Federal Court Cour fédérale

Date: 20210129

Docket: T-1617-18

Citation: 2020 FC 1103

Toronto, Ontario, January 29, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

SAMSUNG ELECTRONICS CANADA INC.

Applicant

and

THE MINISTER OF HEALTH

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued on November 30, 2020)

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I. Introduction

[1] The Applicant, Samsung Electronics Canada (SECA), seeks judicial review of a decision by the Respondent Minister of Health (Health Canada) to release a number of records requested under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*]. Health Canada issued two decisions: first in July 2018 (July Decision) and then again in August 2018 (August Decision).

[2] The August Decision, which is the subject of this Application, contemplates the release of two types of records: (1) Incident Logs (Logs) and (2) Recall Effectiveness Forms (Forms) (collectively, the Disputed Records). SECA provided both types of records to Health Canada during a voluntary recall in 2016 (Recall) of certain models of its Kenmore and Samsung-branded top-load washing machines (Washers).

[3] SECA argues that the Disputed Records are exempt from disclosure because they (i) contain confidential commercial information, and (ii) their release would harm SECA's competitive and financial position. Health Canada disagrees. Moreover, Health Canada asserts that this Application is procedurally barred because SECA should have brought an application for judicial review of the July Decision, but did not do so. It asserts that the August Decision underlying this Application is invalid because the *ATIA* does not authorize Health Canada to make more than one decision.

[4] Ultimately, I am neither convinced by Health Canada's procedural argument, nor by SECA's substantive argument that the Disputed Records should not be disclosed. I accordingly

decline to intervene. My reasons follow a short background that summarizes the context of this dispute.

II. Background

[5] In 2016, SECA became aware of a number of incidents involving its Washers, whereby the top lids of certain Washers detached while in use, causing damage to property, but no injuries or deaths. SECA communicated information regarding these incidents to Health Canada, pursuant to its obligations under the *Canadian Consumer Product Safety Act*, SC 2010, c 21 [*CCPSA*].

[6] In September 2016, SECA issued a press release stating that it was working with Health Canada regarding the Washers' potential safety issues. In October and November 2016, SECA issued two further press releases, in which it initiated the Recall. Pursuant to the Recall, SECA said that it had sold roughly 245,000 Washers between March 2011 and April 2016.

[7] SECA and Health Canada posted Recall notices on their respective websites, as part of the protocols required by the *CCPSA*. These notices provided information about the affected Washers, including the Washers' model numbers, years of sale, the total number impacted, and the hazard that led to the Recall. Specifically, SECA described the hazard in the public notices in similar terms as it had previously described the hazard to Health Canada, namely as: "abnormal vibrations, tending to occur when bedding is washed on the 'normal cycle'." SECA also noted in the public notices 64 reports of Washer tops detaching, 11 of which caused minor property damage.

[8] In January 2018, Health Canada received an access to information request for disclosure of records related to the Recall (Request). The Request, originally in French, reads:

> Le 4 novembre 2016, Santé Canada publiait en ligne le document intitulé Mise à jour et élargissement du rappel : Samsung Electronics Canada Inc. rappelle certaines /laveuses [*sic*] à chargements par le dessus, dont une copie est jointe à la présente lettre. Cet avis de rappel dont le numéro d'identification est le RA-60872 (« l'Avis »), visait divers modèles de laveuses à chargement vertical fabriquées par Samsung Electronics Canada Inc. (« Samsung »), dont les modèles de laveuses Kenmore. Nous désirons obtenir, conformément à la Loi sur l'accès à [l]'information (LRC 1985, c A-1), copie de l'ensemble du dossier de Sant[é] Canada concernant le rappel des laveuses SECA, y compris, mais sans s'y limiter:
>
> - l'ensemble de la correspondance échangée entre Santé Canada et Samsung concernant le rappel;
>
> - pour chacun des modèles de laveuses visées dans l'Avis, le nombre total de laveuses vendues
>
> [TRANSLATION] On November 4, 2016, Health Canada posted an online document called "Updated and Expanded Recall: Samsung Electronics Canada Inc. recalls Certain Top Load Washing Machines," a copy of which is attached to this letter. This recall notice, bearing identification number RA-60872 ("the Notice"), was for various models of top load washing machines manufactured by Samsung Electronics Canada Inc. ("Samsung"), including Kenmore washing machines. We would like to obtain, under the Access to Information Act (RSC 1985, c A-1), a copy of the full Health Canada file concerning the recall of SECA washing machines, including, but not limited to:
>
> - all correspondence exchanged between Health Canada and Samsung concerning the recall.
>
> - for each washing machine model mentioned in the Notice, the total number of machines sold.

[9] By letter dated April 20, 2018, Health Canada notified SECA – pursuant to third-party notice requirements in *ATIA* subsection 27(1) – of the records it had identified as responsive to

the Request (Section 27 Notice). Along with its Section 27 Notice, Health Canada provided SECA with an intended release package totalling 436 pages (Records Package), which informed SECA of the records that Health Canada intended to either partially or completely release. The Records Package included information that was already publicly available following the Recall (for instance, through the SECA and Health Canada websites). However, it also included information that was not publicly available, namely some of the information that SECA provided to Health Canada pursuant to its *CCPSA* obligations.

[10] SECA responded to Health Canada's Section 27 Notice by e-mail on May 28, 2018, explaining why it felt some records in the Records Package were exempt from disclosure pursuant to section 20 of the *ATIA*.

[11] SECA emphasized that it had consistently treated much of the Records Package as confidential business information, and specifically, had only supplied the Disputed Records to Health Canada on the understanding that those documents would remain confidential. For example, [redacted] the disclosure of which would prejudice SECA's competitive position. SECA asserted that it had also imposed a duty of confidentiality on employees and conducted annual compliance training on confidential records.

[12] Following numerous telephone and e-mail communications exchanged in the ensuing weeks, Health Canada conceded to additional redactions from the Records Package. However,

leading up to the July Decision, disagreement remained about the status of some non-redacted documents within the Records Package, including over the Disputed Records.

[13] In a July 9, 2018 e-mail, Health Canada advised SECA that it had sent the July Decision by mail, which included the section 28 notice letter and a package of records that Health Canada had determined were subject to disclosure under the *ATIA*. In that e-mail, Health Canada advised SECA that the package was "being considered formal [section 28] notice," and that should SECA disagree with the scope of disclosure, its only recourse would be to apply to the Federal Court for judicial review. However, that same e-mail advised SECA that Health Canada would nonetheless be "willing to listen to any specific and limited additional redactions [that SECA] may deem absolutely necessary."

[14] Between July 12, 2018, and August 16, 2018, the parties further discussed the appropriate scope of disclosure under the *ATIA*. Health Canada made further concessions. In an e-mail dated July 27, 2018, Health Canada advised SECA that it was "officially retracting" the July Decision, noting that:

> Health Canada has determined that due to the misinterpretation of some original representations and after taking additional information into consideration, Health Canada agrees that additional redactions should have been applied to a portion of the records; therefore, Health Canada is officially retracting the notice mentioned [in the July 10, 2018 s. 28 notice letter] and will be re-issuing a corrected Section 28 notice to [SECA] in the near future.
>
> [Emphasis added.]

[15] On August 1, 2018, Health Canada advised SECA by e-mail that it had sent another "proposed release package," and again asked the company to "advise of objections within five

days of receiving the records." SECA submitted additional representations to Health Canada on August 7, 2018.

[16] On August 13, 2018, Health Canada notified SECA by e-mail that it would "now have to move forward with the section 28 letter and make [its] final decision as the file [was] extremely late and the applicant [was] pressing for a reply." The e-mail indicated SECA would receive copies of the documents that Health Canada identified for disclosure in its upcoming August Decision. For SECA, the August 13, 2018 e-mail was the first time Health Canada had referred to a "final decision." Health Canada then issued its August Decision. SECA received this second section 28 notice on August 16, 2018, containing a narrower release package, consisting only of the Disputed Records. SECA then filed this Application on September 5, 2018, within the statutory time limit.

[17] On September 26, 2019, SECA cross-examined Curtis Mathews (Team Leader of Health Canada's Access to Information and Privacy Section) on his Affidavit that Health Canada provided in support of this Application. Mr. Mathews was the Health Canada official who had advised, in the July 27, 2018 e-mail to SECA, that Health Canada was "officially retracting" the July Decision and would be "issuing a corrected section 28 notice." During the cross-examination, Mr. Mathews confirmed that the July Decision was thereby "void and of no effect," and that the first time Health Canada mentioned the words "final decision" was with respect to the August Decision.

