Federal Court  Cour fédérale

Date: 20120412

Docket: T-1384-10

Citation: 2012 FC 417

Ottawa, Ontario, April 12, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LTD.

Applicant

and

CANADA - NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD AND THE INFORMATION COMMISSIONER OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Hibernia Management and Development Company Ltd. (the applicant) under section 44 of the *Access to Information Act*, RSC 1985, s A-1 (the ATIA) challenging a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board (the Board), dated August 9, 2010, to disclose records pertaining to a safety and environmental audit of the Hibernia Platform oil and gas operation, offshore of Newfoundland and Labrador.

[2] The applicant requests that this Court order the Board not to disclose the records.

Background

[3] The applicant operates the Hibernia Platform that produces oil and gas from the Hibernia field, located on the continental shelf offshore of Newfoundland and Labrador. The project is operated in accordance with an Operations Authorization issued by the Board to the applicant under the *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3 (the Accord Act).

[4] On June 4, 2010, the Board received an Access to Information Request Form. The following information was requested:

> All documents pertaining to integrated safety and environmental protection audits and inspections of offshore drilling operations conducted by the Board since Jan. 1, 2008.

[5] In response, the Board prepared a list of sixty-four potentially relevant documents. This list included the following items that the Board found might include third party information (the documents):

> C-NLOPB Safety and Environment Audit Report, dated May 23, 2008 (including Appendices A through F); and
>
> Status of Non-Conformance Report, dated June 15, 2010.

[6] These documents were completed as part of the Board's Integrated Safety and Environment Audit, which assessed the regulatory and management system compliance of the applicant's

Hibernia Platform operations. The audit was conducted between January and May 2008 by an audit team consisting of two safety officers and two environmental compliance officers. In the first report, the audit team presented its audit observations and findings. These terms are defined as follows in this report:

> Observation: A statement of fact related to a non-conformance made during a safety audit or safety inspection and substantiated by objective evidence.
>
> Finding: A conclusion, substantiated by one or more observations, that has significant implications for the operator's due diligence in implementing their safety management policies and procedures or in adhering to legislative requirements and/or any non-conformance that has significant implications for safety.

[7] This first report listed items that the audit team observed were to be in non-compliance with the applicant's own policies, conditions imposed by the Board or statutory requirements. Although non-compliances were observed, the report also indicated that there were no immediate concerns for the safety of personnel, the facility or the environment. The second report provided a follow-up on the first, indicating which of the non-compliances had been rectified by the applicant and subsequently closed by the Board.

[8] In a letter dated June 25, 2010, the Board advised the applicant that it had received a request for information pursuant to the ATIA. It explained that the documents, copies of which it included with the letter, were not subject to the privilege under section 119 of the Accord Act. Nevertheless, it sought the applicant's view on the disclosure of them.

[9] In a letter dated July 15, 2010, the applicant provided a detailed response in which it objected to the disclosure of the documents.

[10] On August 3, 2010, the Board notified the applicant by letter that although the documents were not, *per se*, subject to the privilege under subsection 119(2) of the Accord Act, it agreed with the applicant that certain information contained therein might be subject to this privilege. Therefore, the Board stated that it would undertake the process of identifying the information for redaction.

[11] The following week, in a letter dated August 9, 2010 (the decision), the Board explained that it did not view the audit team's observations and findings to be information provided by the applicant. Therefore, it did not agree that these were subject to the privilege under subsection 119(2) of the Accord Act. The Board appended a copy of the documents containing the Board's proposed redactions (the redacted documents) and indicated that it intended to release these documents to the requestor on August 30, 2010. The Board also stated that the applicant was entitled to request a review of its decision.

[12] On August 30, 2010, the applicant filed a notice of motion seeking a review of the Board's decision.

Issues

[13] The applicant submits the following points at issues:

1. Whether the information contained in the documents is privileged and therefore protected from disclosure pursuant to section 119 of the Accord Act without the applicant's written consent.

2. Whether the documents fall within any of the following exemptions to disclosure in the ATIA:

a. Commercial or technical information that is confidential information supplied to the Board by the applicant and which is treated consistently in a confidential manner by the applicant (paragraph 20(1)(b)); or

b. Personal information (section 19)

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Are the documents exempt from disclosure under subsection 24(1) of the ATIA on the basis that they are privileged under subsection 119(2) of the Accord Act?

