EB-2014-0163

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an order pursuant to section 29 of the Ontario Energy Board Act, 1998.

MOTION TO RECONSIDER- MAY 2, 2014
BOOK OF AUTHORITIES AND COMPENDIUM OF MATERIALS OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

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Hopedale Developments Ltd. v. Oakville (Town)

1964 CarswellOnt 175, [1965] 1 O.R. 259, 47 D.L.R. (2d) 482

Re Hopedale Developments Ltd. and Town of Oakville

Porter, C.J.O., McGillivray and McLennan, JJ.A.

Judgment: October 1, 1964

Counsel: *J. T. Weir, Q.C.*, and *B. H. Kellock*, for appellant.
J. H. H. Depew, Q.C., for respondent.

Subject: Public; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Municipal Law --- Practice and procedure before municipal planning authorities — Jurisdiction.

Appeal to Municipal Board — Hearing de novo — Whether Board empowered to limit itself by own principles — Planning Act, R.S.O. 1960, c. 296, s. 30(19).

In an appeal by a property owner to the Municipal Board from the refusal of a municipal council to amend a zoning by-law, the Board, in dismissing the appeal, stated that the case did not come within the principles it had enunciated in earlier decisions. The owner appealed on the grounds that s. 30(19) of the Act, which gave the Board jurisdiction, required a decision on the merits, and that the Board, by referring to prior cases, had refused to exercise its independent judgment. Held, the appeal should be dismissed. On an analysis of its reasons, the Board had given full consideration to the merits of the case, although it had then sought to fit its decision into the general principles stated in other cases. While it was proper for the Board to consider certain principles in deciding an appeal under s. 30(19), it was not proper for it to limit its consideration to the application of those principles. The hearing before the Board was a hearing de novo, and should be conducted as such.

The judgment of the Court was delivered by *McGillivray, J.A.*:

1 This is an appeal upon a question of law only from an order of the Ontario Municipal Board (hereinafter referred to as "the Board") dismissing an application by the appellant for an order directing the council of the respondent municipality to amend a restricted area zoning by-law.

2 The appellant owns approximately 4 $^{1}/_{2}$ acres of land in the Town of Oakville which land was zoned in 1959 by By-law 133 of the Township of Trafalgar to permit use only for semi-detached houses and, for one lot, for a single-family home. The land is situated in a part of the town in which the development has been mainly of a single-family character but which has adjacent to it a 10-acre shopping centre.

3 The Township of Trafalgar was amalgamated with the Town of Oakville to form a new town under the name of the Town of Oakville in January, 1962. The history of the development prior to passing the above by-law in 1959 is outlined by the Board in its reasons as follows:

> The land use of the subject site, some 4 $^{1}/_{2}$ acres, was originally commercial to accommodate a shopping centre to serve the area. At this time all of these lands were within the confines of the Township of Trafalgar and the planning of the area had been carried out by that municipality prior to its annexation to Oakville. A study undertaken by the Trafalgar director of planning, now occupying the same position in the town, indicated in 1958 that the 5 acre commercial site was not of sufficient size to service adequately the projected population, and accordingly the developer was prevailed upon to utilize 10 acres of existing single-family lands lying to the west for the purpose of a larger shopping Plaza. Since the subdivider had at this stage registered and fully serviced 70 single-family lots on the westerly parcel, the change in location was accomplished at the cost of abandoning water, sewer and road installations for some 33 lots. In consideration of this, the Planning Board recommended, and it was concurred in by council, that on the lands surrounding the new site, including the former commercial zone, there should be established a classification of land use to permit the erection of 74 semi-detached dwellings, 100 apartment units and 10 single-family detached dwellings.
>
> Considerable opposition was raised to the change by the residents of the surrounding area at a meeting of Council and at this stage the subdivider agreed to a compromise whereby 34 semi-detached units would be erected in place of the 100 apartments.

4 The appellant asked the council to amend the present by-law to permit use of the land for the erection of a 6-story apartment building and three maisonettes. The council dealt with the application and refused to amend the by-law. The appellant then appealed to the Board to direct an amendment basing its case upon the grounds that the proposed change would effect

> (1) an improvement in the planning area;
>
> (2) an improvement in the economy of the community;
>
> (3) a change consistent with the adjacent shopping centre use;
>
> (4) and that it would meet an economic need for this type of accommodation.

