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Order 02-50

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
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Summary: The applicant First Nation requested access to appraisal reports and supporting documentation for parcels of land included in an offer made by British Columbia and Canada to the First Nation during treaty negotiations. The Ministry is not required by s. 25(1)(b) to disclose the disputed information to the applicant First Nation. The Ministry is required by s. 12(1) and is authorized by s. 17(1)(e) to refuse to disclose the disputed information. The Ministry is not authorized to refuse disclosure under s. 16(1).

Key Words: public interest – risk of significant harm – public health or safety – clearly in the public interest – Cabinet confidences – substance of deliberations – background explanations or analysis – inter-governmental relations – information about negotiations – reasonable expectation of harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c), 12(2)(c)(i), s. 12(2)(c)(ii), 16(1)(a)(i), 16(1)(c), 17(1), 17(1)(e) and s. 25(1)(b).

Authorities Considered: B.C.: Order 14-1994, [1994] B.C.I.P.C.D. No. 17; Order 104-1996, [1996] B.C.I.P.C.D. No. 30; Order 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order 01-14, [2001] B.C.I.P.C.D. No. 15; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages*), [2002] S.C.J. No. 55, 2002 SCC 53; *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927; *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246; *Gitanyow First Nation* v. *Canada*, [1999] B.C.J. No. 659, [1999] 3 C.N.L.R. 89 (B.C.S.C.); *Quebec (Attorney General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159, [1994] S.C.J. No. 13; *British Columbia (Minster of Forests)* v. *Okanagan Indian Band*, [2001] B.C.J. No. 2279 (C.A.); *Haida First Nation* v. *British Columbia (Minister of*

Forests), [2000] B.C.J. No. 2427, [2001] 2 C.N.L.R. 83 (B.C.S.C.), rev'd [2002] B.C.J. No. 378 (C.A.), supp. reasons [2002] B.C.J. No. 1882; *Chemainus First Nation* v. *British Columbia Assets and Lands Corporation*, [1999] B.C.J. No. 682, [1999] 3 C.N.L.R. 8 (B.C.S.C.); *Westbank First Nation* v. *British Columbia (Minister of Forests)*, [2000] B.C.J. No. 1613, [2001] 1 C.N.L.R. 361 (B.C.S.C.); *Samson Indian Nation and Band* v. *Canada*, [1998] 2 C.N.L.R. 199 (F.C.A.); *Montana Band of Indians* v. *Canada*, [1999] 4 C.N.L.R. 65 (F.C.T.D.); *Paul* v. *British Columbia (Forest Appeals Commission)* (2001), 201 D.L.R. (4th) 251 (B.C.C.A.), supp. reasons 206 D.L.R. (4th) 321; *Workers' Compensation Board* v. *Ontario (Information and Privacy Commissioner)* (1998), 164 D.L.R. (4th) 129 (Ont. C.A.); *Big Canoe* v. *Ontario (Minister of Labour)* (1999), 181 D.L.R. (4th) 603 (Ont. C.A.); *Athey* v. *Leonati*, [1996] 3 S.C.R. 458; *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*, [1997] F.C.J. No. 1812 (T.D.); *Chippewas of Nawash First Nation* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] F.C.J. No. 1822 (C.A.); *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

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1.0 INTRODUCTION

[1] As far as I can tell, this is the first reported Canadian case in which a government is said to be under a duty, not expressed in the applicable access to information law, to disclose to a First Nation information about the government's position in treaty negotiations. The applicant Lheidli T'enneh First Nation ("Lheidli T'enneh"), Canada and British Columbia have been engaged in ongoing treaty negotiations under the umbrella of the British Columbia treaty negotiations initiative for almost eight years.

[2] In August 2000, Canada and British Columbia presented to Lheidli T'enneh a land and cash offer of $7.5 million and roughly 2,900 hectares of land in 11 parcels. On the one hand, Lheidli T'enneh consider the offer "insufficient", but says there is no way to tell if the offer is reasonable without knowing the assessed value of the land in the offer. British Columbia declined to provide that information to Lheidli T'enneh at the treaty table. On January 16, 2001, counsel to Lheidli T'enneh made an access to information request, under

the *Freedom of Information and Protection of Privacy Act* ("Act"), to the then Ministry of Aboriginal Affairs for the following:

> Appraisal reports and supporting documentation in respect of the following land parcels that are included in the Joint Land and Cash Offer of August 1, 2000, of British Columbia and Canada to the Lheidli T'enneh First Nation:
>
> (a) Salmon B, C, D;
> (b) Shelley A, B, C;
> (c) Beaver A, B, C; and
> (d) Salaquo A, B,
>
> more particularly described on the attached map.

[3] The map that accompanied the request indicated the location of the specified parcels, all of which are in the area of the City of Prince George.

[4] The 11 parcels of provincial Crown land contained in the offer were appraised for their land and timber values. Appraisal reports covering the parcels were prepared for what was then known as the British Columbia Assets and Land Corporation ("BCAL"), now Land and Water British Columbia Inc. The land value appraisal report, prepared by R.F. Kennedy & Associates, is dated June 9, 2000 (amended July 17, 2000) ("Land Appraisal"). TDB Forestry Services Ltd. prepared the appraisal report of timber values for BCAL in July 2000 ("Timber Appraisal"). Umphrey Appraisals and Land Management carried out a review of the Land Appraisal; the review is dated July 25, 2000 ("Umphrey Review"). These are the disputed records in this inquiry.

[5] In its May 14, 2001 response to Lheidli T'enneh's access request, what was then the Ministry of Aboriginal Affairs disclosed some information from the disputed records, but severed other information under ss. 16(1)(c) and 17(1)(e) of the Act. According to the response, the withheld information "would reveal information used by the Province in negotiating treaties with Lheidli T'enneh First Nation", and releasing the information "in advance of finalizing a treaty would compromise the negotiations."

[6] This decision prompted Lheidli T'enneh to request a review, under s. 52 of the Act, in the following terms:

> 1. the information that has been severed does not fall within section 16(1)(c) or 17(1)(e);
>
> 2. these exemptions have not been applied properly in the context of treaty negotiations;
>
> 3. the information that has been severed, if disclosed to Lheidli T'enneh, could not reasonably be expected to harm BC's economic interests.

[7] By a letter dated July 26, 2001, the Ministry of Attorney General and Minister Responsible for Treaty Negotiations ("Ministry") told counsel to Lheidli T'enneh that the Ministry had assumed conduct of the file from the former Ministry of Aboriginal Affairs.

The letter said that, in addition to claiming protection under ss. 16(1)(c) and 17(1)(e) of the Act, the Ministry was relying on s. 16(1)(a)(i) in relation to "those portions of the records that have been severed or withheld entirely."

[8] Because the matter did not settle in mediation by this Office, I held an oral inquiry, under Part 5 of the Act, on November 22 and 23, 2001. Both Lheidli T'enneh and the Ministry submitted written arguments before the oral hearing. The Ministry also submitted affidavit evidence.

[9] The day before the parties' written outlines of argument were due, counsel for the Ministry wrote to me and said that the Ministry of Management Services had, just that day, told the Ministry "that section 12 applies to some of the information at issue". In light of the mandatory nature of the s. 12(1) exception, and the interests it addresses, I allowed the Ministry to rely on s. 12(1) for some of the information. I also gave the parties more time, in advance of the hearing, to submit their written arguments on the s. 12(1) point.

[10] I wrote to the parties before the oral hearing to raise the issue of whether it was necessary for me to consider whether s. 25(1) of the Act, which in certain cases compels disclosure of information in the public interest, applies to the disputed information. Both parties ended up making written and oral submissions on whether s. 25(1) required disclosure.

[11] On November 15, 2001 – on the eve of the oral inquiry – the Ministry disclosed further information from the Timber Appraisal. It disclosed the table of contents and portions of the record that describe the appraiser's valuation methodology. It also disclosed assumptions used in determining timber value, found at section 5.2.2, although it withheld the per-cubic-metre values for conifers and for deciduous logs. The Ministry also disclosed an appendix that sets out government of Canada marketable bond average yields, over 10 years, for the years 1919 through 1999. It also disclosed appended printouts from the Bank of Canada website's inflation calculator, showing certain inflation calculations apparently done by the appraiser using the calculator.

[12] After the oral hearing, Lheidli T'enneh's counsel asked me to allow her, on appropriate confidentiality undertakings, to see the unsevered disputed records. I declined to do so in a written ruling dated December 12, 2001. The Ministry had argued I had no authority to require the disclosure of *in camera* material containing information that is subject to an exception under the Act because s. 54(4) of the Act, on which Lheidli T'enneh relied, is subject to confidentiality requirements in ss. 47 and 49. It was unnecessary to resolve this question as I found that, in any event, allowing access to Lheidli T'enneh's counsel – in relation to the *in camera* material or in conjunction with the unsevered disputed records – was not absolutely necessary to enable Lheidli T'enneh to argue its position in the inquiry. I also concluded that such access would irretrievably and significantly compromise the interests at stake for the Ministry and would therefore be an unacceptable prejudice to the Ministry.

2.0 ISSUES

[13] The following issues are raised in this inquiry:

1. Is the Ministry required by s. 25(1)(b) of the Act to disclose information?

2. Is the Ministry required by s. 12(1) of the Act to refuse to disclose information?

3. Is the Ministry authorized by s. 16(1)(a)(i) or 16(1)(c) of the Act to refuse to disclose information?

4. Is the Ministry authorized by s. 17(1)(e) of the Act to refuse to disclose information?

[14] Previous orders have established that the applicant has the burden of proof regarding s. 25(1)(b) issues, but Lheidli T'enneh takes issue with this. I address that question below. Section 57(1) of the Act provides that the Ministry has the burden of proof on all the other issues.

3.0 DISCUSSION

[15] **3.1 Outline of the Evidence** – The following section provides the factual backdrop for this case. Lheidli T'enneh called two witnesses at the oral hearing, both of whom gave evidence as to the history and aspirations of Lheidli T'enneh and about the treaty negotiations and the access request underlying this case. Several individuals swore affidavits in support of the Ministry's case.

[16] The following summary of the parties' evidence is not exhaustive. In reaching my decision I have reviewed all of the oral and affidavit evidence of both parties.

Chief Barry Seymour

[17] Chief Barry Seymour, who has been Chief since 1995, testified that he is Lheidli T'enneh's spokesperson for the purposes of treaty negotiations. Although he does not participate directly in treaty negotiations, he observes and oversees the entire process. He is accountable for the resources devoted to that process and for advancing Lheidli T'enneh's interests. A family-based treaty council is kept abreast of developments in the treaty negotiations. That Council needs the best possible information, the Chief said, in order to decide whether to recommend a vote for or against any treaty offer.

[18] Chief Seymour testified that Lheidli T'enneh has roughly 288 members, as determined under the *Indian Act* (Canada). Lheidli T'enneh has four *Indian Act* reserves. There are two Lheidli T'enneh communities. Roughly 100 individuals live on the reserves, with roughly another 100 living in or near the City of Prince George. Lheidli T'enneh is, the Chief testified, experiencing considerable population growth. Of the roughly 171 individuals who are employable, some 160 are less than 30 years old. The unemployment rate for Lheidli T'enneh members is 65%.

[19] Chief Seymour testified that his people have been trying to find ways to become economically self-sufficient. Lheidli T'enneh has several non-replaceable timber licenses under the *Forest Act*. It owns a shingle mill that employs approximately 24 people and a timber harvesting company that employs around five individuals. Lheidli T'enneh has made various attempts at agricultural enterprises, but has had difficulty making headway, primarily due to poor weather.

[20] The Chief testified that Lheidli T'enneh has several treaty goals. A secure land base for a sustainable and self-sufficient Lheidli T'enneh economy is key, since Lheidli T'enneh people aspire to a standard and quality of life enjoyed by their neighbours in the region. Lheidli T'enneh also wishes to achieve a treaty that enables it to preserve its cultural identity. Another objective is political stability and certainty in the region.

