Access to Confidential Business Information in Government Files

John C. PEARSON*

* Director of Public Prosecution for Nova Scotia, Ministry of Justice, Halifax, Nova Scotia (as he then was, presently Crown Counsel, Crown Law Office — Criminal, Ministry of the Attorney General of Ontario, Toronto, Ontario).

In his most recent annual report,[1] the Information Commissioner of Canada describes the section of the federal *Access to Information Act*,[2] protecting information furnished to government by third parties as one of the legislation's "most used, abused and litigated exemptions". He then recommends the removal of mandatory protection for third party trade secrets and other confidential information and the adoption of a discretionary exemption available only where the party seeking to resist disclosure can establish that release of the information will cause harm. This paper presents a contrary view. It argues reasonable expectations of confidentiality should be respected by government and protected by the courts whether or not the party resisting access can show that disclosure of the information will cause harm.

I. SOME BASIC CONSIDERATIONS

Democracy in Canada has been enhanced by the enactment of freedom of information statutes. Information gathered at public expense should be made available to the public. Politicians and bureaucrats must not be permitted to use outdated or perverted notions of ministerial responsibility or Crown privilege to hide areas of government activity from the cleansing light of public scrutiny. Disclosure of government information facilitates informed public participation in policy formulation, promotes fairness in government decision-making and permits the airing and reconciliation of divergent views.[3]

The importance of the principle of open public access to government information is not diminished by acknowledging that it must admit to exceptions. National security, effective law enforcement, privacy and confidentiality concerns all require restrictions on the general right of access to government information. For example, the reasonable privacy expectations of the individual are constitutionally protected by section 8 of the *Charter of Rights and Freedoms*. Consequently, the federal *Privacy Act* and detailed personal information provisions in provincial freedom of information statutes protect the privacy of individuals with respect to personal information about themselves held by government.

The Supreme Court of Canada has ruled that commercial information devoid of personal content does not engage those aspects of individual liberty which the right of privacy guaranteed by the Charter is intended to protect.[4] Moreover, the bulk of business information in government hands is obtained from corporations, artificial persons created by the state that enjoy only those rights and powers conferred on them by operation of law. From its inception, a business corporation is subject to reporting requirements and its commercial activities are conducted in a regulated environment where a broad right to privacy cannot be reasonably expected.

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1. Annual Report of the Information Commissioner of Canada, J.W. Grace, 1993-94, Supply and Services, Ottawa at 26.

2. *Access to Information Act,* R.S.C. 1985, c. A-1, s. 20.

3. *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 s. 2.

4. *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161 (S.C.C.).

While those who provide valuable business information to government do not have a constitutionally guaranteed right to privacy with respect to that information, they do have a related claim to confidentiality. Those who report sensitive information to government for a specific purpose are entitled to expect the information will be used only for that purpose. The courts prevent the state from using personal information for unauthorized purposes[5] and, while the interests at stake are somewhat different in the context of commercial information, the public interest in upholding reasonable expectations of confidentiality is similar. Full and candid reporting is encouraged when the person furnishing the information does so with assurance that providing the information will not result in unexpected prejudice.

A great deal of business information contained in government files is not obtained through mandatory reporting requirements or as a consequence of government's role as a licensor or regulator of commercial activity. Government amasses reams of business information in the course of its involvement in the marketplace, as a consumer of goods and services, a revenue collector, a subsidizer, a lender or an economic planner. The secrecy surrounding this information is rooted in the competitive characteristics of the marketplace. Like other commercial assets, information has a commercial value which has been traditionally protected through secrecy by public and private enterprise alike. Assumptions of good faith and fair commercial practice create reasonable expectations that commercial confidences will be respected. There is a substantial public interest in meeting these expectations because of the significant role business information plays in the economy. Protecting commercial confidentiality encourages the investment of resources to develop socially useful information. It also prevents others from reaping where they have not sown.[6]

II. THIRD PARTY INFORMATION EXEMPTIONS

In recognition of the public interest in protecting the confidentiality and commercial value of certain types of information, government information access statutes contain "third party information" exemptions. These provisions uniformly prohibit the disclosure of third party trade secrets. There are jurisdictional variations in the protection extended to other forms of confidential commercial information. The federal *Access to Information Act* prohibits disclosure of confidential financial, commercial, scientific or technical information supplied to government by a third party and treated consistently in a confidential manner by the third party.[7] In addition, the federal legislation provides that access must be denied to any information, whether or not it is confidential, if disclosure of

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5. *R.* v. *Colarusso* (1994), 87 C.C.C. (3d) 193 (S.C.C.).