5 The Board held a public meeting at Oakville on January 6, 1964, following which, on the 20th of that month, it dismissed the application giving its reasons therefor. The reasons which are short are as follows:

> The appeal and application for subdivision were opposed at the hearing by the Town of Oakville and some of the residents of the area who launched vigorous objection against any change in zoning proposed by the appellant. It was the evidence of those in opposition that at the time of the purchase of their homes in 1958 and upward, the land was zoned for a small shopping centre which, it was believed, they could live with. When the shopping centre location was moved to the larger site, they opposed the rezoning not only of the western parcel but also that on the northerly and easterly lands proposed for multiple family use. It was their evidence that they moved into this area to enjoy the amenities of single-family residential zoning and they do not believe that they should be compelled every year or so to appear before one body or the other to defend their equities. It is pointed out that only some four years ago the present zoning had been determined after a full and proper hearing by this Board.
>
> The Town, while opposing, did not call evidence but submitted that the present land use requirements were agreed to by all parties as a compromise and duly approved by this Board after a complete public hearing. It was the position of the corporation that there were no significant changes since that time which would justify the intrusion of higher density uses into the area.

Very convincing evidence from a planning viewpoint was given for the appellant by three professional planners and the Board has considered the exhibits filed by these witnesses during the course of the hearing.

Applications under Section 30(19) of The Planning Act coming as they do by way of appeal from the decision of Council, occupy a position under the jurisdiction of the Board quite different from that of many other applications. In such cases the appointed Board is given power by the Legislature to compel elected councils to legislate concerning the rights of those who elected them. In exercising this jurisdiction the Board is of necessity interfering in the discretion vested in the elected representatives by the general provisions of this legislation. It is readily apparent that this is a grave responsibility which must be exercised with every safeguard of judicial caution. Reference is made here to the Board's decisions *"Highway Developments Limited vs The Township of Etobicoke" February 21, 1958*, and *"Sutton Place Developments vs The City of Toronto" March 7th, 1960.*

These decisions, the Board believes, set forth the provisions which must apply before the Board will interfere with the discretion of the elected council.

The Board is of the opinion that the appellant has not brought itself within the requirements enunciated in the above decisions. There is no evidence to indicate that the lands which are the subject of this application cannot be developed economically in conformity with the existing land use. Of concern also to the Board is the effect a higher density land use would have on the undeveloped lands in the immediate area presently zoned for single-family and semi-detached use. The Board is not alone in this uncertainty as the Staff report of June 14th, 1962, to the Oakville Planning Board would indicate under "comments", and the Board quotes "It must be borne in mind that the success of any such application here may be the signal for similar requests in respect of undeveloped lands south of Rebecca Street."

With respect, this conclusion might also apply equally well to the remaining lands to the North owned by the appellant.

The Board is not satisfied that the situation has changed sufficiently since the present zoning was imposed to merit the direction of an amendment to the by-law. In the absence of conclusive evidence that this is indeed an area of change brought about by the various pressures which usually dictate a lowering of those standards conducive to the lesser density amenities, the Board is of the opinion that the residents are entitled to some stability in zoning.

6 The Board had set forth in the cases referred to in the above reasons the circumstances which it said should exist before an application by way of appeal from the council would be allowed.

7 The questions of law with which this appeal is concerned, as they are set forth in the order granting leave, are

I Did the Ontario Municipal Board err in law in holding that it was not required by the provisions of Section 30(19) of The Planning Act, R.S.O. 1960, c. 296 to exercise its independent judgment by determining the appeal to it on the merits of the application made by the appellant.

II Did the Ontario Municipal Board err in law in holding that it should not interfere with the exercise of the respondent's Council's discretion unless the appellant demonstrated that the said Council's action was clearly not for the greatest common good, that it created an undue hardship, that some private right was unduly interfered with or denied, that the said Council had acted arbitrarily on incorrect information or advice or otherwise improperly.

III Did the Ontario Municipal Board err in law in dismissing the appellant's appeal upon the facts found by the Board.