3. Are the documents exempt from disclosure under paragraph 20(1)(b) of the ATIA on the basis that they contain confidential, commercial or technical information, or under section 19 of the ATIA on the basis that they contain personal information?

Applicant's Written Submissions

[15] The applicant submits that no deference should be shown to the Board in its handling of the Access to Information Request Form or in its approach to the applicant's comments on the disclosure of the documents.

[16] The applicant submits that the documents are precluded from disclosure on three grounds:

1. Privilege;
2. Commercial or technical nature; and
3. Personal information.

[17] On the first ground, the applicant submits that although the ATIA provides the public with a right to access information, this right is not unlimited. Rather, the public's right to access must be balanced against a company's right to privacy and confidentiality, particularly where there is no concern that the principle of facilitating democracy will be eroded. Recognizing this need, the applicant submits that subsection 24(1) of the ATIA creates a broad statutory privilege to protect information and documentation whose disclosure is restricted under a provision listed in Schedule II of the ATIA, without the written consent of the person who provided it. As section 119 of the Accord Act is listed under Schedule II, the applicant submits that information collected by the Board through its safety and environmental auditing process is prohibited from disclosure.

[18] The applicant submits that the documents contain information that it provided to the Board and that the observations and findings presented therein were directly derived from personnel interviews, extensive document review and observational activities on and off shore. Without this information, the applicant submits that nothing in the documents would have come into existence. As such, this information did not arise independently of that which the applicant provided to the Board and the Board is therefore not free to release it to the public without the applicant's consent.

The applicant submits that this is further evidenced by the Board's letter dated August 3, 2010, in which it recognized that certain information may be subject to the subsection 119(2) privilege.

[19] In addition, the applicant refers to the statutory interpretation maxim of *expressio unius est exclusion alterius*: to express one thing is to exclude another. The applicant highlights subsection 119(5) of the Accord Act that specifies information and documents exempt from the subsection 119(2) privilege. As information provided for the purposes of safety and environmental audits is not listed therein, the applicant submits that this information is not exempt from the privilege under the *expressio unius est exclusion alterius* maxim.

[20] On the second ground, the applicant submits that the Board is precluded from disclosing the documents under paragraph 20(1)(b) of the ATIA. The applicant submits that there are four criteria that must be met to determine whether this mandatory exemption applies. The information must be:

1. Financial, commercial, scientific or technical;
2. Confidential;
3. Supplied to a government institution by a third party; and
4. Treated consistently in a confidential manner by the third party.

[21] The applicant submits that the documents clearly contain commercial or technical information that it supplied to the Board.

[22] In terms of confidentiality, the applicant refers to jurisprudence that has developed on the test of objective confidentiality. It submits that this test is met in this case because:

1. The specific information is not publicly available. The information was obtained from the applicant through interviews with its personnel, site visits and reviews of confidential and proprietary documentation that the applicant provided to the Board;

2. The information was communicated to the Board in a reasonable expectation of confidence. The applicant had a reasonable expectation of confidentiality due to the provisions in the ATIA and in the Accord Act; and

3. The relationship between the parties would be fostered for the public benefit by confidential communication. There is significant public interest in the full, frank and timely exchange of information between regulatees and regulators that is promoted in a confidential relationship.

[23] The applicant also submits that it, as a third party, released information to the Board and the documents either contain this information or statements or opinions that reveal such information. Finally, the applicant submits that it consistently treated the information it provided to the Board in a confidential manner and on the expectation that it would remain confidential. In summary, the applicant submits that the four-part test under paragraph 20(1)(b) of the ATIA is met and the Board is therefore not free to release the documents without the applicant's written consent.

[24] On the third ground, the applicant submits that individuals, including their employment and contact information, are identified by name in various parts of the documents. Without the consent of these individuals, the applicant submits that this information is also exempt from disclosure under section 19 of the ATIA.

[25] Finally, the applicant submits that it is not possible to sever parts of the documents as the information included therein is inextricable. Therefore, any efforts to sever some of the information would result in a report containing inadequate information to justify releasing it to the requestor.

Respondent's (Board) Written Submissions

[26] The Board submits that as the documents were authored by it and consist of independent observations made by its audit team, they are not exempt from disclosure pursuant to either subsection 119(2) of the Accord Act, or section 19 or paragraph 20(1)(b) of the ATIA.

[27] The Board agrees with the applicant that the standard of review under section 44 of the ATIA requires a decision *de novo* by the Court, which attracts a standard of review of correctness.