6. In *Civil Liability For Taking Or Using Trade Secrets In Canada* (1981) 5 Can. Bus. L.J. 253, Prof. D. Vaver reviews the doctrinal basis for protecting confidential information. He concludes the prevalent modern view is that claims for protection from the wrongful acquisition of confidential information sound either in contract or equity. He recognizes that support also exists for protection through a tort developed from the action of conversion or through the application of property concepts to confidential information.

7. *Supra* note 2 at s. 20(1)(b).

that information could reasonably be expected to result in "material" financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party.[8] The federal legislation also prohibits disclosure of information, whether or not it is confidential, if to disclose the information could reasonably be expected to interfere with contractual or other negotiations of a third party.[9]

Government information access legislation in Ontario[10] and Nova Scotia,[11] on the other hand, extends third party information exemptions to scientific, technical, commercial, or labour relations information only where it has been provided by the third party in confidence, implicitly or explicitly, and where disclosure could reasonably be expected to result in specified harm. These provincial statutes oblige the custodians of government files to refuse to disclose trade secrets but access to other confidential commercial information is prohibited only if disclosure of the information is likely to (1) harm the competitive position or interfere with the negotiating position of a third party, (2) result in similar necessary information no longer being supplied to government, or (3) result in undue financial loss or gain to any person or organization.

Recognizing a third party exemption based on the confidentiality of the information furnished does not necessarily preclude access where the public interest in disclosure is greater than the interest of the third party in confidentiality. Most government information access legislation contains a "public interest override". Subsection 20(6) of the federal *Access to Information Act* confers on government officials a discretion to disclose otherwise exempt information if disclosure will be in the public interest as it relates to public health, public safety or protection of the environment and if the public interest in disclosure clearly outweighs in importance the third party interest protected by the exemption. Ontario's legislation has a similiar override.[12] Surprisingly, Nova Scotia's recently revised freedom of information legislation no longer contains a public interest override.

III. "CONFIDENTIAL INFORMATION" AS DEFINED BY THE COURTS

A basic principle enshrined in all Canadian government information access legislation is that decisions on the disclosure of government information should be reviewed independently of government. In support of this principle, the statutes establish

8. *Ibid.* s. 20(1)(c).

9. *Ibid.* s. 20(1)(d).

10. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31, s. 17.

11. *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 21. See also G.A. Huscroft, *The Freedom of Information and Protection of Privacy Act: A Roadmap for Requesters* (1990) 11 Advocates' Q. 436.

12. *Supra* note 9, s. 23. See *Right to Life Assn. of Toronto Area* v. *Metropolitan Toronto District Health Council* (1992), 86 D.L.R. (4th) 441 (Ont. Div. Ct.).

judges as the final arbiters of whether or not requested third party information will be disclosed where disclosure is contested. Judicial interpretations of the third party exemptions have placed conditions and qualifications on the exemptions not found in the legislation. In particular, the confidential information exemption provided by section 20(1)(b) of the federal *Access to Information Act* has been significantly narrowed by the application of concepts borrowed from American jurisprudence and evidence law.

The first judicial examination of the federal *Access to Information Act* required consideration of the meaning of "confidential information". In *Re Maislin Industries and Minister For Industry, Trade And Commerce, Regional Economic Expansion*[13] the central question was whether information contained in a consultant's report on a transport company being considered by government for multi-million dollar loan guarantees was "confidential" within the meaning of the legislation. In approaching this issue, Associate Chief Justice Jerome developed two interpretive propositions flowing from the basic principle that the purpose of the statute is to codify the right of public access to government information. The first, is that public access should not be frustrated by the courts except upon the clearest grounds and the second, is that the burden of persuasion rests upon the party resisting disclosure.

On the crucial issue of the meaning to be applied to the term "confidential information", Jerome, A.C.J. accepted the submission of the requester that confidentiality should not be determined on the basis of the subjective view of the third party, but rather in accordance with an objective test. The requester proposed the test applied by the United States Court of Appeals in the case of *National Parks and Conservation Association* v. *Morton et al.,*[14] which looks to the effects of disclosure to determine if the information is "confidential". Under this test, information is only confidential if disclosing it will impair the government's ability to obtain similar information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained.

