



REPORT WITH RESPECT TO REVIEW OF A REQUEST
FOR INFORMATION MADE TO
DEPARTMENT OF NATURAL RESOURCES

This review arises from a refusal by the Department of National Resources to disclose a record requested by the Applicant pursuant to The Freedom of Information and Protection of Privacy Act (the "Act").

A brief statement of the factual background is necessary.

A Forest Management License Agreement dated June 17, 1988 was granted to Norsask Forest Products Inc. ("Norsask") by the Crown pursuant to section 19 of The Forest Act Cap F 19. It contained a restriction upon assignment, in the following terms:

"19.17 Assignment

The Licensee shall not assign this Agreement or any of its rights hereunder to any other party without the prior written consent of the Minister and the payment to the Minister by the Licensee of such transfer fee as the Minister may prescribe."

Subsequently, Norsask entered into an Agreement entitled "Management Agreement" with Meadow Lake Pulp Partnership and Mistik Management Ltd. ("Mistik") whereby the said partnership acquired an interest in the said Forest Management License Agreement.

The Agreement is of considerable length (49 pages) and complexity and purports to regulate the manner in which the respective parties will participate in the exploitation of the forests covered by the Forest Management License Agreement. It includes a provision that "this Agreement is conditional upon the consent hereto of Her Majesty the Queen in right of Saskatchewan". The Agreement was submitted to the Department of Natural Resources by Norsask for approval by the Minister and appears to have been consented to. It is this document which is identified by the Department as coming within the purview of the request made by the Applicant.

Upon receiving the request the Department notified the third party of such a request whereupon both Mistik and Meadow Lake Pulp Partnership made written submissions to the Department opposing the disclosure of the Agreement.

Subsequently, by letter dated November 9, 1992 the Department advised the Applicant that:

"With reference to the above request this is to advise you that the record you have requested cannot be released.

This information cannot be released because it contains financial and commercial information that was supplied to the Province in confidence by a third party. Information of this nature is exempt from access according to section 19(1)(b) of The Freedom of Information and Protection of Privacy Act."

I have examined the "Management Agreement" and there can be little doubt that it is a commercial document establishing and

governing as it does business relations between the parties thereto. There is no suggestion that it was supplied to the Department explicitly on a confidential basis but it is argued that it was supplied in confidence implicitly for the sole purpose of obtaining the approval or consent thereto by the Minister.

In their submission to the Department on this matter, the solicitors for Millar Western Pulp (Meadow Lake) Ltd. state:

"There is an explicit statement in the letter of intent signed by CIC Industrial Interests Inc. and Miller Western Industries Ltd. on December 16, 1988 which indicates that public disclosure is not contemplated. Paragraph 19 of the letter of intent reads as follows:

19. Public Disclosure

Except as may be required by law, or by the exigencies of the Saskatoon (sic) legislature, no public disclosure of the transaction contemplated hereby will be made by either party without the consent of the other. The parties agree to cooperate in connection with all publicity relating to this transaction.

CIC Industrial Interest Inc. is a Saskatchewan Crown corporation which owns CIC Pulp Ltd. Millar Western Industries Ltd., Millar Western Holdings (Meadow Lake) Ltd. and CIC Pulp Ltd. are partners in a limited partnership called Meadow Lake Pulp Limited Partnership."

There is no suggestion that Norsask was a party to the said understanding. In a letter to the Department dated November 10, 1992 the said solicitors admitted that the Agreement was submitted to the Minister by Norsask Forest Products Inc. and there is no suggestion whatever that in doing so Norsask stipulated confidentiality.

It is convenient, at this point, to quote section 19(1) in full as follows:

"19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;
- (c) information, the disclosure of which could reasonably be expected to:
 - (i) result in financial loss or gain to;
 - (ii) prejudice the competitive position of; or
 - (iii) interfere with the contractual or other negotiations of;
 a third party;
- (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;
- (e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or
- (f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

In their submissions, the third parties relied on section 19(1)(b) and 19(1)(c) of the Act and before proceeding with the problems associated with section 19(1)(b) it is convenient to dispose of the submissions with respect to section 19(1)(c). I have read the "Management Agreement" carefully and I am unable to conclude that there is anything in the Agreement which could reasonably be expected to result in financial loss, prejudice the

competitive position of, or interfere with the contractual or other negotiations of any of the third parties. Indeed, the submissions made by the third parties are of a general nature, and they have not pointed to or identified any information in the document as being likely to have the effect suggested. Accordingly, I am of the view that the "Management Agreement" is not exempt by virtue of section 19(1)(c). See: Saint John Shipbuilding Ltd. and Minister of Supply and Services (F.C.A.) 1990 67 DLR (4th) 315.

