

**Transcript of the Public Hearings of the Statutory Review Committee
on Access to Information and Protection of Privacy**

Date: Thursday, July 24, 2014 (2:00 - 3:00 p.m.)

Presenter: Barry Tilley
President of Dicks & Company

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ATIPPA Review Committee Members:

Clyde K. Wells, Chair
Doug Letto, Member
Jennifer Stoddart, Member

July 24, 2014

Barry Tilley/David Read

C. WELLS:

Okay. Are we ready to roll, Mr. Tilley?

B. TILLEY:

I think so.

C. WELLS:

Okay. Then we'll leave it up to you.

B. TILLEY:

Okay. Well, good afternoon and thank you for the opportunity to speak to you today. My name is Barry Tilley. I'm the president of Dicks & Company; employed there for 34 years. I'm accompanied by David Read. He is our vice-president; has worked for the company for 29 years. My specific area of responsibility has been with the financial management. Someone called me a bean counter. David has been responsible for the overall operations, including preparation of tender proposals.

We're here today to demonstrate the need for public body accountability which is the very reason why ATIPPA exists. We want to show you how changes made by Bill 29 to section 27 could impact public

body accountability. I know others have presented issues to you on section 27 and we want to add the discussion with some real examples of information and how these changes have affected our access to records.

I begin with a question. Should the public know how much public bodies pay for staplers? It is not like the Colonel Saunders secret recipe or the Cadbury caramel secret. It is, what do public bodies pay for office supplies. Before Bill 29, this information was readily available. Since Bill 29, the right to this information is unclear. There is a case in court right now where a judge will provide the answer. The case resulted from a request we made of the university for information, which eventually became the subject of the Privacy Commissioner's report, Report No. 2013009, where the Commissioner recommended that MUN provide the information. When agreed to do so, Staples Advantage made an application in the Supreme Court to prevent us from getting the records. The evidence and argument were presented to the court last month and a decision is expected in a month or so. And as it's before the

court, I won't be making any comment on the evidence or the merits of the argument, but I will be presenting you the facts of the case as we -- well, not the case but the information that we experienced through our various access requests.

So with that, I'd refer you to our written submission. I don't intend to read it. I don't think you want me to read it.

C. WELLS:

We've read it. We don't need to but what I want to make sure is that you have an opportunity to elaborate on any aspect of it that you want to emphasize or, in particular, draw to our attention. So I leave that up to you to decide. If you're satisfied with it as it is, we've read and understood it. And, of course, in a sense the content of the *Public Tendering Act* we have no jurisdiction over and nothing to say about it, but your particular reason for being here is that since Bill 29 amended the ATIPPA, you can no longer get the information that was readily available to you before. And you attribute this problem that you're having now to Bill 29 and its consequences. Is that a fair assessment

of your position?

B. TILLEY:

Of course, subject to a court decision, which we don't know what's going to be.

C. WELLS:

Yes, sure. We understand, yes.

B. TILLEY:

Well, I don't read to it and I am not going to read it. I could point out a few things that I think are important.

C. WELLS:

Okay, if you would. Go ahead, Mr. Tilley.

B. TILLEY:

We feel we're in, probably not a unique position, but we did make ATIPP requests immediately prior to Bill 29 and then immediately subsequent to Bill 29. So we're able to compare the environment before and after. There always should be a balance between public body accountability and the third party interest, protection of third party interest. We think Bill 29 has tipped the balance far too much in favor of protecting the business interests of third parties.

I will give you a little background on our company. Dicks & Company Limited has been around for a very long time. We have locations in St. John's, Carbonear, Grand Falls. We are a hundred percent locally owned and we employ 60 full-time employees. Our origins go back to 1840. So next year we will be celebrating our 175th anniversary, so. Not a lot of companies left that can boast that claim. And we belong to the office products, well Basics Office Products group. That's the buying group of companies with dealers from here to Victoria where we collectively join our buying volume to have them negotiate contracts with vendors to help us be competitive with others.

And I if I could touch a little on Staples Advantage, and I'm going to distinguish Staples Advantage from Staples Retail. Staples Business Depot operates the retails store here in town. Staples Advantage Canada evolved from the purchase by Staples of Corporate Express. That's how they gained an entry into the commercial marketplace in Newfoundland. And I say they operate quite independently. They have different locations,

different staff, different catalogs, different online ordering systems and, certainly, different pricing.

The Staples Advantage organization in Newfoundland has the sales warehouse and delivery staff, and we estimate they employ less than 15 people.

