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ARTICLES

WHEN CONTRACT NEGOTIATIONS NO LONGER PROTECT YOUR BUSINESS INTERESTS: THE STRANGE WORLD OF THIRD PARTY BUSINESS INTERESTS UNDER FREEDOM OF INFORMATION LEGISLATION

EMIR ALY CROWNE-MOHAMMED*

I. INTRODUCTION

Freedom of information legislation is designed to promote just that – access to governmental information. The *Freedom of Information and Protection of Privacy Act* of British Columbia (“BC Act”) is no different. The BC Act views access to governmental information as promoting democracy, transparency, and citizenry, thereby making “public bodies more accountable to the public and . . . protect[ing] personal privacy by . . . giving the public a right of access to records”¹ *inter alia*.

The right to access governmental information, however, is not unfettered. There are certain protected instances where the public good may

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1. Freedom of Information and Protection of Privacy Act, R.S.B.C., ch. 165, § 2, sched. 1 (1996), available at http://www.bclaws.ca/Recon/document/freeside/-%20F%20-%20Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20%20RSBC%201996%20%20c.%20165/00_Act/96165_01.xml (emphasis added) [hereinafter FIPPA]. Under the BC Act, “records” are defined broadly to include “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.” *Id.*

actually be harmed by undue access to governmental information such as policy recommendations developed by or for a Minister, legal advice, or disclosures harmful to law enforcement or individual safety.² Therefore, an applicant requesting a record may receive a redacted copy of the contract that only exposes the information that is not exempt under the BC Act.³

The focus of this article is section 21(1) of the BC Act, entitled “Disclosure harmful to business interests of a third party,” which provides that:

The head of a public body must 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 or about 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.⁴

II. LAW AND JURISPRUDENCE

Section 21(1) is most often triggered when public bodies enter into outsourcing arrangements or similar types of contracts with private third

2. The BC Act sets out the following exceptions: cabinet and local public body confidences (sec. 12); policy advice or recommendations (sec. 13); legal advice (sec. 14); disclosure harmful to law enforcement (sec. 15); disclosure harmful to intergovernmental relations or negotiations (sec. 16); disclosure harmful to the financial or economic interests of a public body (sec. 17); disclosure harmful to the conservation of heritage sites, etc; (sec. 18) disclosure harmful to individual or public safety (sec. 19); information that will be published or released within sixty (60) days (sec. 20); disclosure harmful to business interests of a third party (sec. 21); disclosure harmful to personal privacy (sec. 22); and disclosure of information relating to abortion services (sec. 22.1).

3. For instance, section 23 of the BC Act (entitled “Notifying the third party”) sets out the parameters and timelines for the Government to notify a “third party” that some, or all, of their information may be subject to disclosure; and to provide them with a window of time to object.

4. FIPPA, *supra* note 1 at ch. 165, § 2, sched. 21(1).

parties.⁵ Applicants requesting access to a governmental record will also expose third party business interests due to the nature of the outsourced obligations.⁶ The burden will always rest with the third party to demonstrate that the information in question satisfied all three limbs of the statutory provision, namely, that: (1) it was sensitive business information; (2) *supplied* in confidence; and (3) that would result in a loss of competitiveness (whether in terms of negotiating leverage, or overall marketplace/economic competitiveness).⁷ It is the term “supplied” that will receive the bulk of the attention in this article. The aim is to show that both the British Columbia Information and Privacy Commissioner (the “Commissioner”) and the British Columbia Courts (“BC Courts”) have interpreted and applied the term in an artificial, arcane, and unreasonable manner.

It should be noted that public bodies themselves are often protected through other provisions in the BC Act. Thus, insofar as the public bodies’ interests are protected from public disclosure, there is little incentive to protect the third party’s legitimate business interests. For instance, section 17 of the BC Act is drafted with considerable discretion and deference to Governmental interests:

(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia *or the ability of that government to manage the economy*, INCLUDING the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

5. See University of British Columbia, Order 03-02 (2003), available at <http://www.oipcbc.org/orders/2003/Order03-02.pdf>. It discusses access to a University’s records for the on-campus supply of goods and services for a review. *Id.*

6. See University of British Columbia, Order F09-04 (2009), available at <http://www.oipcbc.org/orders/2009/OrderF09-04.pdf>. It relates to the disclosure of the Ministry of Provincial Revenue’s revenue management contract with EDS Advanced Solutions Inc. (where part of the Province’s revenue management and collection functions were outsourced to EDS Advanced Solutions).

