IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax Herald Ltd.* v. *Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369

Date: 20081208
Docket: 297753(A)
Registry: Halifax

Between:

The Halifax Herald Limited

Appellant

v.

The Workers' Compensation Board of Nova Scotia

Respondent

- and -

Canadian Manufacturers and Exporters Association of Nova Scotia

Intervenor

Revised Decision:	The decision has been revised according to the erratum released on June 8, 2009. The text of the erratum is appended to this document.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	October 23 and 24, 2008, in Halifax, Nova Scotia
Counsel:	Cory J. Withrow, counsel for The Halifax Herald Limited ("**Herald**"), appellant David P. S. Farrar, Q.C. and Richard M. Dunlop, counsel for the Workers' Compensation Board of Nova Scotia ("**WCB**"), respondent Daniel W. Ingersoll and Andrew D. Taillon, counsel for Canadian Manufacturers and Exporters Association of Nova Scotia ("**CME-NS**"), intervenor

By the Court:

A. Issue and Background

[1] Is the Herald entitled to receive from WCB the names of the 25 companies reporting the highest number of injuries over a three-year period pursuant to *Freedom of Information and Protection of Privacy* (**FOIPOP**) *Act* ("**Act**")?

[2] In February 2007 the Herald requested the names of the 25 companies with the highest number of injuries reported in the years 2004 to 2006 and four related questions. WCB agreed to answer two questions (#3: numbers and types of accidents reported by the 25 employers; #4: cost of claims paid by WCB for injuries for the 25 employers), advised that it could not answer two (#2: size of the 25 workforces; #5: each employer's safety rating compared to their industry average) and refused to answer the request for the names of the 25 companies with the highest number of injuries because:

> ". . . this information is protected, confidential information under section 21 of the *FOIPOP Act*. The WCB feels that if the negative safety records of these employers were released, there is risk their competitive positions could possibly be harmed and their reputations permanently damaged. Therefore, we will not provide the names of the specific employers (personally identifying information) and risk exposing them to financial harm . . ." (WCB letter, March 22, 2007, Exh.2, Leger affidavit).

[3] The Herald then asked the Review Officer under the **Act** to review its request. In its reply to the Review Officer, WCB relied upon exemptions to the requirement to disclose contained in subsections 20(2)(e), (f), (g) and (h) - protection of personal information; and subsections 21(1)(a)(ii) - labour relations information of third parties, and 21(1)(c)(ii) - the information could be reasonably expected to harm significantly the employers' competitive position.

[4] After exchanges with WCB and failed mediation, the Review Officer entered into a formal review and filed a report recommending the release of the requested information in its entirety. (See the Report #FI-07-32, dated April 22, 2008, Exh.4, Leger affidavit.)

[5] WCB declined to answer the request for the names of the 25 companies. The Herald appeals to this Court from WCB's refusal.

B. Scope of Appeal

[6] This Court may determine the matter *de novo* and examine any record in order to determine on the merits whether the information in the record should be released (s. 42). No party asked the Court to examine the records that are the subject of the Herald's request.

[7] The burden is on WCB to prove that the Herald has no right of access to a record. However, where the refusal is to a record containing personal information about a third party, the

Herald has the burden of proof that disclosure would not be an unreasonable invasion of the third party's personal privacy (s. 45).

C. **WCB's position**

[8] Before this Court, WCB argues that the names of the 25 companies are exempt per s. 21(1) of the **Act** on the basis that:

a) the information would reveal labour relations information about the 25 companies;

b) the information was supplied implicitly or explicitly in confidence; and,

c) disclosure could reasonably be expected to:
   i) harm significantly the competitive position of the 25 companies, or
   ii) result in similar information no longer being supplied to WCB when it is in the public interest that it is supplied.

[9] On this appeal, WCB does not argue for an exemption under s. 20 (personal information).

D. **CME-NS's position**

[10] The intervenor CME-NS argues that WCB is entitled to refuse to disclose the names of the 25 companies by reason of the exemptions in s. 20 and s. 21 of the **Act**.

[11] With respect to s. 20 - personal information (an unreasonable invasion of a third party's personal privacy), it argues that the disclosure of the company names, when combined with the already provided answers to questions #3 and #4, could result in identification of the individuals injured, and that would constitute an unreasonable invasion of the injured workers' personal privacy.

[12] With respect to s. 21, it makes the same argument as WCB, but adds that, with regards to the first element, the information sought to be released is not only labour relations information but also financial information; release of the details of the costs in claims of the 25 companies, could make the amount of their WCB premiums discernable to their competitors, and put them in an economically disadvantaged position.

E. **Law**

E.1 **Basic Principle**s

[13] For this part of the decision, I have relied in part upon the text: *Freedom of Information: The Law, the Practice and the Ideal,* Second Edition, by Patrick Birkinshaw (London: Butterworths, 1996).

[14] Our capacity as human beings to acquire, use and store information is essential to our survival. Information forms the foundation for sensible choice and wise judgment.

[15] Communication is premised on the attempt to convey correct information. Control of information, on the other hand, is premised on secrecy, confidentiality and on the quest for privacy which is essential to our full development.

[16] The issue is not secrecy of government information itself, but the control over secrecy and access. When does secrecy operate not just to protect the interests of those possessing secrets, but to subvert the interests of others?

[17] I agree with Mr. Birkinshaw that these converging principles are reconciled by accepting that there are spheres of personal and public life which are legitimately entitled to secrecy, without which our integrity can be comprised, our identity shaken and our security shattered (p. 16-17).

[18] In *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground* (2005) 2:2 UOLTJ 357, A. Levin and M. J. Nicholson compare the bases of the concept of privacy in these three societies. In **Whalen v. Roe**, 429 U.S. 589 (1977), the United States Supreme Court endorsed three distinct privacy interests which reflect that society's view that privacy is a political value centered around the protection of citizens from government; that is, liberty in the sense of anonymity (freedom from government surveillance and intrusion), secrecy (freedom from personal information being made public by government), and autonomy (freedom from government compulsion). In the European Union, where government is not looked upon with as much distrust, privacy is a social concept centered around a person's relationship with other members of society; it involves protection of dignity and respect for private and family life (European Charter, Part II). Levin and Nicholson suggest that liberty and dignity are manifestations of autonomy - one in the political arena, the other in the social field; autonomy, they say, is better understood as a fundamental value of human life in society (¶ 63).