I talk a little bit about the industry. In Canada, Staples, including Staples Advantage and Staples Retail, dominate the market. They have greater than, we believe, 50 percent share. In Newfoundland, if you isolate the commercial marketplace, we believe our strength is with locally-owned private businesses where we believe we are the dominant supplier to that segment of the commercial marketplace. Private businesses are not subject to the *Public Tendering Act* or any legislation. They can choose a supplier based on many things, other than lowest price on a short list of items; things like service delivery, fill rates, et cetera. Some of them also believe that buying from another local business is beneficial to the local economy and therefore benefit them. So we enjoy support from local businesses for that reason

as well.

So to begin our story, it started with MUN's tender for office supplies in April or May 2011. It was for the period July 1, 2011 to May 31, 2014 with an option to extend for two years. It's a contract for a standing offer agreement. The standing offer agreement is where the vendor is obligated to provide tendered items at tendered prices but there is no obligation on the public body to buy any or all of the items that were in the tender. It is just that. It is just a standing offer agreement. It is not like you're bidding on ten shares and if you win the bid you supply the shares at that price. It's quite different.

The items MUN had in their tender was selected from the list of products they purchased from Staples in fiscal 2010 in a report that was provided to them by Staples which they call a Usage Report. The university doesn't track its individual items as purchased on a line-by-line basis. They just track the total amounts. And the practice at MUN has always been to buy the noncontract items from the

vendors who wins the contract or wins the tender. So in this tender we were particularly interested for the main reason that it was the first tender that MUN had issued for office supplies since Staples had purchased Corporate Express. And two other public body tenders where Staples were the incumbent supplier were awarded to others. We were successful in a tender from the College of the North Atlantic. Grand & Toy (now Office Max) were successful in the Government Purchasing Agency tender. So we thought maybe their approach to tendering might have changed and we saw it as an opportunity. So we prepared an aggressive bid and the bid results are there on page 3. We bid 209,000. We were second. Office Max or Grand & Toy bid 212,000, slightly higher than us but sort of gives each of our bids some credibility in terms of where it should be. Staples bid 121,000; \$88,000 below ours, 42 percent. Knowing we prepared an aggressive bid, we felt we had to explore it further. How could they bid such low prices? So we began a process but before we did we noticed that when the university posted its award on the website, they say, "for noncontract items you should obtain quotes from the various suppliers". That was the

change from their practice with previous tenders. And I've included here what the previous award said. Successful bid was Staples Advantage, to order a click on away. That's the name of their online ordering site. There was no suggestion that people get quotes for noncontract items. So, we got excited about that and we said maybe, maybe, there will be an opportunity for us to get some business from university for noncontract items, as was stated on their website.

D. LETTO:

Are you suggesting that something motivated putting that additional information there?

B. TILLEY:

Well, I'd like to think so. I mean we were lobbying pretty hard for the university to give us, first of all, a copy of the bid, which I'll talk about in a minute, and asked for opportunities to bid on noncontract items and it was refused, but, nonetheless, we were actually surprised, I believe, that they had made this comment in on the website when they awarded the contract. And we were encouraged by it. We said maybe, maybe, there will be a chance. So, we met with the university and said

can you give us a list of people in your organization who buy office supplies. And you need to understand that at the university they have a decentralized office supply purchasing system. They have someone, at least one or maybe two people, in each department who can buy office supplies. They don't have a central location where orders are assembled and placed in bulk. Each department orders its own. So we wanted to know who these people were. We wanted to make it easy for them to be able to compare prices between Staples, us, and others. We wanted to give them access to our online ordering sites so they could easily determine what our price would be. We were told that that information couldn't be supplied. And we weren't really told why.

C. WELLS:

That is, the names of their staff people who would place the orders?

B. TILLEY:

Yeah.

C. WELLS:

It couldn't be supplied to you.

B. TILLEY:

No, it couldn't. At least we were told it couldn't

and we don't really know why. So failing that we started calling on individual departments identifying people who purchased office supplies to ask them would they consider seeking quotes for noncontract items and the response we got pretty consistently was well, for one thing they weren't told who won the award or that they should get quotes for noncontract items. And when you think about it, Staples hadn't been their supplier for 28 years, I mean why would they think to go and check the website every time they want to place an order. I mean it's just business as well from their perspective. And the departments weren't even given the list of the items on the contract, so how could they go and get quotes for prices not knowing what was contract and what wasn't.

