



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F20-50

**MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS  
AND RURAL DEVELOPMENT**

Ian C. Davis  
Adjudicator

November 13, 2020

CanLII Cite: 2020 BCIPC 59  
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**Summary:** Two applicants made separate requests to the Ministry for access to information relating to human remains discovered in Lheidli T'enneh Memorial Park in Prince George. The Ministry refused to disclose the responsive information in its entirety under ss. 16 (disclosure harmful to intergovernmental relations or negotiations) and 18 (disclosure harmful to the conservation of heritage sites, etc.) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), and s. 3(3) of the *Heritage Conservation Act*. The adjudicator determined that the Ministry was authorized to refuse to disclose the disputed information under s. 16(1)(a)(iii) of FIPPA and that it was not necessary to consider the other provisions relied upon by the Ministry.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 16(1)(a)(iii).

## **INTRODUCTION**

[1] Two applicants made separate requests to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry) for access to information relating to human remains discovered in Lheidli T'enneh Memorial Park in Prince George. In response to both requests, the Ministry refused to disclose the responsive information in its entirety under ss. 16 (disclosure harmful to intergovernmental relations or negotiations) and 18 (disclosure harmful to the conservation of heritage sites, etc.) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decisions. Mediation did not resolve the issues and they proceeded to inquiry. The OIPC invited Lheidli T'enneh First Nation (Lheidli T'enneh) to participate in the inquiry as a third party

and it made submissions. During the inquiry process, the Ministry sought permission to add s. 3(3) of the *Heritage Conservation Act*<sup>1</sup> (HCA) as an additional basis to refuse access to the records and the OIPC agreed to add this issue into the inquiry.

## ISSUE AND BURDEN OF PROOF

[3] The issue is whether the Ministry is authorized to refuse to disclose the requested information under ss. 16 or 18 of FIPPA, or s. 3(3) of the HCA. Based on s. 57(1) of FIPPA, the burden is on the Ministry to prove that the applicants have no right of access to the requested information under ss. 16 and 18.

[4] FIPPA does not say who has the burden of proof regarding s. 3(3) of the HCA. The parties did not address this issue. Past orders have said that where the public body relies on a provision in a statute other than FIPPA, “it is in the interests of both parties to present argument and evidence in support of their positions.”<sup>2</sup> However, this approach does not satisfactorily answer the question of burden in the context of an OIPC inquiry, where it is in the interests of both parties to present argument and evidence in support of their positions whether or not they have the burden of proof.

[5] In my view, the Ministry has the burden of proof under s. 3(3) of the HCA. In general, “it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it.”<sup>3</sup> I find that this general rule applies here. The Ministry claims the benefit of s. 3(3) of the HCA, so it should have the burden to prove that that section applies. Further, s. 3(3) of the HCA and s. 18 of FIPPA are similar provisions in that they both give a public body the discretion to refuse to disclose information to prevent harm to heritage sites. Since the public body has the burden under s. 18 of FIPPA, it should also have the burden under s. 3(3) of the HCA.

## BACKGROUND

[6] “Lheidli T’enneh” means the people from the confluence of the Fraser and Nechako Rivers.<sup>4</sup> The traditional territory of the Lheidli T’enneh is the area around the City of Prince George, including the Nechako and Fraser River basins to the Alberta border.

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<sup>1</sup> R.S.B.C. 1996, c. 187 [HCA].

<sup>2</sup> Order F20-17, 2020 BCIPC 19 (CanLII) at para. 4, for example.

<sup>3</sup> *Québec v. (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3 at p. 15. See also e.g. *Smith v. Nevins*, [1925] S.C.R. 619.

<sup>4</sup> The information in this background section is based on the provisions of the HCA and the evidence, which I accept, in Affidavit #1 of a negotiator with the Ministry of Indigenous Relations and Reconciliation (Negotiator) at paras. 9-10 and Affidavit #2 of the manager of Archaeological Operations with the Ministry (Manager) at paras. 9-26 and Exhibits “D” and “F”.

[7] Lheidli T'enneh Memorial Park, formerly known as Fort George Park, was built on the location of the traditional Lheidli T'enneh village and burial ground that existed prior to European contact. In 2005, human remains were found at a site within the Park (Site). As a result, the Site was identified as part of an archeological impact assessment and added to the Provincial heritage register. It is now a protected site under the HCA.

