CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

BY COURIER

Our File: PR-99-034

January 18, 2000

Mr. John L. Dickinson
Coordinator, CITT Complaints
Contract Claims Resolution Board
Public Works and Government Services Canada
Place du Portage, Phase III
7A1, #29
Hull, Quebec
K1A 0S5

Dear Mr. Dickinson:

Enclosed is a certified true copy of an Order issued by the Canadian International Trade Tribunal (the Tribunal) on January 18, 2000, requiring the production of certain documents, to be filed with the Tribunal on or before Thursday, January 20, 2000. The Tribunal will transmit these additional documents to counsel to the complainant and counsel to the intervener on Friday, January 21, 2000. Comments on the Government Institution Report, including the documents referred to in the enclosed Order, will be required to be filed with the Tribunal by January 27, 2000. The Tribunal will endeavour to release its findings and recommendations in this case on or about March 6, 2000.

Some of the documents you have been ordered to produce may contain confidential information. In that regard, I draw your attention to sections 43 through 49 of the *Canadian International Trade Tribunal Act*, which govern the disclosure of information in Tribunal proceedings. Please note that rule 12 of the *Canadian International Trade Tribunal Rules* (the Rules), deals with the filing of documents with the Tribunal and rule 15 of the Rules, deals with the filing of confidential information.

With respect to the disclosure of certain confidential documents to a consultant designated by the complainant the Tribunal has decided not to accept the undertaking submitted and will not grant permission to the complainant's counsel to transmit in any manner to that consultant information that has been designated confidential in this proceeding.

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More detailed reasons for both the denial of access to confidential information by the consultant and the Order for the production of documents will follow.

Yours sincerely,

Michel P. Granger
Secretary

Encl.

c.c. Mr. David Sherriff-Scott
Borden Elliot Scott & Aylen

Mr. Ronald D. Lunau
Gowling, Strathy & Henderson

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, February 14, 2000

File No.: PR-99-034

IN THE MATTER OF a request by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. for the disclosure of confidential information to Mr. Eldon Healey;

AND IN THE MATTER OF a complaint filed by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47, and an inquiry by the Canadian International Trade Tribunal under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

BACKGROUND

On January 6, 2000, counsel for MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. (the complainants) filed with the Canadian International Trade Tribunal (the Tribunal) a request for the further production of documents, accompanied by a request for the disclosure of specific confidential information to Mr. Eldon Healey of CFN Consultants. A document entitled "Declaration and Undertaking" (not as per the Tribunal's prescribed form)[1] was attached to the request. The Tribunal invited the other parties to these proceedings to make submissions and responses regarding this request before January 13, 2000. Submissions and responses opposing the release of confidential information to Mr. Healey were received from the Department of Public Works and Government Services (the Department) and Siemens Westinghouse Technical Services, a division of Siemens Westinghouse Incorporated (the intervener).

On January 18, 2000, the Secretary of the Tribunal communicated to the parties the Tribunal's decision to reject the undertaking submitted by Mr. Healey and to deny the complainants' request. The reasons for that decision follow.

ISSUE BEFORE THE TRIBUNAL

The issue is whether the Tribunal should authorize the disclosure of certain confidential information belonging or pertaining to the intervener and contained in the Government Institution Report (GIR) to Mr. Healey under subsection 45(3) of the *Canadian International Trade Tribunal Act*.[2]

POSITIONS OF PARTIES

Submission by the Complainants

Counsel for the complainants submitted that it is fundamentally important that an expert retained by the complainants be given access to specific confidential information attached to the Department's GIR. Counsel maintained that, without the disclosure of these documents, the complainants could not respond to

1. Subrule 16(1) of the *Canadian International Trade Tribunal Rules*, SOR/91-499.
2. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter Act].

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the GIR. Pointing to subsection 45(3) of the Act, counsel added that Mr. Healey is not a business rival or a competitor of the intervener. In view of the short timetable to prepare a response to the GIR, counsel informed the Tribunal that the confidential information would be released to Mr. Healey if a response from the Tribunal were not received by 4:30 p.m. on January 7, 2000.

Submission by the Department

Counsel for the Department stressed that Mr. Healey cannot be recognized as an "independent" expert because he is a registered professional lobbyist acting on behalf of the complainants or their related businesses and, hence, should not be entitled to have access to confidential information. A lobbyist, counsel contended, is by the very nature of his occupation partisan, and he attempts to influence government activity through reliance on his personal and professional relationships with governmental officials and his personal information gained through experience. The communication of pertinent information is the hallmark of the relationship between a lobbyist and his client.

