Federal Court Cour fédérale

Date: 20210301

Dockets: T-477-19
T-512-19

Citation: 2021 FC 148

St. John's, Newfoundland and Labrador, March 1, 2021

PRESENT: The Honourable Madam Justice Heneghan

Docket: T-477-19

BETWEEN:

SUNCOR ENERGY INC.

Applicant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

Docket: T-512-19

BETWEEN:

SUNCOR ENERGY INC

Applicant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued February 12, 2021)

I. INTRODUCTION

[1] Suncor Energy Inc. (the "Applicant") seeks judicial review of two separate decisions of Mr. Trevor Bennett, Access to Information Coordinator and Information and Resources Manager of the Canada-Newfoundland and Labrador Offshore Petroleum Board (the "Respondent"), pursuant to subsection 44(1) of the *Access to Information Act,* R.S.C. 1985, c. A-1 (the "Act").

[2] In cause number T-477-19, the Applicant seeks judicial review of a decision dated February 27, 2019, releasing internal correspondence. The Applicant challenges disclosure of these documents pursuant to subsection 19(1), 24(1) and paragraph 20(1)(b) of the Act.

[3] In cause number T-512-19, the Applicant seeks judicial review of a decision dated March 5, 2019, releasing internal correspondence about a weather event. The Applicant challenges the disclosure of these documents pursuant to subsection 19(1), paragraph 20(1)(b) and subsection 24(1) of the Act.

[4] In cause number T-477-19, the Applicant seeks the following relief:

a) A review of the Decision made by the C-NLOPB, per: Mr. Trevor Bennett, C-NLOPB File 11452-019-175, to release with limited redactions, the responsive records (the

"Records") which contain third party information and the personal information of the Applicant's employees;

b) An order setting aside the C-NLOPB's decision to release the Records and ordering the C-NLOPB not to disclose the Records;

c) In the alternative to (b) above, an order setting aside part of the Decision and ordering the C-NLOPB not to disclose the Records without redaction of all third party information and personal information of all of the Applicant's employees contained in the Records;

d) An order that the within proceeding be held in camera, that evidence filed herein be treated as confidential and sealed by this Honourable Court, and not to be made a public part of the within Court file without further Order of this Honourable Court;

e) Such other orders or reliefs that this Honourable Court considers just, including an award of costs to the Applicant.

[5] In cause number T-512-19, the Applicant seeks the following relief:

a) A review of the Decision made by the C-NLOPB, per: Mr. Trevor Bennett, C-NLOPB File 11452-019-178, to release with limited redactions, the responsive records (the "Records") which contain third party information and the personal information of the Applicant's employees;

b) An order setting aside the C-NLOPB's decision to release the Records and ordering the C-NLOPB not to disclose the Records;

c) In the alternative to (b) above, an order setting aside part of the Decision and ordering the C-NLOPB not to disclose the Records without redaction of all third party information and personal information of all of the Applicant's employees contained in the Records;

d) An order that the within proceeding be held in camera, that evidence filed herein be treated as confidential and sealed by this Honourable Court, and not to be made a public part of the within Court file without further Order of this Honourable Court;

e) Such other orders or relief that this Honourable Court considers just, including an award of costs to the Applicant.

II. BACKGROUND

[6] The facts below are taken from the affidavits filed by the parties, as well as from the transcripts of cross-examinations and the Tribunal Record that was produced pursuant to Rule

317 of the *Federal Courts Rules*, S.O.R. /98-106 (the “Rules”). Although no Confidentiality Order was issued for the within applications, the Respondent filed both a Public and Confidential Tribunal Record. The Judgment and Reasons will issue on a confidential basis, out of an abundance of caution.

[7] The Applicant filed, in cause number T-477-19, the affidavit of Mr. Bob Hand, sworn on August 2, 2019. It also filed an affidavit sworn by Mr. Hand on August 2, 2019, in cause number T-512-19.

[8] The Respondent filed the affidavits of Mr. Bennett, each sworn on August 30, 2019, in both cause number T-477-19 and cause number T-512-19.

[9] Mr. Hand is a Senior Commercial Advisor with the Applicant. He outlined the timeline of events and summarized the correspondence between the parties in the two applications. Copies of the correspondence in issue are attached as exhibits to his affidavits.