[21] According to Chief Seymour, when he became Chief in 1995, the Lheidli T'enneh negotiations were at Stage 2 under the British Columbia treaty process. In May of 1995, Canada, British Columbia and Lheidli T'enneh signed the following agreements regarding their negotiations:

- Principles for Information Sharing Among Parties During Leheit-Lit'en Treaty Negotiations (May 2, 1995)

- Procedures Agreement for Leheit-Lit'en Treaty Negotiations (May 2, 1995)

- Protocol Regarding the Openness of the Leheit-Lit'en Treaty Process (May 15, 1995)

[22] Copies of these documents were provided to me in Exhibit 2, a book of documents entered by Lheidli T'enneh with the Ministry's concurrence. I say more about these documents below.

[23] Chief Seymour testified that, by signing the Leheit-Lit'en Treaty Framework Agreement (August 26, 1996), the three parties advanced to Stage 4 of the BC treaty process. This agreement committed the parties to negotiate a non-exhaustive list of substantive issues and implementation issues, with the intention of entering into an Agreement-in-Principle ("AIP"). The list of substantive and implementation issues includes the following land issues: selection and retention; quantum; tenure, title and expropriations; access; parks and protected areas; cultural and heritage sites and resources; and environmental assessment, management and protection. The issues also include natural resource issues such as forests. In respect of financial matters, the issues include fiscal arrangements, financial settlement and economic development.

[24] Chief Seymour testified that, along with other Lheidli T'enneh representatives, he participated in a 1998 visioning exercise with representatives of British Columbia and Canada. During the visioning exercise, the parties expressed their interests, in terms of their objectives and expectations from the treaty process. He testified that Lheidli T'enneh learned at this time that the offer Canada and British Columbia were likely to make would be much smaller than Lheidli T'enneh had expected. It appears that Lheidli T'enneh had

believed the land component of any offer would likely be equal to roughly five percent of the land area claimed by Lheidli T'enneh as its traditional territory. He said this was very discouraging to Lheidli T'enneh and not at all in line with expectations. He said Lheidli T'enneh nonetheless decided to stay at the treaty negotiation table.

[25] In June 2000, Chief Seymour met with MLA Lois Boone and Dale Lovick, who at the time was the Minister of Aboriginal Affairs for British Columbia. Chief Seymour testified that, at that meeting, the Minister told him Lheidli T'enneh would get a "beefed-up" offer, in the sense that the offer would be larger than had been suggested at the visioning exercise.

[26] The Chief testified that Lheidli T'enneh wishes to have access to the disputed records because it makes good business sense to get appraisal information, so that Lheidli T'enneh can ensure the offer is a good one. He indicated there is a great deal of distrust within Lheidli T'enneh because, among other things, some 1,400 hectares of Lheidli T'enneh land, located in the centre of the City of Prince George, were wrongfully sold by the government in 1911. Many of his people are not, he testified, inclined to trust Canada and British Columbia to make a fair offer. They wish to ensure the offer is fair using the withheld information.

[27] Chief Seymour testified that the annual budget for the Lheidli T'enneh Band, under the *Indian Act*, is in the $11-12 million dollar range, with the annual operational expenses of the Band being around $3 million dollars. Since it entered the treaty process in 1994, Chief Seymour testified, Lheidli T'enneh has borrowed approximately $2.8 million to fund the treaty negotiations.

Richard Krehbiel

[28] I also heard testimony from Richard Krehbiel, who is Lheidli T'enneh's chief treaty negotiator. He testified the negotiations are now in the latter part of Stage 4 of the process, with 27 chapters of an AIP being "near completion". He expressed the view that "most" of the AIP has been negotiated and that the parties are in substantial agreement on it. He acknowledged there are unresolved issues surrounding land and cash, which are key to Lheidli T'enneh's decision to proceed with an AIP. This aspect of the negotiations is very important, he said, because of Lheidli T'enneh's rapid population growth, which compels it to negotiate a deal that will provide for a much larger population in coming years.

[29] Krehbiel acknowledged that Lheidli T'enneh's population is, at present, small and that the traditional territory of Lheidli T'enneh is large when viewed against the population size. He contended that the treaty negotiation process fails to accept the validity of a large Lheidli T'enneh traditional territory despite the fact that its population is small at present. According to Krehbiel's testimony on cross-examination, the land selection model that Canada and British Columbia advanced does not readily apply to Lheidli T'enneh's position, since it has a small population base and a large territory. He agreed that this tacitly acknowledges that Lheidli T'enneh believes another model of treaty negotiations is needed to account for the case of a First Nation with a small existing population base and a large traditional territory.

[30] He also disputed the so-called 'interest-based model' of treaty negotiations advanced by Canada and British Columbia. That approach contrasts with what he considers to be, from a First Nations perspective, the preferred approach of, first, clarifying who has authority over what lands, and a presence on lands, in traditional territories, and, second, allocating responsibility and rights respecting those lands. He called the interest-based model of negotiations a "myth" that is used to entice First Nations into the treaty process. He conceded that the interest-based model might work for governance issues, but that the land and cash component of negotiations raises different issues.

[31] Krehbiel testified that, at the 1998 visioning exercise, Lheidli T'enneh was told that the envelope of land and cash would include a land area of three to six times the area of its existing reserves under the *Indian Act*, with as much as $10 million dollars in cash. This was considered to be "totally inadequate" in relation to Lheidli T'enneh's interest, notably because, once the loan for treaty costs had been repaid, Lheidli T'enneh would be left with very little cash from the offer. He termed an envelope of such a size "an insult". Lheidli T'enneh indicated that such an offer would not be adequate and the parties continued negotiating.

[32] Lheidli T'enneh's understanding is that the envelope of land and cash is fixed. This perception is supported, Krehbiel testified, by information that Canada and British Columbia gave to Lheidli T'enneh. He indicated that a slide presentation made to Lheidli T'enneh by representatives of Canada and British Columbia confirmed that, as the presentation states, "treaties with a larger or better land component will have a smaller financial component and vice versa."

[33] He also criticized the so-called land selection approach to treaty negotiations. According to this model, a First Nation is asked to select lands that are of interest, in the sense of lands it thinks might be useful for either traditional or other purposes. Krehbiel testified that, although Canada and British Columbia insist the land selection model has nothing to do with land value, he considers land value to be key to First Nations. As he put it, it makes no sense to argue that land value has nothing to do with treaty negotiations or with a decision by Lheidli T'enneh to accept or reject an offer. As an example, he said, he might have an interest in living in a mansion, and would like to select one, but cannot afford its value.

[34] As evidence of the relevance of value to treaty negotiations, Krehbiel referred to a 1996 statement regarding British Columbia's approach to treaty settlements, formerly found on the Ministry of Aboriginal Affairs website. A copy of that document is found at Tab 9 of Exhibit 2. It indicated, at pp. 5 and 6, that there will "be considerable differences between urban and rural treaties", because the "higher cash value of urban land", and its relative scarcity, will drive how much land is included in an urban treaty offer. It says the "value of the land and resources on the land" will be one of the factors considered in negotiations pertaining to the amount of land for First Nations.

[35] Krehbiel testified that the cash amount of the offer made in August of 2000 was considerably less than Lheidli T'enneh had expected, while the land component was at the

low end of the range expected, based on the visioning exercise information that Lheidli T'enneh had been given. It was also less than Lheidli T'enneh expected in light of the assurances given by the Minister of Aboriginal Affairs during June and July 2000.

[36] After the offer was made, Lheidli T'enneh indicated to Canada and British Columbia that it was inadequate and, at the negotiation table, asked for a copy of appraisals of the 11 offered parcels. Lheidli T'enneh's view that the offer was inadequate was, among other things, based on the fact that roughly 75% of the offered land is located in the agricultural land reserve and would not be removed from the reserve before its transfer to Lheidli T'enneh. According to Krehbiel, this meant the land was worth very little, especially in light of its apparently poor agricultural potential.

[37] Although Lheidli T'enneh has not formally rejected the offer and the 11 parcels are still on the table, Krehbiel said that Lheidli T'enneh cannot properly evaluate the offer and decide whether to accept it or reject it unless it has information respecting the value of the offered land and information as to how the value was arrived at. This is why Lheidli T'enneh needs the disputed records. Although he suggested, at one point, that the land offered by Canada and British Columbia has, on its face, little value, Krehbiel did say that Lheidli T'enneh cannot really properly assess this unless and until it has access to the withheld information. Because of the location of the offered land, and the poor access to it, Krehbiel testified, it would be "prohibitively costly" for Lheidli T'enneh to commission its own appraisal of the land. This is especially problematic, he testified, in light of the large debt Lheidli T'enneh has already incurred in treaty negotiations.

[38] He also testified that an updated appraisal of the Prince George Experimental Farm – which forms part of the Canada-British Columbia offer – had been given, at some point, to Lheidli T'enneh by British Columbia's chief negotiator. A copy of that document is found at Tab 2 of Exhibit 2. Krehbiel said Lheidli T'enneh obtained its own appraisal of that land, which showed that the land was worth roughly one-third less than the government's appraisal suggested. According to Krehbiel, this demonstrates that appraisal documents can be useful to Lheidli T'enneh.

[39] Krehbiel expressed the opinion that the integrity of the treaty process demands openness and disclosure of information relevant to an offer that is on the table. He argued that, because Lheidli T'enneh would be asked to give up its existing reserve land status under the *Indian Act*, Canada should have to make full disclosure of information regarding land values, just as it is legally required to do in relation to *Indian Act* reserve surrenders.

[40] According to Krehbiel, Lheidli T'enneh's objective is not to determine what is the land and cash envelope that Canada and British Columbia are really able or willing to offer, but to assess the adequacy of the offer that is actually on the table. He said Lheidli T'enneh assumes that, because this is a negotiation, Canada and British Columbia have room to move on their offer, but Lheidli T'enneh does not know what that room is. He acknowledged, at one point, that there may well be little, if any, room for Canada and British Columbia to move outside the land and cash on offer.

[41] Krehbiel testified he is aware that British Columbia is arguing that the appraisal information does not relate to the treaty negotiations directly, because it is only relevant to the federal-provincial cost-sharing arrangements for funding any treaty settlement. He contended that, for the reasons already given, the appraisal information is very important to Lheidli T'enneh, so that it can assess the value and sufficiency of the offer and that, for this reason, Lheidli T'enneh negotiators have several times asked for a copy of the appraisal. Their requests have been rebuffed on the ground the information is not relevant to the parties' interest-based negotiations. As he put it, Lheidli T'enneh cannot negotiate without knowing whether the offer on the table is a pig-in-a-poke. Lheidli T'enneh cannot, as he also put it, negotiate in the dark.

[42] Under cross-examination, Krehbiel conceded that the discussions at the 1998 visioning exercise and the 2000 discussions with the Minister of Aboriginal Affairs were not formal treaty offers. He also agreed, under cross-examination, that the tri-partite agreements relating to the treaty negotiations did not, in his view, amount to an agreement by the parties to share all internal records or information.

Jose Villa Arce

[43] Jose Villa Arce is the Assistant Deputy Minister in charge of the negotiations support division of the treaty negotiation office within the Ministry. In that capacity he provides policy, analytical and technical support to the various treaty negotiation teams fielded by British Columbia.

[44] He deposed in his November 7, 2001 affidavit that the treaty process is voluntary. He said "all parties to the process come to the treaty table, based upon a new relationship of mutual trust, understanding and respect", and acknowledged that treaty negotiations are "often very complex and the positions and circumstances of the parties are dynamic." All treaty negotiations have three parties, *i.e.*, the relevant First Nation, British Columbia and Canada. He said that British Columbia's goal in treaty negotiations is "to achieve a fair settlement within its instructions from government, including the specific mandate" for the particular treaty negotiation. He also deposed that British Columbia "must be accountable to all British Columbians for its disposition of Crown assets" (para. 18).

[45] He deposed that, before a land and cash offer can be made to a First Nation, his office must "first obtain a specific mandate from Treasury Board" (para. 10). The mandate determined by Treasury Board "sets the limits for any offer that can be made" by British Columbia (para. 10), since that mandate "represents the maximum financial value of land, resources that the Province is willing to offer at that time" (para. 11). Accordingly, the "value of land, the cash settlement and other costs cannot exceed that mandate" (para. 11).