In dismissing the application to prevent disclosure, Jerome, A.C.J. concluded:

> *Paragraph 20(1)(b) establishes a twofold test: (1) the information contained in the record must be confidential in its nature* and *(2) this information must be consistently treated in a confidential manner by the third party* (Maislin). *There is no disagreement on the fact that Maislin treated the material in a confidential manner, thus fulfilling the second requirement, but the applicant failed to persuade me that any of the objective standards to which I have referred the information was confidential in its nature.*[15]

Since the only objective standards referred to in the decision are those articulated in the *National Parks* case, it appears the Associate Chief Justice adopted a test significantly narrowing the confidential information exemption. The language of section

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13. *Re Maislin Industries Ltd. and Minister For Industry, Trade And Commerce, Regional Economic Expansion,* [1984] 1 F.C. 939, 8 Adm. L.R. 305, 10 D.L.R. (4th) 417.

14. *National Parks and Conservation Association* v. *Morton et al.,* 498 F.2d 765 (D.C. Cir. 1974).

15. *Supra* note 13 at 423.

20(1)(b) focuses on the manner in which government and the third party treat the information, but the test emerging from the *Re Maislin* case requires the party resisting disclosure to establish that access to the information will result in negative effects either to the information gathering process or to the competitive position of the person supplying the information. This approach builds into section 20(1)(b) a consideration separately addressed in section 20(1)(c) of the Act.

The "objective test" fashioned by Jerome, A.C.J. in *Re Maislin* was applied by the Honourable Mr. Justice Dubé in *Re Noel and Great Lakes Pilotage Authority Ltd.; Dominion Marine Association and its Constituent Members, Third Party*.[16] At issue was disclosure of the identity of marine officers not subject to compulsory pilotage on the Great Lakes. The shipowner's association sought to prevent disclosure of this information on the grounds it was confidential information protected from disclosure by section 20(1)(b). Dubé, J. noted it was not sufficient for the shipowners to merely allege that confidentiality existed and was maintained. It must be proven. In determining whether the shipowners had satisfied the burden of proof on the issue of confidentiality, Dubé, J. referred to the fact that the names in question were sent to government through the mail without being marked "confidential" and with no visible indication of a desire for or expectation of confidentiality.

More troublesome is His Lordship's decision that he "must further consider the consequences of disclosure of confidential information". Adopting the approach established in *Re Maislin*, Dubé, J. concluded that disclosure of the names could not in any way compromise the government's ability to obtain the information in question, since it is required by law and the shipowners have no alternative but to provide the names if they wish to benefit from the pilotage exemption. His Lordship continued:

> *The Association alleged that disclosure of the names could affect the competitive positions of shipowners since the services of these individuals are in great demand. However, it was for the shipowners to present evidence of this. The short paragraph in each affidavit dealing with this matter is not entirely convincing* [...].[17]

In addition to reading a "harm" requirement into section 20(1)(b), Dubé, J. refers to the four criteria for evidentiary privilege developed in *Wigmore on Evidence*[18] and applied by the Supreme Court of Canada in *Slavutych* v. *Baker*.[19] His Lordship uses these criteria to determine whether the shipowners had established that the names constituted confidential information. He finds that to justify nondisclosure of the information, the shipowners had to establish:

1) the information originated in a confidence that it would not be disclosed;

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16. *Noel* v. *Great Lakes Pilotage Authority Ltd.* (1987), 45 D.L.R. (4th) 127, [1988] 2 F.C. 77, 20 F.T.R. 257.

17. *Ibid.* F.C. at 84.

18. J.H. Wigmore, *Wigmore on Evidence*, 3d ed. (Boston: Toronto: Little, Brown, 1961).

19. *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224.

2) confidentiality is essential to maintaining the relation between government and the third party supplying the information;

3) the relation between government and the third party is one which in the opinion of the community ought to be sedulously fostered; and

4) the injury disclosure that the information would cause is greater than the benefit of extending the laws of Canada to provide a right of access to government records.

It is difficult to see how the fourth criterion as described by Dubé, J. could ever be satisfied. The specific injury to the third party resulting from disclosure should not be pitted against the public interest in the general principle of open access to government records. If *Wigmore's* test is to be applied, it should measure the injury resulting from disclosure against the public benefit to be gained from providing the requester with access to the specific information requested. This will require an examination of the requestor's purpose for seeking access to determine whether disclosing the information will satisfy the public interest justifications for permitting a breach of the third party's confidence.