III. Issues and Analysis

[18] Before considering the substantive issue of whether the Disputed Records warrant exemption under the *ATIA*, Health Canada raises a preliminary procedural argument, which is that only the July Decision – and not the August Decision – is valid. In addition, SECA contends Health Canada violated procedural fairness by failing to provide SECA with a section 27 notice for all of the records that Health Canada identified as responsive to the Request.

A. *Preliminary issues*

(1) Which of the two decisions stands?

[19] Health Canada claims the August Decision is void and of no effect because the *ATIA* regime grants heads of government the authority to make only one decision regarding an access to information request. Because Health Canada issued a decision in July 2018 and a second decision in August 2018, Health Canada claims that the August Decision was made in error, and without authority, because the legislation only allows the Minister to make one decision. Health Canada contends that only the July Decision stands, and since SECA missed the *ATIA* section 44 (20-day) filing deadline to judicially review the July Decision, the Court lacks jurisdiction to hear this Application.

[20] To support the argument that the legislation permits only one possible section 28 decision, Health Canada relies on four cases: *Matol Botanical International Inc v Canada (Minister of National Health and Welfare)* (1994), 84 FTR 168, [1994] FCJ No 860 (QL)

(FCTD) [*Matol*]; *AstraZeneca Canada Inc v Health Canada*, 2005 FC 1451 [*AstraZeneca*]; *Porter Airlines Inc v Canada (Attorney General)*, 2013 FC 780 [*Porter*]; and *Recall Total Information Management Inc v Canada (National Revenue)*, 2015 FC 1128 [*Recall*].

[21] I am not persuaded by the principles that Health Canada extracts from these cases to support its argument that SECA should have challenged the July Decision because the August Decision was invalid. Four factors distinguish this case from *Matol*, *AstraZeneca*, *Porter*, and *Recall*, namely that in this case, Health Canada – the government institution – (i) invited SECA to provide further representations regarding disclosure after it had issued the July Decision; (ii) stated that it was "officially retracting" the July Decision following discussions with SECA; (iii) used the language of "final decision" in relation to the August Decision; and (iv) narrowed the scope of the disclosure package consistently throughout discussions with SECA until the company commenced this Application, after which Health Canada made no further decisions regarding disclosure.

[22] *Matol*, *AstraZeneca*, *Porter*, and *Recall* differed in each of these elements. First, the head of the government institution in those cases made further decisions after the third party had already applied for section 44 judicial review of the original decision. In *Matol*, for instance, this Court found that the *ATIA* did not authorise the institutional head to issue further decisions after a section 44 application for judicial review had already been filed with the Court, because the *ATIA* did not enable the head "to sit on appeal from its own decision" (at para 36). Similar scenarios occurred in *AstraZeneca*, *Porter*, and *Recall*. In contrast, here, Health Canada's August Decision came before SECA filed this Application. Health Canada did not re-decide an earlier

decision, but rather rescinded it as part of ongoing negotiations with SECA, and made no further decisions after SECA commenced this Application. Unlike in these four cases, I find that there was only a single decision made here – the August Decision.

[23] Another point of distinction is that the discussions between Health Canada and SECA that followed the Section 27 Notice and the July Decision led Health Canada to consistently narrow the scope of disclosure of the Release Package. This suggests Health Canada and SECA were working together, on an ongoing basis, to determine which records in the Records Package fell within an *ATIA* exemption. The July Decision must be examined in this context. SECA argues that the July Decision was a "preliminary draft decision" at best, and one Health Canada rescinded shortly after issuance, in light of its ongoing discussions with SECA. Although Health Canada issued a formal section 28 notice contemporaneously with the July Decision, its overall context distinguishes this case from the four cited by Health Canada.

[24] Taking a step back, it is worth noting that the Supreme Court of Canada (Supreme Court) has acknowledged that third parties entitled to a section 27 notice may be in the best position to know whether records fall within section 20 exemptions. In *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 [*Merck*], the Court wrote at para 79:

> Given the nature of the exemptions in issue — trade secrets, financial and other confidential information, etc. — the third party whose information is being considered is generally in a better position than the head of the institution to identify information that falls within one of the s. 20(1) exemptions. The third party knows and understands the industry in which it participates and has an intimate knowledge of the specific information, how it has been treated and the possible harm that could come from its disclosure.

[25] The reason that third parties may be in the best position to determine if a record falls within the section 20 exemptions is precisely why the *ATIA* requires that they be given the opportunity to both (i) respond to a section 27 notice of pending disclosure and (ii) to challenge a section 28 decision before this Court. The Supreme Court states that "[a] cooperative approach is necessary in order for the system to work" (*Merck* at para 90).

[26] Proposed disclosure packages are not set in stone until a final decision is issued. For instance, in *Wells v Canada (Minister of Transport)* (1995), 96 FTR 178 at 3, [1995] FCJ No 822 (QL) (FCTD) [*Wells*], Associate Chief Justice Jerome wrote of a preliminary decision:

> ...I have difficulty with [the Applicant's] contention that this decision is irreversible or that it amounts to a waiver which may be used to force the Minister to release documents, yet unreleased, that are properly held to be protected from disclosure. The effect of such a rule would be to foreclose any reconsideration of a decision to release documents to the public and bind the Minister at every step of an Access request once a decision in the affirmative was made or intimated by a lower level government employee. Moreover, the Minister or Head of the Government Institution already has a responsibility under the Act to disclose records requested unless that information is exempt from disclosure under the statute, a clear confirmation of that obligation prior to a review of the documents does not extend that obligation: *Air Atonabee v. Min. of Transport* (1989) 27 F.T.R. 194 at 204-5.

[27] While *Wells* did not involve a third party, it is nonetheless more analogous to the case at hand than the four cases cited by the Respondent on this issue (*Matol*, *AstraZeneca*, *Porter*, and *Recall*). In *Wells*, as in this case, the Minister's second decision narrowed the scope of disclosure from that which the institutional head had initially decided. In addition, the second decision in *Wells*, like here, came before any section 44 judicial review application had been filed. The Minister did not change position after the judicial review had been filed.

[28] Given the facts of this case, including Health Canada's invitation to SECA to provide further representations after having "officially retracted" the July Decision, and its notice of an imminent "final" decision just prior to issuing the August Decision, SECA had good reason to rely on Health Canada's representations regarding the July Decision, and good reason delay the commencement of an application for judicial review to continue negotiating with Health Canada.

[29] I am unpersuaded by Health Canada's argument, raised several months after this *ATIA* section 44 litigation was commenced in September 2018, that its August Decision was a "mistake." After all, the August Decision was not an isolated event, but rather one that involved a number of considered communications and negotiations. Based on assurances that the earlier notice had been "officially retracted" and a "final decision" would issue, the Applicant was entitled to rely on the department's representations.

[30] Looking at the sequence of events from a statutory compliance perspective – and consistent with the principles underlying *Matol*, *AstraZeneca*, *Porter*, and *Recall* – the August Decision was the only legal section 28 decision, and the institution cannot subsequently retract it in favour of the earlier, rescinded one.

(2) Promissory Estoppel

[31] SECA also invokes promissory estoppel in its arguments regarding the August Decision being determinative. I agree that this doctrine applies in the circumstances, as an alternative ground upon which to reject the Respondent's position that only the July Decision stands. Turning to that doctrine, in *Immeubles Jacques Robitaille inc v Québec (City)*, 2014 SCC 34 at

para 19 [*Robitaille*], the Supreme Court held that, in the public law context, promissory estoppel requires proof of a clear and unambiguous promise made to a citizen by a public authority to induce the citizen to perform a certain act.

[32] In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 45 [*Mount Sinai*] (affirmed in *Robitaille*), the Supreme Court re-articulated the test for the doctrine of promissory estoppel:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position....
>
> [T]he promise must be unambiguous but could be inferred from circumstances.

