Federal Court  Cour fédérale

**Date: 20190222**

**Dockets: T-1580-17**
**T-1650-14**
**T-1750-14**
**T-1579-17**

**Citation: 2019 FC 207**

**Ottawa, Ontario, February 22, 2019**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**BOMBARDIER INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**INFORMATION COMMISSIONER OF CANADA**

**Respondent**

**PUBLIC JUDGMENT AND REASONS**

**(Confidential Judgment and Reasons issued February 22, 2019)**

[1] Bombardier Inc. has brought applications for judicial review of four decisions made by Innovation, Science and Economic Development Canada (ISED), or its predecessor, Industry Canada, in response to two requests for information made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (*ATIA*). Bombardier opposes the release of some of the requested information, asserting that, when combined with publicly available data, it would enable accurate inferences to be drawn about commercially sensitive information that could damage its competitive position. As such, Bombardier submits that the information in question is exempt from disclosure under paragraphs 20(1)(b) and 20(1)(c) of the *ATIA*.

[2] Bombardier submits that in determining that the information in question should be disclosed, ISED failed to correctly interpret and apply two of the mandatory exemptions provided for in the *ATIA*. Bombardier further denies that it had previously consented to the disclosure of the disputed information.

[3] The Attorney General of Canada and the Office of the Information Commissioner oppose Bombardier's applications for judicial review, asserting that the public is entitled to information regarding the use of public funds to support projects, and that Bombardier has failed to demonstrate that the disputed information qualifies for exemption under the *ATIA*.

[4] For the reasons that follow, I have concluded that Bombardier has not demonstrated that the information in issue is exempt from disclosure under either paragraph 20(1)(b) or paragraph 20(1)(c) of the *ATIA*. Consequently, Bombardier's applications for judicial review will be dismissed.

## I. Background

[5] Bombardier Inc. is a global transportation company headquartered in Montreal. Bombardier Canadair is now part of Bombardier Inc., and the two entities will be referred to collectively as “Bombardier” for the purpose of these reasons.

[6] In addition to its other activities, Bombardier designs and produces civilian and commercial aircraft, including lines of aircraft known as the “C Series”, “CRJ Series” and “Q 400” aircraft. The information at issue in this application relates to the “CRJ Series” and “Q 400” aircraft.

[7] The aerospace industry is highly competitive, and in order to maintain its competitive position, Bombardier is continually engaged in researching and developing new aircraft programs, whether it be the development of entirely new models of aircraft or significant modifications being made to existing models.

[8] The Technology Partnerships Canada program (TPC) was a special operating agency within Industry Canada that provided funding support for research and development projects in Canada. Funding was provided to recipients in accordance with agreements concluded between the federal Crown and recipient companies.

[9] Bombardier received funding under the TPC program for its “CRJ Series” and “Q 400” aircraft programs. Like other TPC projects, these programs were long-term in nature, commencing with a research and development phase followed by a period in which a product or technology could generate revenue for the recipient. Once the project generated revenue, Bombardier (like other recipients of TPC funding) repaid monies that had been advanced

through the TPC program, in accordance with the terms and conditions of the applicable funding agreements. The two projects at issue in this proceeding are currently in the repayment phase.

[10] The funding agreements between Bombardier and ISED contain confidentiality clauses. Although I have not been provided with all of the relevant confidentiality agreements, I understand a typical clause to provide that "[s]ubject to […] the *Access to Information Act* the parties will keep confidential and will not disclose the contents of this Agreement nor the transactions contemplated hereby without the consent of all parties". The agreements also expressly identify information that Bombardier consented to release, including project numbers and identifiers, a project description and the authorized assistance being provided by ISED.

## II. The Access to Information Requests

[11] An access to information request was made in 2009 (request #A-2009-00050), seeking information with respect to the "[t]otal amount of Technology Partnerships Canada funding approved, paid out to, and repaid up to April 1, 2009". Information was sought with respect to several companies, including Bombardier. Bombardier opposed the disclosure of some of the requested information, and certain information was withheld from disclosure by ISED pursuant to paragraph 20(1)(c) of the *ATIA*. This led to the filing of a complaint with the Office of the Information Commissioner.

[12] In June of 2014, ISED decided that some of the information in the 2009 record did not qualify for exemption and should be disclosed. Bombardier then commenced an application for judicial review seeking an order declaring the June 2014 decision void (application T-1650-14, or the First 2014 Application). On the consent of the parties, the First 2014 Application was held

in abeyance pending the completion of the Office of the Information Commissioner's investigation into a second access request that was still ongoing.

[13] In 2017, the Information Commissioner determined that the complaint was well-founded, recommending that the disputed information be disclosed in its entirety. ISED subsequently advised Bombardier that it intended to accept the recommendations of the Information Commissioner and release the disputed information.

[14] Bombardier then brought a second application for judicial review (application T-1579-17) with respect to this decision, challenging the release of information with respect to "Total Net Expenditures" and "Total Repayments" for Bombardier and Bombardier Canadair. As will be explained below, only the information relating to the "Total Repayments" made to ISED by Bombardier and Bombardier Canadair remains in dispute at this point.

[15] In the meantime, ISED had received a second *ATIA* request in 2011 (request #A-2011-00182 or the 2011 request), which sought information with respect to certain specified TPC projects as of August 26, 2011. In particular, information was sought with respect to "each investment, repayable contribution and loans approved under the Technology Partnerships Canada, to May 31, 2002". Amongst other things, project-related information was sought with respect to repayable contributions and loans, the names of companies in question, total funding approved, total amounts of eligible costs, amounts paid out to date, and amounts repaid by royalty, recoveries or the exercise of warrants.

