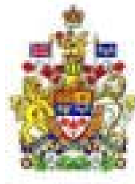
Federal Court of Appeal



Cour d'appel fédérale

Date: 20090526

Dockets: A-492-06
A-499-06

Citation: 2009 FCA 166

CORAM: DESJARDINS J.A.
NOËL J.A.
PELLETIER J.A.

BETWEEN:

MINISTER OF HEALTH

Appellant/Respondent to Cross-appeal

and

MERCK FROSST CANADA LTD.

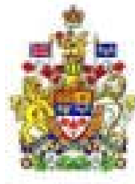
Respondent/Appellant by Cross-appeal

Heard at Ottawa, Ontario, on February 17, 2009.

Judgment delivered at Ottawa, Ontario, on May 26, 2009.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The Court has before it two appeals and two cross-appeals. The appeals are brought by the Minister of Health and the cross-appeals, by Merck Frosst Canada Ltd. (Merck Frosst).

[2] The appeal and the cross-appeal in the principal appeal file, A-492-06 (T-90-01), are from the judgment by a Federal Court judge (the trial judge) in *Merck Frosst Canada Ltd. v. Canada (Minister of Health)*, 2006 FC 1201.

[3] The appeal and cross-appeal in the companion appeal file, A-499-06 (T-36-02), are from the judgment by the same judge in *Merck Frosst Canada Ltd. v. Canada (Minister of Health)*, 2006 FC 1200.

[4] In both of those cases, the trial judge had before him two applications for judicial review under section 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act). Those applications were filed against two decisions by the appellant (the Minister or Health Canada) under section 28 of the Act, namely those made on January 2, 2001 (appeal A-492-06) and December 19, 2001 (appeal A-499-06). The decisions were made in response to two access to information requests received by the Minister from a requestor third party—in this case, a competitor of Merck Frosst—pursuant to section 4 of the Act.

[5] In the first case (appeal file A-492-06), the Minister's decision pertained to the disclosure of records concerning the New Drug Submission (NDS) for Singulair® (Singulair), a drug developed by Merck Frosst for the treatment of asthma. In the second case (appeal file A-499-06), the Minister's decision concerned the disclosure of records pertaining to a Supplemental New Drug Submission (SNDS) for Singulair® (Singulair), a drug developed by Merck Frosst for the treatment of asthma in children aged two to five years.

[6] The access requestor's request in appeal file A-492-06 was for the following records:

> Notice of Compliance, Comprehensive Summary, Reviewer's Notes and any correspondence between Health Canada and Merck Frosst regarding the review of the New Drug Submission for SINGULAIR® Tablets and Chewable Tablets.

[7] The requestor's request for access in appeal file A-499-06 was for the following records:

> All reasonable information on 4 mg SINGULAIR® which was filed as a Supplemental New Drug Submission, including correspondence and the reviewer's notes.

[8] The reasons for this judgment dispose jointly of both appeals, A-492-06 and A-499-06. These reasons for judgment will be placed in both appeal files. Separate judgments will be placed in each file.

FACTS

[9] The facts are undisputed. In appeal file A-492-06, they are found at paragraphs 3 to 21 of the trial judge's reasons and in appeal file A-499-06, at paragraphs 3 to 28 of the trial judge's reasons. These decisions appear in the law reports, as indicated above.

[10] In appeal file A-492-06, the Minister, after considering section 20 of the Act, disclosed approximately 20 pages of records on August 16, 2000, to the party requesting access, without giving Merck Frosst notice pursuant to section 27 of the Act, the Minister being satisfied that no exception applied to those pages.

[11] Also on that date, the Minister decided to refuse to disclose another part of the records. However, the Minister sent Merck Frosst a notice, under section 27, of his intention to disclose pages 1-330, 333-337, 341-375, 379-447, 449-496, 500-524, 526, 527 and 529-547 of the records requested by the access requestor. The Minister asked that within 20 days after that notice was sent,

Merck Frosst send it representations setting out the grounds justifying non-disclosure of the record or part thereof pursuant to subsection 20(1) of the Act.

[12] Merck Frosst obtained an extension of time to respond until September 25, 2000.

[13] In a letter dated September 25, 2000, Merck Frost responded to the Minister's notice from August 16, 2000, with a letter of approximately 10 pages setting forth its objections to the disclosure of information on the pages stated in the notice. In particular, Merck Frosst objected to the disclosure of general categories of information, such as manufacturing techniques, chemistry, dates, controls and file numbers. Merck Frosst also objected to the disclosure of the approximately 20 pages that had already been sent, without notice, to the third party.

[14] On January 2, 2000, the Minister gave Merck Frost notice under subsection 28(3) of the Act of its decision to disclose certain records. Attached to that notice was Appendix "J" to the affidavit of Margery Snider from Health Canada. (Said appendix contained pages 1-23, 26-35, 45-50, 52-59, 61-71, 74-84, 87-104, 111-125, 135-208, 210, 212, 213, 216-220, 222-330, 333-337, 341-387, 389-447, 449-463, 467-496, 500-527, 529-534, 536-544 and 547 of the requested records). The documentation accompanying that notice thus comprised 335 pages on which information was marked for deletion further to Merck Frosst's representations received at that date (A.B., Vol. XXI, page 5159, paragraph 31 and page 5263).

[15] On January 9, 2001, Merck Frosst filed an application for judicial review with the Federal Court.

[16] On September 26, 2001, Margery Snider filed a second affidavit including Appendix “Q”, which contained an even more heavily pared down version of the records that were the subject of the Margery Snider’s Appendix “J” from January 2, 2001 (A.B., Vol. XXI, page 5193, paragraphs 91-95 and Vol. XXIII, page 6368). This version therefore dates from after Merck Frosst instituted the review proceedings.

[17] In appeal file A-499-06, the Minister, after reviewing section 20 of the Act, sent eight pages of records on June 11, 2001, to the party requesting access, without giving Merck Frost notice pursuant to section 27 of the Act, the Minister being satisfied that no exception applied to those pages.