8 The authority which was conferred upon the Board to hear the appeal in the present instance is to be found in s. 30(19) of the *Planning Act*, R.S.O. 1960, c. 296, which provides:

30(19) Where an application to the council for an amendment to a by-law passed under this section or a predecessor of this section, or any by-law deemed to be consistent with this section by sub-section 3 of section 13 of *The Municipal Amendment Act, 1941*, is refused or the council refuses or neglects to make a decision thereon within one month after the

receipt by the clerk of the application, the applicant may appeal to the Municipal Board and the Municipal Board shall hear the appeal and dismiss the same or direct that the by-law be amended in accordance with its order.

9 The extent of the power thus given is wide and was delineated by Kelly, J.A., speaking for the Court in *Mississauga Golf & Country Club Ltd., Re*, [1963] 2 O.R. 625, 40 D.L.R. (2d) 673 (C.A.), as follows:

> In the circumstances prevailing, s. 30(19) gives the Board power to "direct that the by-law (the zoning by-law) be amended in accordance with its order". These words coupled with the very broad provisions of s. 87 of the *Ontario Municipal Board Act* leave no doubt that the Board in acting pursuant to s. 30(19) is not fettered as the appellant submits here. On the appeal to the Board, the Board is exercising an original jurisdiction and may direct the council to do anything a council could have done in dealing with the application to it, even if this departs from the strict terms of the relief requested in the application. . . .

10 The Board was thus required to exercise its independent judgment upon the merits of the appellant's application. It is the basis of the appellant's case before this Court that the Board, by its reference to decisions in the *Highway Developments Ltd.* and *Sutton Place Developments* cases and by its statement that the provisions quoted in these cases must apply before the Board will interfere indicated that the Board had, in so doing, closed its mind and had failed to consider the appellant's case on its merits as it was required to do. The issue accordingly is, did the Board by announcing a policy by which it proposed to guide itself, and by stating that the application did not accord with that policy, then refuse to exercise its independent judgment in the matter before it.

11 The right of an administrative tribunal to formulate general principles by which it is to be guided is undoubted and has been considered upon many occasions in the Courts, particularly in cases dealing with the issuing of licences. Numerous examples of this are referred to in Robson, *Justice and Administrative Law*, 2nd ed., p. 297; and in S. A. de Smith, *Judicial Review of Administrative Action* (1959), p. 184, the learned author, quoting authorities therefor, states:

> It is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion. The courts have encouraged licensing justices to follow this practice.

The tribunal, however, where it has announced considerations by which it is to be guided, and where it has original jurisdiction, must not fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it. This principle has been well stated by Bankes, L.J., in *The King v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176 at p. 184:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes. . . .

Further applications of this principle of law are to be found in the cases of *Fulham Borough Council v. Santilli*, [1933] 2 K.B. 357; *Stepney Borough Council v. Joffe*, [1949] 1 K.B. 599, and *Hammond v. Hutt Valley*, [1958] N.Z.L.R. 720.

12 In the present instance the Board has referred to certain principles set forth in its judgment in *Re Highway Developments Ltd. v. Township of Etobicoke* and has stated again that these must apply before the Board will interfere with the discretion of the elected council. I quote from the reasons of the Board in that case.

> The township council clearly had jurisdiction, under section 390 of *The Municipal Act*, to exercise its discretion as it had done by refusing the application. The board found that its present duty was to review that exercise of discretion and to determine whether there was cause for the board to interfere. It must be clear that the board should decline to interfere with

the exercise by elected representatives of the discretion given to them by the legislature, except where it was shown that their action was clearly not for the greatest common good, that it created an undue hardship that some private right was unduly interfered with or denied, that they had acted arbitrarily on incorrect information or advice, or otherwise improperly.

