Federal Court  Cour fédérale

Date: 20240408

Docket: T-2092-17

Citation: 2024 FC 543

Ottawa, Ontario, April 8, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

ELANCO CANADA LIMITED

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

PUBLIC JUDGMENT AND REASONS
(CONFIDENTIAL JUDGMENT AND REASONS ISSUED ON 20240408)

[1] This *Access to Information Act,* RSC 1985, c A-1 [*Act*] matter was returned to the Court by the Federal Court of Appeal (FCA) in a decision reported at *Canada (Health) v Elanco Canada Limited,* 2021 FCA 191 [FCA Decision]. The facts and background on this matter are outlined in the Federal Court (FC) decision at *Elanco Canada Limited v Canada (Health),* 2019 FC 1455 [FC Decision].

[2] Pursuant to section 44 of the *Act*, Elanco Canada Limited [Elanco] applied for review of Health Canada's decision to disclose portions of the 166-page record [the Record] of Elanco's submissions to Health Canada for approval of the veterinary drug Fortekor™. The parties disagree on the severance and redactions to be applied to the Record.

[3] On the matters remitted by the FCA, the evidentiary record before the Court remains the same. As some of the evidence is confidential, a portion of the hearing was held *in camera*. A Confidential Judgment and Reasons will be released, with a Public version to be issued once the parties identify the confidential information to be redacted.

I. Issues

[4] The FCA remitted the matter to this Court for determination of the following three issues:

A. Determine if the "Identity of Suppliers" is exempt from disclosure.

B. Determine what information, if any, was only exempted from disclosure as a result of paragraph 20(1)(d) of the *Act.*

C. Issue a Judgment that requires Health Canada to disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any information or material that, as a result of the decision of the Federal Court, is exempt from disclosure under section 20 of the *Act.*

[5] Elanco has the burden to demonstrate the application of the statutory exemptions in subsection 20(1) of the *Act* on a balance of probabilities (*Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 92 and 94 [*Merck*]).

[6] Below I will address the remitted issues, by first addressing the "Identity of Suppliers."

II. Analysis

A. *Determine if the "Identity of Suppliers" is exempt from disclosure.*

[7] The FCA directed the Court to determine if "Identity of Suppliers" was included in the "Supplier Information" (FCA Decision at paras 55-56).

[8] In the FC Decision, I found the following on the "Supplier Information":

> [48] The Supplier Information details information on Elanco's confidential commercial relationships with its suppliers and would disclose information regarding the cost of production. Therefore, within the ordinary sense of the term, the information is commercial and treated confidentially by Elanco and reinforced by contractual provisions in agreements with suppliers.

[9] Elanco argues that "Identity of Suppliers" must be treated the same as the "Supplier Information," since Elanco's suppliers' identity is an "integral part" of the content of the supplier agreements. Health Canada argues that "Supplier Information" is a more limited category of information intended to cover the terms of those confidential relationships and not the identity of the suppliers themselves.

[10] The evidence relied upon by Elanco is the Affidavit of Anthony Kahama, the Regulatory Affairs Team Lead at Elanco, sworn on March 29, 2018. In his Affidavit, Mr. Kahama states the following:

58. [redacted]

[redacted]

…

63. [redacted]

[11] Considering the unchallenged evidence of Mr. Kahama, I am satisfied that the "Identity of Suppliers" information should be treated the same as the "Supplier Information" as these are conceptually the same and are treated in the same manner by Elanco.

[12] Attached as Exhibit B to the Reply Affidavit of Anthony Kahama sworn September 14, 2018 [Kahama Reply] is the [redacted]

[redacted]

[redacted]

[13] Paragraph 20(1)(b) of the *Act* protects "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."

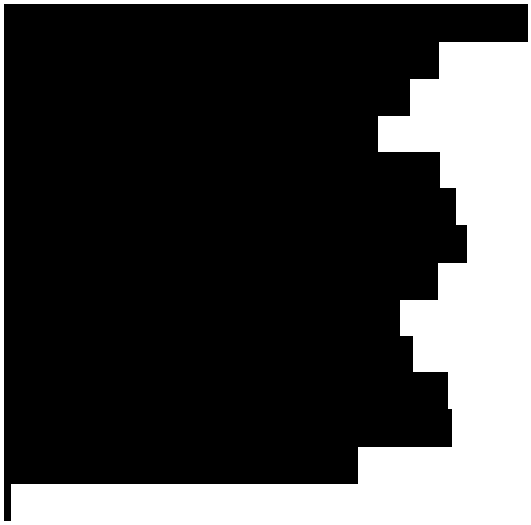
[14] I am satisfied that the information in the records on the "Identity of Suppliers" should be treated consistently with the "Supplier Information" records and, therefore, protected under paragraph 20(1)(b).

[15] Elanco argues that the "Identity of Suppliers" records are also covered by paragraph 20(1)(c) of the *Act* which protects disclosure of information that "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."

[16] In support of this argument, Elanco notes that it need not demonstrate harm or prejudice on a balance of probabilities, but need only demonstrate a reasonable expectation of harm, or harm that is beyond merely possible or speculative (*Merck* at paras 197-204, 206).

