Blood Band v. Canada (Minister of Indian Affairs and Northern Development), 2003 FC 1397, [2004] 2 FCR 60

Date:	2003-11-28
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T-1140-01

2003 FC 1397

The Blood Band (*Applicant*)

v.

Her Majesty the Queen in right of Canada as represented by the Minister of Indian Affairs and Northern Development (*Respondent*)

Indexed as: Blood Band v. Canada (Minister of Indian Affairs and Northern Development) (F.C.)

Federal Court, Lemieux J.--Calgary, April 8; Ottawa, November 28, 2003.

Access to Information -- Indian Band seeking judicial review of DIAND decision to release to requestor documents relevant to land claims case -- Given Access to Information Act, s. 27 third party notice of intention to release -- Band objecting under Act, s. 28(2) -- Band's position: documents prepared in contemplation of litigation, conduct of action, settlement negotiations impeded by disclosure -- Band invoking s. 20(1)(b), (c), (d) exemptions -- Judicial review converted to s. 44 review, application allowed -- Settlement privilege -- Litigation privilege -- Review, exposition of relevant principles -- As s. 44 review comparable to trial de novo, Court must reach own conclusions on evidence -- For third party exemption, must show reasonable expectation of probable harm -- Evidence required to establish -- Settlement negotiations crux of matter -- Recognized by law as worthy of protection -- Within s. 20(1)(d), not covered by s. 20(3) solicitor-client exemption -- Must show disclosure reasonably expected to interfere with settlement negotiations -- Documents in entirety exempt under s. 20(1)(d) -- If process opened to outside intervention by disclosure, DIAND, Band would lose control of situation -- Access Coordinator mistaken in view disclosure of "historical facts" not prejudicial to Band as was very evidence relied on by Band.

Native Peoples -- Lands -- Indian Band seeking judicial review of DIAND decision to sever, release

documentation relevant to land claim -- Band objecting on grounds prepared in contemplation of litigation, disclosure could impede prosecution of action, settlement negotiations -- In main action, Band asserting Crown failed to allocate sufficient lands due to population miscalculation -- Court considering relevant Access to Information Act principles -- Disclosure would result in Band, DIAND losing control of process -- Wrong to say disclosure of "historical facts" not prejudicing Band's case as was very evidence relied upon.

An Indian Band sought judicial review of a Department of Indian Affairs and Northern Development (DIAND) decision to sever and release parts of documents requested in respect of the Band's land claim. The Departmental Access Coordinator identified three documents as relevant and sent the Band an *Access to Information Act*, section 27 third party notice of intention to release. The Band objected under Act, subsection 28(2). As to the first two documents, the 1994 historical report and the 1996 land claim submission, the Band said that they were prepared in contemplation of litigation against the Crown and that their disclosure could impede both prosecution of the action and settlement negotiations. It was further submitted that they were furnished to DIAND as part of without prejudice settlement negotiations and that release could impair settlement efforts. The Band accordingly invoked the paragraphs 20(1)(*b*), (*c*) and (*d*) exemptions. The final document was a DIAND report and the Band argued that, as it was relevant to ongoing litigation, disclosure would interfere with the lawsuit and negotiations.

The Access Coordinator nevertheless determined that the consultant's 91-page historical report should be disclosed in its entirety save for its conclusions, stated on two pages. On the other hand, the 183-page land claims submission would not be released except for the cover page and pages 1 to 20, which contained historical data. Finally, the Access Coordinator said that the DIAND report contained factual information and should, with several portions severed, be released.

In the main action, the Band asserted that the Crown failed to set aside sufficient reserve lands due to a miscalculation of the Band's population.

Held, this section 44 review application should be allowed and the documents protected from disclosure in their entirety.

At the hearing, Band counsel relied upon the settlement (without prejudice) privilege and the litigation privilege (documents generated in the litigation context). The argument was made that documents provided to the government in settlement negotiations are not under the control of a government institution and therefore the Band was entitled to proceed in accordance with *Federal Court Act*, section 18 rather than under section 44 of the *Access to Information Act*.

Turning to the relevant principles, it was pointed out by Gonthier J. in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66, that the statement in Act, section 2 that exceptions to access should be "limited and specific" does not create a presumption in favour of access. In a section 44 review, the Court has to undertake an independent review, comparable to a trial *de novo*, and, if necessary, examine the records at issue document by document. This means that the Court's task is not merely to satisfy itself that the tribunal committed an error but rather to reach its own conclusions upon the evidence adduced. Correctness would be the appropriate standard of review. For a third party exemption, applicant must demonstrate a reasonable expectation of probable harm and in *Canadian Broadcasting Corp. v. National Capital Commision*, Teitelbaum J. explained the type of evidence required to discharge that obligation.

Counsel for applicant did well to stress the settlement negotiations, for that was the crux of the matter. It is a privilege recognized by the law as being worthy of protection. In *Hutton v. Canada (Minister of Natural Resources)*, Gibson J. found that settlement negotiations are within the purview of Act, paragraph 20(1)(*d*) but are not covered by the subsection 20(3) solicitor-client exemption.