7. *Id.*

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.⁸

Additionally, the term “supplied” has been feverishly interpreted to mean information provided by a third party that was *not* negotiated. For instance, in Order 03-04, the Commissioner held that when an agreement is negotiated between a public body and third party, any information disclosed will not qualify as information “supplied” to the public body.⁹ In the same order, the Commissioner, however, carved out an exception stating that, “the exceptions to this tend to be information that, though in a contract between a public body and a third party, is not susceptible of negotiation and change and is likely of a proprietary nature.”¹⁰

8. Freedom of Information and Protection of Privacy Act, 1996, 165 R.S.B.C., § 2, sched. 17 (Eng.), available at http://www.bclaws.ca/Recon/document/freeside/—%20F%20—/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20%20RSC%201996%20c.%20165/00_Act/96165_01.xml.

9. OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 03-04 para 30 (2003), available at <http://www.oipc.bc.ca/orders/2003/Order03-04.pdf> [hereinafter ORDER No. 03-04]. See also OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 01-39 (2001), available at <http://www.oipc.bc.ca/orders/2001/Order01-39.html> [hereinafter ORDER No. 01-39]; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 01-40 (2001), available at <http://www.oipc.bc.ca/orders/2001/Order01-40.html>; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 03-03 (2003), available at <http://www.oipc.bc.ca/orders/2003/Order03-03.pdf> [hereinafter ORDER No. 03-03]; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 03-15 (2003), available at <http://www.oipc.bc.ca/orders/2003/Order03-15.pdf> [hereinafter ORDER No. 03-15]; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 04-06 (2004), available at <http://www.oipc.bc.ca/orders/2004/Order04-06.pdf> [hereinafter ORDER No. 04-06]. The BC Courts have also embraced this interpretation on judicial review. See *Jill Schmidt Health Serv. Inc. v. British Columbia (Information and Privacy Commissioner) et. al.*, [2001] B.C.S.C. 101 (Can.) available at <http://www.courts.gov.bc.ca/jdb-txt/sc/01/01/2001bcsc0101.htm>. Other courts have also adopted a similar interpretation as well. See *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] 200 O.A.C. 134 (Can.), available at <http://www.canlii.org/en/on/onscdc/doc/2005/2005canlii24249/2005canlii24249.pdf>; *Canada Post v. Canada (Minister of Public Works)*, [2004] F.C. 270 (Can.), available at <http://www.canlii.org/en/ca/fct/doc/2004/2004fc270/2004fc270.html>; *Canada (Minister of Public Works and Government Serv.) v. Hi-Rise Group Inc.*, [2004] 238 D.L.R. (4th) 44 (Can.), available at <http://www.canlii.org/en/ca/fca/doc/2004/2004fca99/2004fca99.html>.

10. ORDER No. 03-04, *supra* note 9. See also ORDER No. 01-39, *supra* note 9; B.C.I.P.C.D. No. 40, ORDER No. 03-03, *supra* note 9; B.C.I.P.C.D. No. 3; ORDER No. 03-15, *supra* note 9; ORDER No. 04-06, *supra* note 9. The BC courts have also embraced this interpretation on judicial review, see *Jill Schmidt Health Services Inc.*, [2001] B.C.J. No. 79, *supra* note 9 (upholding ORDER No. 00-22 (2000) B.C.I.P.C.D. No. 25); *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848, 2002 BCSC 603 (upholding ORDER No. 01-39). Other courts have also adopted a similar interpretation as well. See *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851; *Canada Post v. Canada (Minister of Public Works)*,

This narrow interpretation of the term “supplied” appears to have been imported into British Columbian law by the Commissioner in 1994.¹¹ At that time, the Ontario Information and Privacy Commissioner had already reviewed the applicability of the third party business information exception (section 21(1) in the British Columbia legislation), and determined that for information “supplied” by the third party to a public body, the information must be the same as that originally provided by the affected person.¹²

Although the Commissioner extended the Ontario interpretation to British Columbia at that time, the Commissioner cautioned that, “a strict application of this interpretation could produce results that were not intended by the legislators.”¹³ As will be discussed later in this work, the entire rationale for this interpretation is flawed because it ignores the purpose of the BC Act and the realities of competitive bidding.

