

Federal Court



Cour fédérale

Date: 20230921

Docket: T-1747-22

Citation: 2023 FC 1267

Ottawa, Ontario, September 21, 2023

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

**AMERICAN IRON & METAL COMPANY
INC.**

Applicant

and

**SAINT JOHN PORT AUTHORITY
and CANADIAN BROADCASTING
CORPORATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicant American Iron and Metal Company Inc [AIM] seeks a review under subsection 44(1) of the *Access to Information Act*, RSC 1985, c A-1 [ATIA] of the Respondent Saint John Port Authority's [Port Saint John] decision to disclose portions of a 2011 lease agreement [the Lease] and a 2017 lease renewal and amending agreement [the Lease Amendment]

entered into between AIM and Port Saint John. This decision was made further to a request by the Canadian Broadcasting Corporation [CBC] under section 6 of the *ATIA*.

[2] While Port Saint John determined that certain information was exempt from disclosure under the *ATIA*, it concluded that the remainder of the two documents should be disclosed to CBC. AIM disagrees and seeks to exempt large portions of the documents from disclosure under paragraphs 20(1)(b), (c), and/or (d) of the *ATIA*.

[3] For the reasons that follow, the application is dismissed. AIM has failed to establish that the information it seeks to protect should be exempted from disclosure.

II. **Background**

A. *The Lease and Lease Amendment*

[4] Port Saint John is a port authority constituted under the *Canada Marine Act*, SC 1998, c 10, and manages 297 acres of land on behalf of the Government of Canada. It offers both short and long term leases of its facilities.

[5] AIM is a scrap metal recycler, with operations in over ninety (90) locations in Canada and other countries. It has lease, service and/or supply agreements with various municipalities, waste management authorities, and business entities.

[6] AIM obtained the right to a lease agreement with Port Saint John in February 2008, when it purchased another company, SNF LP.

[7] In late 2008 and early 2009, preliminary discussions commenced about expanding AIM's business at Port Saint John.

[8] Between 2010 and 2011, discussions and then negotiations between AIM and Port Saint John occurred with respect to the renewal of the existing lease. Eventually an agreement was reached and the Lease was signed on March 22, 2011.

[9] Initial discussions concerning the Lease Amendment started in February 2015, but were subsequently stalled until July 2016. Meetings between AIM and Port Saint John were held in July 2016, followed by the exchange of proposals. Between March and June 2017, draft agreements were exchanged. The Lease Amendment was ultimately signed on July 6, 2017.

B. *The access request*

[10] Port Saint John is a "government institution" for the purposes of the *ATIA*. On July 8, 2022, it received a request under the *ATIA* from a CBC producer seeking a copy of the property lease agreement between Port Saint John and AIM.

[11] Port Saint John determined that the Lease and Lease Amendment were responsive to CBC's access request. It concluded that certain redactions were required under the *ATIA*, but that the remainder of the two documents should be disclosed. More particularly, Port Saint John

redacted rent and wharfage amounts payable under the Lease and the Lease Amendment and the specific minimum amount to be invested by AIM for capital infrastructure improvements set out in the Lease Amendment.

[12] In accordance with subsection 27(1) of the *ATIA*, Port Saint John notified AIM of the access request and that it intended to disclose the Lease and Lease Amendment in part. Port Saint John provided AIM with copies of the two documents with its proposed redactions so that it could exercise its right to make written representations about Port Saint John's intention to disclose. Port Saint John notified CBC that it was consulting with AIM as the third party.

[13] AIM agreed with Port Saint John's redactions, but proposed numerous additional redactions pursuant to subsection 20(1) of the *ATIA*.

[14] On August 6, 2022, Port Saint John informed AIM of its decision to provide the documents to the requester with the original redactions applied by Port Saint John, as well as the signatures of AIM representatives removed. It informed AIM of its right to request a review under the *ATIA*. Port Saint John also advised CBC of its decision to provide access to the requested records in part.