Now, in fairness, we discovered since that when you go to Staples' website you can identify the contract items from their website. But there was no independent list provided to all their buyers to say here are the contract items which would serve several purposes. First of all, if you're going to buy a stapler, buy the one that's on contract. Don't look

at a catalog and see a variety of staplers and you say I like that one and they go and buy it. We don't know if it's on contract or not at that point. When they key in the product number the item will appear, there'll be a price and there is an obscured dollar sign that appears next to the price that says it's contract. If there is no dollar sign there, it's not contract. But I don't believe the university employees were well versed in that system and how it worked. I don't think they were ever told when you buy office supplies you should follow this practice. I mean it would seem logical to me that the university would require staff to buy contract products before selecting something that's noncontract. But you will see the significance of that difference when I go through some of the other information I've provided.

As it turned out, well, I am not saying we have not received any. We have received few, if any, requests for pricing. Despite them suggesting that they do it, they don't. So with that, we said let's find out and get a copy of Staples' bid. And we weren't really familiar with the ATIPP request or the

ATIPP office so we started calling on senior officials within the university to ask them if a copy of their bid could be made available.

Then I could backtrack a bit. Years ago, it was a matter of routine, when you have a public tender under the *Public Tendering Act*. There is a public opening and we go and attend the public opening. They open the bids and they read the totals. Now, with the list of office supplies that could be several hundred items long it is not practical for someone opening the bid to read everybody's individual price. So the practice was you come back in a day or two and they give us a copy of each other's bids and that went on for years.

C. WELLS:

So you'd get a copy of all of the bids?

B. TILLEY:

A copy of all of the bids. It would give us an opportunity to evaluate how others bid and point out to the public body, look, this company bid this product, we bid this product. They aren't the same. And use of measure issues would arise where we could be helpful to them in analyzing the tender to ensure

that it got evaluated properly. And I believe it was shortly after the ATIPPA came on that that practice stopped. Somebody must have said legislation no longer allows you to provide copies of bids to others. So now we just get the total bids.

D. LETTO:

You mean the changes to ATIPPA in 2012?

B. TILLEY:

No.

D. LETTO:

Or when ATIPPA was put in place?

B. TILLEY:

Back in 2002. I think it took some years before somebody must have said, look, we don't want you to let them have a copy of our bill because the legislation says you shouldn't.

C. WELLS:

So this is prior to the original ATIPPA legislation?

B. TILLEY:

No, subsequent to. Prior to the ATIPPA legislation bids were made

C. WELLS:

You got it? When the ATIPPA legislation was put in place they no longer provided you with the bids.

B. TILLEY:

It wasn't immediate but sometime after it came into place I think some public bodies became aware that maybe they shouldn't be providing it because of section 27, as it was then. So in our process of meeting with people and trying to get a copy of the bid, we said, look, if you want a copy of the bid make an ATIPP request; which we did. It was November 2011. The request was refused by MUN and when I say "refused by MUN", and I say that a few times here, it is not that MUN didn't want us to have the information, they felt they could not give us the information. They felt section 27 may be applicable and could not release it to us. In fact, they often told us, we'll let you have it but we don't know if we're permitted to.

Section 27, as you know, is a mandatory exception, if it applies, and they're not permitted to release it. So we went through the process. We made requests to the OIPC to conduct a review and it was during the informal process of that review where Staples eventually relented and said okay, we give consent for us to get a copy of the bid. And we got

it. And we reviewed it and it was very interesting because while Staples were 42 percent below our bid in total, they were not the lowest bid on almost 30 percent of the items. So, again, we're wondering well, how could that be. I mean there must be more to this than we know. So we said, well, let's see if we can get the Usage Report; in other words, the list of items MUN used in 2010 which was used by MUN to select the items for the tender. Let's ask for a copy of that. And we did through an ATIPP request. It was refused for the same reason. It is mandatory exception, disclosure. And during the OIPC review and during the informal review Staples relented and said, okay, we agree to the release of that information and we received it.

And then I talk about what that report revealed. It revealed total purchases for the year from Staples were \$647,000. A hundred and thirteen thousand was for contract items; \$533,000 for noncontract items. Albeit \$197,000 of that was for non-office supplies. So when you do the math, you come up with a total of \$343,000 for noncontract office supplies and 113 for contract office supplies. In other words, 75 percent

of MUN's office supplies were represented by purchases of noncontract items.