[46] He also deposed that a Treasury Board submission was prepared in order to obtain a specific mandate respecting the making of a land and cash offer to Lheidli T'enneh (para. 13).

[47] In *in camera* portions of his affidavit – *i.e.*, paras. 14, 15, 16, 19 to 21 and 23 – Villa Arce elaborated on his opinion, expressed in para. 9, that disclosure of any of the

withheld information would harm the conduct of relations between British Columbia and Canada, would harm the conduct of negotiations relating to aboriginal treaties generally and would harm the financial interests of British Columbia. At para. 22, he also expressed the view that disclosure of the withheld information "will result in treaty negotiations with respect to land being side-tracked by debate regarding the value of the land/resources" and the "assumptions and methodology of the appraiser", instead of the negotiations being about what properties Lheidli T'enneh wants.

[48] Last, he deposed that, just as the interests of British Columbia and the First Nation can conflict, the interests of British Columbia and Canada can conflict.

Peter Engstad

[49] Peter Engstad is a senior provincial negotiator with the Ministry's treaty negotiation office. He is involved in the negotiation and implementation of the cost-sharing agreement between British Columbia and Canada for funding treaty settlements. His other responsibilities include providing policy advice respecting the treaty process and federal-provincial cost-sharing.

[50] In his November 7, 2001 affidavit, Engstad deposed that Canada and British Columbia negotiate a separate cost-sharing agreement for each treaty negotiation. These agreements are negotiated in the context of the 1993 Memorandum of Understanding between Canada and British Columbia regarding cost-sharing. A copy of that document forms Exhibit A to his affidavit and deals with sharing pre-treaty costs, settlement costs, implementation costs and the cost of self-government ("Cost-Sharing MOU").

[51] According to Engstad, the Cost-Sharing MOU accounts for the fact that Canada and British Columbia have agreed that the latter will contribute most of the land in treaty settlements, while Canada's share will mostly be in cash (para. 7). The purpose of the Cost-Sharing MOU is to achieve an even share, between the two governments, of all treaty costs, including land costs (para. 7). He deposed, at para. 9, that the Cost-Sharing MOU uses the term "cash" in a special sense. In addition to referring to money, the term includes any capital transfers included in an offer, any future lost income to either government due to a reduction in resource revenues on land included in the offer and the cash equivalent of any urban land, federal land and certain forest land included in an offer. In order to implement the Cost-Sharing MOU, policies and procedures have been designed to address cost-sharing issues.

[52] Engstad deposed that the decision as to what land and resources will be included in a particular land and cash offer is made jointly by negotiators for Canada and British Columbia and both governments must first agree on how the costs of the offer will be shared (para. 11). This entails valuation of any land and land resources selected by negotiators for possible inclusion in an offer (para. 11). This is why, Engstad deposed, the parcels of land offered to Lheidli T'enneh were appraised, *i.e.*, they were appraised for federal-provincial cost-sharing purposes (para. 11).

[53] Continuing this theme, at para. 12 he deposed that the reason First Nations do not participate in cost-sharing discussions is that how land and resources are valued for cost-sharing purposes is "unrelated to what lands are included in land and cash offers". This reflects the fact that the Cost-Sharing MOU only determines how costs are shared; it does not determine how much money, land and resources are offered to a particular First Nation (para. 13).

[54] At a province-wide level, Canada and British Columbia use an accounting device known as the "cumulator" to track how the two governments' even shares of the cost of land and resources, on the one hand, and cash contributions, on the other hand, are being achieved on an ongoing basis (para. 18). This is necessary because Canada has an obligation to pay British Columbia cash if the cumulative value of provincial land and resource contributions exceeds the province's 50% share.

[55] Engstad deposed that the decision as to what land and resources should be included in an offer is made by the chief negotiators for Canada and British Columbia in light of negotiations with the relevant First Nation (para. 24). Once this decision has been made, the chief negotiators jointly write to their respective officials and ask that the identified lands and resources be valued for cost-sharing purposes (para. 24). British Columbia does not disclose to the public or to First Nations the "monetary values of land offered to First Nations" (para. 26) and the Ministry has in the past treated, and continues to treat, appraisal documents as confidential (para. 27). Each appraiser is required to keep the appraisal confidential and the terms of reference for each appraisal stipulate that any information provided to the appraiser for the purposes of the appraisal must be kept confidential (para. 33). The appraisal terms of reference are negotiated between British Columbia and Canada (para. 41).

[56] The appraisals in dispute in this inquiry were commissioned, Engstad said, by Land and Water British Columbia Inc. – formerly British Columbia Assets and Land Corporation – for the purpose of valuing land and land resources for potential inclusion in an offer to Lheidli T'enneh (para. 31).

[57] Having referred to the "strategic component of negotiations", at para. 46 – mirroring the evidence of Jose Villa Arce – Engstad deposed that, in his view, disclosure of the disputed information would harm the conduct of treaty negotiations. Among other things, he expressed the opinion that the information would sidetrack the treaty negotiations into a "debate on the value of the land/resources and the assumptions and methodology of the appraiser, instead of a negotiation concerning what property should be included in an offer" (para. 49).

[58] According to Engstad, when the parties agree to enter into the treaty negotiation process, "each understands how the negotiations will be conducted" and it has "never been agreed that negotiations at treaty tables would deal with the value of specific properties" (para. 51). Instead, he deposed, the land negotiations "are intended to address the issue of which property should be included in an offer, not the value of the parcels offered" (para. 51).

[59] On the question of harm to treaty negotiations, Engstad expressed the opinion, without elaboration, that disclosure of the disputed appraisal records "will compromise the ability of the Province and Canada to secure the successful negotiation of treaties with First Nations" (para. 52). Similarly, he expressed the opinion that disclosure of the value of land and resources appraised in the disputed records, and the terms of reference and assumptions used in valuing land and resources, "would harm relations between the Province and the Government of Canada" (para. 53). He did not, again, elaborate on this belief, although he did say that both of those governments have treated, and continue to treat, appraisal information regarding provincial Crown land confidentially and that disclosure of the information would "be in conflict with that prior agreement" (para. 53). He also deposed that, since disclosure of appraisal records such as that in dispute in this inquiry will allegedly "result in an obstacle to the efficient and timely settlement of treaties" generally, the disclosure will harm relations between Canada and British Columbia (para. 54).

[60] According to Engstad, a "fundamental assumption in the current model of treaty negotiations" – he did not say whose assumption it is – is that arrangements regarding cost-sharing "are not the subject of tri-partite negotiations at treaty tables." He believes that disclosure of appraisal records relating to treaty negotiations will result in First Nations wanting to become part of cost-sharing discussions and discussions regarding land and resources valuation (para. 56). This would be far reaching and "potentially" very damaging to the treaty process in British Columbia, since ongoing treaty negotiations would be "derailed to varying degrees", thus resulting in the parties having to "invent a new model for treaty negotiation" (para. 55).

[61] The Ministry tendered another affidavit sworn by Peter Engstad. In that November 20, 2001 affidavit, he took issue with the contention, at para. 21 of Lheidli T'enneh's outline of argument, that the cost-sharing agreement between Canada and British Columbia gives British Columbia a reason to inflate land values. He deposed that the appraisal process is intended to ensure appraisals are properly done by accredited appraisers, all in pursuit of due diligence by Canada and British Columbia.

Nancy Wilkin

[62] Nancy Wilkin is British Columbia's chief treaty negotiator for its Northern Interior Regional Team. She is also British Columbia's chief negotiator for the Lheidli T'enneh treaty negotiations. She deposed that only the chief negotiator knows British Columbia's negotiating mandate during treaty negotiations. She said that, in addition to the main negotiating table, there are a number of working groups that deal with a variety of subjects, one of which is the land component of negotiations. Working group negotiators are not authorized to make offers and they do not know what British Columbia's negotiating mandate is. Their task is to agree on the wording of various treaty chapters. The chief negotiator decides what land gets selected for inclusion in a treaty offer.

[63] She deposed that Canada's and British Columbia's chief negotiators selected parcels of land for inclusion in a treaty offer having taken into account the land interests Lheidli T'enneh expressed at the negotiating table. Before doing this, the negotiators

obtained information about government and third party interests in "certain areas" and consulted with representatives of various local governments and regional advisory committees. Nancy Wilkin also deposed, without giving details, that the Ministry's cost-sharing staff provide a service to negotiators, but do not determine what parcels are included in the offer. Only the chief negotiators for Canada and British Columbia do this.

[64] Nancy Wilkin deposed that Lheidli T'enneh has said, at main table meetings, that it wants to know the values of the land offered, but she has refused to provide that information. She also deposed that treaty discussions regarding land selection are intended to deal with the parcels of land that should be included in an offer. She expressed the opinion that, if the disputed information is disclosed, treaty negotiations will be "side-tracked by debate as to the assumptions and methodology of the appraiser, instead of dealing with what properties and resources should be included in an offer."

[65] **3.2 Duties and Process Commitments in Treaty Negotiations** – Lheidli T'enneh cites various court decisions that it contends affirm the Crown's fiduciary duties to aboriginal peoples, including a duty to negotiate with them in good faith. See *Gitanyow First Nation* v. *Canada*, [1999] B.C.J. No. 659, [1999] 3 C.N.L.R. 89 (B.C.S.C.); *Haida First Nation* v. *British Columbia (Minister of Forests)*, [2000] B.C.J. No. 2427, [2001] 2 C.N.L.R. 83 (B.C.S.C.), rev'd [2002] B.C.J. No. 378 (C.A.), supp. reasons [2002] B.C.J. No. 1882; *Chemainus First Nation* v. *British Columbia Assets and Lands Corporation*, [1999] B.C.J. No. 682, [1999] 3 C.N.L.R. 8 (B.C.S.C.); *Westbank First Nation* v. *British Columbia (Minister of Forests)*, [2000] B.C.J. No. 1613, [2001] 1 C.N.L.R. 361 (B.C.S.C.); *Samson Indian Nation and Band* v. *Canada*, [1998] 2 C.N.L.R. 199 (F.C.A.) *Montana Band of Indians* v. *Canada*, [1999] 4 C.N.L.R. 65 (F.C.T.D.); *R.* v. *Sparrow*, [1990,] 1 S.C.R. 1075; *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

[66] Lheidli T'enneh notes that the Crown – including the provincial Crown – has a fiduciary duty towards First Nations and the courts have said that, even where the federal Crown is in litigation with a First Nation, it has a duty to be open and frank in its disclosure of information to the First Nation. Lheidli T'enneh says this principle applies here, such that, as part of its duty to negotiate in good faith, the Ministry cannot deny access to the records requested under the Act. It contends (para. 55, outline of argument) that British Columbia is, by refusing to disclose the appraisal information, not negotiating in good faith in light of the following circumstances:

- the Province's fiduciary relationship with Lheidli T'enneh;
- the Province's commitments to Lheidli T'enneh in entering into treaty negotiations within the BC treaty process;
- the Province's commitment to conduct interest-based negotiations;
- the nature of the August 2, 2000 Offer, with its land-cash ratios and apparent population-based formula;
- the Province's commitments on information-sharing as set out in the 1995 Procedural Agreements.

[67] At the oral hearing, counsel for Lheidli T'enneh said I must consider the cases on the Crown's fiduciary duty in making my findings on harm and disposing of the issues in this inquiry. I do not understand Lheidli T'enneh to be arguing that, in discharging my functions under Part 5 of the Act, I am under a fiduciary or trust-like obligation to Lheidli T'enneh to take into account its best interests. Such an argument was rejected by the Supreme Court of Canada in relation to the quasi-judicial functions of the National Energy Board in conducting a hearing on a power export licence application and disposing of that application. See *Quebec (Attorney General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159, [1994] S.C.J. No. 13. In *British Columbia (Minster of Forests)* v. *Okanagan Indian Band*, [2001] B.C.J. No. 2279 (C.A.), at para. 37, Newbury J.A. said a judge's "broad discretion" respecting an award of costs must be informed by the principle that "the honour of the Crown is at stake in dealings between it and aboriginals". I do not read this statement, made in the specific circumstances of that case, as undercutting the Supreme Court's decision in the National Energy Board case, which would in any event take precedence.