[8] Section 12.1 of the HCA provides that a person must not damage, desecrate or alter, among other things, a Provincial heritage site or object, or a burial place that has historical or archaeological value, without a permit. The minister may issue a permit allowing a person to carry out actions prohibited under s. 12.1. The permit may include requirements, specifications and conditions that the minister considers appropriate, including requiring the permit holder to provide the minister with reports satisfactory to the minister.

[9] In early February 2014, the City of Prince George and an archeological consultant (Archaeologist) applied for an alteration permit under the HCA in relation to the Site. The Archaeology Branch of the Ministry issued the requested permit (Permit) to allow for the ongoing identification and assessment of archaeological and heritage sites, as the City undertook development activities at the Site. The permit included terms requiring the permit holders to provide the Ministry with written reports outlining the work carried out under the terms of the Permit.

[10] In 2017, as the City and the Archaeologist carried out work under the authority of the Permit, more human remains were found at the Site.

[11] In March 2018, one of the applicants (Applicant A) made a request to the Ministry for access to “a copy of any and all archaeological reports in existence regarding the discovery of any and all human remains at any time within the grounds of [the Park] ... including but not limited to those of the human remains of 13 people discovered during the construction of the [Park] Pavilion in the summer of 2017.”<sup>5</sup>

[12] In June 2018, the other applicant (Applicant B) made a request to the Ministry for the following information: “what DNA or other testing of these bodies has determined, as it is my understanding that most of the bodies are non-native, or have no known DNA relationship with local native people.”<sup>6</sup>

[13] As stated above, the Ministry responded to both access requests by refusing to disclose the requested information under ss. 16 and 18 of FIPPA.

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<sup>5</sup> Email dated March 26, 2018.

<sup>6</sup> Email dated June 8, 2018. This email was initially sent to the City of Prince George. The City then transferred the access request to the Ministry under s. 11(1) of FIPPA (letter dated July 5, 2018).

## RECORDS AND INFORMATION IN DISPUTE

[14] The records responsive to both access requests are identical. They are interim, annual and update archaeological reports, comprising 304 pages total, created by the Archaeologist. The reports are dated between 2014 and 2017. In general, the information in the reports is about the various excavations conducted at the Site under the authority of the Permit.

### SECTION 16 OF FIPPA

[15] The parts of s. 16 that are relevant to this inquiry provide:

- (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: ...
    - (iii) an aboriginal government; ...
  - (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.<sup>7</sup>

[16] Section 16(1) uses the language “could reasonably be expected to harm”. According to the Supreme Court of Canada, this language means “a reasonable expectation of probable harm”.<sup>8</sup> In this case, the Ministry must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to meet the standard under s. 16. The s. 16 analysis is contextual and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”.

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<sup>7</sup> Section 16(3) does not apply in this case because the records have not been in existence for 15 years or more.

<sup>8</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Ltd. v. Canada (Health)*, 2012 SCC 3. All of the quotes in para. 16 above are taken from para. 54 of the 2014 case cited here.

### **Overview of the Parties' Positions**

[17] The Ministry submits that ss. 16(1)(a)(iii) and 16(1)(c) apply to the disputed information because disclosure of that information could reasonably be expected to harm intergovernmental relations and negotiations between the Province and Lheidli T'enneh.<sup>9</sup> The Ministry submits that withholding the disputed information in its entirety is required in order to uphold the honour of the Crown, fulfill the Province's commitment to reconciliation and meet its constitutional obligations to engage, negotiate and consult with Lheidli T'enneh.<sup>10</sup> I address the Ministry's submissions on the specifics of the legal test under s. 16 below.

[18] The applicants submit that s. 16 does not apply to the disputed information.

[19] Applicant A says "the damage to relationships was actually internal within the members of the Lheidli T'enneh First Nation."<sup>11</sup> He also says s. 16 does not apply because treaty negotiations between the Province and Lheidli T'enneh have concluded.