[16] Bombardier was advised of the 2011 request in June of 2014. It then provided written representations opposing the release of the requested information. In July of 2014, ISED decided

that some of the requested information qualified for exemption, but that other information could not be withheld from disclosure under the *ATIA*. Bombardier then commenced an application for judicial review with respect to this decision (application T-1750-14, or the Second 2014 Application). The Second 2014 Application was also held in abeyance pending the completion of the Office of the Information Commissioner's investigation into the 2011 request.

[17] The Information Commissioner subsequently determined that the complaint with respect to the 2011 request was well-founded, recommending that all of the requested information be disclosed. By letter dated September 29, 2017, ISED advised Bombardier that it intended to accept the Information Commissioner's recommendation and disclose the requested record in its entirety. Bombardier then commenced an application for judicial review (application T-1580-17) with respect to ISED's September 29, 2017 decision.

[18] Bombardier's four applications for judicial review were subsequently consolidated by order of Justice Noël, with T-1580-17 continuing as the lead file. The parties all agree that the applications are moot to the extent that they relate to ISED's 2014 decisions, and, with one limited exception that will be discussed further on in these reasons, the entire focus of the parties' submissions was on ISED's two decisions from 2017.

## III. The Disputed Information

[19] The information at issue in this case is contained in spreadsheets compiled by ISED.

[20] It turns out that certain of the information sought through the 2009 request that Bombardier had originally sought to protect had in fact previously been made public, specifically information with respect to "Total Net Expenditure" and "Net Expenditures to Date" for

Bombardier and Bombardier Canadair TPC projects to April 1, 2009. Consequently Bombardier no longer seeks to protect this information. Bombardier is also no longer objecting to the release of previously undisclosed project-related information regarding monies "Repaid via Warrants Exercised" by Bombardier Inc. and Bombardier Canadair to May 31, 2002.

[21] Eight entries in the spreadsheets remain in dispute. These include two entries covered by the 2009 request with respect to "Total Repayments" of TPC funding for Bombardier Inc. and Bombardier Canadair. There is also a second group of six entries relating to the 2011 request, including entries for "Total Eligible Costs" for Bombardier Inc. and Bombardier Canadair, as well as amounts "Repaid via Royalties" and "Recoveries". While this information is publicly available in aggregate form, what is not publicly available is a break-down of the information by project.

[22] Bombardier asserts that this information is exempt from disclosure pursuant to paragraphs 20(1)(b) and 20(1)(c) of the *ATIA*, and that in concluding that the information should be disclosed, ISED erred by failing to correctly interpret and apply these mandatory exemptions.

## IV. The Legislative Regime

[23] Paragraph 20(1)(b) of the *ATIA* provides that "… the head of a government institution shall refuse to disclose any record requested under this Act that contains … financial … information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party".

[24] Paragraph 20(1)(c) of the *ATIA* requires that heads of government institutions refuse to disclose any record that contains "information the disclosure of which could reasonably be

expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party …".

[25] The full text of the statutory provisions at issue in this proceeding is attached as an appendix to these reasons.

[26] Both of these provisions create mandatory exemptions. That is, once the information sought has been shown to fall within the exemption in question, the head of the government institution has no discretion and must refuse to disclose it, subject only to any applicable statutory override: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 98, [2012] 1 S.C.R. 23.

[27] Also at issue in this proceeding is subsection 20(5) of the *ATIA*. This provides that the head of a government institution may disclose any record that contains information that falls within the exemptions identified in subsection 20(1) of the Act "with the consent of the third party to whom the information relates". There is a factual dispute between the parties as to whether Bombardier has previously consented to the disclosure of the disputed information.

## V. The Apprehended Harm

[28] As part of the highly competitive environment in the aerospace industry, aircraft manufacturers make frequent use of "benchmarking", which involves the ongoing gathering of commercial and strategic intelligence with respect to competitors. According to the evidence of Fiona Kerr, a Senior Advisor, Risk and Asset Management in Bombardier's Commercial Aircraft Division, competitors are particularly interested in uncovering information with respect to the

costs faced by their rivals. They are also interested in information as to how their competitors position themselves in the market, and how far their development programs have advanced.

[29] Ms. Kerr further asserts that if the disputed information in this case was made public, it would provide Bombardier's international competitors with valuable insight into its operations that would be otherwise unavailable to them. This would be particularly unfair, Bombardier says, as [redacted]

[30] Amongst others involved in the commercial aircraft sector, Bombardier competes with Boeing Company, Airbus and Embraer S.A., at least two of which are much larger companies. According to Ms. Kerr, these companies would likely be interested in the information that Bombardier is seeking to keep confidential. Embraer S.A., in particular, would be especially interested in information relating to Bombardier's "CRJ Series" aircraft, as it directly competes with an aircraft manufactured by Embraer S.A., and information with respect to Bombardier's "Q 400" aircraft, as Embraer S.A. had recently announced its intention to examine re-entry into the turboprop aircraft market.

[31] In addition to undermining its competitive position, Bombardier states that its competitors would be able to use the disputed information in trade disputes. These include major disputes in which Bombardier is currently engaged with Boeing in the United States involving the "C Series" aircraft, as well as a complaint against Bombardier brought by Brazil before the World Trade Organization. While acknowledging that Bombardier's C Series aircraft had not actually received any funding through the TPC program, Ms. Kerr nevertheless asserts that

Bombardier's competitors would likely mischaracterize the disputed information to bolster their positions in these trade disputes.

[32] Finally, Bombardier says that its competitors would be able to combine the disputed information with publicly available information in order to obtain an approximation of the [redacted] Once competitors have a [redacted] Bombardier says that they would be able to combine this with other publicly available information to obtain [redacted] Access to this information would allow Bombardier's competitors to undercut Bombardier by pricing their products just below those of Bombardier.