13 Although it is proper for the Board in an appeal under s. 30(19) of the *Planning Act* to consider certain principles in deciding an appeal, it is not proper for the Board to limit its consideration to the application of these principles. It is, of course, important to keep in mind, as the Board has done, that it is being asked to interfere with the discretion exercised by an elective body but that can be but one of all the considerations which must be taken under review. The hearing before the Board is a hearing *de novo* and must be conducted as such. Counsel for the respondent submits that those parts of the principles stated, namely, "clearly for the greatest common good" or "creating an undue hardship" are sufficiently wide to require the Board to give full consideration to all matters as in a hearing *de novo*. I do not agree. It is possible that the Board may so interpret the phrases in question but such phrases are of uncertain meaning and their scope is questionable. Of even more importance, However is the consideration that if they are to have the breadth of meaning we are asked to attribute to them then no purpose is served by outlining them as principles to be followed by the Board. In laying them down as principles and stipulating that the defendant must come within them the Board has sought, one must conclude, to reduce the scope of the inquiry. To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application is clearly wrong and the Board, if it so fettered its jurisdiction, would be in error.

14 In the present instance, however, notwithstanding what was said on this point in its reasons, the Board has shown that it did not so fetter itself and that all matters entitled to be considered were considered and were weighed and were dealt with. The Board found

(1) That there was no evidence to establish that the subject lands could not be developed economically within the existing land use;

(2) That a higher density land use might have an undesirable effect upon the adjacent undeveloped lands;

(3) That a change of zoning in this instance might readily stimulate and perhaps justify similar requests with respect to undeveloped land in the immediate vicinity;

(4) That

The Board is not satisfied that the situation has changed sufficiently since the present zoning was imposed to merit the direction of an amendment to the by-law. In the absence of conclusive evidence that this is indeed an area of change brought about by the various pressures which usually dictate a lowering of those standards conducive to the lesser density amenities, the Board is of the opinion that the residents are entitled to some stability in zoning.

15 The Board in its reasons has thus made it clear that it has given full consideration to all matters before it including the submissions made by the appellant, and then, upon grounds which I consider both adequate and sound, has indicated why it felt the appeal should not be allowed. What it then sought to do, though in the reverse order, was to fit the decision which it had reached into one or more of the general principles which it had previously announced. Looked at in this perspective it did not err and did not fail to adjudicate upon the merits. From this it follows that while approval cannot be given to the manner in which the Board has expressed a part of its reasons it has conducted a proper inquiry and has given full consideration and weight to all matters which it was called upon to determine.

16 My answer to the questions would be:

I. If the Board held that it was not required by the provisions of s. 30(19) of the *Planning Act* to exercise its independent judgment in the determination of all matters in appeal on their merits, the answer to this question would be "yes"; but a full reading of the reasons of the Board makes it apparent that it did not so restrict itself and that it refused the appeal upon the merits.

II. In view of the answer to question this need not be answered.

III. No.

17 I would allow no costs.

1994 CarswellOnt 1021
Ontario Court of Appeal

Ainsley Financial Corp. v. Ontario (Securities Commission)

1994 CarswellOnt 1021, [1994] O.J. No. 2966, 121 D.L.R. (4th) 79, 18 O.S.C.B. 43, 21 O.R. (3d) 104, 28 Admin. L.R. (2d) 1, 6 C.C.L.S. 241, 77 O.A.C. 155

AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MACKAY LIMITED, NORWICH SECURITIES LTD. and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 28-30, 1994
Judgment: December 21, 1994
Docket: Doc. CA C16489

Counsel: *Dennis O'Connor, Q.C.*, and *James Doris*, for appellants.
Brian Finlay, Q.C., Philip Anisman and *J. Gregory Richards*, for respondents.

Subject: Securities; Public; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Securities and Commodities --- Commissions and exchanges — Nature and powers

Securities and commodities — Commissions and exchanges — Nature and powers — Jurisdiction — Policy statements — Commission attempting to regulate sale of penny stocks through public interest policy — Policy statement being in form de facto legislation and mandatory due to threat of sanctions — Policy statement being invalid as being beyond commission's authority.

The Ontario Securities Commission issued a draft policy statement relating to the marketing and sale of penny stocks, which was directed at securities dealers who were not members of the Toronto Stock Exchange or the Investment Dealers Association of Canada. The respondents commenced an action claiming that the commission had no authority to issue the policy statement. The respondents successfully moved for summary judgment seeking a declaration that the policy statement was invalid.