[20] Applicant B's submissions focus on the history of the Site and its historical inhabitants. He provided archival material and an academic paper that he says establish that the land in question was surrendered to the railway.<sup>12</sup> Applicant B submits that disclosing the disputed information "is in the public and academic interest of establishing a better historical record."<sup>13</sup> Applicant B says "the issue in question is precisely about exactly whose remains were buried and found in the park, and it is not clear that these remains are necessarily Lheidli T'enneh."<sup>14</sup> Applicant B also says s. 16 does not apply because treaty negotiations between the Province and Lheidli T'enneh have collapsed.<sup>15</sup>

[21] Lheidli T'enneh submits that ss. 16(1)(a)(iii) and 16(1)(c) apply. They describe the disputed information as "sensitive".<sup>16</sup> They say the lands in question belong to them and, contrary to Applicant B's submissions, were never surrendered. They say they met with the minister and his team on January 29, 2020 and discussed building a relationship and moving forward on a government-to-government agreement. They submit that disclosure of the disputed information "would be a major concern" for them and "will impact

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<sup>9</sup> Ministry's initial submissions at paras. 66-120.

<sup>10</sup> *Ibid* at paras. 77-85.

<sup>11</sup> Applicant A's submissions (letter dated July 17, 2018) at p. 1.

<sup>12</sup> Emails from Applicant B to the OIPC and the parties dated March 13 and May 29, 2020.

<sup>13</sup> Applicant B's submissions at p. 5.

<sup>14</sup> Email from Applicant B to the OIPC and the parties dated March 13, 2020.

<sup>15</sup> Applicant B's submissions at p. 5.

<sup>16</sup> Lheidli T'enneh's submissions (letter dated February 13, 2020) at p. 3.

negotiations” for developing a relationship and entering into a government-to-government agreement with the Province.<sup>17</sup>

[22] Ultimately, Lheidli T’enneh does not consent to sharing any of the disputed information. They agree with the Ministry that the information should be withheld in its entirety. They want to keep what they consider to be their sensitive information within their government.<sup>18</sup>

[23] Although ss. 16(1)(a)(iii) and 16(1)(c) are clearly related, I will deal with s.16(1)(a)(iii) first and then, if necessary, s. 16(1)(c).

***Is Lheidli T’enneh an “aboriginal government”?***

[24] The first question is whether Lheidli T’enneh is an “aboriginal government” for the purposes of FIPPA.<sup>19</sup> Schedule 1 of FIPPA defines “aboriginal government” as “an aboriginal organization exercising governmental functions”. Past OIPC orders establish that an “aboriginal government” under FIPPA includes at least a “band” as defined in the federal *Indian Act*.<sup>20</sup>

[25] The Ministry provided sworn evidence that Lheidli T’enneh is a self-defined governing body and a band under the *Indian Act*.<sup>21</sup> Lheidli T’enneh elect a Chief and Council, which carries out various administrative, legislative, and financial functions on behalf of their members. Also, the Ministry provided evidence that Lheidli T’enneh has independently negotiated a number of agreements with the Province and the Government of Canada.

[26] The applicants did not make submissions on this specific issue, nor did Lheidli T’enneh. However, Lheidli T’enneh clearly considers itself an independent organization exercising governmental functions. For example, Lheidli T’enneh says that it has been discussing a “government-to-government” agreement with the Province.

[27] I accept the Ministry’s uncontroverted evidence that Lheidli T’enneh exercises various governmental functions on behalf of its members and is a band under the *Indian Act*. I agree with Lheidli T’enneh and the Ministry that Lheidli T’enneh is an aboriginal organization exercising governmental functions. Therefore, Lheidli T’enneh is an “aboriginal government” under FIPPA.

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<sup>17</sup> *Ibid* at p. 1.

<sup>18</sup> *Ibid* at pp. 1 and 3.

<sup>19</sup> Order F20-20, 2020 BCIPC 23 (CanLII) at para. 100.

<sup>20</sup> Order 01-13, 2001 CanLII 21567 (BC IPC) at para. 14. See also Order F19-38, 2019 BCIPC 43 at para. 110.

<sup>21</sup> Affidavit #1 of the Negotiator at paras. 11-13.

***What relations, if any, exist between the Province and Lheidli T'enneh?***

[28] Section 16(1)(a)(iii) is about whether disclosure of the disputed information could reasonably be expected to harm the conduct by the government of British Columbia of “relations” between that government and an aboriginal government. Accordingly, the next question is what relations, if any, exist between the Province and Lheidli T'enneh.