## VI. The Standard of Review

[33] Pursuant to 51 of the *ATIA*, judges sitting in review of decisions such as those in issue in this case must determine whether the head of the relevant government institution was required to refuse to disclose a record in accordance with the provisions of the *ATIA*. If it is determined that this was in fact the case, the judge must order the institution head not to disclose the record in question.

[34] I agree with the parties that the standard of review to be applied in reviewing decisions with respect to the application of mandatory exemptions under the *ATIA* is that of correctness. That is, my role is to determine whether the statutory exemptions have been applied correctly to the contested records: *Merck*, above at para. 53.

## VII. Analysis

[35] The *ATIA* provides a right of timely access to information in records under the control of government institutions, and has been held to enshrine a quasi-constitutional right of access for the purpose of facilitating democracy: *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315 at para. 1, [2012] 2 F.C.R. 421; *Merck*, above at para. 1; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61, [1997] S.C.J. No. 63, per La Forest J. (dissenting, but not on this point).

[36] The *ATIA* facilitates democracy "by helping to ensure that citizens have the information required to participate meaningfully in the democratic process", and by assisting in holding politicians and officials to account: *Merck*, above at para. 22. As a consequence, access to information legislation is to be given a broad and purposive interpretation.

[37] The Courts have, however, also recognized that other public and private interests may be engaged when access is sought to government information. Governments collect information from third parties that can include confidential commercial information that may be valuable to competitors, the disclosure of which may cause financial or other forms of harm to these third parties and discourage research and innovation: *Merck*, above at para. 2.

[38] As a consequence, a careful balance must be struck between the competing interests of providing the public with access to government information and protecting the interests of third parties: *Merck*, above at paras. 2 and 4. The question for determination is whether that balance has been properly struck in this case.

A. *The Burden and Standard of Proof on a Third Party Claiming a Section 20(1) Exemption*

[39] Insofar as the burden of proof is concerned, I understand the parties to agree that Bombardier bears the burden of showing why the disputed information should not be disclosed: *Merck*, above at para. 92.

[40] As to the standard of proof, the party resisting disclosure must establish on the civil standard of the balance of probabilities that the relevant statutory exemption applies. However, the evidence that will be required to reach that standard will depend on the nature of the proposition that the third party seeks to establish and the particular context of the case: *Merck,* above at paras. 94-95.

[41] The exemptions contained in subsection 20(1) of the *ATIA* relate to third party confidential commercial information, and are mandatory in nature. Therefore, once the record in issue is found to come within the exemption claimed, disclosure must be refused (subject to the public interest override contained in subsection 20(6) of the Act which is not in issue in this case): *Merck,* above at para. 98. The head of the government institution may also release the disputed information with the consent of the third party to whom the information relates: subsection 20(5) of the *ATIA*.

B. *Is the Disputed Information Exempt from Disclosure Pursuant to Paragraph 20(1)(b) of the ATIA?*

[42] The confidential information exemption established under paragraph 20(1)(b) of the *ATIA* is a class-based exemption. That is, once it has been shown that the disputed information contained in the record in question corresponds to the statutory provision, the information is

exempted and, as noted above, the head of the government institution must refuse to disclose it: *Merck*, above at para. 99.

[43] The parties agree that test to be used in determining whether information is exempt from disclosure under paragraph 20(1)(b) of the *ATIA* is that established by Justice MacKay in *Air Atonabee Ltd. v. Minister of Transport* (1989), 27 C.P.R. (3d) 180 at paragraph 34, 27 F.T.R. 194, and approved by the Supreme Court of Canada in *Merck*, above at para. 133. That is, the party resisting disclosure must establish that the information in issue:

(a) is financial, commercial, scientific or technical in nature;

(b) is confidential information;

(c) that was supplied to a government institution by a third party; and

(d) has been treated consistently in a confidential manner by the third party.

[44] This test is conjunctive, meaning that Bombardier must satisfy all four elements of the test in order to establish that the information in question is exempt from disclosure: *Air Atonabee*, above at para. 34.

[45] While the parties agree that the disputed information is financial in nature, they disagree as to whether the other three elements of the test have been satisfied by Bombardier. Consequently it is necessary to consider each of the three remaining elements of the *Air Atonabee* test.

(1) Is the Disputed Information "Confidential Information"?

[46] In *Air Atonabee*, this Court held that in order to construe the term "confidential information" in paragraph 20(1)(b) of the *ATIA* in a manner that is consistent with the purposes of the Act, regard must be had to the content of the information, its purposes and the circumstances under which it was compiled and communicated: above, at para. 34.

[47] In particular, the Court must consider:

a) whether the content of the record is such that the information it contains is not available from sources otherwise accessible by the public, or could not be obtained by observation or independent study by a member of the public acting on his or her own;

b) whether the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed; and

c) whether the information was communicated (whether required by law or supplied gratuitously) in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication: *Air Atonabee*, above at paras. 43-45.

(2) Is the Disputed Information Already Available from Sources Otherwise Accessible to the Public?

[48] It appears that some of the disputed information may already be available to the public. While Bombardier takes issue with this finding, the Office of the Information Commissioner

found that the disaggregated figure for “Recoveries” for both Bombardier Inc. and Bombardier Canadair could be derived from publicly available information, specifically by subtracting these companies’ “Net Expenditures to Date” from their “Authorized Assistance”.