[28] The Board submits that the party resisting disclosure, the applicant in this case, must prove on a balance of probabilities, that the documents are exempt from disclosure. The Board submits that the applicant has not established that the documents are information or documents provided to it for the purposes of Part II or Part III of the Accord Act (as required for the privilege under subsection 119(2) to operate in accordance with section 24 of the ATIA). Rather, the Board submits that although information provided by the applicant is included in the documents, the actual generation of the documents (including observations and findings presented therein and compilation and writing thereof) was done solely by the audit team.

[29] The Board refers to jurisprudence that has developed on access to information requests for audit reports generated by government agencies or privately held companies. The Board submits

that references in these cases to independent observations made by auditors is similar to the scenario in the case at bar. This renders the documents exempt from the statutory privilege.

[30] The Board also highlights the applicant's failure to specifically identify portions of the documents that contain the information allegedly attracting privilege. Rather, the Board submits that the applicant has merely made broad assertions to prevent the disclosure of the documents. The Board refers to the affidavit of Sharon Hiscock and the footnote reference therein to eighteen of the ninety-six observations in the audit report. The Board submits that these eighteen observations are primarily independent observations of the audit team. Any reference to the applicant's manuals, checklists or procedures does not disclose the contents of these documents. In sum, the Board submits that the applicant has failed to establish, on a balance of probabilities, that the documents must be withheld from disclosure in their entirety.

[31] In response to the applicant's submission on subsection 119(5) of the Accord Act and the lack of specific exclusion of audit reports thereunder, the Board submits that subsection 119(2) only establishes statutory privilege over documents provided to it by an operator. As the documents are authored by the Board and therefore not provided to it by an operator, these do not fall under the scope of subsection 119(2) or of any exception to it (i.e., subsection 119(5)). For the same reason, namely that the documents were authored by the Board and not provided to it by the applicant, the Board submits that the documents are not exempt under paragraph 20(1)(b) of the ATIA. The Board also submits that by merely making broad assertions, the applicant has failed to demonstrate that there is information contained in the documents that is of a commercial or technical nature.

[32] In response to the applicant's submission that the documents should not be disclosed due to the existence of personal information therein, the Board submits that this information was removed from the redacted documents which it attached to its decision.

[33] Finally, the Board submits that the documents do not contain any of the applicant's information that cannot be severed from it.

Respondent's (ICC) Written Submissions

[34] The Information Commissioner of Canada (ICC) submits that it is Parliament's intention that the ATIA, which holds a quasi-constitutional status, be applied liberally and broadly. Therefore, rather than being the exception, the disclosure of documents under the control of government institutions is to be the norm. Exceptions to non-disclosure must be interpreted strictly. Any portion of the record that does not contain exempted information and that can be reasonably severed must be disclosed in accordance with section 25 of the ATIA.

[35] The ICC acknowledges the effect of this Court's decision on the requestor. It submits that a finding by this Court on the Board's decision to redact portions of the documents would have the effect of removing the requestor's right to complain under the ATIA to the ICC about the Board's decision to refuse access. This would usurp the requestor's right to an independent investigation by the ICC of the exemptions claimed.

[36] The ICC submits that the applicant has failed to establish the heavy evidentiary burden that the redacted documents fall within the exemptions of the ATIA. The ICC submits that the applicant

must satisfy the Court with clear and direct evidence that an exemption to the right of access requires that the information not be disclosed. The withholding of information must only occur in the most limited and specific of circumstances. Therefore, any information that does not qualify for exemption must be disclosed.

[37] The ICC submits that through its bald assertions, unsupported by cogent clear and direct evidence, the applicant has failed to establish on a balance of probabilities that paragraph 20(1)(b) of the ATIA applies. The ICC highlights jurisprudence that has rejected arguments that independent comments or observations based on a review of third party records meant that those comments or observations were supplied by the third party. The ICC refers to information in the documents that it submits clearly did not emanate from the applicant, namely:

1. Common set of audit topics;
2. Generic and non-facility specific checklists;
3. Canadian Association of Petroleum Producer's "Safe Lifting Practices"; and
4. Authorizations issued by the Board to the applicant.

[38] The ICC also submits that the applicant has failed to adequately establish that the documents contain commercial or technical information, or that they are objectively confidential. The ICC submits that the confidential documents that the applicant supplied to the Board for the audit are only referred to by title in a list in the redacted documents. This is not sufficient to cloak the redacted documents with confidentiality.