It then took another seven years before the Commissioner set forth a more extensive discussion of the term “supplied.” In Order 01-39, the Commissioner noted, “the fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied.”¹⁴

[2004] F.C.J. No. 415 (TD) *affirmed* [2004] F.C.J. No. 2016 (CA); Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc., [2004] F.C.J. No. 468 (C.A.).

11. In Order No. 26-1994, a labor union sought access to a contract between the British Columbia Hydro and Power Authority and Westech Information Systems Inc. . OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 26-94 (1994), *available at* <http://www.oipc.bc.ca/orders/1994/Order26.html> [hereinafter ORDER No. 26-94].

12. Ministry of Environment and Energy, Ontario Order P-609, page 2 (January 12, 1994) (stating that since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been ‘supplied’ for the purposes of section 17(1) of the Act.). *See also* Re: Stadium Corporation of Ontario Limited, Ontario Order P-263, page 17 (January 24, 1992). “The information contained in these records was the result of negotiations between the institution and the affected parties and does not consist of information ‘supplied’ by the affected parties to the institution. In addition, I cannot conclude that disclosure of the records would permit the drawing of accurate inferences about information actually supplied to the institution by the affected parties, and, therefore, the institution and affected parties have failed to satisfy the second part of the section 17(1) test.” *Id.* *See also* ORDER No. 26-1994, *supra* note 11 (citing Ministry of Natural Resources, Ontario Order P-385, page 3 (December 18, 1992)). “It has been established that information which is the result of contractual negotiations between a governmental institution and an affected person, does not qualify as information which has been ‘supplied’, regardless of whether this information may have been treated confidentially.” *Id.*

13. ORDER No. 26-94, *supra* note 11.

14. ORDER No. 01-39, *supra* note 9. By their nature, contracts are negotiated between the contracting parties. *Id.* It is up to . . . the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of § 21(1)(b). *Id.* *See also* OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No.00-09 (2000), *available at* <http://www.oipc.bc.ca/orders/2000/Order00-09.html>;

In that same order, however, the Commissioner also acknowledged that information that might otherwise be considered ‘negotiated’ may be supplied in at least two circumstances.¹⁵ First, the information will be found to be supplied if it is relatively “immutable” or not susceptible of change.¹⁶ In other words, information may come from a single person and remain relatively unchanged, yet this does not necessarily mean that the information is “supplied.”¹⁷ Second, where disclosure of the information would allow a reasonably informed observer to draw accurate inferences about the underlying confidential information that was “supplied” by the third party, that is, about information not expressly contained in the contract.¹⁸

As noted earlier, this interpretation is narrow and unreasonable. Section 17(1) of Ontario’s Freedom of Information and Protection of Pri-

OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 00-22 (2000), *available at* <http://www.oipc.bc.ca/orders/2000/Order00-22.html>; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 00-24 (2000), *available at* <http://www.oipc.bc.ca/orders/2000/Order00-24.html>; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 00-39 (2000), *available at* <http://www.oipc.bc.ca/orders/2000/Order00-39.html>; OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. 01-20, para. 81-89 (2001), *available at* <http://www.oipc.bc.ca/orders/2001/Order01-20.html> [hereinafter ORDER No. 01-20]. The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not “supplied” if the other party must agree to the information or terms in order for the agreement to proceed. ORDER No. 01-39, *supra* note 9.

15. ORDER No. 01-20, *supra* note 14.

16. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be “supplied” within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be “supplied.” It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be “supplied” by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become “negotiated” information, since its presence in the contract signifies that the other party agreed to it.

17. ORDER No. 01-39, *supra* note 9 (emphasis added) (citing ORDER No. 01-20 (2001)). The intention of § 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily “supplied” within the meaning of § 21(1). *Id.* Most recently, in Order 01-20, Commissioner Loukidelis again stated that information provided by one party and accepted by another (as evidenced by its inclusion in the contract), is negotiated, not “supplied” information. *Id.*

18. ORDER No. 01-39, *supra* note 9 at 50.

vacy Act (the “Ontario Act”) deals with third party information.¹⁹ It states that:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.²⁰

On judicial review, the Ontario Superior Court of Justice has twice upheld the Ontario Information and Privacy Commissioner’s (the “Ontario Commissioner”) finding that “supplied” must refer to the non-negotiated aspects of outsourcing (and other) contracts. First, in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, where a labor union had requested details of sale between Boeing (and others) and the Government of Ontario’s Ministry of Economic Development and Trade, the Court upheld the Ontario Commissioner’s findings.²¹ The court stated that although the contract contained commercial, financial, and labor relations information, the information (as a whole) had not been “supplied” to the Ministry.²² Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the Ontario Commissioner

19. Freedom of Information and Protection of Privacy Act, R.S.O., ch. F 31 §17.1 (1990), available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90f31_e.htm.