But, in the *Access to Information Act* context, unlike in civil litigation, to come within paragraph 20(1)(*d*) it is not enough to merely assert the settlement negotiation privilege. It has to be demonstrated that disclosure of the requested records could reasonably be expected to interfere with settlement negotiations. If applicant establishes that the documents were created or exchanged during settlement negotiations and establishes a reasonable expectation of probable harm due to release, there is no need to go outside the section 20 third party exemptions. From that it followed that in this case it would not have to be decided whether a third party at a section 44 review can claim an exemption beyond that provided by section 20, a matter which is the subject of conflicting opinion in this Court. It would also render moot the question whether section 18.1 judicial review is available given the provision for a section 44 review, taking into account *Federal Court Act*, section 18.5. Therefore the instant matter had to be dealt with under section 44.

Upon a review of all three documents, it was concluded that the documents in their entirety qualified for exemption under paragraph 20(1)(*d*) and that severance was inappropriate.

Were it to be argued that, since the settlement negotiations are now off, they can no longer be interfered with as contemplated by paragraph 20(1)(*d*), there would be two responses: (1) DIAND has decided only that it will not negotiate this Band's claim within the specific claims process, an issue under review by the Indian Land Claims Commission; and (2) the Band's action will be subject to the settlement attempts mandated by rule 257.

Disclosure would result in DIAND and the Band losing control of the situation by the process being opened up to outside intervention.

The Court could not agree with the Access Coordinator's view, that disclosure of the "historical facts" would not prejudice the Band's position. What this official categorized as "historical facts" are the very evidence which the Band says is needed to prove its case.

statutes and regulations judicially

considered

Access to Information Act, R.S.C., 1985, c. A-1 , ss. 2, 13 (as am. by S.C. 2000, c. 7, s. 21), 19(1), 20, 23, 25, 27, 28(2), 44, 68 (as am. by S.C. 1990, c. 3, s. 32, Sch., item 1; 1992, c. 1, s. 143, Sch. VI, item 1), 69.

Access to Information Act, S.C. 1980-81-82-83, c. 111, Sch. 1, s. 44.

Excise Tax Act, R.S.C., 1985, c. E-15 , ss. 81.24 (as enacted by R.S.C., 1985 (2nd Supp.), c. 7, s. 38; (4th Supp.), c. 47, s. 52), 81.28 (as enacted by R.S.C., 1985 (2nd Supp.), c. 7, s. 38; (4th Supp.), c. 47, s. 52).

Federal Court Act, R.S.C., 1985, c. F-7 , ss. 18 (as am. by S.C. 1990, c. 8, s. 4), 18.1 (as enacted *idem*, s. 5), 18.5 (as enacted *idem*).

Federal Court Rules, 1998, SOR/98-106, r. 257.

Order in Council P.C. 1887-1151.

cases judicially considered

applied:

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2003 FCT 250 (CanLII), [2003] 4 F.C. 3 (T.D.); *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66; (2003), 224 D.L.R. (4th) 1; 47 Admin. L.R. (3d) 1; 24 C.P.R. (4th) 129; 301 N.R. 41; *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)* 2003 FCT 681 (CanLII), (2003), 25 C.P.R. (4th) 460; 234 F.T.R. 294 (F.C.T.D.); *Air Atonabee v. Canada (Minister of Transport)* reflex,

(1989), 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.); *Canadian Broadcasting Corp. v. National Capital Commission* 1998 CanLII 7774 (F.C.), (1998), 147 F.T.R. 264 (F.C.T.D.); *Hutton v. Canada (Minister of Natural Resources)* 1997 CanLII 5581 (F.C.), (1997), 137 F.T.R. 110 (F.C.T.D.); *Samson Indian Nation and Band v. Canada* 2000 CanLII 14837 (F.C.), (2000), 182 F.T.R. 71 (F.C.T.D.).

referred to:

Canadian National Railway Co. and Canadian Pacific Ltd. v. Canada reflex, (1993), 62 F.T.R. 150 (F.C.T.D.); *Dussault v. Canada (Customs and Revenue Agency)*, 2003 FC 973 (CanLII), 2003 FC 973; [2003] F.C.J. No. 1253 (F.C.) (QL); *Aliments Prince Foods Inc. v. Canada (Department of Agriculture and Agrifood)* (2001), 272 N.R. 184 (F.C.A.); *Canada Packers Inc. v. Canada (Minister of Agriculture)*, reflex, [1989] 1 F.C. 47; (1988), 53 D.L.R. (4th) 246; 32 Admin. L.R. 178; 26 C.P.R. (3d) 407; 87 N.R. 81 (C.A.).

authors cited

Manes, Ronald D. and Michael P. Silver. *Solicitor-Client Privilege in Canadian Law*. Markham, Ont.: Butterworths, 1993.