[39] The ICC criticizes the applicant's submission that maintaining confidentiality is in the public interest. The ICC submits that this disregards the applicant's legal requirement to supply the Board with requested safety and environmental information. It also disregards the public interest in knowing whether the applicant is upholding its statutory commitments and whether the government is pursuing its regulatory mandate on safety and environmental protection related to petroleum operations.

[40] The ICC agrees with the Board's submissions that the information in the documents cannot be characterized as being supplied by the applicant. The ICC further submits that the applicant has failed to tender cogent evidence on the portions of the documents that contain the information that it provided to the Board.

[41] In response to the applicant's submissions on the exemptions to subsection 119(2) of the Accord Act, the ICC submits that as the documents were not supplied by the applicant, there can be no inference drawn from the fact that "safety and environmental audits" are not included in the list of exceptions set out in subsection 119(5). In the alternative, the ICC submits that should the Court find that the documents do fall within the scope of subsection 119(2), they are exempt from this privilege by several provisions of the Accord Act, specifically:

1. 119(2): "…except for the purposes of the administration or enforcement of either Part …";

2. 119(5)(f): "any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III"; or

3. 119(5)(g): "…the status of operational activities or of the development of or production from a pool or field".

[42] Finally, the ICC submits that the sole personal information remaining in the redacted documents pertains to the Board's own personnel. This information is excluded from the definition of "personal information" under the *Privacy Act* and section 19 of the ATIA therefore does not apply.

Analysis and Decision

[43] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing Court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[44] The parties agree that a review under section 44 of the ATIA requires the Court to conduct a *de novo* review of the records. This requires the Court to "engage in a detailed scrutiny of the information to determine whether all or parts of the information should be withheld from disclosure" (see *Coradix Technology Consulting Ltd v Canada (Minister of Public Works and Government Services)*, 2006 FC 1030, [2006] FCJ No 1310 at paragraph 31).

[45] In the case at bar, all the claimed bases of exemption are mandatory in nature. The jurisprudence is well established that the Court should not show deference to a board's decision on whether or not a given document is included in a mandatory statutory disclosure exemption. The Court should therefore review this matter on a standard of correctness (see *Thurlow v Canada (Royal Mountain Police)*, 2003 FC 1414, [2003] FCJ No 1802 at paragraph 28; *Provincial Airlines Limited v Canada (Attorney General)*, 2010 FC 302, [2010] FCJ No 994 at paragraphs 17 and 18). If the Court does not agree with the Board's decision, it must substitute its own view and provide the correct answer (see *Dunsmuir* above, at paragraph 50).

[46] **Issue 2**

Are the documents exempt from disclosure under subsection 24(1) of the ATIA on the basis that they are privileged under subsection 119(2) of the Accord Act?

The ATIA is intended to promote the public right of access to information in records held under the control of Canadian government institutions. Exemptions to this right are to be limited and specific (ATIA, subsection 2(1)). A mandatory exemption is provided under subsection 24(1) of the ATIA, which incorporates by reference select provisions from other statutory instruments, including section 119 of the Accord Act. Therefore, to be exempt from disclosure under the ATIA, the documents must first qualify as privileged under section 119 of the Accord Act.

[47] Subsection 119(2) of the Accord Act grants privilege to information or documentation provided by a person for the purposes of Part II (Petroleum Resources), Part III (Petroleum Operations), or regulations made thereunder. In the case at bar, the applicant submits that this

provision bestows privilege protection on the documents. However, the documents were not produced or provided by the applicant. Rather, they were produced by the Board based on its audit.

[48] Nevertheless, the applicant submits that the documents were produced based on information derived from its sources that it granted the audit team access to; specifically:

1. Interviews with the applicant's personnel;
2. Information contained in the applicant's documents; and
3. Observations of the applicant's onshore and offshore activities.

[49] The applicant submits that as a result of this provision of access, the documents contain details of its policies, procedures, equipment, processes and activities. It also submits that it only granted the audit team access on the understanding that the information was to remain confidential in accordance with subsection 119(2) of the Accord Act.

[50] To evaluate the applicant's submission, it is necessary to consider the nature of the documents and the content contained therein. The documents present the results of an environmental and safety audit conducted of the applicant's Hibernia Platform operation in 2008 and 2010. These audits are carried out in accordance with Part III of the Accord Act, which seeks to promote safety and environmental protection in the exploitation of the Newfoundland and Labrador offshore petroleum resources (section 135.1).