[19] In **R. v. Dyment** [1988] 2 SCR 417, the Supreme Court of Canada identified three zones of privacy or autonomy: personal space, dignity, and personal information. The first emulates the American notion of liberty. The second emulates the EU model. The third concern is more than the threat to liberty by mishandled public sector conduct, or to dignity by wrongful private sector conduct; it concerns a threat to autonomy. It is based on Canada's coalescing identity, as a multicultural society (neither homogeneous nor "melting pot"), of tolerance and respect for other citizens' autonomy and control of their private and public personae (Levin & Nicholson ¶ 68). In **Dyment**, La Forest J. wrote: "society has come to realize that privacy is at the heart of liberty

in a modern state . . . Grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual . . ." and for that reason held it to be worthy of constitutional protection. **Dyment** is but one in a series of decisions that have expanded on the theme in the context of sections 7 and 8 of the Charter: **Hunter v. Southam** [1984] 2 SCR 145; **R. v. Morgentaler** [1988] 1 SCR 30; **R. v. Beare** [1988] 2 SCR 387; **Edmonton Journal v. Alberta** [1989] 2 SCR 1326; **Rodriguez v. British Columbia** [1993] 3 SCR 519; **R. v. O'Connor** [1995] 4 SCR 411; **Godbout v. Longueuil** [1997] 3 SCR 844; **Blencoe v. British Columbia** [2000] 2 SCR 307; and especially La Forest J.'s analysis in **B.(R.) v. Children's Aid Society of Metropolitan Toronto** [1995] 1 SCR 315.

[20] This issue of secrecy, the exclusivity of use of information, is most acute in respect of government and public bodies, which represent the collective or public interest, have the authority to accumulate large volumes of information about private entities in fulfilling their public trust, and operate, by design or otherwise, with significant limits on openness and access.

[21] The growth in government's intrusion into private lives necessitates safeguards against abuse. Jeremy Bentham wrote: "Secrecy, being an instrument of conspiracy, ought never to be the system of regular government." He added: "Without publicity, no good is permanent; under the auspicious of publicity, no evil can continue." Pierre Trudeau said: "Democratic progress requires the ready availability of true and complete information. In this way people can objectively evaluate the Government's policies. To act otherwise is to give way to despotic secrecy." (pp. 173 &185 in *Federal Access to Information and Privacy Legislation Annotated 2004*, by Michel W. Drapeau and Marc-Aurele Racicot (Carswell, 2004).

[22] We have always been an Information Society. But, from the time of the commissioning of the Doomsday Book in 1085 to the present, the growth in government, and their access to information, has magnified the concern about the acquisition, use, and release of information.

> The provision of information has always been at the centre of the relationship between government and society; provision of information has always been instrumental in the way governmental institutions have been created or allowed to develop. Such developments have occurred to fulfil public expectations in oversight, accountability, explanation or legitimacy for the exercise of power. (Birkinshaw, p. 5)

[23] Control, use and regulation of information is inherently a feature of power. Government is the organization of information for the use of power in the public interest. Exposure of government information to the public safeguards against irrational processes and perverted use.

[24] There are arguable reasons why confidentiality must be maintained, or not maintained, in various relationships. The problem arises whenever a private body or individual insists on confidentiality in respect of its interplay with a public body, and the public body acts on that communication. Experience has shown that government decisions made behind closed doors are not always rational, or in the public interest. The more irrational the process, the more government will want to conceal, and the greater the need for openness and accountability.

[25] As in life, the hallmarks of good policy and law are reasonable limits. Just as we do not live in a world of absolutes, there are no absolutes on the issue of access and privacy. Some suggest that access and privacy rights are not contradictory, as they at first appear, but rather complementary. In either case, access and privacy are limited rights. They are subject to exceptions when overshadowed by greater public interests, and are based on reasonable expectations of actual or imputed harm to specific private and public interests.

[26] It is the balance between access to information, which is an essential component of democracy itself and accountability of government, and the equally important protection of privacy which grounds a free and pluralistic society, that has lead in our generation to **FOIPOP** legislation in most democracies.

E.2 **Legislation**

[27] Despite the long history of government collecting information and its impact upon private and public lives, access legislation is a fairly recent phenomenon. The first Canadian statute was the **Freedom of Information Act** of Nova Scotia passed in 1977. The first Canadian privacy legislation appears to have been introduced in Saskatchewan in 1978. In all but four jurisdictions, privacy legislation has been incorporated into the access legislation. Such is the case in Nova Scotia, where in 1990 a new **Act** incorporated, as a purpose, the protection of individual privacy where disclosure would constitute an unwarranted invasion of personal privacy, and where in 1993 the current **Act**, intentionally renamed as **Freedom of Information and Protection of Privacy Act**, placed protection of privacy on an equal footing with access to information.

[28] The purpose of the **Act** and analytical framework for its application is articulated by Saunders, J.A. in **O'Connor** v. **Nova Scotia**, 2001 NSCA 132. The importance of this decision cannot be underestimated in light of the analysis of the Supreme Court of Canada in **Dagg v. Canada** [1997] 2 SCR 403, in which the majority did not agree with La Forest J.'s result, but did agree with his analysis of the principles for balancing access and privacy under similar legislation. The court held that the positive obligation on public bodies to fully accommodate access requires that the legislation be liberally construed so as to give clear expression to the legislature's intention that these obligations enure to the benefit of good government and its citizens (¶¶ 40 and 41), and that exemptions and exceptions be narrowly construed.

[29] At ¶¶ 55 to 58, he describes the Nova Scotia legislation as unique in Canada. He wrote:

> [56] Thus the **FOIPOP Act** in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific."
>
> [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.

[30] Structurally the Nova Scotia **Act** sets out its purpose (s. 2), definitions (s. 3), scope (s. 4), the right of access to any record under government control (s. 4) subject only to specific exemptions (s. 12 to 31). The **Act** describes procedures for accessing government information (s. 6-11, 22 and 23) and for review and appeal (s. 32-42), and for the protection of personal privacy (s. 24 to 31) and ends with miscellaneous general provisions (s. 43-52).

[31] The right to any record is to be broadly construed, and is subject only to specific narrowly-defined exemptions. There are many exemptions, including intergovernmental affairs, cabinet deliberations, government advice, law enforcement, solicitor-client privilege, certain government financial and economic interests, health and safety, conservation, local government, academic research and evaluations, certain hospital records, and labour conciliation records.

[32] Relevant to this application is the exemption for confidential information (s. 21) and CME-NS's additional claim for exemption under s. 20 - unreasonable invasion of a third party's personal privacy.

[33] In respect of CME-NS's claim under s. 20, the relevant statutory provisions read:

> 3 (a) (I) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, address or telephone number, . . .
>
> **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.
> (2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
>
> (c) the personal information is relevant to a fair determination of the applicant's rights;
>
> (d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
>
> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence;
>
> (g) the personal information is likely to be inaccurate or unreliable; and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
>
> . . .