[18] On December 19, 2001, the Minister gave Merck Frost notice, under section 28 of the Act, of its decision to disclose the records it had deleted further to Merck Frosst’s representations.

[19] On January 8, 2002, Merck Frosst filed an application for judicial review with the Federal Court.

[20] On July 17, 2002, Margery Snider filed an affidavit containing the deleted records. Only the following pages of the document reproduced at Exhibit “U” of that affidavit remain in dispute,

namely pages 7-16, 24-33, 35, 39-42, 43-46, 48-54, 57, 105-115, 119-121, 137-167, 187-188, 194-198, 200, 202, 204-246 and 296.

ISSUES

[21] There are two types of issues: those relating to the Minister's appeals and those relating to the cross-appeals by Merck Frosst. Overall, these issues concern the interpretation and application of sections 20, 25, 27, 28, 44 and 51 of the Act.

[22] The following issues are raised in the Minster's appeals:

(a) Did the trial judge err in law in concluding that a government institution cannot disclose information to an access requestor unless the third party (in this case, Merck Frosst) has been given prior notice by the government institution?

(b) Did the trial judge err in fact and law in applying the exceptions provided at paragraphs 20(1)(*a*), (*b*) and (*c*) of the Act to the facts of the case?

(c) Did the trial judge err in fact and law in applying section 25 of the Act?

[23] The following issues are raised in Merck Frosst's cross-appeals:

(a) Is Merck Frosst entitled to obtain a declaration with regard to the lawfulness of the government institution's disclosing its records to an access requestor without first notifying Merck Frosst?

(b) Did the trial judge err in ruling in favour of the validity of the government institution's procedure whereby the onus to establish that the Minister must refuse the disclosure of a record is on the party objecting to disclosure?

(c) Did the trial judge err in fact and law in applying the exceptions provided at paragraphs 20(1)(*a*), (*b*) and (*c*) of the Act to the facts of the case?

[24] Each issue will be dealt with according to its rank. However, since they are related, issue (a) from Merck Frosst's cross-appeal will be dealt with immediately after issue (a) from the Minister's appeal. As well, issue (b) from the Minister's appeal and issue (c) from Merck Frosst's cross-appeal will be addressed together, owing to their related nature.

APPLICABLE STANDARDS OF REVIEW

[25] The usual rules applicable to the appellate review of a subordinate court, as set forth in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paragraph 43, and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paragraphs 27-28, apply in this case. Questions of law are decided on a standard of correctness. However, this Court will only intervene on questions of fact or questions of mixed fact and law if there is a palpable and overriding error. If a pure error of law is extricated from a mixed question of fact and law, the question of law thus isolated is decided according to the standard of correctness (*Housen v. Nikolaisen*, *loc. cit.*, paragraph 31).

APPLICABLE STATUTORY PROVISIONS

[26] The applicable provisions from the Act are reproduced as they read when the events giving rise to this dispute unfolded:

2. (1) The purpose of this Act is to extend 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.

2. (1) La présente loi a pour objet d'élargir 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.

. . .

[. . .]

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

has a right to and shall, on request, be given access to any record under the control of a government institution.

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

a) les citoyens canadiens;

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

. . .

[. . .]

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(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;

(c) information the disclosure of which could reasonably be expected to result in

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) des secrets industriels de tiers;

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) des renseignements dont la divulgation risquerait vraisemblablement de causer des

material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

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

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.

. . .

[. . .]

25. Notwithstanding any other provision of this Act, 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 Act 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 loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

. . .

[. . .]

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

27. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale qui a l'intention de donner communication totale ou partielle d'un document est tenu de 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 :

a) trade secrets of a third party,

a) soit des secrets industriels d'un tiers;

(b) information described in paragraph 20(1)(b) that was supplied by a third party, or

b) soit des renseignements visés à l'alinéa 20(1)b) qui ont été fournis par le tiers;

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party,

c) soit des renseignements dont la communication risquerait, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1) c) ou d).

The head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record of part thereof.

La présente disposition ne vaut que s'il est possible de rejoindre le tiers sans problèmes sérieux.

(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.

(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.

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

(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

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

the record as to why the record or part thereof should not be disclosed.

de communication totale ou partielle, dans les vingt jours suivant la transmission de l'avis.

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

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 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.

(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.

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

(3) L'avis d'une décision de donner communication totale ou partielle d'un document conformément à l'alinéa (1)b)

shall include

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.

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act 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.

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

44. (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

. . .	[. . .]
51. Where the Court determines, after considering an application under section 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.	51. La Cour, dans les cas où elle conclut, lors d'un recours exercé en vertu de l'article 44, 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.

ANALYSIS

[27] A preliminary observation must be made.

[28] At paragraph 56 of its memorandum, Merck Frosst was quick to cite not only the provisions of the Act but also Canada's international agreements—namely the *North American Free Trade Agreement* (NAFTA) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs Agreement)—the Treasury Board policy issued pursuant to paragraph 70(1)(*c*) of the Act, Health Canada's internal policies and the principles underlying the duty of fairness.

[29] However, none of this, except for the Act and procedural fairness, was argued before the trial judge (see Merck Frosst's application for judicial review, public A.B., Vol. I, page 47). The trial judge focused on the Act in question, with one exception. In appeal A-492-06, he mentioned the Treasury Board's policy at paragraph 69 of his reasons when summarizing the respondent's arguments but did not dispose of that argument.

[30] The standard of review can only be applied and the appeals decided on the basis of the Act at issue. For one thing, the trial judge cannot be criticized for errors on issues that were not brought to his attention. For another, the appellant cannot remake its case on appeal.

> ***Issue* (a) *from the Minister's appeal: Did the trial judge err in law in concluding that a government institution cannot disclose information to an access requestor unless the third party (in this case, Merck Frosst) has been given prior notice by the government institution?***

[31] Merck Frosst objects to the decisions made on August 16, 2000, (in appeal file A-492-06) and June 11, 2001, (in appeal file A-499-06) pursuant to which the Minister disclosed records to the access requestor without giving prior notice to the "third party"—in this case, Merck Frosst.