[49] I am prepared to assume that the disputed information is not currently available from sources that are otherwise accessible to the public, or could not be obtained by observation or independent study by a member of the public acting on his or her own. While the disputed information is available to the public in aggregate form, I will accept for the purpose of these reasons that it is not currently available in a manner that is specifically attributable to a particular aircraft project. It is this breakdown by project that Bombardier asserts is commercially sensitive information.

(3) Was the Disputed Information Communicated to ISED by Bombardier with a Reasonable Expectation that it would not be Disclosed to the Public?

[50] I am not, however, persuaded that the information in issue was communicated to ISED by Bombardier with a reasonable expectation that it would not be disclosed.

[51] In coming to this conclusion, I would start by observing that the jurisprudence has held that parties seeking government contracts “cannot expect the same degree of confidentiality as parties who are assisting the government”: *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 at para. 76, [2005] F.C.J. No. 859, aff’d 2006 FCA 241, 353 N.R. 84.

[52] One of the entries in the 2011 record is blank, namely the entry for Bombardier Canadair under “Recoveries” to May 31, 2002. The record thus does not contain any information, whether provided by Bombardier or otherwise.

[53] In addition, as previously noted, the funding agreements between Bombardier and ISED contain a confidentiality clause that expressly provides that while the parties would keep the contents of the agreements and the transactions contemplated thereby confidential, the agreements were nevertheless subject to the provisions of the *ATIA*. While Bombardier may have been reasonably entitled to assume that commercially sensitive information provided to ISED would be kept confidential, it was nevertheless on notice that the agreements were subject to the *ATIA*.

[54] Furthermore, the confidentiality clause in a November 1999 amendment to the funding agreement involving Bombardier Inc. gave the Minister discretion to disclose any of the contents of the agreement or the transactions contemplated by it in a variety of circumstances involving trade disputes. There is a similar provision in a 2008 Settlement Agreement between ISED and Bombardier Canadair which superseded its earlier agreement with Technologies Partnerships Canada. As a consequence, Bombardier was on notice that the disputed information could potentially be disclosed in certain circumstances.

[55] More importantly, Bombardier had previously consented to the disclosure of information with respect to "actual repayments made to date, pursuant to the agreement". Having done so, Bombardier could have no reasonable expectation from that point that six of the entries - those relating to "Total Repayments", monies "Repaid via Royalties" and "Recoveries" for each of Bombardier Inc. and Bombardier Canadair - would be kept confidential.

[56] That is, on June 2 and June 3, 2008, Mairead Lavery (who was then Bombardier's Vice-President of Strategy & Business Development) executed two forms, each of which was entitled "Permission to Release Information". These forms, which relate to the release of information in

response to Parliamentary requests, list a series of options that could be selected electronically by the person completing the form.

[57] These options range from a blanket refusal to permit the release of *any* information in response to Parliamentary requests to unqualified permission to release *all* of the information identified in the form in response to Parliamentary requests. The forms also offer the option of permission being granted for the release of only certain specified types of information.

[58] Ms. Lavery selected the option on both forms permitting the disclosure of information with respect to "actual repayments made to date, pursuant to the agreement". Information relating to "actual repayments made to date, pursuant to the agreement" corresponds to the "Total Repayments" entries in the 2009 record and the "Repaid via Royalties" and "Recoveries" entries in the 2011 record.

[59] The first form completed by Ms. Lavery names the proponent as Bombardier Inc., and identifies the project number, contribution date, and project title. The second form names the proponent as Bombardier Canadair, and contains the same identifying information. Each form thus relates to a specific agreement between ISED and the entity in question, with the result that the forms clearly contemplate the release of information broken down by entity and project.

[60] Bombardier suggests that Ms. Lavery must have thought that the repayment information would only be disclosed in aggregate form. There is clearly no merit to this submission. Not only is it unsupported by any evidence, there would have been no reason to have separate forms for two different Bombardier entities, each relating to a specified project, if the intent was to only disclose aggregate information.

[61] Bombardier also submits that at most, the consent forms contemplate permission being granted on a one-time basis for the disclosure of information to a particular point in time. I do not accept this submission.

[62] The sub-option selected by Ms. Lavery is one of several alternative options listed below the first option. This first option states “I give ITO permission to release ALL of the information listed below in response to Parliamentary requests, without the need to contact me each time”.

[63] Below the first option, there are a series of several other options where permission is granted to release only specified types of information, one of which contemplates the release of information relating to “actual repayments made to date, pursuant to the agreement”. As noted, this was the option selected by Ms. Lavery.

[64] It is clear that this (and the other options listed below the first option) only qualify the first phrase in the first option, namely the extent of the information that may be released. If this were not the case, the forms would make no sense.

[65] Indeed, I do not understand Bombardier to dispute that the permission granted by Ms. Lavery contemplated the disclosure of repayment information “in response to Parliamentary requests”, a phrase that appears only in the first option. In the same vein, the sub-options contemplate permission being granted for the disclosure of specified types of information “without the need to contact [the person granting permission] each time”.

[66] The use of the phrase “without the need to contact me each time” in the permission form clearly contemplates future requests for information being made that would be subject to the permission previously granted.

[67] Bombardier concedes that while the intent of the forms "would probably be obvious" to someone with legal training, a lay person may have been confused by the wording of the documents. While I am of the view that the intent of the documents is quite clear, I would also note that we have no information as to Ms. Lavery's background, and, in particular, no information as to whether she had any legal training. As a result, that there is no evidentiary support for Bombardier's argument. It is also reasonable to assume that as the Vice-President of Strategy & Business Development of a large company such as Bombardier, Ms. Lavery was likely a sophisticated individual who would have understood what she was doing.

