NOVA SCOTIA COURT OF APPEAL

Citation: Unama'ki Board of Police Commissioners v. Canadian Broadcasting Corporation, 2003 NSCA 124

Date: 20031120
Docket: CA 195728
Registry: Halifax

Between:

Unama'ki Board of Police Commissioners, Chapel Island Band Council, Eskasoni Band Council, Membertou Band Council and Waycobah Band Council

Appellants

v.

John Chesal, of the Canadian Broadcasting Corporation CBC Radio and the Attorney General of Nova Scotia

Respondents

Judges: Bateman, Cromwell and Oland, JJ.A.

Appeal Heard: October 7, 2003, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Oland, JJ.A. concurring.

Counsel: Bruce Wildsmith, Q.C., for the appellants Unama'ki Board of Police Commissioners, Chapel Island Band Council, Membertou Band Council and Waycobah Band Council
Appellant, Eskasoni Band Council not appearing
David C. Coles and David Doyle, for the respondent John Chesal
Edward A. Gores, for the respondent, Attorney General of Nova Scotia

Reasons for judgment:

[1] This is an appeal from a judgment of Justice C. Richard Coughlan of the Supreme Court made pursuant to the **Freedom of Information and Protection of Privacy Act**, S.N.S. 1993, c. 5, s. 1, as amended, (the "**FOIPOP Act**"), ordering release of a document in possession of the government. Justice Coughlan's decision is reported as **Chesal v. Nova Scotia (Attorney General)** at (2003), 211 N.S.R. (2d) 321; N.S.J. No. 30 (Q.L.); 2003 NSSC 10.

[2] This dispute centers around the release of an Audit Report. A brief history of the matter is necessary to understand the issues.

[3] Canada, Nova Scotia, and the Chapel Island, Eskasoni, Membertou, Wagmatcook and Whycocomagh Bands of the Unama'ki District of the Mi'kmaq Nation (the "Unama'ki Communities") entered into an agreement dated July 12th, 1994 to establish police services for the Unama'ki Communities. This document is called the "Tripartite Agreement".

[4] Pursuant to the Tripartite Agreement, a police force known as the Unama'ki Tribal Police (the "UTP") was established with an "independent police governing authority" known as the Unama'ki Board of Police Commissioners (the "Board"). Membership on the Board consisted of two representatives from each Unama'ki Community and one non-voting representative from each of the Federal and Provincial Government.

[5] Under the Tripartite Agreement, the Nova Scotia Government had a responsibility to contribute, prior to March 31, 1999, up to $2,507,955 toward the cost of the First Nations policing services for the Unama'ki Communities. The Second Amendment to the Tripartite Agreement required the Nova Scotia Government to contribute a sum not exceeding $1,311,360 between April 1, 1999 and March 31, 2001. The Third Amendment required the Nova Scotia Government to contribute a further sum not exceeding $163,920 for First Nation policing services between April 1, 2001 and June 30, 2001. The Fourth Amendment required a provincial contribution not exceeding $403,848 for policing during the period between July 1, 2001 and March 31, 2002.

[6] Article 5.2 of the Tripartite Agreement required that the Nova Scotia Minister of Justice, upon the recommendation of the Board, appoint aboriginal

police offers pursuant to s. 42D of the **Police Act**, R.S.N.S. 1989, c. 348, as amended. Article 5.4 of the Agreement set out the following responsibilities of the Government of Nova Scotia:

> **5.4 Level of Policing**
>
> Pursuant to Nova Scotia's duty under subsection 3A(2) of the *Police Act* to ensure that an adequate and effective level of policing is maintained throughout the province, Nova Scotia shall:
>
> a) provide standard operating procedures for use by the Unama'ki Tribal Police, which standard operating procedures shall be adopted by the Board save and except in those cases where, in the opinion of the Board, an operating procedure would impair the ability of the Unama'ki Tribal Police to provide culturally sensitive policing, in which case there shall be consultation between Nova Scotia and the Board to develop a mutually acceptable operating procedure;
>
> b) provide to the Board and the Chief of Police information and advice respecting the management and operation of the Unama'ki Tribal Police, techniques in handling special problems and other information considered to be of assistance.
>
> c) determine, through a system of assessments, evaluations and inspections, the adequacy, efficiency, effectiveness and cultural sensitivity of the police services provided on the Reserve lands; and
>
> d) take measures to ensure that the Reserve lands are adequately and effectively policed, which measures shall include the revocation of the exemption made under section 3A(5)(a) of the Police Act and the making of arrangements for policing of the Reserve lands by other police forces in the province, if, in the opinion of Nova Scotia, following consultation with the Board, the Unama'ki Tribal Police fails to provide adequate and effective policing services on the Reserve lands.
>
> (Emphasis added)

[7] Pursuant to the Agreement, the Unama'ki Tribal Police Force was responsible for the enforcement of applicable federal and provincial laws and

enforcement of the by-laws of the Unama'ki Communities in force within the Reserve Lands.

[8] The Audit Report, which is titled "Unama'ki Tribal Police Focussed Audit 1999", and is a review of the state of that police service, was conducted as was the responsibility of the Nova Scotia government under the Tripartite Agreement (Article 5.4 at ¶ 6, above). The written Audit Report bears the date of February 2000.

[9] The respondent, John Chesal, is employed by the Canadian Broadcasting Corporation as a radio reporter in Sydney, Nova Scotia. On March 26th, 2001, he requested access to the Audit Report (**FOIPOP Act**, s. 6).

[10] By letter dated April 26th, 2001, the Freedom of Information and Protection of Privacy Coordinator [the "FIOPOP Coordinator"] sent letters to the Chiefs of the four Bands involved in the UTP and to the Department of the Solicitor General of Canada requesting their views on the disclosure of the Audit Report.

[11] Chief Terrance J. Paul of the Membertou Band Council, the only member of the four Bands to respond to the FOIPOP Coordinator's inquiry, replied by letter dated May 14th, 2001 stating: "We object to releasing this information".