[32] The Minister alleges that, on the contrary, subsection 27(1) of the Act does not require the head of a government institution to contact the "third party" unless the record contains or the head of the institution has reason to believe it might contain information protected by subsection 20(1) of the Act.

[33] The trial judge ruled on this point at paragraphs 63 and 64 of his reasons (in appeal file A-492-06) and at paragraphs 71 and 72 (in appeal file A-499-06):

> In the opinion of this Court, it is irrelevant that the records disclosed without prior notice are not subject to subsection 20(1) of the Act. The interpretation advocated by the respondent would give the respondent a power to determine subsection 20(1) applicability that would be sheltered from any judicial supervision and could cause irreparable harm to third parties affected by access requests.
>
> This Court therefore finds that the disclosure of records by the respondent without prior notice contravened the spirit of subsection 20(1) of the Act. Since this procedure could

> cause irreparable harm to a third party concerned, such as the applicant, if the respondent erred in concluding that subsection 20(1) did not apply to these records, the disclosure without prior notice should not have taken place.
>
> [Emphasis added.]

[34] The language of subsection 27(1) of the Act requires the head of a government institution to contact the "third party" only if the record contains or the head of the institution has reason to believe it might contain secrets or information described in paragraph 27(1) of the Act. Paragraph 27(1) of the Act then refers to the trade secrets of a third party, information described in paragraph 20(1)(*b*) that was supplied by a third party and information the disclosure of which the head of the government institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party.

[35] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Justice Iacobucci called to mind Elmer Driedger's statements in *Construction of Statutes* (2d ed. 1983) according to which there is currently only one principle or approach:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] The object of the Act, as stated at section 2, is to "extend 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".

[37] In *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430, Justice McDonald, writing for the Court, explained at paragraph 23 of his reasons the effect of section 2 of the Act:

> 23 In my opinion, therefore, all exemptions must be interpreted in light of this clause. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

[38] In the landmark case *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453, Justice MacKay of the Federal Court concluded as follows regarding the duty of the head of a government institution pursuant to section 28 of the Act at that time, now section 27:

> 11 The Act precludes disclosure of various types of information as specifically defined and also authorizes refusal to disclose information in certain other defined cases. In relation to third party information, that is information relating to a party other than the requestor or a government agency, which is not otherwise exempt, the *Access to Information Act* exempts from disclosure only certain kinds of information as defined in section 20, the relevant parts of which for purposes of this case are:
>
> . . .
>
> The Act provides for intervention and an opportunity for representations by a third party, not in all cases but in certain cases, as follows. . . .
>
> 12 It may be worth stressing in passing that the Act does not require notice to a third party before disclosure of information relating to that party except in the circumstances set out in section 28(1). Where the head of the institution considering all the relevant evidence before her or him concludes that the information requested is not of a character referred to in that section, notice to the third party is not required, will not be ordered by the Court and no right to apply for review under section 44(1) accrues. (See *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1987), 10 F.T.R. 48, aff'd sub nom. *Twinn v. Minister of Indian Affairs and Northern Development* (1987), 80 N.R. 263 (F.C.A.)).
>
> [Emphasis added.]

[39] The trial judge ignored this case law and therefore erred in law at paragraph 64 of the reasons for judgment in A-492-06 and at paragraph 72 of the reasons for judgment in A-499-06.

Issue* (a) *from Merck Frosst's cross-appeal: Is Merck Frosst entitled to obtain a declaration with regard to the lawfulness of the government institution's disclosing its records to an access requestor without first notifying Merck Frosst?

[40] At paragraphs 44 and 64 of his reasons in appeal file A-492-06, and at paragraphs 52 and 62 of his reasons in appeal file A-499-06, the trial judge concluded that Merck Frosst is entitled to obtain a declaratory order with regard to the lawfulness of the disclosures of records without prior notice on August 16, 2000, and June 11, 2001. However, the formal judgment delivered by the Federal Court did not contain a declaration.

[41] In light of my findings on the preceding issue, it follows that Merck Frosst cannot obtain a declaration regarding the lawfulness of the government institution's disclosing the disclosed records without prior notice.

Issues (*b*) from the Minister's appeal and (*c*) from Merck Frosst's cross-appeal: Did the trial judge err in fact and law in applying the exceptions provided at paragraphs 20(1)(*a*), (*b*) and (*c*) of the Act to the facts of the case?

Paragraph 20(1)(*a*)

[42] In appeal A-492-06, the trial judge made the following conclusion at paragraph 105 of his reasons:

> 105 Disclosure of pages 462 to 493, 495, and 518 to 521 should be refused under paragraph 20(1)(*a*) of the Act since these pages contain information that constitutes a trade secret.
>
> [Emphasis added.]

[43] However, appeal file A-490-06 does not contain any specific conclusion relating to paragraph 20(1)(*a*) of the Act.

[44] The Minister submits that the trial judge erred in neglecting to state which legal test he used to conclude that paragraph 20(1)(*a*) applies to the 33 pages of records listed.

[45] The Minister also submits that the judge presented no analysis in support of his decision to exclude these pages and that the respondent did not provide any objective and specific evidence allowing the judge to conclude as he did.

[46] Merck Frosst simply contends that the trial judge had all of the evidence before him and that he correctly decided that the pages contained trade secrets and should be excluded under paragraph 20(1)(*a*) of the Act.

[47] In its memorandum, Merck Frosst filed summary tables of its evidence in support of its claim that the excluded pages contain trade secrets. These tables refer to affidavits filed on June 1, 2001, by experts hired by Merck Frosst—amongst others, Robert Sarrazin and Annie Tougas.

[48] In his affidavit dated June 1, 2001, Mr. Sarrazin writes the following in respect of pages 462-493, 495 and 518-512 (A.B., Vol. XXXII, page 8510):

> [TRANSLATION]
>
> 170. Pages 461 to 547 pertain to the review of the summary of chemical and galenical research. This information deals with—and repeats—the information provided by Merck Frosst for the NDS. These pages contain information that constitutes the trade secrets in their fundamental components: specifically, the manufacture, analysis, control and specifications of the active substance and the final product. These details are particularly sought-after by generic competitors to develop their own product.