[68] Lheidli T'enneh says that British Columbia has a higher duty to disclose information related to Lheidli T'enneh's land and resource interests, particularly within the scope of the treaty negotiations and the commitments British Columbia made in that process. It argues that case law establishes that, while the Crown's fiduciary obligations to First Nations and its duty to the public generally must be balanced, the Crown must give priority to aboriginal interests. Lheidli T'enneh says the duty of the federal Crown to deal fairly and openly with First Nations in an adversarial litigation setting must apply even more forcefully to the federal Crown and provincial Crown in a treaty negotiation setting, especially where there is an element of reliance and trust by Lheidli T'enneh on the disputed records. As counsel for Lheidli T'enneh put it during the oral hearing, this is no ordinary commercial negotiation and the Crown's duty to Lheidli T'enneh applies more strongly in this non-adversarial setting.

[69] Lheidli T'enneh places particular emphasis on *Gitanyow*, above. In that case, Williamson J. held that, once Canada and British Columbia have entered into treaty negotiations under the British Columbia treaty framework, they have a legal duty to negotiate in good faith. That duty flows from the Crown's historic fiduciary duty to First Nations. Williamson J. rejected the argument that, once the parties enter into treaty negotiations, the rules change and any duty to negotiate in good faith ceases. He declined, however, to find that the Crown, having entered into treaty negotiations, is under a duty to actually conclude a treaty. In doing so, he said the following (at para. 70 (B.C.J.)):

> [70] … I can find nothing that obliges the Crown to negotiate a treaty. The B.C. treaty process is voluntary. The parties enter the process of their own free will and while the purpose of their doing so is if possible to secure a treaty, there is no obligation to achieve that end. The Gitanyow Framework Agreement provides, in s. 13.1, that any of the parties may suspend the negotiations by written notice.

[70] Williamson J. went on to say following at paras. 73 and 74:

> [73] I decline at this stage to determine in a detailed way the content of the Crown's duty to negotiate in good faith. To do so, in other than the most general terms, would come perilously close to considering the case for the second declaration by the plaintiffs, a matter upon which I have heard neither evidence nor submissions.
>
> [74] In general terms, that duty must include at least the absence of any appearance of "sharp dealing"…, disclosure of relevant factors…, and negotiation "without oblique motive"… .

[71] As to the legal duty to negotiate in good faith once treaty negotiations have been entered into, see also *Westbank First Nation*, above.

[72] At the oral hearing in this case, counsel for Lheidli T'enneh submitted that *Gitanyow* requires British Columbia to place an emphasis on the interests of the First Nation where that would not "unduly conflict" with other interests British Columbia must address. She also said the value of land offered to Lheidli T'enneh is one of the "relevant factors" to which Williamson J. referred in *Gitanyow*, thus requiring disclosure of that information. In her submission, the duty to disclose arises here because of the circumstances leading to the 2000 public offer, the information-sharing principles in the 1995 process agreements and the course of negotiations among the parties. Since land value has been put in issue, British Columbia cannot – regardless of its contention that land value is not consistent with the parties' supposed agreement to pursue interest-based negotiations – claim that Lheidli T'enneh does not need appraisal information.

[73] The Ministry says the content of British Columbia's obligation to negotiate in good faith "is a matter for the courts", not this inquiry. It cites Order No. 251-1998, [1998] B.C.I.P.C.D. No. 46, in which my predecessor held that he had no authority to, as the Ministry puts it, "address broader issues in the treaty process, such as the fiduciary obligation of the government to First Nations peoples" (paras. 18, 19 and 33, reply submission).

[74] During the oral hearing, counsel for the Ministry submitted that the Act is a law of general application and Lheidli T'enneh must be treated in the same manner as any other access applicant. Further, disclosure under the Act is public disclosure, not just to Lheidli T'enneh for purposes of its treaty negotiations. Once Lheidli T'enneh made its access request under the Act, counsel argued, its quest for disclosure of appraisal information moved outside the treaty negotiation process. She argued that the usual considerations under the Act apply, such that disclosure to Lheidli T'enneh is disclosure to the world at large. In the Ministry's submission, the Act is simply not a proper forum for enforcing British Columbia's obligation to negotiate in good faith or the terms of agreements it has with Lheidli T'enneh concerning the treaty negotiation process. The interests of Lheidli T'enneh in the requested records are not, generally speaking, relevant to determining the applicability of particular disclosure exceptions, though they may be a relevant consideration in the Ministry's decision to invoke discretionary exceptions such as s. 16 and s. 17.

[75] In the alternative, the Ministry says there has been no breach of any obligation by British Columbia. It says the cases do not go as far down the road of Crown disclosure, in the context of treaty negotiations with First Nations, as Lheidli T'enneh contends. According to the Ministry, it has already provided Lheidli T'enneh with "significant amounts of data" regarding land that is the subject of the parties' negotiations, including forestry data and mapping information (para. 32, initial submission). Under *Gityanow*, the duty to bargain in good faith does not mean the Crown cannot conduct tough treaty negotiations or that total disclosure is required. Any analysis of good faith obligations must also take place in relation to how the particular treaty negotiation takes place. The Ministry says that, in the context of the parties' interest-based negotiations, it has disclosed sufficient information for Lheidli T'enneh to "be able to determine what land parcels" it would like to see offered as treaty settlement lands (para. 32, initial submission). Further, the process commitments made for the treaty negotiation reflect the parties' understanding that disclosure between them would *not* be total.

[76] In my view, *Gitanyow*, other cases Lheidli T'enneh cites or procedural agreements pertaining to treaty negotiations with Lheidli T'enneh do not establish at all, or at the very least with any clarity, that British Columbia has an obligation to disclose the information in dispute in this inquiry to Lheidli T'enneh. Such an obligation would be a significant extension and refinement of the ruling in *Gitanyow*. I also tend to agree with the Ministry that the process agreements for the treaty negotiation do not, on the whole, support an obligation of total disclosure of negotiating information to Lheidli T'enneh.

[77] Indeed, those agreements indicate the opposite. There may be added significance to this in light of para. 70 of *Gitanyow*, which appears to say that, although the Crown is under a legal duty to negotiate in good faith once it enters treaty negotiations, that duty can – at least as regards any alleged duty to actually conclude a treaty – be amended by agreement amongst the parties. Far from suggesting that it is hopeless to contend that British Columbia has an obligation, independent of the Act, to disclose to Lheidli T'enneh valuation information respecting offered lands and land resources, I simply note that this is not at all plain and obvious. It is a novel proposition, as yet not established in jurisprudence.

[78] Setting aside these observations, however, I consider it flawed to connect the Act to Ministry duties to negotiate in good faith with the Lheidli T'enneh or live up to treaty negotiation process commitments. Section 4 of the Act creates a public right of access to records in the custody or under the control of public bodies, including the right of an individual applicant to have access to records containing personal information about the applicant. These access rights are subject to the information disclosure exceptions in the Act and the feasibility of reasonably severing such information from a requested record. It has to be remembered that the Act is not an exclusive means of public access to information. This is particularly true of non-personal information, which is what is at stake in this inquiry. Nor is the Act a mechanism for refereeing contractual or other rights of restricted access. It does not take away other means of access to the withheld information in this inquiry. In Order 01-52, [2001] B.C.I.P.C.D. No. 55 which concerned s. 18(b) of the Act, the applicants argued it was significant that they intended to use the

disputed information for research purposes and that the government had already made the information available on a restricted basis to another researcher. I stated the following about this, at paras. 75 to 77:

> [75] The EIA's allegation is an example of a tendency to lose sight of the fact that public bodies can release non-personal information, restrictively or publicly, outside of the Act, as s. 2(2) of the Act confirms. That section provides that
>
> > … this Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.
>
> [76] The reality is that, acting outside of the Act, the Ministry could release non-personal information to the applicants for restricted purposes such as research (and s. 35 of the Act allows disclosure of even personal information, in restricted cases, for research purposes). I do not know if the applicants have requested, outside of the Act, access to detailed kill locations for research purposes. I would think that a commitment from the applicants of confidentiality or restricted use would be a relevant consideration for the Ministry in considering such a request outside of the Act. There may also be other considerations for the Ministry to weigh in assessing such a request.
>
> [77] When it comes to assessing, under s. 18(b), the risk of harm from disclosure, I do not think the applicants' stated intentions to make responsible scientific and conservation use of the disputed information warrant an assumption that, if they are given access, it will not be public access. … Opinions may differ on whether, outside of the Act, the applicants ought to be given restricted or conditional access to grizzly kill locations for research purposes. That would, however, be a matter for the Ministry's judgment outside of the Act. It is not part of the right of public access to information under the Act, the determination of which is the purpose of this inquiry.

[79] I would add to this a reference to s. 3(2) and s. 71 of the Act, which read as follows:

> **Scope of this Act**
>
> 3(2) This Act does not limit the information available by law to a party to a proceeding.
>
> …
>
> **Records available without request**
>
> 71(1) The head of a public body may prescribe categories of records that are in the custody or under the control of the public body and are available to the public, on demand, without a request for access under this Act.
>
> (2) The head of a public body may require a person who asks for a copy of an available record to pay a fee to the public body.

> (3) Subsection (1) does not limit the discretion of the government of British Columbia or a public body to release records that do not contain personal information.

[80] Without suggesting that parties to a treaty negotiation are engaged in a "proceeding", I consider s. 3(2) and s. 71 further confirm the ability of public bodies to give public or restricted access to information, particularly non-personal information, outside of the access to information regime in the Act.

[81] With the greatest of respect for the importance of Crown fiduciary obligations to Lheidli T'enneh as a First Nation and to process commitments made by the parties to this treaty negotiation, I do not believe it is appropriate to view the right of public access to information under s. 4 of the Act as flowing from either Crown fiduciary obligations to Lheidli T'enneh or from treaty negotiation protocols which have been agreed to or imposed on Lheidli T'enneh. I find some support for this perspective in the case of *Chippewas of Nawash First Nation* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] F.C.J. No. 1822 (C.A.), at para. 6, where Rothstein J., speaking for the Court, said the following:

> The second argument is that the Government of Canada has a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian Land. We are not dealing here with the surrender of reserve land, as was the case in *Guerin* v. *The Queen*. Nor are we dealing with Aboriginal rights under section 35 of the *Constitution Act, 1982*. This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. The government is acting pursuant to a public law duty. Fiduciary obligations do not arise in those circumstances.

[82] The information available to Lheidli T'enneh under the Act may or may not coincide with information available to it by other means such as Crown disclosure obligations to First Nations engaged in treaty negotiations or process agreements for those negotiations. If those other means oblige the Ministry to give Lheidli T'enneh access to some or all of the information in issue in this inquiry, the obligation is one that is not defined or diminished by the level of accessibility established by the right of public access under the Act. If British Columbia or the Ministry have a duty recognizable in law, outside the Act, to disclose appraisal information to Lheidli T'enneh, then it ought to be complied with, but it is not to be determined or enforced by means of the access to information process under the Act.

[83] As I have already said, the Act is geared to providing access to records unless information in them is excepted from disclosure and can reasonably be severed. This may not serve the specific purposes of Lheidli T'enneh if appraisals of the 11 parcels of land offered in the treaty negotiation were prepared for and submitted (in part) to Cabinet for it to authorize a negotiating mandate and also for federal-provincial cost-sharing purposes. On the other hand, if, as Lheidli T'enneh argues, British Columbia is under an independent legally-recognizable duty to provide it with valuation information about offered lands, then Lheidli T'enneh's interest may be better served by enforcing that duty in a forum not subject to the Act's disclosure exceptions.