[12] The FOIPOP Coordinator, by letter dated June 14, 2001, advised Mr. Chesal that he would not disclose the Audit Report. The Coordinator said, in part:

> Your request for access is refused at this time primarily because an aboriginal government has objected to disclosure, and it is thus our view that disclosure of the report would harm the conduct of relations between ourselves and an aboriginal government, as well as reveal information supplied in confidence. It is also our view that disclosure of a small part of the report would amount to an unreasonable invasion of third parties personal privacy. We are thus claiming exemption for the entire report under clause 12(1)(a)(iii) and (b) and subsection 20(1) for a small part of the report.

[13] By request dated June 21st, 2001, Mr. Chesal sought a review of the FOIPOP Coordinator's decision by the FIOPOP Review Officer (s. 32(1), **FOIPOP Act**). On inquiry by the Review Officer about the circumstances of the refusal, the FOIPOP Coordinator replied by letter dated June 28, 2001 stating in relevant part:

> The Solicitor General of Canada has not raised any intergovernmental objections, but has suggested that we consider the views of Aboriginal Governments. Our own Aboriginal Affairs Agency also has not claimed that the release of the report would harm its ongoing treaty negotiations. However, Chief Terrance Paul, one of the bands under the Unama'ki Tribal Police Force has objected to disclosure.
>
> Mr. Jim Beaver, director of Police and Public Safely at N.S. Justice has informed me that the release of the report would harm ongoing negotiations for a new policing agreement for the affected bands. This view is also supported by the objections of Chief Paul. At this point in time our principal claim for exemption is thus under clause 12(1)(a)(iii) i.e. disclosure would harm our relations with aboriginal governments. We also claim an exemption under clause 12(1)(b), i.e. information provided in confidence by another government. The report notes that it is subject to the *FOIPOP Act*. However, it is noted as being confidential, and there would be (subject to the Act) some degree of confidentiality associated with the provision of information to the authors of the report.
>
> We would, however, wish to disclose the report following the conclusion of those negotiations in the interests of accountability and because of a broader public interest. However, subsection 12(2) requires that we seek the approval of Cabinet if disclosure would be harmful to the conduct of relations between N.S. and Aboriginal Governments. Because of the objection of Chief Paul, we would have to seek approval from the Executive Council to disclose the report if he does not consent to disclosure at that point.
>
> We also claim an exemption under subsection 20(1) i.e. an unreasonable invasion of personal privacy. This claim relates solely to the specific file examples on pages 10, 29, and 30 and to the reference to the police chiefs specific deficiencies. (e.g. pages 12, 30 and 31.) . . .
> (Emphasis added)

[14] By written decision dated August 23rd, 2001, the Review Officer recommended that the Department of Justice reverse its decision to refuse disclosure. He noted that he had written the only Band Chief who had responded to the Coordinator and invited him to make representations to the Review Officer. Chief Paul did not respond to the Review Officer's invitation.

[15] In recommending that the Report should be disclosed, the Review Officer said, in part:

> **Conclusions:**

> **Section 45(1)** places the burden on the Department to prove that disclosing the audit could, to use the words of s. 12(1)(iii), "reasonably be expected to harm the conduct by the Government of Nova Scotia of relations between the Government and an aboriginal government." Given that only one of the consulted parties raised an objection and no reasons for that objection were provided, I am not satisfied the Department is able to prove that disclosure of the audit could reasonably be expected to harm the government's relations with the aboriginal government.
>
> With respect to the personal information in the audit, which the Department feels is exempt from disclosure, it is my view that the information falls under subsection 20(4) which lists the kind of personal information which, if disclosed, would not be an unreasonable invasion of privacy. Among that list, (e), is information about a third party's position or functions as a member of a public body. In my view the personal information relates to a third party's position or function and therefore cannot be withheld under s. 20(1).

[16] The FOIPOP Coordinator, by letter dated June 25, 2001, advised Mr. Chesal that he would not follow the recommendation of the Review Officer to disclose the report.

[17] On October 22nd, 2001 Mr. Chesal appealed the refusal to release the Audit Report to the Supreme Court of Nova Scotia (s. 41(1), **FOIPOP Act**). Justice C. Richard Coughlan heard the appeal by way of *de novo* hearing on July 2nd, 2002 and August 29th, 2002.

[18] Justice Coughlan ordered the disclosure of the Audit Report, concluding that the Report was subject to the **FOIPOP Act**; that it was not exempted from disclosure by virtue of ss. 12(1)(a)(iii), 12(1)(b) or 12(2) of the **Act**; and that disclosure of the full report was not an unreasonable invasion of a third party's personal privacy in that the personal information contained therein fell under s. 20(4)(e) of the **Act**. The Unama'ki Board and the Band Councils have appealed that decision.

[19] By consent of the parties, Justice Coughlan's order directing disclosure of the Audit has been stayed pending this Court's determination of the appeal.

Issues:

[20] The appellants allege several errors of law which can be grouped into three areas:

> Did the Chambers judge apply the wrong test in determining whether there was a reasonable expectation of harm arising from the release of the information contained in the Audit Report?
>
> Did the Chambers judge err in his conclusion that the information contained in the Audit Report was not received in confidence?
>
> Did the Chambers judge err in concluding that the personal information contained in the Audit Report fell within s. 20(4)(e) of the **Act**.

Standard of Review:

[21] Appeals from a judgment of the Supreme Court under the **FOIPOP Act** are authorized by s. 38(1) of the **Judicature Act**, R.S.N.S. 1989, c. 240, s. 1. and subject to the usual civil standard of review - findings of fact are reversible only where there is obvious, palpable and overriding error. On matters of law the judge must be correct. (**O'Connor v**. **Nova Scotia (Minister of the Priorities and Planning Secretariat)** (2001), 197 N.S.R. (2d) 154; N.S.J. No. 360 (Q.L.) (C.A.)).