The commission appealed that judgment. The commission submitted that the statement was only a guide for those dealers engaged in the sale of penny stocks and was put forward to assist securities dealers in understanding and complying with obligations imposed under the *Securities Act* (Ont.). The policy statement did not forbid any specific practice or declare the practices set out in the statement as obligatory. The policy did not indicate that noncompliance would be regarded as sanctionable conduct. The respondents opposed the appeal. They submitted that the policy was mandatory and that it established an onerous and detailed scheme to dictate the manner in which the respondents had to carry out their business. Further, they submitted that the commission's reference to its practices as being in the public interest implied that failure

to follow the practices could lead to sanctions under the Act. The respondents also submitted that the policy statement was de facto legislation and beyond the commission's authority.

Held:

The appeal was dismissed.

The policy statement had to be characterized as mandatory and as an attempt by the commission to impose on the respondents a de facto legislative scheme complete with substantive requirements. There was no statutory authority to impose such a scheme; therefore, the policy statement was invalid. In characterizing the policy statement, two factors were significant: the format of the statement, and the linkage made between the power to sanction and the pronouncement. In its form, the policy statement read like a statute or regulation, setting down a code of conduct, and not like a statement of guiding principles. Linking the commission's power to sanction in the public interest with a pronouncement that the practices as set out in the policy statement were in accord with the public interest gave the policy statement a coercive tone. It suggested that failure to comply with the guidelines of the policy statement could result in sanctions under the Act. Such a threat was the essence of a mandatory requirement. The coercive effect of the policy statement could also be found in commission staff's attitude towards the policy statement as indicated in a report to the commissioners. The report indicated that commission staff would treat the policy statement as if it were the equivalent of a statutory provision or regulation.

Table of Authorities

Cases considered:

Capital Cities Communications Inc., Re (1977), (sub nom. *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission))* [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181 — *referred to*

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1; [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1 — *referred to*

Hopedale Developments Ltd. v. Oakville (Town), [1965] 1 O.R. 259, 47 D.L.R. (2d) 482 (C.A.) — *referred to*

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, 44 N.R. 354, 137 D.L.R. (3d) 558 — *referred to*

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, 22 Admin. L.R. (2d) 1, 4 C.C.L.S. 117, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 14 B.L.R. (2d) 217, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, 46 B.C.A.C. 1, 75 W.A.C. 1 *considered*

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5 —

s. 27 [re-en. Financial Services Statute Law Reform Amendment Act, 1994, S.O. 1994, c. 11, s. 360]

s. 127 [re-en. Financial Services Statute Law Reform Amendment Act, 1994, S.O. 1994, c. 11, s. 375]

Appeal from judgment reported at (1993), 17 Admin. L.R. (2d) 281, 1 C.C.L.S. 1, 16 O.S.C.B. 4077, 14 O.R. (3d) 280, 10 B.L.R. (2d) 173, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]) declaring Ontario Securities Commission policy statement invalid.

The judgment of the court was delivered by *Doherty J.A.*:

1 In August of 1992, the Ontario Securities Commission (the Commission) issued Draft Policy Statement 1.10. The statement related to the marketing and sale of penny stocks and was directed at securities dealers like the respondents, who were not members of the Toronto Stock Exchange or the Investment Dealers Association of Canada. The Commission formally adopted the draft with some minor modifications in March of 1993.

2 In September 1992, the respondents commenced an action against the Commission claiming, among other things, that the Commission had no authority to issue Policy Statement 1.10. In April 1993, the respondents brought a motion in their action for summary judgment seeking a declaration that Policy Statement 1.10 was invalid. After a lengthy hearing, Blair J. granted the motion and declared Policy Statement 1.10 invalid. The Commission appeals from that judgment.

3 Policy Statement 1.10 was held in abeyance pending the decision of Blair J. It has, of course, not been issued in light of that decision. The respondents' action against the Commission continues with respect to the other claims advanced by the respondents.

4 The reasons of Blair J., now reported at (1993), 14 O.R. (3d) 280, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]), provide a detailed account of the events culminating in the adoption of Policy Statement 1.10 and make extensive reference to the content of the Policy Statement and related documents. As I agree with the conclusion reached by Blair J. and am in substantial agreement with his reasons, I will not rework the ground so fully tilled by him. These reasons should be read in conjunction with those of Blair J.