[33] I am aware that the doctrine of promissory estoppel has a narrow berth in the context of government decisions. As Justice Mainville wrote in *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130:

> [38] Though the doctrine of promissory estoppel may be available against a public authority, including a minister, its application in public law is narrow. As noted by Binnie J. in his concurring opinion in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (*Mount Sinai*) at para. 47, public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.
>
> [39] This principle has been expressed in various ways. In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950]

> S.C.R. 211, at p. 220, Rand J. expressed it as follows: "there can be no estoppel in the face of an express provision of a statute". In *Canada (Minister of Employment & Immigration) v. Lidder*, [1992] 2 F.C. 621 at p. 625, Marceau J.A. stated the principle as follows: "[t]he doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty"….
>
> [Emphasis added.]

[34] In *Malcolm*, the FCA refused to apply promissory estoppel to prevent a Minister from exercising his broad discretion in a way that did not align with the policy decisions of his predecessors: the Court recognized that the Minister had wide discretion, and that policy decisions of previous Ministers did not bind the incumbent. The principle drawn, then, is that a party cannot use the doctrine as a sword to prevent the exercise of a statutory duty, particularly where Parliament intended that duty to protect the interests of persons of special concern. In *Malcolm*, that duty was a discretionary decision-making power.

[35] The analogy in the *ATIA* context is that a third party cannot not use promissory estoppel to prevent an institution from exercising its statutory duty to make a decision regarding an access request, when section 28 of this legislation clearly spells out a duty to make such a decision. SECA, however, does not rely on promissory estoppel to prevent HC from making a decision. Rather, it asserts the promissory estoppel doctrine as a shield to prevent Health Canada from rescinding a decision properly made – the August decision – in favour of its retracted July decision. This reasoning holds water. Looking at the scenario differently, Health Canada cannot retract its first decision based on an error, engage in further negotiations on the promise of a prospective final decision, render that final decision, and then claw it back after the start of litigation to prevent SECA from challenging the decision in this Court.

[36] Health Canada intended for SECA to rely on its unambiguous words and conduct. The former rescinded its July Decision, and replaced it with its “final” August Decision. In between, it continued to work with SECA to determine the proper scope of disclosure. SECA relied on this when it decided not to file an unnecessary section 44 application for review of the July Decision. To do so would have been a waste of resources, including Health Canada’s and this Court’s, given that Health Canada indicated a continuing willingness to negotiate. SECA is thus entitled to defend its actions through the shield of promissory estoppel, and Health Canada cannot only, after the start of litigation and in hindsight, now say that it issued its second decision in error, such that only its first decision stands.

[37] In sum, I find that the August Decision is valid, that the July Decision has no force or effect, and that this Application was properly filed within the 20-day statutory deadline.

(3) Did Health Canada breach the principles of procedural fairness?

[38] SECA raised a procedural unfairness argument relating to the fact that Health Canada withheld some records from the original Records Package, which SECA only discovered after the withheld records were shared with SECA in the course of this litigation. Health Canada conceded at the hearing of this Application that it should have disclosed the withheld records in the Section 27 Notice. As these records have since been disclosed in the context of this Application, I find that SECA has not suffered any procedural unfairness.

B. *Substantive Issues*

[39] At the heart of this matter lies the substantive issue of whether Health Canada incorrectly failed to exempt the Disputed Records from disclosure under the *ATIA* on the basis of confidentiality (paragraph 20(1)(b)) or harm (paragraph 20(1)(c)).

(1) Standards of Review and Proof

[40] This is the first *ATIA* decision released since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the Supreme Court held that reasonableness is the default standard for judicial review. However, a clear indication that the legislature intended a different standard to apply rebuts this presumption (*Vavilov* at paras 32 and 34-35). *ATIA* subsection 44(1) provides that judicial review must be a *de novo* review, and is "to be heard and determined as a new proceeding."

[41] Therefore, without using the exact language of an "appeal," subsection 44(1) of the *ATIA* clearly indicates that Parliament intended that this Court conduct a correctness review. This means that I must decide anew whether the Disputed Records fall within an *ATIA* exemption, based on the evidence presented by the parties (*Merck* at para 3). *Merck* also confirms a long line of cases holding that a correctness standard applies (*Merck* at para 53). Both parties agree, as do I, that *Vavilov* does not change this standard.

[42] Finally, in terms of the burden of proof, *Merck* also instructs that the third party bears the onus of establishing any exemption from disclosure on a balance of probabilities (at paras 94-95).

(2) Are the records exempt from disclosure under *ATIA* paragraph 20(1)(b)?

[43] The Disputed Records contain two types of information: the (1) Logs and (2) Forms. SECA submitted these Disputed Records to Health Canada in the context of its 2016 Recall, pursuant to its obligations under section 14 of the *CCPSA* recall protocols, under which the manufacturer must inform Health Canada of any events that meet the statutory definition of an "incident" within two days of becoming aware of such events (*CCPSA*, subsection 14(2)). The *CCPSA* defines "incident" in paragraphs 14(1)(a) and (b), as an occurrence, defect, or characteristic that may reasonably have been "expected to result in an individual's death or in serious adverse effects on their health, including a serious injury."

[44] Here, the Disputed Records came into existence after events involving the Washers met the statutory definition of an "incident." Before assessing whether the information in the Disputed Records falls within an exemption under paragraph 20(1)(b), a brief description of them follows.

(a) *The Logs*

[45] In their full format, the Logs contain a table featuring six columns: (1) Customer Name; (2) Customer Address; (3) Model number; (4) Date of Incident Report; (5) Customer Report to

Customer Service; and (6) Resolution. Following discussions with SECA, Health Canada agreed to redact columns (1) and (2), “Customer Name” and “Customer Address,” pursuant to *ATIA* subsection 19(1) because they contained personal information. Health Canada also agreed to redact column (6), “Resolution,” because it accepted SECA’s arguments that the column contained confidential information that was scientific, commercial, technical, or financial under *ATIA* paragraph 20(1)(b). Health Canada refused to withhold the remaining columns from disclosure, citing its obligation under the *ATIA* to release them.

(b) *The Forms*

[46] The Forms are standard three-page questionnaires from Health Canada. Third parties must complete these questionnaires as part of the consumer product incident and recall process. In addition to general contact information, the Forms request information through blank “fields,” to be filled in by parties that have communicated “incidents” to Health Canada. The Forms request further information from third parties, including: the total number of affected units; the total number of distributed units; the kinds of measures that the third party has taken to notify the public of incidents (*i.e.*, notices in retail outlets, on websites, or in other media); the number of consumers affected (including the number of consumers who have been contacted and who have responded); the kinds of response measures that have been taken in remediation (*i.e.*, how many customers were contacted, the mode of contact, and the number of product returns, refunds, exchanges, and repair kits that have been processed); and updates on the number of incidents. The Forms also request information about deaths or injuries related to the incidents.

[47] [redacted]

[48] Pursuant to discussions with SECA, and as occurred with the severed portions of the logs described above, Health Canada also redacted certain portions of the Forms in accordance with *ATIA* requirements. It redacted: [redacted]. Health Canada made these redactions pursuant to *ATIA* subsection 19(1) and paragraph 20(1)(b).

(c) *Parties' Arguments regarding paragraph 20(1)(b)*

[49] SECA asks this Court to exempt the Disputed Records from disclosure under *ATIA* paragraph 20(1)(b), and thus prohibit their release. SECA argues that the Disputed Records contain sensitive commercial information, which it has consistently treated as confidential.

[50] Specifically, SECA states the Logs . SECA notes that the Forms contain . The company also points to its .

[51] SECA notes that it has consistently imposed strict confidentiality requirements on its employees, including having them sign confidentiality agreements and attend annual compliance training, and that it provided the Disputed Records to Health Canada with a reasonable expectation of confidence. SECA further claims that the information in the Disputed Records is not otherwise available to the public.

[52] Health Canada responds that the Disputed Records are not exempt under paragraph 20(1)(b) for four reasons. First, Health Canada says the information in the Disputed Records is not “financial, commercial, scientific or technical” within the meaning of the *ATIA*. It characterizes the information in the Disputed Records as falling outside the scope of paragraph 20(1)(b). Health Canada argues that the fact that does not change the nature of the information.

[53] Second, Health Canada contends that some of the information in the Disputed Records is already publicly available. This type of information includes:

[redacted]. Health Canada states that it regularly releases information related to the number of incidents reported for voluntary recalls, or, when requested by the public, information related to incident logs or consumer complaints (with personal information redacted). Health Canada argues that, to the extent that information in this case was not already publicly available, anyone could obtain it through observation or by surveying customers.