(d) the personal information relates to employment or educational history;

. . .

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

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

. . .

(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; . . .

[34] In respect of WCB and CME-NS's claim for exemption under s. 21, the section reads:

Confidential information

21 (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) The head of a public body shall disclose to an applicant a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an enactment.

(4) Subsections (1) and (2) do not apply if the third party consents to the disclosure. 1993, c. 5, s. 21 .

[35] Relevant to both claims are ss. 31(1) and (4), which read:

Disclosure in public interest

31 (1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(4) This Section applies notwithstanding any other provision of this Act. 1993, c. 5, s. 31.

F. Section 20 (Personal Information) Exemption

[36] Before this Court CME-NS argues that the Nova Scotia Court of Appeal in **Nova Scotia (Health) v. Dickie**, 1999 NSCA 662, ¶ 30 described "recorded information about an identifiable individual" in broad terms.

[37] CME-NS submits that the release of the names of the 25 companies with the highest number of workplace injuries, when combined with the already made disclosure of the numbers and types of accidents reported by the 25 companies and the total costs in claims paid out in respect of those injuries, would constitute an unreasonable invasion of the personal privacy of the injured workers. It argues: "This information, if released, would allow individual employees of each employer to be identified through the reference to the name of the employers and the numbers and types of accidents reported. . . . There is law indicating that where an individual may be identifiable, it is an unreasonable invasion of privacy."

[38] CME-NS cites **Canada v. Canada** 2006 FCA 157 at ¶43, *Government Information, Access and Privacy*, by McNairn and Woodbury (Carswell; looseleaf to Release1 in 2008, p. 7-5), and **Ontario v. Pascoe** (2001) 154 OAC 97 at ¶ 15, affirmed (2002) 166 OAC 88 (OCA).

[39] CME-NS referred to the affidavit of Matthew Doreen, which contains internet excerpts from four news articles about industrial accidents. In some, the injured worker is named; in others the employers appear to be named and the incident described. Significantly WCB spokespersons appear to have commented to the press about the accidents.

[40] CME-NS argues that information such as that contained in three of the news articles, together with the total disclosure requested, would permit anyone to "ascertain the compensation paid out for workplace injuries based on that particular individuals injury . . . this meets the definition of personal information, as it would provide information about an individual's employment and health care history."

[41] CME-NS argues that if a person had information, other than through the media, the release of the requested information could lead to an identifiable individual and "would be an invasion of personal privacy".

Analysis

[42] CME-NS's argument has no merit.

[43] I accept that the Court is obligated to consider, as a relevant factor, the possibility that the release of the requested information could lead, in combination with other information available to individual members of the public, to the identification of a person. There may be circumstances where release of non-personal information, when combined with other information held by a member of the public, might lead to identification of personal information about an individual.

[44] I further recognize that the burden is on the person requesting release of the information to establish on a balance of probabilities that the disclosure of any such information would not be an unreasonable invasion of the third parties' personal privacy (in this case, the personal privacy of an injured worker).

[45] There is not enough evidence upon which I could reasonably find or infer that the release of the information requested would lead to personal information that might constitute an unreasonable invasion of an injured worker's personal privacy. In **Dagg v. Canada** [1997] 2 SCR 403, the Supreme Court of Canada dealt with a claim, under equivalent federal legislation, that sign-in log for employees who worked weekends for the Department of Finance was exempt personal information. The Court said no in a split decision, but all agreed on La Forest J.'s analytical approach. Applying that approach to the facts of this case, the information that could lead to identification of injured employees would not constitute an unreasonable invasion of their personal privacy.

[46] To the contrary, WCB's 2007 Annual Report, attached to Mr. Field's affidavit, contains considerable information and data which suggest that the release of the names of the 25 employers with the highest number of accidents would not lead to disclosure of the names of the injured workers or unreasonably invade their personal privacy. At page 62, the chart entitled "Claims Registered by Firm" shows 12 firms with 200 or more new claims registered in 2007 for a total of 5,980 new claims - an average of almost 500 per employer. The next 41 firms registered 100 or more claims, or a total of 9,930, which, by my calculation works out to an average of 242 per firm. The fact that 53 employers with the highest number of claims registered in 2007, totalling 15,910 claims or 49.66% of the new claims registered with WCB in 2007, leads me to conclude that the three-year total requested by the appellant for the top 25 employers would not, for all practical purposes, lead to the discovery of personal information or invade unreasonably any injured worker's personal privacy. The oral submission that an employer with few employees could be in the top 25 is not supported by the evidence.

[47] The excerpts from the news articles in the Doreen affidavit do not support an inference that the release of the requested information would constitute either disclosure of personal information - it is already in the public domain, or an unreasonable invasion of personal privacy.

[48] In summary, while in some circumstances the revelation of the name of an individual might constitute an unreasonable invasion of personal privacy, there was no factual basis for the submission that the release of the names of the 25 employers, out of the 18,508 registered with WCB, would lead to the identification of an individual and, more important, to the release of information about that individual that would constitute an unreasonable invasion of their personal privacy.

G. Section 21 (Confidential Information) Exemption

G.1 Three Part Test

[49] The claim for exemption under s. 21 requires WCB to establish that disclosure of the names of the 25 employers:

a) would reveal labour relations or financial information about the 25 employers, and

b) would reveal information supplied implicitly or explicitly in confidence, and

c) could reasonably be expected to harm significantly the employers' competitive position, or result in similar information no longer being supplied to WCB when it is in the public's interest that it is supplied.

G.2 Labour Relations

[50] The first issue is whether the information is about labour relations.

[51] WCB submits that the **Workers' Compensation Act** ("**WCA**") which WCB administers applies to the worker-employer relationship in respect of workplace safety and, in particular, involves workers who suffer an injury by accident arising out of and in the course of employment (s. 10(1)). WCB cites dictionaries for the ordinary meaning of the term, a labour text for its view that labour relation is a huge topic encompassing the employer-employee relationship inclusive of employee safety, and the definition of a public body in the **Act** (s. 3(1)(j)).

[52] The Herald submits that the disclosure would not release labour relations information about the 25 companies: "Information relating to "labour relations" is information that pertains to the relations between an employer and its employees with respect to the collective bargaining between such parties and related activities."