[84] **3.3 Public Interest Disclosure** – Section 25(1)(b) of the Act requires disclosure of information, in the public interest, in certain circumstances. Disclosure of information under the Act is generally public disclosure. Section 25(1) is a departure from this, in that it contemplates disclosure of information to the public, to an affected group of people or to an applicant, such as Lheidli T'enneh. Section 25(1) reads as follows:

> **Information must be disclosed if in the public interest**
>
> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

Burden of proof under s. 25

[85] As I mentioned earlier, Lheidli T'enneh contended that, contrary to views expressed in previous decisions under the Act, the burden of establishing that s. 25(1) applies does not properly rest on an access applicant. I addressed this question recently in Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 30 and following. I quote paras. 37-39 below:

> [37] In Order No. 165-1997 and other s. 25(1) cases in which the applicant has been said to have a burden of proof, the applicant has raised the applicability of s. 25(1). This is the context in which my predecessor and I have referred to the applicant as bearing a burden of proof. Where an applicant has argued that s. 25(1) applies, it will be in the applicant's interest, in practical terms, to identify information in support of that contention. For example, although an applicant will not know the contents of requested records, she or he may well be in a position to establish that there is a clear public interest in the matter generally. Such evidence can provide support for the decision, in an inquiry under Part 5 of the Act, as to whether s. 25(1) requires information to be disclosed. In other words, an applicant will be obliged, as a matter of common sense, to provide evidence and explanation for her or his assertion that s. 25(1) requires disclosure. This practical obligation may obviously be constrained, however, by the fact that the applicant does not have access to the disputed information.
>
> [38] I agree that, since the head of a public body must apply s. 25(1) even where no access request has been made, the head has some obligation to consider whether it applies on the facts known to the head. Consistent with this view, where a public body has, for example, relied on s. 25(1) in disclosing a third party's personal information, without an access request, and the commissioner later investigates that disclosure under s. 42 of the Act in response to a complaint, it will be up to the public body, in practical terms, to provide an explanation, including relevant evidence, as to why s. 25(1) required it to disclose the information.

> [39] Section 4 of the Act creates a right of access, where an access request is made under s. 5, to parts of a record not excepted from disclosure (if the information that is excepted can reasonably be severed). By contrast, s. 25(1) requires a public body to disclose information where certain facts exist, regardless of whether an access request has been made. Section 25(1) either applies or it does not and in a Part 5 inquiry it is ultimately up to the commissioner to decide, in all the circumstances and on all of the evidence, whether or not it applies to particular information. Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.

[86] I have applied these considerations, and the interpretation of s. 25(1) in Order 02-38, in deciding the s. 25(1) issue in this case.

Is public interest disclosure required here?

[87] Counsel for Lheidli T'enneh argues that the public interest disclosure issue must be considered before any of the other issues. She also acknowledges that, as I pointed out in Order 01-20, [2001] B.C.I.P.C.D. No. 21, the words used in s. 25(1)(b) potentially have a broad meaning, but they must be read "in conjunction with the requirement for immediate disclosure and by giving full force to the word 'clearly', which modifies the phrase 'in the public interest'" (p. 4). According to Lheidli T'enneh, disclosure of the disputed appraisal information is clearly in the public interest when considered "in the broader context of the treaty negotiation process" (para. 45, reply submission). She said that little progress has been made in negotiating treaties through the British Columbia treaty process and there are significant problems with that process (paras. 46-48, reply submission).

[88] One of the key obstacles, it is argued, is the lack of disclosure by British Columbia "as to the true basis for its mandate to settle treaties" (para. 49, reply submission). It is argued that, if disclosure of the requested appraisal records would implicitly reveal British Columbia's negotiating mandate, such disclosure is in the public interest, since it would confirm the suspicions of First Nations (including Lheidli T'enneh) that British Columbia and Canada have negotiating mandates based on a population formula, as opposed to the interest-based negotiations supposedly taking place at treaty negotiation tables throughout British Columbia (para. 45, reply submission). The following passage appears at para. 48 of Lheidli T'enneh's reply submission:

> Accordingly, it is respectfully submitted that disclosure of information about the value of land included in a treaty settlement offer, should be disclosed to [*sic*] Lheidli T'enneh as a matter of public interest. If the First Nation party has more complete information about the basis for an offer being made, it will be able to make informed choices about how it wishes to conduct its negotiations and how much money it should borrow in order to achieve a settlement.

[89] Lheidli T'enneh argues there is an interest in disclosure of the appraisal information without delay. It contends there has been enough delay in the treaty negotiation process and disclosure could result in the process finally beginning to work. It will, as Lheidli T'enneh's counsel put it in oral argument, allow Lheidli T'enneh to be fully informed as to the value of the public offer. Lheidli T'enneh says that, because it has been negotiating for some time and is going further into debt, there is a compelling need to disclose this information without delay so that it can assess the underlying economic value of the offer that is on the table and better understand the basis for continued negotiations, offers and counter-offers (para. 24, final s. 25 submission).

[90] Lheidli T'enneh objects to some of the Ministry's s. 25 arguments and to the affidavits the Ministry has tendered in support of its s. 25 arguments on the basis that large parts are re-argument and elaboration on harm under s. 16 and s. 17. Lheidli T'enneh says those parts are not relevant to s. 25 and also should not, in fairness, be considered by me as rebuttal material in relation to s. 16 and s. 17. The Ministry says that, if it is to bear an obligation to adduce evidence about whether or not s. 25 compels disclosure in this case, then it should not be constrained from doing so. In particular, it says, it should not be limited in adducing evidence to support its s. 25 case just because the applicability of this provision arose as an issue only after the Ministry's submissions and evidence on other issues had already been advanced.

[91] Addressing Lheidli T'enneh's concerns about fairness regarding rebuttal material on issues on which the parties' cases had already been completed, I have not given the Ministry's s. 25 argument and evidence weight respecting other issues, specifically the applicability of the disclosure exceptions in ss. 12, 16 and 17. With respect to the relevance of establishing harm under s. 16 or s. 17 for purposes of the s. 25 analysis, as I said in para. 34 of Order 01-20:

> I agree with the applicant that the application of s. 25(1) does not involve a weighing, from an evidentiary point of view, of the threshold in s. 25(1) against the exceptions in Division 2 of Part 2 of the Act.

[92] This does not mean, however, that Lheidli T'enneh's position that the broader context of the treaty negotiation process supports a compelling need for disclosure without delay under s. 25(1)(b) warrants my not considering the Ministry's perspective on that process and whether that process will be served or frustrated by disclosure of the withheld information. To that end, I have considered the Ministry's s. 25 argument and evidence even though, not surprisingly, there is convergence between the Ministry's position on harm from disclosure under s. 16 and s. 17 and its position on whether, under s. 25(1)(b), disclosure would or would not advance the treaty negotiation process in the public interest.

[93] Acknowledging that I raised the s. 25 issue in the first place, I have decided that s. 25(1) does not apply to the withheld information. I am not persuaded that compulsory disclosure of this particular information, without delay, is clearly in the public interest within the meaning of s. 25(1)(b). There is undoubtedly a public interest in the fair and constructive progress of treaty negotiations with Lheidli T'enneh and other First Nations. It is, however, anything but clear that disclosure of the disputed information to Lheidli

T'enneh is necessary to bring about, or would necessarily contribute to bringing about, a treaty. Lheidli T'enneh attaches legitimate public interest to the benefits it foresees in disclosure. The Ministry also attaches legitimate public interest to the harms it foresees in disclosure, including specific harm addressed in the *in camera* part of this inquiry. In my view, the public interest is significantly implicated from both perspectives and, in the circumstances, a clear public interest in mandatory disclosure, without delay, under s. 25(1)(b) of the Act is not present.

[94] **3.4 Protection of Cabinet Confidences** – The Ministry argues that s. 12(1) of the Act applies to some information in this case. That section reads as follows:

> **Cabinet and local public body confidences**
>
> 12 (1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> (2) Subsection (1) does not apply to
>
> (a) information in a record that has been in existence for 15 or more years,
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[95] According to the Ministry, the mandatory exception to the right of access created by s. 12(1) applies because, as indicated by the following quote from para. 6 of an affidavit sworn by Linda Brandie, a Ministry of Management Services manager for information, privacy and records services, the following information was included in July 4 and July 19, 2000 submissions prepared for Treasury Board, a committee of Cabinet, respecting the negotiation with Lheidli T'enneh:

- maps identifying the parcels appraised;
- the MOU on cost sharing with the government of Canada in relation to negotiations with the Lheidli T'enneh First Nation;
- the page attached and marked as *In Camera* Exhibit "A" to this affidavit; and

- two pages attached and marked as *In Camera* Exhibit "B" to this affidavit.

[96] Linda Brandie deposed, at para. 6 of her affidavit, that she had been informed by Angie Sorrell, a Treasury Board Analyst, that both of these Treasury Board submissions "went to Treasury Board for consideration in deciding whether to approve a mandate in relation to treaty negotiations with the Lheidli T'enneh First Nation." She also deposed, at para. 7, that provincial government negotiators do not have a mandate to make a treaty offer to a First Nation without Treasury Board approval and part of the process for obtaining such a mandate "includes a review by Treasury Board of (1) the lands appraised and (2) their value."

[97] According to the Ministry, the British Columbia Court of Appeal decision in *Aquasource Ltd*. v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927, supports the view that the disputed information must be withheld under s. 12(1). The following passages from *Aquasource* are relevant here:

> [39] … Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted…". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s.12(2)(c) relating to background explanations or analysis which I will discussion later.
>
> [40] As I understand Aquasource's argument, only those items listed in s.12(1) are excluded which reveal the thinking of Cabinet. That loads too much on the word "deliberations" and gives too little weight to "substance". Moreover, I agree with the submission of counsel for the Attorney General that Aquasource's interpretation would restrict the application of s. 12(1) to records of discussions and resolutions which do not exist. Since the evidence before the Commissioner was that minutes of Cabinet discussions or debates are not taken nor are the individual votes recorded. This a time-honoured practice based on the constitutional conventions of Cabinet solidarity and collective responsibility: …
>
> [41] It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. I arrive at this conclusion with the assistance of several authorities. …
>
> [48] What then is a workable test for s. 12(1) questions? The Attorney General argues, and I agree, that the Commissioner took the right approach in another case: *Inquiry re: A Request for Access to Records about the Premier's Council on Native Affairs* (2 February, 1995), Order No. 33-1995, where he said at p. 5 of the decision:

> The public bodies offered useful descriptions of each type of record at issue in this dispute. A "Cabinet submission" and a Treasury Board Chairman's report contain some information, now severed, that would necessarily be the object of Cabinet's deliberation with respect to "recommendations," "advice," and outlining a suggested course of action. The internal evidence of the language used, the public bodes argue, supports this argument. Furthermore, they argue, "a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1)."
>
> > It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations[,] because it would permit the drawing of accurate inferences with respect to the deliberations. (Argument for the Public Bodes, pp.9-10).
>
> I agree with this general characterization of Cabinet submissions and apply it specifically below.

From the acceptance there emerges this test: Does the information sought to be disclosed form the basis for Cabinet deliberations?

[98] The Ministry argues that, following *Aquasource*, s. 12(1) protects "information that was prepared for the purpose (whether in whole or in part) of forming the basis of Cabinet deliberations", where disclosure of that information would reveal the substance of Cabinet deliberations, "at least where it can be inferred by an applicant that the information was prepared for the purpose of forming the basis of Cabinet deliberations" (para. 3.06, Ministry's s. 12(1) submissions). The Ministry says (at para. 3.07 of its s. 12(1) submissions) Linda Brandie's affidavit discloses that, although the requested records are not Treasury Board records, they contain information

> … that was considered by Treasury Board during its deliberations concerning whether to approve a specific mandate in relation to treaty negotiations with the Lheidli T'enneh First Nation.

[99] The Ministry argues that disclosure of the information just described "would reveal the thinking of Treasury Board", *i.e.*, disclosure of the information "would reveal the substance of Treasury Board deliberations" (para. 3.08, Ministry's s. 12(1) submissions).