[49] Mr. Sarrazin goes on to briefly describe the contents of the relevant pages, after which he reiterates that they constitute a trade secret. He then makes several references to the statement at paragraph 170 of his affidavit (A.B., Vol. XXXII, page 8510):

> [TRANSLATION]
>
> 175. At page 470, a table indicates the number of known impurities in Merck Frosst's raw material and the acceptable limits.
>
> 176. That constitutes a trade secret. I reiterate my comments at paragraph 170 on this subject.
>
> 177. This information deals with—and repeats—the information provided by Merck Frosst for the NDS. This is scientific or technical information (from Merck Frosst) that presents a likely risk of significant commercial or financial repercussions. <u>Innovative companies, including Merck Frosst, generally treat this type of information as confidential</u>.

[Emphasis added.]

[50] In her affidavit dated June 1, 2001, Annie Tougas states the following (A.B., Vol. III, page 179):

> 96. The specifications list the major product criteria (such as pages 470-71, 475-477, 482-483, 520-521 of the Records) and the limits to be met for ensuring product quality and consistency. Batches are released on the Canadian market according to the specifications. They are usually based on critical parameters (such as pages 475-476, 481-483, 520-521 of the Records) and if released, it would provide information on the specific parameters (such as pages 475, 481, 485-487 of the Records) subject or release and/or stability control. . . . Besides the confidentiality and prejudicial impacts of any unwarranted disclosure of the information, the said information lies at the core of what constitutes a trade secret.
>
> [Emphasis added.]

[51] Thus, Merck Frosst's affiants provided general statements and made copious references to information that had already been deleted, in the September 26, 2001, Appendix "Q", from the records that the Minister intends to send to the access requestor.

[52] However, in *Société Gamma Inc. v. Canada (Department of Secretary of State)*, [1994] F.C.J. No. 589, cited by this Court in *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, [2006] F.C.J. No. 704, Justice Strayer, then of the Federal Court, found at paragraph 7 of his reasons:

> . . . . There is unfortunately no authoritative jurisprudence on what is a "trade secret" for the purposes of the *Access to Information Act*. One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial . . . confidential information supplied to a government institution . . . treated consistently in a confidential manner . . ." which is protected under paragraph (*b*). In respect of neither (*a*) nor (*b*) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. . . .
>
> [Emphasis added.]

[53] In *AstraZeneca Inc. v. Canada (Health)*, [2005] F.C.J. No. 859, Justice Phelan of the Federal Court echoed Justice Strayer's remarks:

> 62 Strayer J. (as he then was) in *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 FTR 42 held that the term "trade secret" is to be given a relatively narrow interpretation. A trade secret must be something of a technical nature which is very closely guarded and is of such peculiar value to the owner of the trade secret that harm to him would be presumed from its mere disclosure.
>
> 63 It is not so much a question of narrow or broad interpretation as it is determining whether the information falls within the common law meaning of trade secret. Parliament intended to protect genuine trade secrets.
>
> 64 Health Canada's Access to Information Act Third Party Information Operational Guidelines outlines the department's view of the criteria to be met:
>
> - the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of persons);
> - the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
> - the information must be capable of industrial or commercial application;
> - the possessor must have an interest (eg. an economic interest) worthy of legal protection.
>
> 65 The type of information which could potentially fall into this class includes the chemical composition of a product and the manufacturing processes used. However, it is not every process or test which would fall into this class particularly where such process or test is common in a particular industry.
>
> [Emphasis added.]

[54] It is clear from these two decisions that the notion of trade secret is interpreted in a narrow sense and that in the test used in the case law to determine whether paragraph 21(1)(*a*) applies to a record's contents, a high threshold is applied. Anyone who relies on that provision must necessarily furnish specific, objective and detailed evidence that the information constitutes a trade secret.

[55] The trial judge's decision contains no statements on the notion of trade secret, the applicable legal test to characterize information as a trade secret or the burden of proof.

[56] Furthermore, the affidavits relied on by Merck Frosst contain some very broad statements. These include sentences such as [TRANSLATION] "[Disclosure of information] . . . presents a likely risk of significant commercial or financial repercussions . . ." (paragraph 177, affidavit of Mr. Sarrazin, cited above) and ". . . They are usually based on critical parameters . . ." (paragraph 96, affidavit of Ms. Tougas, cited above). [Emphasis added.]

[57] Furthermore, the bases for an exclusion under paragraph 20(1)(*a*) are entangled and sometimes even confused with the bases required under paragraph 20(1)(*b*), as evidenced by the following sentence at paragraph 177 of Mr. Sarrazin's affidavit, cited above: [TRANSLATION] "Innovative companies, including Merck Frosst, generally treat this type of information as confidential. . . .". In *Société Gamma Inc.*, Justice Strayer was careful to point out at paragraph 7 of his reasons, cited above, that "[t]here must be some difference between a trade secret and something which is merely 'confidential'".

[58] Lastly, Merck Frosst did not meet its burden of providing objective and specific evidence providing a basis on which to conclude that the information still remaining on the pages in dispute constitutes trade secrets.

[59] Absent explanations in support of the trial judge's decision stated at paragraph 105 of his reasons in appeal file A-492-06 and absent adequate evidence, I find that the trial judge erred in law in exempting the 33 pages of records listed at that paragraph 105.

Paragraph 20(1)(*b*)

[60] The Minister challenges the trial judge's conclusions at paragraph 106 of his reasons in A-492-06 and at paragraph 113 of his reasons in A-496-06.

[61] The paragraphs are the following:

> **In appeal A-492-06, paragraph 106 -**
> Disclosure of pages 14 (the reference to the percentage), 33 to 34, 117, 147 (the last three lines), and 207 should be refused under paragraph 20(1)(*b*) of the Act since these page [*sic*] contain confidential information that was treated in a confidential manner by the applicant and is not available in the public domain.
>
> [Emphasis added.]
>
> **Appeal A-499-06, paragraph 113 -**
> Disclosure of pages 105 to 115, 119 to 121, 137 to 167, 212, 236, 242 and 244 should be refused under paragraph 20(1)(*b*) of the Act because those pages contain confidential information that was treated as such by the Applicant and is not in the public domain.
>
> [Emphasis added.]