C. *The section 44 ATIA application*

[15] AIM filed a Notice of Application, pursuant to section 44 of the *ATIA*, seeking a review of Port Saint John's decision to disclose portions of the Lease and Lease Amendment. It seeks an order under section 51 of the *ATIA* directing Port Saint John not to disclose certain information

in the two documents because it is third party information that is exempt from disclosure under paragraphs 20(1)(b), (c), and (d) of the *ATIA*.

[16] AIM asserts that its proposed redactions are required to protect its confidential financial and commercial information, and that the disclosure of the information could reasonably be expected to result in material financial losses, prejudice AIM's competitive position, and interfere with its contractual or other negotiations. A description of the specific information AIM seeks to exempt from disclosure in the Lease and Lease Amendment is set out in paragraphs 21 and 22 of its Memorandum of Fact and Law.

[17] CBC filed a Notice of Appearance pursuant to subsection 44(3) of the *ATIA* and was made a party to the proceeding.

(1) Confidential Information

[18] On October 31, 2022, AIM filed a motion for confidentiality in relation to the affidavits of Herbert Black (sworn September 21, 2022) and Andrew Dixon (sworn October 19, 2022). The motion also sought an order that CBC cease being a party to the proceeding.

[19] Ultimately, the parties consented to a Confidentiality Order. By order dated November 14, 2022, Justice Diner designated the following as Confidential Information:

- a) The Lease Agreement between the Saint John Port Authority and American Iron & Metal Company Inc., as contained in Exhibits "B", "C" and "D" of the Affidavit of Herbert Black;
- b) The Lease Renewal and Amending Agreement between the Saint John Port Authority and American Iron & Metal Company

Inc., as contained in Exhibits “B”, “C” and “D” of the Affidavit of Herbert Black;

c) Information relating to the negotiations of specific terms of the Lease Agreement and the Lease Renewal and Amending Agreement between the Saint John Port Authority and American Iron & Metal Company Inc., as contained in paragraphs 10, 14, 15, 17, 18 and 19 of the Affidavit of Andrew Dixon and Exhibits “A” to “E” of the Affidavit of Andrew Dixon.

[20] The Confidentiality Order further provides that CBC remains a party to the proceeding, but that its access to the Confidential Information would be limited to its legal counsel and subject to their execution of an undertaking agreed upon by the parties.

[21] In its Memorandum of Fact and Law, CBC stated that AIM had refused to provide CBC’s counsel with access to the Confidential Information despite counsel executing an undertaking agreed to by the parties. It argued that, as a result of the non-disclosure, “CBC is limited in its ability to make meaningful and detailed submissions regarding the redactions proposed by AIM”: CBC’s Memorandum of Fact and Law, at para 6.

[22] Following a Pre-Hearing Conference, an order was issued: (i) denying AIM’s informal request for the entire hearing to be held *in camera*; (ii) requiring AIM to serve counsel for CBC with an unredacted copy of its application record; and (iii) authorizing CBC to file further written submissions addressing any issues arising from their review of the unredacted record.

[23] The Court did not conduct any portion of the hearing of the application *in camera* as counsel for the parties were able to make their submissions without expressly mentioning the Confidential Information in open court. Further, these Reasons were written in a manner to avoid

disclosing the Confidential Information and counsel for the parties were given an opportunity to review them before release to make submissions on the need for any redactions.

(2) The evidence

[24] Both AIM and Port Saint John filed affidavit evidence addressing Port Saint John's decision to disclose portions of the Lease and Lease Amendment and AIM's proposed redaction of certain information. AIM filed the Affidavit of Herbert Black, the President and Chief Executive Officer of AIM, sworn September 21, 2022 [the Black affidavit].

[25] Port Saint John filed the Affidavit of Andrew Dixon, its Chief Operating Officer, sworn October 19, 2022 [the Dixon affidavit]. It also filed the Affidavit of Kerrileigh Nelson, Port Saint John's Corporate Secretary & Compliance Manager, sworn October 19, 2022.