ANALYSIS:

[22] The parties do not dispute that the Audit Report is a "record" falling within the terms of the **FOIPOP Act**. A "record" is defined under Section 3(k) of the **Act**:

> (k) "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

[23] Section 4(1) of the **FOIPOP Act** provides that it applies "to all records in the custody or under the control of a public body . . .". The Department of Justice is a "public body" as defined in section 3(1)(j) of the **Act**:

> **3(1)** In this Act,
>
> (j) "public body" means
>
> (i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which
>
> (A) are appointed by order of the Governor in Council, or
>
> (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,
>
> and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,
>
> (ii) the Public Archives of Nova Scotia,
>
> (iii) a body designated as a public body pursuant to clause (f) of subsection (1) of Section 49, or
>
> (iv) a local public body,

[24] The **Act** directs disclosure of government records, subject to limited exemptions:

> **5 (1)** A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.
>
> **(2)** The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[25] In **O'Connor**, supra, Saunders, J.A., conducted a comparative review of the freedom of information and privacy acts in other Canadian provinces and concluded that the Nova Scotia statute is unique in that one of its declared purposes is to ensure that public bodies are "fully accountable to the public" (¶ 54). He said:

> [40] Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

[26] And:

> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.
>
> (Emphasis added)

[27] In keeping with the promotion of openness and accountability of government, exemptions to disclosure, are to be construed narrowly (¶ 81 **O'Connor**).

[28] These principles must guide the resolution of requests for disclosure under the **FOIPOP Act**.

[29] The appellants say that the Chambers judge applied the wrong test in concluding that the Audit Report is not exempt from disclosure under s. 12(1)(a)(iii) and/or s. 12(1)(b) of the **Act**. Section 12 provides:

> **12 (1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:
>
> (i) the Government of Canada or a province of Canada,
>
> (ii) a municipal unit or school board,
>
> (iii) an aboriginal government,
>
> (iv) the government of a foreign state, or
>
> (v) an international organization of states;
>
> (b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.
>
> (Emphasis added)

[30] In considering whether disclosure of the information could reasonably be expected to "harm the conduct by the Government of Nova Scotia of relations between the Government and the aboriginal government" Justice Coughlan said:

> [22] The *FOIPOP Act* is to be broadly interpreted in favour of disclosure (*McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288 (C.A.)). Bearing that direction in mind, I find the phrase in the *Act* "could reasonably be expected to harm" is to be read as "could reasonably be expected to result in probable harm".
>
> (Emphasis added)

[31] The appellants say that by requiring "an expectation of probable harm", Coughlan, J. applied a standard more onerous than that called for in the **Act**. The appellants submit that the Chambers judge wrongly required those opposing

disclosure to demonstrate that it was reasonably expected that damage was more likely than not to occur.

[32] The Chambers judge's restatement of the test mirrored the language adopted by MacGuigan, J.A., in **Canada Packers Inc. v. Canada (Minister of Agriculture) et al.** (1988), 87 N.R. 81; F.C.J. No. 615 (Q.L.) (F.C.A.).

[33] At issue in **Canada Packers** was the interpretation of s. 20 of the **Access to Information Act**, S.C. 1980-81-82-83, c. 111 (Schedule I). That section provides:

> 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.
>
> . . .

[34] The information in issue in **Canada Packers** was meat inspection team audit reports. The Federal Appeal Court rejected the trial judge's requirement that the "evidence of harm under paragraphs 20(1)(c) and (d) must be detailed, convincing and describe a direct causation between disclosure and harm." (at ¶ 16) The appeal court took particular exception to the trial judge's requirement that the opponents of disclosure demonstrate direct causation between the disclosure and the harm. Having rejected the test adopted by the trial judge, the court considered, by analogy to tort law, a "foreseeablity" test but rejected that standard because it would prohibit disclosure if there was "the mere possibility of foreseeable damage". This, the Court held, would be inconsistent with the purpose of the **Act**,

which favoured disclosure. It was in this context that MacGuigan, J.A. framed "the expectation of probable harm" test. He said p. 89:

> **[21]** What governs, I believe, in each of the three alternatives in paragraphs (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, viz. "could reasonably be expected to". This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.
>
> **[22]** However, I believe the temptation to carry through the tort analogy should be resisted, particularly if **Wagon Mound (No. 2)**, supra, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this Court has followed in **Lor-Wes Contracting Ltd. v. Minister of National Revenue**, [1986] 1 F.C. 346; 60 N.R. 321, and **Cashin v. Canadian Broadcasting Corporation**, no. A-53-87, decided May 13, 1988, [86 N.R. 24], requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in the light of the purpose of the **Act** as set out in s. 2. ... Section 2(1) provides a clear statement that the **Act** should be interpreted in the light of the 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". With such a mandate, I believe one must interpret the exceptions to access in paragraphs (c) and (d) to require a reasonable expectation of probable harm. [See Note 6 below]
>
> (Emphasis added)

[35] Note 6, referred to in the passage above, says:

> 6. This is not unlike the test adopted by Lacourcière, J., in a different context in **McDonald v. McDonald**, [1970] 3 O.R. 297, at p. 303, that "reasonable expectation...implies a confident belief".

[36] Under consideration in **McDonald v. McDonald**, [1970] 3 O.R. 297, was whether there was a reasonable expectation that a spouse who was addicted to alcohol would be rehabilitated within a foreseeable period of time. Lacourcière J. said at p. 303:

> Reasonable expectation in my interpretation implies a confident belief, for good and sufficient reasons, that rehabilitation will occur.

[37] It is my view that the statutory test "reasonable expectation of harm" did not require restating. The rewording of the test to include the notion of probable harm was an error. However, I think the judge reached the right conclusion (although by applying an incorrect test) in deciding that the evidence did not make out the ground of exemption under s. 12(1)(a)(iii). The analysis in **Canada Packers** must be read in context. MacGuigan, J.A. obviously found the reference to "probability" helpful in distinguishing a "reasonable expectation" in s. 20(1)(c) and (d) of the **Access to Information Act** from a mere "possibility". For the reasons which follow, it is my view that Coughlan, J. did not err in rejecting a bare possibility of harm as sufficient to ground a refusal to disclose or in the result he reached that the exemption under s 12(1)(a)(iii) had not been established on this record.