[54] Third, Health Canada argues that SECA has not met its burden of establishing a reasonable expectation of confidentiality. The [redacted] Disputed Records are insufficient in and of themselves for SECA to establish the confidential nature of the Disputed Records. [redacted]

[55] Finally, Health Canada contends SECA failed to demonstrate that keeping the Disputed Records confidential fosters a relationship between the institution and the third party that is in the public benefit. Health Canada notes that SECA submitted the Disputed Records as a result of its obligations under the *CCPSA*. Indeed, Health Canada states that mandatory reporting under the *CCPSA* acknowledges the important role industry plays in product safety, and provides it with a broad understanding of safety-related incidents occurring with consumer products, in a relationship between manufacturer and regulator for the public benefit.

(d) *The Key ATIA Statutory Provisions*

[56] The two key *ATIA* provisions at issue in this Application read:

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part 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;
…	[…]

[57] To consider whether a certain record must be disclosed under the *ATIA*, it is important to recall the tension at the heart of the *Act*, and the competing interests that courts must balance in applying its provisions. Justice Mactavish discusses these in *Bombardier Inc v Canada (Attorney General)*, 2019 FC 207 [*Bombardier*], at paras 35-38:

> [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, 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.

[58] In short, courts must examine section 20 exemptions in light of the *ATIA*'s overall purpose, which is to "enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions" (*ATIA*, subsection 2(1)). However, this Court must also balance this right of access with the rights of affected third parties, such that "necessary exceptions to the right of access should be limited and specific" (*ATIA*, paragraph 2(2)(a)).

[59] I will now turn to first consider the question of whether SECA has met its burden of establishing that the Disputed Records fall into the confidentiality exemption (paragraph

20(1)(b)), and then consider whether the Disputed Records should be exempted from disclosure due to alleged harm (paragraph 20(1)(c)).

(i) Paragraph 20(1)(b) Analysis

[60] A third party arguing that information is exempt from disclosure pursuant to paragraph 20(1)(b) bears the burden of establishing four criteria on a balance of probabilities. The third party must establish that the information in question is: (i) financial, commercial, scientific, or technical in nature; (ii) confidential; (iii) consistently treated in a confidential manner by the third party; and (iv) supplied to a government institution by a third party: *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 27 FTR 194 at 19, [1989] FCJ No 453 (QL) (FCTD) [*Air Atonabee*]; see also *Merck* at para 133, and *Bombardier* at para 43.

[61] The third party must establish all four criteria of this conjunctive test in order to succeed (*Bombardier* at para 44). Therefore, the failure to establish any one of the four criteria will be fatal to a third party's claim for an exemption. Conversely, if the third party establishes all four criteria, the information will be exempt from disclosure under the *ATIA*, subject to the obligation to sever non-exempt information under section 25, or other statutory overrides such as the public interest override in subsection 20(6) (which was not argued in this case). The government head has no discretion with respect to its disclosure obligations (*Merck* at para 97; *AstraZeneca* at para 53).

[62] Justice MacKay in *Air Atonabee* (at 26-27) expanded on the second criterion, writing that "whether information is confidential will depend on its content, its purposes and the circumstances in which it was compiled and communicated," namely:

> (a) that the content of the record is such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> (b) that the information originates and be communicated in a reasonable expectation of confidence that it will not be disclosed; and
>
> (c) that the information is 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.

[63] Combining the analyses of *Air Atonabee* and *Merck* (at para 133), and considering *Burnbrae Farms Limited v Canada (Canadian Food Inspection Agency)*, 2014 FC 957 [*Burnbrae Farms*] at para 66, the third party must establish each of the following components, in order to exempt information from disclosure:

1. the information is financial, commercial, scientific or technical;
2. the information is confidential, in that;
    a. it is not publicly available;
    b. it originated and was communicated in a reasonable expectation of confidence it would not be disclosed; and
    c. it was communicated out of a fiduciary relationship or one that is not otherwise contrary to the public interest, and maintaining its confidentiality will foster that relationship for the public benefit;

3. the third party consistently treated the information as confidential; and
4. the third party supplied the information to a government institution.

[64] SECA has failed to persuade me that the Disputed Records warrant exemption from disclosure under paragraph 20(1)(b) for two reasons. First, I find that the portions of the Disputed Records that Health Canada has not already exempted from disclosure lack any "financial, commercial, scientific or technical" information within the meaning of the *ATIA*. Second, I am not persuaded that the information in the Disputed Records is confidential. With SECA unable to establish each component of the four-part test, the Disputed Records must be disclosed, as explained in more detail below

(ii) Financial, commercial, scientific or technical information

[65] Defining what constitutes "financial, commercial, scientific or technical" information is a deceptively delicate task. In *Merck*, the Supreme Court adopted Justice MacKay's approach in *Air Atonabee*, which called for the terms to be given their "ordinary dictionary meanings" (*Merck*, at para 139). The Court also found that disputed information need not have any inherent value to meet this criterion (*Merck*, at para 140).

[66] Neither party suggested, and nor do I find, that the information in the Disputed Records qualifies as "financial" or "scientific." The key question, then, is whether the Disputed Records contain "technical" or "commercial" information within the meaning of the *ATIA*.

1. *“Technical” information*

[67] Common online dictionary definitions of the word “technical” include: “[a person] having knowledge of or expertise in a particular art, science, or other subject; skilled in the formal and practical techniques of a particular field” (Oxford English Dictionary online: <www.oed.com/view/Entry/198447>); information relating to “the sort of machines, processes, and materials that are used in industry, transport, and communications” (Collins Dictionary online: <www.collinsdictionary.com/dictionary/english/technical>); “to the practical use of machines or science in industry, medicine, etc.,” and “having special knowledge especially of how machines work or of how a particular kind of work is done” (Merriam-Webster Dictionary online: <www.merriam-webster.com/dictionary/technical>).

[68] Not everything that relates to a consumer product necessarily qualifies as technical. For instance, in *Information Commissioner of Canada v Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157 at para 70 [*Safety Board*], Justice Desjardins explained that it is “incorrect… to characterize the entire record collected during an air navigation flight as being ‘technical’ information when only a specific part might be, for instance when precise flight instructions are given.” Similar to the situation in *Safety Board*, while certain aspects relating to SECA’s products could qualify as technical, such as the design and manufacturing of the Washers, none of that kind of information is found in the Disputed Records. Accordingly, I am not persuaded that the Disputed Records contain “technical” information, as the term is commonly understood and defined.

2. *"Commercial" information*

[69] This leaves "commercial" as the only type of information category into which the Disputed Records could fall. Turning back to definitions, the three online dictionaries referenced above define "commercial" as "engaged in commerce; trading" (Oxford English Dictionary online: <www.oed.com/view/Entry/37081>); "involving or relating to the buying and selling of goods; concerned with making money or profits, rather than, for example, with scientific research or providing a public service" (Collins Dictionary online: <www.collinsdictionary.com/dictionary/english/commercial>); and "occupied with or engaged in commerce or work intended for commerce" (Merriam-Webster Dictionary online: <www.merriam-webster.com/dictionary/commercial>).

[70] When considering similar definitions for "commercial" in *Novartis Consumer Health Canada Inc v Canada (Minister of Health)*, 2013 FC 508, [2013] FCJ No 1450 (QL) at para 29 [*Novartis*], Justice Hughes noted, "I find that these definitions are not particularly helpful and are somewhat circular in their meaning; (e.g.) commercial has to do with commerce." I agree. The dictionary definitions of "commercial" provided above are exceedingly broad, potentially capturing almost any information relating to a business or organization, regardless of its purpose or context.

[71] As noted above, *Merck* established that the Applicant only needs to meet a civil burden of proof, which is to satisfy the paragraph 20(1)(b) exemption on a balance of probabilities. It also pointed out that "what evidence will be required to reach that standard will be affected by the

nature of the proposition the third party seeks to establish and the particular context of the case" (*Merck*, at para 94, emphasis added).

[72] The context in which information is communicated is a central factor in cases where a third party is claiming an exemption from disclosure under the *ATIA*. The parties in this Application confirmed that there is no case law interpreting the *ATIA* paragraph 20(1)(b) exemption in the context of a *CCPSA* recall. The modern approach to statutory interpretation should be used, reading paragraph 20(1)(b) contextually, in its grammatical and ordinary sense, taking into account the *ATIA*'s scheme and purpose, including Parliament's intent (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo*]).