[26] On consent of the parties, Port Saint John sought leave of the Court to serve and file a supplementary affidavit of Andrew Dixon, sworn February 9, 2023 [the supplemental Dixon affidavit] as part of its Respondent's Record. Port Saint John submitted that, in light of section 44.1 of the *ATIA*, which states that a section 44 application is a new proceeding, and the participation of CBC as a party, it sought to file evidence supporting Port Saint John's reliance on paragraph 18(b) of the *ATIA*. The further evidence was "intended to assist the Court in determining this matter as a new proceeding and to better understand the matters at issue between the three parties". By order dated February 13, 2023, Associate Judge Tabib granted Port Saint John's motion.

[27] Port Saint John relied on the supplemental Dixon affidavit to support its redactions of the rent and wharfage amounts payable, and the specific minimum amount to be invested by AIM for capital infrastructure improvements, as exempt information under paragraph 18(b) of the *ATIA*: Port Saint John's Memorandum of Fact and Law, at paras 37-49.

III. Issues

[28] A preliminary issue arising in this application is the scope of the Court's *de novo* review under section 44 of the *ATIA*. More specifically, whether the Court's review is restricted to the information Port Saint John intends to disclose and is being challenged by AIM in this application, or whether the Court's review is broader and includes a review of the information which Port Saint John is refusing to disclose to CBC.

[29] As noted above, Port Saint John tendered evidence and made submissions about the information in the Lease and the Lease Amendment it had deemed exempt under paragraph 18(b) and to which it was refusing access. In my view, as explained below, the scope of the Court's *de novo* review under section 44 is limited to the information Port Saint John, as a government institution, decided to disclose, and which AIM, as the third party, challenges.

[30] The only issue, therefore, to be determined on this application is whether the information in the Lease and Lease Amendment that AIM seeks to protect is exempt from disclosure under paragraphs 20(1)(b), (c), and/or (d) of the *ATIA*.

IV. Analysis

A. *Scope of the Court's de novo review*

[31] An application under section 44 is a *de novo* review to be heard and determined as a new proceeding in accordance with section 44.1 of the *ATIA: Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53 [*Merck Frosst*]; *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 at paras 12-14 [*Preventous*]; *Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at para 23; *Najm v Canada (Indigenous Services)*, 2023 FC 744 at para 4; *Actial Farmaceutica SRL v Canada (Health)*, 2022 FC 971 at para 42.

[32] At issue in a section 44 application is a government institution's "notice of decision to disclose a record or a part of a record". A third party may apply to the Court for "a review of the matter": *ATIA*, s 44(1). The onus is on the third party to establish that the information it seeks to protect from disclosure falls within an exemption under the *ATIA: Merck Frosst* at paras 94-95; *Samsung Electronics Canada Inc v Canada (Health)*, 2020 FC 1103 at para 42 [*Samsung*].

[33] The Federal Court of Appeal recently held that the "matter" under review in a section 44 application is "whether the information requested should be disclosed": *Preventous* at para 12. As I read it, the reference to "information requested" means the information requested that is at issue in the section 44 application. In other words, the information requested that the government institution decided to disclose to the requestor that is challenged by the third party. Indeed, subsection 44(2) provides that an application under subsection 44(1) is brought in "respect of the disclosure".

[34] This interpretation finds support in the Supreme Court's decision in *Merck Frosst*. Similar to this case, the government institution determined that some of the information in the requested records was exempt from disclosure and would not be released, while other information would be disclosed. The Court held that a review under section 44 concerned "the institution's decision to release information which the third party thinks falls within the protected sphere": *Merck Frosst* at para 23. The Supreme Court did not suggest that the reviewing court's role in a section 44 application was also to look behind the government institution's redactions and consider the information it was not releasing. Of note, in that case, the redactions evolved and, as the case progressed, more redactions were applied to the requested records.