Now in our industry we're very aware that anybody who enters into a contract for office supply items, that they will no doubt buy things are not on contract. And we're very much aware that the noncontracted items could be significant, maybe as much as the contract amounts; but not 75 percent. That's unusual.

The report also shows there were 70 instances where identical products with identical product numbers were charged at different prices. And I've outlined them on Appendix 1.

C. WELLS:

Unless it is necessary for you to deal with the ATIPPA aspect, the access, it is not necessary to go into that detail. We've got the general story. So we don't need to be persuaded that MUN could get a lower price from you or anything like that. You're making the case for your entitlement to information and that in your view Bill 29 prevented you from getting information that you would get prior to that.

So we don't need to hear you make the case with the lower price. I don't think. Do you?

D. LETTO:

I've read it. I think it is quite clear.

C. WELLS:

It is quite clear, yes.

J. STODDART:

Um-hmm.

C. WELLS:

So you don't need to cover that in detail. But if you feel that it's necessary to make your case, you go ahead and do it. So don't feel that we need it.

B. TILLEY:

I just wanted to demonstrate the need for accountability when I talk about identical items being charged at different prices. It is not just a few percentage points more, it's several times more.

C. WELLS:

Is that Appendix 1 you're looking at now?

B. TILLEY:

Yes. We'll look at just the first item and I won't talk about anymore of them. There is a product available for \$1.42. With the C in front of it, which we assume meant contract, the same product

available at \$5.85. That's several times the price of the contract item. So, that was the information we received when we got a copy of the 2010 report and we think this information is helpful to us to go to the university and ask them to be accountable. Why? Why are you paying more for the same product?

D. LETTO:

Just for my understanding. If an item is a contract item and it has the same product number how is it possible to order exactly the same item but now it's not the contract price?

D. READ:

It's a question for Staples or Memorial.

D. LETTO:

Okay, fair enough.

D. READ:

We do not understand. It is our inference that the C means contract. We brought it to the attention of Memorial and they observed it and took notes but didn't confirm it or deny it and maybe didn't know it and so that's where we had to leave it, so. We were the ones that brought this to their attention.

And I guess if I can just go further with that

then and pick up where you've left off there, Barry. At our next ATIPPA request, where post-Bill 29 we were denied this information, and this is the usage information now that we want. Okay, so you have your contract. You've identified these 500 items. Here is the price. It is extremely low. So, did you buy any of those? And the one illustration that I had to provide for you was that there was some post-it notes that we identified through this process, the university inadvertently thought they were tendering on 139 packages of 12 and, really, they wanted 11 packages. Or sorry, four packages of 12 and 134 individual. So it is more like 15 packages of 12. So we all bid on the same item and everybody thinks we are bidding on equal ground but the incumbent knows they're never going to buy that. And the subsequent prices, the bids, reflected it. Staples was \$2.52, Grand & Toy was \$12.96 and we were \$14.50. And that item in Staples catalog is \$107.99. So there is something going on there. And if we're unable to get the information post-Bill 29 that we were able to get pre-Bill 29, then we can't identify these opportunities for the university who they're not in the office product business like we are. So

they don't have the same appreciation understanding of yield of measure issues and other things. Sorry to steal your thunder there.

B. TILLEY:

No, that's all right. That's really I have. The other information was in Appendix 2 the report revealed that the university could buy a black binder for \$1.45 but the blue one was \$5.40. Identical in every respect, except different colors. We know from our experience that they cost the same. Our selling price is the same. Our list price is the same. But buy a black one, you pay \$1.45. Buy a red one, you pay \$5.40. And I won't get into more of that if you rather I wouldn't. But there are many examples where that occurred.

C. WELLS:

And this is the information that you're now unable to get as a result, you say, or since passage of Bill 29?

B. TILLEY:

Yes. Correct. Well, it's before the court, so.

C. WELLS:

We understand that this does involve issues that are before the court. So we have to be circumspect about

what we say about it.

B. TILLEY:

Absolutely.

C. WELLS:

Thank you.

B. TILLEY:

I mean irregardless of what the court may decide, we still think Bill 29 has placed a greater burden on the public to get access to the one-part test versus the three-part test. You're familiar with that.

C. WELLS:

As a bidding, as a company that's involved with bidding for competitive business under the *Public Tender Act*, do you have any objection to your bid being made available to your competitive bidder? Do you think it should be it should be?

B. TILLEY:

Not after the tender closes.

C. WELLS:

After the tenders close, yeah.

B. TILLEY:

Of course not. It was the practice for many, many years. I mean we all survived in a process where that was routinely made available.