[62] The burden of proof is on the party that is objecting to the disclosure of records (*Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, [2003] F.C.J. No. 916). That burden is heavy (*AstraZeneca Canada Inc. v. Canada (Health)*, [2005] F.C.J. No. 859, paragraph 52, affirmed by [2006] F.C.J. No. 1076).

[63] The exception provided at paragraph 20(1)(*b*) contains three conditions, namely that the information be financial, commercial, scientific or technical; that it be confidential; and that it be consistently treated as confidential.

[64] In the case at bar, the financial, commercial, scientific or technical nature of the information in the records in dispute is not being challenged.

[65] In *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, [2006] F.C.J. No. 704, in which I wrote the reasons for judgment, I summarized the state of the law regarding the particular requirements for paragraph 20(1)(*b*):

> 71 The second requirement under the paragraph 20(1)(*b*) disclosure exemption is that the information in question must be confidential.
>
> 72 The jurisprudence establishes that confidentiality must be judged according to an objective standard: the information itself must be "confidential by its intrinsic nature" (*Société Gamma Inc. v. Department of the Secretary of State of Canada* (1994), 79 F.T.R. 42 at para. 8 [*Société Gamma*]; *Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (T.D.) [*Air Atonabee*]; *Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare)* (1992), 52 F.T.R. 22, aff'd (1992), 148 N.R. 147 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2006] 1 F.C.R. 379 (F.C.A.)). In *Air Atonabee*, *supra*, Mackay J. suggested the following approach to determine whether a particular record contained "confidential information" (at page 210):
>
> - . . . whether information is confidential will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely:
>   - (a)
>
>   that the content of the record be 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 originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and;

- (c)

  that the information be 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.

This Court recently endorsed this approach in *Canada (Minister of Public Works and Government Services v. Hi-Rise Group Inc.* (2004), 318 N.R. 242 (F.C.A.) [*Hi-Rise*].

73 The burden of persuasion with respect to the confidential nature of the information clearly rests upon the responding parties (*Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency)* (1999), 250 N.R. 314 at para. 3 (F.C.A.) [*Atlantic Canada*]; *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General* [sic] (2003), 241 F.T.R. 160, at para. 19). To satisfy their burden in this regard, the responding parties must provide “actual direct evidence” of the confidential nature of the information at issue (*Atlantic Canada*, *supra* at para. 3), which must disclose “a reasonable explanation for exempting each record” (*Wyeth-Ayerst*, *supra* at para. 20); “evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1)” (*Wyeth-Ayerst*, *supra* at para. 20).

[66] Yet, the test set out by the trial judge, namely that the records “contain confidential information that was treated in a confidential manner by the applicant and is not available in the public domain” simply repeats paragraph 20(1)(*b*).

[67] In both A-492-06 and A-499-06, Merck Frosst failed to submit any direct and objective evidence regarding the information’s confidentiality or its treatment as confidential.

[68] With regard to appeal A-492-06, the Minister argued that the filing of the affidavit of Margery Snider from Health Canada on September 26, 2001, was a pivotal step in the case. Prior to September 2001, the reference exhibit was Appendix "J".

[69] However, in September 2001, after having carried out more detailed research in the course of these proceedings, Heath Canada attached a new version of the records with even more deletions than the first. This was Appendix "Q" to Margery Snider's affidavit dated September 26, 2001 (A.B., Vol. XXIII, page 6368).

[70] In their respective affidavits dated December 7, 2001, both Annie Tougas and Robert Sarrazin, affiants for Merck, admit to having reviewed the confidential affidavit of Margery Snider from Health Canada dated September 26, 2001, containing both Appendix "J" and Appendix "Q".

[71] In her December 7, 2001, affidavit (A.B., Vol. XIII, page 3095), Annie Tougas states, under the heading "DECISION BY HEALTH CANADA":

> 86. Contrary to what is alleged at paragraph 90 of Ms. Snider's Affidavit (that the letter of January 2, 2001 "implied that additional limited and specific representations might impact on Health Canada's position"), the said letter clearly states the following:
>
> > *In the absence of detailed representations on your part, identifying specific, limited details in the remaining information which may be confidential, we were unable to reach the conclusion that any additional information qualifies as confidential third party information under subsection 20(1).*
> >
> > *Therefore, this will serve to advise you of our decision to disclose the records as per the attached copy.*

> *Should you still object, you have the right to request a review of this decision before the Federal Court . . .*
>
> 87. This corresponds with paragraphs 28(3) and (4) of the ATI Act, to be the final decision by Health Canada "to disclose the records as per the attached copy", subject to this Court's review. This is how we, at Merck Frosst, understood the letter of January 2, 2001. This is why we filed our Notice of Application before this Court.
>
> [Emphasis added.]

[72] Although Merck Frosst had Appendix "Q", a more pared-down and contemporaneous version of the record than Appendix "J", it opted to continue to base its arguments on version "J" from January 2, 2001, rather than the version appearing at Appendix "Q" of Margery Snider's affidavit from September 26, 2001.

[73] This was an evolving process. In submitting the record as set out at Appendix "Q", the Minister fleshed out its position and conceded some of Merck Frosst's claims by paring the record down further. The onus was on Merck Frosst to respond to this new version of the record, which Appendix "Q" contained.

[74] Merck Frosst must accept the consequences of having chosen to remain silent, for all intents and purposes, with respect to the version of the record contained in Appendix "Q".

[75] The affidavits submitted by Merck Frosst prior to September 26, 2001, are of limited use since it is impossible to tell whether a given argument still applies with respect to Appendix "Q".

[76] Furthermore, the affidavits submitted by Merck Frosst after September 26, 2001, namely those of Annie Tougas and Robert Sarrazin dated December 7, 2001, fail to provide the direct and objective evidence required for an exception from disclosure to be granted under paragraph 20(1)(*b*).