[73] While "commercial" has not been considered in the context of a *CCPSA* recall, it has been interpreted in analogous contexts. I begin with *Brewster Inc v Canada (Environment)*, 2016 FC 339 [*Brewster*]. There, Justice Phelan considered a request to disclose communications between the applicant and Parks Canada relating to the approval process for a Jasper National Park project. He noted that the applicant failed to demonstrate that the communications in question contained commercial information:

> [16] It is too broad an argument that because Brewster is in business and engaged with Parks Canada on a proposed commercial enterprise, all records (in this case primarily correspondence) should be characterized as commercial.
>
> [17] Section 20(1)(b) creates a class-based (as opposed to a harm-based) exemption. Inclusion in this class does not depend on the context surrounding the request. Brewster must objectively satisfy all three criteria of the provision – the type of information; its quality and treatment; and its provenance.

> [18] The type of information covered by the provision typically includes costs, profits, pricing strategies, manufacturing processes, business or operations methods.
>
> [19] As noted by the Minister and expanded upon by the Information Commissioner, administrative details such as page numbering, dates, location of information and e-mails scheduling meetings or phone calls are not the type of information contemplated by s 20(1)(b).
>
> [Emphasis added.]

[74] Justice Phelan's articulation captures a narrower understanding of what constitutes "commercial" for the purposes of *ATIA* paragraph 20(1)(b), overcoming some of the problems identified in *Novartis* with the broader, "circular" definition of "commercial" (*i.e.*, "having to do with commerce"). I agree that costs, profits, pricing strategies, manufacturing processes, and business or operations methods are at the bedrock of running a commercial enterprise, and that it is this type of information Parliament intended the statutory exemption to capture, rather than the administrative details.

[75] I note that the passage above also provides the important observation that "inclusion in this class does not depend on the context surrounding the request" (*Brewster*, at para 17). That is, why someone requests access to information in the hands of government is irrelevant. What is crucial, rather, is the context in which the information is gathered. In other words, the circumstances in which the information came into the hands of government is central to characterizing that information, and determining whether it ought to be disclosed.

[76] *Brewster* is not unique in articulating a narrower concept of "commercial." Other cases have recognized a distinction between information of a commercial nature and information

merely obtained in the course of business or commerce. For example, in *Provincial Airlines Limited v Canada (Attorney General)*, 2010 FC 302 at para 26 [*Provincial Airlines*], Justice Mandamin held that a security designation assigned to the applicant in that case by the Federal Government in relation to a maritime aerial surveillance contract was not "commercial" information. He found the information did not relate to "the ongoing conduct of business," but rather, "related to an enterprise's capacity to maintain confidentiality" (*Provincial Airlines*, at para 28). In other words, neither the purpose nor the nature of the security designation was commercial, despite arising out of a commercial contract.

[77] To support his conclusion, Justice Mandamin relied on the Federal Court of Appeal decision in *Safety Board*, which refused to characterize as "commercial" information collected by NAV CANADA, notwithstanding that NAV CANADA's business model included the provision of fee-based navigation services to airlines. Justice Desjardins explained, on behalf of the Federal Court of Appeal at para 69, that:

> [69] Common sense with the assistance of dictionaries (*Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 at 208) dictates that the word "commercial" connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as "commercial".
>
> [Emphasis added.]

[78] In *Brainhunter (Ottawa) Inc v Canada (Attorney General)*, 2009 FC 1172 at paras 23-24 [*Brainhunter*], this Court concluded that information relating to the way a company satisfies the requirements of a Request for Proposals (RFP) as part of a government tender process was not

commercial in nature. Justice Martineau refused to accept the argument that any information arising out of the bid document for a commercial contract was “commercial” within the meaning of the paragraph 20(1)(b) exemption. He found the fact that the business transaction involved commerce was insufficient in itself; rather, for a record to qualify as “commercial,” “the record must actually contain ‘commercial information’” (*Brainhunter* at para 23, citing *Appleton & Associates v Canada (Privy Council Office)*, 2007 FC 640 [*Appleton*]).

[79] *Appleton* involved a request for information relating to international arbitration that alleged that Canada violated treaty obligations by allowing Canada Post’s courier service to compete in the private sector. Similar to *Brainhunter*, in rejecting that the disputed records contained confidential information, Justice O’Reilly held that “the document must itself contain financial or commercial information. It is not enough that the document was created in the context of a proceeding that may have financial or commercial implications” (*Appleton*, at para 26).

[80] Indeed, *Brainhunter* required “direct evidence” of confidential commercial information, and the court in that case found that:

> [24] The record in question does not relate to trade or commerce, but reflects the basic fact that the applicant wants to trade services for money with the government. A very large portion of the remaining information contained in the record pertains exclusively to the way in which various candidates satisfy the mandatory requirements for the positions set out in the RFP. By itself, this information is not commercial in nature. That said, there is some general corporate information in the executive summary and there are references to previous contracts with governmental organizations for similar services; however the Court doubts very much that any such general information can be labeled “commercial”. In any event, the applicant has failed to

> provide actual direct evidence of any specific confidential commercial information.
>
> [Emphasis in original.]

[81] Turning to *Burnbrae Farms* at para 73, Justice Strickland, in the context of Canadian Food Inspection Agency (CFIA) inspection reports, found only limited information to be commercial for the purposes of paragraph 20(1)(b) – namely only information relating to customer and brand names, and the volume of product shipped. Justice Strickland premised her reasoning on the requirement that information had to "relate or pertain" to matters of commerce (harkening back to the original definition in *Air Atonabee* as endorsed in *Merck*). After a comprehensive review, she held that the bulk of the information did not satisfy this definition.

[82] I will end this review of the judicial interpretation of "commercial" in subsection 20(1)(b) back where it began – with *Novartis*, which has parallels to the present case. In *Novartis*, the applicant drug manufacturer was required under the *Food and Drugs Act*, RSC 1985, c F-27 and the *Food and Drug Regulations*, CRC, c 870, to annually report adverse drug reactions to Health Canada to ensure product safety. The applicant objected to the proposed disclosure of the narratives section of its annual summary report of all information relating to adverse drug reactions.

[83] Discussions between Health Canada and Novartis regarding disclosure ensued and, as with SECA here, Health Canada agreed to several additional redactions. After referencing the "circular" dictionary definition of commercial (described in paragraph 70 above), undertaking a detailed review of the context, and considering that much of the report narratives were already

public, Justice Hughes concluded that they did not to contain information not otherwise public that is commercial, scientific, or technical (*Novartis*, at paras 31-32).

[84] Again, the challenge in SECA's case relates to the yet-uncharted territory of the Request having been made in relation to a voluntary recall, within the novel context of the *CCPSA*. In the analogous cases reviewed above, which interpret the meaning of "commercial" under paragraph 20(1)(b), two key observations emerge.

[85] First, attributing an overly narrow definition to "commercial" runs afoul of the ordinary meaning envisioned by the Supreme Court in *Merck*, and indeed, the broad and purposive analysis of the exemptions that the *ATIA* requires (*Bombardier*, at para 36). By the same token, an overly broad interpretation of "commercial" risks eroding the *ATIA*'s objective to facilitate democracy through the right of timely access to records under government control and ensuring that exemptions from disclosure remain limited and specific (*ATIA*, subsection 2(1); *Merck*, at para 106; *Bombardier*, at para 35).

[86] Second, a fundamental distinction exists between information merely collected or created in the course of business or commerce, and information of a commercial nature. Inherently commercial information warrants exemption from disclosure (where it satisfies the other paragraph 20(1)(b) requirements). Conversely, information merely collected or created in the course of business does not tend to imbue it with a commercial nature – unless of course that information is inherently commercial. The key take-away is that information merely arising in

parallel with a commercial enterprise's existence may well not qualify for exemption under paragraph 20(1)(b).