[35] While *Merck Frosst* was decided before section 44.1 was added to the *ATIA*, the new provision does not change the scope of a *de novo* review under section 44. Section 44.1 provides that "for greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding". As such, the added provision simply clarifies the nature of both section 41 and 44 proceedings; namely that they are fresh proceedings. It does not change the scope of either proceeding. A section 44 review is concerned with the disclosure of information, while a section 41 review is concerned with the refusal of access to information.

[36] Finding that the scope of the Court's *de novo* review under section 44 extends to consideration of information to which the government institution is refusing access would circumvent the applicable legislated process. The *ATIA* sets out a separate procedure for a requestor to follow if they want to challenge a decision to refuse access, starting with filing a complaint with the Information Commissioner: *ATIA*, ss 30-37; *Porter Airlines Inc v Canada*

(*Attorney General*), 2013 FC 780 at para 64. A matter of refused access may ultimately be the subject of a review before this Court under section 41. In such a review, the burden of proof is determined based on section 48 – it may lie with the government institution, a third party, or in a smaller subset of situations, the Privacy Commissioner.

[37] If I am wrong, and the scope of a section 44 review extends to the information a government institution refuses to disclose, the Court should only undertake such a review where the requestor takes issue with the refused access. Here, the CBC took “no position” over Port Saint John’s redactions. In fact, in its written submissions, the CBC asked the Court to dismiss the application and order the release of the records to CBC “with only the redactions proposed by the Port Authority”: CBC’s Memorandum of Fact and Law, at para 52.

[38] As set out in paragraph 21 above, the CBC expressed concern about AIM’s failure to provide access to the Confidential Information (which only includes the unredacted information AIM seeks to protect; it does not include the unredacted information Port Saint John exempted) in accordance with the Confidentiality Order. Following a Pre-Hearing Conference to address that matter, among others, I ordered AIM to disclose the Confidential Information to counsel for CBC. At no point did CBC ever request that it be granted access to the information redacted by Port Saint John so that it could challenge those redactions.

[39] A wholesale review by the reviewing court of all the information responsive to an access request would be an onerous task. It would require the Court to review each record to determine

whether any exemptions apply. This approach would be wholly inconsistent with section 45 of the *ATIA*, which provides that an application is “to be heard and determined in a summary way”.

[40] Based on the foregoing, I conclude that the Court’s review in this application is restricted to the information that Port Saint John has decided to disclose and with which AIM takes issue. As such, the supplemental Dixon affidavit and the submissions made by Port Saint John about its exemptions under paragraph 18(b) of the *ATIA* were not required.

B. *AIM failed to establish that the information should be exempt from disclosure*

[41] The purpose of the *ATIA* is “to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions”: *ATIA*, s 2. In furtherance of that purpose, paragraph 2(2)(a) sets out three guiding principles: (i) government information should be available to the public; (ii) necessary exceptions to the right of access should be limited and specific; and (iii) decisions on the disclosure of government information should be reviewed independently of government.

[42] The onus is on the third party objecting to the disclosure of the information in question to demonstrate why disclosure should not be made: *Merck Frosst at para 92*. Specifically, it must establish that a statutory exemption under the *ATIA* applies on the balance of probabilities. The evidence required to meet that standard depends on the nature of the exemption relied upon and the particular context of the case: *Merck Frosst at para 94*.

[43] AIM seeks to exempt information from disclosure under paragraphs 20(1)(b), (c), and (d) of the *ATIA*:

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 and is treated consistently in a confidential manner by the third party;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[...]

[...]

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[44] As explained below, I conclude that AIM has failed to discharge its onus to establish that the information is exempt under paragraph 20(1)(b), (c), and/or (d). The fatal flaw in AIM's case is the lack of compelling and specific evidence tendered in support of its proposed redactions.

Rather than file evidence that addresses the particular information in the two agreements, AIM rests its case on generalities, bald assertions, and speculation.