5 Counsel, whose excellent presentations were of great assistance, agree that this appeal turns on the proper characterization of Policy Statement 1.10. The Commission submits that Policy Statement 1.10 is a guide to the business practices which the Commission regards as appropriate for those engaged in the marketing and sale of penny stocks. The Commission submits that the *Securities Act*, R.S.O. 1990, c. S.5 and Regulations passed under that Act impose certain obligations on securities dealers engaged in the marketing and sale of securities. The Commission further submits that Policy Statement 1.10 was put forward to assist security dealers in understanding and complying with those obligations by informing them of the Commission's view as to what constituted appropriate business practices in the context of the marketing and sale of penny stocks. The Commission contends that Policy Statement 1.10 does not forbid any specific practice or declare that the practices set out in the statement are obligatory. Nor, according to the Commission, does Policy Statement 1.10 indicate that non-compliance with the statement will be regarded as per se sanctionable conduct.

6 The respondents submit that Policy Statement 1.10 is mandatory and establishes an onerous and detailed scheme intended to dictate the manner in which the respondents must carry on their business. The respondents further argue that the Commission's reference to its prescribed practices as being "in the public interest" necessarily implies that the failure to follow those practices will render the respondents liable to sanction under the various "public interest" provisions of the *Securities Act*. [1] The respondents contend that Policy Statement 1.10 is de facto legislation and beyond the authority of the Commission.

7 I understand counsel for the respondents to concede the validity of Policy Statement 1.10 if the Commission's characterization of that statement is correct. I also understand counsel for the Commission to concede the invalidity of Policy Statement 1.10 if the respondents' characterization of it is correct.

8 In my opinion, counsel have captured the essence of this appeal.

9 Various statutory provisions charge the Commission with the primary regulatory authority in the securities field. That field is necessarily subject to detailed and far-reaching regulation. The Commission also has a recognized policy-making function: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 596. Furthermore, the Commission has an important adjudicative function and is given a broad discretion to take various steps and impose various sanctions where, in the Commission's opinion, the public interest so requires. All of these powers and duties must be exercised with a view to protecting the investing public and enhancing the efficiency and integrity of capital markets: *Pezim*, supra, at p. 589.

10 The Commission performs its duties and exercises its discretion within the framework established by the pertinent statutory provisions and Regulations. These statutory instruments do not, however, tell the whole regulatory story. The Commission has developed various techniques, including policy statements, designed to inform its constituency and further the goals described above. These non-statutory instruments have increased in number and gained in prominence as securities regulation has become more complex and the problems to which the Commission must respond more diverse. Contemporary securities regulation involves an amalgam of statutory and non-statutory pronouncements and seeks to regulate by means of retrospective, ad hoc, fact-specific decision making and prospective statements of policy and principles intended to guide the conduct of those subject to regulation.

11 The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; *Re Capital Cities Communications Inc.* (sub nom. *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*) (1977), 81 D.L.R. (3d) 609 at p. 629 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; *Pezim*, supra, at p. 596; *Law Reform Commission of Canada, Report 26, Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.

12 Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support for the opinion expressed by the Ontario Task Force on *Securities Regulation: Responsibility and Responsiveness* (June 1994) at pp. 11-12:

> A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

13 To the extent that the reasons of Blair J. may be read as requiring some statutory authority for the issuing of such guidelines, I must, with respect, disagree with those reasons. Nor, in my view, are pronouncements which are true guidelines rendered invalid merely because they regulate, in the broadest sense, the conduct of those at whom they are directed. Any pronouncement by a regulator will impact on the conduct of the regulated. A guideline remains a guideline even if those affected by it change their practice to conform with the guideline.

14 Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or Regulation: *Capital Cities Communications Inc.*, supra, at p. 629; Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" (1989), Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace, p. 97 at p. 107. Nor can a non-statutory instrument preempt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd.*, supra, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. Iacobucci J. put it this way in *Pezim* at p. 596:

> However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

15 If Policy Statement 1.10 has crossed the Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument, then I agree with Blair J. that the Commission could only issue that statement

if it had statutory authority to do so. The Commission concedes that as the legislation stood at the relevant time[2] it had no such statutory authorization.

