Office of the Consumer Advocate

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April 23, 2018

Board of Commissions of Public Utilities
120 Torbay Road, P.O. Box 2140
St. John's, NL A1A 5B2

Attention: G. Cheryl Blundon, Director of Corporate Services / Board Secretary

Dear Ms. Blundon:

RE: NL Hydro ("Hydro") 2017 General Rate Application
- Consumer Advocate's Response to Hydro's Application dated April 13, 2018 seeking confidentiality in relation to its Response to RFI's PUB-NLH-149 and CA-NLH-254

Following the filing of Hydro's Additional Cost of Service information on March 22, the Public Utilities Board (PUB) filed the following RFI:

> ***PUB-NLH-149;*** *page 7, lines 6 – 11. Provide the details for the purchases of 20 GWh over the Maritime Link referred to in footnote 19, including the amounts purchased per transaction, the price paid per transaction and any other costs associated with the transaction.*

Similarly, following the filing of Hydro's Additional Cost of Service information on March 22 the Consumer Advocate (CA) filed the following RFI:

> ***CA-NLH-254;*** *Please file copies of all contracts for power purchases over the Maritime Link. If confidentiality is a concern, these provide a table showing power purchase contracts in aggregate form to eliminate such confidentiality concerns including period of purchase, type of contract, source of energy (i.e., gas, coal, oil, nuclear, hydro, other renewable,etc.) energy amounts and price.*

By their correspondence dated April 6, 2018 addressed to the Board Hydro notified the Board and thereby all the Intervenors that it was claiming confidentiality in relation to the RFI's referred to above and indicated that it would only provide the RFIs to those parties who would sign a confidentiality undertaking.

At a meeting among counsel for the Board and the Intervenors dated April 10, 2018 the Consumer Advocate objected to Hydro's request of confidentiality undertakings from the Intervenors and requested that Hydro make formal motion under the Rules of Procedure to request the confidentiality protection.

As such by its application dated April 13, 2018 Hydro seeks an Order from the Board, ordering that Hydro's replies to RFI's PUB-NLH-149 and CA–NLH-254 be considered confidential and that the Intervenors' access to them be governed by the terms of the undertakings to be executed by the Intervenors' representatives prior to the receipt of that confidential information.

Hydro claims by its application that the response to PUB-NLH-149 would disclose sensitive commercial trading information and also suggests that the response to CA–NLH–254 would breach confidentiality agreements and may also disclose sensitive commercial information.

Order No. PU.30 (2017), being the Rules of Procedure governing Hydro's GRA, states that Hydro is entitled to request that information filed with the Board be considered confidential and not be released or released subject to conditions set by the Board. However, Order No. PU. 30(2017) also states that the Board is bound by the provisions of ATIPPA and documents which are determined by the Board to be confidential are to be dealt with in accordance with the provisions of ATIPPA.

The Consumer Advocate submits that Hydro has not presented sufficient evidence at this point for the Board to determine that the responses to the RFI's should remain confidential. Hydro has suggested that release of the information might *potentially* increase ratepayers costs" (See: paragraph 7 of Hydro's application) or that release of the information *could* damage the relationship between NEM and its counterparties (See: paragraph 8). (Emphasis added)

In Corporate Express Canada Inc. v. Memorial University of Newfoundland et. al (2015) NLCA 52 the Newfoundland and Labrador Court of Appeal, considered the issue of the standard of proof a party must establish in applying to keep their information confidential. The Court held as follows:

> *[42] Justice Cromwell addressed the issue of harm to a resisting party's competitive position in Merck Frosst, saying that "[a]party claiming[exemption under this kind of provision] must show that the risk of harm is considerably above a mere possibility, although not having to establish the balance of probabilities that the harm will in fact occur"(at paragraph199.) The test has also been stated to require a clear cause and effect relationship between the disclosure and the alleged harm that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results...[are] more than merely possible or speculative"*
>
> See: Corporate Express Canada Inc. v. Memorial University Newfoundland et. al (2015) NLCA 52, para. 42 (Attached)

In this case Hydro has provided no such evidence to the Board. The alleged harm to Hydro and/or the ratepayers referred to in Hydro's application is vague and speculative.

