A-1094-88

CORAM: PRATTE J.A.
URIE J.A.
HUGESSEN J.A.

IN THE MATTER OF SECTION 44 OF THE ACCESS TO INFORMATION ACT
S.C. 1980-81-82 c. 111

B E T W E E N :

SAINT JOHN SHIPBUILDING LIMITED

APPELLANT,
(Applicant)

and

THE MINISTER OF SUPPLY AND SERVICES,

RESPONDENT.
(Respondent)

Heard at Halifax, on Monday and Tuesday,
January 29 and 30, 1990.

Judgment rendered from the Bench at Halifax
on Tuesday, January 30, 1990.

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY:

HUGESSEN J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax,
on Tuesday, January 30, 1990)

HUGESSEN J.A.

This is an appeal from an order of Martin J. dismissing an application made by the appellant pursuant to subsection 44(1)

of the *Access to Information Act*.[1] This application was in respect of a decision to release certain extracts and summaries of a contract between the applicant and the Minister for the construction of naval vessels.

The applicant invokes the provisions of paragraphs (*c*) and (*d*) of subsection 20(1) to oppose the disclosure of the information sought. They read:

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

In applying that text to the material before him, the Judge followed the guidelines laid down by MacGuigan J.A. for this Court in *Canada Packers Inc. v. The Minister of Agriculture*,[2] where he said, at page 89:

> ... I believe one must interpret the exceptions to access in paragraphs (c) and (d) to require a reasonable expectation of probable harm. (The underlining is in the original.)

The applicant now invites us to say that this is wrong, first, because paragraph (*c*), while conveying the notion of "prejudice" (or harm), does not set so high a threshold as probability and, second, because paragraph (*d*) speaks only of interference and does not require any showing of harm at all. We do not agree. The setting of the threshold at the point of probable harm seems to us to flow necessarily from the context, not only of

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[1] R.S.C., 1985, c. A-1.

> 44.(1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

[2] (1988) 87 N.R. 81.

the section but of the whole statute, and is the only proper reading to give to the French text ("risquerait vraisemblablement de causer des pertes").[3]

As to the notion of interference, we think that in order to justify an application by a third party under section 44 there must necessarily be an interference whose consequences will likely be damaging to that party. "Interference" is used here in its sense of "obstruct" ("entraver", in French), much as it is in sports parlance, when the player is penalised for "interference". Here again, the threshold must be that of probability and not, as the appellant would seem to want it, mere possibility or speculation.

This brings us to the second major thrust of the appellant's argument, which was that the Judge had erred in not giving sufficient weight to the appellant's evidence as to the various harms it would suffer if this material were made public. The Judge, we are told, has failed to understand the competitive climate in which the appellant must operate and the realities within which it must negotiate with its subcontractors, suppliers and trade unions. We can see no indication that the Judge did not carefully look at and weigh all the material before him (indeed, the contrary appears to be the case), and what the appellant is really asking us to do is to substitute our appreciation for his; this we will not do. The Judge's conclusion on paragraph (*c*) was that

> The expectation of harm which has been shown by the Applicant in this matter has far too large an ingredient of speculation or mere possibility to meet the standard ...

On paragraph (*d*) he said:

> ... the Applicant has shown the mere possibility that disclosure of the contract might interfere with its contractual or other negotiations.

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[3]Compare *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at 863-864, per Wilson J.

While it is possible that the Judge could without error have reached the opposite conclusion, the question is, at bottom, one of opinion and appreciation and we are quite unable to say that he was wrong.

Two minor points should be mentioned in closing. First, the appellant suggested that the material ordered to be released was in some respects different from what had been requested; the short answer to that is that the appellant's interest, as third party intervenor in a request for information, is limited to those matters set out in subsection 20(1), and it has no status to object that the Government may have given more or less than it was asked for. Secondly, the appellant urges that, because this is a Defence contract, the Court should be specially reticent in releasing information. On this we can do no better than to quote the Judge:

> Under s. 15 of the Act the Respondent has the discretionary authority to refuse to disclose any record if its release could reasonably be expected to be injurious to the defence of Canada. The Respondent does not purport to act under that section of the Act but under s. 20. I agree that my review is limited to the considerations set out in s. 20 of the Act and that the matter of national security is irrelevant to this hearing.

The appeal will be dismissed with costs.

James K Hugessen
J.A.

FEDERAL COURT OF APPEAL

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