[38] In reading the **FOIPOP Act** as a whole, and considering its interpretation by this Court, particularly in **O'Connor**, supra, I have concluded that the legislators, in requiring "a reasonable expectation of harm", must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. Our **Act** favours disclosure and contemplates limited and specific exemptions and exceptions:

> **2** The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
>
> (iii) specifying limited exceptions to the rights of access,

> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.
>
> (Emphasis added)

[39] Before access to a record is refused pursuant to s. 12(1)(a)(iii), it must be "reasonably expected" that the public release of the information will harm relations between governments. The legislation does not say, "might possibly harm" or "could reasonably harm". The *Merriam-Webster Online* dictionary defines "reasonable" as (a) being in accordance with reason; (b) not extreme or excessive. To "expect" means (a) to consider probable or certain; (b) to consider reasonable, due, or necessary; (c) to consider bound in duty or obligated. The *Cambridge Advanced Learners Dictionary*, online, defines "reasonable" as (1) based on or using good judgment and therefore fair and practical, or (2) acceptable. To "expect" means to think or believe something will happen, or someone will arrive. Finally, the *American Heritage Dictionary of the English Language*, online, defines "reasonable" as (1) capable of reasoning; rational. (2) governed by or being in accordance with reason or sound thinking*;* (3) being within the bounds of

common sense. (4) not excessive or extreme; fair. To "expect" means 1(a) to look forward to the probable occurrence or appearance of*;* (b) to consider likely or certain; and also (2) to consider reasonable or due*;* (3) to consider obligatory; require*;* (4) to presume; suppose. All of these definitions lend support to the proposition that the language of the statute requires that there be more than a mere possibility of harm.

[40] The evidentiary burden here rested upon those opposing disclosure: the appellants and the AGNS. The evidence of harm offered at the hearing before Coughlan, J. was contained in the affidavits of Terrance Paul and Bernard Christmas.

[41] In an affidavit dated June 6th, 2002, Terrance Paul, Chief of the Membertou Band and, at the time of the audit, chair of the Unama'ki Board of Police Commissioners, deposed that the Mi'kmaq regard their dealings with non-Aboriginal governments as private and confidential and consider any release of information about them as a breach of diplomatic protocol. The thrust of his seven paragraph affidavit is captured in the following excerpt:

> 5. One of the persons who conducted and was responsible for the audit, and who signed the Unama'ki Tribal Police Focussed Audit 1999 Report, is Dennis P. Kelly, then Director, Operations, Police and Public Safety Services Division, Department of Justice. He has informed me and I do verily believe that it was his understanding and belief that the audit was, and the Unama'ki Tribal Police Focussed Audit 1999 Report, is confidential.
>
> 6. The Mi'kmaq Aboriginal governments, including the Membertou Band of which I am Chief, and the Eskasoni, Chapel Island and Waycobah Bands, and the Union of Nova Scotia Indians and Confederacy of Mainland Mi'kmaq as tribal councils for the thirteen (13) Mi'kmaq bands in Nova Scotia, regularly communicate, conduct negotiations and discussions, exchange correspondence and hold meetings with non-Aboriginal governments, including the Government of Nova Scotia and its various departments and officials. The Mi'kmaq regard their dealings with non-Aboriginal governments as private and confidential between them and the non-Aboriginal governments, and regard the release of information about them, such as the Unama'ki Tribal Police Focussed Audit 1999 Report, by non-Aboriginal governments without their consent as a breach of diplomatic protocol between them. The release by a non-Aboriginal government

> of such information would be harmful to the non-Aboriginal government's relationship with the Mi'kmaq Aboriginal government in question. In particular, the release to third parties and the media of information provided to a non-Aboriginal government, even if not explicitly said to be confidential, without explicit Mi'kmaq consent, would severely undermine the candour and frankness required for harmonious and productive relationships, and would make the Mi'kmaq unduly cautious and suspicious of non-Aboriginal governments and unduly circumspect in their dealings with non-Aboriginal governments.

[42] In an affidavit dated June 13, 2002, Daniel Christmas, an elected Councillor of the Membertou Band and, at the time of the audit, Executive Chair of the Union of Nova Scotia Indians, endorsed Chief Paul's objections to disclosure. At paragraph nine of the ten paragraph affidavit Mr. Christmas says:

> 9. I have had direct experience for more than the last 20 years in the conduct of relations between Mi'kmaq governments and the Province of Nova Scotia. That relationship may be characterized, on the Mi'kmaq side at least, as very delicate and sensitive, with a great deal of suspicion and distrust on the part of the Mi'kmaq towards the Province and provincial Ministers, departments and officials. The release by the Province of information obtained by it from the Mi'kmaq, without Mi'kmaq consent, would undermine and seriously harm the Province's already fragile relationship with Mi'kmaq governments.

[43] In an affidavit dated May 30, 2002 Raymond Cusson, one of the authors of the Audit Report, deposed that he recalls being at a meeting with the members of the Membertou Band Council on September 7, 2001, which members advised that they would not agree to disclosure of the 1999 Audit Report.

[44] That was the evidence before Justice Coughlan. The evidentiary standard on such applications has been addressed by privacy commissioners in British Columbia and Ontario. In **Order 02-50: British Columbia (Ministry of Attorney General)**, [2002] B.C.I.P.C.D. No. 51 ("**B.C. Order 02-50**") the British Columbia Information and Privacy Commissioner considered a similarly worded provision of that province's **Act** (**Freedom of Information and Protection of Privacy Act**, R.S.B.C. 1996 c. 165). There, the applicant First Nation requested access to appraisal reports and supporting documentation for parcels of land included in an offer made by British Columbia and Canada to the First Nation

during treaty negotiations. The Ministry claimed that disclosure of the withheld information "could reasonably be expected to harm" the conduct by British Columbia of relations with the government of Canada (s.16(1)(a)(i)) and the conduct of negotiations relating to aboriginal self-government or treaties (s.16(1)(c)).

[45] The relevant portion of s. 16 of the British Columbia **Act**, which is similar to our s. 12, provides :

> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies;
>
> . . .
>
> (iii) an aboriginal government;
>
> ...
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or
>
> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.
>
> . . .

