COURT FILE NO.: 82/04; 75/04
DATE: July 8, 2005

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MATLOW, JENNINGS AND SWINTON JJ.

B E T W E E N:	
THE BOEING COMPANY	
Applicant	*Peter Manderville and Benjamin Na*, for the Applicant
- and -	
MINISTRY OF ECONOMIC DEVELOPMENT AND TRADE OF ONTARIO, ASSISTANT COMMISSIONER THOMAS MITCHINSON, INFORMATION AND PRIVACY COMMISSIONER, ONTARIO, BOMBARDIER INC. and CAW-CANADA	*David Goodis*, for the Respondent Information and Privacy Commissioner
	Anthony F. Dale, for the Respondent CAW-Canada
Respondents	
AND B E T W E E N:	
BOMBARDIER INC.	
Applicant	*Mark Hayes*, for the Applicant
- and -	
MINISTRY OF ECONOMIC DEVELOPMENT AND TRADE OF ONTARIO AND THE BOEING COMPANY, INFORMATION AND PRIVACY COMMISSIONER/ONTARIO and CAW-CANADA	*David Goodis*, for the Respondent Information and Privacy Commissioner
	Anthony F. Dale, for the Respondent CAW-Canada
Respondents	
	HEARD at Toronto: June 3, 2005

SWINTON J.:

[1] The Boeing Company and Bombardier Inc. have each brought applications for judicial review of the decision of Assistant Information and Privacy Commissioner Mitchinson ("the Commissioner"), Order PO-2226, Appeal PA-030030-2 dated January 19, 2004, in which the Ministry of Economic Development and Trade was ordered to produce to the respondent, CAW-Canada, three agreements entered into by the Government of Ontario in relation to the purchase and sale of de Havilland Inc.

[2] The issue in these applications is whether the records ordered disclosed were exempt from disclosure under the third party information exemption found in s. 17 of the *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F-31 ("the Act").

Background Facts

[3] This case arises out of an application under the Act made by CAW-Canada in 2002, requesting information from the Ministry relating to the 1992 sale of the de Havilland business from Boeing to de Havilland Inc., a company indirectly owned by Bombardier and the Ontario government and the subsequent sale of the Ontario government's share of the company to Bombardier in 1997, together with information concerning tax incentives, benefits and corporate commitments from Bombardier relating to jobs.

[4] The Ministry identified three responsive records, the disclosure of which is the subject of this judicial review. These records are:

(a) Asset Purchase Agreement dated January 22, 1992 between The Boeing Company, Boeing of Canada Ltd., Boeing Canada Technology Ltd., 692567 Ontario Ltd., de Havilland Inc., Bombardier Inc., de Havilland Holdings Inc. and the Crown, as represented by the Ministry. This lengthy and complex document set out the terms and conditions of the sale of the de Havilland business, in which Bombardier Aerospace became a 51% owner and the provincial government a 49% owner of de Havilland Inc.

(b) Shareholders Agreement dated March 9, 1992, between Bombardier Inc., Ontario Aerospace Corp., the Ministry and de Havilland Holdings Inc. This document reflects the formation of Ontario Aerospace Corp., which was formed by the Ministry to hold its shares of the de Havilland business.

(c) Share Purchase Agreement dated January 26, 1997, between Bombardier Inc., Ontario Aerospace Corp. and the Ministry. Through this document, Bombardier purchased the Ministry's shares in the de Havilland business subject to certain terms and conditions.

[5] The Ministry refused to disclose these records on the basis of the exemption in s. 17 of the Act, which reads:

> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, *supplied* in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; ... (emphasis added)

[6] The CAW appealed the decision to the Commissioner. In the Notice of Inquiry, the Commissioner set out the test for "supplied" in s. 17 of the Act, stating that, in general, for information in a contract to have been "supplied", it must be the same as that originally supplied by the affected party. In addition, information in a record would be "supplied" if it would allow the drawing of accurate inferences with respect to the information actually supplied to the institution. The Notice then asked the parties to explain if information was supplied and, if so, to provide evidence as to how it was supplied, including the form, the reason for it, by whom and in what circumstances.

[7] After receiving written submissions from the parties, the Commissioner determined that while the records contained commercial, financial and labour relations information, the information had not been "supplied" to the Ministry. In his reasons, the Commissioner set out the general principles with respect to the interpretation of the term "supplied" (at p. 4):

> Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).
>
> The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

[8] After reviewing the parties' submissions, the Commissioner concluded that the information had not been supplied, for reasons set out by him on p. 5:

> Record 1 in this appeal is a complex, multi-party agreement for the purchase of the assets of a large corporation. Records 2 and 3 are agreements that flow from Record 1, and they are also detailed and complex. All three contracts are multi-faceted and contain customized terms and conditions. None of the parties resisting disclosure have provided representations supporting the position that the agreements or any specific provisions in them were "supplied" to the Ministry or that they would reveal information actually supplied to the

> Ministry and, in my view, it is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-governmental parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

[9] The applicants then launched these applications for judicial review, arguing that the Commissioner erred in determining that the information had not been "supplied" to the Ministry.