[77] Absent objective and direct evidence, the trial judge erred at paragraph 106 of his reasons in refusing disclosure of the information at pages 14 (the reference to the percentage), 33, 34, 117, 147 (the last three lines), and 207 of Appendix "Q" in appeal A-492-06 on the basis of the confidentiality and the confidential treatment of that information.

[78] As regards appeal A-499-06, the reference exhibit is Appendix "U" to Margery Snider's affidavit dated July 8, 2002. (A.B., Vol. 10, page 3187).

[79] Absent objective and direct evidence, the judge also erred in refusing disclosure of the information at pages 105 to 115, 119 to 121, 137 to 167, 212, 236, 242 and 244 of Appendix "U" in appeal file A-499-06 on the basis of the information's confidentiality and confidential treatment.

[80] Neither paragraph 106 of the trial judge's judgment relating to appeal A-492-06 nor paragraph 113 relating to appeal A-499-06 can be allowed to stand.

<u>Paragraph 20(1)(*c*)</u>

<u>Error of fact and law</u>

[81] It has been consistently established in case law that for paragraph 20(1)(*c*) to apply, the information for which an exception to disclosure is claimed must not be in the public domain and that there must be a "reasonable expectation of probable harm" (see *AstraZeneca Canada Inc. v. Canada (Health)*, [2005] F.C.J. No. 859, paragraph 109, affirmed by our Court in [2006] F.C.J. No. 1076; see also *Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare)*, [1992] F.C.J. No. 144, paragraph 50, affirmed by our Court in [1992] F.C.J. No. 950).

[82] In *AstraZeneca Canada Inc. v. Canada (Health)*, [2005] F.C.J. No. 859, affirmed by this Court in [2006] F.C.J. No. 1076, Justice Phelan stated the following regarding the evidentiary burden to be met under paragraph 20(1)(*c*) of the Act:

> 109 Information which is in the public domain (subject to limited circumstance where compelling evidence establishes otherwise) cannot be said to be within section 20(1), particularly paragraph (*c*). It is always incumbent on the person resisting disclosure to establish harm, a more difficult task where the same type of information is in the public domain including information available from similar regulatory sources. See *Canada Packers Inc. v. Canada (Minister of Agriculture)*, 26 CPR(3d) 407 (FCA).

[83] In *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, 2007 FCA 272, Justice Pelletier, writing for the Court, emphasized the importance of checking whether the specific information is in the public domain:

> [61] . . . 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. . . .

[84] As well, the case law establishes that the onus is on the party objecting to the disclosure to establish a probability of harm, and not a mere possibility thereof. In *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*, 79 F.T.R. 113, [1994] F.C.J. No. 1059, Justice MacKay of the Federal Court held as follows:

> 43 Having examined the Record and the Proposal, it is not self-evident to me from the documents themselves that the applicant, whatever may be its concerns, has demonstrated a basis for "a reasonable expectation of probable harm". That is the standard enunciated and applied by Mr. Justice MacGuigan in *Canada Packers*[10]. The applicant does not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal simply by affirming by affidavit that disclosure "would undoubtedly result in material financial loss and prejudice" to the applicant or would "undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings". These affirmations are the very findings the Court must make if paragraphs 20(1)(*c*) and (*d*) are to apply. Without further explanation based on evidence that establishes those outcomes are reasonably probable, the Court is left to speculate and has no basis to find the harm necessary to support application of these provisions.
>
> [Emphasis added.]

[85] In *Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-food)*, [2000] F.C.J. No. 2088, Justice Nadon (then of the Federal Court) stated the following:

> 9 Further, the plaintiff should not only state in an affidavit that disclosure of the documents would probably cause it harm, it should also submit evidence of the likelihood of such harm.

[86] In *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, [2003] F.C.J. No. 916, Chief Justice Richard, writing for the Court, confirmed and reiterated this principle:

> 20 Affidavit evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1) of the Act.

[87] In appeal A-492-06, the trail judge addressed the exception under paragraph 20(1)(*c*) of the Act at paragraphs 103, 104 and 107 of his decision. In appeal A-499-06, the trial judge dealt with this exception at paragraphs 101, 111 and 112 of his decision.

[88] I will first analyze appeal case A-492-06.

[89] In that case, the trial judge presented the results of his application of paragraph 20(1)(*c*) as follows:

> 103 The pages concerning which disclosure should be refused according to Mr. Sarrazin, the applicant's affiant, since they contain information that was not available "as such" in the public domain are not excluded under paragraph 20(1)(*c*) of the Act. According to the charts filed by the parties, these records consist of pages 105 to 110, 135 to 142, 222 to 235, 342 to 355, 523, 530 to 531, and 537.
>
> 104 However, <u>disclosure should be refused under paragraph 20(1)(*c*) of the Act with regard to records containing information that is more specific or more detailed than information available in the public domain</u>. According to the charts filed by the parties, these records consist of pages 33 to 34, 117, 146 to 148, 170 to 173, 179 to 196, 204 to 208, 210, 212 to 213, 217 to 220, 236 to 327, and 399.
>
> . . .
>
> 107 Disclosure of pages 33 to 34, 117, 146 to 148, 170 to 173, 179 to 196, 204 to 208, 210, 212 to 213, 217 to 220, 236 to 327, 399, and 527 <u>should be refused under paragraph 20(1)(*c*) of the Act since these pages contain information the disclosure of which could reasonably be expected to result in material financial loss or gain to the applicant or prejudice its competitive position</u>.
>
> [Emphasis added.]

[90] The trial judge set out the two branches of the paragraph 20(1)(*c*) test. At paragraph 104, he stated, "disclosure should be refused under paragraph 20(1)(*c*) of the Act with regard to records containing information that is more specific or more detailed than information available in the public domain". At paragraph 107, he further stated, "Disclosure of [the] pages . . . should be refused . . . since these pages contain information the disclosure of which could reasonably be expected to result in material financial loss or gain to the applicant or prejudice its competitive position".

[91] Did the trial judge have the evidence to support a refusal of disclosure?