20. *Id.*

21. The Commissioner’s approach in this case was consistent with the approach taken in other cases interpreting § 17(1). The Commissioner has consistently found that information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been “supplied.” *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] 200 O.A.C. at para. 18-19, 134 (Can.), available at <http://www.canlii.org/en/on/onscdc/doc/2005/2005canlii24249/2005canlii24249.pdf>. The Commissioner took the view that the records did not contain information which was supplied to the Ministry because the information was found in complex contracts which were the subject of agreement by a number of parties. *Id.*

22. *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] 200 O.A.C. 134 (Can.), available at <http://www.canlii.org/en/on/onscdc/doc/2005/2005canlii24249/2005canlii24249.pdf>.

concluded that the information was not “supplied.”²³ It has also been held that even a bid or proposal that was furnished in response to an RFP or tendering process is not necessarily ‘supplied’, especially if the bid is successful.²⁴

Then, in *Canadian Medical Protective Assn. v. John Doe*, the Ontario Superior Court of Justice again reviewed the adjudicator’s decision (based on the standard of “reasonableness”).²⁵ The case concerned a request to obtain details of a membership fee arrangement between the Canadian Medical Protective Association and the Ontario Medical Association.²⁶ Here, the Court upheld the adjudicator’s decision regarding the section 17(1) disclosure, stating “as a general rule, information in a contract will be considered ‘mutually generated’ as opposed to ‘supplied’ unless it can be shown that the information would reveal information actually supplied by the third party.”²⁷

23. *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] 200 O.A.C. at para. 18-19, 134 (Can.), available at <http://www.canlii.org/en/on/onscdc/doc/2005/2005canlii24249/2005canlii24249.pdf>.

24. See ORDER NO. 03-15, *supra* note 9 at para. 66.

An RFP process aims to generate competitive proposals from qualified parties for the provision of goods or services to government. If all goes well, it leads to the government contracting with one, or more, of the proposing parties to provide the goods or services sought. It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor’s proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor’s proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been “negotiated” since their presence in the contract signifies that the other party agreed to them. *Id.*

25. *Canadian Med. Protective Ass’n v. Loukidelis*, [2008] D.L.R. (4th) 134, available at <http://www.canlii.org/en/on/onscdc/doc/2008/2008canlii45005/2008canlii45005.pdf>. The Adjudicator held that the parties had failed to meet their onus of proving that the information (except for Table 1) in the 2004 MOU was “supplied” under s. 17(1) for the following reasons:

- a) the 2004 MOU was an end product of a negotiation process, and sets out mutually agreed upon terms;
- b) disclosure of the 2004 MOU would not reveal, or permit the drawing of accurate inferences with respect to, any information actually supplied to the Ministry;
- c) Appendices 1 and 2 relate to and expand upon, the provisions of the main agreement, as they are not distinguishable from the main agreement for the purpose of the “supplied” issue;
- d) although the information in Appendix 2 may have been originally provided by the CMPA, the methodology has come to represent the negotiated intention of all the parties;
- e) Table 1, relating to a previous year (2002), was attached for the purpose of illustrating the format of future Tables, and the data within Table 1 was to be used for future calculations; therefore, it was supplied and not negotiated. *Id.*

26. *Id.* at para. 39.

27. *Canadian Med. Protective Ass’n v. Loukidelis*, [2008] D.L.R. (4th) 134, available at <http://www.canlii.org/en/on/onscdc/doc/2008/2008canlii45005/2008canlii45005.pdf>.

III. ANALYSIS

This narrow and stifling interpretation of “supplied” renders the section 21(1) exception (and the section 17(1) exception under the Ontario Act) meaningless and devoid of any air of commercial reality. All government contracts are negotiated. Short of a trade secret, or (perhaps) a proprietary pricing formula,²⁸ nothing would ever be “supplied” to the public body under this approach. The power imbalance in governmental contracting and negotiations is painfully evident, even for the most influential corporations. *Everything* is negotiated.