[46] In discussing the standard of proof required to demonstrate that the release of information could reasonably be expected to harm the conduct of relations

between the British Columbia government and another government the Commissioner wrote:

> ¶ 111 At para. 3 of its initial submission, the Ministry accepts that, while it need not establish a certainty of harm, it is not sufficient to provide evidence of speculative harm. It cites the following passage from p. 10 of Order 00-10, [2000] B.C.I.P.C.D. No. 11, on the question of proof under the reasonable expectation of harm test:
>
> > The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.
>
> ¶ 112 As I also noted at p. 10 of Order 00-10, the evidence must establish a rational connection between disclosure of the disputed information and the harm that will allegedly result. The Supreme Court of Canada has said, in the context of s. 22(1)(b) of the federal *Privacy Act*, that the reasonable expectation of harm test requires "a clear and direct connection between the disclosure of specific information and the injury that is alleged": *Lavigne v. Canada (Office of the Commissioner of Official Languages*, [2002] S.C.J. No. 55, 2002 SCC 53, at para. 58 (Q.L.). As is discussed further below, in relation to s. 17(1), I adopt the same formulation for the evidence required to meet a reasonable expectation of harm test under the *Act*.

[47] In **Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)**, (1998) 164 D.L.R. (4th) 129 (Ont. C.A.), the Privacy Commissioner appealed from a decision of the Divisional Court quashing the Commissioner's decision ordering release of certain information. At issue before the Commissioner was a request for information from the Workers' Compensation Board with respect to employers having the highest penalty ratings based on their accident experiences. The Board denied the request. The denial was appealed to the Assistant Information and Privacy Commissioner. The Board argued that the information should be protected by the statutory exemptions in s. 17(1) and (2) of the **Freedom of Information and Protection of Privacy Act**, R.S.O. 1990, c. F.31. Section 17(1) protected from disclosure certain records

where disclosure “could reasonably be expected to” prejudice the holder's competitive position or cause undue loss or gain.

[48] The relevant portions of s. 17(1) read:

> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > . . . . .
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency . . .

[49] In granting the application for disclosure, the Commissioner held that the Board had not provided “detailed and convincing evidence” that there could be a reasonable expectation that one of the types of injuries specified in subsections 17(1)(a) and/or (c) will occur.” (¶ 22). The Divisional Court found that the Commissioner’s decision was patently unreasonable because the requirement that there be “detailed and convincing evidence” was too stringent a test. In allowing the appeal from the Divisional Court, Labrosse, J.A., writing for the Court of Appeal, said, in relation to the standard of proof demanded by the Commissioner:

> ¶ 26 . . . Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to

> weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.

[50] Finally, on the issue of the quality of the evidence required to support a refusal to disclose information, I refer to the decision of the Supreme Court of Canada in **Lavigne v. Canada (Office of the Commissioner of Official Languages)**, [2002] 2 S.C.R. 773; S.C.J. No. 55 (Q.L.). There, Robert Lavigne, a federal public servant, filed complaints with the Commissioner of Official Languages ("COL") alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. In conducting their investigation the investigators working for the Office of the Commissioner of Official Languages ("OCOL") encountered problems because certain employees were reluctant to give information, fearing reprisals. The investigators gave assurances that the interviews would remain confidential within the limits prescribed by the **Official Languages Act**, R.S.C. 1985, c. 31 (4th Supp.). The investigation report concluded that the complaints were well founded and submitted recommendations to the Department concerned, which agreed to implement them. Then Mr. Lavigne made a request to the COL, under s. 12 of the **Privacy Act**, R.S.C. 1985, C. P-21 ("**PA**"), for disclosure of the personal information contained in the files on the complaints he had made. A copy of this information was sent to him, excepting the portions which were withheld under the exemption set out in s. 22(1)(b) of the **PA**. That provision authorizes the refusal of access to information requested "the disclosure of which could reasonably be expected to be injurious to ... the conduct of lawful investigations". He brought an application for judicial review of the COL's decision refusing to disclose the information requested. The dispute related to the personal information concerning Mr. Lavigne as well as non-personal information contained in the interview notes of the OCOL investigators. In the case of the personal information, the respondent's request related only to the notes of the interview with his supervisor. The Federal Court, Trial Division ordered disclosure of the personal information requested by Mr. Lavigne. He was denied disclosure of the non-personal information. After a series of unsuccessful appeals the matter reached the Supreme Court of Canada. The principal issue on appeal was whether, pursuant to s. 22(1)(b) of the **PA**, disclosure of the personal information requested by Mr. Lavigne could reasonably be expected to be injurious to the conduct of lawful investigations by the COL.

[51] Section 22(1)(b) of the **Privacy Act** provides:

> 22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> ...
>
> (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

[52] In finding the evidence wanting, Gonthier J., writing for the Court, said:

> 60 As I have said, s. 22(1)(b) is not an absolute exemption clause. The decision of the Commissioner of Official Languages to refuse disclosure under s. 22(1)(b) must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a *reasonable expectation of injury* in order to refuse to disclose information under that provision. In addition, s. 47 of the *Privacy Act* provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on *reasonable grounds*, the Federal Court may then vary that decision and authorize access to the personal information (s. 49). The appellant relied primarily on Mr. Langelier's affidavit to establish the reasonable expectation of injury.
>
> 61 I do not believe that Mr. Langelier's statements provide a reasonable basis for concluding that disclosure of the notes of the interview with Ms. Dubé could reasonably be expected to be injurious to future investigations. Mr. Langelier contends that disclosure would have an injurious effect on future investigations, without proving this to be so in the circumstances of this case. The Commissioner's decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner's decision not to disclose the personal information requested was based on the fact that Ms. Dubé had not consented to disclosure, and does not

> establish what risk of injury to the Commissioner's investigations the latter might cause. . . .
>
> . . .
>
> The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, *generally*, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the *Privacy Act* and the *Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case. In the case of Ms. Dubé, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner's investigations.
>
> (Emphasis added)

[53] Of significance here, in my view, is that the Court in **Lavigne** did not relax the burden of proof, notwithstanding its recognition of the importance of language rights and the delicacy of the circumstances. Gonthier, J. wrote in this regard:

> 64 In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour

> unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate context in which the Commissioner carries out his functions.
>
> 65 Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is *reasonable* to maintain confidentiality. For these reasons, I would dismiss the main appeal.
>
> (Underlining mine)

[54] The evidence of Messrs Paul and Christmas says nothing of the harm which could be expected from disclosure of the "information" in the Audit Report. The thrust of their evidence is that harm would come from the "act" of the government disclosing the Audit Report. In effect they assert that harm will arise, not from the content of the information disclosed, but from the fact that the government willingly surrenders the information to the public. The government has refused to disclose the information. Any disclosure which occurs at this stage will be through order of the Court, not by operation of the government. The appellants have offered no evidence of a reasonable expectation of harm arising from the disclosure of the "information".