[53] The Herald cites two decisions of the Information and Privacy Commissioner of Ontario: **IPC Order - PO 2010**, April 23, 2002 (respecting disclosure of proposed underwater logging applications by private parties); and **IPC Order - P-653**, April 8, 1994 (respecting pay equity plans in hospitals); **Dickie v. Nova Scotia**, 1999 NSCA 62 at ¶ 59; **Reid v. Halifax Regional School Board**, 2006 NSSC 56 at ¶¶ 21 to 23; and, **Foley v. Cape Breton Regional Hospital**, 1996 CarswellNS 342 (NSSC) at ¶ 81.

[54] CME-NS supports WCB's argument in favour of an expansive definition of labour relations. It cites ¶ 18 in **Shannex Health Care Management Incorporated v. Nova Scotia**, 2004 NSSC 54, for the proposition that the Ontario legislation uses similar language with a similar rationale and that the decision of the Ontario Court of Appeal in **Ontario v. Ontario** (2003) 178 O.A.C. 171 for the proposition that the phrase "labour relations", although not defined in the **Act**, can extend to relations and conditions of work beyond those related to collective bargaining.

[55] The Supreme Court of Canada has given clear direction that all statutes are to be interpreted to give effect to their purpose. Each case must be analysed on its own facts but in the context of the relevant legislative purpose. The request in this case is for the names of employers who have the most incidents of workers being injured on the job.

[56] I agree with WCB and CME-NS that whether applying the words "labour relations" in their ordinary dictionary definition or in the context of the purpose of the **Act**, the subject matter of the Herald's request deals directly with the employer-worker relationship and, in particular, workplace safety.

[57] In the cases cited by the Herald, the subject matter of the disclosure request was not similar in nature to the case at bar. In several cases it was unconnected to labour relations, or, at best, as noted by MacAdam, J. in **Foley:** "only incidental[ly]".

[58] CME-NS argued before this Court that disclosure of the requested information would reveal commercial or financial information about the 25 companies. In light of the "labour-relations" ruling, it is unnecessary to decide this.

G.3 Information supplied in confidence

Evidence

[59] The information supplied by employers to WCB is that contained in the Accident Report. It is from this information that WCB compiles its statistics. The parties disagree as to whether the Reports were supplied, implicitly or explicitly, in confidence.

[60] WCB notes that:

a) Section 86(1) of the **Workers' Compensation Act** ("**WCA**"), requires an employer to submit an Accident Report within five days of an accident;

b) The report form, attached as Tab 4 to Mr. Field's affidavit includes statements that, WCB submits, indicate they are supplied in confidence: on page 1 "The WCB is unable to accept WCB Accident Reports by e-mail at this time due to confidentiality and security issues with the internet." and in the declaration and consent part of the form: "Notice: The WCB may obtain and share any information necessary to process this claim with appropriate health care professionals and government agencies. Such information may include, but is not necessarily limited to, current and prior medical records, examinations, treatments and income information."

c) Section 165 of **WCA** reads:

> **Co-operation with Department of Labour**
> 165 (1) The Board and the Occupational Health and Safety Division of the Department of Labour may co-operate in any way, including the sharing of information otherwise privileged or confidential, in order to promote occupational health and safety and achieve their goals.

> (2) Without limiting the generality of subsection (1), the Board and the Occupational Health and Safety Division of the Department of Labour may exchange
>
> (a) any information regarding compliance with any enactment respecting occupational health and safety; and
>
> (b) any information or statistics regarding workplace injuries or occupational diseases required by the Board in order to properly carry out the provisions of Section 121.

d) The "My Account" on-line service for employers works like on-line banking, has four security levels and can only be accessed through a password.

[61] Mary Morris is an Employment Advisor with the Province of Nova Scotia who advises employers from premises rented from CME-NS. CME-NS filed her affidavit and she was not cross-examined on it. In ¶ 9 she swears that employers provide information to WCB on the understanding that it will not be made public "in part because of their concerns regarding the stigma associated with work place injuries."

[62] The Herald, through the affidavit of its counsel, puts the WCB Employer Registration Form in evidence and has relied upon the content of WCB's 2007 Annual Report contained in Mr. Field's affidavit.

Law

[63] WCB acknowledges that the names of the 25 employers were not supplied by the employers, but submits that the common characteristic of the employers - that they had the highest number of injuries, is information supplied by the employers in confidence and therefore s. 21 applies.

[64] It cites **Chesal v. Nova Scotia** 2003 NSSC 10 (affirmed by the Court of Appeal at 2003 NSCA 124) for the legal analysis and factors for this part of the test. **Chesal** dealt with the phrase "received in confidence" contained in s. 12 of the **Act** which deals with the exemption for information received from another government. Both the Supreme Court and Court of Appeal adopted the British Columbia approach, and applied the non-exhaustive list of seven factors enumerated in **Re: Vancouver Police Board** [1999] B.C.I.P.D. 44.

[65] CME-NS cites the analysis of the phrase "supplied in confidence" in the s. 20 exemption (for personal information), set out in the Nova Scotia Court of Appeal's decision in **Dickie** at ¶¶ 56 to 64. At ¶¶ 59 and 60, Cromwell, J.A. disagreed with the Court below which determined that in order to be confidential the provider of the information must believe that the information will never be revealed. Confidential information does not preclude information that may be revealed and is not, for example, limited to privileged information. He did agree with the Court below that simply labelling documents as "confidential" does not make the documents confidential.

[66] CME-NS also cites Justice Pickup in **Fuller v. Nova Scotia,** 2004 NSSC 86. Pickup J. relied upon the **Chesal** analysis and, based on the only evidence before him, the affidavit of the

person who supplied the information stating that he considered it to be confidential, decided that it was supplied in confidence.

[67] While the decisions cited by WCB and CME-NS are in respect of other sections of the **Act** and worded slightly differently than s. 21, the differences in wording are, in my view, of no consequence. Application of the non-exhaustive **Vancouver Police Board** factors is a fair and relevant analytical approach to determining when information is supplied in confidence in a s. 21 analysis.

[68] The Herald submits that ¶ 43 in Justice Coughlan's decision in **Chesal** summarized the test.

[69] The Herald also asked this Court to consider the analysis made by the Information and Privacy Commissioner of Ontario in **Order P-373**, 1992 CanLII 4216. In that case, in circumstances very similar to those before this Court, the WCB was requested to disclose the names and other information of companies who had been penalized, fined, penalty rated or charged additional amounts by WCB for 1990. During mediation the request was reduced from all companies to the top 50 companies. The operation of Ontario's **Workers' Compensation Act** is similar to that of Nova Scotia. In rejecting the "supplied in confidence" argument, the Commissioner wrote:

> As to the claim that the names and addresses of the employers were supplied in confidence, in my view, information that an employer operates within an industry which falls within the jurisdiction of the **WCA**, and therefore must register with the Board, submit certain forms and participate in certain programs, is a function of the industry in which it operates. **I do not agree that the names and addresses of the employers were supplied to the Board in confidence. In my view, it is the financial, commercial and personal information contained on the forms which was supplied in confidence, and none of this information would be revealed through disclosure of the records at issue in these appeals.** (My emphasis)

[70] While the Ontario Division Court quashed the Commissioner's decision, the Ontario Court of Appeal, 1998 CarswellOnt 3445, applying the standard of review of reasonableness, reinstated it.