[92] In his affidavit dated June 1, 2001, (A.B., Vol. XXXII, page 8507) Robert Sarrazin, affiant for Merck Frosst, stated the following:

> [TRANSLATION]
>
> 147. Pages 198 to 222 relate to the summary tables of clinical trials. These provide, on a study-by-study basis, specific methodological details including the inclusion and exclusion criteria used in clinical pharmacology trials, diagnostic parameters and outcome measurements. This information represents the entirety of the knowledge of Merck Frosst's experts from the clinical pharmacology assessment. . . .
>
> 148. This is scientific or technical information (from Merck Frosst) that presents a likely risk of significant commercial or financial repercussions. . . .
>
> 149. For an innovative competitor, this is a comparison tool for preparing or improving the developmental plan for a product in the same class. Drawing up a similar plan from the available scientific documentation would require considerable effort and a fair amount of time. This information is not usually exchanged between competitors.
>
> . . .
>
> 152. Pages 263 to 327 pertain to the discussion of the clinical trials. They contain a critical analysis and an interpretation of the clinical outcomes conducted by expert staff at Merck Frosst. . . . This "Discussion and Assessment of Clinical Outcomes" is a veritable meta-analysis of clinical information having no equivalent in the literature. . . .
>
> 153. This is scientific or technical information (from Merck Frosst) that presents a likely risk of significant commercial or financial repercussions. . . .
>
> [Emphasis added.]

[93] These statements, which encompass a large number of pages (up to 91 at a time), remain vague, speculative and silent as to specifically how and why the disclosure of the requested information would be likely to bring about the harm alleged by Merck Frosst.

[94] Regarding appeal case A-499-06, the trial judge presented the results of his application of paragraph 20(1)(*c*) as follows:

> 111 The pages in respect of which the Applicant says that disclosure should be refused because they contain information that is not "as such" in the public domain are not exempt under subsection 20(1)(*c*). According to the tables submitted by the parties, those pages are 7 to 16, 43 to 46, 48 to 54, 204 to 211, 213 to 225, 227 to 231, 233 to 235, 237, 239 to 241, 243, 245, 246 and 296.
>
> 112 However, disclosure should be refused under paragraph 20(1)(c) in respect of documents containing more specific or detailed information than the information in the public domain the disclosure of which would likely cause the Applicant significant loss of profit or undermine its competitiveness. According to the tables submitted by the parties, those pages are pages 57, 187, 188, 200 and 202.
>
> [Emphasis added.]

[95] In this case, Merck Frosst's evidence is similar to that for appeal A-492-06.

[96] In his affidavit dated May 2, 2002, (A.B. A-499-06, Vol. 6, page 1641), Robert Sarrazin stated the following:

> [TRANSLATION]
>
> 99. To conclude, a SNDS, just like a NDS, contains a great deal of scientific and technical information, even commercial or financial considerations (including trade secrets), that is not disclosed to third parties and, if it were to be disclosed, that disclosure would be contrary to the confidentiality recognized and applied in the industry. Such disclosure would also result in significant losses for the company concerned and procure significant commercial advantages for a competitor (including generic companies).
>
> 100. Considering the sums involved, a single piece of information that may seem innocuous may provide the key to a solution that had, until then, been fervently sought by a competitor at great expense.

[97] He makes no mention of any of the pages listed at paragraph 112 in the trial judge's decision.

[98] In her affidavit dated May 2, 2002, (A.B., A-499-06, Vol. 6, page. 1853), Laura King, affiant for Merck Frosst, stated for her part that:

> 34. Consequently releasing this part of the SNDS will help a competitor to understand Merck Frosst's know-how and will assist a competitor in the preparation of a NDS or SNDS. Knowledge of the contents of the submission would facilitate a competitor in its drug development process and expedite their product launch, resulting in material financial loss to Merck Frosst. This includes another innovator company, working on a different chemical entity that would be able to apply Merck Frosst's strategy (know-how) (see pages 4,5,7, 18-20, 22-24, 34-104, 116, 122-129, 132, 179, 286-291 of the Record). Consequently, according to my experience and expertise, this information meets the requirements of paragraph 20(1)(*c*) of the ATI Act.
>
> [Emphasis added.]

[99] Just as in appeal A-492-06, these statements remain vague, speculative and silent as to specifically how and why the disclosure of the requested information would be likely to bring about the harm alleged by Merck Frosst.

[100] The trial judge erred in fact and law at paragraphs 104 and 107 of his reasons in appeal file A-492-06 and at paragraph 112 of his reasons in appeal file A-499-06.

Issue (c) from the Minister's appeal: Did the trial judge err in fact and law in applying section 25 of the Act?

[101] At paragraph 108 of his reasons in appeal A-492-06, the trial judge wrote,

> 108 Except where a specific passage from a page has been noted (see the examples at paragraph 107 of these reasons), the page should be deleted in its entirety under section 25 of the Act since, in this Court's opinion, it would be very difficult to separate information the disclosure of which should be refused.
>
> [Emphasis added.]

[102] At paragraph 114 of his reasons in A-499-06, he wrote,

> 114 At the hearing, counsel for the Respondent conceded that some passages on pages 226, 232, 238 and 244 should be exempted under subsection 20(1) of the Act. The Court's view is that those pages should be suppressed in their entirety under section 25 of the Act because I believe it would be extremely difficult to isolate the information that should not be disclosed. The same is true of the pages referred to in paragraphs 112 and 113.
>
> [Emphasis added.]

[103] In *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265, our Court held the following, as penned by Justice Heald:

> 13 I think it significant to observe that section 25 is a paramount section since the words "Notwithstanding any other provision of this Act" are employed. In my view, this means that once the head of the government institution has determined, as in this case, that some of its records are exempt, the institutional head, or his delegate, is required to consider whether any part of the material requested can reasonably be severed. Section 25 uses the mandatory "shall" with respect to disclosure of such portion, thereby requiring the institutional head to enter into the severance exercise therein prescribed. . . .
>
> . . .
>
> 18 When sections 2 and 25 of the Act are read in context, it is apparent that the respondent's delegate erred in failing to comply with the provisions of section 25. This failure to perform the severance examination mandated by section 25 is, in my view, an error in law which is fatal to the validity of the decision a quo. . . .