[10] In his affidavit filed in support of cause number T-477-19, Mr. Hand deposed that the names of █████, █████, █████, █████ and █████, together with their affiliation with the Applicant, were publicly available on their LinkedIn profiles.

[11] Mr. Hand also deposed that the LinkedIn Profiles do not give particulars about their work nor disclose their correspondence with the Respondent. Copies of the LinkedIn profiles are attached as Exhibit L to his affidavit.

[12] In his affidavit in support of cause number T-512-19, Mr. Hand deposed that the name of [redacted] and his status as an employee of the Applicant were publicly available on his LinkedIn profile; however, that his correspondence with the Respondent on behalf of the Applicant was not public knowledge. Exhibit I to this affidavit is a copy of [redacted] LinkedIn profile.

[13] In his affidavits, Mr. Bennett outlined the correspondence between the parties and described how he conducted internet searches to find out if the names and associations of individuals who are not government employees are publicly available. He deposed that he types the name and association into "Google" and looks at the first page of results. He deposed that he conducted such a search in the respective files. Copies of his search results are attached as exhibits to his affidavits.

[14] Mr. Bennett was cross-examined upon his affidavits on September 27, 2019.

[15] Upon cross-examination, Mr. Bennett was questioned about his practice in conducting internet searches and how he determines if information is publicly available. He confirmed, upon cross-examination, that his Google searches did not disclose that the Applicant's employees had communicated with the Respondent.

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[16] On December 20, 2018, the Respondent notified the Applicant of an access to information request seeking the following information:

> All emails between the Chairman and CEO Scott Tessier and Chief Safety Officer Paul Alexander from Nov. 14 to Nov. 21, 2018 (inclusive).

[17] The Respondent enclosed twelve pages of emails responsive to this request and provided the Applicant an opportunity to respond. The emails appear to discuss a weather event and its impacts on the functioning of equipment.

[18] The Applicant responded on January 21, 2019 and argued that the documents in their entirety should not be disclosed. It made the following submissions:

> 1) The documents comprise correspondence provided to the Respondent pursuant to Part III of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c.3 (the "Accord Act"). The Applicant submitted that the correspondence is privileged pursuant to subsection 24(1) of the Act and subsection 119(2) of the Accord Act.
>
> 2) The Applicant submitted that the emails not sent by either Scott Tessier or Paul Alexander did not fall within the scope of the request.
>
> 3) The Applicant submitted that the correspondence in the documents was derived from information provided by the Applicant that it treated in a confidential manner and therefore was exempt from disclosure pursuant to paragraph 20(1)(b).
>
> 4) The Applicant also submitted that the emails contained personal information about its employees and that this information should not be disclosed pursuant to subsection 19(1) of the Act.

[19] The Respondent replied, by letter dated January 28, 2019 and noted that all the emails were within the scope of the request. It also submitted that a blanket refusal of disclosure was not appropriate, as the subject matter of the emails has been discussed in media reports. The Respondent attached a copy of the documents with new proposed redactions:

> 1) On page 1 of the attachments: the second paragraph in the first email dated November 14, 2018, the second half of the second email also dated November 14, 2018, and the first 5 sentences of the third email dated November 13, 2018.
>
> 2) On page 2 of the attachments: the first, second and fourth bullets of the second email dated November 14, 2018.
>
> 3) On page three of the attachments: the first four bullet points from an email dated November 14, 2018, sent from Jill Mackey regarding the functioning of thrusters.
>
> 4) On page 4 of the attachments: part of the first sentence in an email dated November 15, 2018 that reads as follows: [redacted]
>
> 5) On page 5 of the attachments in an email dated November 16, 2018: the first sentence, except for the names of [redacted] and [redacted], and the last sentence.
>
> 6) On page 6 of the attachments: Lines 1-10 of the "forwarded message" dated November 17 at 12:33PM, NST and a phone number on page 2.
>
> 7) On page 8 of the attachments: The third and fourth sentences of the email dated November 17, 2018.
>
> 8) On page 11 of the attachments: The third paragraph of the email dated November 20, 2018.