In *Piller Sausages & Delicatessens* v. *Canada (Minister of Agriculture),*[20] Jerome, A.C.J underwent an apparent change of heart and expressed reservations about the utility of applying tests derived from United States caselaw to interpret Canada's access to information legislation. Although the *Piller Sausages* case did not directly deal with the confidentiality requirement in section 20(1)(b), the Associate Chief Justice foreshadowed his subsequent abandonment of the *National Parks* test by noting that the American test blends the exemptions set out in sections 20(1)(b) and (c) of the Canadian Act by combining a "class" test and an "injury" test in one exemption. He concluded:

> *Therefore, while the American jurisprudence is helpful in seeking an understanding of similar terminology, the standard for refusing to disclose must be established with specific reference to the* Canadian Act.[21]

The Associate Chief Justice expressly jettisoned any reliance on the *National Parks* test in *Montana Band of Indians* v. *Canada (Minister of Indian Affairs & Northern Development).*[22] Noting that section 20(1)(b) does not include an injury test and does not oblige the party seeking to resist access to establish competitive harm will result from disclosure, His Lordship determined that "the definition of `confidential' must be a less practical one, having to do with the nature of the information itself". Accordingly, he found the access exemption in section 20(1)(b) applied to records relating to the finances of an Indian Band, in the hands of government by virtue of the reporting requirements imposed by the *Indian Act,* where the evidence established the Band treated the

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20. *Piller Sausages & Delicatessens* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 118, 38 B.L.R. 19, [1988] 1 F.C. 446, 18 C.P.R. (3d) 356.

21. *Ibid.* F.T.R. at 130.

22. *Montana Band of Indians* v. *Canada (Minister of Indian & Northern Affairs*), [1989] 1 F.C. 143, 51 D.L.R. (4th) 306.

information as confidential and those seeking to justify disclosure could not provide any evidence the information was available to anyone beyond the Band and its fiduciaries. In reaching this conclusion, Jerome, A.C.J. made no reference to the *Wigmore* test. He did suggest, however, that the fiduciary relationship existing between the Band and the federal government was a relevant factor in determining whether the information is confidential.

MacKay, J. was subsequently required to grapple with the meaning of "confidential information" in *Air Atonabee Ltd. c.o.b. City Express* v. *(Canada) Minister of Transport.*[23] An airline sought to prevent disclosure of information relating to its safety inspections on the basis, *inter alia*, that the information was exempt under section 20(1)(b). His Lordship reviewed the Federal Court jurisprudence on the issue and found it establishes the following propositions:

1) to qualify for exemption, the information must be confidential by its nature by some objective standard which takes account of the content of the information, its purposes, and the conditions under which it was prepared and communicated;

2) information is not confidential, even if the third party considered it so, where it has been available to the public from some other source; and

3) information is not confidential where it could be obtained by observation, albeit with effort.

After holding that the *National Parks* case had been expressly rejected by Jerome, A.C.J. in the *Montana* case, MacKay, J. considered but rejected the submission that in determining an appropriate objective standard for the term "confidential information" the court should look to the test adopted in dealing with an action for breach of confidence — was the information imparted in a confidential manner and does it have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. His Lordship held that this test was not useful because the cases establishing it dealt with equitable relief in relation to alleged unauthorized use of information provided entirely by one party to another in circumstances of confidence which give rise to a fiduciary relationship or constructive trust. He found "a more interesting and apt analogy" to be the *Wigmore* test adapted by Dubé, J. in *Noel*.

The relevance of *Wigmore's* test for evidentiary privilege to the meaning of "confidential information" in section 20(1)(b) of the *Access to Information Act* is questionable. The law of evidence has been extremely reluctant to recognize new classes of privileged evidence because the result of declaring evidence to be subject to privilege is that the trier of fact may be deprived of relevant and probative evidence. This important policy consideration has no application in the context of access to information legislation. Exemptions to the open government principle should undoubtedly be limited and

23. *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 37 Admin.L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180.

specific,[24] but the consequences of applying a disclosure exemption are much less significant than those resulting from the recognition of a new class of evidentiary privilege.

IV. THE "MATERIAL HARM" TEST

In advocating the abolition of *Access to Information Act* exemptions based solely on the confidential nature of the requested information, the federal Information Commissioner suggests section 20(1)(c) of the legislation is "fully adequate to ensure that any legitimate business need for secrecy is served".[25] A review of the caselaw interpreting section 20 (1) (c) casts doubt on this contention. The courts have stressed that those seeking to resist disclosure on the basis of expected prejudice must present "detailed" and "convincing" evidence. Two New Brunswick cases decided early in the life of Canadian freedom of information legislation have been influential in the development of the test for commercial harm.

