Date: 20071123

Docket: T-2194-03

Citation: 2007 FC 1231

BETWEEN:

SAWRIDGE BAND

Applicant

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 6th of November, 2007 of an application under section 44 of the *Access to Information Act*[1] for review of a decision on behalf of the Minister of Indian Affairs and Northern Development (the "Respondent") to disclose to a requester, a member of the Sawridge Band, (the "requester") information in the possession of the Respondent provided to the Respondent by the Applicant. The decision at issue is dated the 3rd of November, 2003 and was disclosed to the Sawridge Band (the "Applicant") on the 7th of November, 2003.

[2] Subsection 44(1) of the *Access to Information Act* (the "*Act*") reads as follows:

[1] R.S.C. 1985, c. A-1.

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.	**44.** (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)*b*) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

It was not in dispute that the Applicant was entitled to bring this matter before the Court.

PRELIMINARY ISSUE

[3] Counsel for the Respondent urges that Her Majesty the Queen is not a proper party to this proceeding and that the style of cause should be amended to remove Her Majesty the Queen in Right of Canada from the style of cause and that the designation "Minister of Indian and Northern Affairs" should be amended to read "Minister of Indian Affairs and Northern Development." Counsel for the Applicant did not oppose this amendment to the style of cause. The style of cause has been so amended on these Reasons and will be so amended on the Order disposing of this Application.

BACKGROUND

[4] A member of the Sawridge Indian Band, and that member's membership is not disputed for the purposes of this matter although it is in issue in other proceedings before the Court, made a request under the *Act* to the Respondent by letter dated the 23rd of May, 2003. She requested:

> 1. The current balances, details and transactions and supporting documents (BCRs) for the
> a) **Sawridge Capital Trust Fund** and
> b) **Sawridge Revenue Trust Fund** for the last two years ending March 31, 2002

> 2. A Sawridge **consolidated financial statement** for the year ending March 31, 2002.

[5] The Respondent made a preliminary decision pursuant to the *Act* to release responsive records to the requester and so advised representatives of the Applicant.

[6] The Applicant objected to the disclosure of responsive records to the requester.

[7] After consultations, the Respondent maintained its decision to release responsive records. This application followed.

THE SUBSTANTIVE ISSUES

[8] Counsel for the Applicant identified three (3) substantive issues on this application:

> (a) the information (that is to say, the information proposed to be released) is not in the "control" of the Respondent and therefore cannot be disclosed without the Applicant's consent. Further, the Respondent has a fiduciary relationship with the Applicant that, together with the circumstances in which the information was provided, creates accountability at law;
> (b) the information consists of financial information and records of the Applicant that is confidential information supplied to a government institution by a third party and is consistently treated in a confidential manner by the Applicant. The information was received by the Respondent in confidence; and
> (c) the information proposed to be disclosed exceeds the scope of the request.

[9] During the hearing of this matter, the third substantive issue above was withdrawn.

THE LEGISLATIVE SCHEME

[10] Subsection 2(1), subsection 4(1) and the opening words of subsection 20(1) and paragraph (b) of that subsection read as follows:

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

…

…

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

(*a*) a Canadian citizen, or

a) les citoyens canadiens;

(*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

b) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

has a right to and shall, on request, be given access to any record under the control of a government institution

…

…

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act 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

b) des renseignements financiers, commerciaux, scientifiques ou

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;	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;
…	…
[emphasis added]	[je sousligne]

[11] Section 69 of the *Indian Act*[2] reads as follows:

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.	**69.** (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.
(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.	(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

[12] Section 8 of the *Indian Bands Revenue Moneys Regulations*[3] reads as follows:

8. (1) Every Band shall engage an auditor to audit its account and to render an annual report in respect thereof.	**8.** (1) Une bande doit engager un vérificateur qui sera chargé d'examiner le compte et d'établir un rapport annuel à ce sujet.
(2) A copy of the auditor's annual report shall, within seven days of its completion,	(2) Dans les sept jours qui suivent la date à laquelle le vérificateur termine son rapport annuel, un exemplaire dudit rapport doit être
(*a*) be posted in conspicuous places on	*a*) placé en des endroits bien en vue de

[2] R.S.C. c. I-6.
[3] C.R.C., c. 953.

the Band Reserve for examination by members of the Band; and	la réserve pour que les membres de la bande puissent l'examiner; et
(*b*) be supplied to the Minister of Indian Affairs and Northern Development.	*b*) remis au ministre des Affaires indiennes et du Nord canadien.
[emphasis added]	[je sousligne]

ANALYSIS

[13] Before turning to the substantive issues identified above, I will comment briefly on the issue of standard of review. The response to this issue was not in dispute before me.