[51] The documents report the audit team's observations and findings. Although a list of the applicant's documents reviewed by the audit team is included, there are no excerpts of the

applicant's documents or of the interviews with its personnel. Nor are there any photographs or site plans of the applicant's operation. The non-conformances identified by the audit team do refer to statutory requirements and commitments made under the applicant's own policies. However, the observations are generally limited to whether or not the applicant is in compliance with these commitments and whether there are procedural deficiencies. Further, trade names have been redacted in the redacted documents.

[52] Extensive jurisprudence has developed on access to information requests for audits reports on private companies generated by government agencies. In *Canada Packers Inc v Canada (Minister of Agriculture)* (FCA), [1989] 1 FC 47, [1988] FCJ No 615, two individuals requested access to audit reports completed by meat inspectors of meat packing plants. Mr. Justice MacGuigan differentiated the employee information from the information contained in the audit reports on the basis that the former had been supplied by the meat packing company whereas the latter had not. Therefore, the latter, the information contained in the audit reports, did not attract the same protection as the confidential employee information (at paragraph 11). As explained by Mr. Justice MacGuigan, "[t]he reports are, rather, judgments made by government inspectors on what they have themselves observed". In the more recent case of *Toronto Sun Wah Trading Inc v Canada (Attorney General)*, 2007 FC 1091, [2007] FCJ No 1418, Deputy Justice Max Teitelbaum followed *Canada Packers* above, and stated that "[i]f information was simply noticed by officials while at the Applicant's premise, this does not constitute information supplied by the Applicant" (at paragraph 24).

[53] This jurisprudence, coupled with the above review of the nature and content of the documents, suggests that they are more accurately described as independent observations by the audit team than actual materials produced by the applicant. The applicant has not provided clear evidence to indicate that the opposite is true. Therefore, I do not find that the documents fall within the scope of subsection 119(2) of the Accord Act.

[54] The applicant also submits that the lack of reference to environmental and safety audits in subsection 119(5) of the Accord Act (exemptions to the application of privilege under subsection 119(2)), supports its position that the documents are privileged. However, as the documents do not fall under subsection 119(2), subsection 119(5) does not apply.

[55] Conversely, if I had found that the documents are privileged under subsection 119(2), I would agree with the ICC that there are classes enumerated under subsection 119(5) under which the documents may be disclosed. As submitted by the ICC, significant parts of the documents pertain to contingency plans for emergencies (paragraph 119(5)(f)) and to the status of the Hibernia Platform's operations (paragraph 119(5)(g)). Therefore, I find that even if subsection 119(2) privilege applies to the documents, they may still be disclosed under paragraphs 119(5)(f) and (g) of the ATIA.

[56] **Issue 3**

Are the documents exempt from disclosure under paragraph 20(1)(b) of the ATIA on the basis that they contain confidential, commercial or technical information, or under section 19 of the ATIA on the basis that they contain personal information?

In *Blank v Canada (Minister of the Environment)*, 2006 FC 1253, [2006] FCJ No 1635, Mr. Justice James Russell described some general interpretative principles to guide the application of the ATIA (paragraphs 30 to 32):

> First of all, the Act must be interpreted in the light of the fundamental principle that government information should be available to the public, and that exceptions to the public's right of access should be "limited and specific". […]
>
> Secondly, public access to government information should not be frustrated by the courts except upon the clearest of grounds. Any doubt should be resolved in favour of disclosure, with the burden of persuasion resting upon the party resisting disclosure. […]
>
> Thirdly, although the Act creates a right of access, that right is not absolute. It must be examined in light of other provisions of the Act and the specific exemptions claimed. […]

[57] These principles should be considered in applying both paragraph 20(1)(b) and section 19 of the ATIA to the circumstances of the case at bar.

[58] Recently, the Supreme Court of Canada in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3, [2012] SCJ No 3, reviewed the standard of proof required by parties objecting to the disclosure of records under paragraph 20(1)(b) of the ATIA and stated at paragraphs 92 to 95:

> 92 Who bears the burden is not controversial. The third party bears the burden of showing why disclosure should not be made when it seeks judicial review (under s. 44 of the Act) of the head's decision to disclose material which has been the subject of a notice under s. 27. This has been clear since the early case law construing the Act: see, e.g., *Maislin Industries*.
>
> (b) The Standard of Proof
>
> 93 The applicable standard of proof is less clear. Merck argues that the Federal Court of Appeal erred in applying a heavier standard of proof than that of the balance of probabilities. For example, at para.