[45] Furthermore, AIM's overly expansive approach to redactions is inconsistent with a "limited and specific" application of the *ATIA*'s exemptions. The range of information that AIM seeks to exempt from disclosure is extremely broad. It includes: hours of operations; default provisions; the lease termination date; description of business activities; description of the types of taxes, levies, rates and charges payable without any specific amounts listed; description of the types of utilities payable without any specific amounts listed; waste, destruction and removal responsibilities; environmental provisions; and maps of portions of the leased premises. A comprehensive listing of the types of information at issue is set out in paragraphs 21-22 of AIM's Memorandum of Fact and Law and Appendix "A" of Port Saint John's Memorandum of Fact and Law.

C. *Information not "supplied" by AIM as required by paragraph 20(1)(b)*

[46] The confidential information exemption in paragraph 20(1)(b) is a class-based exemption. As such, the information must be redacted once it is established that the information in question meets the requirements of the section: *Merck Frosst* at para 99; *Bombardier Inc v Canada (Attorney General)*, 2019 FC 207 at para 42 [*Bombardier*].

[47] The party seeking to resist disclosure must demonstrate that the information is: (i) financial, commercial, scientific, or technical information; (ii) confidential information; (iii) supplied to a government institution by the third party; and (iv) consistently treated in a

confidential manner by the third party. All four of these requirements must be met before the information is exempted from disclosure: *Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135 at para 51 [*Calian*]; *Concord Premium Meats Ltd v Canada (Food Inspection Agency)*, 2020 FC 1166 at para 96 [*Concord*]; *Samsung* at paras 60-61; *Bombardier* at paras 43-44.

[48] The information in the Lease and Lease Amendment is not exempt from disclosure under paragraph 20(1)(b) because it was not “supplied” by AIM to Port Saint John. Rather, the information constitutes terms and conditions that were negotiated as between the parties.

[49] As determined by Justice Heneghan in *131 Queen Street Ltd v Canada (Attorney General)*, 2007 FC 347, negotiated terms of a lease do not constitute “supplied information”:

[33] In this case, the disputed information consists of certain provisions in the Head Lease and the Sub-Lease that were agreed upon by the parties as a result of negotiations. It is not information that was merely provided to the government by the Applicant. The comments of Justice McGillis at paragraph 3 of *Halifax Development Limited v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (T.D.) (QL) are applicable here:

... With respect, I do not agree that the rental rates constitute information which was "supplied" to a government institution. The evidence tendered on the motion establishes that the rental rates were negotiated between the applicant and respondent as a term of the leases. In my opinion, a negotiated term of a lease may not properly be characterized as information which was supplied to the government. Paragraph 20(1)(b) of the Act is therefore inapplicable to the facts of this ease [sic].

[50] The evidence tendered by both AIM and Port Saint John supports that the terms of the Lease and Lease Amendment were negotiated before the parties executed the final agreements: Black affidavit, at paras 10-12, 16-17; Dixon affidavit, at paras 5-22.

[51] More specifically, with respect to the Lease, Andrew Dixon, who was the chief negotiator for Port Saint John, avers that Port Saint John initiated the negotiations. Following initial discussions and negotiations in May 2010, Port Saint John prepared and delivered a formal offer to lease, including business terms: Dixon affidavit, at paras 9-10.

[52] Further, the evidence establishes an ensuing negotiation between AIM and Port Saint John, involving offers, counter-offers, and compromises before a final agreement on terms of the Lease was reached in March 2011: Dixon affidavit, at paras 11-15, Exhibits B, C, D, and E. The documentary evidence supports Mr. Dixon's statement that "terms of the lease were not provided by one side or the other, but were the result of negotiation between the parties": Dixon affidavit, at para 16.