[55] The focus of the **Act** is upon the disclosure of "information" as is clear from s. 2:

> **2** The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

> (iii) specifying limited exceptions to the rights of access,
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.
>
> (Emphasis added)

[56] To satisfy the requirements of s. 12(1)(a), there must be evidence that the public knowledge of the "information" could be reasonably expected to harm relations between the governments. Unaddressed in the evidence is how the release to the public of the "information" contained in the Audit Report will harm relations between the appellants and the Nova Scotia Government. The appellants say that the harm is self-evident on a reading of the report. I disagree. The Nova Scotia Government prepared the Audit Report and is already aware of its contents. In my view there is no evidence from which to conclude that the public release of the report could reasonably be expected to harm relations between the governments.

[57] To give effect to the appellants' submissions would be to create a blanket privilege for all information pertaining to an aboriginal government. It would matter not whether the information contained in the Audit Report is critical or supportive of the aboriginal policing initiative. It is the position of the appellants that it may not be disclosed without consent. Section 12(1)(a) of the **FOIPOP Act** clearly does not establish a class exemption from disclosure for all information flowing between governments.

[58] In **Do-Ky et al. v. Canada (Ministers of Foreign Affairs and International Trade)** (1999), 173 D.L.R. (4th) 515; F.C.J. No. 673 (Q.L.) (F.C.A.) (Q.L.), affirming (1997), 143 D.L.R. (4th) 746; F.C.J. No. 145 (Q.L.) (F.C.T.D.) a similarly worded section of the federal **Access to Information Act**, R.S.C. 1985, c. A-1, was held not to create a class exemption for diplomatic exchanges between governments. Under consideration was s.15(1) of that **Act**. There, the applicant's request for disclosure of four diplomatic notes exchanged between Canada and another foreign state had been refused by the Minister of Foreign Affairs and International Trade. The refusal was upheld on judicial review by the Federal Court. The package of information in dispute was three notes sent by Canada to the foreign country and one note from that country to Canada. It was accepted that the four notes constituted a dialogue between the governments of the two countries.

[59] Section 15(1) of that **Act** provides:

> 15(1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information
>
> . . .
>
> (h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official

> correspondence exchanged with Canadian diplomatic missions or consular posts abroad...

(Emphasis added)

[60] On appeal to the Federal Court of Appeal, in the course of affirming the decision of the trial court, Sexton, J.A. was careful to point out that s. 15(1)(h) did not create a "class exemption" for diplomatic notes. He said:

> [8] We should stress however that there is no "class exemption" for diplomatic notes. Under section 15(1) there is no presumption that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations. There must be evidence of this. Certainly where the documents contain information which, for example, might cast doubt on the commitment of another country to honour its international obligations and that other country objects to the disclosure, the case for exemption will have been made out.

[61] Thus the onus was upon the opponent to disclosure to establish, on the evidence, that there was a reasonable expectation of injury to the conduct of international affairs. The Federal Court of Appeal was satisfied that there was an evidentiary basis for the trial judge's refusal to disclose:

> [7] We have also examined the notes and the confidential record and are satisfied that there was sufficient evidence upon which the motions judge could reasonably conclude that the diplomatic notes contain specific information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs. It is therefore unnecessary for us to consider the other more general issues addressed by the motions judge relating to whether diplomatic notes must be disclosed.

[62] Similarly, the **FOIPOP Act** does not contain a class exemption from disclosure for information passing between the aboriginal and provincial government. The information must be brought within the s. 12 exception. While the untimely release of particulars of negotiations or other sensitive communications between such governments might qualify for exemption, there is no evidence that negotiations in relation to the aboriginal policing initiative are continuing, nor does this report contain details of any such negotiations. I would

agree with the comments of Rothstein, J. in **Canada (Information Commissioner) v. Canada (Prime Minister)**, [1993] 1 F.C.R. 427; [1992] F.C.J. No. 1054 (Q.L.) (T.D.) at p. 478 (F.C.R.):

> . . . While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government [page479] witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

[63] It is my view that Coughlan, J. was correct in finding that the evidence here fell far short of that required to forestall disclosure of the Audit Report. I have read the Audit Report, as did he. I have also taken into account the importance of fostering initiatives which promote the exercise of aboriginal government, as was urged by the appellants. On this latter issue, while I accept that the importance of the promotion of aboriginal self government is a significant aspect of the context within which the statute must be interpreted and in which the expectation of harm must be assessed, the evidence, interpreted in that context, must nonetheless establish the factual basis for the exemption. The record in this case did not do so.

[64] I am not persuaded that Coughlan, J. erred in concluding that this now dated Audit Report of the efficacy of UTP, which initiative was supported by the expenditure of substantial public funds, is of the sensitive nature obviously contemplated by this exemption in the **Act**.

Confidentiality

[65] The appellants submit, as well, that the Chambers judge erred in holding that the information contained in the Audit Report was not exempt from disclosure because its release would reveal information that was received in confidence.

[66] It was the evidence of Messrs Paul and Christmas that they understood that the Audit report was conducted in confidence and that the information supplied for the Audit was provided in confidence. Each page of the Audit Report is stamped "Confidential". This evidence, say the appellants, is sufficient to trigger s. 12(1)(b) of the **FOIPOP ACT** which provides:

> **12 (1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> . . .
>
> (b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.
>
> (Emphasis added)

[67] While the legitimacy of the subjective belief of Messrs. Paul and Christmas that the information supplied for the Audit Report was provided in confidence is not in question, the issue is whether the record contains evidence that such a belief was, objectively, warranted.