Thus, having failed to establish its evidentiary burden as set out in *Merck Frosst*, and as adopted by the Court of Appeal in this jurisdiction, the Consumer Advocate submits that Hydro's application should be dismissed by the Board and further the Board should Order that Hydro's replies to the RFIs at issue be fully disclosed to all of the Intervenors without qualification.

It is noted that Hydro has referenced a Nova Scotia Utility Board case in its application being 2014 NSUARB 5/ NSPI /South Canoe Wind Project (South Canoe) as a precedent in support of its application.

However, it is submitted that the South Canoe case does not provide the Board any guidance, as this was an application before the Nova Scotia Public Utilities Board for approval of a capital expenditure by the utility. The information sought to be protected in that case was in the nature of third-party responses to requests for proposals by the utility for a capital project to be built in the future. In the case of PUB-NLH-149 the Board is seeking information regarding the 20 GWh that had *already* been purchased by Hydro.

As well, in relation to CA-NLH-254, the Consumer Advocate requested the power purchase information over the Maritime Link in aggregate form to address any potential issues of confidentiality. The South Canoe case does not address the circumstance where an intervenor has qualified its request for disclosure.

Hydro has not presented a reported case whereby a regulated utility, forced to buy in competitive markets to supply their customers, has requested its regulator to order that all parties to a regulatory hearing sign confidentiality agreements to keep the supply agreements confidential.

It is the Consumer Advocate's view that the power purchase agreements referred to in the RFI's are no different than Hydro's oil supply purchase information and insofar as its oil supply purchase information does not attract confidentiality these power purchase agreements should not either.

The Consumer Advocate repeats all of the foregoing and submits that in the interests of transparency and full disclosure, and based on the fact that Hydro has not demonstrated that the alleged harm arising from the release of the information at issue is anymore than "possible or speculative", its answers to CA–NLH-254 and PUB–NLH–149 should be released to all of the Intervenors without the requirement of confidentiality undertakings.

Yours truly,

Stephen Fitzgerald
Counsel for the Consumer Advocate

Encl.
/bb

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Date: 20151030
Docket: 14/85
Citation: *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

CORPORATE EXPRESS CANADA INC.
Trading as STAPLES ADVANTAGE CANADA — APPELLANT

AND:

THE PRESIDENT AND VICE-CHANCELLOR,
MEMORIAL UNIVERSITY OF
NEWFOUNDLAND,
GARY KACHANOSKI — FIRST RESPONDENT

AND:

ED RING, INFORMATION AND
PRIVACY COMMISSIONER OF
NEWFOUNDLAND AND LABRADOR — SECOND RESPONDENT

AND:

DICKS & COMPANY LTD. — THIRD RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G3476,
2014 NLTD(G)

Appeal Heard: April 6, 2015
Judgment Rendered: October 30, 2015

Reasons for Judgment by Hoegg J.A.
Concurred in by White and Harrington JJ.A.

Counsel for the Appellant: R. Paul Burgess
Counsel for the First Respondent: Peter D. Shea
Counsel for the Second Respondent: Andrew A. Fitzgerald
Counsel for the Third Respondent: Kyle R. Rees

Hoegg J.A.:

INTRODUCTION

[1] The appellant, Corporate Express Canada Inc., trading as Staples Advantage Canada (Staples), was the successful bidder on a tender for office supplies awarded by Memorial University of Newfoundland (MUN) in June 2011. The third respondent, Dicks & Company Ltd. (Dicks), was an unsuccessful bidder. MUN is a public body governed by the provisions of the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1 (the *Act*). Staples' appeal concerns whether MUN must disclose to Dicks certain information which Staples supplied to MUN as a condition of the tender contract.

[2] The *Act* has since been repealed and replaced by the *Access to Information and Protection of Privacy Act 2015*, SNL c. A-1.2. All parties agree that the provisions of the former *Act* govern this appeal.

BACKGROUND

[3] There was a considerable disparity between Staples' successful tender bid and Dicks' unsuccessful bid, and Dicks was interested in finding out what accounted for it. To this end, approximately 15 months after the tender was awarded, Dicks requested from MUN information about office supplies MUN purchased from Staples under the tender contract (contract items) and office supplies MUN could purchase from any supplier but purchased from Staples outside of the tender contract (non-contract items).

[4] Before MUN responded to Dicks' request, MUN sought Staples' position on it as required by section 28 of the *Act*. Staples responded, saying that the requested information should not be disclosed and giving reasons for its position. MUN subsequently refused to disclose the requested information.