16 There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline," just as no definitive conclusion can be drawn from the use of the word "regulate." An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

17 In submitting that Policy Statement 1.10 is a guideline, Mr. O'Connor urged the court to accept the language of Policy Statement 1.10 at face value. He relies on the following passages from the Policy Statement as clearly indicating that it was not intended to either impose specific obligations on those at whom it was directed or fetter the public interest discretion of the Commission:

> This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> . . . . .
>
> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

18 Blair J. considered these passages but ultimately held that Policy Statement 1.10 was mandatory and invalid. Two passages from his reasons capture his conclusion (pp. 294 and 296 O.R.):

> In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.
>
> . . . . .
>
> To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

19 I agree with Justice Blair's conclusion and also rely on the factors he assembles in support of it (at pp. 294-98 O.R.). Two of those factors are particularly significant. The first factor is the format of the statement. Guidelines connote general statements of principles, standards, criteria or factors intended to elucidate and give direction. Policy Statement 1.10 sets out a minutely detailed regime complete with prescribed forms, exemptions from the regime, and exceptions to the exemptions. Policy Statement 1.10 reads like a statute or Regulation setting down a code of conduct (the phrase used in the Commission minutes to describe Policy Statement 1.10) and not like a statement of guiding principles.

20 The second factor is the linkage made in Policy Statement 1.10 between the Commission's power to sanction in the public interest and its pronouncement that the practices set out in the policy statement accord with the public interest. That connection gives the Policy Statement a coercive tone. Policy Statement 1.10 suggests that non-compliance could evoke the Commission's sanction powers. The threat of sanction for non-compliance is the essence of a mandatory requirement. The coercive effect of Policy Statement 1.10 is also apparent in the Commission staff's attitude toward the statement as reflected in the Staff Report submitted to the Commissioners. The Report demonstrates that the staff of the Commission, who are the

individuals with their fingers on the enforcement trigger, would treat Policy Statement 1.10 as if it were the equivalent of a statutory provision or Regulation.

Conclusion

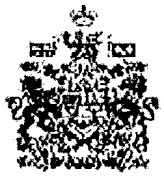
21 Policy Statement 1.10 must be characterized as mandatory and an attempt by the Commission to impose on the respondents a de facto legislative scheme complete with detailed substantive requirements. The Commission could not impose such a scheme without the ap propriate statutory authority. None existed. Policy Statement 1.10 is invalid. The appeal must be dismissed with costs.

Appeal dismissed.

Footnotes

1 The *Securities Act* was substantially amended and renumbered by the *Financial Services Statute Law Reform Amendment Act, 1994*, S.O. 1994, c. 11. Those amendments came into force in July of 1994. The powers formerly found in s. 27 of the Act are now found in s. 127.

2 Bill 190 presently before the Ontario Legislature will amend the *Securities Act* to permit the Commission to issue statutory instruments referred to as rules (s. 143) and will also recognize the Commission's authority to issue non-statutory instruments referred to as policies (s. 143.8). Paragraph 14 of s. 143(1) gives the Commission the power to make rules with respect to "trading or advising in penny stocks." Section 143.8(1) defines the word "policy."



SUPREME COURT OF CANADA

CITATION: Penner *v.* Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125

DATE: 20130405
DOCKET: 33959

BETWEEN:

Wayne Penner
Appellant
and
Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow
Respondents
- and -
Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 72)	Cromwell and Karakatsanis JJ. (McLachlin C.J. and Fish J. concurring)
DISSENTING REASONS: (paras. 73 to 127)	LeBel and Abella JJ. (Rothstein J. concurring)

Penner *v.* Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125

Wayne Penner *Appellant*

v.

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow *Respondents*

and

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association *Interveners*

Indexed as: Penner *v.* Niagara (Regional Police Services Board)

2013 SCC 19

File No.: 33959.

2012: January 11; 2013: April 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Issue estoppel — Administrative law — Police disciplinary proceedings — Complaint alleging police misconduct brought under Police Services Act, R.S.O. 1990, c. P.15 ("PSA") — Civil action for damages arising from same incident also commenced — PSA hearing officer finding no misconduct and dismissing complaint — Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer's decision — Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created — Whether unfairness arises from application of issue estoppel in this case.