[68] **Order 01-13; British Columbia (Ministry of Environment, Lands and Parks)**, [2001] B.C.I.P.C.D. No. 14 (Q.L.), a decision of the B.C. Privacy Commissioner, provides an example of the kind of evidence which could satisfy the requirement that information be "received" in confidence. There, the Commissioner was considering opposition to disclosure of information, invoking s. 16(1)(b) of the B.C. **Act**. The wording of that clause is, for the purposes of this analysis, the same as that in s. 12(1)(b) of our **Act**. The applicant had requested information relating to surveys of First Nations moose harvesting, in two regions of British Columbia, in each of three years. The survey had been conducted using

Ministry funding in order to facilitate wildlife management in the regions. The Ministry provided some data to the applicant, but refused to disclose numbers of moose killed by aboriginal persons in one of the regions in each of the three years.

[69] The Commissioner considered whether the information was "received in confidence" from an aboriginal government. It was the evidence that many First Nations were reluctant to participate in the survey. In order to increase the participation rate the government agreed that each First Nation would control the collection and dissemination of data. Band members would only supply the information to members of their own communities, thus a survey co-ordinator and one or more interviewers were engaged in each community. The co-ordinators and interviewers were chosen by representatives of the Band, and not the federal government. There was evidence that the information was only "provided upon the government of the aboriginal community consenting to such collection." In considering the arrangements for collecting the information the Commissioner concluded that although the date-collectors in each community were paid by the Ministry, they were not acting as the Ministry's agents. He was satisfied, as well, that the information was "received from" an aboriginal government in which regard he said:

> ¶ 20 Sean Sharpe's evidence is that the individuals who collect the data and provide it to the Ministry's contractor are representatives of the relevant aboriginal government. Brenda Burghardt's evidence is to the same effect. I am satisfied that, although the data-collectors in each community are paid by the Ministry's contractor, they are not acting as the Ministry's agents, for the purposes of s. 16(1)(b) in collecting the data. Each is, instead, the chosen representative of his or her First Nation. From the point of collection of the data onward, the data are within the control of the relevant aboriginal government, subject only to the terms on which data are disclosed to the Ministry's contractor and on which summaries for each community are disclosed in turn to the Ministry. I am satisfied that, in receiving data respecting each First Nation (including their member communities), the Ministry is receiving the data from an aboriginal government.

[70] In holding that the requirements of s. 16(1)(b) of the B.C. **Act** were satisfied, the Commissioner relied upon the evidence of both the manner of collection of the data, which spoke of confidentiality, and the evidence of verbal and written

assurances of confidentiality respecting the survey data by Ministry representatives to the First Nations.

[71] The **FOIPOP Act** refers to confidential information in a number of sections (ss. 19C(b), 20(2)(f), 20(5), and 21(1)(b)). Section 12(b) applies to information "received" in confidence, while all other sections describe the information as "provided" or "supplied" in confidence. In **Order 331-1999; Vancouver Police Board** [1999] B.C.I.P.C.D. No. 44 the Privacy Commissioner considered the meaning of "received" in confidence, as contrasted with "supplied" or "provided" in confidence in similarly worded provisions of the **Freedom of Information and Protection of Privacy Act**, R.S.B.C. 1996, c. 165, s. 16(1)(b). He concluded that "received" in confidence requires that there be evidence of an expectation of confidentiality on the part of both the supplier and the receiver of the information. I agree.

[72] The Commissioner developed a helpful list of factors to aid in determining whether information was received in confidence. He said:

> ¶ 37 What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s. 16(1)(b) cases:
>
> > 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
> >
> > 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
> >
> > 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to

> receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
>
> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
>
> 7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

[73] I will apply the above factors, which I do not suggest are determinative or exhaustive, to the evidence here. Nova Scotia, through the Solicitor General, has a duty "to ensure that an adequate and effective level of policing is maintained throughout the Province" (the **Police Act**, R.S.N.S. 1989, c. 348, s. 1, s. 3A(2)). In addition, the Solicitor General is required to "promote the preservation of peace, the prevention of crime, the efficiency of police services and the improvement of police relationships with communities within the Province (the **Police Act**, s. 3A(3)). The **Police Act** specifically provides that one of the ways in which the Province can fulfil its duties is to ". . . determine, through a system of assessments, evaluations and inspections, the adequacy, efficiency and effectiveness of police services provided in a municipality" (the **Police Act**, s. 3A(4)(e)). There is nothing in the **Police Act** which states or implies that this kind of information gathered by the Province in fulfilment of its duty is "received" in confidence.

[74] Acting under the authority of s. 3A(5) of the **Act**, the Minister of Justice exempted the Reserve lands from the provisions of the **Police Act** and Regulations (Tripartite Agreement, Article 5.3). The Tripartite Agreement, however, in Article 5.4 and Schedule D contains provisions which mirror those in s. 3A of the **Police Act** and the related Regulations. As with the **Police Act**, there is nothing in the Tripartite Agreement which expressly provides for confidentiality of the information received by the Province for the purpose of assessing the UTP.

[75] Counsel for the appellants submits that the UTP was an exercise in aboriginal government and, therefore, information about its operation should be shielded from disclosure. It is his submission that information about the operation of an aboriginal government is not the kind of information which falls within the intent of the **FOIPOP Act**. I disagree. The Audit Report expressly provides that disclosure is subject to the provisions of the **FOIPOP Act**. It is, therefore, the principles of the **FOIPOP Act** which govern its release. Similarly, under Article 15.9 of the Tripartite Agreement, information collected by Nova Scotia pursuant to the Agreement is also subject to the rights and safeguards provided for under the **FOIPOP** scheme. While I do not agree with the Chambers judge at first instance that these references assist in applying the exemptions under the **Act**, they do make clear that the parties understood that the information in issue here is subject to both the obligations and exemptions under the **Act**.