[68] Bombardier also contends that the permission documents that were provided to the Office of the Information Commissioner by ISED during the course of its investigation "have not been authenticated" and should therefore be given little weight. Bombardier is not, however, disputing the admissibility of the documents, nor is it suggesting that the documents could not be located in its own files or that they may have been altered in any way.

[69] If there was a real concern as to the authenticity of the permission forms, one would have anticipated receiving an affidavit from Ms. Lavery denying that she had completed the documents. Bombardier has not, however, provided an affidavit from Ms. Lavery, and it has not provided a reasonable explanation for its failure to do so.

[70] Ms. Kerr simply states in her Reply affidavit that "Mairead Lavery is no longer employed by Bombardier, and I was unable to discuss these documents with her". There is no suggestion that any efforts were actually made to locate Ms. Lavery or to speak to her, and Ms. Kerr has provided no explanation as to why she was unable to discuss the permission documents with her.

[71] Bombardier suggests that Ms. Lavery may not have known that information provided in response to Parliamentary requests would be contained in a public record. It further submits that Ms. Lavery may have misunderstood what she was agreeing to. Bombardier has, however, once again failed to provide any evidence to support these contentions.

[72] While this finding is sufficient to dispose of Bombardier's arguments with respect to the issue of the permission forms, I would also note that even if Ms. Lavery had misunderstood the import of the forms, as was suggested by Bombardier, this would not be sufficient to find a lack of consent on the part of the company. As the Federal Court of Appeal has observed, in considering the import of documents such as those in issue here, the focus should be on the wording of the clause in question, rather than on an individual's subjective understanding of its scope: *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 at para. 66, 414 D.L.R. (4th) 165.

[73] Bombardier further submits that there is no evidence that consideration was provided by ISED in exchange for the consents provided by Ms. Lavery, with the result that the forms are therefore unenforceable. I do not accept this submission. The consent forms did not amount to an amendment to an existing contract for which consideration may have been required, but instead simply refer to specific agreements involving Bombardier and Bombardier Canadair.

[74] In light of the consent provided by Ms. Lavery, Bombardier could not have had a reasonable expectation after June of 2008 that information contained in the "Total Repayments" entries in the 2009 record and the "Repaid via Royalties" and "Recoveries" entries in the 2011 record would not be disclosed: *Calian*, above at paras. 52-53; *StenoTran Services v. Canada*

*(Minister of Public Works and Government Services)*, [2000] 186 F.T.R. 134 at paras. 12-15, [2000] F.C.J. No. 747.

[75] As a result, this information was not "confidential information" within the meaning of the *Air Atonabee* test.

(4) Conclusion Regarding the Paragraph 20(1)(b) Exemption

[76] As was noted earlier, the *Air Atonabee* test is conjunctive. Having failed to establish that the disputed information was communicated to ISED by Bombardier with a reasonable expectation that it would not be disclosed to the public, it follows that the information in question was not "confidential information" within the meaning of the *Air Atonabee* test. It follows that it is not exempt from disclosure under paragraph 20(1)(b) of the *ATIA*.

[77] In light of my finding on this point, it is not necessary to consider the third component of the second element of the *Air Atonabee* test: that is, whether the disputed information was communicated in a relationship between government and the party supplying it that was either a fiduciary relationship or one that is not contrary to the public interest, which relationship would be fostered for public benefit by confidential communication.

[78] It is also unnecessary to address the third element of the *Air Atonabee* test: that is, whether the disputed information was "supplied" to ISED by Bombardier.

[79] I will, however, briefly address the fourth element of the *Air Atonabee* test: that is, whether the disputed information has been treated consistently in a confidential manner by Bombardier. My finding with respect to the consents provided by Ms. Lavery leads to the conclusion that to the extent that the disputed information relates to "Total Repayments", monies

"Repaid via Royalties" and "Recoveries", it had not been consistently treated in a confidential manner by Bombardier. As a consequence, Bombardier has also failed to satisfy the fourth element of the *Air Atonabee* test with respect to this information.

[80] This then takes us to the second exemption claimed by Bombardier – that is, its assertion that the disputed information is exempt from disclosure under paragraph 20(1)(c) of the *ATIA*.

C. *Is the Disputed Information Exempt from Disclosure Pursuant to Paragraph 20(1)(c) of the ATIA?*

[81] As noted earlier, paragraph 20(1)(c) of the *ATIA* exempts information from disclosure that could reasonably be expected to result in material financial loss or gain to or prejudice the competitive position of a third party. The list of types of harm identified in paragraph 20(1)(c) is disjunctive. As a consequence, it is not necessary for Bombardier to show that the "prejudice" to its competitive position will also result in "harm": *Merck*, above at para. 212. It will be sufficient if Bombardier can show that disclosure of the disputed information could reasonably be expected to cause it either financial loss or gain, or prejudice its competitive position.

[82] Like the paragraph 20(1)(b) exemption, the paragraph 20(1)(c) exemption is mandatory in nature and the head of the government institution must refuse to disclose the records in issue once it is established that they fall within the exemption.

[83] Unlike the paragraph 20(1)(b) exemption, however, the paragraph 20(1)(c) exemption is not class-based. It is, rather, a harm-based exemption, and applies only if the disclosure of the disputed information could reasonably be expected to result in any of the forms of harm identified in the provision: *Merck*, above at paras. 99 and 184.

[84] In order to establish that information is exempt from disclosure under paragraph 20(1)(c) of the *ATIA*, a party resisting disclosure must demonstrate "a reasonable expectation of probable harm": *Merck*, above at paras. 192-195.