[71] The Herald makes two submissions respecting the second test:

a) While the names of injured workers, the date and type of injury and the medical records included in Accident Reports were supplied by the employers, the fact that an employer had a certain number of accidents and was among the 25 employers with the highest number of accidents, was not information supplied by employers but rather information tabulated by WCB in the same manner that other information supplied by employers was tabulated by WCB and published in their Annual Reports and by other means.

b) On the totality of the circumstances, while the employers may have hoped that the information supplied would be kept confidential, the information was required to be supplied by reason of their participation in the WCB program - for most of whom participation was mandatory, and there was nothing in the **WCA**, the Employer Registration Form, WCB's Employers Information Guide, or the Accident Report which expressly stated that the mandated disclosure was confidential or from which anyone should infer that the disclosure was confidential.

Analysis

[72] I agree with the Herald's argument that the information sought to be disclosed is not information supplied by any employers. The analysis in the Ontario WCB case (**P-373**) involving a similar request in similar circumstances is persuasive.

[73] The disclosure sought in this application is the name of the 25 employers with the highest number of workplace accidents. This information is tabulated by WCB and is not supplied by the employers.

[74] The analysis of Justice Kelly in **Atlantic Highways Corp. v. Nova Scotia** (1997) 162 N.S.R. (2d) 27, is relevant. In that case a private company and the government had conducted negotiations for a proposed public/private toll highway partnership. Competitors of the private corporation sought disclosure of an agreement entered into between the parties. Atlantic Highways argued that it should not be disclosed as it contained proprietary information that would disclose details about how they conducted business. It was competing in New Brunswick for a new toll highway project against its competitors for the Nova Scotia project. Release of the agreement would compromise its negotiating position in other projects. Justice Kelly held that the information they sought to protect was so intermingled with government input, standards and proposals that it clouded anyone's ability to determine, as distinct and severable, any confidential information supplied by Atlantic Highways.

[75] If I am wrong (that is, the information is information supplied by third parties), resolution of the issue of whether the information was supplied in confidence is a more difficult and nuanced analysis.

[76] For this analysis Justice Bateman's approach in **Chesal** (¶ 76) is the appropriate analytical tool, keeping in mind Justice Cromwell's observation in **Dickie** that it is not enough that the information is marked "confidential", but, on the other hand, it is not necessary to establish that the supplier believed that it would never be revealed.

[77] A third helpful analysis is that of Justice MacKay in **Air Atonabee Ltd. v. Canada**, 1989 CarswellNat 585 (FC) ¶¶ 37 to 53. His analysis is summarized accurately in the head note as follows:

> Confidentiality involved an objective standard which took account of the content of the information, its purposes, and the conditions under which it was prepared and generated. Simply

> stating that it was confidential was not sufficient. On the other hand, potential harm to the third party was not part of the test nor, in a regulatory context such as this, was any argument that the release of the information of the information would compromise the department's ability to secure that information in future.
>
> . . .
>
> For information to be confidential, it must not be otherwise available to the public in the sense of other sources to which the public has access or of information that could be obtained by observation or independent study by a member of the public acting alone. Secondly, it had to have originated and have been communicated with a reasonable expectation of confidence. Thirdly, whether supplied mandatorily or gratuitously, it must have been communicated in a relationship between the government and the supplying party which was either a fiduciary one or not contrary to the public interest and the fostering of which would be a public benefit.

[78] McNairn and Woodbury write about this issue as it relates to the Federal legislation at page 4-5: "The information must be confidential in an objective sense, which will be determined principally by its content . . ., its purpose, and the conditions under which it was prepared and communicated," and meet three other conditions:

i) it is not available from other public sources or by observation or independent study;

ii) it originated or was communicated in a reasonable expectation of confidence; and

iii) it was communicated, whether gratuitiously or by compulsion, in a relationship, between government and the supplier, that was a fiduciary relationship or another relationship that was not contrary to the public interest and that would be fostered, for the public benefit, by confidentiality.

As an example, they suggest that in respect of an accepted public tender, the total price of the tender cannot reasonably be expected to be kept confidential, but maybe unit prices in the tenderer's proposal could be.

[79] Application of the seven **Chesal** factors leads me to the conclusion that the supply of Accident Reports by employers to WCB may properly be considered to have been supplied in confidence <u>with respect to some of their contents, but not with respect to the name of the employer or the fact that an accident occurred or the type of injury incurred.</u>

[80] The **WCA** does not contain an explicit statement of its purposes. It is clear from caselaw that the basic purpose of workers' compensation is to pay for costs associated with work related injuries. It guarantees that a worker injured on the job will receive medical treatment at no cost, periodic payments to replace lost wages, and permanent disability benefits if he or she cannot return to work. At the same time, it guarantees an employer who is mandated by law, or who choses to purchase workers' compensation insurance, that covered workers are barred from suing that employer. I agree with WCB that complementary to the purposes of the legislation is the taking of any other measures that would tend to reduce the incidence of workplace injuries;

WCB spoke in terms of education, coaching, the rate structure, warnings and surcharges to encourage stronger safety ethics and practices, and penalize poor safety records.

[81] Fundamental to a worker's ability to have the costs of his medical expenses paid and lost wages reimbursed is the requirement that any incident resulting in a workplace injury be reported.

[82] While it is easy to understand that some of the contents of an Accident Report may contain personal information for which privacy is the paramount priority, the fact of the accident is not something that one should expect, as a matter of common sense, viewed on an objective standard, would meet the narrowly interpreted entitlement to secrecy, where privacy trumps access. Other than the bald general assertion in affidavits that confidentiality was expected, there is no evidence upon which it is reasonable to expect confidentiality with respect to the fact that a workplace accident has occurred in a particular workplace.