C. WELLS:

You don't consider that to be information that would affect your ability to fairly compete?

B. TILLEY:

No, and Dave can speak better to that. There are no two tenders the same, I mean.

D. READ:

Well, that's right. And everybody has a different core list and then it's up to suppliers to evaluate whether that core list is a large part of their business or a smaller part of their business. So, and everybody goes about it in a different way. I mean, while the Government of Newfoundland and Labrador has a requirement and a tendering process, Memorial as a different one. And their lists are different because Memorial's an educational institution so they needed more educational supplies, say, than office supplies. So it can change a little bit. So they are different? And we have no objection to our prices being read allowed as they always were for many, many years. In fact, it kept us competitive. It made us a little sharper and it also saved the public some money because everybody was interested in how the other guy did and sharpened

their pencil for the next one.

C. WELLS:

The protection under the ATIPPA is in the context of not disclosing information that would affect the fair competitive ability of a competitor. You don't feel that you're disclosing your bid after the tender is closed would unfairly affect you, do you? Or do you?

B. TILLEY:

No. No, as a matter of fact, as we've said, the incumbent bidder is at a tremendous advantage when competing for subsequent bids that we think should be eliminated. The Usage Report in 2010, I believe, suggested that we all get that before we prepare our bids, which is not the case. We didn't know that the university were spending 75 percent of its volume on noncontract items. That was an item of information that was shared with us.

C. WELLS:

It is known by the company that had the information, had the contract before but not known by the other competitive bidders.

B. TILLEY:

Exactly. So if we knew that there was an opportunity to sell 75 percent as a noncontract basis we'd bid

differently for the contract list.

D. READ:

But it is still difficult to bid differently when you are expecting and you're relying on someone to tell you what they are going to use, but the number, because of units of measure, it's inadvertently correct. So the bidders without the knowledge of that are bidding higher because they think oh, I'm going to have to supply 139 of these and the bidder who knows we only sold them 11, they're not going to use 139. That bidder has the distinct advantage.

J. STODDART:

Could you just repeat so, I'm not very familiar with this process, so that I'm sure I understand. The university bids for a series of more or less standard items. That there are items off that list that university personnel may legitimately need (phonetic), that's one question. But the other question is, even on those lists of, let's say, standard items, they may not be standard but I'm calling them standard for now, university personnel are not required to purchase it from the company to which the bid was formally awarded because they were the lowest bidder?

B. TILLEY:

Well, they are obligated to buy.

J. STODDART:

They are obligated to buy.

B. TILLEY:

To buy the contract items from the successful bidder.

So that's true.

J. STODDART:

Okay. They only have the choice to go elsewhere then
for the noncontract items?

B. TILLEY:

As posted on their website.

J. STODDART:

Okay, thank you.

B. TILLEY:

For noncontract, please get quotes.

J. STODDART:

Yes, okay.

D. READ:

If they can't identify what the contract items are,
that's

B. TILLEY:

And that's the obstacle if you don't know what's on
contract how do you know what to go out to pricing

for?

J. STODDART:

Okay. So they go to buy something very standard and they don't know, they don't have access to the information that you have to buy it from the lowest bidder. Is that what you're saying de facto? I'm just trying to understand the context in which this issue of commercial interest is taking place.

B. TILLEY:

I don't know really how to explain it other than the practice has been you buy all your office supplies from the winning bidder. Contract, noncontract, everything is gone to the winning bidder.

J. STODDART:

Oh, okay.

B. TILLEY:

There is no attempt to seek quotes for items that are not on the contract.

C. WELLS:

When you were refused access to the information was a particular section of the Act cited as the basis on which the refusal was made?

B. TILLEY:

By the university, yes, section 27.

C. WELLS:

Section 27?

B. TILLEY:

I forget which subsection it is.

C. WELLS:

Any with anymore specific than that?

B. TILLEY:

No. No, as a matter of fact when we asked the Commissioner to review it we suggested that MUN's response to our request was inadequate. They were obligated and should have provided us the reasons why section 27 applied. But that didn't happen. It was just quoting section 27.

So I don't know where we are in our presentation. Following the results of the bid, and when we got a copy of the bid and got a copy of the Usage Report which revealed these discrepancies that I've been through, before we made a third request we compared what Staples would charge for noncontract items based on their tender offering of 55 percent off their catalog price for list items and five percent off their catalog price for what they call for market-priced items. We compared that to our price

at what we offered in the tender of 40 percent off our catalog price and we put together a Schedule 3 which does the comparison. And it illustrates that our 40 percent off our price is substantially less than Staple's 55 percent off their price. So there are savings available, should the university departments decide to get quotes.