APPLICATION for judicial review, converted by the Court into an *Access to Information Act*, section 44 review, of a decision by a Departmental Access to Information Act Coordinator to sever and release to an undisclosed requestor certain documents in an Indian land claims matter. Application allowed.

appearances:

Kenneth R. McLeod for applicant.

D. Kim McCarthy for respondent.

solicitors of record:

Walsh Wilkins Creighton LLP, Calgary, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Lemieux J.:

BACKGROUND

[1]By way of an application pursuant to section 18.1 [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act* [R.S.C., 1985, c. F-7], the Blood Band (the Band) consisting of the members of the Blood Tribe challenges a decision dated June 16, 2001, made by the Access to Information Act Coordinator (the Access Coordinator) at the Department of Indian and Northern Development (DIAND) to sever and release parts of documents which an undisclosed requestor sought access to from DIAND under the rubric "Land Claim of the Blood Indian Band". The Access Coordinator determined parts of these documents qualified for exemption under certain paragraphs of section 20 of the *Access to Information Act* [R.S.C., 1985, c. A-1] (the Act).

[2]The Access Coordinator identified three relevant documents to the request:

(1) a 1994 historical report by a consultant to the Band;

(2) a 1996 land claim submission to DIAND prepared by solicitors retained by the Band;

(3) a 1998 confirmation report prepared by an official at DIAND assessing and summarizing the position of the parties.

[3]The Access Coordinator considered the applicant a third party in respect of these three documents and, therefore, sent the Band a section 27 third party notice stating its intention to release the documents in severed form. The Band, pursuant to subsection 28(2) of the Act, made representations objecting to any release of the documents.

[4]As to the first two documents, the 1994 historical report and the 1996 land claim submission, the Band's legal counsel submitted to the Access Coordinator the documents were prepared in contemplation of litigation in the context of the Band's Federal Court action against the Federal Crown commenced in 1980 and disclosure may interfere with the prosecution of its action as well as any future settlement negotiations.

[5]In addition, the Band's legal counsel submitted to the Access Coordinator the historical report and land claim submission were placed in the hands of DIAND in without prejudice settlement negotiations of its legal action which included negotiations related to the acceptance of the Blood Band's claim for negotiation as a specific claim . It was submitted their release could reasonably interfere with settlement efforts as well as the specific claims eligibility negotiations between the Blood Tribe and the Canadian Government.

[6]For this and other reasons, legal counsel to the Band submitted to the Access Coordinator the exemptions provided for in paragraphs 20(1)(*b*), (*c*) and (*d*) of the Act applied.

[7]Other provisions of the Act were invoked before the Access Coordinator but I need not refer to them as counsel for the applicant Band at the hearing before me did not rely on these other provisions to challenge the decision.

[8]As to the third document proposed for release, the report prepared by the DIAND official, the Band submitted this document was prepared in contemplation of or was relevant to the ongoing litigation between the parties and disclosure may well interfere with the Band's prosecution of its action against Canada as well as any future settlement negotiations. Paragraphs 20(1)(*c*) and (*d*) were invoked. This document is 65 pages and all of its pages are headed "without prejudice".

[9]By letter dated June 16, 2001, the Access Coordinator provided the Band its reasons for exemption and severance for release.

[10]First, the consultant's historical report of 91 pages was to be disclosed in its entirety with the exception of two pages said to constitute the conclusions of the report. The Access Coordinator expressed the belief the pages proposed for release contained historical data which would not prejudice the Band's position if disclosed. The excepted two pages are said by the Access Coordinator to be protected pursuant to paragraphs 20(1)(*b*), (*c*) and (*d*) of the Act.

[11]The second document, the land claims submission totalling 183 pages prepared by solicitors retained by the Band and an additional 20 appendices including elder statutory declarations was to be withheld in its entirety, again pursuant to paragraphs 20(1)(*b*), (*c*) and (*d*), with the exception of the covering page and pages 1 to 20 of that document. The Access Coordinator said these pages, namely, the introduction and the facts to the legal submission, were historical data, and disclosure would not prejudice the Blood Band's position. The facts identified by the Access Coordinator were characterized as general facts, Mormon settlement efforts in the area and population figures for the Blood Tribe.

[12]The Access Coordinator said the third document, one prepared for DIAND and provided to the Band, overall contained factual information which should be released with several severed portions and certain specific pages

protected, again under the same paragraphs of subsection 20(1) of the Act.

[13]The receipt by the Band of the June 16, 2001 letter caused it to initiate proceedings in this Court, not under section 44 of the Act, but rather pursuant to section 18.1 of the *Federal Court Act*, a procedure which the Federal Crown took objection to.

[14]For ease of reference, I reproduce paragraphs 20(1)(*b*), (*c*), and (*d*) of the Act which provide third party mandatory exemptions as well as section 25 which authorizes severances:

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;

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(*d*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

. . .

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material. [Emphasis mine.]

[15]The litigation previously referred to is an action launched on January 10, 1980, (Court file T-238-80) by the Chief of the Blood Band of Reserve 148, Jim Shot Both Sides, and the Councillors of the Band as plaintiffs, on behalf of all of the Blood Tribe. The defendant in the action is Her Majesty the Queen in right of Canada.