[5] Dicks then requested Ed Ring, Information and Privacy Commissioner of Newfoundland and Labrador (the "Commissioner"), to review the matter. The Commissioner did so in accordance with his mandate under the *Act* and provided a report which recommended that MUN disclose the requested information. MUN then provided Staples with a copy of the Commissioner's report and advised Staples that it accepted the Commissioner's recommendation and that it would be disclosing the requested information to Dicks. MUN also advised Staples of its right to appeal MUN's decision to disclose, as it was required to do by section 60(1) of the *Act*.

[6] Staples subsequently appealed MUN's decision by applying to the Supreme Court Trial Division seeking exemption from disclosure under section 27(1)(b) of the *Act*. Staples also argued that disclosure of the requested information would be harmful to its competitive position (section 27(1)(c)(i)) and/or cause it significant financial loss (section 27(1)(c)(iii)). Dicks and the Commissioner subsequently sought and were granted intervenor status. MUN stayed disclosure of the requested information pending the Court's decision.

THE LEGISLATION

[7] The legislative provision exempting public bodies from disclosing requested information is section 27(1) of the *Act*. It reads:

> 27(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
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> (a) trade secrets of a third party;
>
> (b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or
>
> (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

> (i) harm the competitive position of a third party or interfere with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in significant financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

THE TRIAL DIVISION DECISION

[8] The Trial Division Appeal Judge (the "Judge") properly treated Staples' application as an appeal under the *Act* and conducted a *de novo* assessment of Dicks' request for disclosure. He correctly placed the burden on Staples to establish on a balance of probabilities that the requested information was exempt under the provisions of section 27(1) of the *Act.*

[9] The Judge set out the factual background to the case at paragraphs 4 to 7 and 10 to 11 of his decision:

> 4 On May 2011, the Applicant, the Second Intervenor and one other company, were invited by MUN to submit a bid in relation to Tender Number TFS-009-11, Office Supplies. The invitation was for the supply "on and when required" of office supplies for the period July 1, 2011 to May 31, 2014, with an option to extend for an additional 24 months granted to MUN and the right of MUN to cancel the contract upon 30 days written notice. A copy of the Invitation to Submit a Tender was attached at Exhibit "A" to the Affidavit of Patrick Cretot.
>
> 5 The Applicant was advised by MUN that it had been the successful bidder for the office supplies. The Applicant's proposal was endorsed on the bottom of each page as *"Confidential and Proprietary — Not to be copied or distributed without permission."*
>
> 6 The Second Intervenor filed a number of requests with MUN pursuant to the *Act*. The first request was made on November 25, 2011 for a copy of the proposal submitted by the Applicant. This information was provided on August 28, 2012. The Applicant states that, but for inadvertence to reply within stated time limits, It would have objected to the release of the proposal. A second request was made June 1, 2012 for the spreadsheet showing, basically, the list of office supplies

from which the tender items were selected. This information was provided by MUN to the Second Intervenor on September 19, 2012.

7 The third request forms the subject matter of this Appeal. The Second Intervenor requested on August 28, 2012:

> (a) "A list of contract items purchased from Staples for the period from July 1st, 2011 to June 30th, 2012 to include the product number, item description, quantity purchased, unit of measure, price charged, and total extended value per item; and
>
> (b) A list of non contract office supply items purchased from Staples for the period from July 1st, 2011 to June 30th, 2012 to include the product number item description, quantity purchased, unit of measure, price charged, and total extended value per item." (Emphasis mine)

. . .

10 The Applicant has been the successful contractor for the provision of office supplies to MUN for a period exceeding 30 years, including the contract period immediately prior to the tender period now in question (i.e. July 1, 2011 to May 31, 2014) and for the contract period following May 31, 2014.

11 The Second Intervenor had previously requested and received from MUN the usage reports for the fiscal year 2010, i.e. the year immediately prior to contract period now under consideration.