[85] The Supreme Court has held that "a reasonable expectation of probable harm" is "something that is at least foreseen and perhaps likely to occur, but not necessarily probable". While a party resisting disclosure "need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed", it must nevertheless "do more than show that such harm is simply possible": all quotes from *Merck*, above at para. 196. Indeed, something "well beyond" or "considerably above" a mere possibility of harm must be shown: *Merck*, above at paras. 197 and 199.

[86] A party cannot simply rely on a subjective belief that harm will result if certain information is disclosed: *AstraZeneca Canada Inc.*, above at para. 46. The requirements of paragraph 20(1)(c) may, in principle, be satisfied where it can be shown that the disclosure of information not previously made public could give competitors "a head start in developing competing products, or give them a competitive advantage in future transactions": *Merck*, above at paras. 219 and 220. The information must, however, be examined in its entirety in order to determine the likely impact of its disclosure: *Merck*, above at para. 219.

[87] Insofar as the causal link between disclosure and harm is concerned, a party resisting disclosure must provide proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged": *Merck*, above at para. 197, citing *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 58, [2002] 2

S.C.R. 773; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47, at pp. 58-59, [1988] F.C.J. No. 615.

[88] With this understanding of the relevant legal principles, I turn next to consider the evidence adduced by Bombardier with respect to the issue of harm.

[89] Bombardier asserts that it will suffer two forms of harm if the disputed information is disclosed. The first is probable financial harm and prejudice to its competitive position as a result of the competitive advantage that will be gained by its competitors. The second form of harm asserted by Bombardier is the exacerbation of trade disputes.

(1) Will the Release of the Disputed Information Cause Bombardier Financial Harm or Damage its Competitive Position?

[90] Bombardier asserts that its competitors would likely use the disputed information to determine its funding sources for specific projects and time periods, as well as expenditures and repayments relating to specific projects at specific times. This would enable Bombardier's competitors to obtain a [redacted]

[91] Ms. Kerr states that information in the 2011 record relating to Bombardier's "CRJ700" aircraft would be of particular interest to Embraer, as that aircraft competes directly with the Embraer 170 aircraft. According to Ms. Kerr, access to the disputed information would enable Embraer "to determine [redacted]

Information with respect to Bombardier's "Q 400" aircraft would also be of great interest to Embraer, Ms. Kerr says, as it has recently announced its intention to examine re-entry into the turboprop aircraft market.

[92] Ms. Kerr explains that a "key component" of the [redacted] For some aircraft, such as Bombardier's "Q 400" and "CRJ Series" aircraft, this number is publicly available. Other publicly available sources of information such as quarterly reports and press releases could be used to determine the [redacted] Ms. Kerr asserts in her June 15, 2018 affidavit that by [redacted] by the [redacted] a competitor could obtain an [redacted] under the applicable contribution agreement.

[93] Ms. Kerr goes on to assert that once the [redacted] is determined by a competitor, it could then be combined with other publicly available information to obtain a [redacted] This would, in turn, enable a competitor to [redacted] Bombardier's competitors could then use this information to undercut it by pricing their products just below those of Bombardier. Ms. Kerr claims that the ability to perform calculations that reveal the [redacted] is what distinguishes the disputed information from the aggregate repayment information that has already been made public.

[94] Ms. Kerr asserts that Bombardier's competitors could also use the disputed information as part of [redacted] and that this could have a [redacted]

[95] Bombardier says that the harm that it faces if the disputed information is released is analogous to that faced by the applicant in *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371, 38 C.P.R. (4th) 164. There, this Court found that while aggregate amounts paid to

the applicant pursuant to a contract were not exempt from disclosure, information that could lead to the calculation of approximate unit prices per dose should not be disclosed.

[96] The Court reasoned that if the quantities of doses and volume ranges were publicly disclosed, this information could be combined with already-public information concerning the total contract value to calculate the approximate unit price per dose: *Aventis*, above at para. 25. The Court found that the commercial value of the pricing information was clear: competitors would be able to undercut Aventis' prices, and Aventis would not have similar information regarding its competitors' pricing structures: *Aventis*, above at para. 32.

[97] Bombardier argues that the same concerns exist in this case, submitting that the disclosure of the disputed information would provide Bombardier's competitors with insight into its operations that would not otherwise be available. This would amount to a windfall competitive advantage, which would be exacerbated by the fact that Bombardier would not have access to comparable information with respect to its competitors in Brazil and the United States as this type of information is treated as commercially confidential information or is otherwise not available in those jurisdictions.

[98] Finally, Bombardier asserts that disclosure of information regarding its "Total Eligible Costs" would reveal how much it costs the company to develop new aircraft programs. This would in turn enable Bombardier's competitors to assess the company's overall efficiency in developing new aircraft programs. This would compound the informational asymmetry between Bombardier and its competitors, and would result in "unmistakable" commercial disadvantages for the company.

[99] I am not persuaded that there is a reasonable expectation that the disclosure of the disputed information will cause Bombardier harm that is "well beyond" or "considerably above" the merely possible or speculative.

[100] The Federal Court of Appeal has held that affidavit evidence that is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1) of the *ATIA*: *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2003 FCA 257 at para. 20, [2003] F.C.J. No. 916.

[101] To the extent that Bombardier asserts that [redacted] may be [redacted] it has not identified what information ([redacted]) may bear on the [redacted] nor has it demonstrated how the [redacted] would be calculated. Bombardier has, moreover, not shown that the information that would have to be included in the equation [redacted] is in fact publicly available [redacted]

[102] Bombardier chose not to provide the Court with complete copies of the funding agreements between the company and ISED. I note, however, that the Office of the Information Commissioner has observed that these agreements set out [redacted] [my emphasis]. Bombardier has not identified most of the various factors that may be taken into account in [redacted]

[103] As a consequence, this case is readily distinguishable from the *Aventis* case relied upon by Bombardier. There, the applicant was able to show that with the disclosure of the information at issue in that case, Aventis' competitors would have had access to *all* of the information necessary to calculate the unit price per dose of the medication in question – information the disclosure of which would indeed put the company at a competitive disadvantage.