[16]The statement of claim refers to Treaty 7 entered into on or about September 27, 1877, by which Canada agreed to establish a reserve for several First Nations whose traditional territory was in southern Alberta. The Blood Tribe was a signatory to that Treaty. The size of the reserve was to be sufficient to allow one square mile for each family of five persons or, in that proportion, for larger or smaller families.

[17]The statement of claim recites a separate reserve for the Blood Tribe was established by an amendment to Treaty 7 on July 2, 1883, after the Band advised Canada it did not want to be in a common reserve with the Blackfoot or Sarcee Bands in an area known as the Blackfoot Crossing Reserve.

[18]The plaintiffs in their action say the federal Crown made a wrong population calculation, i.e., the incorrect 2,737 members versus the 3,600 Tribe members which is alleged to be the correct figure for their new and separate Reserve (the new reserve). As a result of this miscalculation, the land mass for the new reserve is too small--the Band is short 172.6 square miles. The plaintiffs say an Order in Council, P.C. 1151 dated May 17, 1887, confirming the size of the new reserve as containing 547.5 square miles, was based on misleading information.

[19]The federal Crown defended on April 3, 1980. It denied it failed to set aside insufficient reserve lands for the Band.

[20]Defendants' documents were listed in August 1980 with plaintiffs' documents listed November 22, 1983.

[21]On August 7, 1996, the plaintiffs moved the Court for directions as to the procedure to govern the course of the proceedings and allowing it to continue since the claim was at the eligibility stage of the specific claim process in DIAND. Justice Dubé, on September 17, 1996, ordered the action to be continued.

[22]On February 24, 1999, Justice Gibson granted the plaintiffs' liberty to amend their statement of claim. An important new allegation is that, on or about September 25, 1880, an agreement was reached between the Blood Tribe and the federal Crown as to the location and extent of its new reserve. The plaintiffs allege the new reserve would be on the land between the Kootenay (now the Waterton River) and the St-Mary's River to Chief Mountain and the International Border at the 49th parallel. The plaintiffs allege the new reserve was lawfully established as agreed for the Blood Tribe that year in accordance with the natural boundaries of those landmarks.

[23]In the alternative, the plaintiffs state the new reserve was lawfully established in the fall of 1882 when the federal Crown's representative completed a survey for the new reserve of 650 square miles.

[24]Plaintiffs say the amendment to Treaty 7 entered between the Blood Tribe and the federal Crown on or about the second day of July 1883, by which the Blood Tribe purportedly agreed to accept a new location for a reserve on condition of surrender of their interest in the Blackfoot Crossing Reserve initially established pursuant to Treaty No. 7, is illegal for a number of reasons.

[25]Action T-238-80 became a specially managed proceeding at the request of the plaintiffs after the new *Federal Court Rules, 1998* [SOR/98-106], took effect. The solicitors to the Blood Band advanced the proceeding should be specially managed because the claim was currently within the specific claims process at DIAND which "is an alternative dispute resolution process, and it was agreed by the parties that this claim would be held in abeyance pending the resolution of the specific claim".

[26]In an affidavit in support of the specially managed request Deborah Scott, legal assistant to the solicitors to the plaintiffs, said:

(a) The claim represents a unique mixture of "specific" claim issues under Department of Indian and Northern Affairs Aboriginal Land Claim Policy for specific claims and treaty land entitlement issues;

(b) In 1980, a task force was formed with representatives from both the Blood Tribe and the Crown and in August 1981, the joint task force made recommendations to the Government of Canada which were not followed;

(c) In 1990, the Blood Tribe renewed work on the specific claim culminating in the submission of the claim to specific claims. Elders were also interviewed in Blackfoot to gain further historical evidence and insight into the events relating to the establishment of the Blood Tribe Reserve pursuant to Treaty 7. Those interviews were translated and transcribed and the information sworn in statutory declaration by the elders.

(d) Since the submission of the specific claim in 1996, the research has been conducted and meetings with Specific Claims Canada and the Department of Justice have been ongoing;

(e) The specific claims process is an alternative dispute resolution process governed by the Department's policy "outstanding business in native claims policy". The claim was submitted and considered by Specific Claims on the understanding that the original legal action by the Tribe would be held in abeyance pending the decision of Specific Claims on the submitted claims.

[27]Justice Gibson was named case management judge and continued to receive periodic reports from the parties.

[28]On February 16, 2000, Justice Gibson received a report from one of the solicitors to the plaintiffs who advised

that on November 10, 1999, a preliminary position letter was received by the Band from the Specific Claims Branch of DIAND. That letter rejected all of the positions presented by the Tribe in their various claim submissions but, according to the solicitors, very little explanation was given for the rejection.

[29]The reports to Justice Gibson indicate the federal Crown provided a written rationale on March 3, 2000, why it rejected eligibility for negotiations in its specific claims process. The Band made supplementary submissions on March 10, 2000. It was agreed further research would be required which would take four to six months.