[17] Health Canada characterizes Elanco's position as akin to "mere recitations of the fear" (*Astrazeneca Canada Inc v Canada (Minister of Health),* 2005 FC 189 at para 77) and, thus, not information that "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."

[18] Elanco argues that disclosure of the "Identity of Suppliers" could prejudice Elanco's position in what is described as a competitive market. They rely on the evidence of Mr. Kahama, who states that their supply would be disrupted if cost of production for Fortekor™ became known. Mr. Kahama states the following in his affidavit:

65. 

[19] The evidence of Mr. Kahama is that disclosure of this information would cause harm. This evidence was not challenged. Considering that Elanco need only demonstrate a reasonable expectation of probable harm, I accept that the disclosure of the "Identity of Suppliers" information could have a negative competitive impact on Elanco (*Merck* at para 206). Thus, the "Identity of Suppliers" information is covered by paragraph 20(1)(c).

[20] The final consideration is if the "Identity of Suppliers" is covered by paragraph 20(1)(d) which protects from disclosure information "which could reasonably be expected to interfere with contractual or other negotiations of a third party."

[21] Elanco must demonstrate reasonable expectation of probable harm, but not merely speculative harm (*Merck* at para 206; *Canada (Transport) v Air Transat AT Inc*, 2019 FCA 286 at

para 84; *Société Gamma Inc v Canada (Department of Secretary of State)*, [1994] FCJ No 589 (Trial Div.))

[22] Elanco argues that Mr. Kahama's evidence demonstrates how disclosure of the supplier identities would reasonably interfere with contractual negotiations because Elanco and [redacted]. Health Canada did not challenge this evidence.

[23] Health Canada argues that Mr. Kahama's evidence does not address how the disclosure of the supplier identities would obstruct or interfere with contractual negotiations, but rather simply references the treatment of confidential information and obligations with one of the suppliers.

[24] As I found in the FC Decision at paragraph 86, Elanco was not required to establish "proof of harm." I am satisfied that Elanco has established sufficient and non-speculative evidence of potential harm to contractual negotiations. Further, it is probable that disclosure of the supplier's identities could harm their contractual negotiations, given that they have negotiated specific confidentiality provisions to protect the identity of suppliers.

[25] I am satisfied that "Identity of Suppliers" is also exempted under paragraph 20(1)(d) of the *Act*.

B. *Determine what information, if any, was only exempted from disclosure as a result of paragraph 20(1)(d) of the Act.*

[26] Paragraph 20(1)(d) protects from disclosure information "which could reasonably be expected to interfere with contractual or other negotiations of a third party."

[27] As noted in the FCA decision, evidence of the effect of disclosure on actual contract negotiations is required (FCA Decision at para 45).

[28] The parties agree that paragraph 20(1)(d) is relevant to the following categories of information: (a) supplier information; (b) packaging and storage information; (c) [redacted] information; and, (d) [redacted] information.

[29] In the FC Decision, I found the following exemptions apply to each of the categories:

1. (a) supplier information – paragraphs 20(1)(b) and (c);
2. (b) packaging and storage information – paragraphs 20(1)(b) and (c);
3. (c) [redacted] information – paragraphs 20(1)(a),(b) and (c); and
4. (d) [redacted] information – paragraphs 20(1)(a), (b) and (c)

[30] Both parties acknowledge that the above four categories do not need to be exempted from disclosure under paragraph 20(1)(d) since they were found to be exempted from disclosure under provisions of subsection 20(1) of the *Act*.

[31] Elanco argues that the issue is moot since they have already been exempted and, therefore, the Court need not decide on the application of paragraph 20(1)(d).

[32] Health Canada argues that, in accordance with the FCA's directions, the Court must determine what information was "solely" protected by paragraph 20(1)(d) and not just if the paragraph "applies."

[33] As noted above, I have determined that "Identity of Suppliers" is covered by paragraph 20(1)(d). Furthermore, in the same context, the "Supplier Information" would be covered by paragraph 20(1)(d) since it is appropriate to treat "Supplier Information" and "Identity of Suppliers" in the same manner.

[34] However, the following: the packaging and storage information; the [redacted] information; or [redacted] information as information, would not be exempt under paragraph 20(1)(d) as no evidence was led to in support of such a claim.

[35] While also exempted under other paragraphs, I have found that "Supplier Information" and "Identity of Supplier" is also covered by paragraph 20(1)(d) of the *Act*.

[36] There is no information that was only exempted from disclosure under paragraph 20(1)(d) of the *Act*.

C. *Issue a Judgment that requires Health Canada to disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any information or material that, as a result of the decision of the Federal Court, is exempt from disclosure under section 20 of the Act.*

[37] Section 25 of the *Act* instructs "the head of the institution," Health Canada, in this case, to disclose a record that is not exempt from the disclosure and can be reasonably severed from any part of the record that contains the exempt information.