[20] The Respondent noted that some of the information was publicly available, as it was mentioned in the media, and therefore subject to disclosure, and attached the media report referred to.

[21] The Applicant replied on February 15, 2019, and challenged the following sections of the emails:

> 1) Page 1 of 196: The Applicant submitted that the second and third emails on this page were not between Scott Tessier and Paul Alexander and are outside of the scope of the request. The

> Applicant also submits that the name should be redacted as personal information.
>
> 2) Pages 3 and 4 of 196: The Applicant submits that the second and third emails on this page are from Jill Mackey and fall outside of the scope of the request.
>
> 3) Page 37 out of 196: The Applicant provided information regarding an RMT to the Respondent pursuant to Part III of the Accord Act and privileged under subsection 119(2) of the Accord Act. According to subsection 24(1) of the Act, this information is exempt from disclosure.
>
> The Applicant also submits that this information is confidential and exempt from disclosure pursuant to paragraph 20(1)(b) of the Act.
>
> The Applicant also submits the emails contain the names of two employees, and , which are exempt from disclosure pursuant to subsection 19(1).
>
> 4) Page 41 of 196: The Applicant submitted that only the first email was between Scott Tessier and Paul Alexander, and the other three are outside of the scope of the request. It also submits that the reference to is personal information and should be redacted.
>
> 5) Page 45 of 196: The names of and should be redacted as it is personal information.
>
> 6) Pages 104-105 of 196: The email is not between Scott Tessier and Paul Alexander and is outside of the scope of the request. The Applicant also submitted that the name should be redacted, as it is personal information.

[22] In its letter of February 20, 2019 in reply to the Applicant, the Respondent made the following comments:

> 1) It confirmed that all disclosed emails were part of an email chain between Scott Tessier and Paul Alexander and within the scope of the request.
>
> 2) The names of , , , , and would be disclosed, because Google searches indicate their positions with the Applicant.

> 3) It agreed to withhold the subject line of the email on page 37 of 196.
>
> 4) Google searches for [redacted], [redacted], [redacted], [redacted] and [redacted] were attached.

[23] On February 27, 2019, the Respondent notified the Applicant of its intention to disclose the records on March 19, 2019, unless an application for judicial review was filed. The Respondent enclosed a copy of the records intended for disclosure and noted that it reflected the disclosures to which the Applicant consented. The Respondent noted again that the fact that communication was made with the Respondent was not personal information. Further, since the names of the Applicant's employees are publicly available, the names would be disclosed.

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[24] On February 1, 2019, the Respondent notified the Applicant of an access to information request for the following information:

> I would like to receive all correspondence between Natural Resources Canada and Husky Energy and Natural Resources Canada and the CNLOPB referring to the predicted storm of November 15, 2018 and subsequent oil spill, from November 14th to date.

[25] The Respondent enclosed six pages of emails responsive to the request and relevant to the Applicant and provided the Applicant an opportunity to respond.

[26] The Applicant responded on February 20, 2019. It objected to the inclusion of [redacted] name, as it was personal information on page 5 of the disclosed documents. It

submitted that the communication between [redacted] and the Respondent is privileged pursuant to subsection 119(2) of the Accord Act. However, the Applicant stated it was amenable to disclosing the communications, if [redacted] name was redacted.

[27] In the challenged section of the documents, Scott Tessier refers to a conversation he had with [redacted]. The Applicant also submitted that information on the last page of the documents should be redacted, to be consistent with the access to information request.

[28] The Respondent replied on February 21, 2019 and stated that the fact that Scott Tessier communicated with [redacted] was not information provided by the Applicant and as such was not privileged pursuant to subsection 119(2) of the Accord Act. The Respondent agreed to redact the challenged information on the last page of the documents.

[29] By correspondence dated February 22 and 26, 2019, the Applicant submitted to the Respondent that the substance of the information, including which of its employees communicated with the Respondent, was privileged pursuant to section 24 of the Act, and the publicly available test did not apply.

[30] The Applicant did not specifically state that it objected to the disclosure of information pursuant to subsection 19(1) or section 20 of the Act.

[31] On March 5, 2019, the Respondent provided the Applicant an audit copy of the records it intended to disclose. The Respondent said that it disagreed with the Applicant that any information was covered by privilege.