[30]Justice Gibson formally stayed the action until January 2004 taking into account reports of continuing work on the specific claim as an alternate dispute resolution mechanism in relation to the action.

[31]The Court was advised that on January 9, 2003, the specific claim was not accepted by DIAND and therefore not eligible for negotiation for settlement. The solicitors to the Band advised they would be seeking instructions to request the Indian Claims Commission (the Commission) to conduct an inquiry into the claim.

[32]As I understand it, the Band's claim is currently being reviewed by the Commission.

[33]In an affidavit in support of these proceedings, Annabel Crop Eared Wolf, Tribal Government Coordinator of the Blood Band, deposed, *inter alia*:

(c) many of the documents were prepared in contemplation of or are relevant to ongoing litigation and pertain directly to the issues set out in these claims;

(d) many of the documents were prepared to assist The Blood Band to obtain legal advice regarding contemplated or on-going litigation and The Blood Band maintains a solicitor-client privilege to these documents;

(e) disclosure of some or all of the documents may interfere with lawsuits and/or negotiations between the parties and are exempted under Section 20(1)(c) and (d) of the *Access to Information Act*. These documents also contain financial and commercial information that is confidential and exempted pursuant to Section 20(1)(b) of the same Act. The disclosure of these documents would severely prejudice The Blood Band's position both for purposes of the on-going litigation and for settlement negotiations.

[34]The respondent filed the affidavit of Lynne Desjardins, Acting Access Coordinator at DIAND. She stated "I agree with the reasons for the . . . Act exemptions invoked on the documents which are the subject of this action".

[35]She further stated she believed the exemptions invoked on these records constituted a reasonable balance between the rights of the requestor pursuant to sections 2 and 25 of the Act and the rights of the individuals and the applicants pursuant to subsection 20(1).

[36]She confirmed, without saying more, her view that the release of historical data would not prejudice the Band's position.

ANALYSIS

(1) Preliminary observations

[37]In its written memorandum, counsel for the Band invoked the following sections of the Act as a shield to the release of the subject documents:

(1) subsection 19(1) because the documents contained personal information;

(2) the documents were provided by an Aboriginal government covered by section 13 [as am. by S.C. 2000, c. 7, s. 21];

(3) the documents fell within the National Archives' exemption and the Privy Council exemption under sections 68 [as am. by S.C. 1990, c. 3, s. 32, Sch., item 1; 1992, c. 1, s. 143, Sch. VI, item 1] and 69 of the Act.

[38]Counsel for the Band, at the hearing, withdrew reliance on these provisions or did not argue them.

[39]The heart of his oral submissions focussed on a number of privileges. He concentrated on the settlement privilege (without prejudice privilege) and argued the three documents were understood to be provided to, and exchanged, between the Band and DIAND for the purpose of negotiation of the outstanding claims. He also focussed on the litigation privilege arguing the documents proposed for release were all generated in the context of litigation.

[40]According to counsel for the Band, documents provided to the government in the context of settlement negotiations are privileged and are not covered by the Act--they are not within the control of a government institution and this is why he argues his section 18 [as am. by S.C. 1990, c. 8, s. 4] *Federal Court Act* proceeding is well-founded.

[41]In the alternative, counsel for the Band argued if the Act applied, paragraphs 20(1)(*b*), (*c*) and (*d*) provided appropriate exemptions. He argued there was a cross-over between these sections and section 23 of the Act which specifically deals with solicitor-client privilege.

(2) Some principles

[42]In *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2003 FCT 250 (CanLII), [2003] 4 F.C. 3 (T.D.), Justice Layden-Stevenson of this Court encapsulated some basic principles from the case law which I adopt [at paragraph 9]:

I begin with a review of basic principles. Subsection 2(1) of the Act contains its purpose, which is to provide the public with a right of access to information in records under the control of the government. Exceptions to that right of access should be limited and specific: *Canada Packers Inc. v. Canada (Minister of Agriculture)*, reflex, [1989] 1 F.C. 47 (C.A.) (*Canada Packers*); *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403 (*Dagg*). Public access ought not be frustrated by the courts except in the clearest of circumstances. It is a heavy burden of persuasion that rests upon the party resisting disclosure: *Maislin Industries Limited v. Minister of Industry, Trade and Commerce*, [1984] 1 F.C. 939 (T.D.) (*Maislin*); *Rubin v. Canada (Mortgage and Housing Corp.)*, reflex, [1989] 1 F.C. 265 (C.A.) (*Rubin*); *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (F.C.), [1993] 1 F.C. 427 (T.D.). The standard of proof to be applied in reviewing exemptions under subsection 20(1) of the Act is that of a balance of probabilities: *Northern Cruiser Co. v. Canada* reflex, (1995), 99 F.T.R. 320n (F.C.A.).