[104] The Court further found that the information at issue in *Aventis* could be used by the applicant's competitors to undercut the applicant in upcoming bids for government contracts. Bombardier has not provided evidence regarding any upcoming bids in the course of which its competitors could potentially make use of the disputed information.

[105] Insofar as the information relating to Bombardier's "Total Eligible Costs" is concerned, Bombardier asserts that the disclosure of this information could reveal how much it costs the company to develop a new aircraft program.

[106] The term "Total Eligible Costs" is defined in the TPC funding agreements between the Government of Canada and Bombardier as referring to the total dollar amount of direct and indirect project costs, reasonably and properly incurred and/or allocated, less applicable credits.

[107] Bombardier has not provided evidence to show that its "Total Eligible Costs" actually equate to its program development costs or total project costs. Nor has it identified what portion of its development costs are in fact ineligible for consideration under the TPC program. Information has also not been provided with respect to the value of any "credits" that might apply.

[108] Bombardier has also failed to satisfactorily explain how information that is at least ten years old (in the case of the 2009 request) or eight years old (in the case of the 2011 request) could be used to create a competitive disadvantage for Bombardier in relation to new and different aircraft programs in 2019 or beyond. Ms. Kerr's affidavits are entirely silent on this question, and common sense dictates that the commercial value of information such as that in issue here will diminish over time.

[109] Bombardier's final contention that its competitors will use the disputed information in [redacted] the company, with [redacted] I do not accept this submission.

[110] The Supreme Court has held that courts "have often - and rightly - been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party": *Merck*, above at para. 224; *Air Atonabee*, above at para.64; *Coopérative fédérée du Québec v. Canada (Agriculture et Agroalimentaire)* (2000), 180 F.T.R. 205, at paras. 9-15, 5 C.P.R. (4th) 344.

[111] Indeed, the Supreme Court has held that refusing to disclose information out of concern that the information will be misunderstood by the public "would undermine the fundamental purpose of access to information legislation", as the point of access legislation "is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it": *Merck*, above at para. 224.

[112] I have thus concluded that Bombardier has failed to demonstrate that it will suffer probable financial harm and prejudice to its competitive position as a result of the competitive

advantage that will be gained by its competitors if the disputed information is disclosed to the public. The final question, then, is whether Bombardier has established that its position in trade disputes will be prejudiced by the release of the disputed information. This issue will be addressed next.

(2) Will the Release of the Disputed Information Prejudice Bombardier's position in Trade Disputes?

[113] Insofar as the potential exacerbation of trade disputes is concerned, Bombardier asserts that its competitors have used, and continue to vigorously pursue trade disputes in an attempt to undercut Canada's aerospace industry by demonstrating that Canada favours domestic aerospace companies through the provision of government funding. According to Bombardier, the *ATIA* was never intended to be used, and should not be used as a mechanism for foreign companies to gain a collateral advantage in trade disputes. Information regarding Canada's TPC program should instead be sought through the official mechanisms in place through trade dispute resolution processes, and not through access to information requests.

[114] In support of this argument, Bombardier cites the example of a major trade dispute in which it was engaged with Boeing. This dispute was brought before the International Trade Commission in the United States, and involved the sale of several "C Series" aircraft to Delta Airlines.

[115] Bombardier further notes that Brazil complained about the Technologies Partnership Canada program in its complaint to the World Trade Organization, which complaint once again involved Bombardier's "C Series" aircraft. In September of 2017, the WTO established a panel

to look into Brazil's assertion that Canada had unfairly subsidized Bombardier's "C Series" jet program.

[116] Ms. Kerr states that she "ha[s] no reason to believe that anything in the [disputed information] is evidence of the violation of any international treaty or agreement". That said, she asserts that Bombardier's competitors would likely mischaracterize the disputed information in an effort to bolster their positions in trade disputes (as it has done with publicly available information) in an effort to show that Canada has historically provided Bombardier with subsidies, contrary to Canada's international obligations. This would allow Bombardier's competitors to falsely claim that this has enabled the company to undercut its competitors' prices.

[117] Ms. Kerr further states that if the disputed information is released, and is subsequently misused by Bombardier's competitors, it will be forced to expend even more resources in responding to these allegations.

[118] As will be explained below, Bombardier has not established a reasonable expectation that the disclosure of the disputed information will cause it harm that is "well beyond" or "considerably above" the merely possible or speculative. Bombardier's allegations fail to make a clear and direct connection between the disclosure of specific entries in the disputed information, the use of this information in the context of trade disputes and harm within the meaning of paragraph 20(1)(c) of the *ATIA*.

[119] Dealing first with the dispute with Boeing in the United States, it appears that duties that had been imposed by the U.S. Department of Commerce have now been rescinded following a

ruling by the International Trade Commission in January of 2018, with the result that there is no longer a live dispute between Boeing and Bombardier. As a consequence, the disclosure of the disputed information could not have any bearing on the outcome of that case.

[120] Insofar as Brazil's WTO complaint is concerned, this complaint involves Bombardier's "C Series" aircraft. However, as was noted earlier, Bombardier's "C Series" aircraft did not receive any funding through the TPC program. The disputed information relates to Bombardier's "CRJ Series" and "Q400" aircraft, and not the "C Series" aircraft program. Bombardier has not satisfactorily explained how information with respect to the funding it received through the TPC program in relation to its "CRJ Series" and "Q400" aircraft would be relevant to a trade dispute involving Bombardier's "C Series" aircraft.