So the next thing we did is make a request for, okay, they bid very low on the contract back in 2011. Let's find out what was purchased after the first year of that contract. So that's when we made the request where purchases made by MUN from Staples for the period from July 1, 2011 to June 30th, 2012 which was the first year of the contract. So we wanted to compare what they thought they were going to purchase versus what they actually purchased. And we also wanted to know what was the volume of noncontract items for that period. Once again, we made an ATIPP request. It was refused. And this was after Bill 29. We asked the Commissioner's office to review it. They issued a report, even post-Bill 29. And recommended that the conditions of section 27 did not apply and MUN should release the information. MUN

readily agreed to do it and Staples filed an application in the Supreme Court to prevent them from providing us with this information. So that's what's before the court now and we're waiting on a decision.

It is also interesting in this whole process we became aware that Staples has two catalogs. One is called the Source Book and the other one is called Strictly Business Source Book, and the university are given the Source Book with a 55 percent discount off its list prices. The Strictly Business Source Book, we understand, is the catalog available to smaller and private businesses with different prices which aren't further discounted. So, I did a comparison of what MUN would pay based on their 55 percent off the Source Book with what any other business in town would pay using the Strictly Business Source Book and it revealed, on Appendix 4, small businesses are paying much less for noncontract office supplies than the university. It addresses the issue, how could Staples bid so low on contract list of items. And I guess the answer is, they're charging more for the noncontract items, more than the small business around the corner. And it goes against the normal

practice that people with large volumes buy cheaper.

C. WELLS:

That sort of gets beyond our area. We're not conducting an inquiry as to the propriety or otherwise of MUN's purchasing practices or Staples' selling practices. We're here to hear from you, your concerns about the effect of the amendments to the ATIPP legislation and I think you've made that point. We don't want to get into this kind of detail because I think it would be inappropriate for us to do so. But you've certainly given us enough information to clearly make your point.

As of now, you're awaiting a decision of the court in order to determine whether or not a refusal based on section 27 is legally correct. The Commissioner has expressed a view that it should be released. Staples took an application to the court to prevent the university from releasing it and that issue is pending decision by a judge. Depending on what the judge decides, it may turn out that there is no problem, you can get access. And from your point of view, the existing versions of the Act are okay if the judge decides that you are entitled to it.

B. TILLEY:

With respect to our industry and our specific set of circumstances.

C. WELLS:

With respect to that specific set of circumstances.

B. TILLEY:

There could be other similar or different circumstances where a judge might rule differently, because of the changes to section 27 from Bill 29. The burden is greater on the public to try and get access to records than it was.

C. WELLS:

And that's the gist of your representation to us, that the change --

B. TILLEY:

No, this stuff was just to demonstrate the need for accountability.

C. WELLS:

Yes.

B. TILLEY:

With this information we should be able to go the university and ask them to account for their spending of our money.

D. READ:

Respectfully, I would submit that our business interest here, because we have a business interest here, is very compatible with the public interest in having that information available. And pre-Bill 29 we were able to start the ball rolling for our business interest which is, again, in the public interest and post-Bill 29 we were stymied. And we've had considerable expense and a fair amount of time has passed. We don't have a decision yet but we have gone through all those flaming hoops, I guess we've had to jump through, and hopefully we'll get a ruling in our favor and have the information. But I believe if we don't have that information, there is not going to be anybody holding some accountability there.

D. LETTO:

It seems to me there is two issues that you've put your finger on with respect to ATIPPA. One is the mechanics of what section 27 should say, what words should be in there, and, I guess, then your impression of how it does and how it should work. And the second is the cost or benefit to public bodies when there is not full disclosure after the fact, which seem to relate to ATIPPA.

I'll start with that one first. What would you say would be the benefit to the public body if the kind of disclosure that you're advocating were the case? It was understood by everybody that when the bid is opened people have access to the information. Competitors do and next time they can sharpen their pencils and do what it takes to win. What's the benefit to the public body and to that whole process?

D. READ:

Well, the benefit there, if suppliers sharpen their pencils is that there is going to be savings. There is going to be opportunity for better pricing or, I might say, better value. I mean, the bid list of items was pretty low priced. No one would argue that. On the surface it appears that the university in this case had a very aggressive bid and they could point to that and say we did a good job. On the other hand, if there is actually spending more for a basket of goods at the end of the day, then that's not in the public's interest.