[29] The Ministry submits that the Province has interactions with Lheidli T'enneh and that these constitute relations under s. 16(1)(a)(iii).<sup>22</sup> In support of its position, the Ministry provided sworn evidence that the Province and Lheidli T'enneh:

- have in place a number of formal negotiated agreements including agreements relating to forests, pipelines, mines, and clean energy, some of which involve ongoing, day-to-day, consultation;<sup>23</sup>
- are required to engage in regular and ongoing consultations, negotiations and collaborations because the Lheidli T'enneh community is situated in an area that is of significant economic importance to the Province;<sup>24</sup>
- continue to explore options for advancing reconciliation, including the possibility of a comprehensive government-to-government agreement;<sup>25</sup>
- continue to consult each other with respect to issuing HCA permits for sites within Lheidli T'enneh territory;<sup>26</sup> and
- are currently in the early stages of collaborating on an initiative to develop a GIS-based potential model for archaeological sites in the Prince George Natural Resource District.<sup>27</sup>

[30] In addition to this evidence, Lheidli T'enneh confirmed in its submissions, as noted above, that they have commenced discussions with the Province about building a relationship and moving forward on a government-to-government agreement.

[31] The applicants point out that formal treaty negotiations between the Province and Lheidli T'enneh ended in June 2018, when Lheidli T'enneh voted against a proposed comprehensive treaty. The Ministry's evidence confirms this.<sup>28</sup>

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<sup>22</sup> Ministry's initial submissions at paras. 91-95.

<sup>23</sup> Affidavit #1 of the Negotiator at paras. 13-16.

<sup>24</sup> *Ibid* at paras. 18-19.

<sup>25</sup> *Ibid* at para. 19.

<sup>26</sup> Affidavit #2 of the Manager at paras. 49 and 64.

<sup>27</sup> *Ibid* at paras. 73-74.

<sup>28</sup> Affidavit #1 of the Negotiator at para. 13.

[32] Although formal treaty negotiations have concluded, relations under s. 16(1)(a) are clearly not limited to such negotiations. If the Legislature had intended to limit “relations” under s. 16(1)(a) only to “negotiations”, it would have explicitly said so, as it did in s. 16(1)(c). Based on the ordinary meaning of the term and the other parts of s. 16(1), I am satisfied that “relations” includes “negotiations”, but also captures other types of interactions.

[33] In my view, the Ministry’s and Lheidli T’enneh’s evidence as described above establishes that, for the purposes of s. 16(1)(a)(iii), relations exist between the Province and Lheidli T’enneh. In general, I find these relations involve consultations, collaborations, discussions and negotiations between the Province and Lheidli T’enneh relating to matters ranging from economic issues to heritage conservation to a potential government-to-government agreement.

***Could disclosure of the disputed information reasonably be expected to harm the conduct by the government of British Columbia of the relations between that government and Lheidli T’enneh?***

[34] The final question under s. 16(1)(a)(iii) is whether disclosure of the disputed information could reasonably be expected to harm the provincial government’s conduct of relations with Lheidli T’enneh.

[35] The Ministry’s argument, as I understand it, is as follows.<sup>29</sup>

[36] Lheidli T’enneh does not consent to disclosure of the disputed information. This is because the information relates to a place that was once their traditional village and burial ground. The Site is of great cultural and historical significance to them. The fact that the Site has been disturbed and is now a park pains and angers Lheidli T’enneh. The information also relates to Lheidli T’enneh ancestors. Lheidli T’enneh’s relationship with their ancestors is real, sacred and vital to their sense of identity. For these reasons, the disputed information is viewed by Lheidli T’enneh as sensitive and private. As such, publicly disclosing the disputed information would be viewed by Lheidli T’enneh as disrespectful and insensitive to their culture and express wishes.

[37] The Ministry argues that, if the information is disclosed, Lheidli T’enneh would feel disrespected and lose trust in the Province. This would lead to Lheidli T’enneh becoming less engaged and collaborative and more defensive in its relations with the Province. The Ministry submits that this is the harm to the relations between the Province and Lheidli T’enneh that could reasonably be expected to result from disclosure of the disputed information.

[38] In support of this argument, the Ministry provided affidavit evidence from a negotiator with the Ministry of Indigenous Relations and Reconciliation

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<sup>29</sup> Ministry’s initial submissions at paras. 96-120.