[76] The Government of Nova Scotia has provided funds for the tribal policing initiative in excess of 3.5 million dollars. One would expect information about the product of that expenditure, as is contained in the Audit Report, to be available to the Nova Scotia public.

[77] Article 5.4 of the Tripartite Agreement obliged the Province to “ensure that an adequate and effective level of policing” was maintained. That Article provided that one of the ways in which this was to be accomplished was that the Province “determine, through a series of assessments, evaluations and inspections, the adequacy, efficiency, effectiveness and cultural sensitivity of the police services provided on the Reserve lands”. While the provision of the information for the Audit Report by the Board and the members of the UTP was not expressly compelled, it is my view that its supply was effectively compulsory, if the Province was to properly review and assess the police service, as was agreed by the parties.

[78] There is no evidence that the government of Nova Scotia understood that the Audit Report or the information supplied would be confidential. Nor is there evidence that the Nova Scotia government gave any assurance of confidentiality. Aside from the appearance of the word “Confidential” on the Audit Report, the actions of the parties do not provide objective evidence of an expectation of confidentiality.

[79] There is no evidence before us that similar types of information, for example, audits of other police forces, are held in confidence.

[80] In summary, I am not persuaded, in considering the circumstances reviewed above, that the Chambers judge erred in concluding that the Audit Report was not “received by” the Nova Scotia Government “in confidence”.

Revealing Personal Information:

[81] The **Act** prohibits the release of certain personal information:

> **20 (1)** The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[82] The Chambers judge found that the Audit Report contained personal information, the disclosure of which would invade a third party’s privacy. This finding is not in dispute. He concluded, however, that release of this information was specifically authorized by s. 20(4)(e) of the **Act**:

> 20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> . . .

> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

[83] It is the appellants' submission that the Chambers judge erred in this regard because the third party, about whom information is provided in the Audit Report, is not "an employee or member of a public body". The judge held that the UTP was a "public body". The third party was the Chief of the UTP.

[84] "Public body" is defined in the **FOIPOP Act**:

> **3(1)** In this Act,
>
> (j) "public body" means
>
> (i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which
>
> (A) are appointed by order of the Governor in Council, or
>
> (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,
>
> and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,
>
> (ii) the Public Archives of Nova Scotia,

> (iii) a body designated as a public body pursuant to clause (f) of subsection (1) of Section 49, or
>
> (iv) a local public body;

[85] The **Interpretation Act**, R.S.N.S., 1989, c.235, s.7(1)(w), defines a "public officer" to include a person in the public service of the Province. This definition is unhelpful here. The **Act** does not define "in public service of the Province".

[86] In concluding that the UTP was a "public body", the Chambers judge said:

> [56] In this case, the Tribal Police was established to carry out policing services for the Unama'ki Communities. The members of the Tribal Police are appointed by the Minister of Justice as Aboriginal police officers pursuant to the *Police Act, supra*. The Agreement sets out the duties of the Tribal Police in clause 6.2.3. as follows:
>
> Duties of the Unama'ki Tribal Police
>
> The Unama'ki Tribal Police shall be, and is charged with the enforcement of the applicable laws of the province, the applicable laws of Canada and the by-laws of the Unama'ki Communities in force within the Reserve lands.
>
> [57] I find the Tribal Police is a body of persons, all the members of which in the discharge of their duties are public officers and, therefore, the Tribal Police is a public body as defined by the FOIPOP Act.

[87] The appellants challenge the judge's conclusion on two bases: (i) while it may be that the individual police officers are "public officers", the UTP service, as distinct from the UTP Board, is not a legal entity capable of suing or being sued in its own name and is, therefore, not a public body; (ii) applying the "limited class" rule of statutory interpretation to the expression "other body of persons" in s. 3(1)(j) of the **Act** (¶ 84, above) that general expression must be limited to the "genus of the narrow enumeration that precedes it" (the appellant here citing Ruth

Sullivan, *Dreidger on the Construction of Statutes*, (3rd ed., Toronto: Butterworths, 1994)). The appellant says that the preceding enumeration in s. 3(1)(j) "a Government department or a board, commission, foundation, agency, tribunal, association . . ." is not sufficiently broad to include a body such as the UTP.

[88] I find neither of these arguments persuasive. The appellants have cited no authority in support of the submission that the UTP, to be a public body, must be a "legal entity". Nor do I accept that s. 3(1)(j) presents "a narrow enumeration of a class" which would clearly exclude a police force such as the UTP . I would characterize the list of entities which may qualify as a public body - "a Government department or a board, commission, foundation, agency, tribunal, association" - as broad and varied.

[89] Having rejected these two submissions as demonstrative of error by the trial judge I would dismiss this ground of appeal. I emphasize, however, that in so doing I have addressed only the two arguments advanced by the appellant on this issue. These reasons are not authority for any broader proposition than that these two submissions should not succeed, the burden here resting with the appellants.

[90] As to the appellants' submission that consent of the Governor in Council pursuant to s. 12(2) of the **FOIPOP Act** was necessary, even where the Audit Report did not fall within s. 12(1), I would reject it for the reasons given by Coughlan, J.

DISPOSITION:

[91] I would dismiss the appeal. The parties have agreed that the Audit Report shall not be disclosed until the appeal period for filing a Notice of Appeal with the Supreme Court of Canada has passed, or, if an appeal is filed, until the application for leave has been determined by that Court.

[92] The respondent has requested costs against both the appellants and the Attorney General of Nova Scotia (AGNS). The AGNS participated in this appeal on a limited basis - for the purpose only of advancing its contention that the Chambers judge misstated the test for harm. I have accepted that the language

used by the Chambers judge was unnecessary, but that the proper test applied to this record would lead to the result he reached. I would not order the AGNS to pay costs nor direct that he receive costs from either party. The costs at trial should stand as the parties agreed. The appellants paid costs of the proceeding before Justice Coughlan in the amount of $4,023.79. The AGNS paid an additional $2,500.00 in costs, for a total figure of about $6,500.00, inclusive of disbursements. I would order that the appellants pay, to the respondent, costs of the appeal in the amount of $2,000 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.