“Supplied” *must* be interpreted in a manner that permits even negotiated information to be withheld from public disclosure. The Supreme Court of Canada has expressly noted that:

When one interpretation can be placed upon a statutory provision which would bring about a *more workable and practical result*, such an interpretation should be preferred *if the words invoked by the Legislature can reasonably bear it*.²⁹

That is precisely the situation here. Public bodies outsource certain functions to third parties,³⁰ thereby enhancing the public good through the efficiency and competitiveness of the private sector. Thus, it is necessary that the interests of these third parties be protected under the BC Act’s exceptions.

Indeed, the Supreme Court of Canada has repeatedly endorsed a purposive approach to statutory interpretation. For instance, in *Verdun v. Toronto-Dominion Bank*, the court stated that:

Courts are obliged to determine the meaning of legislation in its *total context*, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the *courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate*.³¹

28. Even in this instance it is unclear if this would be protected, since the pricing formula itself might have been the subject of intense negotiation(s), or intense scrutiny (at the very least). *See supra* Order F08-22.

29. *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 (Can.) *citing* *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, per Estey J., at p. 284, *available at* <http://csc.lexum.umontreal.ca/en/2003/2003scc9/2003scc9.pdf> (emphasis added).

30. Like revenue management and the collection of outstanding fines or dues in Order F09-04. OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER, ORDER No. F09-04 (2009), *available at* <http://www.oipcbc.org/orders/2009/OrderF09-04.pdf> [hereinafter ORDER No. F09-04].

31. *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 (Can.), *available at* <http://csc.lexum.umontreal.ca/en/1996/1996rcs3-550/1996rcs3-550.pdf>. (quoting ELMER A. DRIEDGER, CONSTRUCTION OF STATUTES PG 131 (Butterworths 2d ed. 1983)) (emphasis in original).

Additionally, the court determined that an appropriate interpretation can be justified in terms of its plausibility, efficacy, and acceptability.³²

This is, of course, is an expansion of Professor Driedger's more concise statement that "today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."³³

Therefore, by examining the purpose of the BC Act (to make public bodies *more* accountable to the public),³⁴ it is clear that the rights, responsibilities, and protections afforded under the BC Act are not absolute and must be interpreted to give due regard to countervailing considerations and interests. Even Ontario's Act states that its purpose is:

to provide a right of access to information under the control of institutions in accordance with the principles that, (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific."³⁵

The Act recognizes that access to information is not an absolute right, but must be weighed against other competing considerations.

Given the enumerated exceptions under the BC Act, it must be interpreted so as to provide a *limited* right of access to information, and must be weighed against other countervailing interests. There is a balance that must be struck between making public bodies more accountable to the public and third parties' interests in protecting their information from unfair public disclosure. Currently, the interpretation of the word "supplied," skews this balance heavily in favor of the applicant, with little (if any) regard to alternative interpretations that give rise to a more workable and practical result.³⁶

In a recent decision, the Commissioner continues to disregard the balance that must be struck in interpreting and applying the BC Act.³⁷

32. *Id.*

33. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (Can.), available at <http://csc.lexum.umontreal.ca/en/1998/1998rcs1-27/1998rcs1-27.pdf> (quoting ELMER A. DRIEDGER, CONSTRUCTION OF STATUTES 87 (Butterworths 2d ed. 1983)). *But see*, Emir Crowne-Mohammed, *How Many Times Have You Been Cited By The Supreme Court*, 35 ADVOCATES' Q. 170-80 (2009) (discussing the subtle difference between Driedger and Sullivan's formulation of the modern approach.); *See also* Council of Haida Nation v. British Columbia (Minister of Forests), [1997] 153 D.L.R. (4th) 1 (Can.), available at <http://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2009/1997canlii2009.pdf>.

34. FIPPA, *supra* note 1 at sec. 2 (emphasis added).

35. Freedom of Information and Protection of Privacy Act, R.S.O., ch. F 31 §17.1 (1990), available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90f31_e.htm.