D. LETTO:

That's what I was getting at. People would see that side of it as well.

D. READ:

Exactly.

D. LETTO:

At the start, Mr. Tilley talked about the balance that's needed. Section 27 needs to reflect some kind of balance between accountability and third party harm. And I'm wondering if you can help us understand, not draft the clause in the Act, but what values should be implicit in section 27 so that balance that you talk about is actually there?

B. TILLEY:

Well, I guess I can say do we have a right to know what the public body paid for a stapler. It is not the Colonel's secret that we're asking for. It is not for the components that go into manufacturing a widget, which I believe Mr. Murray said, the information about the cost of the components that go into the widget if provided to the public body should not be made available to anybody. That's confidential and should be as such. But the price of public body pays for an office supply, I mean, why is that

C. WELLS:

We've had others represent to us, Mr. Tilley, that

it's a factor in doing business with the government on a public tender basis that you ultimately disclose, can be expected to have to disclose exactly what you were paid for the goods or services that you provided. And that people should expect that. Is that your view? Or do you think businesses should have protection?

B. TILLEY:

No, absolutely. I mean we believe the university should get a fair price for everything they buy, not a ridiculously low price on some things and an exorbitantly high price on other things. It should be a fair price for everything they buy.

C. WELLS:

But that doesn't address my question. Let me try again. We've had others who were here before you dealing with this area and I'm interested in hearing the point of view of a business involved in this kind of competitive bidding. And others have said to us businesses that are competing for government business to supply goods or services to government and to be paid in taxpayer dollars have to expect that they should be ultimately the price they are paid for the goods or services will be made public and there are

no secrets or no basis for nondisclosure. That's the view they expressed. Do you share that view?

B. TILLEY:

I absolutely share that view.

C. WELLS:

Okay.

D. LETTO:

There are different types of services or not services, there are different types of businesses and different types of information that businesses would want to share with the government. So we're talking about pricing here. Can you think of instances, even with respect to your own company, where there is things that you show the government in the context of making a bid that you wouldn't want the public to have access to?

D. READ:

I can't think of any at present but I can point to something that the federal government does for their office supplies purchasing arrangement and they have taken a stand where they require suppliers to demonstrate that they are not selling anything below cost and that part of their arrangement is that they can come and look at a supplier's invoice to have

proof that you've not bid below cost, because they recognize the value of a profit made by a business and also, you know, if a business has to make a profit and lose money on some items then there has to be a turnabout somewhere else.

D. LETTO:

So there's that oversight?

D. READ:

Exactly.

D. LETTO:

There is an element of oversight in the whole process.

D. READ:

So while I would say to you that we don't have anything in our negotiations with government that we would not want made public there is nothing that we would deny public access to, but at the federal government level where they've come up with this quite clever idea that I think has a lot of merit, at that point I wouldn't really want to share our invoice cost with the public. But we haven't reached that point yet.

D. LETTO:

But so there is a line that needs to be drawn,

depending on the sort of business and the sort of interaction.

D. READ:

I think you're right. And particularly if it's trade secrets or something and you're developing areas of rocket science or, as Barry has indicated, the Colonel's secret recipe. But really we're talking about file folders and staplers.

D. LETTO:

Or if you were a software developer.

D. READ:

Well sure, that makes some sense. There's a knowledge base there maybe that you're trying to protect.

C. WELLS:

The difference here, Mr. Read, is you weren't asking for Staples' invoice cost to them?

D. READ:

Oh no. No.

C. WELLS:

No. Well, that's the Government of Canada uses this as a means of checking to make sure that bidding is competitive and fair and nobody is getting an unfair advantage, they don't publish your invoice cost.

D. READ:

Oh no, you're correct, Mr. Wells.

C. WELLS:

Oh, okay. So it's not, that is information is not disclosed.

D. READ:

And shouldn't be.

C. WELLS:

And that shouldn't be, that's fair enough. That's private information. So that that's fair enough that that shouldn't be disclosed. You weren't asking for Staples' invoice costs.

D. READ:

No, no.

C. WELLS:

You were asking how much the university paid Staples for the products they sold.

D. READ:

What did you purchase and how much of them did you purchase and at what price.