[14] In *Air Atonabee Ltd. v. Canada (Minister of Transport)*[4], Justice MacKay wrote:

> The role of the Court to conduct a "review of the matter" *de novo*, including examination document by document of the records proposed to be disclosed which the applicant third party seeks to have prohibited from disclosure, does not seem to have been thoroughly discussed previously, perhaps because it has been seen to be so obvious in previous cases that no issue was raised about it. That is, however, the role implicit in the statute, consistent with the purposes of the Act and one that the Court has adopted in practice in previous cases arising under section 44… In light of the jurisprudence of evolving in relation to the Act there can no longer be doubt that upon application for review, the Court's function is to consider the matter *de novo* including, if necessary, a detailed review of the records in issue document by document.
>
> [citations omitted]

It is not in dispute then, that this is a review *de novo*. I have reviewed "document by document" the documents proposed to be released that have been provided to the Court in a confidential affidavit.

a) "In control"

[15] Subsection 4(1) of the *Act*, quoted above, provides that a person such as the requester in this matter has a right to and shall, on request, be given access to any record "under the control" of a

[4] [1989] F.C.J. No. 453, May 24, 1989 (F.C.T.D.).

government institution, such as the Respondent. This is consistent with the purpose of the *Act* set out in subsection 2(1), also quoted above, which also refers to records "under the control" of a government institution such as the Respondent. Counsel for the Applicant urges that the records at issue are not "under the control" of the Respondent because of conditions unilaterally "imposed" by the Applicant in covering letters delivering the records at issue and because of the "trustee/beneficiary relationship" that exists between the Respondent and the Applicant by virtue of the "fiduciary relationship" that the Crown has with First Nations.

[16] Counsel for the Respondent refers to section 8 of the *Indian Bands Revenue Moneys Regulations* quoted earlier in these reasons and urges that, in the light of the obligation created by those *Regulations* on the Applicant to supply records such as those at issue here to the Respondent, it was not open to the Applicant to seek to impose terms and conditions on the supply of the records to the Respondent and further, that it was not open to the Respondent to accede to any such terms and conditions. Further, counsel urges, the special relationship between the Applicant and the Respondent cannot override or circumscribe the provision by the Applicant of the records to the Respondent.

[17] In *Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance)*[5], Justice Nadon, then of the predecessor to this Court, wrote at paragraphs 13 and 14 of his reasons:

> In any event, in view of the Federal Court of Appeal's decision in *Canada Post Corp. v. Canada (Minister of Public Works)*,… mere physical possession of the records by the Respondent is sufficient, under subsection 4(1) of the *Access to Information Act*, to require the Respondent to disclose the requested information.

[5] [1999] 2 F.C. 381 (T.D.).

> At pages 127 and 128 of his reasons, for the majority of the Federal Court of Appeal, Mr. Justice Létourneau said:
>
> > The notion of control referred to in subsection 4(1) of the *Access to Information Act*…is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "*de jure*" and "*de facto*" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the government.
>
> The remarks of Strayer J., as he then was, in *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports),*… are along the same lines as those made by Létourneau J. A. in *Canada Post Corp.* here is how Strayer J. stated his opinion…:
>
> > The plain meaning of the language employed in the Act does not suggest that "information", "government information", or "record under the control" of the Government must be limited by some test as to how and on what terms the information or record came into the hands of the Government. That is the kind of qualification which the CFL is asking me to create. I can find no basis for doing so. The plain meaning of subsections 2(1) and 4(1) as quoted above is that the Act gives access subject to many exceptions, to any record, or information in a record, which happens to be within the custody of the Government regardless of the means by which that custody was obtained….
> >
> > [citations omitted, emphasis added]

[18] I am satisfied that the foregoing makes it clear beyond a doubt that the Applicant had no authority to impose terms and conditions on the provision of the records at issue to the Respondent. Once the records were provided, they were in the possession and "control" of the Respondent for the purposes of the *Act*. Further, the special relationship, however described, that exists between the Applicant and the Respondent creates no limitation on the concept of documents "in the control" of the Respondent. If Parliament had intended that First Nations have a special status and exemption

under the *Act*, it could easily have said so. It chose not to.[6]

b) The Paragraph 20(1)(b) of the *Act* Exemption

[19] Counsel for the Applicant urges that the records in issue are exempt from disclosure by virtue of paragraph 20(1)(b) of the *Act* quoted above. Counsel for the Respondent urges that paragraph 20(1)(b) has no application on the facts of this matter by reason of the requester's membership in the Applicant and in reliance on *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*[7] where Associate Chief Justice Jerome wrote at pages 153 to 155:

> The core of the applicants' case and their strongest argument, is that this information is "financial…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". It will be seen that this test, as set out in paragraph 20(1)(*b*), contains four criteria:
>
> > 1) The records must be (in this case) financial information. That is conceded by the respondent here, quite properly, in my opinion.
> > 2) The information must be "confidential" by some objective standard. …That factor remains very much in dispute.
> > 3) The information must be supplied to a government institution by a third party. The respondent attempted to argue that, because the balances on the applicants' funds held in trust had been provided to the Bands by the Department, that information could not be considered as having been "supplied" by the Bands. There is no question, however, that the financial statements, in their current form, were prepared by the Bands' accountants for the Bands' own use and provided to the government in fulfillment of the statutory reporting requirements. I have no doubt, therefore, that this material was "supplied" by the third parties.
> > 4) The information must have been treated consistently in a confidential manner by the third party. This, together with the confidential nature of the information itself, forms the basis of the dispute in this case.
>
> The applicants argue that, by any objective test, this information is confidential in nature. The reasons can be summarized as follows:
>
> > 1) The Bands have not released the information to the public and the public does not have any proprietary interest in the information.