III. SUBMISSIONS

A. *The Applicant's Submissions*

[32] The Applicant argues that the records at issue in both causes T-477-19 and T-512-19 are exempt from disclosure pursuant to subsection 19 (1), and paragraph 20(1) (b) of the Act.

[33] The Applicant submits that the Respondent erred in finding that the names and contact information of its employees were not exempt from disclosure. It argues that the context of their correspondence with the Respondent, or their "Individual Involvement" in such correspondence, is personal information that is exempt from disclosure pursuant to subsection 19(1) of the Act.

[34] Relying on the decision in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, the Applicant submits that the definition of personal information is broad and that privacy rights are paramount.

[35] The Applicant relies on the decision in *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252 to argue that the involvement of private sector employees in correspondence with the government, in this case the Respondent, constitutes "personal information" that is exempt from disclosure.

[36] The Applicant submits, as well, that there is no evidence that the employees' "Individual Involvement" was publicly available information, as addressed in subsection 19 (2) of the Act. It contends that the internet searches conducted by the Respondent show names and a connection with the Applicant but not their connection with the records nor their "Individual Involvement" with the Respondent.

[37] The Applicant then argues that the information proposed to be released by the Respondent qualifies for an exemption against disclosure on the basis of the test set out in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.).

[38] In both causes numbered T-477-19 and T-512-19, the Applicant submits that the Respondent erred in finding that subsection 24(1) of the Act did not apply to the parts of the record at issue.

[39] The Applicant argues that the documents at issue contain information that is privileged pursuant to subsection 119(2) of the Accord Act. It submits that subsection 24(1) of the Act provides a mandatory exemption to disclosure pursuant to the provisions set out in Schedule II of the Act, which includes section 119 of the Accord Act.

[40] In causes numbered T-477-19 and T-512-19, the Applicant submits that all communications between it and the Respondent regarding the impact of a weather event on its operations, including which employees made such communications, took place under Part III of the Accord Act and therefore are privileged pursuant to subsection 119(2) of the Accord Act.

[41] The Applicant argues that under subsection 24(1) of the Act, this information is exempt from disclosure. The Applicant submits that even though the records in question were prepared by the Respondent and incorporate information provided by it, the privilege applies to all of the information, including the identity of its employees.

B. *The Respondent's Submissions*

[42] The Respondent submits that only the name and contact information of the Applicant's employees is personal information and that this information is publicly available. It argues that the fact that an employee's "Individual Involvement", that is the fact that an employee corresponded with the Respondent, in not "personal information", but a communication of a profession, non-personal, nature. Accordingly, the Respondent argues that the exemption against disclosure, pursuant to subsection 19(1) of the Act, does not apply.

[43] The Respondent further submits that subsection 19(2) of the Act provides discretion about the release of personal information that is publicly available. It argues that only the names and contact information about the Respondent's employees, as contained in the documents, can be described as "personal information" and this information is publicly available.

[44] The Respondent also argues that the decision in *Janssen-Ortho*, *supra* is distinguishable on its facts and does not apply in the present case.

[45] With respect to the Applicant's reliance upon paragraph 20(1)(b) of the Act, the Respondent submits that the Applicant has not provided any evidence that the documents in

question contain confidential financial, commercial, scientific or technical information that had not already been redacted.

[46] In response to the applications in T-477-19 and T-512-19, the Respondent submits that to qualify for the privilege pursuant to subsection 119(2) of the Accord Act, the Applicant must have provided information to the Respondent for the purposes of Part II or III of the Accord Act. It argues that because the documents in question are internal correspondence, they were not provided by the Applicant and do not fall within the scope of subsection 119(2) of the Accord Act.

[47] The Respondent further submits that a “blanket privilege” over all information provided by the Applicant is inappropriate and inconsistent with the section 119 of the Accord Act, citing *Canadian Forest Oil Ltd. v. Chevron Canada Resources* (2000), 257 N.R. 277 (F.C.A.).

IV. DISCUSSION AND DISPOSITION

[48] The first issue to be addressed is the applicable standard of review.