[83] The internet excerpts of news articles in the Doreen affidavit which describe where and how workplace accidents occurred, in which articles WCB spokespersons comment on the accidents, suggest that the fact of an incident, the workplace and type of injury is not treated as confidential. As will be noted later in this decision, WCB's 2007 Annual Report and Employer Information Guide expressly state that it is the basic right of employees to know about hazards that affect their health and safety (Guide, p. 4), and WCB "envision[s] a province where customers are less inclined to buy products or support businesses that show no regard for safe work practices. And for employees, the safety of a workplace will be an important consideration in their choice of employment." (Report, p. 15)

[84] I agree with the Herald that WCB's Employer Registration Form contains nothing that expressly or by implication would lead an employer to believe that communications with WCB are in confidence. To the contrary, Section 5 of that form expressly states that WCB "is subject to, and complies with, the provisions of the **Freedom of Information and Protection of Privacy Act**"; that is, the principles in the **Act** apply to their relationship.

[85] The statements in the Accident Report from which a reasonable expectation of privacy may be inferred do not relate to the disclosure sought by the Herald. The statement in the "declaration and consent" portion, that is signed by the worker, simply gives the worker notice that personal information with regards to his medical health may be shared with health care professionals and government agencies as necessary to deal with his medical condition and treatment. The other statement deals with WCB's inability to accept reports by e-mail because of the insecurity of the internet. Neither relates to the disclosure of the names of employers with the workplace injuries.

[86] The fact that submission of an Accident Report is compulsory and vital to the purpose (and implementation) of the workers' compensation scheme does not lead to a reasonable expectation that the fact of an accident and the type of accident is information that will be treated as confidential.

[87] The legislation, which provides a scheme that most employers are obligated to join, and which other employers (the size and type of whose operations in comparison with those who are obligated to enroll are not before the Court) join for other reasons, is indicative of a program about which confidentiality in respect of all their dealings is not a central element. WCB submits that the scheme involves an educational component. WCB's 2007 Annual Report confirms this element of the scheme, and the rather poor workplace safety record of employers in Nova Scotia. No evidence supports the view that keeping the fact of workplace injuries, the type of injury or the names of workplaces with the poorest record secret will promote the purpose of the legislation.

[88] In the next portion of this decision further reference will be made to WCB's 2007 Annual Report. This Report contains public disclosure of much information with respect to the numbers, types and consequences of work place injuries.

[89] The most telling indication of WCB's subjective view that the names of employers with unsafe workplace practices are not to be treated as confidential is the statement at p. 15 of their 2007 Annual Report:

> We [WCB] want companies large and small to recognize that competition is fiercer than ever - for both customers and potential employees. And, like the environment today, we **envision** a province where customers are less inclined to buy products or support businesses that show no regard for safe work practices. And for employees, the safety of a workplace will be an important consideration in their choice of employment. (My emphasis)

How could this vision be implemented without disclosure of the names?

[90] In summary, WCB's Annual Report is contraindicative of its submission that the supply by employers of the facts and particulars of workplace injuries is made with a reasonable expectation of confidentiality with respect to the fact that these employers have a high incidence of workplace injuries.

G.4 Harm significantly employers' competitive position, or result in similar information no longer being supplied to WCB

First elements - Significant Harm to competitive position

[91] WCB argues that the test to be applied is:

a) per Bateman, J.A. in **Chesal**: less onerous than "could reasonably be expected to result in probably harm" but greater than "a bare possibility of harm" (¶ 37);

b) per MacKay, J.A. in **Air Atonabee**: "a foundation for finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived, but rather is reasonable" (¶ 56); and,

c) per Kelly, J. in **Atlantic Highways**: "more than the possibility of some loss . . . . that the information 'reasonably' be expected to 'harm *significantly*' or 'interfere *significantly*' . . . [implying] a logically and rationally based threshold of 'speculative proof' of 'harm' or damages of some substance." (¶ 45).

[92] CME-NS cites ¶ 45 in **Atlantic Highways** for the test.

[93] In its first brief, the Herald refers to the following for the test:

a) Justice Edward's adoption in **Shannex** of the **Atlantic Highways** test, including ¶ 46 where Kelly, J. wrote that while "the release of the information may be expected to cause one or both of the categories of harm to AHC, they [AHC] have not satisfied me on the evidence to the extent that is required by subsection 21(1) that there is a sufficient prospect of the degree of harm that is contemplated by that subsection."; and,

b) Pickup, J.'s adoption, at ¶ 59 in **Fuller** ,of the Supreme Court of Canada's statement in **Lavigne v. Canada** 2002 SCC 53: "there must be a clear and direct connection between the disclosure of specific information and the injury that is alleged."

[94] In its supplementary brief, the Herald refers the Court to **Ottawa Football Club v. Canada** (1989) 24 F.T.R. 62 to the effect that the test is the reasonable prospect of probable harm, a test adopted by the Supreme Court of Nova Scotia but rejected by the Court of Appeal in **Chesal**.

[95] WCB argues that while the purpose of the **Act** is to hold public bodies accountable, disclosure of the requested information on the basis (as found by the Review Officer) that it would enable people to make informed decisions about where to work based on workplace safety, is an error in analysis. Disclosure would not hold WCB accountable or enable persons to make informed decisions about workplace safety but rather it would have the potential to embarrass unfairly 25 employers.

[96] WCB argues that logically the employer with the biggest workforce has the potential to have a higher number of workplace injuries. This does not necessarily reflect on the employer's safety culture. There is no guarantee that the released information would be put in a fair context.

[97] Second, occupational health and safety issues are complex and the presence of an employer on the "top 25" list may be unrelated to safety procedures of that employer. Disclosure "could cause potential damage to an employer's reputation and its continued viability as a business" and "the unfair embarrassment" can reasonably be expected to result in significant

harm to their competitiveness position for two reasons: (i) their ability to attract employees with skills because a reasonable employment seeker is likely to be dissuaded from applying at a workplace with a perceived inadequate safety record; and (ii) unfair competitive position because competitors would use the poor performance (and presumably higher WCB premium rate) to undercut employers with poor workplace safety performances.

[98] Finally, release of the names would likely dissuade reasonable customers from buying services and products from an employer with a poor safety rating.

[99] CME-NS argues that the "top 25" employers will be unfairly associated with the stigma of an unsafe work place because "many claims are unrelated to actual accidents but can also be attributed to many other [unrelated] means", and may result in an inability to attract employees and do business.

[100] In its first brief, the Herald argues that the fact that the information sought is no longer current is relevant. In the **Ottawa Football Club** case at ¶ 15 the Court held it difficult to believe that the injury could be causally linked to disclosure of three year old information.

[101] The Herald further argued that if the **Shannex**, **Atlantic Highways**, and **Fuller** factual matrices did not meet the threshold test of disclosure causing significant harm to a company's competitive position, the release of the names of the 25 employers in these circumstances would not meet the threshold.