[100] The following submission appears at paras. 3.09 and 3.10 of the Ministry's s. 12(1) submissions:

> 3.09 In order for government negotiators to make an offer to a First Nation, they must first seek the approval of a specific mandate from Treasury Board. Part of the process of seeking a mandate includes a review by Treasury Board of the lands valued and their values. First Nations are aware of that mandate process. As such, the Ministry submits that disclosure of the information referred to in paragraph 5 of Linda Brandie's affidavit would reveal to the Applicant the fact that Treasury Board had considered that information in their deliberations.

> 3.10 The Ministry submits that the very fact that it has applied section 12 to information, and cited that section in this inquiry, as the Act requires it to do, revealed to the Applicant that the information severed under that section is information that would reveal the substance of Cabinet deliberations.

[101] As I have indicated in the past – including in Order 02-38 – I have some difficulty with the thrust of the Ministry's argument here, since it presupposes that the Ministry has correctly applied s. 12(1) to information in a record. I presume the Ministry is not arguing that an incorrect reliance on that section somehow communicates the fact that information would, if disclosed, reveal the substance of Cabinet deliberations, thereby supporting application of that section.

[102] Lheidli T'enneh, for its part, argues that the withheld information consists of "background explanations or analysis" within the meaning of s. 12(2)(c), such that it must be disclosed. It argues that the value of the 11 parcels of land is merely background information provided to Treasury Board for its consideration in making its decision to provide a specific mandate for the settlement offer that was made to Lheidli T'enneh. Lheidli T'enneh submits that, because the 11 parcels of land have been offered to Lheidli T'enneh, Treasury Board's decision respecting the mandate to offer those parcels "has been made public" within the meaning of s. 12(2)(c)(i). Accordingly, the appraisal information cannot be withheld under s. 12(1). As soon as Treasury Board's decision to provide the mandate for that offer was made public by virtue of the offer having been made, Lheidli T'enneh argues, it cannot be said that disclosure of the appraisal information would reveal the substance of Treasury Board deliberations.

[103] Lheidli T'enneh also argues that the Ministry has not met its burden of proving that s. 12(1) applies because it has not submitted in evidence "the relevant corresponding Treasury Board records". It relies in this respect on Order 01-14, [2001] B.C.I.P.C.D. No. 15. At para. 25 of that decision, I had the following to say about evidence to support a s. 12(1) argument:

> For future reference, it would be preferable in a case such as this for the public body to provide me, if at all practicable, with the relevant corresponding Cabinet or Cabinet committee records. In this case, at least, the affidavit evidence and internal evidence in the records was satisfactory for the purposes of s. 12(1), but that will not always necessarily be so.

[104] I said much the same thing, again, in Order 02-38, at para. 77.

[105] While I continue to believe that a public body should whenever practicable provide me with copies of relevant Cabinet or Cabinet committee documentation to support a claim for s. 12(1) protection, I am satisfied in this case that the Ministry has provided sufficient evidence to establish that information in the disputed records was submitted to Treasury Board. In her affidavit, the relevant portions of which I have already quoted, Linda Brandie deposed that she had "viewed the submissions which were prepared for Treasury Board". On that basis, and in light of the two *in camera* exhibits to her affidavit that I have described above, I accept that some of the disputed information was submitted to Treasury

Board. In making this finding I have also had regard to other *in camera* evidence before me.

[106] I observe from the *in camera* exhibits to Linda Brandie's affidavit that the information submitted to Treasury Board was not merely incidental or insignificant. It was substantive and material. I note also Linda Brandie's evidence that she was told by Angie Sorrell, a Treasury Board analyst, that the relevant Treasury Board submissions did go to Treasury Board for its consideration. I am satisfied that the information in dispute in this inquiry was required to be prepared for the purposes of making a submission to Treasury Board, it was considered by Treasury Board in giving British Columbia's negotiators a mandate in relation to treaty negotiations with Lheidli T'enneh, and that some of the withheld information (identified in the *in camera* exhibits to the Brandie affidavit) was included in that submission to Treasury Board.

[107] Having subjected all of the Ministry's evidence to a particularly close and critical scrutiny, I conclude that disclosure of the withheld information that was submitted to Treasury Board (*in camera* Exhibits "A" and "B" to the Brandie affidavit) would, as contemplated by the *Aquasource* decision, reveal the substance of deliberations of Treasury Board, which previous decisions have accepted is a Cabinet committee under s. 12(1).

[108] I am also persuaded that s. 12(2)(c) does not apply to the disputed information. The negotiators for British Columbia and Canada have offered a number of parcels of land to the Lheidli T'enneh. This is not the same as, under s. 12(2)(c)(i), making public the negotiating mandate approved by Treasury Board, even assuming that the offering of the parcels was approved in that negotiating mandate. The making of the offer also does not qualify as an implementation, under s. 12(2)(c)(ii), of the negotiating mandate approved by Treasury Board. With the offer rejected, but still open for acceptance, and the negotiations still being under way, the negotiation mandate can hardly be characterized as having been implemented.

[109] Accordingly, I find that s. 12(1) requires the Ministry to refuse to disclose to Lheidli T'enneh the withheld information that was submitted to Treasury Board.

[110] **3.5 Harm to Intergovernmental Relations or Treaty Negotiations** – The Ministry claims disclosure of the withheld information could reasonably be expected to harm the conduct by British Columbia of relations with the government of Canada (s. 16(1)(a)(i)) and the conduct of negotiations relating to aboriginal self-government or treaties (s. 16(1)(c)). Section 16 reads as follows:

> **Disclosure harmful to intergovernmental relations or negotiations**
>
> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;

(ii) the council of a municipality or the board of a regional district;

(iii) an aboriginal government;

(iv) the government of a foreign state;

(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

(c) harm the conduct of negotiations relating to aboriginal self government or treaties.

(2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information, or

(b) the Executive Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 or more years unless the information is law enforcement information.

Standard of proof under s. 16(1)

[111] At para. 3 of its initial submission, the Ministry accepts that, while it need not establish a certainty of harm, it is not sufficient to provide evidence of speculative harm. It cites the following passage from p. 10 of Order 00-10, [2000] B.C.I.P.C.D. No. 11, on the question of proof under the reasonable expectation of harm test:

> The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.

[112] As I also noted at p. 10 of Order 00-10, the evidence must establish a rational connection between disclosure of the disputed information and the harm that will allegedly result. The Supreme Court of Canada has said, in the context of s. 22(1)(b) of the federal *Privacy Act*, that the reasonable expectation of harm test requires "a clear and direct connection between the disclosure of specific information and the injury that is alleged": *Lavigne* v. *Canada (Office of the Commissioner of Official Languages*), [2002] S.C.J. No. 55, 2002 SCC 53, at para. 58 (Q.L.). As is discussed further below, in relation to s. 17(1), I adopt the same formulation for the evidence required to meet a reasonable expectation of harm test under the Act.

Is there a reasonable expectation of harm under s. 16(1)?

[113] The Ministry argues that relations between British Columbia and Canada – both generally speaking and in relation to negotiation of treaties – could reasonably be expected

to be harmed by disclosure of the disputed information. Its submissions boil down to the following:

1. None of the parties at the Lheidli T'enneh treaty table has ever agreed that negotiations would deal with the value of specific properties. Those negotiations have been conducted on the basis of a land selection model. (Lheidli T'enneh vigorously disputes this.)

2. Canada and British Columbia have agreed to treat land appraisal information as confidential and have consistently done so. Disclosure of the information in dispute here would conflict with that agreement and practice, harming relations between British Columbia and Canada by impeding their negotiation of treaties.

3. Disclosure of the disputed information would sidetrack the Lheidli T'enneh negotiations, and treaty negotiations more generally, into disputes over land value, which would impede the timely and efficient resolution of treaty negotiations in British Columbia. (Lheidli T'enneh vigorously disputes this.)

4. Canada and British Columbia have a common interest in making an offer that Lheidli T'enneh will accept and disclosure of the disputed information could reasonably be expected to compromise their ability to reach a deal with Lheidli T'enneh.

5. Interference with the ability of Canada and British Columbia to conclude a deal with Lheidli T'enneh will "necessarily" harm the relationship between the two governments.

[114] The Ministry also made *in camera* submissions about s. 16(1)(a)(i) and s. 16(1)(c). As I have done with the Ministry's *in camera* arguments on other issues, I have subjected those submissions to the most critical scrutiny that I can fairly apply.

[115] The Ministry supports its s. 16(1)(a)(i) case with evidence that John Watson, Regional Director General for Indian and Northern Affairs Canada, has "confirmed" that Canada agrees with the Ministry's s. 16(1)(a)(i) case. This is, of course, an expression of opinion, from a party that is not disinterested in the outcome, on the very issue that is before me. I have given John Watson's 'confirmation' of the Ministry's position little weight, as it falls into the category of "hypothetical assertions or conclusionary statements", of no real probative value, which I found to be inadequate in Order 01-20 (a case dealing with s. 21 of the Act).

[116] The Ministry relies heavily for its s. 16(1)(a)(i) and s. 16(1)(c) case on Peter Engstad's affidavit and, to some extent, Jose Villa Arce's affidavit. Engstad's evidence underpins the elements of the Ministry's case as summarized above. As far as the s. 16(1)(a)(i) issue is concerned, I do not find the Ministry's evidence persuasive. It comes down, as I see it, to saying that, if it is required to disclose information under the Act, Canada will be unhappy, will somehow ascribe blame to British Columbia and will lose confidence in British Columbia's ability to work with Canada in trying to resolve aboriginal treaty negotiations and land claims. The Ministry's s. 16(1)(a)(i) argument that

Canada will be unhappy, and thus lose confidence in British Columbia, comes close to being a self-fulfilling prophecy. I am not convinced that Canada's supposed reaction establishes a reasonable expectation of harm under s. 16(1)(a)(i). Such a finding would come close to accepting that two governments can together agree not to disclose information despite the harms test in that section.

[117] I am similarly not persuaded that supposed side-tracking of treaty negotiations into debate about the value of land offered to Lheidli T'enneh raises a reasonable expectation of harm to relations between Canada and British Columbia. As I noted above, Lheidli T'enneh vigorously rejects the contention that the three parties have agreed to a land selection model for negotiations, in which the value of particular parcels is irrelevant. Ministry witnesses have said that a focus on land valuation issues will divert attention from issues the parties have agreed to address. Lheidli T'enneh says it does not agree that land and resource values are not relevant. It seems as accurate to ascribe a hampering of the negotiation process to the non-disclosure of valuation information (the Lheidli T'enneh perspective) as to the disclosure of such information (the government perspective). The parties' disagreement about whether valuation information is relevant to their negotiations is an underlying stumbling-block for them. I cannot see how Canada could lay blame for "side-tracking" of negotiations on this issue at British Columbia's feet.

[118] Canada and British Columbia may not like it if Lheidli T'enneh insists on addressing land and resource value, but I fail to see the connection between disclosure of valuation information and any such insistence by Lheidli T'enneh. If Lheidli T'enneh could afford its own appraisal of the offered parcels – again, it says it cannot afford its own appraisal – it would almost certainly wish to address land value. A supposed diversion of negotiations into land and resource value issues has more to do with Lheidli T'enneh's approach to the negotiations, than to disclosure of the dollars and cents of the government's appraisals.

[119] The Ministry relies on Order No. 14-1994, [1994] B.C.I.P.C.D. No. 17, in the portion of its initial submission that deals with s. 16(1)(a)(i), but it also clearly relies on that case in support of its s. 16(1)(c) arguments. In Order No. 14-1994, my predecessor accepted that, since relations between British Columbia and Canada were sensitive on the issue of aboriginal treaty negotiations, there was a reasonable expectation of harm from public disclosure of information about estimated provincial contributions to the costs of treaty settlements. Commissioner Flaherty accepted that disclosure of that information would hamper British Columbia's ability to "negotiate freely in the context of a confidential strategy" (p. 5). He accepted, for the purposes of s. 16(1)(c), that disclosure of estimated minimum and maximum costs of settling land claims would affect the "negotiation mandate and expected outcomes" of the provincial government (p. 6). A treaty negotiator had testified that disclosure of the global bottom-line figures for settlement of all land claims would "prejudice the cost of land claims and mislead the public with respect to its [*sic*] expectations" (p. 5). As regards s. 16(1)(a)(i), my predecessor found (at p. 5) that disclosure of the cost estimates would harm relations between Canada and British Columbia regarding their sharing of the costs of land claims settlements. He did not, however, set out his reasoning in arriving at that finding.