[43]I note Justice Gonthier's remarks in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66, concerning the exceptions to access. He said this on behalf of the Court [at paragraph 21]:

The statement in s. 2 of the *Access Act* that exceptions to access should be "limited and specific" does not create a presumption in favour of access. Section 2 provides simply that the exceptions to access are limited and that it is incumbent on the federal institution to establish that the information falls within one of the exceptions (see also s. 48 of the *Access Act*).

[44]To the principles listed in *Heinz*, *supra*, Justice Gibson in *SNC Lavalin Inc. v. Canada (Minister for*

International Co-operation) 2003 FCT 681 (CanLII), (2003), 25 C.P.R. (4th) 460 (F.C.T.D.) added another [at paragraph 13]:

. . . a review by this Court on an application such as this of a decision to release records to a requester is a review *de novo* [citing Justice MacKay's decision in *Air Atonabee Ltd. v. Canada (Minister of Transport)* reflex, (1989), 27 F.T.R. 194 at 206].

[45]In *Air Atonabee v. Canada (Minister of Transport)* reflex, (1989), 27 C.P.R. (3d) 180 (F.C.T.D.), Justice MacKay ruled that a review under section 44 of the Act [then S.C. 1980-81-82-83, c. 111, Sch. I] obligated the Court to undertake a new and independent review of the whole matter, comparable to a trial *de novo*. He said this at pages 196-197 of his reasons:

In light of the jurisprudence evolving in relation to the Act there can no longer be doubt that upon application for review, the court's function is to consider the matter *de novo* including, if necessary, a detailed review of the records in issue document by document.

[46]When conducting a review *de novo*, the task of the Court is not to satisfy itself that the tribunal, here the respondent, through its Access Coordinator, committed an error but rather to arrive at its own conclusions based on the evidence adduced (see, *Canadian National Railways Co. and Canadian Pacific Ltd. v. Canada* reflex, (1993), 62 F.T.R. 150 (F.C.T.D.), in connection with an appeal *de novo* pursuant to sections 81.24 [as enacted by R.S.C., 1985 (2nd Supp.), c. 7, s. 38; (4th Supp.), c. 47, s. 52] and 81.28 [as enacted by R.S.C., 1985 (2nd Supp.), c. 7, s. 38; (4th Supp.), c. 47, s. 52] of the *Excise Tax Act* [R.S.C., 1985, c. E-15]). If it is appropriate to talk about the standard of review in these circumstances, that standard would be the standard of correctness. (See *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP), supra*, at paragraph 19 and *Dussault v. Canada (Customs and Revenue Agency)*, 2003 FC 973 (CanLII), 2003 FC 973; [2003] F.C.J. No. 1253 (F.C.) (QL), at paragraph 14.)

[47]I observe both the Supreme Court of Canada and the Federal Court of Appeal have endorsed Justice MacKay's interpretation that a section 44 review is *de novo*. (See *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP), supra*, with Justice Gonthier's discussion in his analysis of the standard of review applicable to a decision of the Commissioner not to release information requested under the *Access to Information Act*. He stressed the Court's broad power of review (paragraph 15). See also the Federal Court of Appeal's decision in *Aliments Prince Foods Inc. v. Canada (Department of Agriculture and Agrifood)* (2001), 272 N.R. 184 (F.C.A.), at paragraph 7.)

[48]Parliament framed the third party exemptions in paragraphs 20(1)(*c*) and (*d*) in terms of "could reasonably be expected to" result in material financial loss or to prejudice the competitive position or to interfere with contractual or other negotiations of a third party. The case law relied upon by the respondent, indicates an applicant must establish a reasonable expectation of probable harm (see *Canada Packers Inc. v. Canada (Minister of Agriculture)*, reflex, [1989] 1 F.C. 47 (C.A.)).

[49]In *Canadian Broadcasting Corp. v. National Capital Commission* 1998 CanLII 7774 (F.C.), (1998), 147 F.T.R. 264 (F.C.T.D.), Justice Teitelbaum reviewed the type of evidence necessary to establish reasonable expectation of probable harm at paragraphs 25-29:

In **SNC-Lavalin Inc. v. Canada (Minister of Public Works)** reflex, (1994), 79 F.T.R. 113 at page 127 (F.C.T.D.), the court held the applicant cannot merely affirm by affidavit that disclosure would cause the harm discussed in paragraph 20(1)(*c*) of the Act. The court stated that these affirmations are the very findings that the court must make and so further evidence establishing probable harm is needed.

The evidence as to the harm that would be caused to the CBC is, at best, very meagre. In her affidavit of October

9, 1997, Ms. Marshall states, in paragraphs 6, 7, 8 and 9:

6. The Agreement reflects the manner in which CBC contracts for events such as Canada Day.

7. The Agreement contains many elements of a sensitive competitive nature. The Agreement includes not only the amount requested by CBC for participating in and broadcasting events such as the shows, but also the manner in which its services are delivered, and the type of incentives provided such as a sponsorship package.

8. I believe that the disclosure of the Agreement would be harmful the CBC's competitive position as it would disclose all those elements referred to in Paragraph 7 of this my affidavit and permit competitors of CBC to incorporate those items in any competing proposal to N.C.C. The release of the following Articles of the contract, in particular, could reasonably be expected to prejudice the CBC: Article 2.03(d), Article 3.01(a), Article 4 and particularly 4.05, Schedule B.