[102] In its reply brief, the Herald submits that simply alleging that disclosure of the names could affect their ability to attract employees, or could permit competitors to determine their WCB rates and undercut their prices, or deter potential customers because of a perceived unsafe workplace, without producing "any relevant and compelling evidence that would give rise to a logically and rationally based threshold of speculative proof" in support of these allegations, is not sufficient. Without evidence it is pure speculation.

[103] Finally, the Herald argued that there was no evidence tendered that expressly or inferentially could give rise to a conclusion that any possible harm would be significant.

Analysis

[104] Relevant evidence on this issue is found in WCB's 2007 Annual Report and WCB's Employer Information Guide, attached to Mr. Field's affidavit. The evidence includes:

i) "Nova Scotia has among the highest rates of work place injuries in Canada." (Guide, p. 1) From among 300,000 insured workers, there were 34,017 registered accident claims in 2005, 31,810 in 2006, and 32,038 in 2007. (Report, p. 1)

ii) Employers in Nova Scotia pay the second highest rates in Canada at $2.65 per $100.00 of payroll. (Guide, p. 1; Report, p. 59 and 60)

iii) WCB is one of only three underfunded WCBs in Canada (second worst only to Ontario) with over $400 million of unfunded liabilities, and growing. (Report, p. 49)

iv) "The cost of workplace injury insurance in Nova Scotia is driven, in large part, by the claims cost experience of a relatively small number of employers." (Report, p. 13)

v) As noted earlier, 12 employers in 2007 accounted for 5,980 or 18.67% of the number of new claims registered in 2007 and the 41 employers with the next highest number of new claims registered 9,930 or 30.99% of the total new claims registered (Report, p. 62). Fifty-three of the 18,508 registered employers accounted for about 50% of reported injuries. The Report does not disclose how much of the $8.2 billion total assessable payroll they represent.

vi) Employees have a "basic right to know about hazards that affect their health and safety". (Guide, p. 4)

vii) WCB instituted the "Priority Employer Program" to offer coaching services to workplaces with the greatest opportunity to improve their safety performance. (Report, p. 13)

viii) Under the "Safety Incentive Program", in 2007, for the first time (and after two years of warning notices) WCB issued surcharges to 79 employers with claims cost experience at least 200% worse than their industry peers for four consecutive years. In addition, 80 employers received notice that without improvement, they would be surcharged in 2009 and further 162 were notified they could see a surcharge in 2010 if their safety and return to work performance does not improve. (Report, p. 13 and 24)

ix) "We [WCB] want companies large and small to recognize that competition is fiercer than ever - for both customers and potential employees. And, like the environment today, we envision a province where customers are less inclined to buy products or support businesses that show no regard for safe work practices. And for employees, the safety of a workplace will be an important consideration in their choice of employment." (Report, p. 15)

x) "Preventing work-related injury is the WCB's number one priority." (Report, p. 24 and 25)

xi) "Reducing work-related disability by reducing workplace injury and improving the rate of safe and timely return-to-work requires addressing socio-economic factors related to work place safety. These factors included attitudes and behaviours . . . regarding the prevention of work place injury and the importance of safe and timely return-to-work following a workplace injury." (Report, p. 42)

xii) "Nova Scotia has an unacceptably high rate of workplace injury. On average, more than two dozen Nova Scotians are injured every day and someone dies on the job every two weeks." (Guide, p. 1)

[105] In response to WCB's concern that the disclosure may unfairly embarrass the named employers, the Herald filed a supplementary affidavit of Dan Leger outlining the Herald's track record and policy of following ethical guidelines for impartiality, completeness, and contextualizing in accord with responsible journalism. I note that the four other requests made of WCB by the Herald would provide fair context for the one refused. From the Annual Report, it is clear that if WCB does not have the size of the workforces (request #2) it does have their respective total assessable payrolls, and if WCB does not have their respective safety rating compared to their industry average (request#5) they clearly have calculated their claims cost experience in comparison with their industry peers (Report, p. 13).

[106] Nothing in the **Act** exempts the Herald, or any other recipient of the disclosure, from liability under the well-established torts of defamation, injurious falsehood, deceit, or negligence, whether or not **Qusson v. Quan** 2007 ONCA 771 (recently followed in **Grant v. Torstar** 2008 ONCA 796) is confirmed, modified, or overturned by the Supreme Court of Canada as a result of the hearing scheduled for January 13, 2009.

[107] More important to this analysis, no evidence substantiated the argument that the number of incidents suffered at the workplaces of the 25 employers with the highest number of accidents was not related to "attitudes and behaviours towards workplace safety" or was for any reason unrelated to workplace safety and attitudes and behaviours in respect thereof. There is no evidence that disclosure of the names of the 25 employers would be unfair.

[108] Generalized nonspecific statements in some affidavits opined that employers named would suffer a stigma and could be hindered in attracting employees, or competing with peers who have a better safety rating and therefore lower WCB rates, or in attracting customers. These opinions do not meet the threshold of speculative proof of significant harm. In this context, I understand 'significant' to mean important, and more than temporary or short term.

[109] In this analysis I have relied upon a series of decisions from New Brunswick and the Federal Court culminating in the statement of the Supreme Court of Canada in **Lavigne v. Canada**, adopted by Pickup J. in **Fuller**, that there must be a clear and direct connection between the disclosure of the specific information and the injury that are alleged.

[110] Although specifics were not put in evidence, I accept that there are more reasons than simply than an employer has a poor attitude to workplace safety that may affect the number of workplace injuries. As argued, it may simply be that the employer has a very large workforce in comparison to the other 15,507 employers. I would assume that, even though Nova Scotia's WCA does not require employers in many lower-risk industries to participate (WCB's 2007 Annual Report, page 41, and Counsel's oral submission), not all employment involves the same risk to employees; that is, some employers' work activities are inherently more risky. This may be by reason of both the nature of the job, and the extent to which an employer cannot fully control the elements or environment in which the work takes place.

[111] I fail to understand how employers whose names might be disclosed by reason that they have very large workforces, or are involved in inherently risky industries, should be embarrassed by disclosure, unless their incidence of workplace injuries is worse than their competitors.

