Minister of Health) [2005] FC 1633 following *Air Atonabee v. Minister of Transport* (1989) 27 C.P.R. (3d) 180 (FCTD), Mackay, J.; see also *Ontario First Nations Limited Partnership v. Information and Privacy Commissioner* Court File no.571/04, February 16, 2006 Ont. Superior Ct., Divisional Court, Swinton, J. and the OIPC decision requiring disclosure of contracts in the Sky-Dome construction project: *Stadium Corporation of Ontario Limited Case* Order P-263, January 24, 1992, Tom Wright, Commissioner, (OIPC).