[87] The decisions examined above (*Safety Board*, *Novartis*, *Brewster*, *Burnbrae Farms*, *Brainhunter*, and *Provincial Airlines*) all support these two key observations. While SECA's case raises additional considerations given the novel context, it resembles the six cases above in that they all concluded that disputed information was not commercial, despite being collected in the course of business. Like under the *CCPSA*, the requestor in those cases sought access to information collected in the context of a regulatory scheme – either in the context of government inspections (*Burnbrae Farms*, *Novartis*, *Provincial Airlines*, and *Safety Board*) or bids for public contracts (*Brainhunter* and *Brewster*). As for *Appleton*, while it did not arise out of a regulatory reporting requirement or inspection context, it too shares basic principles with the other cases, namely that "commercial" information does not extend to every document associated with commerce or trade.

[88] To conclude the interpretation of paragraph 20(1)(b), I turn back to the principles enunciated in *Rizzo*. Parliament chose to use the word "commercial," and nothing more precise. Yet, Parliament chose to strike a balance in the *ATIA* between granting the public access to government information and protecting the interests of third parties (*Merck*, at para 4; *Bombardier*, at para 38). Parliament also chose to say – right up front in the *ATIA*'s purpose provisions – that any exceptions should be "limited and specific" (section 2). Accordingly, one cannot simply use an amorphous, overly broad definition to interpret the word "commercial" in the paragraph 20(1)(b) exemption; rather, one must examine the context in which the information

in the hands of the government institution arose. From there, the task is to determine whether it is the type of information Parliament intended to exempt from the general rule of public disclosure.

[89] I am satisfied that Parliament did not intend to exempt the type of information at issue in the Disputed Records. That information, which Health Canada has not already redacted pursuant to *ATIA* subsection 19(1) or paragraph 20(1)(b), is not commercial in nature, but rather relates to public safety. It was submitted to Health Canada in furtherance of the *CCPSA*'s purpose to protect the public "by addressing or preventing dangers to human health or safety… posed by consumer products in Canada" (section 3).

[90] Doubtless, a recall is an extraordinary measure that falls outside the normal conduct of a commercial enterprise's affairs. SECA is ordinarily in the business of manufacturing and selling consumer products, not recalling them. Indeed, if the *CCPSA* regime did not exist, and if the Washers' hazard had not arisen, the Disputed Records would likely not have been created. Accordingly, there is a lack of nexus between SECA's ordinary or regular course of business and the creation of the Disputed Records.

[91] In sum, I find that since the Disputed Records contain no "financial, commercial, scientific or technical" information as required by paragraph 20(1)(b), they must be disclosed. Further, I do not find them to be "confidential."

(iii) "Confidential" information

[92] Determining whether information is confidential depends upon its content, purposes and the circumstances in which it was compiled and communicated (*Air Atonabee*, at 26-27). The inquiry is primarily a question of fact, one that demands careful regard to the specific evidence presented, without overgeneralizing the holdings of past cases (*Merck*, at para 150). I now turn to address each of *Air Atonabee*'s three indicia of confidentiality set out in detail above in paragraph 62 of these Reasons.

1. *Was the information is publicly available?*

[93] Health Canada argues that although certain parts of the Disputed Records were not publically available, a member of the public could nonetheless obtain them through independent observation or by surveying customers. Health Canada also argues that, in any event, it regularly releases similar information relating to product recalls.

[94] I disagree with Health Canada's arguments on both counts. First, a single person acting alone would require a huge investment of time and resources to compile the information in question, if they were even able to do so (*Air Atonabee*, at 22). Second, the information in question has not itself been released.

[95] In *Canadian Imperial Bank of Commerce v Canada (Human Rights Commission)*, 2007 FCA 272, the Federal Court of Appeal clarified the inquiry necessary to determine whether information was publically available for the purposes of assessing confidentiality:

> [61] ... In *Air Atonabee*… the test for confidential information was said to be that "*the content of the record* be such that the information it contains is not available from sources otherwise accessible by the public" (emphasis added): see *Air Atonabee Ltd.*, at para. 42[.] Thus the test is not whether information of the same kind is available in the public record but whether the specific information can be found there.

[96] Here, as the specific information found in the Disputed Records has not otherwise been released or published, it is neither accessible to the public nor publicly available.

2. *Did the information originate, and was it communicated, with a reasonable expectation of confidence that it would not be disclosed?*

[97] SECA submits that the Disputed Records originated and were communicated in a reasonable expectation of confidence for two principal reasons: (i) ██████████ ██████████████ and (ii) because the nature of their contents was so sensitive that it was reasonable to expect they would be treated as confidential.

[98] I disagree. Numerous decisions have attenuated the expectation of confidence vis-à-vis information provided in regulatory contexts, particularly with respect to conclusions or reports prepared by the regulatory body (for example, *Burnbrae Farms*, at paras 61-62; *Porter Airlines Inc v Canada (Attorney General)*, 2014 FC 392 at paras 56-59 [*Porter 2014*]; *AstraZeneca*, at para 76).

[99] I recognize that distinctions may exist impacting the expectation of confidentiality of information given the context, such as for regimes in which inspectors visit third party premises

to observe and record information for regulatory purposes (*Les viandes du Breton Inc v Canada (Canadian Food Inspection Agency*), 2006 FC 335 at paras 44-52 [*Viandes*]), or even when considering government tendering processes (see for example, *Brainhunter*).

[100] The fact that a third party considers information "confidential" within their walls does not alter the regulator's duty to comply with its own statutory obligations, that is, to collect and disclose information as required by law (*Burnbrae Farms*, at para 62). Neither can the third party shirk its obligation to disclose information that the law requires it to disclose (*Porter 2014*, at para 72). As Justice Gauthier noted in *Viandes* (in the context of meat processing reports compiled by CFIA inspectors), "[t]he fact that the reports and the information they contain are treated confidentially within the business does not in any way alter the way in which they are treated by the [CFIA] or the principles set out in the [*ATIA*]" (at para 52).

[101] Here, pursuant to section 14 of the *CCPSA*, SECA had a legal obligation to compile and provide the Disputed Records to Health Canada. As noted above, Parliament has provided no guidance as to how the *CCPSA* interacts with the *ATIA*, nor have the Courts interpreted the law in the context of recalls.

[102] In SECA's situation, there was no preordained right or expectation of confidentiality between SECA and Health Canada. Rather, [redacted] [redacted]. And while nothing in the Disputed Records expressly indicates that the information would be subject to the *ATIA*, [redacted] [redacted] cannot relieve the institution from its duty to comply with the *ATIA* (*Burnbrae*

Farms, at para 62; *Viandes*, at para 52). Just as parties cannot contractually agree to circumvent mandatory statutory obligations, neither can those obligations disappear simply because the third party misunderstood them. As Justice Phelan noted in *AstraZeneca*:

> [80] While the fact that government and third parties have kept the information confidential to date is one aspect of the test, it is not determinative, nor is the fact that the records have a notation related to them that they are not to be released without the third party's permission.
>
> [Emphasis added.]

[103]

[104] Finally, *ATIA*'s Schedule II lists some 65 statutes that Parliament expressly intended to shield from the *ATIA*. The *CCPSA* does not appear among the Schedule II statutes. Had Parliament intended to exclude the *CCPSA* from disclosure under the *ATIA*, it could have done so.

[105] To summarize on this second of the three confidentiality criteria, although SECA might have subjectively expected that the information in the Disputed Records would remain confidential, its expectation in this regard was not objectively reasonable (see *Burnbrae Farms*, at para 61; *Brookfield Lepage Johnson Controls Facility Management Services v Canada*

(Minister of Public Works and Government Services), 2003 FCT 254 at para 16, aff'd 2004 FCA 214). As explained above in the discussion of "commercial" information, the Disputed Records came into existence because of the Recall, in the context of the *CCPSA*. The context was one of consumer and public safety, and it was unreasonable for SECA in this context to expect confidentiality.

[106] Furthermore, I have already noted that much of the Disputed Records' content was already disclosed in Recall notices. The key information not yet disclosed [redacted] but do not change their nature. In any case, SECA's characterization of the incidents, as included in public notices of the Recall, should not be determinative of their nature. The fact that [redacted] are any more confidential than the descriptions that SECA used in public Recall notices.

3. *Does confidentiality serve the public interest?*

[107] SECA asserts that the public interest requires that the Disputed Records remain confidential, in order to incentivize third parties, like SECA, that are subject to both the *CCPSA* and the *ATIA*, to "continue to provide detailed information to Health Canada regarding a recall of a product from the Canadian market without fear of public disclosure of their confidential

information” (Applicant’s Memorandum of Fact and Law, at para 85). SECA further suggests that failing to protect the confidentiality of the Disputed Records would have a “chilling effect” on the quality and comprehensiveness of information provided by third parties to Health Canada.