> 62, in the context of her analysis of s. 20(1)(b), Desjardins J.A. spoke of there being a "heavy" burden on the objecting party. Similarly, in relation to s. 20(1)(a), she referred, at para. 54, to a "high threshold".
>
> 94 This notion of a "heavy burden" appears in many places in the jurisprudence relating to the exemptions: see, e.g., *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 (CanLII) (with supplementary reasons at 2005 FC 648 (CanLII)), at para. 52, aff'd 2006 FCA 241, 353 N.R. 84, and *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427 (T.D.) ("*Canada v. Canada*"), at p. 441. However, it is important to differentiate between the standard of proof and how readily that standard may be attained in a given case. It is now settled law that there is only one civil standard of proof at common law and that standard is proof on the balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40. Nothing in the Act suggests that we should depart from this standard. However, as noted in *McDougall*, "context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences" (para. 40). Proof of risk of future harm, for example, is often not easy. Rothstein J. (then of the Federal Court) captured this point in *Canada v. Canada* where he noted that there is a "heavy onus" on a party attempting to prove future harm while underlining that the obligation to do so requires proof on a balance of probabilities (p. 476). Therefore, I conclude that a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.
>
> 95 Turning to the Court of Appeal's reasons in the present case, I am of the opinion that they applied a higher burden than the civil standard of the balance of probabilities in relation to the s. 20(1)(a) and (b) exemptions. As noted, the court called for a "high threshold" in relation to s. 20(1)(a) (para. 54) and applied a "heavy" burden in relation to s. 20(1)(b) (para. 62). While exemptions are the exception and disclosure the general rule, with any doubt being resolved in favour of disclosure, the applicable standard of proof is still the civil standard of the balance of probabilities.

[59] Paragraph 20(1)(b) of the ATIA specifies three conditions that must be met before the head of the government institution will refuse to disclose a requested record. The information must be:

1. Financial, commercial, scientific or technical;
2. Confidential and consistently treated as confidential by the third party; and
3. Supplied to a government institution by the third party.

[60] In the case at bar, the applicant submits that the information in the documents is, on its face, commercial or technical. In *Air Atonabee Ltd v Canada (Minister of Transport)*, 27 FTR 194, [1989] FCJ No 453 at 208, Mr. Justice W. Andrew MacKay explained that the meaning of commercial and technical is to be taken as these are commonly understood with the assistance of dictionaries (approved by the Supreme Court of Canada in *Merck* above, at paragraphs 138 and 139). In applying this approach, the Federal Court of Appeal recently found that information collected during the course of business is not characterized as commercial merely on the basis that a company charges a fee for its services. Similarly, an entire data record may not be characterized as technical simply because it includes some technical instructions (see *Information Commissioner of Canada v Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157, [2006] FCJ No 704 at paragraphs 69 and 70).

[61] In the case at bar, the applicant did not elaborate on its submission that the information was commercial or technical. Its bald assertion that the information does meet this characterization is not sufficient to discharge its burden of proof on the standard of the balance of probabilities.

[62] Extensive jurisprudence has developed on the second condition required under paragraph 20(1)(b) of the ATIA: namely the issue of confidentiality. In *Canada (Health) v Merck Frosst Canada Ltd*, 2009 FCA 166, [2009] FCJ No 627, Madam Justice Desjardins explained that to meet

this condition, the information must be “confidential by its intrinsic nature” which will depend on its content, purpose and the circumstances in which it is compiled and communicated (paragraph 65). This requires that:

1. The content not be available from other publicly available sources or by independent observation or study by a member of the public;

2. The information was communicated in a reasonable expectation of confidence; and

3. The information was communicated in a relationship between the government and the party supplying it and this relationship will be fostered for the public benefit by confidential communication.

[63] Further, the party objecting to the disclosure of the records must provide “actual direct evidence” of its confidential nature. Vague or speculative evidence cannot be relied upon (see *Merck* (FCA) above, at paragraph 65).

[64] In the case at bar, the applicant submits that the documents inherently contain information that meets all of the conditions under paragraph 20(1)(b) of the ATIA. However, I agree with the respondents that the applicant’s submissions do not provide adequately clear and direct evidence identifying specific portions of the documents to support its position and discharge its burden of proof. The redacted documents are clearly audit reports completed by the Board. Although the audit team’s findings presented therein are based in part on information supplied by the applicant, the documents do not, in themselves, replicate that information.