9. I believe that the disclosure of the Agreement could also interfere with CBC's contractual or other negotiations. The release of sponsorship information could reasonably be expected to interfere with other sponsorship negotiations. The release of the contract price per year, and the method by which CBC delivers its services could also be expected to interfere with contractual negotiations involving similar projects. The release of the following Articles of the contract, in particular, could reasonably be expected to interfere with CBC's contractual or other negotiations: Article 2.03(d), Article 3.01(a), Article 4 and particularly 4.05, Schedule B.

After a careful reading of these paragraphs, I cannot come to any other conclusion than that what Ms. Marshall is doing is making certain confirmations without giving any evidence that there is a reasonable expectation of probable harm to the applicant if the information requested is divulged.

It is also not enough to merely speculate that the applicant may suffer some probable harm if the requested information is made public.

In **Canada (Information Commissioner) v. Canada (Minister of External Affairs)**, reflex, [1990] 3 F.C. 665 at pages 682-3 (F.C.T.D.), the court held that paragraph 20(1)(**d**) of the Act requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the applicant will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems were held to be insufficient to qualify under the exemption. Similar reasons were provided in **Société Gamma Inc. v. Canada (Secretary of State)** reflex, (1994), 79 F.T.R. 42 (F.C.T.D.) where the court stated that paragraph 20(1)(**d**) must refer to an obstruction to negotiations rather than merely the heightening of competition which might flow from disclosure. Finally, in **Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)** (1990), 107 N.R. 89 (F.C.A.), the court stated at page 91 that mere speculation or possibility is insufficient to ground an exemption under paragraph 20(1)(**d**). Given the lack of evidence about the effect on actual contractual negotiations, I have no difficulty finding that the applicant has failed to satisfy paragraph 20(1)(**d**) of the Act. [Emphasis mine.]

(3) Application to this case

[50]During oral argument, counsel for the applicant tailored his case to fit within the subsection 20(1) exemptions which the Access Coordinator found largely applicable. He abandoned recourse to exemptions found outside section 20 except to the spill-over into section 23 of the Act when claiming settlement is a form of solicitor-client privilege. For reasons expressed later in these reasons, I do not think there is any crossover and that settlement negotiations sit readily within paragraph 20(1)(*d*) of the Act.

[51]I mention at this point the Access Coordinator did not give specific reasons why she found the three documents partially qualified for a particular specific exemption (either paragraphs 20(1)(*b*), (*c*), or (*d*)), nor why the release of historical data would not prejudice the Band.

[52]Counsel for the applicant, during oral argument, stressed the settlement negotiations relating to the documents.

[53]It was appropriate for him to do so because, in my view, the issue of settlement negotiations is the crux of the matter before me and it is a privilege recognized at law worthy of protection.

[54]Settlement privilege attaches to documents created or exchanged during negotiations carried on for the purpose of settling an action or avoiding litigation. Justice Gibson in *Hutton v. Canada (Minister of National Resources)* 1997 CanLII 5581 (F.C.), (1997), 137 F.T.R. 110 (F.C.T.D.), found the language of paragraph 20(1)(*d*) of the Act could embrace settlement negotiations. He said this at paragraph 24 of his reasons:

I am satisfied, however, that the requested record does fall within the terms of paragraphs 20(1)(*c*) and (*d*). In both of those paragraphs, the test is whether the requested record "could reasonably be expected" *Canada Packers Inc. v. Canada (Minister of Agriculture)*, reflex, [1989] 1 F.C. 47, at 57-60 (C.A.)) to result in material financial loss or gain, prejudice to the competitive position of, or to interfere with contractual or other negotiations of a third party, in this case Terra. The evidence is sufficient to demonstrate the magnitude of the amounts at stake in the litigation that is before the courts in the United States that could reasonably be expected to be the subject of settlement negotiations. [Emphasis mine.]

[55]I agree with Justice Gibson. Settlement negotiations are within the purview of paragraph 20(1)(*d*) of the Act and are not covered by the solicitor-client exemption stated in subsection 20(3) of the Act. For this proposition, I refer to the authors of *Solicitor-Client Privilege in Canadian Law*, Markham, Ont.: Butterworths, 1993. Manes and Silver say this at pages 115-116 about settlement negotiation privilege:

The settlement negotiation privilege is not a true solicitor-client privilege, in that it does not relate to communications between a solicitor and client, but rather to communications with the other side or adverse party to a dispute. Accordingly, we have called this category of non disclosure "settlement negotiation privilege". The case law favouring the protection of such communications from disclosure is replete with references to the policy underlying such protection and was aptly summarized by Sopinka and Lederman in the text on evidence. [Footnotes omitted.]