In *Re Daigle*,[26] a politician sought access under a provincial statute to a consultant's report on work performed at the construction site of a nuclear generating station. It was not disputed that the report had been prepared and provided to government on a confidential basis. The provincial power commission and the consultant sought to resist disclosure of the report on the basis that disclosure was excluded by a legislative prohibition against the disclosure of information that would cause "financial gain or loss" to a person or department. Both a senior official from the power commission and a senior representative of the consultant filed affidavits indicating disclosure of the report would cause financial gain or loss to contractors working on the site because the contents of the report would influence their success in obtaining future contracts. In the view of the official from the power commission, disclosure of the study would also have financial consequences for the power commission.

Counsel on behalf of the government argued that determination of whether or not disclosure would cause financial loss or gain could only be made by persons with reasonable expertise and experience and the court should not substitute its opinion for that of the experts. In rejecting this proposition, the Honourable Mr. Justice Stevenson stated:

> *While the opinions of such persons* [experts], *if based on expertise, experience* and *supporting facts, are entitled to respect, the final determination of an application such as this rests with the court, operating within the framework of the Act. The opinions of experts are not conclusive*

24. *Supra* note 7 s. 2.

25. *Supra* note 1 at 27.

26. *Re Daigle* (1980), 30 N.B.R. (2d) 209, 70 A.P.R. 209 (Q.B.).

> *— if they were, the Legislature would have provided for determination of the issue by an expert or a panel of experts, rather than by a judge.*[27]

Material before the court asserting that public release of the report would have financial consequences for the contractors was not supported by any evidence from the contractors themselves. While Stevenson, J. expressed suspicion concerning the "genuineness of the Minister's, and the consultant's solicitousness for the welfare of the contractors", His Lordship determined the application on the ground that to successfully rely on the statutory exemption it was necessary for the party resisting disclosure to establish loss or gain would result directly from disclosure of the information. He characterized the concerns expressed in the evidence about future gains or losses to the contractors as "speculation". Stevenson, J. was also not prepared to find the concerns expressed by the power commission official with respect to the consequences of disclosure to the power commission sufficiently specific to meet the test for exemption.

At issue in *Re Daigle* were the consequences of disclosing the information. Any attempt to predict consequences will necessarily involve speculation. The expertise and experience of the witness determines how much weight can be attached to the witness' opinion. If the evidence tendered in support of an exemption is suspect on grounds of bias, it should not be relied on. However, if the evidence is objective and comes from a qualified expert, it should not be excluded on the basis that it is "speculation".

Re Daigle was relied on by the Honourable Mr. Justice Barry in *Re Gillis and Chairman of the New Brunswick Electric Power Commission*.[28] The chairman of the power commission refused a request for release of information concerning the performance of a government contract. The requester represented a business competitor of the company doing the work. Both an official of the power commission and a representative of the company performing the contract provided affidavits swearing that some of the requested information would cause financial loss or gain to both the performing and requesting companies. In finding this evidence did not trigger the exemption provision, Barry, J. opined:

> *If a person or firm wishes to keep their contracts secret, then such should not do business with the provincial Government. What a government does is public business as it is the money of the public which is being expended.*[29]

While it is true all legitimate government business is conducted on behalf of the public, it does not follow all government business is best conducted in public. Indeed, the public interest is best served by government following commercial practices established by the marketplace. Commercial confidences customarily observed should be respected. In any event, the New Brunswick statute under consideration provides for nondisclosure of third party information where disclosure will have financial consequences. Companies

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27. *Ibid.* N.B.R. at 215.

28. *Re Gillis and Chairman of the New Brunswick Electric Power Commission* (1981), 37 N.B.R.(2d) 66, 97 A.P.R. 66, 130 D.L.R. (3d) 558 (Q.B.).

29. *Ibid.* D.L.R. at 561.

doing business with government are entitled to rely on such assurances. While Barry, J. allowed that if the evidence indicated disclosure of the information would result in a financial loss or gain he "might take a different view", the legislation mandated nondisclosure in such circumstances.