Insofar as section 19(1)(b) is concerned, I have already indicated that while the document contains commercial information it was not explicitly supplied in confidence and the question therefore remains whether it can be said to have been implicitly supplied in confidence by Norsask to the Department.

This section of the Act closely resembles a similar provision in the federal Access to Information Act, R.S.C. 1985, Cap A1:

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

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party."

Like the Saskatchewan Act, the section is disjunctive and does not couple confidential information with a reasonable

expectation of financial prejudice or interference with contractual or other negotiation, and in this respect these Acts differ from comparable Acts in Ontario and British Columbia which specifically require that disclosure of confidential information must result in some detriment to a third party to be exempt from disclosure.

The federal Act does not specifically state that the information may be supplied explicitly or implicitly on a confidential basis but this would be so in any event. See: Lac Minerals v. International Corona Resources, (1989) 61 DLR (4th) 14. (S.C.C.)

There have been a number of decisions dealing with the interpretation and application of section 21(b) of the federal Access to Information Act. I refer particularly to:

Maislin Industries and Minister for Industry, Trade and Commerce (1984) 10 DLR (4th) 417

Noel and Great Lakes Pilotage Authority (1988) 45 DLR (4th) 127

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989) 27 FTR 194

Information Commissioner of Canada v. Minister of External Affairs (1990) 72 DLR (4th) 113

These decisions indicate that in order to come within the exception in 19(1)(b) of the Act it is not sufficient merely to find that the information is private, (as opposed to public or

published or disclosed in some manner) and that it was supplied with an expectation of confidentiality. These cases, as I understand them, hold that there must be something in the nature of the information, the relationship between the government institution and the third party or some circumstances which would militate against the policy in favour of disclosure adumbrated by the Act.

In Information Commissioner of Canada v. Minister of External Affairs (supra) at page 118, Denault, J. (FTD) states:

"As for . . . the confidential nature of the information, the Air Atonabee decision contains a thorough review of the jurisprudence on this issue and MacKay, J. concludes at page 202 with the following comments:

This review leads me to consider the following as an elaboration of the formulation by Jerome, ACJ in Montana Band of Indians v. Canada (1988) 26 CPR (3rd) 68 that whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated namely:

(a) That the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,

(b) That the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

(c) That the information be communicated, whether required by law or supplied gratuitously in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest and which relationship will be fostered for public benefit by confidential communication."

At page 119, Denault, J. also refers to the American doctrine that commercial or financial information is confidential if its disclosure would impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. This approach, he says, has the advantage of clearly recognizing that confidentiality is a shared responsibility between informer and informant and (on the same page) he goes on to say:

"According to that theory it is sufficient, to demonstrate that confidentiality exists, to establish that the interests of either party require as much. I would agree that a determination of confidentiality is not made less objective by the fact that only one side has an interest in maintaining confidentiality. What must be objectively determined is whether the information was obtained in exchange for the explicit or implicit promise that it would be treated confidentially." (emphasis added)

I am dealing here with a request for information about the disposition of a significant amount of public property. There can be no doubt that the public has a legitimate interest in these kinds of transactions and that a party dealing with the government in such matters may reasonably expect this to be the case and accordingly, it does not appear to me to be in the public interest that secrecy should be fostered.

As I already indicated, the information in the "Management Agreement" appears to me to be innocuous insofar as the interests

of the third parties are concerned and under all the circumstances I can see no basis for their claim to confidentiality under section 19(1)(b) and no sufficient reason why a promise of confidentiality should be implied.

It follows from what I have already said that the fact such information may have been treated as "confidential" by the Department prior to the enactment of The Freedom of Information and Privacy Act does not assist the case for nondisclosure since it was clearly the intent of the Act that greater access to information should be provided following its enactment.

Accordingly, I recommend that the "Management Agreement" be disclosed by the Department to the Applicant.

DATED at Regina, Saskatchewan this ^{5th} day of February, 1993.


Derril G. McLeod, Q.C.,
Commissioner of Information and
Privacy for Saskatchewan