[120] The ramifications for inter-governmental relations of disclosure of the estimated overall costs of settling land claims in British Columbia, in the context of ongoing cost-sharing negotiations between Canada and British Columbia, strike me as different from the consequences for inter-governmental relations of disclosure of appraisal information to Lheidli T'enneh, a party to the negotiations with an interest in that specific information. The limited reasoning in Order No. 14-1994 does not persuade me of the validity of the Ministry's case here under s. 16(1)(a)(i).

[121] Again, as regards s. 16(1)(c), at p. 6 of Order No. 14-1994, my predecessor referred to harm to the negotiation of aboriginal treaties if global cost estimates were publicly known. He was of the view that public knowledge of the bottom-line estimates for overall land claims settlement would negatively affect British Columbia's negotiating mandate, thus harming negotiations. Here, Lheidli T'enneh wishes to have appraised values so that it can better assess the worth of an offer it has received. From its perspective, that information will help, not hinder, treaty negotiations or divert them into irrelevant areas. Even if Lheidli T'enneh were to use that information in negotiations, I do not agree the Ministry has established that this could reasonably be expected to harm those negotiations, as distinct from having an effect on the strategies or positions of Canada or British Columbia in the negotiations.

[122] The Ministry's s. 16(1)(c) case comes down to saying that British Columbia's ability to negotiate with Lheidli T'enneh and Canada would be harmed if the appraisal information in the requested records were known to Lheidli T'enneh. For the reasons given above regarding s. 16(1)(a)(i), I am not persuaded that placing appraisal values on the table would harm the negotiations. To the extent the Ministry's argument relates to harm to its own negotiating position, this is more properly a s. 17(1) argument, which I address below. I make the same finding respecting the Ministry's *in camera* arguments under s. 16(1)(a)(i) and s. 16(1)(c).

[123] **3.6 Harm to British Columbia's Interests** – The Ministry also says it is entitled to withhold the disputed information under s. 17(1) of the Act, which reads as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Standard of proof under s. 17(1)

[124] My remarks above about the standard of proof under s. 16(1) apply here as well, but the parties have also made more specific standard of proof arguments for this exception. The Ministry notes that s. 17(1) requires only a reasonable expectation of harm, not a significant or substantial harm (paras. 37-38, initial submission). It also says it is not necessary to demonstrate that "actual harm will result" – there need only be "a reasonable expectation of probable harm". The Ministry cites the Federal Court of Appeal decision in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246, at p. 253, for the proposition that a public body can rely on s. 17(1) if there is a reasonable expectation of "probable harm". Lheidli T'enneh also cites *Canada Packers*, but for the proposition that "detailed and convincing evidence" of a reasonable expectation of harm must be provided before a public body can rely on s. 17(1) (para. 18, reply submission).

[125] It is helpful to consider these two aspects of the *Canada Packers* decision in the full context of what was said in that case and what has been said in some subsequent cases. The passage from the judgment of MacGuigan J. in *Canada Packers* that addressed a requirement for "detailed and convincing" evidence to establish a reasonable expectation of the harms described in s. 20(1) of the federal *Access to Information Act* reads as follows, at p. 253:

> The learned motions judge, sailing as he was in completely uncharted waters, set out in these passages a statement of the law which seems to me, with the greatest of respect, to be somewhat imprecise and misleading in all its elements, *viz.*, that "evidence of harm under ss. 20(1)(c) and (d) must be detailed, convincing and describe a direct causation between disclosure and harm". [FN 2] By "detailed" he perhaps meant only "specific", as used in s-s. 2(1), but the connotation of "detailed" is of greater particularity, and of more particularity than may be necessary for the estimation of a reasonable expectation under paras. (c) and (d). By "convincing" he may have meant only that the appellant bore the burden of proof, or that the evidence must not be merely speculative, but again the connotation of the word seems to imply more, and the "more" is undefined. However, the greatest concern must be over his adoption of the concept of direct causation.

[126] I will also quote part of footnote 2 to the above passage:

> The motions judge seems to have adopted the words "detailed", and "convincing" from the decision he cited of Martin J. in the *Sawridge* case, where they are employed but not elevated to the status of a test. …

[127] The passage from the judgment of MacGuigan J. that introduced the "probable harm" phraseology for a "reasonable expectation" of harm threshold reads as follows, at p. 255:

> What governs, I believe in each of the three alternatives in paras. (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, *viz.*, "could reasonably be expected to". This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.
>
> However, I believe the temptation to carry through the tort analogy should be resisted, particularly if *Wagon Mound No. (2)*, *supra*, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this court has followed in … requires that we view the statutory language in these paragraphs in their total context, which must mean particularly in the light of the purpose of the Act as set out in s. 2. [FN3] Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific." With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm. [FN4]

[128] Here is footnote 4 to the above passage:

> This is not unlike the test adopted by Lacourciere J. in a different context … that "reasonable expectation … implies a confident belief".

[129] After *Canada Packers*, the courts continued to use the words "detailed and convincing" to describe, in the context of the federal *Access to Information Act*, the evidence required to establish a reasonable expectation of harm from disclosure of information. Further, as I noted in Order 00-10, the Ontario Court of Appeal, in *Workers' Compensation Board* v. *Ontario (Information and Privacy Commissioner)* (1998), 164 D.L.R. (4th) 129 (Ont. C.A.), at pp. 142-143, upheld the use of that language in a decision under the Ontario *Freedom of Information and Protection of Privacy Act*. The Court said the following at p. 142:

> … the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. Those words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing a reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. …

[130] Federal court decisions since *Canada Packers* have continued to describe a reasonable expectation of harm threshold in terms of "probable harm" but the test of

"probability" has not been adopted in all quarters and may have been refined in the Supreme Court of Canada's decision in *Lavigne* earlier this year. As I noted in Order 00-10, the Ontario Court of Appeal in *Big Canoe* v. *Ontario (Minister of Labour)* (1999), 181 D.L.R. (4th) 603 (Ont. C.A.) rejected the idea that there must be a probability of harm where the exception to disclosure involves a threat to personal safety. It said the following at p. 613:

> … The expectation of probable harm test was developed in a context where personal safety was not in issue. *Canada Packers*, *supra*, involved the interpretation of a provision exempting disclosure of the requested information in circumstances where disclosure could reasonably be expected to result in material financial loss or interfere with contractual negotiations. The interests at stake in that case were less compelling than those of personal safety and bodily integrity. It is unreasonable to require a government institution to show an expectation of probable harm to an individual in order to rely on the personal safety exemption provisions in the FOI.
>
> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly, s. 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record.

[131] In Order 00-39, [2000] B.C.I.P.C.D. No. 42, I acknowledged the shortcomings of a balance of probabilities risk-assessment in the context of determining whether there is a reasonable expectation of harm from the disclosure of information. Referring to the test for reasonable expectation future harm in *Athey* v. *Leonati*, [1996] 3 S.C.R. 458, at pp. 470-471, I said the following at p. 17 of Order 00-39:

> The cited portion of the decision in *Athey* relates to assessment of damages in a personal injury action. In that context, the relative likelihood of future harm – whether more or less than even – is reflected in the amount of damages awarded. My task here is to assess whether disclosure of information in requested records could reasonably be expected to result in a particular harm. A projection in the future is involved, but there is no assignment of a relative likelihood of occurrence as an adjustment to the amount of damages awarded. I take the point from *Athey*, however, that an assessment based on a balance of probabilities has a place in deciding whether a past event occurred, which it does not have in determining whether a potential future event will happen. I believe this to be consistent with what I said in Order No. 00-10. The standard of proof for harms-based exceptions under the Act is a reasonable person's expectation that disclosure of the requested information could cause the harm specified in the exception. On the one hand, the standard is not defined by mathematical likelihood. On the other hand, as is

> indicated in *Athey*, a future possible event is not to be taken into account on the basis of mere speculation.

[132] The "confident belief" label that MacGuigan J. suggested in *Canada Packers* was similar to a reasonable expectation of probable harm has resurfaced in *Lavigne*. In *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*, [1997] F.C.J. No. 1812 (T.D.), Richard J. analyzed the threshold for reasonable expectation of injury to the conduct of lawful investigations in s. 16(1)(c) of the federal *Access to Information Act* and its counterpart, s. 22(1)(b) of the federal *Privacy Act*. (These federal provisions are generally analogous to the law enforcement exception in s. 15(1)(a) of the Act.) After quoting the passage from *Canada Packers* in which "probable harm" was said to be the appropriate standard, and noting the significance of some specific statutory language involved, Richard J. said the following at para. 43:

> The reasonable expectation of probable harm implies a confident belief. There must be a clear and direct link between the disclosure of the specific information and the harm alleged. The Court must be given an explanation as to how or why the harm alleged would result from the disclosure of specific information. The more specific and substantiated the evidence, the stronger the case for confidentiality. It cannot refer to future investigations generally.

[133] The *Lavigne* decision also concerned s. 22(1)(b) of the federal *Privacy Act*. At para. 29, Gonthier J. quoted a passage from B. McIsaac *et al.*, *The Law of Privacy in Canada* (Toronto: Carswell, 2000, updated 2001, release 4), which refers to the reasonable expectation of injury test as requiring a reasonable expectation of "probable harm". Then, at para. 58, he said the following:

> The non-disclosure of personal information provided in s. 22(1)(b) is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner)* v. *Canada (Immigration and Refugee Board)*, *supra*, at para. 43, "[t]he reasonable expectation of probable harm implies a confident belief". There must be a clear and direct connection between disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure.

[134] The following passage is found at para. 61 of *Lavigne*:

> The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interviews with Ms. Dube on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are no cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always

> be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations posed by the *Privacy Act* and the *Official Languages Act*. The Commissioner [of Official Languages] must exercise his discretion based on the facts of each specific case. In the case of Ms. Dube, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner's investigations.

[135] In *Canada Packers*, the court described a reasonable expectation of harm as a reasonable expectation of "probable" harm. The idea of "probable" harm was introduced in contrast to the alternative of mere "possible" harm, which the Court rejected. *Canada Packers* also expressly associated "probable" harm with "a confident belief", an objective standard which does not necessarily equate to a "more likely than not" test. As I have said before, the language of the particular test laid down in the Act must guide the evidentiary standard to be applied. For example, in Order 00-24, [2000] B.C.I.P.C.D. No. 27, I said the following at p. 4:

> The harm feared under s. 17(1) must not be fanciful, imaginary or contrived. Evidence of speculative harm will not satisfy the test, but it is not necessary to establish a certainty of harm. The quality and the cogency of the evidence presented must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception.

[136] The Ontario Court of Appeal held, in *Big Canoe*, that "more likely than not" was an unreasonably high formulation in the context of risk of harm to personal safety. In *Workers' Compensation Board*, it found that the words "detailed and convincing" appropriately describe the quality of evidence required to satisfy the onus of establishing a reasonable expectation of harm. In *Lavigne*, the Supreme Court of Canada, in the context of disclosure claimed to be detrimental to the conduct of lawful investigations, adopted the language of Richard J. in *Canada (Immigration and Refugee Board)*, above, *i.e.*, that a reasonable expectation of probable harm implies a "confident belief". That Court also said there must be a clear and direct connection between disclosure of specific information and the injury alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure.

[137] Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information. A Ministry or government preference for keeping the disputed information under wraps in its treaty negotiations with Lheidli T'enneh will not, for example, justify non-disclosure under

s. 17(1). There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.