[104] The trial judge had a duty to ensure compliance with section 25 of the Act, which, where applicable, provides for severance, provided that such severance does not cause serious problems. It was not open to him to order the removal of the entire page without explaining the difficulties of the severance exercise, which he did not do. The trial judge substituted his own discretion for that exercised by the head of the government institution when there was no evidence from Merck Frosst

establishing that the first exercise by the head of the government institution was incorrect. That is an error of law.

[105] Merck Frosst argues (at paragraphs 128 to 142 of its memorandum) that it was up to Health Canada to do a thorough study of the file and that Health Canada cannot merely content itself with a cursory examination and then shift the burden to Merck Frosst for Merck Frosst to do the work in its stead.

[106] That argument disregards the case law on the subject, as shown in my reply to issue (*b*) from the cross-appeal.

Issue (**b*****) from the cross-appeal: Did the trial judge err in ruling in favour of the validity of the government institution's procedure whereby the onus to establish that the Minister must refuse the disclosure of a record is on the party objecting to disclosure?***

[107] Merck Frosst argues that the Minister could not place the onus on it to show why the disclosure of the documents should be refused under subsection 20(1). Merck Frosst asserted that the Minister had to perform a genuine and thorough examination of the documentation before sending the notice pursuant to section 27 of the Act.

[108] Merck Frosst submits that the trial judge's finding that the onus of demonstrating the application of subsection 20(1) of the Act is on interested third parties—in this case, Merck Frosst—is erroneous. Merck Frost therefore submits that the trial judge erred in validating the

decision-making process that led to the Minister's decision dated January 2, 2001, in appeal A-492-06 and the one dated December 19, 2001, in appeal A-499-06.

[109] In his reasons for judgment in appeal file A-492-06, the trial judge concluded as follows:

> 78 Despite the telling arguments put forward by the applicant on this point, in this Court's opinion the procedure of placing on the applicant the onus of establishing that the respondent should refuse to disclose the records under subsection 20(1) of the Act is not illegal.
>
> 79 Since disclosure is the rule, and refusal to disclose is the exception, the respondent was required only to identify the passages of records to which subsection 20(1) of the Act was likely to apply, and then to ask the applicant to make representations with regard to the applicability of subsection 20(1) to all the records.
>
> 80 It is clear that the applicant is in a better position and has greater expertise than the respondent when it comes to identifying the passages of records that are the subject of an access request and to which subsection 20(1) of the Act is likely to apply, since most of the records emanate from the applicant.
>
> 81 This is also one of the arguments put forward by the applicant in support of its conclusions regarding the applicability of subsection 20(1) of the Act in response to the following question, which deals with the validity of the respondent's conclusions regarding the applicability of subsection 20(1) to the records that are the subject of the access request..
>
> 82 For a third party, such as the applicant, this procedure unquestionably creates an onus and a considerable amount of work when an access request is made and when the time comes to reach a conclusion on the applicability of subsection 20(1) of the Act. However, this burden is not out of proportion if we consider the greater expertise of the third party and the importance that party is likely to attach to the protection of information about itself.
>
> 83 In short, the purpose of this procedure is to require the respondent to consult the applicant after a fairly cursory examination of the records, to take the applicant's recommendations into account and, if it decides not to follow those recommendations, to explain why. If the applicant is dissatisfied with the respondent's decision, it may apply to this Court under section 44 of the Act for a review of the respondent's decision.

[110] Identical paragraphs, numbered 86 to 91 inclusively, are found in the trial judge's reasons for judgment related to appeal file A-499-06.

[111] Paragraphs 2(1) and 4(1) of the Act enshrine the right of Canadian citizens and permanent residents to have access to records under the control of a government institution except where limited and specific exceptions are made to this right, while ensuring that decisions on the disclosure are reviewed independently of government.

[112] The case law of our Court consistently establishes that the burden is on the party objecting to disclosure of the information (*Wyeth Ayerst Canada Inc. v. Canada*, [2003] F.C.J. No. 916, paragraph 19; *Merck Frosst Canada v. Canada (Minister of Health)*, [2000] F.C.J. No. 1281, paragraph 6).

[113] Under section 27 of the Act, as it read at the time of the dispute, if the record contains or the head of a government institution has reason to believe it might contain the type of information that should be exempted pursuant to subsection 20(1) of the Act, the head of a government institution who intends to disclose any record requested under this Act, or any part thereof, shall give the "third party", Merck Frosst in this case, written notice of the request received and of the fact that the head of the institution intends to disclose the record or part thereof.

[114] Contrary to what was argued by Merck Frosst, Parliament imposes nothing more on the government institution.

[115] The only duty imposed on the head of the government institution under subsection 27(1) of the Act is that of stating, in the notice, the passages of the record that are the subject of the access request and that contain or for which there is reason to believe might contain

> (a) the trade secrets of a third party,
>
> (b) information described in paragraph 20(1)(*b*) that was supplied by a third party, or
>
> (c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party.

[116] Furthermore, under subsection 27(3) of the Act, the notice shall include (*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 27(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 (*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.

[117] The words defining the duty incumbent on the head of the government institution did not substantially change following the amendments made to section 27 of the Act in 2007.

[118] The trial judge's finding in appeal cases A-492-06 and A-499-06 is consistent with the Act.

CONCLUSION

[119] In appeals A-492-06 and A-499-06, I would allow the appeals with costs, set aside paragraphs 93 and 104 to 108 of the trial judge's decision in appeal A-492-06 and paragraphs 101 and 112 to 114 in the trial judge's decision in appeal A-499-06 and, rendering the judgments that he should have rendered, I would dismiss the applications for judicial review.

[120] In appeals A-492-06 and A-499-06, I would dismiss the cross-appeals with costs to the Minister.

"Alice Desjardins"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-492-06 A-499-06
STYLE OF CAUSE:	MINISTER OF HEALTH v. MERCK FROSST CANADA LTD.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 11, 2009
REASONS FOR JUDGMENT BY:	Desjardins J.A.
CONCURRED IN BY:	Noël J.A. Pelletier J.A.
DATED:	May 26, 2009

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