[65] The ICC's submission on the public interest is also pertinent. The public has an important interest in knowing both whether third parties who receive benefits from the government through licenses to operate comply with the associated conditions and whether the government is fulfilling its mandate in promoting safety and environmental protection at these operations. Safety and environmental audits serve as an important tool in public disclosure of these commitments. This is further support for public disclosure of the documents.

[66] The applicant also submits that the documents should be exempted from disclosure on the basis of section 19 of the ATIA. This provision prohibits the government from disclosing records that contain personal information. However, this exemption provision must be read in conjunction with section 25 of the ATIA, which provides that: "… 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." In the case at bar, the Board removed all personal information on the applicant's personnel from the documents. Therefore, the remaining material, namely the redacted documents, should be disclosed in accordance with section 25 of the ATIA.

[67] In summary, I am unable to conclude that the Board's decision was incorrect. As I have found no error with the Board's decision, I find no basis on which to grant the applicant the relief sought. This application is dismissed with costs and the redacted documents released to the requestor.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicant's application is dismissed with costs and the redacted documents shall be released to the requestor.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Access to Information Act, RSC 1985, s A-1

16.1 (1) The following heads of government institutions shall refuse to disclose any record requested under this Act that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority:	16.1 (1) Sont tenus de refuser de communiquer les documents qui contiennent des renseignements créés ou obtenus par eux ou pour leur compte dans le cadre de tout examen, enquête ou vérification fait par eux ou sous leur autorité :
(a) the Auditor General of Canada;	a) le vérificateur général du Canada;
(b) the Commissioner of Official Languages for Canada;	b) le commissaire aux langues officielles du Canada;
(c) the Information Commissioner; and	c) le Commissaire à l'information;
(d) the Privacy Commissioner.	d) le Commissaire à la protection de la vie privée.
(2) However, the head of a government institution referred to in paragraph (1)(c) or (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded.	(2) Toutefois, aucun des commissaires mentionnés aux alinéas (1)c) ou d) ne peut s'autoriser du paragraphe (1) pour refuser de communiquer les documents qui contiennent des renseignements créés par lui ou pour son compte dans le cadre de toute enquête ou vérification faite par lui ou sous son autorité une fois que l'enquête ou la vérification et toute instance afférente sont terminées.
19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans

	les cas où :
(a) the individual to whom it relates consents to the disclosure;	a) l'individu qu'ils concernent y consent;
(b) the information is publicly available; or	b) le public y a accès;
(c) the disclosure is in accordance with section 8 of the *Privacy Act*.	c) la communication est conforme à l'article 8 de la Loi sur la protection des renseignements personnels.
20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
. . .	. . .
(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; . . .	b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers; . . .
(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	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.
24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	24. (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.
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	25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est

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.

cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof, . . .

28. (1) Dans les cas où il a donné avis au tiers conformément au paragraphe 27(1), le responsable d'une institution fédérale est tenu : . . .

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

b) de prendre dans les trente jours suivant la transmission de l'avis, pourvu qu'il ait donné au tiers la possibilité de présenter des observations conformément à l'alinéa a), une décision quant à la communication totale ou partielle du document et de donner avis de sa décision au tiers.

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

29. (1) Dans les cas où, sur la recommandation du Commissaire à l'information visée au paragraphe 37(1), il décide de donner communication totale ou partielle d'un document, le responsable de l'institution fédérale transmet un avis écrit de sa décision aux personnes suivantes :

(a) the person who requested access to the record; and

a) la personne qui en a fait la demande;

(b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

b) le tiers à qui il a donné l'avis prévu au paragraphe 27(1) ou à qui il l'aurait donné s'il avait eu l'intention de donner communication totale ou partielle du document.

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.

44. (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

47. (1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

47. (1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;

Canada-Newfoundland Atlantic Accord Implementation Act, SC 1987, c 3

119.(2) Subject to section 18 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

119.(2) Sous réserve de l'article 18 et des autres dispositions du présent article, les renseignements fournis pour l'application de la présente partie, de la partie III ou de leurs règlements, sont, que leur fourniture soit obligatoire ou non, protégés et ne peuvent, sciemment, être communiqués sans le consentement écrit de la personne qui les a fournis, si ce n'est pour l'application de ces lois ou dans le cadre de procédures judiciaires relatives intentées à cet égard.