B. TILLEY:

I didn't get into the recent tender that closed just a few weeks ago where the bids are outlined in section 7 where Staples decided that they chose to

bid \$99,000 for a basket of goods that is 51 percent below the next lowest bidder. It says to us, and still says to us, the university business is obviously very important to Staples. They want the contract obviously at a loss. They are not in business to lose money, so they're going to find ways to make it up elsewhere, we believe. And if we had this information we could help the university understand that there is a better way.

C. WELLS:

We make no comment on what motivates Staples or any of that aspect of it, but you have relied on this to make your point about proper entitlement to information as to what government or government agencies and government-funded offices spend to purchase goods and services. And your argument is that there is no basis for denying that under the ATIPP legislation. Or if there is, it should be removed. Is that a fair summary of where you are?

B. TILLEY:

Of course. I believe so.

D. LETTO:

One of the things we've talked about here frequently - I'll introduce the topic and then move on - is the

power of the Commissioner. And we've talked about what if the Commissioner had the authority to make binding orders of public bodies. In this case, you've had to go to court, presumably at some cost to the organization, but if the Commissioner were able to issue binding orders in this case to the university, even if there was -- well, I guess, Staples could in that context take the issue to court if it didn't agree with the Commissioner.

B. TILLEY:

The issue in court was between Staples and the university.

D. LETTO:

Yes, fair enough.

B. TILLEY:

We applied for intervenor status and were granted it and we participated. The Privacy Commissioner's Office participated as an intervenor by legislation, that they have the legislative right to intervene in cases like this. So I guess whatever process would occur at the Commissioner's Office was a binding recommendation, I'm assuming the party can still challenge it in court.

D. LETTO:

They could, yes. Would it change the perception of the whole thing, perhaps?

B. TILLEY:

Well, I'm not sure. I mean the Privacy Commissioner issued recommendations which were accepted by the public body. So whether it was binding or not, the public body agreed to it.

D. LETTO:

An acknowledgment that, yes.

C. WELLS:

Yes, the court case is testing the strict wording of the legislation.

B. TILLEY:

That's right.

C. WELLS:

And Staples appear to be arguing that the university has no right to release that information on the basis of it being confidential proprietary trade information of Staples.

B. TILLEY:

Well, they are complaining it was supplied in confidence and would cause them harm.

C. WELLS:

Okay.

J. STODDART:

This morning, I don't know if you had the time to follow some of the, I guess, evidence or the information that we heard from the previous witness - the Centre for Law and Democracy - that talked about the public interest and the public for them suggested an extensive public interest override.

Do you think that in the context of interpreting rights to commercial information, scientific information, propriety information and so on that there could be a public interest override in the law when you're dealing with things like, because I understand here the issue is how many just staplers, pencils, workbooks, ruler, mouse pads and so on, did a public body purchase?

B. TILLEY:

I think so because when we were preparing for our court case in consultation with our lawyer one of the issues he raised was a lot of legislation dealing with issues like this have a public interest override there. And if the ATI PPA did have that same public

interest override, then it would be helpful to allow the law to say there is a public interest in this information being made available. Override, in other words, the strict wording of section 27. And I'm not a lawyer so I can't really comment more than that.

C. WELLS:

Mr. Tilley, are you satisfied that you've placed before us everything you want to say or place before us?

B. TILLEY:

Yeah, I think so. I guess if I would conclude with one comment, is that we never ask or expect to get preferential treatment for access to government spending. We are a local company and we don't think we should be denied equal access to government spending, which is what we think is occurring right now.

C. WELLS:

Your firm and you gentlemen individually are like the rest of us, taxpayers in this province, and would you not agree that that would give you a basis for being entitled to receive information as to how government funds are spent?

B. TILLEY:

Of course, I mean, why shouldn't we?

C. WELLS:

Okay. Well, if you're satisfied that you've said everything you want to say to us, anything you want to add, Mr. Read?

D. READ:

No. No, thank you.

C. WELLS:

Okay. We thank both of you gentlemen for preparing the document that you prepared and submitted to us, and thank you very much for coming here this afternoon to make this presentation. We appreciate it.

D. READ:

Thank you for your time.

B. TILLEY:

Appreciate the opportunity.

D. LETTO:

Thank you.

C. WELLS:

We will adjourn. We have one more, Mr. Burry, and I recognize Mr. Burry is sitting in the room. I've seen him before. And if he's ready to go in 15

minutes, we'll adjourn for 15 minutes and start with Mr. Burry at 3:10, instead of 3:30, as originally planned. Is that all right, Mr. Burry? Okay.

(Off the Record)

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of
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