[108] I cannot support the slippery slope that is implicit in SECA’s “chilling effect” argument. As Justice Rennie stated with respect to a similar argument advanced in *Porter 2014*, “[a] fear that disclosure of regulatory findings would hinder communication would apply to other federally regulated industry, well-beyond airlines. I cannot accept that this Court should preclude the disclosure of regulatory findings on the basis that it will encourage regulated entities to not disclose information that they are legally required to disclose” (at para 72).

[109] In short, I cannot agree with SECA that exempting the Disputed Records from disclosure enhances the public interest: rather, it would undermine the strong public interest in obtaining access to information (*Toronto Sun Wah Trading Inc v Canada (Attorney General)*, 2007 FC 1091 at para 23, aff’d 2008 CAF 239).

[110] I now turn to the last section of these Reasons, to address SECA’s argument that harm or prejudice will result from disclosure of the Disputed Records, within the meaning of the exemption contained in *ATIA* paragraph 20(1)(c).

(3) Are the records exempt from disclosure under *ATIA* paragraph 20(1)(c)?

[111] There are two circumstances under which records are exempt from disclosure pursuant to *ATIA* paragraph 20(1)(c). These circumstances exist where the disclosure of the information

could reasonably be expected to result in either (i) material financial loss or gain, or (ii) prejudice to the competitive position of the third party. These are disjunctive criteria, rather than conjunctive, unlike paragraph 20(1)(b). Also unlike paragraph 20(1)(b), one must note that paragraph 20(1)(c) is a harms-based exemption that focuses on prejudice flowing from the disclosure of information. The two principal considerations under paragraph 20(1)(c) are the degree of likelihood of harm, and the type of harm (see *Porter 2014*, at para 79).

[112] In *Merck*, the Supreme Court considered the "reasonable expectation of probable harm" that had been applied in the paragraph 20(1)(c) analysis. It noted that courts had struggled to reconcile the test's use of "probable," which implies that something is more likely than not to occur, with "reasonable expectation," which implies that something is at least foreseen and perhaps likely to occur, but not necessarily probable (*Merck*, at para 196). The Supreme Court concluded that while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, it must nonetheless do more than show that such harm is merely possible (*Merck*, at paras 196, 206). Disclosure of information that is not already public, which would give competitors a head start in developing competing products, or a competitive advantage in future transactions, may meet the requirements of paragraph 20(1)(c) (*Merck*, at paras 219-220).

[113] Finally, but notably in SECA's case, the evidentiary burden for an applicant to successfully claim the paragraph 20(1)(c) exemption cannot be satisfied simply by affidavit evidence that affirms that disclosure would cause the type of harm described in the provision (*Merck*, at para 227; see also *AstraZeneca*, at para 90; *Viandes*, at para 9). Instead, further

evidence is required that establishes that harmful outcomes are reasonably probable (*Brainhunter*, at para 32). Evidence of harm flowing from disclosure can only be determined on the basis of the specific records at issue in an access request. Such an assessment is fact-specific and turns on the circumstances of each case (*Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135 at para 44).

[114] Having reviewed the guiding principles and standard of proof to satisfy the harm-based test under paragraph 20(1)(c), I turn to SECA's arguments and an assessment of whether SECA will suffer harm as a result of disclosure of the Disputed Records.

[115] SECA argues that the information in the [redacted] . SECA also argues that, given the competitive market for washing machines in Canada, the disclosure of the Disputed Records may be reasonably expected to result in material financial loss and prejudice to SECA's competitive position.

[116] SECA bases its argument on statements in the Affidavit of Konrad Baranowski, SECA's Director of Supply Chain Management and Operations. Mr. Baranowski states in his Affidavit that the disclosure of the Disputed Records would cause serious and substantial financial harm to SECA, and hamper its ability to continue to sell and market washing machines in Canada. Mr. Baranowski further states that there is a limited market for washing machines in Canada, which creates a high level of competition among manufacturers and sellers of washing machines. [redacted]

Mr. Baranowski states that

He deposed that either scenario would likely result in serious financial loss to SECA and a financial gain to competitors (see Affidavit citations at Applicant's Record, p 13).

[117] In my view, these statements in an Affidavit, without more, do not "demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative" (*Merck*, at para 203). As Justice Phelan wrote in *AstraZeneca*:

> [46] Recognizing the inherently speculative nature of proof of harm does not however relieve a party from putting forward something more than internally held beliefs and fears. Evidence of reasonably expected results, like forecasting evidence, is not unknown to courts and there must be a logical and compelling basis for accepting the forecast. Evidence of past documents of information, expert evidence, evidence of treatment of similar evidence or similar situations is frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

[118] Here, I note once again that much of the information regarding the Recall had already been made publicly available in the notices posted on Health Canada and SECA's web sites. SECA has not made it clear – or provided any corroborating or objective evidence – as to how information on the Disputed Forms would further harm its competitive position. The public and competitors already know of the Recall, the issues that led to the Recall, and the number of incidents, based on the information already disclosed.

[119] As also previously noted, [redacted]. I agree with Health Canada that to find the Disputed Records could reasonably be expected to result in material loss or prejudice to SECA's competitive position within the meaning of paragraph 20(1)(c), would unduly expand the scope of the provision and undermine both the *ATIA*'s disclosure regime and the purpose of the *Act*.

[120] I do not find that SECA has met its onus to show evidence beyond a mere possibility of harm, and thus the paragraph 20(1)(c) exemption does not exempt the Disputed Records from disclosure.

IV. Costs

[121] Given the divided result on the issues – the procedural (in favour of the Applicant) and the substantive (in favour of the Respondent) – no costs will be awarded.

V. Conclusion

[122] As set out in these Reasons, SECA was successful on the first contested ground, that this Application was properly brought with respect to the August Decision. However, it has failed to meet the tests required for exemption from disclosure of the Disputed Records under either of *ATIA* paragraphs 20(1)(b) or 20(1)(c). For the foregoing reasons, the Disputed Records must be disclosed.

VI. Confidentiality

[123] A draft of these Reasons was shared with the parties on November 9, 2020, accompanied by the following Direction:

> The parties are to provide the Court with a joint proposal on the confidentiality of the Draft Judgment and Reasons by no later than November 20, 2020 at 4:00 p.m. (EST). If the parties cannot come to an agreement, they may each file separate submissions of no more than five (5) pages under the same timeline. The parties should note that the confidentiality of this decision is ultimately at the Court's discretion and it will act in the best interests of justice.

[124] The parties jointly advised the Court on November 19 that they had been unable to agree to a joint proposal, and requested an additional week to provide their submissions. I granted this extension, receiving separate submissions from the Applicant and Respondent on November 27, 2020. I advised the parties at the time that I would hold off releasing these Public Reasons until January 29, 2021, to allow for the appeal period to run. An appeal has since been filed. These Public Reasons contain all redaction requests made by the Applicant.

JUDGMENT in T-1617-18

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No costs shall issue.

"Alan S. Diner"
Judge

ANNEX

Excerpts from the *Access to Information Act*, RSC 1985, c A-1

Purpose of Act	**Objet de la loi**
Purpose of Act	**Objet de la loi**
2 (1) The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.	**2 (1)** La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.
Specific purposes of Parts 1 and 2	**Objets spécifiques : parties 1 et 2**
(2) In furtherance of that purpose,	**(2)** À cet égard :
(a) Part 1 extends the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government; and	a) la partie 1 élargit l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif;
(b) Part 2 sets out requirements for the	b) la partie 2 fixe des exigences visant la

proactive publication of information.	publication proactive de renseignements.
Complementary procedures	**Étoffement des modalités d’accès**
(3) This Act is also intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.	**(3)** En outre, la présente loi vise à compléter les modalités d’accès aux documents de l’administration fédérale; elle ne vise pas à restreindre l’accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.
…	[…]
Personal Information	**Renseignements personnels**
Personal information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	**19 (1)** Sous réserve du paragraphe (2), le responsable d’une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.
Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Part that contains personal information if	**(2)** Le responsable d’une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(a) the individual to whom it relates consents to the disclosure;	a) l’individu qu’ils concernent y consent;

(b) the information is publicly available; or

b) le public y a accès;

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

c) la communication est conforme à l’article 8 de la *Loi sur la protection des renseignements personnels*.