[49] In their original written submissions, the parties argued that whether the information is exempt from disclosure pursuant to subsection 19(1) and paragraphs 20(1)(b) and 20(1)(d) of the Act is reviewable on the standard of correctness, relying on the decision in *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95.

[50] Post-hearing, the parties were given the opportunity to make further submissions about the standard of review in light of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 441 D.L.R. (4th) 1 (S.C.C.). Further submissions were filed by the Respondent on January 5, 2021 and by the Applicant on January 15, 2021.

[51] The decision in *Vavilov, supra* teaches that presumptively, the standard of reasonableness applies to administrative decision makers.

[52] However, in an application for judicial review pursuant to section 44 of the Act, the legislature has provided, in section 44.1, that a review will proceed on a *de novo* basis. Section 44.1 reads as follows:

***De novo* review**	**Révision *de novo***
44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	**44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[53] In *Vavilov, supra* the Supreme Court distinguished between *de novo* and reasonableness review, in paragraphs 83, 116 and 124, as follows:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision

maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

…

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

…

[124] Finally, even though the task of a court conducting a reasonableness review is not to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd*., 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

[54] Here, the Supreme Court marks a distinction between a *de novo* review, where the Court "steps into the shoes" of the initial decision-maker and determines the matter on its own. It is not necessarily determining if the original decision-maker was correct or not.

[55] Upon a correctness review, the Court is asking if the first decision-maker made the "correct" decision.

[56] As noted above, the Courts have recognized correctness as the applicable standard of review for decisions involving subsection 19(1) and paragraph 20(1)(b) of the Act. *Vavilov*, *supra* instructs reviewing Courts to apply the standard of reasonableness except in certain limited circumstances, for example when the relevant legislation points toward the application of a different standard of review, whether correctness or a *de novo* review.

[57] *Vavilov*, *supra* also addresses the differences between review upon the correctness standard and *de novo* review.

[58] In the present circumstances, the within applications are brought pursuant to section 44 of the Act. Section 44.1 of the Act clearly provides that in such a case, the review is to proceed upon a *de novo* basis. It is not necessary, in my opinion, to say anything more about nuanced differences between a *de novo* review and the standard of correctness.

[59] The parties submit that the exercise of discretion, pursuant to subsection 19(2) of the Act is reviewable on the standard of reasonableness. I agree; see the decision in *Canada (Information Commissioner v. Canada (Minister of Natural Resources)* (2014), 464 F.T.R. 308 (F.C.).

[60] Subsection 19(1) of the Act provides as follows:

Personal Information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.

[61] Subsection 19(2) grants exceptions to this general rule, in certain circumstances. Subsection 19(2) provides as follows:

Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Part that contains personal information if	**(2)** Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où:
(a) the individual to whom it relates consents to the disclosure;	**a)** l'individu qu'ils concernent y consent;
(b) the information is publicly available; or	**b)** le public y a accès;
(c) the disclosure is in accordance with section 8 of the *Privacy Act*	**c)** la communication est conforme à l'article 8 de la

Loi sur la protection des renseignements personnels

[62] The Act adopts the definition of "personal information" contained in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 (the "Privacy Act"), as follows:

personal information	**renseignements personnels**
means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment:
(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	**a)** les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,	**b)** les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;
(c) any identifying number, symbol or other particular assigned to the individual,	**c)** tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;
(d) the address, fingerprints or blood type of the individual,	**d)** son adresse, ses empreintes digitales ou son groupe sanguin;
(e) the personal opinions or views of the individual except where they are about another individual or about a	**e)** ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une

proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

(g) the views or opinions of another individual about the individual,

g) les idées ou opinions d'autrui sur lui;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

but, for the purposes of sections 7, 8 and 26 and

toutefois, il demeure entendu que, pour l'application des

section 19 of the *Access to Information Act*, does not include

articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant:

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(j.1) the fact that an individual is or was a ministerial adviser or a member of a ministerial staff, as those terms are defined in subsection 2(1) of

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment:

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

j.1) un conseiller ministériel, au sens du paragraphe 2(1) de la *Loi sur les conflits d'intérêts*, actuel ou ancien, ou un membre, actuel ou ancien, du personnel

the *Conflict of Interest Act*, as well as the individual's name and title,	ministériel, au sens de ce paragraphe, en ce qui a trait au fait même qu'il soit ou ait été tel et à ses nom et titre;
(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,	**k)** un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;
(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and	**l)** des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
(m) information about an individual who has been dead for more than twenty years; (*renseignements personnels*)	**m)** un individu décédé depuis plus de vingt ans.(*personal information*)

[63] In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 (S.C.C.), the Supreme Court of Canada directed that the definition of "personal information" should be broadly interpreted.

[64] The information in issue, that is employees' names and job titles, is clearly "personal information". It falls within the definition provided in the *Privacy Act*, *supra*. It follows, then that the real question for determination is whether that information should be disclosed, upon the exercise of the discretion conferred by subsection 19(2) of the *Act*.

[65] The Applicant refers to the decision in *Janssen-Ortho, supra* as support for its argument that the Respondent erred in deciding to disclose information about the correspondence sent by its employees to the Respondent.

[66] In *Janssen-Ortho, supra*, the Federal Court found that disclosure of names of employees would also disclose information about them that was not in the public domain, including their attendance at meetings, the writing of letters and authorship of studies about removal of a drug product from the market. The Applicant argues that these findings equally apply to release of information about correspondence between its employees and the Respondent.

[67] In response, the Respondent argues that the decision in *Janssen-Ortho, supra* is distinguishable and argues that the facts in the present case are analogous to those found in *Canada (Information Commissioner) v. Canadian Transportation Accident Investigation & Safety Board* 49 C.P.R. (4th) 7 ("*Nav Canada*"). The Federal Court of Appeal found, at paragraphs 54 – 55, that the Safety Board communications were not personal information because the records were professional in nature and even if they may lead to the identification of an individual, the records did not contain information about an individual.

[68] In *Husky Oil Operations Limited v. Canada – Newfoundland and Labrador Offshore Petroleum Board* (2018), 418 D.L.R. (4th) 112 (F.C.A.), the Federal Court of Appeal addressed the apparent contradiction between *Janssen-Ortho*, supra and *Nav Canada*, *supra*, and found that the different results were due to the different nature of the information in question. The Federal Court of Appeal observed that in *Nav Canada*, *supra* the records were “purely transactional and informational”, while the records in *Janssen-Ortho*, *supra* disclosed more specific, “intimate” details about the employees’ work and opinions.

[69] In *Husky, supra* the records included a request by the applicant for geophysical information and revealed nothing about the named employees “beyond the fact that the requests were made in the course of their employment”.

[70] The Federal Court of Appeal applied a “purposive approach to the concept of ‘personal information’” and found that the names and titles of Husky’s employees, in the context of the records, were not personal information because “the records on which the employees’ names are found in the case at bar, would not reveal anything intimately connected to their private life and which they might reasonably have expected to keep for themselves”.

[71] In *Suncor Energy Inc. v. Canada – Newfoundland and Labrador Offshore Petroleum Board* (2018), 418 D.L.R. (4th) 144 (F.C.A.), the facts were similar to those in *Husky, supra*, and in the present case. The Federal Court of Appeal, in the reasons of Justice de Montigny, found that the “names and titles of Suncor’s employees’ involvement in Suncor’s procurement of

certain geophysical information from the Board" did not meet the definition of personal information.

[72] At paragraph 19 of *Suncor Energy, supra*, Justice de Montigny also found that is was reasonable for the respondent to disclose names pursuant to paragraph 19(2)(b) because the names and titles of the employees were publicly available on LinkedIn. The Federal Court of Appeal said that the applicant bore the burden to show that the records disclosed more about the employees than was publicly available on the internet.

[73] Writing for the majority in *Suncor Energy, supra* and *Husky, supra*, Justice Gauthier dismissed the appeals because the information was publicly available, pursuant to paragraph 19 (2) (b) and the applicant did not submit evidence to show that the information intended to be released was more than the information that was publicly available.

[74] In the present matter, the records disclose the names of employees in the context of correspondence with the Respondent.

[75] In my opinion, the fact that an individual corresponded with the Respondent in the course of employment was transactional and did not reveal personal information, as discussed in *Nav Canada, supra* and *Husky, supra*. The Applicant's characterization of this fact as "Individual Involvement" does not change the nature of the information and does not make it personal information.

[76] The parties agree that the names and contact information of the employees are personal information. All of the employees of the Applicant in question have public LinkedIn pages showing their names and association with the Applicant. The Applicant acknowledges that this information is publicly available.

[77] In my opinion, in these circumstances and considering the relevant jurisprudence, the Respondent reasonably exercised its discretion in finding that the information contained in the records, with employees' names is publicly available and not exempt from disclosure. The fact that the individual corresponded with the Respondent is not "personal information" and the Respondent did not err in deciding to disclose this information, to disclose this publicly available information.

[78] In causes T-477-19 and T-512-19, the Applicant claims that the documents meet the test set out in *Air Atonabee, supra* for an exemption pursuant to paragraph 20(1)(b). That paragraph provides as follows:

Third party information	**Renseignements de tiers**
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains	**20 (1)** Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
…	…
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party	**b)** des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle

and is treated consistently in a confidential manner by the third party;	et qui sont traités comme tels de façon constante par ce tiers;

[79] In both causes T-477-19 and T-512-19, the Applicant argues that information about the impacts of a weather event upon its operations, contained in the documents that the Respondent proposes to disclose, is highly sensitive commercial information that it treats confidentially. The Applicant seeks exemption from disclosure of this information, pursuant to paragraph 20(1)(b) of the Act.

[80] According to the decisions in *Air Atonabee, supra* and *Merck-Frosst Canada Ltd. v. Canada (Health)*, [2012] S.C.R. 23 (S.C.C.), the Applicant must satisfy all four elements in order to qualify for an exemption pursuant to paragraph 20(1)(b).

[81] Relying on the decision in *Air Atonabee, supra*, the Applicant argues that in determining if the information is "confidential", the Court must consider the following factors:

- Whether the information in a record is unavailable from sources otherwise accessible to the public or could not be obtained by observation or independent study by a member of the public acting on his own;
- That the information originate and be communicated in a reasonable expectation that it will not be disclosed;
- That the information be communicated, either pursuant to a legal requirement or voluntarily, in a relationship between a government and the supplying party that is either a fiduciary relationship or a relationship that is not contrary to the public interest, and which relationship will be fostered for the public benefit by confidential communication.

[82] The Respondent submits that there must be a reasonable expectation of privacy for the information to be considered confidential and sufficient evidence that the government also treated the information as confidential, citing the decisions in *Air Atonabee, supra* and *Bombardier Inc. v. Canada (Attorney General)*, 2019 FC 207.

[83] Further, the Respondent argues that more is required than the Applicant's assertion that it considered the information to be confidential; it must have been treated on a confidential basis by both parties and not otherwise disclosed. Here, the Respondent relies on the decisions in *Air Atonabee, supra* and *Janssen-Ortho, supra*.

[84] Meeting the burden imposed by paragraph 20(1)(b) of the Act requires evidence. In my opinion, the evidence submitted by the Applicant falls short. In the affidavits of Mr. Hand and in its written and oral submissions, the Applicant asserts that the information is confidential but its evidence does not support those assertions.

[85] Further, the evidence shows that the information intended to be disclosed by the Respondent is already publicly available.

[86] As noted above, the Applicant asserts a privilege against disclosure of the redacted documents on the basis of subsection 24(1) of the Act which provides as follows:

Statutory prohibitions against disclosure	**Interdictions fondées sur d'autres lois**
24 (1) The head of a government institution shall refuse to disclose any record requested under this Part that	**24 (1)** Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des

contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[87] Schedule II, referenced in subsection 24(1) above, includes subsection 119(2) of the Accord Act which provides as follows:

Privilege	**Protection des renseignements**
119 (2) Subject to section 18 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.	**119 (2)** Sous réserve de l'article 18 et des autres dispositions du présent article, les renseignements fournis pour l'application de la présente partie, de la partie III ou de leurs règlements, sont, que leur fourniture soit obligatoire ou non, protégés et nul ne peut, sciemment, les communiquer sans le consentement écrit de la personne qui les a fournis, si ce n'est pour l'application de ces parties ou dans le cadre de procédures judiciaires relatives intentées à cet égard.

[88] Pursuant to subsection 119(2) of the Accord Act, information or documents provided to the Respondent for the purpose of Part II or Part III of the Accord Act is privileged and shall not be knowingly disclosed without consent, or for the purposes of the administration or enforcement

of the Accord Act. Subsection 119(5) of the Accord Act identifies a number of exceptions to the privilege created by subsection 119(2).

[89] As discussed in the decision in *Hibernia Management & Development Co. v. Canada – Newfoundland and Labrador Offshore Petroleum Board* (2012), 407 F.T.R. 293 (F.C.), the availability of the privilege depends on the source of the documents in issue.

[90] In *Hibernia*, *supra*, auditors, not the applicant, produced the documents in question. The Federal Court disagreed with the applicant's arguments that the documents were produced based on information derived from its sources and accordingly, were covered by subsection 119(2). The Court found that the documents contained findings and observations of the audit team and included a list of documents that had been reviewed, but the report contained no excerpts of interviews with employees of the applicant. Because the documents were best described as "independent observations", the Court found that they were not provided by the applicant and were not protected by privilege pursuant to subsection 119(2) of the Accord Act.

[91] In the present cases, the documents in question are internal communications between the Respondent's staff. Some of the emails refer to information provided by the Applicant and some emails were redacted by the Respondent. In my opinion, the emails subject to disclosure are correspondence between the Respondent's staff and not produced by the Applicant, and therefore not protected by privilege under subsection 119(2) of the Accord Act. As a result, the prohibition against disclosure created by subsection 24(1) of the Act is not applicable.

[92] If the documents intended for disclosure are covered by the privilege afforded by subsection 119(2), then they shall not be disclosed without consent except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

[93] According to the decision in *Husky Oil Operations Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board* (2014), 470 F.T.R. 290 (F.C.) there is a limited exception to the privilege established in subsection 119(2) of the Accord Act and that this requires a factual determination. There are no submissions or evidence in the present applications on whether the disclosure was required for the purposes set out in the Accord Act.

[94] The Applicant relies on the decision in *Husky Oil*, *supra* in support of its argument that the scope of the privilege provided by subsection 119(2) of the Accord Act includes the name of the person who provided the information. It submits that the privilege afforded by subsection 119(2) of the Accord Act is similar to the privilege established by the *Canada Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c.3, which protects "statements and the authors of those statements;" see the decision in *Société Air France v. Greater Toronto Airports Authority et al.*, 2010 ONSC 432.

[95] The Respondent submits that this case is distinguishable because *Husky Oil*, *supra* involved documents provided to the respondent by the applicant. The Respondent also submits that according to paragraph 69 of *Husky Oil*, *supra*, an exception to disclosure cannot be

invented. The Respondent further argues that paragraph 81 supports its position that there is no "all-encompassing blanket privilege".

[96] In my opinion, if the information is protected by privilege, than that privilege would extend to the author of the information and not to the Applicant, either directly or indirectly.

V. CONCLUSION

[97] In the result, the names and contact information of certain employees of the Applicant, which the Respondent proposes to disclose, is "personal information" within the scope of subsection 19(1) of the Act. However, the Respondent reasonably determined that this information is publicly available, within the meaning of paragraph 19(2)(b) of the Act, that is via LinkedIn, and reasonably exercised its discretion to disclose that information. The Applicant's submissions about "Individual Involvement" do not change the facts about public availability.

[98] The Applicant failed to meet its evidentiary burden to show its entitlement to the benefits of paragraph 20(1)(b) of the Act, for non-disclosure of the requested information.

[99] The Applicant has also failed to show that it is entitled to the benefit of the privilege created by subsection 24(1) of the Act.

[100] There is no reviewable error in the manner in which the Respondent dealt with the access requests that are the subject of the within applications for judicial review, and the applications will be dismissed with costs to the Respondent.

JUDGMENT in T-477-19 and T-512-19

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed, with costs to the Respondent.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-477-19
STYLE OF CAUSE:	SUNCOR ENERGY INC. v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
DOCKET:	T-512-19
STYLE OF CAUSE:	SUNCOR ENERGY INC. v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	AUGUST 12, 2020
JUDGMENT AND REASONS:	HENEGHAN J.
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