Harm to British Columbia's financial or economic interests

[138] In contending that s. 17(1) applies in this case, the Ministry relies on the affidavits of Jose Villa Arce, Peter Engstad and Nancy Wilkin, as well as on its s. 16(1)(c) harm arguments. It relies also on Order No. 14-1994, in which my predecessor concluded that if, "during the negotiations, the potential final settlement amount were known, it would harm the government's financial or economic interests" under s. 17(1). The Ministry also refers to Order No. 104-1996, [1996] B.C.I.P.C.D. No. 30, which dealt with a request for records relating to the proposed sites for a new facility. Commissioner Flaherty accepted in that case that disclosure of the records would reveal information about negotiations carried on by and for the Ministry. The Ministry says s. 17(1)(e) applies equally here, since the disputed records deal with the appraisal of land selected by British Columbia and Canada and that information is "about negotiations" carried on by British Columbia.

[139] Lheidli T'enneh says the Ministry's evidence in support of its s. 17(1)(e) case is, like the rest of the Ministry's evidence, speculative and not sufficient to raise the necessary reasonable expectation of harm. Among other things, Lheidli T'enneh says the following at para. 22-23 of its reply submission:

> 22. As there is a substantial amount of information severed from the Ministry's affidavits and submissions, Lheidli T'enneh is limited in its ability to respond to the Ministry's evidence and argument on this issue. It appears that the Ministry is concerned that disclosure of some of the information in the appraisal records will implicitly disclose the Province's negotiating position.
>
> 23. Lheidli T'enneh submits that disclosure of the appraised value of the 11 parcels of land in this case, will not implicitly disclose the Province's negotiating position. All it will reveal is the value of the public Offer. Lheidli T'enneh will have no way of calculating the province's negotiating mandate. Because Lheidli T'enneh cannot respond to the Ministry's submissions on this point, which have been made *in camera*, it is submitted that the Commissioner ought to canvass this carefully with the Ministry's witnesses, in order to assess whether the evidence is specific and probative, or speculative and non-probative on this issue. It is also submitted that the Commissioner should critically review the *in camera* evidence in order to ensure that all of its should have been submitted *in camera*.

[140] I am persuaded from my review of the withheld information taken together with the Ministry's open and *in camera* evidence and argument that the Ministry has established a reasonable expectation of harm within the meaning of s. 17(1) of the Act. The withheld information is "information about negotiations carried on by or for a public body of the government of British Columbia" and as contemplated by s. 17 (1)(e) there is a reasonable expectation of harm to the financial or economic interests of British Columbia if that information is disclosed. The Ministry's case establishes specific and direct reason to believe that disclosure of the withheld information will interfere, in a significant sense,

with British Columbia's ability to reach some or all of its objectives in treaty negotiations with Lheidli T'enneh and very possibly other First Nations as well. Those objectives include direct financial and economic considerations for British Columbia, as well as delay and other process considerations that have financial and economic ramifications for British Columbia. I find the interference that could reasonably be expected to result constitutes harm to the financial or economic interests of British Columbia under s. 17(1) of the Act.

[141] I recognize that Lheidli T'enneh may contend that its confidentiality commitments regarding information received from government in the treaty negotiation process eliminate risk of harm to British Columbia from disclosure to third parties, such as other First Nations engaged in treaty negotiations. Risk of harm deriving from such disclosure to third parties is only one aspect of the Ministry's case for harm under s. 17(1). I am satisfied that the Ministry has established its case even on the basis of disclosure of the withheld information to Lheidli T'enneh alone.

[142] **3.7 Exercise of Discretion** – The parties also join issue on the question of whether the Ministry's head has exercised his discretion properly under s. 16(1) and s. 17(1) of the Act. Lheidli T'enneh submits that, if I determine the Ministry is authorized to refuse access under either provision, the head of the Ministry did not properly exercise his discretion to claim these disclosure exceptions. Although the exercise of discretion to invoke s. 16(1) is not critical to my disposition of this inquiry, because of my finding that this disclosure exception does not apply, I have considered the head's exercise of discretion both under s. 16(1) and under s. 17(1).

[143] The word "may" in provisions such as s. 16 or s. 17 confers on the head of a public body a discretion to disclose information that can be withheld under one of Act's exceptions to the right of access. In Order 02-38, at para. 149, I affirmed once again that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure and cited some of the relevant factors in considering the public interest in disclosure. I will not repeat that non-exhaustive list of factors here.

[144] The head must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations. If the head of the public body has not done so, he or she can be ordered to re-consider the exercise of discretion. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. The commissioner can require the head to reconsider her or his exercise of discretion if it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered or relevant ones have not been considered. See Order 02-38, at para. 147.

[145] Lheidli T'enneh contends that, in this case, the decision-making process followed by the former Ministry of Aboriginal Affairs and by the Ministry did not comply with numerous of the Act's provisions, notably ss. 6, 7, 8 and 10. It says the process followed "clearly violates the spirit and intent of the Act" (para. 33, reply submission). Lheidli T'enneh notes that, because the original decision on its access request was made by an individual who did not have the delegated authority to make the decision, the Ministry's Deputy Minister, Phillip Steenkamp, made a new decision on November 7, 2001, on the

eve of this inquiry. Lheidli T'enneh says that, although the affidavit of Terry Stewart provides evidence as to the factors the Deputy Minister considered in making his decision and exercising his discretion under ss. 16 and 17, the head's discretion has not been properly exercised because of the earlier flaws of the decision-making process. Lheidli T'enneh also argues that the Minister has failed, as it should, to provide the best evidence, *i.e.*, evidence from the Deputy Minister himself.

[146] I do not accept the argument that the flaws in the decision-making process warrant my remitting the exercise of discretion to invoke s. 16 or s. 17 back to the Ministry for re-consideration. Whatever the deficiencies in the decision-making process were or might have been, the fact remains that a fresh decision was made before the inquiry and in my judgement it cured earlier flaws. Moreover, the only remedy Lheidli T'enneh could expect, if I were to accept its argument, would be for me to order the head to reconsider his exercise of discretion. I consider the November 7, 2001 decision cured previous procedural flaws and decline to find that the head's discretion was improperly exercised on that basis.

[147] As for the merits of the Deputy Minister's exercise of discretion, Lheidli T'enneh argues, at para. 34 of its reply submission, that he failed to account for the following relevant factors:

- the province's general fiduciary relationship with Lheidli T'enneh, and its specific fiduciary obligations to Lheidli T'enneh in the context of the treaty negotiation process;

- the province's fiduciary obligations in respect of disclosure of information about land;

- the terms of the 1995 Procedural Agreements among the three parties, particularly the Principles for Information Sharing (May 2, 1995);

- that Lheidli T'enneh has not requested access to the province's internal documents in respect of its negotiating mandate, strategy or cost-sharing negotiations;

- that the province and the federal government disclosed to Lheidli T'enneh the appraisal of the federal Agricultural Farm lands, which are also "cash equivalents" under the cost-sharing MOU;

- that disclosure of the appraisal for the federal Agricultural Farm lands assisted the negotiations, in that Lheidli T'enneh is now aware of the range of value for that land and is prepared to accept it as part of a treaty settlement;

- that disclosure of the appraisal for the federal Agricultural Farm lands did not side-track the negotiations "by a debate regarding the value of the land/resources and the assumptions and methodologies of the appraiser";

- the potential benefits to disclosure to Lheidli T'enneh;

- the fact that the value of land is significant to Lheidli T'enneh, and that the selection of land for treaty settlement purposes cannot be separated from the value of the land, particularly in terms of assessing the economic development potential of an offer;

- the spirit and intent of Recommendation #2 of the B.C. Claims Task Force, which states that "[e]ach of the parties be at liberty to introduce any issues at the negotiation table which it views as significant to the new relationship";

- while the appraisals may have been prepared for cost-sharing purposes, disclosure of the information contained in the documents will not reveal the specifics of the cost-sharing process or the substance of those negotiations between the province and the federal government.

[148] In the oral hearing, counsel for Lheidli T'enneh referred to the dissenting judgement of Huddart J.A. in *Paul* v. *British Columbia (Forest Appeals Commission)* (2001), 201 D.L.R. (4th) 251 (B.C.C.A.), supp. reasons 206 D.L.R. (4th) 321, in support of Lheidli T'enneh's submission that I should remit this matter for re-consideration of the exercise of discretion to invoke ss. 16 and 17. In that case, the petitioner claimed that the Ministry of Forest's seizure of four logs on the ground that they had been cut without authority under s. 96(1) of the *Forest Practices Code of British Columbia* was an unjustifiable infringement of his aboriginal right to cut timber in order to modify his house. At para. 148, Huddart J.A. said that "the exercise of a decision maker's discretion must be consistent with s. 35" of the *Constitution Act, 1982*, which affirms aboriginal rights. The context for this observation was the issue of whether an adjudicative tribunal – the Forest Appeals Commission – had the capacity to require respect for aboriginal rights by administrative decision-makers whose discretionary enforcement actions under the *Forest Practices Code of British Columbia* had the potential to infringe those rights.

[149] For its part, the Ministry relies on the affidavit of Terry Stewart, who deposed as to the factors the Deputy Minister considered in exercising his discretion under ss. 16 and 17. The Ministry says, at para. 48 of its initial submission, that the Deputy Minister considered a variety of factors, including the following:

- the objectives of the British Columbia treaty process;

- the fact that Lheidli T'enneh had agreed to keep the requested information confidential;

- the fact that there does not appear to be a duty on a party in negotiations to fully disclose all of its internal documents;

- the accountability goal of the Act;

- the language of ss. 16 and 17 and the fact that they are intended to prevent harm to various government interests;

- the practice of the treaty negotiations office in the past not to release this type of information;

- the fact that Canada and British Columbia have agreed to treat such information as confidential;

- the fact that the requested information is both significant and sensitive;

- the fact that the land selection issue is still on-going in negotiations with Lheidli T'enneh; and

- whether or not disclosure of the information would increase public confidence in the operations of the Ministry and its treaty negotiations.

[150] Although some of the factors that the Deputy Minister relied on are less than compelling – indeed, some of them border on being circular – I cannot, after careful consideration, conclude that any of them is irrelevant or extraneous to the exercise of the head's discretion. Nor is there evidence of bad faith. I need not agree with the decision reached by the Deputy Minister. I find he did exercise discretion under s. 16 and under s. 17. I find that in doing so he weighed the conflicting interests at stake, albeit in descriptive terms that reflect British Columbia's view of the treaty process and its obligations to Lheidli T'enneh. I find he did not exercise his discretion perversely or unfairly. In all of the circumstances, I would not order the re-consideration of the Deputy Minister's exercise of discretion.

[151] On the issue of the exercise of discretion to invoke the s. 16 and s. 17 exceptions, I have also considered it useful to assume, for the purposes of argument only, that British Columbia may have a fiduciary obligation to Lheidli T'enneh to disclose some or all of the withheld information. Even on this basis, I would not order the Deputy Minister to re-consider his exercise of discretion. This is because the fiduciary obligation to disclose is not infringed by lack of access under the Act. These circumstances are unlike *Paul* and other cases involving the enforcement of regulatory prohibitions and accompanying permit schemes with the potential to proscribe or interfere with aboriginal entitlements affirmed under s. 35 of the *Constitution Act, 1982*. As I said earlier, the access process under the Act does not diminish disclosure requirements that flow from fiduciary obligations owed by British Columbia to Lheidli T'enneh. The Act is a separate scheme for public access to information in the custody or under the control of public bodies. It does not proscribe or prevent the information withheld in this inquiry from being disclosed to Lheidli T'enneh in accordance with any obligation British Columbia owes to Lheidli T'enneh because of its trust-like relationship with aboriginal people.

4.0 CONCLUSION

[152] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that the Ministry is required to refuse to disclose the information that it withheld under s. 12(1) of the Act,

2. I find that the Ministry is not authorized to refuse access to the information that it withheld under s. 16(1) of the Act, but I make no order requiring disclosure in light of my findings in relation to s. 12(1) and s. 17(1)(e) of the Act, and

3. I confirm the decision of the Ministry that it is authorized to refuse access to the information it withheld under s. 17(1)(e) of the Act.

[153] In light of my finding respecting s. 25(1)(b), no order is required in that regard.

October 21, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia