REPORT **FI-05-20**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the Office of Aboriginal Affairs to refuse to disclose gaming agreements it has with the First Nation Bands across the province.

REVIEW OFFICER: Darce Fardy

REPORT DATE: July 4, 2005

ISSUE: Whether the decision of the Office of Aboriginal Affairs is supported by the exemptions found in Sections 12 (harm to relations between the government and an aboriginal government); 17 (harm to the government's financial and economic interests); and 21 (protection of the confidential information of third parties).

In a Request for Review, pursuant to the **Freedom of information and Protection of Privacy Act** *(FOIPOP)***,** the Applicant asked that I recommend to the Office of Aboriginal Affairs (OAA) that it reverse it's decision not to disclose the certain gaming agreements.

The OAA had been asked for:

> All video lottery terminal agreements and all gaming agreements between the government of Nova Scotia, including the Office of Aboriginal Affairs acting on its behalf, and the First Nations bands across Nova Scotia.

In accordance with the Act the OAA notified the First Nations of the application and asked whether or not they consented to disclosure. The OAA refused the Applicant's request after discussions with representatives of the First Nations and told the Applicant that

> (W)e have received representations from First Nations and have concluded that disclosure would be harmful to relations between the provincial government and First Nations in Nova Scotia. As well, because of the nature of these agreements and the fact that some are still under negotiation it would harm the competitive position of the bands. In addition, because the Nova Scotia government is now negotiating treaty and related issues with the Mi'kmaq and Canada such disclosure could undermine these discussions.

The OAA cited exemptions from disclosure found in sections **12(1)(a)(iii)**, **17 (1)(e)** and **21(a)(ii), (b)** and **(c)(i)** of *FOIPOP*.

> S.12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm the conduct by the Government of Nova Scotia of relations between the Government or any of the following or their agencies
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> (iii) an aboriginal government
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> S.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 Nova Scotia or the ability of the government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> (e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

S 21 (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied implicitly or explicitly, in confidence;

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party.

Background:

Through an agreement with the Government of Nova Scotia, the Mi'kmaq bands in the Province operate their own video lottery terminals (VLTs) on reserves. The First Nations Gaming Commissions, representing the thirteen Bands in the Province, signed agreements with the Government to operate VLTs, as well as to license charitable gaming activities such as bingo.

Recently in recognition of gambling addiction problems in the Province, the Government announced a gaming strategy to remove one thousand of the 3849 VLTs now in use. At the same time the Minister Aboriginal Affairs said the Government will "continue discussions with First Nations about restructuring gaming arrangements to implement a more socially responsible gaming model on reserves."

The Applicant's submission:

The Applicant believes the agreements should be made public because they relate to "a matter of significant importance" given the government's recognition of the serious problems of gambling addiction among users in Nova Scotia. He also said that the OAA must live up to its obligations under **Section 2(b)(i)** of *FOIPOP* to "facilitate informed public participation in policy formulation" by disclosing the agreements.

The Applicant continued that unless the First Nations gaming agreements are made public, as other gaming agreements are, "Nova Scotians have no way of knowing whether the provincial strategy is the most effective to achieve desired ends."

In a comment on the exemptions cited under s.12 and s.17, the Applicant said there is no evidence that the financial and economic interests of any of the parties, or the Government's relationship with First Nations, were harmed following the release of a financial analysis of the First Nations Gaming Commissions by the Chartered Accountants, Grant Thornton, in 2000, which contained many details of the agreements.

With respect to confidential information the Applicant proposed that such information be severed and the remainder of the agreements disclosed.

Finally he cited *O'Connor v. Nova Scotia* [2001] NSCA 132 in which the Court of Appeal noted that, in accordance with **Section 2(a)**, public bodies were required to be "fully" accountable to the public with a "positive obligation" to accommodate the public's right of access.

The First Nations submission:

The solicitor for First Nations outlined his position in a representation to the OAA and proposed that it be used as his submission to the Review Officer. He explained that the gaming agreements with the various bands were negotiated separately and in confidence with the Government and the Nova Scotia Gaming Corporation.

> "[W]hen such agreements are negotiated by First Nations they are part of a complicated and sometimes turbulent relationship between the Mi'kmaq and the Province. Any disclosure of private financial agreements negotiated in good faith undermines the candor and frankness necessary for a productive, cooperative, continuing, long-term relationship."

Although the solicitor spoke for all of the bands, some of them made additional comments on the application directly to the OAA, which were provided to the Review Officer.

A spokesman for the Glooscap and Pak'tnkek Mi'kmaq Bands said disclosure "will result in the destruction of the growing relationship between the Mi'kmaq Bands of Nova Scotia and the Provincial Government involving vast numbers of agreements, and leading to the inability of the parties to enter into agreements in the future."

The OAA's submissions:

The OAA made a written and oral submission. In support of claiming an exemption under s.12, it went to some lengths in both submissions to stress the importance of establishing trust between the First Nations and the Government of Nova Scotia. It said any trust would be difficult to achieve if the Government were seen to be disclosing details of an agreement which the First Nations believed to be protected. It said "the ongoing negotiations with the bands may become even more

sensitive. We know that the bands rely on the revenues achieved from video lottery terminals for various kinds of social programs and economic development initiatives in their communities."

The OAA also cited the statement made by the solicitor for First Nations (quoted above) on the importance of avoiding any action that would further harm a "complicated and sometimes turbulent relationship" between the Government and First Nations.

The OAA noted that although the Nova Scotia Court of Appeal ordered the disclosure of an Audit Report into police servicing by Tribal Police in the Unama'ki communities in the Province, there was no indication at the time, of ongoing negotiations on Aboriginal policing. It also noted that the Court acknowledged that the "untimely release of particulars of negotiations or other sensitive communications between such governments might qualify for exemption (pursuant to Section 12)." (*Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124)

The OAA also cited a ruling of the British Columbia Information and Privacy Commissioner who accepted the government's decision to refuse to disclose government estimates of the costs involved in negotiating and settling native land claims. (Order 01-14).

It explained the general context of the relations between Mi'kmaq bands governments and Nova Scotia "can best be understood by reference to some of the litigation which uniquely concerns Mi'kmaq Aboriginal rights. It is noteworthy that most of these decisions result from the Crown's prosecution of defendants for the exercise of their Aboriginal rights, such as hunting and fishing." The legitimacy of these rights was recognized in the *Constitution Act, 1982.*

OAA also quoted the words of a writer who commented on the struggles of the Mi'kmaq to have their Aboriginal and treaty rights affirmed:

> "With their small land base and populations relative to the rest of Canada's First Nations, Maritime first Nations had to wait until the latter part of the 20th century before they were able to secure a solid legal basis for their rights in Canadian Law . . . "

The OAA noted a statement made two years ago by the provincial Minister Responsible for Aboriginal Affairs that the challenge is for government and First Nations to reach understanding "within the fabric of modern day Canada."

The OAA made other points in its oral submission to the Review Officer:

- all gaming agreements with the bands are negotiated separately
- disclosure would impact on negotiations because they are still ongoing on some gaming agreements. Even ones that had been settled could be impacted by more favourable terms in later agreements.
- historically the relationship between the government and First Nations has been one of distrust.
- The Courts have been urging government to cooperate with First Nations.
- Negotiations on the agreements were conducted implicitly in confidence.
- Government can't prove disclosure would harm the relationship, but given past experience a negative reaction can be expected.
- such reluctance to disclose may dissipate as trust is built up.
- The OAA's decision to disclose the Grant Thornton 2000 review of First Nations gaming commissions, which is available on the OAA's website, illustrates the OAA's willingness to be open and accountable.

With respect to s.17(e), the OAA wrote that the Government is currently involved in re-negotiating six of the gaming agreements, specifically on "standard operational and fiscal arrangements" as well as with respect to the reduction in the numbers of VLTs.

The OAA continued that the Province's financial interests are at stake because the reduction of VLTs may involve "the disposition of provincial funds in a fashion yet to be determined."

Conclusions:

During a meeting with OAA officials, I noted that, unlike most other government agreements, the gaming agreements with First Nations made no reference to the *FOIPOP* Act. The OAA conceded that the reaction of the First Nations to the application may not have been the same if it had been made clear that such agreements are subject to the *FOIPOP* Act.

There is no question that the Courts, and other ruling bodies, attach considerable importance to the need for sensitivity in dealing with First Nation negotiations. In *Taku River* the Supreme Court of Canada said:

> The Crown's Duty to consult and accommodate Aboriginal peoples . . . is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by Section 35(1) of the Constitution Act 1982. (*Taku River Tlingit First Nation v. British Columbia [92004] SCR 74.)*

Given the view of the Courts and the substance of the OAA's submissions, both oral and written, I am satisfied that disclosing the agreements at this time could "reasonably be expected" to harm relations between the Government and First Nations.

With respect to the question of "openness" and "accountability" raised by the Applicant (and raised frequently in many of my Reviews) it is my view the OAA exercised these obligations when it issued the Grant Thornton Report and in other public statements.

While recognizing the public interest in the matter of problem gambling, as the Applicant suggests, it is my view disclosure of the agreements would have no significant impact on the debate.

Having determined that s.12 applies, there is no need for me to examine the exemptions cited under s.17 and s.21 whatever the merits of the case put forward by the OAA and the third party.

Recommendations:

- that the OAA, in the future, include in its agreements with First Nations, a notification that such agreements are subject to the Freedom of Information and Protection of Privacy Act.
- that the OAA confirm in writing to the Applicant its decision to deny access to the agreements in question.

Section 40 of the Act requires the Office of Aboriginal Affairs to make a decision on this recommendation within 30 days of receiving this report and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the OAA is deemed to have refused to follow this recommendation.

Dated at Halifax, Nova Scotia this 30th day of June, 2005.

Darce Fardy, Review Officer