[53] The evidence also demonstrates that the terms of the Lease Amendment were negotiated. Following stalled discussions in 2015, negotiations took place through 2016 and 2017 regarding amendments to the lease, with proposals and counter proposals exchanged between the parties before the final Lease Amendment was executed in July 2017: Dixon affidavit, at paras 17-21. Mr. Dixon's affidavit states that "much like the Lease, the Lease Amendment was negotiated between two sophisticated parties with the engagement of legal counsel [...] Terms of the Lease

Amendment were not provided by one side or the other, but were the result of negotiation between the parties”: Dixon affidavit, at para 22.

[54] Given the requirements under paragraph 20(1)(b) are conjunctive, my finding that AIM did not “supply” the information in question to Port Saint John is sufficient to dispose of AIM’s reliance on this exemption. As Justice Diner aptly stated, “the failure to establish any one of the four criteria will be fatal to a third party’s claim for an exemption”: *Samsung* at para 61.

D. *AIM failed to establish a reasonable expectation of probable harm*

[55] In contrast to paragraph 20(1)(b), paragraphs 20(1)(c) and (d) are harm-based exemptions. The onus is on the party invoking either exemption to establish a reasonable expectation of probable harm arising from the disclosure of the information: *Merck Frosst* at paras 192, 206; *Concord* at para 96; *AstraZeneca Inc v Health Canada*, 2005 FC 1451 at paras 41-42 [*AstraZeneca*], aff’d 2006 FCA 241.

[56] To satisfy this burden, the party must demonstrate a clear and direct linkage between the disclosure and the alleged harm:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [emphasis added]

Canada (Information Commissioner) v Canada (Prime Minister),
1992 CanLII 2414 (FC) at p 479

[57] Affidavit evidence simply attesting that harm will result is insufficient to discharge the burden: *Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683 at para 78; *Brainhunter (Ottawa) v Canada (Attorney General)*, 2009 FC 1172 at para 32; *AstraZeneca* at para 90.

[58] In this case, AIM does exactly what the jurisprudence warns against, by relying on an affidavit “couched in generalities”: *Halifax Development Limited v Canada (Minister of Public Works and Government Services)*, [1994] FCJ No. 2035 (TD) at para 4. AIM’s evidence falls significantly short of establishing a reasonable expectation of probable harm as required under paragraphs 20(1)(c) and (d) of the *ATIA*.

[59] Considering the expansive scope and nature of the information it seeks to protect, it was incumbent on AIM to tender evidence establishing how the exemptions claimed apply to the specific information at issue. However, it failed to do so. AIM’s affidavit evidence does not refer to specific sections or information in the Lease or Lease Amendment the disclosure of which could cause harm, or explain how disclosure of the information it seeks to redact will lead to that harm. Rather, Mr. Black’s affidavit merely recites the language used in the statutory provisions and makes broad, sweeping statements about the potential harm: Black affidavit, at paras 22, 24-25.

(1) Paragraph 20(1)(c)

[60] The types of harm enumerated in paragraph 20(1)(c) are disjunctive. AIM must establish that disclosure of the information will either result in material financial loss or prejudice its competitive position: *Merck Frosst* at para 212; *Calian* at para 40.

[61] In terms of material financial loss, AIM refers to “negative media articles” published by CBC. AIM claims it has a “reasonable expectation to believe” that CBC will use the information to “continue its campaign of negative media coverage of AIM” and to use the information to “propagate ways in which the Saint John Port Authority could impose additional costs on AIM or avenues that could be explored to terminate the Lease Renewal Agreement prematurely”: AIM’s Memorandum of Fact and Law, at paras 68-69.

[62] There is, however, simply no evidence to substantiate AIM’s claim of a “campaign” by CBC. In fact, AIM wrongly attributes media articles to CBC: AIM’s Memorandum of Fact and Law, at para 67. Only one of the five media articles included in Mr. Black’s affidavit was actually published by CBC: Black affidavit, Exhibit A.

[63] Further, all five articles are similar in nature and report on complaints about AIM’s Port Saint John facility. Three of the media articles published in July 2022, including the CBC one, reported on two workplace fatalities that occurred within seven months at AIM’s facility at Port Saint John. As the articles reported, because of concerns for the safety of workers, local politicians were calling for the closure of the facility. The other two articles, published in

January 2021 and September 2020, reported on explosions and a fire at AIM's facility. There is no suggestion in Mr. Black's affidavit that these media articles are inaccurate. Indeed, he states that AIM has faced a great deal of "public criticism" and "political pressure" in respect of its operations: Black affidavit, at para 21. This is exactly what the news articles report on.

[64] In any event, this Court has held that anticipated negative or even inaccurate media reporting is insufficient to justify exempting information from disclosure. Any concerns about unfair negative media coverage may be addressed through other avenues: *A Inc v Canadian Museum for Human Rights* 2022 FC 1115 at para 94 [*Museum for Human Rights*]; *Concord* at paras 52, 89; *Burnbrae Farms Ltd v Canada (Canadian Food Inspection Agency)*, 2014 FC 957 at paras 112-113.

[65] AIM's concerns about the possibility of future negative media coverage are insufficient to justify redaction of the information it seeks to protect in the Lease and Lease Amendment.

[66] With respect to harm to its competitive position, AIM baldly asserts that disclosure of the information will give its competitors "unfair insight into their commercial and financial dealings": AIM's Memorandum of Fact and Law, at para 66. It provides no evidence showing how disclosure of specific information in the two agreements would prejudice AIM's competitive position beyond a mere assertion at paragraph 24 of Mr. Black's affidavit, which states:

This information could reasonably be expected to be used by a competitor to develop knowledge of the confidential information contained in the Lease Agreement and Lease Renewal Agreement which could then be used to develop business plans to undercut

AIM in future bids and/or negotiations. A competitor could also use this information to develop and implement a business plan to attempt to steal the property on which we operate.

[67] AIM also relies on this Court's decision in *Equifax Canada Co v Canada (Minister of Public Works and Government Services)*, 2014 FC 487 [*Equifax*]. This reliance is misplaced. The information at issue in that case was contract pricing and payment terms. The Court held that in disclosing the contract price, "there is a real, objective risk that this information will give competitors a head start or "spring board" in developing competitive bids against the Applicant for future contracts": *Equifax* at para 30.

[68] In this case, Port Saint John has redacted the rent and wharfage amounts payable, as well as the specific minimum amount to be invested by AIM for capital infrastructure improvements. AIM has failed to show how the broad range of other information it seeks to exempt, for example obligations of maintenance, repair, and insurance, would provide a "head start" for their competitors. Rather, I agree with the Respondents that these types of general terms and conditions are typically found in leasing agreements. It is difficult to understand how disclosure of this type of general information could provide an unfair insight into AIM's business dealings or prejudice its competitive position.

[69] AIM has failed to establish that the information should be exempted pursuant to paragraph 20(1)(c).

(2) Paragraph 20(1)(d)

[70] Paragraph 20(1)(d) provides a mandatory exemption for information that “could reasonably be expected to interfere with contractual or other negotiations of a third party”.

[71] To rely on this exemption, obstruction or interference with contractual or other negotiations of a third party must be probable and not merely speculative. Evidence of heightened competition or increased competitive pressure is insufficient. Hypothetical risk to future business opportunities also does not suffice: *Calian* at para 4, *Museum for Human Rights* at para 99; *Canadian Broadcasting Corp v Canada (National Capital Commission)*, 1998 CanLII 7774 (FC) at para 29 [*National Capital Commission*].

[72] Relying on the affidavit of Mr. Black, AIM argues that disclosure of the information would interfere with its contractual negotiations. In his affidavit, Mr. Black states that AIM has lease, service, and or/supply agreements with various municipalities, waste management authorities, and business entities: Black affidavit, at paras 25-28. AIM alleges that these parties could use the information to negotiate more favourable lease, service and/or supply agreements.

[73] In *Saint John Shipbuilding Ltd v Canada (Minister of Supply and Services)*, 1988 CarswellNat 213 [*Saint John Shipbuilding*], aff'd by 1990 CarswellNat 231, the Federal Court rejected a third party's similarly expansive approach. In that case, the government institution had agreed to redact dollar figures, percentages, and other specific financial information prior to disclosure, but the third party objected to the release of the rest of the contracts. The third party argued that release of general provisions, such as penalty and warranty provisions, would

prejudice its position in negotiating future contracts. The Court held that the expectation of harm shown by the third party had “far too large an ingredient of speculation or mere possibility to meet the standard”: *Saint John Shipbuilding* at para 22.

[74] Further, I find that AIM’s evidence that it negotiates all of its agreements individually, such that each is unique and tailored to the particular contracting party, undermines its argument that harm will result if the terms of the Lease and Lease Agreement are disclosed: Black affidavit, at paras 26, 31. If the terms of each agreement are individually negotiated, then disclosure of the terms of one such unique agreement would not prejudice AIM’s ability to negotiate in other contexts.

[75] AIM has not met the required burden, as it has not demonstrated proof of a reasonable expectation that actual contractual negotiations will be obstructed by disclosure: *National Capital Commission* at para 29. At best, it has perhaps raised some evidence of increased competitive pressure, but this is not sufficient to establish the necessary harm: *Calian* at para 47.

[76] AIM also claims that disclosure of the information would interfere with future negotiations with new potential lessors: Black affidavit, at paras 30-32. This evidence is particularly speculative. Mr. Black indicates that AIM’s preference is to acquire property, but that due to limited buying opportunities it may be “forced” to pursue lease agreements, further making it unclear how many actual lease agreements comparable to those it has with Port Saint John it would be negotiating: Black affidavit, at para 30.

[77] AIM has not demonstrated that disclosure of this information will obstruct or prejudice contractual or other negotiations, and therefore the exemption in paragraph 20(1)(d) cannot be relied upon.

V. **Conclusion**

[78] For the foregoing reasons, I am dismissing this application. AIM has failed to establish that the information is exempt from disclosure under paragraphs 20(1)(b), (c), or (d) of the *ATIA*.

[79] Following the hearing, counsel for the parties advised the Court that they had agreed on the quantum of costs payable in accordance with Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. Having considered their agreement, and in the exercise of my discretion pursuant to subsection 53(1) of the *ATIA* and Rule 400 of the *Rules*, I find their costs proposal to be reasonable. I am therefore awarding costs payable to each of Port Saint John and CBC in the amount of \$3,570.00.

[80] The Court held a teleconference, prior to the release of these Reasons, in light of concerns expressed by the Applicant about disclosure of the Confidential Information given its stated intent to appeal this Judgment. After hearing counsel for the parties and further considering this issue, I have determined that the Confidentiality Order dated November 14, 2022 will remain in place during the appeal period from this Judgment.

JUDGMENT in T-1747-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. The Applicant shall pay each of the Respondents costs in the amount of \$3,570.00.
3. The Confidentiality Order dated November 14, 2022 is hereby extended during the appeal period from this Judgment.

"Anne M. Turley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1747-22

STYLE OF CAUSE: AMERICAN IRON & METAL COMPANY INC v
SAINT JOHN PORT AUTHORITY AND CANADIAN
BROADCASTING CORPORATION

PLACE OF HEARING: HELD IN PERSON IN FREDERICTON NB, AND VIA
VIDEOCONFERENCE (HYBRID)

DATE OF HEARING: AUGUST 15, 2023

**REASONS FOR JUDGMENT
AND JUDGMENT:** TURLEY J.

DATED: SEPTEMBER 21, 2023

APPEARANCES:

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Sarah M. Dever Letson FOR THE RESPONDENT SAINT JOHN PORT
AUTHORITY

Iain MacKinnon FOR THE RESPONDENT CANADIAN
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SOLICITORS OF RECORD:

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Saint John NB AUTHORITY

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