[56]In the context of the *Access to Information Act*, unlike the situation which prevails in civil litigation, it is insufficient simply to assert the privilege of settlement negotiations to fit within paragraph 20(1)(*d*) of the Act. An applicant must bring evidence that disclosure of the requested records could reasonably be expected to interfere with settlement negotiations.

[57]The result of the analysis at this point is if the applicant establishes the documents were created or exchanged during settlement negotiations and establishes a reasonable expectation of probable harm on release, there is no need to go outside the confines of the section 20 third party exemptions. This conclusion has two results.

[58]First, I do not have to decide whether a third party, in a section 44 review, can claim an exemption outside what is provided for in section 20. There is a debate about this in this Court (contrast *Heinz, supra*, and *SNC Lavalin, supra*). Second, it renders moot any question which may linger whether a section 18.1 judicial review proceeding can be taken notwithstanding the availability of a section 44 review in the light of section 18.5 [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act*.

[59]I conclude the proceeding before me must be pursuant to section 44 which means section 18.1 of the *Federal Court Act* is unavailable.

[60]The respondent, while taking objection to the manner in which this Court was seized under section 18 of the *Federal Court Act* requested the within application for judicial review be as if it was a review under section 44 of the *Access to Information Act* and I so order.

(4) Conclusions

[61]Based on my review of the three documents, portions of which were severed for release, I have concluded the entire documents qualify for exemption under paragraph 20(1)(*d*) and that severance is inappropriate.

[62]It is clear the consultants' historical report and the solicitors' submissions were placed in the hands of DIAND for the purpose of achieving a settlement of the 1980 legal action in the Federal Court through the mechanism of having that claim recognized as eligible for negotiation as a specific claim pursuant to the federal government's native claim policy and then, if accepted, negotiated to a conclusion and if that should not come to pass, its action in the Federal Court would still be alive.

[63]The expert consultants' report represents appreciations of fact on numerous points necessary to garner DIAND's recognition as disclosing an outstanding lawful obligation on the part of the federal government. The solicitors' submission musters all of the facts and applies those facts to legal arguments for the purpose of persuading DIAND that the claim should be settled through the specific claim process.

[64]The third document was also prepared in the context of the Band's efforts to gain recognition their claim should be settled as a specific claim . It represents the views of an expert retained by DIAND to analyse the facts and positions put forward by the Band to gain that recognition, outlines further research performed in addition to the research submitted by the Band and makes an assessment of the strength and weakness of the historical facts advanced by either side.

[65]Documents of this nature are privileged from a production in the discovery process in an action. I need only refer to Justice MacKay's decision in *Samson Indian Nation and Band v. Canada* 2000 CanLII 14837 (F.C.), (2000), 182 F.T.R. 71 (F.C.T.D.), at paragraph 9:

An initial question is whether the documents in question qualify as subject to without prejudice privilege. It is the Crown's view that many of those in question do not qualify for they are not concessions of weakness by Samson in its own case. It is urged that the policy underlying the privilege is a narrow one, simply to avoid disclosure at trial of such concessions made in efforts to settle matters. I am not persuaded that the privilege or its underlying policy is so narrow. Rather, where the documents are created with a view to reconciliation or settlement respecting a matter in dispute in litigation between the parties, the documents are without prejudice and privileged (see Sopinka, Lederman and Bryant, **The Law of Evidence in Canada**, 2nd ed. (1999) at pp. 807-809). If a document is made for the purpose of settlement or reconciliation of issues in litigation it matters not whether it is marked or described as "without prejudice"; it will be so classed either by its description or by implication.

[66]Now, it may be argued the settlement negotiations are off and therefore there cannot be any interference with them within the meaning of paragraph 20(1)(*d*).

[67]There are two answers to this proposition. What DIAND has decided is that it would not recognize the Band's claim as being eligible for negotiation within the specific claims process. That issue is being reviewed by the Indian Land Claims Commission.

[68]Second, the Band's action in the Federal Court is still alive, and if it goes forward, after discovery takes place, settlement discussions will take place as mandated by rule 257 of the *Federal Court Rules, 1998*.

[69]I am of the view there is sufficient evidence before me to conclude the release of the three documents could reasonably be expected to interfere with settlement negotiations surrounding the Band's action.

[70]Disclosure of these documents, in this context, results in both the Band and DIAND losing control of the prevailing circumstances (the action and settlement efforts) by opening up the process to outside intervention, a process which heretofore has been carefully managed by the Band and DIAND. Such a consequence, in my view,

cannot but interfere with the realities of settlement negotiations of an action.

[71]I touch on one last point. The Access Coordinator was of the view the disclosure of historical facts would not prejudice the Band's position. I do not share this view.

[72]While some of the events referred to in the documentation necessarily are in the public domain, such as the existence of Treaty 7, what the Access Coordinator coined as historical facts are in reality the very evidence which the Band asserts is needed to prove its Federal Court action and, for the reasons expressed, cannot but prejudice the Band *vis-à-vis* a third party.

[73]For all of these reasons, this section 44 review application is allowed, with costs. The subject documents are protected from disclosure in their entirety pursuant to paragraph 20(1)(*d*).