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[6] For brief reasoning to the same effect, see *St. Joseph Corp. v. Canada (Public Works and Government Services)* [2002] F.C.J. No. 361, 2002 FCT 274, March 12, 2002, at paragraph 55.
[7] [1989] 1 F.C. 143 (F.C.T.D.).

> 2) The reports were prepared by the Bands, for the Bands, at the expense of the Bands and relate [to the extent of this dispute] solely to the Bands' own funds.
> 3) The information was conveyed to the government within the context of the fiduciary/trust relationship which exists between the Crown and the Indians and as such was "communicated in circumstances in which an obligation of confidence arises".
> 4) The statements were provided to the Department for the limited purpose of allowing DIA to carry out its fiduciary tasks of monitoring and supervising Band expenditures. In these circumstances there exists a private law duty of confidence, either by virtue of the fiduciary relationship or implied from the nature of the information and the circumstances of its communication to DIA:…
>
> [citations omitted]

[20] As in *Montana*, the Respondent here concedes that the records at issue are financial information. Having reviewed the records "document by document", I agree.

[21] On the facts of this matter, and having reviewed the records at issue and the correspondence between the Applicant and the Respondent covering the provision of those records, I am satisfied that the information is "confidential" in nature.

[22] There can be no doubt that the records at issue were supplied to the Respondent by a third party. Equally, there can be no doubt that the records at issue have been treated consistently by the Applicant, at all relevant times, in a confidential manner. Indeed, the lengths to which the Applicant has gone to treat the records as confidential are extraordinary.

[23] Counsel for the Respondent urges that the Montana Band decision, particularly as it relates to paragraph 20(1)(b) of the *Act*, can be distinguished because the requester there was a journalist member of the general public whereas, on the facts of this matter, the requester is a member of the

Applicant Band, certainly for the purposes of this matter, and is thus, like the Band itself, an "owner" of the records at issue. Returning to the manner in which the Applicant treats the records at issue, not only in relation to independent third parties, but equally in relation to individual members of the Applicant Band, the requester and other members of the Band certainly are not treated like "owners".

[24] Counsel for the Respondent referred me to the following passage at page 156 of the reported decision in *Montana Band*:

> …the only people who are ever likely to have access to this information are the people it belongs to – the members of the applicant Bands – and those who owe them a duty of confidence, for example, their accountants. The respondent has not demonstrated even a reasonable likelihood that persons whose interests differ from those of the Band will be allowed to review this material.

Such is not the case here. The record before the Court makes it clear that the requester is a person whose interests differ from certain other members of the Band, particularly the elected Chief and council members. There is no certainty, whatsoever, that if the requester gains access to the records at issue, they will not be used for purposes contrary to the interests of certain other members of the Applicant.

[25] Based on the foregoing brief analysis, I am satisfied that the passage from page 156 of the cited decision in *Montana Band* to which counsel for the Respondent refers me is distinguishable on the facts of this matter. The interest of the requester, like the interest of the journalist requester in *Montana Band*, is not at all likely to be consistent with the interest of the Applicant as represented by its Chief and council members. On the facts of this matter, I am satisfied that paragraph 20(1)(b) of the *Act* applies and that thus the records at issue are exempt from disclosure to the requester.

CONCLUSION

[26] For the foregoing reasons, this application will be granted. An Order will go prohibiting the Respondent from releasing the records at issue, in whole or in part, to the requester.

COSTS

[27] Both parties requested costs of this application. In the normal course, costs would follow the event. This matter has not unfolded "in the normal course". The application was originally set down for hearing on the 11th of September, 2007 and both sides were given fully adequate notice of that fact. On that date, at the appointed hour, counsel for the Respondent and this Judge appeared ready to proceed. Counsel for the Applicant, without credible explanation, did not appear. In the result, by Order, the matter was adjourned to November 6th with the following stipulation:

> The hearing of this matter is adjourned on a peremptory basis as against the Applicant, to Tuesday, the 6th of November, 2007 at 1:00 p.m.

[28] On the 6th of November, counsel on both sides appeared. Counsel for the Applicant, by letter since it was another member of his firm that appeared at that time, extended his apologies to the Court and counsel for the Respondent. The failure to appear on the September date apparently resulted from a misunderstanding between, perhaps, the Applicant and counsel, or perhaps within the office of counsel. In these circumstances, and in order to emphasize the importance of the

judicious use of limited court resources, I will exercise my discretion to provide that there will be no Order as to costs.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario.
November 23, 2007

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2194-03
STYLE OF CAUSE:	SAWRIDGE BAND and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 6, 2007
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DATED:	November 23, 2007

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