(3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

(3) Nul ne peut être tenu de communiquer les renseignements protégés au titre du paragraphe (2) au cours de procédures judiciaires qui ne visent pas l'application de la présente partie ou de la partie III.

. . .

. . .

(5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under

(5) Le paragraphe (2) ne vise pas les catégories de renseignements provenant d'activités autorisées sous le régime de la partie III et relatives à :

Part III, namely, information or documentation in respect of

(a) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;

a) un puits d'exploration, si les renseignements proviennent effectivement du forage du puits et si deux ans se sont écoulés après la date d'abandon du forage;

(b) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) ninety days since the well termination date of the delineation well, have passed;

b) un puits de délimitation, s'ils proviennent du forage du puits et une fois écoulée la dernière des périodes suivantes, à savoir deux ans après la date d'abandon du forage du puits d'exploration en cause ou quatre-vingt-dix jours après la date d'abandon du forage du puits de délimitation;

(c) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) sixty days since the well termination date of the development well, have passed;

c) un puits d'exploitation, s'ils proviennent effectivement du forage du puits et une fois écoulée la dernière des périodes suivantes, à savoir deux ans après la date d'abandon du puits d'exploration en cause ou soixante jours après la date d'abandon du forage du puits d'exploitation;

(d) geological work or geophysical work performed on or in relation to any portion of the offshore area,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or

(ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the work;

d) des travaux de géologie ou de géophysique exécutés dans telle partie de la zone extracôtière ou y ayant trait :

(i) s'agissant d'un levé marin pour un puits foré, après la période visée à l'alinéa a) ou la dernière des périodes visées aux alinéas b) ou c), selon l'alinéa qui s'applique au puits en cause,

(ii) par ailleurs, au plus tôt cinq ans après leur achèvement;

(e) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any portion of the offshore area,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or (c) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;

(f) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;

(g) diving work, weather observation or the status of operational activities or of the development of or production from a pool or field;

(g.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;

(h) any study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act*, if the study has been completed; and

(i) an environmental study, other than a study referred to in paragraph (h),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (a) or the later period referred to in subparagraph (b)(i) or (ii) or (c)(i) or (ii), according to whether paragraph (a), (b) or

e) des recherches ou études techniques ou des opérations expérimentales, y compris des travaux de géotechnique, exécutés dans telle partie de la zone extracôtière ou y ayant trait :

(i) si elles portent sur un puits foré après l'expiration de la période visée à l'alinéa a) ou la dernière des périodes visées aux alinéas b) ou c), selon l'alinéa qui s'applique au puits en cause,

(ii) par ailleurs, au plus tôt cinq ans après leur achèvement ou après que ces terres sont devenues réserves de l'État;

f) un plan visant les situations d'urgence résultant d'activités autorisées sous le régime de la partie III;

g) des travaux de plongée, des observations météorologiques, l'état d'avancement des travaux, l'exploitation ou la production d'un gisement ou d'un champ;

g.1) des accidents, des incidents ou des écoulements de pétrole dans la mesure où ces renseignements sont nécessaires pour l'établissement et la publication d'un rapport à cet égard dans le cadre de la présente loi;

h) des études achevées financées sur le compte ouvert au titre du paragraphe 76(1) de la *Loi fédérale sur les hydrocarbures*;

i) d'autres types d'études de l'environnement :

(i) s'agissant d'un puits foré, après l'expiration de la période visée à l'alinéa a) ou de la dernière des périodes visées aux alinéas b) ou c), selon l'alinéa qui s'applique au puits en cause,

(c) is applicable in respect of that well, or

(ii) in any other case, if five years have passed since the completion of the study.

(ii) par ailleurs, lorsque cinq ans se sont écoulés depuis leur achèvement.

Interpretation Act, RSC 1985, c I-21

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1384-10
STYLE OF CAUSE:	HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LTD. - and – CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD and THE INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
DATE OF HEARING:	October 12, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	April 12, 2012

APPEARANCES:

Gregory A. C. Moores	FOR THE APPLICANT
Amy M. Crosbie	FOR THE RESPONDENT, CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
Yannick Landry	FOR THE RESPONDENT, THE INFORMATION COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

Stewart McKelvey St. John's, Newfoundland and Labrador	FOR THE APPLICANT
Curtis, Dawe St. John's, Newfoundland and Labrador	FOR THE RESPONDENT, CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
Office of the Information Commissioner of Canada Ottawa, Ontario	FOR THE RESPONDENT, THE INFORMATION COMMISSIONER OF CANADA