[10] The specific information that Dicks requested, described in paragraph 7 of the Judge's decision above, comprises detailed information respecting both contract and non-contract items MUN purchased from Staples between July 1, 2011 and June 30, 2012. The requested information was referred to by the Judge and is referred to herein as "usage reports." Staples' obligation to provide the usage reports to MUN is set out in Schedule A – General Requirements of the Tender Contract, under the term "Ordering, Billing and Reporting" found at page 64 of the Appellant's Appeal Book Part II. It reads:

> The vendor must provide standard reporting including usage, filled order performance, return statistics, invoice details and summary, and the like. The vendor should be able to provide customized reporting tailored to the requirements of the University. In addition, the vendor must be able to provide a monthly report of all items purchased which are not included in contract. This report must identify the order originator.

MUN does not have a centralized purchasing office that could easily assemble the usage information, and did not have its own record of it when Dicks requested it. However, being entitled to obtain it from Staples, MUN did so in order to provide it to Dicks.

[11] The Judge considered the three exemptions in section 27(1) that Staples argued applied to exempt the information from disclosure.

[12] In considering whether section 27(1)(b) applied to exempt the requested information from disclosure, the Judge found that the usage reports were commercial, financial or technical information "supplied" by Staples to MUN. He also found that it was secondary information that was not part of the negotiated contract which made it eligible for exemption from disclosure. However, he went on to find that the information was not confidential and therefore not exempt from disclosure, saying that "[n]either the content, purpose, nor circumstances in which the information was compiled or communicated would support the argument that the information was confidential in nature."

[13] The Judge also determined that exemption from disclosure was not warranted under sections 27(1)(c)(i) or (iii). His assessment of the evidence, which he described as "mere possibility and conjecture," did not convince him that Staples' competitive position would be harmed by the disclosure, or that disclosure would cause Staples significant financial loss.

[14] In concluding, the Judge added that "[Staples] clearly wishes to protect the turf that it has enjoyed for 30 years and it continues to enjoy the benefits of having the contract to provide office supplies to MUN."

THE APPEAL

[15] Staples appeals the Judge's decision, arguing that he erred in interpreting section 27(1)(b) of the *Act* as requiring that the supplied information must be objectively determined to be confidential in order to be exempt from disclosure and that he reached the wrong conclusion by applying this incorrect test to the evidence. Staples argues that section 27(1)(b) sets out a two-pronged subjective test, which when applied to the evidence, supports its position that the requested information it supplied to MUN is exempt from disclosure. Staples also argues that the Judge erred in finding that disclosure of the requested information would not cause harm to the competitive position of Staples within the meaning of section 27(1)(c)(i),

and in finding that disclosure of the requested information would not result in significant financial loss to Staples within the meaning of section 27(1)(c)(iii). Alternatively, Staples argues that only portions of the requested information be released, like "the quantities of the products, or the total sales of items, rather than unit prices and quantities", saying this could "strike a balance between the rights of the public and the rights of the parties".

STANDARD OF REVIEW

[16] This appeal raises issues of statutory interpretation and application of statutory law to found facts. Matters of statutory interpretation are questions of law reviewable on a standard of correctness, as was recently confirmed by the Supreme Court in *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (see also *Trimart Investments Limited v. Gander (Town)*, 2015 NLCA 32). Judicial determinations resulting from the application of a legal standard to a set of facts raise questions of mixed fact and law. Questions of mixed fact and law are reviewable on the deferential standard of palpable and overriding error unless "it is clear that the ... judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law" (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37).

ISSUES

[17] The issues for consideration by this Court are:

1. Did the Judge err in concluding that the requested information was not exempt from disclosure under section 27(1)(b)?

2. Did the Judge make palpable and overriding errors in determining that the requested information was not exempt from disclosure under sections 27(1)(c)(i) and (iii) of the *Act*?

ANALYSIS

Governing Principles

[18] It is well-established that the approach to the interpretation of statutes must be "broad and purposive" and that words are to be read in their grammatical and ordinary sense harmoniously within the context, scheme

and purpose of the legislation (*Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124. (See also *Newfoundland and Labrador (Minister of Forest Resources and Agrifoods) v. A.L. Stuckless and Sons Ltd.*, 2005 NLCA 11, 244 Nfld. & P.E.I.R. 298 (at para. 56 and *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485).