In the *Piller Sausages* case, Associate Chief Justice Jerome considered New Brunswick authority and American jurisprudence in fashioning an evidentiary test for section 20(1)(c) of the federal *Access to Information Act*. He recognized that actual competitive harm from the disclosure of information not yet released is impossible to show. This does not mean, however, that "conclusory and generalized allegations of harm" will suffice. What is required, he concluded, is that the evidence:

> [...] *must at least establish a likelihood of substantial injury* [...]. *The expectation must be reasonable, but it need not be a certainty.*

Jerome, A.C.J. also held in the *Pillar Sausages* case that to satisfy the evidentiary burden under section 20(1)(c) the party seeking to prevent access is required to establish direct causation between disclosure of the information and harm to the third party.

In the context of the case, adoption of this test rendered any harm resulting from media coverage of the disclosed information irrelevant because access to the information was not a direct cause of the harm suffered by the third party. In rejecting this approach in *Canada Packers Inc.* v. *Canada (Minister of Agriculture),*[30] the Federal Court of Appeal observed that the use of the phrase "reasonably be expected to" in section 20(1)(c) implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. The Honourable Mr. Justice MacGuigan, on behalf of the Court, applied a "words in total context" approach to the paragraph and concluded it prohibits access upon a showing of a reasonable expectation of probable harm as a result of disclosure. However, as two justices of the Trial Division of the Federal Court have observed, the determination of just what constitutes a "reasonable expectation of probable harm" will give rise to serious disagreement.[31]

When it comes to protecting commercial information belonging to government, a number of jurisdictions have established much lower exemption thresholds. The federal *Access to Information Act* allows the head of a government institution to refuse to disclose any record that contains information the disclosure of which "could reasonably be expected to prejudice the competitive position" of an institution.[32] Ontario's *Freedom of Information and Protection of Individual Privacy Act* permits a government head to refuse to disclose a record in government files that contains any commercial information

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30. *Canada Packers Inc.* v. *Canada (Minister of Agriculture)*, [1989] 1 F.C. 47, 26 C.P.R. (3d) 407 (C.A.).

31. See Denault, J. in *Information Commissioner (Can.)* v. *Canada (Minister of External Affairs)* (1990), 35 F.T.R. 177 (F.C.T.D.) and Jerome, A.C.J. in *Cyanamid Canada Inc.* v. *Canada (Minister of National Health and Welfare)* (1992), 52 F.T.R. 22 (F.C.T.D.).

32. *Supra* note 7 s. 18(b).

belonging to the government that "has monetary value or potential monetary value".[33] Nova Scotia recently enacted legislation recognizing a third party exemption for confidential commercial information other than trade secrets only where disclosure can reasonably be expected to significantly harm the third party or result in undue financial loss or gain.[34] However, under this new legislation, the government may refuse to disclose any of its commercial information "that has, or is reasonably likely to have, monetary value". None of these statutory protections for commercially valuable government information require the showing of "probable harm".

CONCLUSION

This examination of the treatment government information access law accords commercially valuable information has sought to demonstrate that in the process of establishing and supporting laudable open government principles, legislators and judges have failed to adequately protect confidential third party business information in the hands of government. As a result, those seeking to prevent the disclosure of confidential business information must satisfy an inappropriate test. Ironically, it is easier for government to protect its own valuable commercial information than it is for a third party to protect similar information it has been compelled to furnish to government.

In his annual report, the Information Commissioner of Canada states he has seen "thousands of government-held records relating to private businesses". He contends that "real secrets are rare" and dismisses with the following words the concerns of those who have expended money and effort to protect what they consider to be a valuable commercial asset:

> *Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking.*[35]

Mr. Grace calls for the abolition of section 20(1)(b) of the *Access to Information Act* because he feels it comes close to authorizing cozy arrangements whereby government officials and private firms "agree among themselves to keep information secret". The answer to this problem is not to abolish the protection provided by the paragraph but to require that government officials inform in advance those who wish to do business with government that confidentiality will not attach to the transaction. There can be no reasonable expectations of confidentiality where this simple step has been taken.

Those who furnish confidential information to government are entitled to expect the information will remain confidential to the persons to whom it is required to be divulged and that the government's use of the information will be restricted to the

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33. *Supra* note 7 s. 18(1)(a).

34. *Supra* note 10 s. 17.

35. *Supra* note 1 at 27.

purposes for which it is divulged. In deciding whether third party information is "confidential", the nature of the information itself, the nature of the relationship between government and the party claiming its confidentiality, the manner in which the information was obtained, and the reason why the information is being requested are all relevant considerations. The appropriate time to consider the public interest factors in the *Wigmore* test is not during the initial determination of confidentiality but when the "public interest override" is invoked.