[38] *Merck* says the following about section 25:

> [237] The heart of the s. 25 exercise is determining when material subject to the disclosure obligation "can reasonably be severed" from exempt material. In my view, this involves both a semantic and a cost-benefit analysis. The semantic analysis is concerned with whether what is left after excising exempted material has any meaning. If it does not, then the severance is not reasonable. As the Federal Court of Appeal put it in *Blank v. Canada (Minister of the Environment)*, 2007 FCA 289, 368 N.R. 279, at para. 7, "those parts which are not exempt continue to be subject to disclosure if disclosure is meaningful". The cost-benefit analysis considers whether the effort of redaction by the government institution is justified by the benefits of severing and disclosing the remaining information. Even where the severed text is not completely devoid of meaning, severance will be reasonable only if disclosure of the unexcised portions of the record would reasonably fulfill the purposes of the Act. Where severance leaves only "[d]isconnected snippets of releasable information", disclosure of that type of information does not fulfill the purpose of the Act and severance is not reasonable: *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 (T.D.), at pp. 558-59; *SNC-Lavalin Inc*., at para. 48. As Jerome A.C.J. put it in *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.):
>
> > To attempt to comply with section 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. <u>The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide.</u> [Emphasis in original; pp. 160-61.]
>
> [238] That said, one must not lose sight of the purpose of s. 25. It aims to facilitate access to the most information reasonably possible while giving effect to the limited and specific exemptions set out in the Act: *Ontario (Public Safety and Security)*, at para. 67.

[39] Although section 25 aims to facilitate access to as much information as possible, it also requires Health Canada to exercise judgment and reasonableness in assessing if the information that is left to be disclosed has any meaningful value.

[40] Health Canada accepts that large portions of the Record are exempt from disclosure, but Health Canada submits that Elanco has conflated the concepts of exempting information in the Records under section 20 and severing information under section 25 of the *Act*.

[41] While Elanco has the burden to demonstrate the application of the statutory exemptions in subsection 20(1) of the *Act* (*Merck* at paras 92 and 94), it is Health Canada who has the obligation to assess severance based upon section 25 of the *Act*.

[42] At this stage, while the parties have reached agreement on the treatment of most of the information in the Record, the remaining areas in dispute will be addressed below.

(1) Information at pages 44, 45, 48, 59, 85 and 88 of the Record [redacted]

[43] Health Canada proposes that this information can be severed and therefore disclosed on the grounds of inconsistency, specifically referencing Appendix A to the Respondent Supplementary Record that:

> This information has been left un-highlighted for exemption elsewhere throughout the Records, and/or is information that Elanco now proposes to disclose in blue highlights, but has left highlighted in yellow for exemption elsewhere in the Records.

[44] Elanco argues that this is Fortekor™ Manufacturing Information and thus covered by paragraph 20(1)(c), which was covered in the FC Decision at paragraph 78. Further, Elanco notes that Health Canada does not seek to sever the number of tablets produced in a batch of Fortekor™ 20 mg tablets.

[45] I accept that this information should not be disclosed as it constitutes Fortekor™ Manufacturing Information.

(2) At page 56 of the Record, Health Canada proposes to sever the following information: [redacted]

[46] Elanco argues that [redacted]. They argue that disclosure of this information would allow a competitor to infer that Fortekor™ contains [redacted]. Elanco claims that this would inform competitors of key steps in the production of Fortekor™.

[47] I accept that this information is confidential Fortekor™ Manufacturing Information and, therefore exempted from disclosure.

(3) At page 68, Health Canada proposed to sever the following: [redacted]

[48] Health Canada proposes this information can be severed and therefore disclosed because of where it contextually appears in the records. They argue that the "information falls outside of the applicable category of information identified next to the highlighting and is therefore not exempt from disclosure."

[49] Elanco argues that this disclosure would inform a competitor that the production of Fortekor™ requires [redacted]. I accept that this is confidential manufacturing information and, therefore, exempt from disclosure.

(4) At page 84 of the Health Canada Severances, Health Canada proposes to sever the following text: [redacted].

[50] According to Elanco, [redacted] is one of the confidential steps used to [redacted] used in the production of Fortekor™.

[51] Accordingly, this information is Fortekor™ Manufacturing Information and is exempt from disclosure.

III. Conclusion

[52] Based upon the foregoing, the Record shall be disclosed in format as attached at Schedule "C" to the Reply of the Applicant [Note: Schedule "C" not attached to Public Judgment and Reasons].

IV. Costs

[53] The FCA found that setting aside the decision may render the fixed costs of $12,900.00 a nullity, and directed this Court to address the issue of costs in this Judgment (FCA Decision at para 61).

[54] On November 8, 2023, Elanco submitted its Bill of Costs for Remitted Issues with total fees amounting to $6,120.00.

[55] Therefore, Elanco is entitled to its costs, which is a total of $19,020.00.

JUDGMENT IN T-2092-17

THIS COURT'S JUDGMENT is that:

1. The Respondent Health Canada is ordered to redact the portions of the Record marked as at Schedule "C" attached [Note: Schedule "C" not attached to Public Judgment and Reasons].

2. Elanco shall have its costs of $19,020.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2092-17
STYLE OF CAUSE:	ELANCO CANADA LIMITED V CANADA (MINISTER OF HEALTH)
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