[19] Section 3 of the *Act* states its purposes and sets out several ways in which these purposes are to be achieved:

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

[20] Also noteworthy is Cromwell J.'s comment at paragraph 95 of *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (*Merck Frosst*). Merck Frosst is a pharmaceutical company which had submitted information to Health Canada in pursuit of approval to market a particular drug. A competitor pharmaceutical company requested this information pursuant to provisions of the federal *Access to Information Act*, RSC 1985, c. A-1 (*Federal Act*). In his discussion of the standard of proof required to exempt the requested information from disclosure under the *Federal Act*, Justice Cromwell stated that "exemptions are the exception and disclosure the general rule, with any doubt being resolved in favour of disclosure". Like the *Federal Act*, the legislative provisions of the *Act* are directed to providing disclosure for the purposes of making public bodies more accountable and enabling people to access information about themselves, while allowing for specific and limited exceptions to disclosure in order to protect personal privacy.

Is the requested information exempt under section 27(1)(b)?

[21] The Judge interpreted section 27(1)(b) to require an objective determination of whether information is confidential, saying, "To meet the threshold of the requested information to be considered confidential, the test is an objective one, and whether the information is confidential will depend upon its content, its purposes and the circumstances in which it was compiled or communicated" (at paragraph 36). In so holding, the Judge relied on the objective test set out in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 (Fed. T.D.), a decision which had interpreted paragraph 20(1)(b) of the *Federal Act*. At paragraph 38 of his decision, the Judge reasoned that the requested information:

> ... was compiled and supplied in compliance with the requirements of the tender proposal which were known to the Applicant and consistent with the Applicant's stated reporting capacity. ... The content was information of actual items purchased. Neither the content, purpose, nor circumstance in which the information was compiled or communicated would support the argument that the information was confidential in nature.
>
> (Emphasis added.)

[22] Staples argues that the test for exemption from disclosure set out in section 20(1)(b) of the *Federal Act*, which requires a determination that the requested information be confidential, does not apply to section 27(1)(b) of the *Act*. Staples maintains that the two sections are differently worded, and that section 27(1)(b) does not require a determination that the requested information be confidential.

[23] Section 20(1)(b) of the *Federal Act* reads:

> Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> ...
>
> financial , commercial , scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

[24] Section 27(1)(b) of the *Act* reads:

> The head of a public body shall refuse to disclose to an applicant information that would reveal ... commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party ...

[25] Section 20(1)(b) of the *Federal Act* does differ in wording from section 27(1)(b) of the *Act*. However, in reality, determination of whether the requested information is confidential amounts to the same thing as determining whether the requested information is Staples' information which Staples had supplied in confidence and treated consistently as confidential. While section 27(1)(b) of the *Act* does not require a determination that the information be assessed for its confidentiality in the same manner as section 20(1)(b) of the *Federal Act* requires, the confidentiality of the requested information must still be determined.

[26] Whether the requested information is the confidential information of a third party requires that the contents of the requested information be examined with a view to identifying the origin and ownership of the information. This is an essential part of the test for exemption set out in section 27(1)(b), along with whether the information was supplied by the third party explicitly or implicitly in confidence and whether it was treated consistently as confidential information by the third party. Application of the test involves fact finding, the application of legal principles and interpretation of the legislative provision. It is an objective determination, made in the context of the purpose of the legislation. Accordingly, I do not agree with Staples that the Judge erred in saying that the test under section 27(1)(b) is an objective one.

[27] In order to be exempt from disclosure under section 27(1)(b), the words of the section require the resisting party to establish that disclosure of the requested information would:

1) *reveal* commercial, financial, labour relations, scientific or technical *information of a third party*

2) that was *supplied by the third party*

3) *explicitly or implicitly in confidence* and

4) that was *treated consistently as confidential information by the third party.*

(Emphasis added.)

[28] The Judge seemed to accept that the requested information was supplied implicitly or explicitly in confidence and treated consistently as confidential by Staples, but he characterized Staples' evidence in this regard as self-serving, saying at paragraph 34:

> If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate the intent of the *Act* by adding such an endorsement to the information supplied ...

The Judge went on to say at paragraph 39 that endorsements on the usage reports were "made" after the request for information had been received and could be "viewed as an attempt by [Staples] to bolster its position."

[29] The stamping and endorsing of the usage reports as confidential is evidence going to whether Staples supplied the requested information in confidence and treated it consistently as confidential. However, such evidence of Staples' subjective actions and intentions is far from determinative of whether disclosure of the requested information would reveal Staples' information which was supplied in confidence and treated consistently as confidential. While the Judge did not specifically consider whether the requested information was actually Staples' information, he recognized that Staples' subjective actions and beliefs in its supply and treatment of the requested information could not determine the exemption issue, and therefore applied the "confidentiality" test from section 20(1)(b) of the *Federal Act* to address the deficiency. To my mind he did not err in doing so.