36. ORDER No. 03-04, *supra* note 9.

37. ORDER No. F09-04, *supra* note 30.

The Commissioner states that the BC Act:

should be administered with a clear presumption in favour of disclosure. . . [as] nowhere is the right of access more important for the accountability of public bodies to the public than in the arena of public spending through large-scale government outsourcing of public services to private enterprise. Businesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions.³⁸

This view is undoubtedly self-serving, since the BC Act clearly states that its purpose is “to make public bodies *more* accountable.”³⁹ Contrast this with Nova Scotia’s Freedom of Information and the Protection of Privacy Act (the “NS Act”) that is drafted in more absolute terms.⁴⁰ For instance, the purpose of NS Act is, “to ensure that public bodies are *fully* accountable to the public.”⁴¹

The Commissioner’s enthusiastic and partisan views that the BC Act has a “presumption in favour of disclosure,”⁴² ignores earlier criticism that section 17(1) of the BC Act was drafted permissively, and favorably, towards governmental interests.⁴³ The legislation does not require that any of the *government’s* information be “supplied” as to pre-

38. *Id.* at para. 18.

39. Freedom of Information and Protection of Privacy Act, 1996, R.S.B.C., c. 165, § 2, n. 1 (Eng.), available at http://www.bclaws.ca/Recon/document/freeside/—%20F%20—/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20%20RSBC%201996%20c.%20165/00_Act/96165_01.xml.

40. Freedom of Information and Protection of Privacy Act, 1993 S.N.S., ch. 5 (Can.), available at <http://www.gov.ns.ca/just/regulations/regs/foiregs.htm>.

41. *Id.* at § 2(a). See also *Shannex Health Care Mgmt. Inc. v. Nova Scotia (Health)*, [2004] NSSC 54, para. 54 (Can.), available at <http://decisions.courts.ns.ca/nssc/2004/2004nssc54.pdf>. Although, sub-section 2(a)(iii) does recognize that there are “limited exceptions to the rights of access.” *Id.*

42. ORDER No. F09-04, *supra* note 30.

43. Section 17 (1) states that:

The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia.
- (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

vent disclosure. Indeed, the government may simply “deem” it “financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value.”⁴⁴ The government’s interests are clearly well protected. There cannot be any presumption in favor of disclosure.

IV. CONCLUSION

Equity and the principles of natural justice demand that third party business interests be protected as well. Indeed, as it currently stands, the only *real* information that is exempted from disclosure under outsourcing arrangement is the government’s own information. Even pricing information is not immune from disclosure. Consider the decision in Order F08-22⁴⁵ concerning access to a housekeeping services agreement between the Fraser Health Authority and Sodexo MS Canada Ltd., where the Commissioner held that even pricing information had not been “supplied,” and could therefore be released to the applicant. Pricing information is undoubtedly *the* most sensitive aspect of an outsourced (or other) agreement. The steadfast and unreasonable interpretation of the word “supplied” has effectively silenced the section 21(1) provisions of BC Act. The Commissioner has completely ignored the reality of modern business and competitive bidding.

Therefore, it is only if the government body *deems* some (or most) of the third party’s business interests to also represent confidential governmental information will be protected. And, in outsourcing arrangements, often characterized by routine tension and problems, the vulnerability of the third party is heightened. Indeed, as interpreted by the Commissioner, BC’s Act leaves most of a third party’s business interests at the capricious and arbitrary whim of governmental bodies.

Furthermore, in allowing a more expansive reading of the word “supplied,” there is no risk of abuse by third parties, since it is grammatically situated in the midst of a three-part test. Namely, the head of a public body must 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 or about a third party,
- (b) that is supplied, implicitly or explicitly, in confidence, and

Freedom of Information and Protection of Privacy Act, 1996, R.S.B.C., c. 165, § 2, sched. 1 (Eng.), available at http://www.bclaws.ca/Recon/document/freeside/—%20F%20—/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20%20RSBC%201996%20%20c.%20165/00_Act/96165_01.xml.

44. *Id.* at 17(1)(b).

45. [2008] B.C.I.P.C.D. No. 40.

- (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.⁴⁶

Hence third parties must still satisfy the other two parts of the test. The rules of modern statutory interpretation demand that the Commissioner take a more purposive and practical approach to the definition of “supplied.” Courts too, on judicial review, should afford less deference to the views of the Commissioner, as the narrow approach to the word “supplied” is certainly unreasonable, unworkable, and devoid of the realities of modern contracting.

46. Freedom of Information and Protection of Privacy Act, R.S.B.C., c. 165, § 2, sched. 21(1) (1996), *available at* http://www.bclaws.ca/Recon/document/freeside/—%20F%20—/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20%20RSBC%201996%20%20c.%20165/00_Act/96165_01.xml.