The Standing of the Commissioner Before this Court

[10] The Boeing Company brought a motion returnable at the hearing seeking a ruling to limit the standing of the Commissioner to make submissions.

[11] According to the recent decision of the Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 1426, the scope of an administrative tribunal's standing should be determined in the context of a particular application for judicial review (at para. 33). A court, in determining standing, should consider the assistance that the tribunal can provide to the court, given the importance of a fully informed adjudication of the issues, as well as the importance of maintaining tribunal impartiality (at paras. 37-38).

[12] Applying that test, this Court ruled that the Commissioner's role would be determined following the oral submissions of the respondent, CAW. After those submissions were made, the Commissioner's counsel was asked to address only the standard of review and jurisdiction.

The Standard of Review

[13] In reviewing the Commissioner's interpretation and application of the meaning of "supplied" in s. 17 to a written record, the standard of review to be applied is reasonableness (*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) at p. 473).

[14] In applying that test, the task of the Court is to determine whether the reasons of the Commissioner stand up to a somewhat probing examination. If there is a line of reasoning that supports the decision, then the Court, on judicial review, should not interfere with the decision (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55).

Analysis

[15] As noted by the Commissioner in his reasons, the exemption in s. 17(1) is designed to protect the "informational assets" of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities (Reasons, p. 3). In order for a record to qualify for exemption under s. 17, the Act contemplates a three part test:

(a) The records must reveal trade secrets or scientific, technical, commercial, financial or labour relations information;
(b) The records must have been "supplied" to the ministry in confidence, implicitly or explicitly; and
(c) Disclosure of that information must give rise to a reasonable expectation of the type of harm specified in s. 17(1)(a), (b) and/or (c).

(*Ontario (Workers' Compensation Board), supra*, p. 474)

[16] The applicants argued that the Commissioner erred in applying the second part of the test, as there is no evidence that the records were not "supplied" to the Ministry. They submitted that the nature of the confidential information in the records was such that it clearly was supplied to the Ministry by Bombardier and Boeing and could only have originated from them. Moreover, the Ministry's submissions stated,

> The Ministry is one of eight parties to the Asset Purchase Agreement which was prepared by one of the affected parties. The Ministry submits that for all intents and purposes the Agreement was "supplied" to it.

[17] It is telling that the Ministry makes reference only to the Asset Purchase Agreement and does not address the two Share Purchase Agreements in this paragraph. Moreover, in response to the request for details about the information in the Notice of Inquiry, neither the Ministry nor the applicants provided any detail with respect to the information provided and its form. While Boeing did make reference to certain articles and schedules, it did so in relation to the issue of the commercial nature of the information. On the issue of "supplied in confidence", it focussed on confidentiality, relying on the confidentiality clause of the Asset Purchase Agreement.

[18] The Commissioner's approach in this case was consistent with the approach taken in other cases interpreting s. 17(1). The Commissioner has consistently found that information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been "supplied". Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the Commissioner has concluded that the information was not supplied (for example, IPC Order MO-1706, pp. 9-10; IPC Order P-1545 at pp. 9-10).

[19] The Commissioner took the view that the records before him did not contain information which was supplied to the Ministry because the information was found in complex contracts which were the subject of agreement by a number of parties, in the case of the Asset Purchase Agreement, and between the government and Bombardier with respect to the other two agreements. His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.

[20] During argument before us, counsel for the applicants did not point to anything in the sealed records ("the Private Record") which showed that the Commissioner erred in concluding that there were no informational assets in the three agreements. Having examined the Private Record, I find that the Commissioner reasonably concluded that the agreements were the subject of negotiations between the parties, and that they do not reveal information of the applicants actually supplied to the Ministry. The Asset Purchase Agreement in the Private Record contains neither the exhibits nor the schedules to which Boeing referred in its factum, and which might have disclosed information supplied by it. While the Commissioner has applied s. 17 in other cases to protect informational assets such as trade secrets and copyright material, that is not the type of information that the Commissioner ordered disclosed in the present case.

[21] The decision of the Commissioner was reasonable. He applied the appropriate test in a manner consistent with past decisions to the records before him, and he was well aware that one of the agreements was a multi-party agreement.

[22] While the applicants argued that this decision is inconsistent with the decision in Order PO-2283 dated May 18, 2004, that case is distinguishable. The record there was a single page cashflow estimate prepared by Bombardier and supplied to the Ministry of Finance. The Commissioner determined that the information was supplied in confidence and was not part of a contract (at p. 9).

Conclusion

[23] For these reasons, the applications for judicial review are dismissed. If the parties are unable to agree with respect to costs, the respondents may make written submissions within 21 days of the release of this decision, and the applicants may make responding submissions within 15 days thereafter.

SWINTON J.
MATLOW J.
JENNINGS J.

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REASONS FOR JUDGMENT

Swinton J.

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