[30] In essence, Staples argues that the content of the information in the usage reports is its information, and disclosure of it would reveal its information which was submitted in confidence and treated consistently as confidential by them.

[31] Staples compiled and supplied the usage reports at MUN's request pursuant to a term in the tender contract. Accordingly, the first relevant inquiry is whether Staples' compilation of the information alters its content.

[32] The compilation of information was dealt with by the Supreme Court in *Merck Frosst*, where the Court was applying section 20(1)(b) of the *Federal Act* to a request for disclosure of scientific research which Merck Frosst had compiled and supplied to Health Canada. Merck Frosst had argued that its compilation of information it supplied to Health Canada made it confidential. The Court rejected Merck Frosst's argument, saying:

> [139] First, the terms "financial, commercial, scientific or technical" should be given their ordinary dictionary meanings. As MacKay J. in *Air Atonabee* stated, at p. 268:
>
> > . . . dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.
>
> [140] Second, the case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately "depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time" (*Air Atonabee*, at pp. 267-68).
>
> [141] Finally, I agree that administrative details such as page and volume numbering, dates and location of information within the records are not scientific, technical, financial or commercial information (*AstraZeneca*, at para. 73).
>
> [142] In general, the same can be said about the formatting and structure of submissions such as the choice to use a graph or table to present information or the precise organization and ordering of sections of a document the general contents of which are the subject of publicly available guidelines as is the case here: see, e.g., *Société Gamma*, at pp. 63-64. Of course, whether or not the exemption applies must be considered in light of the nature of the information and the evidence in the particular case.

[33] Accordingly, the listing, formatting, numbering and categorizing of information is not in itself information which could qualify for exemption from disclosure. Neither does such listing, formatting, numbering and categorizing alter the character or content of the supplied information. Likewise, Staples' listing, formatting, numbering and categorizing of the information in the usage reports is not information which could qualify to be exempt from disclosure. Nor does Staples' compilation of the information transform it into Staples' information if it was not Staples' information to

begin with. Accordingly, compilation does not alter the content of the usage reports.

[34] The next relevant inquiry is whether disclosure of the contents of the usage reports would reveal Staples' information. In other words, is the content of the usage reports Staples' information?

[35] The Judge characterized the information in the usage reports as commercial, financial or technical, and this characterization is not in dispute.

[36] There are two usage reports. One contains specific descriptions, including product numbers, of items purchased in accordance with the specific descriptions of products set out in the tender bid, along with the quantities purchased and the prices paid (the contract usage report). The other report contains a list of items MUN could purchase from any office supplies supplier, along with descriptions and prices, but which MUN purchased from Staples (the non-contract usage report).

[37] The information in the contract usage report is arguably different from the information in the non-contract usage report in that it involves items supplied to MUN pursuant to the tender. However, it is not information that formed part of the tender bid; it is after-the-fact information respecting how many of the items that were part of the tender bid were actually used by MUN and what MUN actually paid for those items. In actual fact, this is MUN's information, which it possessed and could have disclosed without the involvement of Staples. Staples only compiled and supplied it because MUN did not have an efficient system in place to track usage. Hence, the contract provision that the winning bidder, in this case Staples, would do so. The prices MUN paid for the specific products set out in the tender might have been Staples' confidential information when Staples bid on the tender, but once MUN actually purchased and paid for the items the information became MUN's. Accordingly, the information in the contract usage reports identifying the quantities and prices of specific items MUN purchased and paid for is not Staples' information, and I cannot see how its disclosure would reveal any of Staples' information which Staples had supplied in confidence and treated confidentially.

[38] The same reasoning applies to MUN's purchases of the non-contract items detailed in the non-contract usage report. Moreover, the prices of the non-contract items came from published catalogues available to businesses or entities purchasing office supplies to which a standard discount was

applied. These purchases were open commercial transactions in respect of which the pricing for specifically described office supplies identified by product numbers was in the public domain (*Merck Frosst* at paragraph 146). Disclosing this information is simply disclosing what MUN, as a public institution, paid for non-contract office supplies it purchased on an as-required basis. Accordingly, the non-contract information is not and never was Staples' information and its disclosure cannot be said to reveal Staples' information which it had supplied to MUN in confidence and treated consistently as confidential.