(Negotiator). The Negotiator has represented the Province in treaty negotiations with Lheidli T'enneh since 2004.<sup>30</sup> The Negotiator says he attended a three-hour meeting with Lheidli T'enneh Elders in 2018 where the entire time was spent discussing the remains discovered at the Site rather than the proposed treaty. The Negotiator says there were “many passionate and heartfelt speeches, ranging from tear-filled to voices raised in anger.”<sup>31</sup> Although the Negotiator says he cannot speak for Lheidli T'enneh, he says he observed that “the issue was having a huge emotional impact on the Elders.”<sup>32</sup>

[39] The Negotiator also says he has “spent many years building a trusting relationship with Lheidli T'enneh on behalf of the Province.”<sup>33</sup> He says he is able to have meaningful conversations with Lheidli T'enneh about important issues. He deposes further that he “would no longer have been welcome at Elders’ meetings or been able to continue having those conversations if the Ministry had released the Records.”<sup>34</sup>

[40] In addition to the Negotiator’s evidence, the Ministry also submitted an affidavit sworn by the Ministry’s Manager of Archaeological Operations (Manager), who has 11 years of experience working with Lheidli T'enneh.<sup>35</sup> The Manager says that Lheidli T'enneh view information about their ancestors as “intimate and sacred” and that the discovery of ancestral remains “has raised painful emotions” for Lheidli T'enneh.<sup>36</sup>

[41] The Manager also states that, if the disputed information were disclosed, the Ministry’s consultation process with Lheidli T'enneh with respect to issuing HCA permits could reasonably be expected to become strained.<sup>37</sup> This is because Lheidli T'enneh would lose trust that the Ministry would protect information relating to their heritage and culture.<sup>38</sup> The Manager says that Lheidli T'enneh could become reluctant to provide information to the Ministry regarding heritage conservation.<sup>39</sup>

[42] Finally, the Ministry submits that s. 16(1)(a)(iii) applies to all of the information in the records, not just the information that specifically relates to the human remains. The Ministry notes that some of the information in the archeological reports is “ostensibly innocuous” and relates to “scientific methods or sections that do not directly relate to the most recent discovery of ancestral

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<sup>30</sup> Affidavit #1 of the Negotiator at paras. 1 and 6.

<sup>31</sup> *Ibid* at para. 28.

<sup>32</sup> *Ibid* at paras. 28 and 30.

<sup>33</sup> *Ibid* at para. 33.

<sup>34</sup> *Ibid*.

<sup>35</sup> Affidavit #2 of the Manager at paras. 2 and 50.

<sup>36</sup> *Ibid* at paras. 52 and 57.

<sup>37</sup> *Ibid* at paras. 56-57 and 61-62.

<sup>38</sup> *Ibid* at para. 62.

<sup>39</sup> *Ibid*.

remains”.<sup>40</sup> Nevertheless, the Ministry submits that s. 16(1)(a)(iii) applies to this information. The Ministry relies on the Manager’s evidence. The Manager deposes that:

... it is important to understand that selecting particular words, sentences and sections of the Records to disclose, such [as] scientific methods or sections that do not directly relate to the most recent discovery of ancestral remains, is not an appropriate approach in this context. The Records, as collected to respond to the applicants’ requests, and this inquiry itself, would not exist were it not for the fact that the Site exists on the remains of the traditional village and burial ground of Lheidli T’enneh and the need to protect and conserve that heritage from further intrusion and damage.

From the first pages of the Records, Lheidli T’enneh are bluntly reminded of the loss of their culture and heritage. Making continued requests to share parts of the Records, once they have already said no, is inappropriate and disrespectful. The entirety of the Records should be given the respect and privacy desired by Lheidli T’enneh.<sup>41</sup>

[43] The Ministry also says the disputed information is “a scientific analysis imposed upon a sacred, intimate part of Lheidli T’enneh culture.”<sup>42</sup> According to the Ministry, Lheidli T’enneh would view public disclosure of the disputed information in this form as “extremely disrespectful”.<sup>43</sup> For these reasons, the Ministry submits that line-by-line severing of scientific information or other “ostensibly innocuous” information in the records is not appropriate in the context of this case.

[44] As outlined above, Lheidli T’enneh say they never ceded, released, or surrendered the lands in question. They say the Site used to be their village until they “were forcibly removed by the Indian Agent in the sale of land to the railway”.<sup>44</sup> They also say that if the Ministry disclosed the disputed information “this would be a major concern of the Lheidli T’enneh and will impact negotiations for [a government-to-government] agreement and the relationship with Lheidli T’enneh.”<sup>45</sup>

[45] As for the applicants, Applicant A argues that any harm to the relations between the Province and Lheidli T’enneh would be the result of internal conflict within Lheidli T’enneh rather than the Ministry’s disclosure of the disputed information.