Submission by the Intervener

Counsel for the intervener supported the submissions made by counsel for the Department. Counsel added that Mr. Healey is a lobbyist on behalf of one or more of the companies belonging to the Irving group, which includes the complainants. Counsel further added that, in 1992, Mr. Healey was registered as a professional lobbyist for St. John Shipbuilding, that is, Fleetway Inc.'s predecessor company. Counsel maintained that it would be entirely inappropriate for Mr. Healey to obtain access to confidential information relating to the intervener, a competitor of Mr. Healey's client. Counsel finally raised concerns with respect to the enforcement of undertakings made by lobbyists, given that they are not members of any professional organization and, thus, are not subject to any disciplinary sanctions should they breach such undertakings.

Response by the Complainants

Counsel for the complainants replied that the suggestion that Mr. Healey would not honour an undertaking of confidentiality is an unworthy suggestion, particularly when there is absolutely no basis for making it in Mr. Healey's case.

DECISION

Pursuant to subsection 45(3) of the Act, **counsel** for any party in Tribunal proceedings **may** be disclosed confidential information by the Tribunal for use in these proceedings.

The Tribunal has interpreted the word "counsel" in subsection 45(3) of the Act as being not limited to lawyers.[3] In *Mathewson*, the Tribunal recognized that parties are entitled to be represented by counsel of their choice before the Tribunal, which regularly permits parties to be represented by persons other than lawyers, such as trade consultants, economists and accountants.[4] The Tribunal notes, in this regard, that, in his "Declaration and Undertaking", Mr. Healey stressed that he has been retained by counsel for the complainants for the purpose of assisting counsel and reviewing material in order to allow counsel to prepare and submit a response to the GIR. Thus, on that ground alone, there is no reason not to grant Mr. Healey access to certain confidential information.

3. (9 June 1998), RR-97-008 (CITT) at 5 [hereinafter *Mathewson*].
4. *Ibid.*

However, the Tribunal has interpreted the word "may" in subsection 45(3) of the Act as an indication of Parliament's intention to confer a discretion on the Tribunal in deciding whether to grant access to confidential information to any counsel in any proceedings.[5] As stated in *Ottoson-King*, that discretion is not unfettered. It must be exercised in good faith, on the basis of the considerations that are relevant to the statutory purpose and objective of the Act.[6] The Tribunal adopts the reasoning in *Ottoson-King* as to its role vis-à-vis the protection of confidential information:

> It is clear from reading sections 44 to 48 of the Act that Parliament considers the protection of confidential information in the Tribunal's proceedings to be an important objective. In particular, subsection 45(3) of the Act provides that disclosure may be subject to "such conditions as the Tribunal considers are reasonably necessary or desirable to ensure that" confidential information is not disclosed to any party to the proceedings or to any business competitor or rival. In the Tribunal's view, the fact that subsection 45(3) of the Act contemplates that the Tribunal may disclose confidential information, subject to such conditions as it considers are reasonably necessary or desirable to ensure that confidential information is not disclosed to any party or business competitor or rival, indicates that the Tribunal is under an obligation to safeguard confidential information. In exercising its discretion under subsection 45(3) of the Act, the Tribunal is, therefore, of the view that it must be mindful of that objective.[7]

Being mindful of the above-mentioned objective, the Tribunal is of the view, to use the Tribunal's words in a previous proceeding,[8] that there is an "understandable apprehension" on the part of the intervener that a possible disclosure of confidential information to its competitor or rival could occur if the Tribunal were to grant Mr. Healey access to that information. Without questioning Mr. Healey's integrity, the Tribunal is of the view that his current professional activities as a lobbyist, particularly his involvement and potential involvement with companies directly competing with the intervener to which the information relates, do not allow sufficient guaranties for the Tribunal to authorize the disclosure of that information under any conditions.

Being of the view that there is a risk that Mr. Healey, even involuntarily, could disclose the requested confidential information in a manner likely to make it available to a business competitor or rival of the intervener, the Tribunal denies the complainants' request for disclosure of that confidential information to Mr. Healey.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

5. (11 March 1994), NQ-93-003 (CITT) at 2 [hereinafter *Ottoson-King*].
6. In *The Director of Investigation and Research, Competition Act* v. CITT, the Federal Court of Canada concluded that sections 44 to 48 of the Act "constitute a complete code with regard to disclosure of confidential information" (17 November 1993), A-584-93.
7. *Supra* note 5.
8. (21 June 1994), NQ-93-007 (CITT) at 8.