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Supreme Court Balances Access to Information and Third-Party Confidentiality

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The Supreme Court of Canada (the Court) recently issued its first decision interpreting the exemption in the *Access to Information Act* (the ATIA) protecting third-party commercial information in the possession of a government institution from disclosure to requesters: *Merck Frosst Canada Ltd. v. Canada (Health)*. The decision heralds a new, much-needed balance between requesters' rights to information about government and the rights of third parties to have confidential information that they provide to the government for regulatory or other purposes protected from disclosure. As a guiding principle in applying the ATIA, the Court found that government institutions have equally important duties to disclose information that is accessible under the Act, and to refuse to disclose confidential information that is exempt under the Act. The government must take both duties equally seriously. The Court held: "third party confidential commercial information must receive the protection which the Act intends for it."

BACKGROUND

Health Canada received access to information requests for documents related to a New Drug Submission and Supplementary New Drug Submission filed by Merck. Merck objected to the disclosure on the basis that the information was exempt under s. 20(1)(a), (b) and (c) of the ATIA. Section 20(1)(a) provides that any record that contains trade secrets of a third party must be exempted from disclosure. Section 20(1)(b) states that a record that contains confidential financial, commercial, scientific or technical information of a third party that was supplied by the third party to a government institution must be exempt. Finally, s. 20(1)(c) exempts information, the disclosure of which could reasonably be expected to result in material financial loss or gain to, or prejudice the competitive position of, a third party.

Merck also objected to Health Canada's disclosure of certain records without any notice to Merck. Merck further objected to the process followed by Health Canada of making only a cursory initial examination of the records requested, and then placing the onus on the third party to provide evidence establishing that the requested records fall within the exemption. Merck submitted that the human and financial resources that Health Canada requires third parties to expend responding to access to information requests creates undue commercial injury that was not intended by the ATIA.

NOTICE OF DISCLOSURE TO THIRD PARTIES

The ATIA requires a government institution to give written notice to a third party if it intends to disclose a record that it has reason to believe contains third-party information that is exempt from disclosure under s. 20(1). The Court found that there is a low threshold for giving notice of a potential disclosure, as the harm that could follow from an erroneous disclosure is irreversible. The government institution can *only* disclose information without notice where the information is clearly subject to disclosure, that is, where there is no reason to believe the information is exempt from disclosure.

The institution *must* give the third party notice if it: is in doubt about whether the information is exempt from disclosure; intends to disclose otherwise exempt information pursuant to the public interest override provisions of the ATIA; or intends to disclose material that has been severed from other non-disclosable information. The Court concluded that under this test, Health Canada should not have disclosed certain information without notice to Merck.

The Court then turned to the question of the type of review the government institution must undertake before seeking representations from the third party. The responsibility to make the initial determination of whether third-party information is exempt from disclosure rests with the government institution, which must review each individual record to determine which

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portions, if any, may be exempt. This responsibility cannot be shifted to the third party. If information is clearly exempt from disclosure, the institution should refuse disclosure without requiring the third party to make submissions.

However, if the issue is not clear, notice must be given, and the third party must have an opportunity to make its representations. The Court rejected Health Canada's submission that at this stage the third party has an "onus to persuade it that the exemptions apply." Rather, the third party is to provide reasonable assistance to the institution in carrying out the institution's duties under the Act.

THIRD-PARTY EXEMPTIONS

The Court set out the tests to be applied for exemption under s. 20(a), (b) or (c) of the ATIA. With respect to s. 20(1)(a), the Court held that a trade secret is a plan or process, a tool, mechanism or compound, that must meet four criteria:

- the information must be secret in an absolute or relative sense (i.e., is known by only 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 a secret;
- the information must be capable of industrial or commercial application; and
- the possessor must have an interest (e.g., economic) worthy of legal protection.

The Court also considered whether information that is already publicly available, such as a compilation of published studies, could be subject to the confidential information exemption under s. 20(1)(b). The Court held that while the content of published studies is not confidential (and therefore not exempt from disclosure), express or implicit statements of the third-party's evaluation of the reliability of a study will generally meet the definition of confidential information.

The Court also provided guidance on the requirement that information be "supplied to a government institution by a third party" to be exempt under s. 20(1)(b). The documents at issue included notes prepared by Health Canada scientists and correspondence between Health Canada and the third party. The Court held that documents prepared by a government employee that reveal confidential information supplied by a third party must be exempt, as well as the confidential information itself. However, judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.

Turning to the harm-based exemption in s. 20(1)(c), the Court held that the third party must demonstrate "a reasonable expectation of probable harm." The Court concluded that this test captures the principle that while a third party need not show on a balance of probabilities that the harm will in fact come to pass if the record is disclosed, the third party must nonetheless do more than show that such harm is merely possible. The Court held that insofar as Health Canada had required that the loss or prejudice be "immediate" and "clear", it had applied an unduly onerous test of probability of harm. The Court also accepted Merck's submission that disclosure of information not already in the public domain that could give competitors a head start in product development could, as a general proposition, be shown to give rise to a reasonable expectation of probable harm.

SEVERANCE

Finally, the Court considered the proper application of s. 25 of the ATIA, which provides that where the head of an institution is authorized to refuse to disclose a record, he or she is nonetheless required to disclose any part of the record that is not exempt from disclosure and that can be reasonably severed from the exempt portion of the record. The Court held that in severing a document, the institution undertakes "both a semantic and a cost-benefit analysis." In the semantic analysis, the institutional head must consider whether the severed information that remains to be disclosed has any meaning. If it does not, then severance is not reasonable. The cost-benefit analysis considers whether the effort required to sever non-exempt information is justified by the quality of access granted by the remaining information. If the severed portions of the record to be disclosed would not contain information that "would reasonably fulfil the purposes of the Act," then severance is not reasonable.

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CONCLUSION

The Supreme Court's decision provides important guidance on both the substance of the third-party exemptions in the ATIA and the process to be followed by government institutions in giving notice to third parties that may be affected by an ATIA request. The Court has recognized that an overzealous application of the right of access to information, or a lack of procedural protections, would threaten research and innovation by Canadian companies – that was never Parliament's intention in enacting legislation to promote government accountability. This decision restores the balance intended between access to information about government and protection of confidential commercial information of private entities.

Merck was represented by Blakes at the Supreme Court of Canada level.

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