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<sup>40</sup> Ministry’s initial submissions at paras. 118 and 140.

<sup>41</sup> Affidavit #2 of the Manager at paras. 95-96.

<sup>42</sup> Ministry’s initial submissions at para. 112.

<sup>43</sup> *Ibid.*

<sup>44</sup> Lheidli T’enneh’s submissions at p. 1.

<sup>45</sup> *Ibid.*

[46] Applicant B argues that the disputed information should be disclosed in order to establish an accurate historical record. He submits that the human remains discovered at the Site may not be of Lheidli T'enneh ancestors. He argues that the public is entitled to know the identities of the persons discovered and, until the identities are known, "no one indigenous group can claim sole interest in the remains, despite where the remains were located."<sup>46</sup>

[47] I am not persuaded by the applicants' arguments in this case.

[48] The evidence does not persuade me that there is internal conflict within Lheidli T'enneh that could negatively affect its relations with the Province, as Applicant A argues. Applicant A mentions news coverage and public comments by Lheidli T'enneh, but did not provide any supporting documentary evidence. However, even if internal conflict does exist, that is not inconsistent with a finding that there is also a reasonable expectation of harm to the intergovernmental relations if the Province were to disclose the disputed information. In other words, it is possible to have two different causes of harm.

[49] I appreciate Applicant B's concern for the historical record. However, I fail to see how knowing the true identities of the persons discovered at the Site or whether the lands in question were surrendered has any bearing on the s. 16(1)(a)(iii) analysis.<sup>47</sup> Despite the archival material provided by Applicant B, Lheidli T'enneh consider the disputed information to be their information, about their territory, history and culture. I accept that they believe this in good faith, based on the nature of the information and the undisputed historical facts about the location of their village and burial site. The question is whether, in these circumstances, the harm described in s. 16(1)(a)(iii) could reasonably be expected to result from disclosure of the disputed information. In my view, the answer to that question does not turn on knowing the true identities of the persons discovered or whether the lands in question were surrendered.

[50] I also accept, as Applicant B suggests, that if the disputed information were publicly disclosed, other groups may claim interest in the information. However, s. 16(1)(a)(iii) is not about whether another group may benefit from disclosure of the disputed information in a way that outweighs Lheidli T'enneh's interests. In this case, s. 16(1)(a)(iii) is only concerned with whether disclosure of the disputed information could reasonably be expected to cause harm to intergovernmental relations between Lheidli T'enneh and the Province.

[51] Contrary to the applicants' submissions, in my view, disclosure of the disputed information could reasonably be expected to harm the government of British Columbia's conduct of relations with Lheidli T'enneh.

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<sup>46</sup> Applicant B's submissions at p. 5.

<sup>47</sup> On this point, I agree with the Ministry's reply submissions at para. 15.

[52] In general, I accept Lheidli T'enneh's submissions and the Ministry's evidence. Based on the material before me, I accept that disclosure of the disputed information could reasonably be expected to disrespect or hurt Lheidli T'enneh and that they would consequently lose trust in the Province. In particular, I accept the Ministry's evidence that:

The discovery of the remains serves as a painful reminder of how the Lheidli T'enneh's heritage was disregarded by earlier colonial governments. A park was built where their ancestors were buried. Even though the park was renamed to honour Lheidli T'enneh, ongoing works in the park continue to disturb those remains.<sup>48</sup>

[53] Given the connection between the disputed information and Lheidli T'enneh's territory and ancestry, I can understand why Lheidli T'enneh have strong opinions and emotions about the Site and the remains and why they oppose public disclosure of the disputed information. The Ministry's evidence satisfies me that the disputed information relates to a sacred part of Lheidli T'enneh culture and a sensitive part of their history. This is why Lheidli T'enneh expects the Province to treat the disputed information confidentially. Disclosure would not respect Lheidli T'enneh's culture and wishes.

[54] I agree with the Ministry that not all of the disputed information specifically relates to the human remains discovered. As noted above, all of the information generally relates to excavations conducted at the Site under the authority of the Permit. Some of that information is the kind of information and formatting one would expect to see in a report, such as headers, page numbers, title pages, tables of contents and background information.

[55] I accept that Lheidli T'enneh could reasonably be expected to feel disrespected by public disclosure of any of this information, including what would seem to be innocuous in another context. Lheidli T'enneh objects to disclosure of *all* of the disputed information, not just parts of it. As such, I accept that disclosure of any of the information would be disrespectful to Lheidli T'enneh because it would disregard their express wishes.