Third Party Information

Renseignements de tiers

Third party information

Renseignements de tiers

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part 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 :

(a) trade secrets of a third party;

a) des secrets industriels de tiers;

(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;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that concerns the vulnerability of the third party’s buildings or other structures, its networks

b.1) des renseignements qui, d’une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l’élaboration, de la mise à jour, de la mise à l’essai ou de la mise en œuvre par celle-ci de plans de gestion des urgences au sens de l’article 2 de la *Loi sur la gestion des urgences* et, d’autre part, portent sur la vulnérabilité des bâtiments ou autres

or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(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

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

…

Disclosure authorized if in public interest

(6) The head of a government institution may disclose all or part of a record requested under this Part that contains information described in any of paragraphs (1)(b) to (d) if

(a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party,

ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

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;

d) des renseignements dont la divulgation risquerait vraisemblablement d’entraver des négociations menées par un tiers en vue de contrats ou à d’autres fins.

[…]

Communication dans l’intérêt public

(6) Le responsable d’une institution fédérale peut communiquer, en tout ou en partie, tout document qui contient les renseignements visés à l’un ou l’autre des alinéas (1)b) à d) pour des raisons d’intérêt public concernant la santé ou la sécurité publiques ou la protection de l’environnement; ces raisons doivent de plus justifier nettement les conséquences éventuelles de la communication pour un tiers : pertes ou profits financiers,

any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.	atteintes à la sécurité de ses ouvrages, réseaux ou systèmes, atteintes à sa compétitivité ou entraves aux négociations — contractuelles ou autres — qu'il mène.
…	[…]
Statutory Prohibitions	**Interdictions fondées sur d'autres lois**
Statutory prohibitions against disclosure	**Interdictions fondées sur d'autres lois**
24 (1) The head of a government institution shall refuse to disclose any record requested under this Part that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	**24 (1)** Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.
Severability	**Prélèvements**
25 Notwithstanding any other provision of this Part, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Part by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.	**25** Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente partie pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente partie, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.
…	[…]

Third Party Intervention

Notice to third parties

27 (1) If the head of a government institution intends to disclose a record requested under this Part that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

Waiver of notice

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

Contents of notice

(3) A notice given under subsection (1) shall include

Intervention de tiers

Avis aux tiers

27 (1) Le responsable d'une institution fédérale qui a l'intention de communiquer un document fait tous les efforts raisonnables pour donner au tiers intéressé, dans les trente jours suivant la réception de la demande, avis écrit de celle-ci ainsi que de son intention, si le document contient ou s'il est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait vraisemblablement, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

Renonciation à l'avis

(2) Le tiers peut renoncer à l'avis prévu au paragraphe (1) et tout consentement à la communication du document vaut renonciation à l'avis.

Contenu de l'avis

(3) L'avis prévu au paragraphe (1) doit contenir les éléments suivants :

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

a) la mention de l'intention du responsable de l'institution fédérale de donner communication totale ou partielle du document susceptible de contenir les secrets ou les renseignements visés au paragraphe (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

b) la désignation du contenu total ou partiel du document qui, selon le cas, appartient au tiers, a été fourni par lui ou le concerne;

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

c) la mention du droit du tiers de présenter au responsable de l'institution fédérale de qui relève le document ses observations quant aux raisons qui justifieraient un refus de communication totale ou partielle, dans les vingt jours suivant la transmission de l'avis.

…

[…]

Representations of third party and decision

Observations des tiers et décision

28 (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

28 (1) Dans les cas où il a donné avis au tiers conformément au paragraphe 27(1), le responsable d'une institution fédérale est tenu :

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head

a) de donner au tiers la possibilité de lui présenter, dans les vingt jours suivant la transmission de l'avis, des observations sur les raisons

of the institution as to why the record or the part thereof should not be disclosed; and

qui justifieraient un refus de communication totale ou partielle du document;

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

b) de prendre dans les trente jours suivant la transmission de l'avis, pourvu qu'il ait donné au tiers la possibilité de présenter des observations conformément à l'alinéa a), une décision quant à la communication totale ou partielle du document et de donner avis de sa décision au tiers.

Representations to be made in writing

Observations écrites

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(2) Les observations prévues à l'alinéa (1)a) se font par écrit, sauf autorisation du responsable de l'institution fédérale quant à une présentation orale.

Contents of notice of decision to disclose

Contenu de l'avis de la décision de donner communication

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Part or a part thereof shall include

(3) L'avis d'une décision de donner communication totale ou partielle d'un document conformément à l'alinéa (1)b) doit contenir les éléments suivants :

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

a) la mention du droit du tiers d'exercer un recours en révision en vertu de l'article 44, dans les vingt jours suivant la transmission de l'avis;

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.	**b)** la mention qu'à défaut de l'exercice du recours en révision dans ce délai, la personne qui a fait la demande recevra communication totale ou partielle du document.
Disclosure of record	**Communication du document**
(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Part or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.	**(4)** Dans les cas où il décide, en vertu de l'alinéa (1)b), de donner communication totale ou partielle du document à la personne qui en a fait la demande, le responsable de l'institution fédérale donne suite à sa décision dès l'expiration des vingt jours suivant la transmission de l'avis prévu à cet alinéa, sauf si un recours en révision a été exercé en vertu de l'article 44.
…	[…]
***De novo* review**	**Révision *de novo***
44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	**44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.
…	[…]
Order of Court not to disclose record	**Ordonnance de la Cour obligeant au refus**
51 Where the Court determines, after considering an application under section	**51** La Cour, dans les cas où elle conclut, lors d'un recours exercé en vertu de l'article 44,

44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

que le responsable d'une institution fédérale est tenu de refuser la communication totale ou partielle d'un document, lui ordonne de refuser cette communication; elle rend une autre ordonnance si elle l'estime indiqué.

Excerpts from the *Canada Consumer Product Safety Act*, SC 2010, c 21

Purpose

Purpose

3 The purpose of this Act is to protect the public by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada, including those that circulate within Canada and those that are imported.

…

Requirement to provide information

14 (2) A person who manufactures, imports or sells a consumer product for commercial purposes shall provide the Minister and, if applicable, the person from whom they received the consumer product with all the information in their control regarding any incident related to the product within two days after the day on which they become aware of the incident.

Objet de la loi

Objet

3 La présente loi a pour objet de protéger le public en remédiant au danger pour la santé ou la sécurité humaines que présentent les produits de consommation qui se trouvent au Canada, notamment ceux qui y circulent et ceux qui y sont importés, et en prévenant ce danger.

[…]

Communication de renseignements

14 (2) Toute personne qui fabrique, importe ou vend tout produit de consommation à des fins commerciales communique au ministre et, le cas échéant, à la personne de qui elle a obtenu le produit tout renseignement relevant d'elle concernant un incident lié au produit, dans les deux jours suivant la date où l'incident est venu à sa connaissance.

Report	**Rapport**
(3) The manufacturer of the consumer product, or if the manufacturer carries on business outside Canada, the importer, shall provide the Minister with a written report — containing information about the incident, the product involved in the incident, any products that they manufacture or import, as the case may be, that to their knowledge could be involved in a similar incident and any measures they propose be taken with respect to those products — within 10 days after the day on which they become aware of the incident or within the period that the Minister specifies by written notice.	**(3)** Le fabricant du produit en cause ou, si celui-ci exerce ses activités à l’extérieur du Canada, l’importateur fournit au ministre, dans les dix jours suivant la date où l’incident est venu à sa connaissance ou le délai que le ministre précise par avis écrit, un rapport écrit contenant des renseignements concernant l’incident, le produit, tout produit qu’il fabrique ou importe, selon le cas, qui pourrait, à sa connaissance, être impliqué dans un incident semblable et toute mesure visant ces produits dont il propose la prise.
[Emphasis added.]	[Je souligne.]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1617-18
STYLE OF CAUSE:	SAMSUNG ELECTRONICS CANADA INC. v THE MINISTER OF HEALTH
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 10, 2020
JUDGMENT AND REASONS:	DINER J.
CONFIDENTIAL JUDGMENT AND REASONS DATED:	NOVEMBER 30, 2020
PUBLIC JUDGMENT AND REASONS DATED:	JANUARY 29, 2021

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