[121] Bombardier's claim that Brazil will use the disputed information to create a false impression in the trade dispute also involves speculation about the litigation strategy of a sovereign state.

[122] Furthermore, I agree with the Office of the Information Commissioner that to the extent that Bombardier claims that Brazil will misuse the disputed information in the context of the WTO case, this implicitly acknowledges that the appropriate use of the information would not be harmful to it.

[123] In addition, as was noted earlier, the Supreme Court has held that courts should be sceptical about claims that the public misunderstanding of disclosed information will inflict harm on third parties: *Merck*, above at para. 224, and that refusing to disclose information for this reason would undermine the purpose of access to information legislation. The better approach is

to disclose the information so that the public can evaluate it for themselves: *Merck*, above at para. 224.

[124] While these comments were made in relation to a suggestion that the public may misunderstand disclosed information, analogous reasoning may be applied to Bombardier's argument regarding the potential misuse of the disputed information in this case: see also *Coopérative fédérée*, above at paras. 12 and 13; *Matol Botanical International Inc. v. Canada (Minister of National Health and Welfare)*, [1994] F.C.J. No. 860 at para. 23, 84 F.T.R. 168.

[125] Bombardier's argument also does not fully address the information that is already publicly available regarding monies that the company has received from the Government of Canada and has already repaid. As noted at paragraph 105 of the Information Commissioner's memorandum of fact and law, a certain amount of such information is already in the public domain, and it has not demonstrated that the disclosure of the disputed information would be of any real consequence in light of the publicly available information.

[126] I have, therefore, not been persuaded that Bombardier has a reasonable expectation that it will suffer harm in the context of international trade disputes that is "well beyond" or "considerably above" the merely possible.

(3) Conclusion Regarding the Exemption Claimed Under Paragraph 20(1)(c) of the *ATIA*

[127] As a consequence, I find that Bombardier has not demonstrated a reasonable expectation of probable harm within the meaning of paragraph 20(1)(c) of the *ATIA* that would directly result from the disclosure of the disputed information that is "well beyond" or "considerably above" the merely possible or speculative.

## VIII. Conclusion

[128] For these reasons, I am satisfied that Bombardier has failed to establish that the disputed information is exempt from disclosure under either paragraph 20(1)(b) or paragraph 20(1)(c) of the *ATIA*. In light of this conclusion it is not necessary to deal with the question of whether the information should be released under subsection 20(5) of the *ATIA*.

## IX. Costs

[129] The Office of the Information Commissioner has not sought its costs of this application, and none will be awarded in its favour.

[130] Bombardier asks that it have its costs with respect to the two 2014 applications for judicial review in any event of the cause. Bombardier submits that both of the 2014 decisions by ISED were unlawful, as ISED had previously made decisions with respect to the 2009 and 2011 access requests, and did not have the power to reconsider those decisions.

[131] As noted earlier, Bombardier's challenges to the 2014 decisions were consolidated with Bombardier's applications for judicial review with respect to the Information Commissioner's 2017 decisions.

[132] No reference was made to the legality of the 2014 decisions in the memorandum of fact and law that Bombardier filed with respect to the consolidated application for judicial review, either in relation to the merits of the application or in relation to the issue of costs. Nor was any mention made of this issue in counsel's submissions with respect to the merits of the consolidated application.

[133] The first time that any mention was made of the legality of the 2014 decisions was in counsel's oral submissions on the issue of costs at the conclusion of the hearing. Counsel for the Attorney General of Canada was clearly caught by surprise by this, which was understandable, given that it was an entirely new argument. Moreover, Bombardier did not identify the authority that it says supports its argument until its final submissions in reply.

[134] All of the parties agree that the 2014 applications for judicial reviews are now moot, as they have been superseded by the 2017 decisions. To accept Bombardier's argument on the costs issue, I would have to first decide the merits of the 2014 applications for judicial review. I acknowledge that I have the power to decide an issue notwithstanding the fact that it has become moot: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. I am not, however, prepared to do so in this case, especially as the Attorney General of Canada was given no advance notice that the legality of the 2014 decisions remained in issue, at least insofar as it related to the question of costs.

[135] The Attorney General of Canada is entitled to its costs of these applications. In accordance with the agreement of the parties, these costs are fixed in the amount of $2,600 inclusive of disbursements and GST.

**JUDGMENT IN T-1580-17**

**THIS COURT'S JUDGMENT is that:**

1. These four applications for judicial review are dismissed, with costs to the Attorney General of Canada fixed in the amount of $2,600.00 inclusive of disbursements and GST; and

2. A copy of these reasons shall be placed on each of files T-1580-17, T-1650-14, T-1750-14 and T-1579-17.

"Anne L. Mactavish"
Judge

Appendix

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|---|---|
| *Access to Information Act*,<br>R.S.C., 1985, c. A-1) | *Loi sur l'accès à l'information*,<br>L.R.C. (1985), ch. A-1) |
| 20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains | 20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant : |
| […] | […] |
| (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; | b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers; |
| […] | […] |
| (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or | c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité; |
| […] | […] |
| (5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates. | (5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | T-1580-17,T-1650-14,T-1750-14,T-1579-17 |
| **STYLE OF CAUSE:** | BOMBARDIER INC. v ATTORNEY GENERAL OF CANADA AND INFORMATION COMMISSIONER OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 20, 2018 |
| **PUBLIC JUDGMENT AND REASONS:** | MACTAVISH J. |
| **DATED:** | FEBRUARY 22, 2019 |

**APPEARANCES:**

| | |
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