[56] I can also understand why Lheidli T'enneh takes the position that none of the disputed information should be disclosed. I agree with the Ministry that the reports, in general, impose a scientific and methodological analysis on subject matter that is sensitive and sacred to Lheidli T'enneh. I recognize that the formal, scientific analysis in the reports is useful for the purposes of heritage conservation under the HCA. However, in my view, the tone, substance and format of the reports portray the disputed information in a manner that simply does not appropriately reflect the sensitive, sacred, and historically significant nature of the subject matter for Lheidli T'enneh. For this reason, I accept that

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<sup>48</sup> Affidavit #1 of the Negotiator at para. 31.

public disclosure of any of the disputed information would be disrespectful to Lheidli T'enneh and would negatively impact their perception of, and relationship with, the Province.

[57] I also find it reasonable to conclude that the negative impact of disclosure on Lheidli T'enneh would result in their becoming less engaged and collaborative and more defensive in their relations with the Province. I find this could reasonably be expected to harm the relations between the Province and Lheidli T'enneh.

[58] In particular, I find the evidence of the Negotiator and the Manager compelling.

[59] The Negotiator's evidence satisfies me that he is a trusted bridge between the two governments. His relationship of trust with Lheidli T'enneh took many years to build. I find that communications between the two governments would deteriorate if the Negotiator were no longer able to attend Elders' meetings and have meaningful conversations with Lheidli T'enneh. This in turn would harm the relations between the Province and Lheidli T'enneh because meaningful and effective communication is clearly essential to the health and success of intergovernmental relations.

[60] I also accept the Manager's evidence that, if the disputed information were disclosed, the Ministry's consultation process with Lheidli T'enneh with respect to issuing HCA permits could reasonably be expected to become strained. This is because Lheidli T'enneh would lose trust that the Ministry would protect information relating to their heritage and culture.<sup>49</sup> Based on the Manager's evidence, I find that Lheidli T'enneh could become reluctant to provide information to the Ministry regarding heritage conservation.<sup>50</sup>

[61] Further, in my view, Lheidli T'enneh's own submissions are convincing evidence of a reasonable expectation of harm in this case. As noted above, Lheidli T'enneh say that if the Ministry disclosed the disputed information "this would be a major concern of the Lheidli T'enneh and will impact negotiations for [a government-to-government] agreement and the relationship with Lheidli T'enneh."<sup>51</sup> Given the rest of Lheidli T'enneh's submissions, the context and the other evidence before me, I interpret this part of Lheidli T'enneh's submissions to mean that disclosure of the disputed information would *negatively* impact (i.e., harm) relations between them and the Province because it would cause them to take a more defensive and less collaborative stance toward the Province.

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<sup>49</sup> Affidavit #2 of the Manager at para. 62.

<sup>50</sup> *Ibid.*

<sup>51</sup> Lheidli T'enneh's submissions at p. 1.

[62] Having regard to the evidence as a whole, I conclude that disclosure of the disputed information could reasonably be expected to result in harm to the relations between the Province and Lheidli T'enneh. Specifically, I find that, at the very least, disclosure could reasonably be expected to result in harm to the Province's ability to effectively communicate with Lheidli T'enneh, to engage in collaborative heritage conservation efforts, and to make progress on a government-to-government agreement.

[63] To be clear, I find that s. 16(1)(a)(iii) applies to all of the disputed information. For the reasons discussed above, I accept that, in the unique circumstances of this case, disclosure of any of the disputed information would result in the harm described in s. 16(1)(a)(iii). Disclosure would disrespect Lheidli T'enneh's express wishes and publicly portray the sensitive and sacred nature of the disputed information in a manner that is disrespectful to Lheidli T'enneh, resulting in the harms described above.

[64] In the result, I conclude that s. 16(1)(a)(iii) applies to the disputed information and the Ministry is authorized to refuse to disclose it. Given my conclusion on s. 16(1)(a)(iii), I consider it unnecessary to also consider the other exceptions to disclosure relied upon by the Ministry.

## **CONCLUSION**

[65] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse access to the disputed information under s. 16(1)(a)(iii).

November 13, 2020

## **ORIGINAL SIGNED BY**

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Ian C. Davis, Adjudicator

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