[112] I accept that the disclosure of the names of the 25 employers with the most workplace accidents could embarrass them. It should only stigmatize them if they can improve their safety record and do not do so. To stigmatize means to attach a label of disgrace. It is not a disgrace to be a very large employer or to be in an industry that is inherently risky. I reject this as unsubstantiated and purely speculatively that any such embarrassment would, or should, be permanent (the respondents' word) or long term, or that it would or should significantly harm their competitive position. On the contrary, disclosure should encourage a workplace with a comparatively poor safety record to improve its safety record, and logically should make that employer more competitive in terms of attracting employees, reducing its WCB rate, and attracting customers. It can only be reasonably expected to affect them in the long term if they do not respond to the serious workplace safety problem in Nova Scotia, which WCB's Annual Report says is in large part caused by a relatively small number of employers (page 13) - incredibly, only 53, out of 18,508 total registered employers, have been the source of 49.66% (15,910) of new registered injury claims in 2007.

Second element - Similar information no longer being supplied to WCB

[113] WCB argued that about 25 to 30% of the 18,000 registered employers are not required to register, because they are not employers of more than 2 employees or do not conduct the types of business required by law to participate in the scheme. There is no evidence as to the size or types of operations carried on by these "voluntary" registrants, except WCB's Annual Report at page 41 where it states that, "unlike some jurisdictions, Nova Scotia does not cover many lower-risk industries", or the reasons that they register their businesses with the workers compensation scheme. There is no evidence as to how many of the 300,000 insured workers originate from employers not required to participate. There was no evidence as to whether any of the "voluntary" registrants are amongst the 25 employers with the most workplace injuries, or the small number (53) who account for 49.66% of injuries, or the 79 employers who have been issued surcharges for having "claims cost experience" over four consecutive years 200% worse than industry peers, or the other 242 who have been issued warnings of impending surcharges (Annual Report, pp. 13 and 24).

[114] Obviously, the vast majority of employers (about 14,000) employing the vast majority of workers, are obligated to participate in the scheme. The compulsory participants are in the higher-risk industries. All participants are obligated to provide the information under the legislation. It would call for pure speculation, not supported by any evidence, to conclude that WCB would not continue to receive information from those "voluntary" registrants in the absence of any evidence that they might be among those with the poorest safety records. Furthermore, without evidence as to why employers who are not compelled to participate do participate, there is no foundation for reasonable speculation that they may withdraw from the scheme.

[115] Of concern is the fact that WCB's 2007 Annual Report recognizes that reduction of Nova Scotia's "unacceptably high rate of workplace injury" requires addressing attitudes and behaviours. To encourage this, WCB itself not only provides incentives such as coaching through the "Priority Employer Program" and other educational and information programs - the soft approach, but also imposes warnings and surcharges under the "Safety Incentive Program" for poor performers - a hard approach. I fail to understand how disclosure could have an adverse effect on participation by employers not compelled to participate, that the imposition of surcharges (a direct attack on the employer's pocketbook) has not, or would not, have.

[116] The subsection - 21(1)(c)(ii) dealing with the cutoff of similar information includes the clause: "when it is in the public interest that the information continue to be supplied." The reference to public interest makes s. 31 of the **Act** relevant. Section 31 overrides all other sections in the **Act**. It says in effect that WCB may disclose information "(a) about a risk of significant harm . . . to the health or safety of the public or a group of people; or (b) the disclosure of which is, for any other reason, clearly in the public interest".

[117] WCB's Annual Report says that it envisions a province where customers are less inclined to buy products and support businesses, and employees are less inclined to consider employment opportunities with employers, who have poor workplace safety records.

[118] WCB's Annual Report and Employers Guide emphasize that Nova Scotia's performance in respect of workplace safety is one of the worst in the country, WCB's liabilities are seriously underfunded, and WCB sees that the effort to reduce the number of people hurt on the job is very difficult because it is, to a large extent, out of their control and within the control of those in the workplace itself.

[119] In (i) the context of WCB's recognition of the risk of significant harm to health or safety in Nova Scotia's workplaces, and (ii) the obvious public interest in reducing the number of workplace injuries, and (iii) their recognition that it is a "basic right" of employees to know about the hazards that affect their health and safety, and (iv) in light of s. 31 of the **Act**, it is difficult to understand how the public interest is better served by non-disclosure of the requested information, because of the possibility that some voluntary participants, whose reasons for being in the scheme and the effect upon whom of the requested disclosure is unknown, might withdraw. The concerns and objectives in WCB's Annual Report are contraindicative of their position in this appeal.

[120] On the evidence before this court, the public interest - both in terms of:

i) the longer term impact of disclosure on the future conduct of the relatively small number of employers who are largely responsible for giving Nova Scotia one of the highest rates of workplace injuries in Canada - a matter of significant harm to the health and safety of workers; and

ii) the “basic right” of employees and potential employees to know about the hazards that affect their health and safety

is clearly better served by disclosure than the possibility that some voluntary participants might withdraw (which the evidence has not established).

H. **Conclusion**

[121] In summary,

a) The disclosure of the names of the 25 employers with the highest number of workplace injuries over a three year period will not disclose personal information about injured workers that could constitute an unreasonable invasion of their personal privacy per s. 20 of the **Act**.

b) The disclosure of the names of the 25 employers (I) would reveal labour relations information about the 25 employers, but (ii) would not reveal information supplied by the employers, or, if I am wrong, the information for which access is sought was not supplied with a reasonable expectation of confidentiality, and furthermore, (iii) disclosure of the names of the 25 employers could not reasonably be expected to harm significantly their competitive positions, or result in similar information no longer being supplied to WCB when it is in the public’s interest that it be supplied, per s. 21 of the **Act**.

[122] The Herald’s application is granted.

[123] If the parties cannot agree on costs, they are invited to address the Court.

J.

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax Herald Ltd.* v. *Nova Scotia (Workers' Compensation Board*), 2008 NSSC 369

Date: 20081208
Docket: 297753(A)
Registry: Halifax

Between:

The Halifax Herald Limited

Appellant

v.

The Workers' Compensation Board of Nova Scotia

Respondent

- and -

Canadian Manufacturers and Exporters Association of Nova Scotia

Intervenor

Erratum:	June 8, 2009
Judge:	The Honourable Justice Gregory M. Warner
Heard:	October 23 and 24, 2008, in Halifax, Nova Scotia
Counsel:	Cory J. Withrow, counsel for The Halifax Herald Limited ("**Herald**"), appellant David P. S. Farrar, Q.C. and Richard M. Dunlop, counsel for the Workers' Compensation Board of Nova Scotia ("**WCB**"), respondent Daniel W. Ingersoll and Andrew D. Taillon, counsel for Canadian Manufacturers and Exporters Association of Nova Scotia ("**CME-NS**"), intervenor

By the Court:

[1] In Paragraph 3, subsection 21(a)(ii) should read subsection 21(1)(a)(ii) and subsection 21(c)(2) should read subsection 21(1)(c)(ii)

J.