[39] In summary, I am of the view that the Judge did not err in finding that the requested information was not exempt from disclosure. I add only that whether the usage reports were "supplied [by Staples to MUN] explicitly or implicitly in confidence" remains an open question in my mind due to the nature and character of the information and the fact that Staples had a contractual obligation to provide it to MUN. This point was not argued on appeal and it is unnecessary to decide it given the above conclusion.

Is the requested information exempt under section 27(1)(c)?

[40] Staples also appeals the Judge's findings that disclosure would not cause Staples significant financial loss or harm its competitive position. In relation to Staples' arguments under section 27(1)(c), the Judge stated at paragraph 45:

> ... no convincing evidence, and no empirical, statistical or other evidence has been presented to satisfy the court on a balance of probabilities that disclosure of the Requested Records will 'harm' the competitive position of Staples or result in significant financial loss". ... If there was an expectation of harm then it cannot be said, in these circumstances, that such expectation is reasonable.

The Judge went on to say at paragraph 46 that the evidence proffered by Staples respecting probable harm was vague and speculative and insufficient to establish a reasonable expectation of probable harm to the competitive position of Staples. He continued at paragraph 47 to say that there was no clear or convincing evidence of probable harm and added that Staples' argument respecting harm to its competitive position was "exaggerated, based on conjecture and insufficient to ground the exemptions claimed". He concluded at paragraph 51 that Staples' evidence was not sufficiently detailed or convincing to substantiate that its competitive position would be

harmed or that release of the requested information could cause it significant financial loss.

[41] The evidence in this case was provided by Mr. Cretot of Staples and David Reed of Dicks. In support of its position, Staples relies on the opinion of Mr. Cretot and the acknowledgement of Mr. Reed in cross-examination that, in Mr. Reed's opinion, disclosure of the requested information would enable Dicks to understand the bidding strategy of Staples, and argues that Dicks' ability to understand Staples' bidding strategy amounts to evidence of harm to Staples competitive position and significant financial loss to Staples.

[42] Justice Cromwell addressed the issue of harm to a resisting party's competitive position in *Merck Frosst*, saying that "[a] third party claiming [exemption under this kind of provision] must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur" (at paragraph 199.) The test has also been stated to require "a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results ... [are] more than merely possible or speculative". (Commissioner's Report, Appellant's Appeal Book, Part I, Tab 3 at para. 15 citing Saskatchewan Report 2005-003.)

[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples' competitive position or result in significant financial loss to it. While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples' competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder's loss of exclusive knowledge of MUN's contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a risk of harm considerably above a mere possibility, or a real risk of financial loss. More specifically, disclosure of

MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples' bidding strategy, without more, is not evidence from which harm to Staples' competitive position and significant financial loss to it can be reasonably inferred.

[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples' competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.

DISPOSITION

[45] In the result, I would dismiss Staples' appeal and affirm the orders of the Judge below that both the contract and non-contract usage reports are not exempt from disclosure under section 27(1) of the *Act*.

COSTS

[46] The Judge viewed the circumstances of this case as a dispute between two commercial entities and awarded Dicks, as the prevailing litigant, its costs against Staples. The Judge also awarded MUN its costs against Staples.

[47] Staples argues that Dicks should not be awarded costs because it was an intervenor in the proceeding. Intervenors are frequently not awarded costs because they voluntarily involve themselves in litigation. In this case, Dicks, while voluntarily involving itself in this litigation, was also an interested party. As such, Dicks was in a good position to appreciate the issues, and in fact made a substantial and valuable contribution to the hearings in both courts. I share the view of the Judge that Dicks ought to be treated, insofar as costs are concerned, in a manner akin to that respecting a party to the litigation.

[48] On appeal, Dicks' position prevailed. Accordingly, I would affirm the costs order of the Judge and order that Dicks receive its Scale 3 costs in this Court.

[49] The Commissioner has not requested costs and MUN did not actively participate in the appeal. Accordingly, I would not order any costs payable to the Commissioner or MUN on the appeal.

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L. R. Hoegg

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.