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act* ("*PSA*"), alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil action struck on the basis of issue estoppel. While finding

several factors weighed against the application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

Held (LeBel, Abella and Rothstein JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's

subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way; however, the Court of Appeal failed to fully analyze the fairness of

using the results of that process to preclude P's civil action. Nothing in the legislative text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

Per LeBel, Abella and Rothstein JJ. (dissenting): The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice

system in Canada. The doctrine of issue estoppel seeks to protect the reasonable expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the "very limited" discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and

preventing injustice by preserving the finality of litigation. The ultimate goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to administrative law. The Court's residual discretion to refuse to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *PSA* and that required in a civil trial is irrelevant in this case. The hearing officer

made unequivocal findings that there was virtually no evidence to support P's claims. That means that there is simply no evidence to support P's claims whatever standard of proof is applied. P should not be allowed to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of Police designated an outside prosecutor and an independent

adjudicator. Similar methods of appointment are quite common in other parts of the law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

Cases Cited

By Cromwell and Karakatsanis JJ.

Applied: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ. (dissenting)

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC

52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, leave to appeal refused, [1999] 1 S.C.R. xiv; *Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

Statutes and Regulations Cited

O. Reg. 123/98, Part V, Sch., s. 2(1)(g)(i), (ii).

Police Services Act, R.S.O. 1990, c. P.15, Part II, Part V, ss. 56, 57, 60(4), 64(1), (7) to (10), 68(1), (5), 69(3), (4), (7), (8), (9), 70(1), 71(1), 76, 80, 83(7), (8), 95.

Provincial Offences Act, R.S.O. 1990, c. P.33.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 21.01.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, ss. 10, 10.1.

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LeSage, Patrick J. *Report on the Police Complaints System in Ontario*. Toronto: Ministry of the Attorney General, 2005.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Moldaver and Armstrong JJ.A.), 2010 ONCA 616, 102 O.R. (3d) 688, 267 O.A.C. 259, 325 D.L.R. (4th) 488, 94 C.P.C. (6th) 262, [2010] O.J. No. 4046 (QL), 2010 CarswellOnt 7164, affirming a decision of Fedak J., 2009 CarswellOnt 9420. Appeal allowed, LeBel, Abella and Rothstein JJ. dissenting.

Julian N. Falconer, *Julian K. Roy* and *Sunil S. Mathai*, for the appellant.

Eugene G. Mazzuca, *Kerry Nash* and *Rafal Szymanski*, for the respondents.

Malliha Wilson, *Dennis W. Brown*, *Q.C.*, and *Christopher P. Thompson*, for the intervener the Attorney General of Ontario.

Maureen Whelton and *Richard Macklin*, for the intervener the Urban Alliance on Race Relations.

Louis Sokolov and *Daniel Iny*, for the intervener the Criminal Lawyers' Association (Ontario).

Robert D. Holmes, Q.C., for the intervener the British Columbia Civil Liberties Association.

Ian J. Roland and *Michael Fenrick*, for the intervener the Canadian Police Association.

Tim Gleason and *Sean Dewart*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ. was delivered by

[1] CROMWELL AND KARAKATSANIS JJ. — This appeal focuses on the discretionary application of issue estoppel. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

[2] The appellant, Wayne Penner, was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*"), alleging unlawful arrest and use of unnecessary force. He also started a civil action against the court security officer, the two police officers, their chief of police, and the Regional Municipality of Niagara Regional Police Services Board ("Police Services Board") in the Superior Court of Justice, claiming damages arising out of the same incident.

[3] Mr. Penner's complaint under the *PSA* was referred by the Chief of Police to a disciplinary hearing presided over by a retired police superintendent. The police officers were found not guilty of misconduct. Mr. Penner was a party to the disciplinary hearing and the subsequent appeals to the Ontario Civilian Commission on Police Services ("Commission") and the Divisional Court.

[4] The respondents applied to have the civil action dismissed on the basis of issue estoppel because, in their view, the disciplinary hearing had finally resolved the key issues underpinning Mr. Penner's civil claims.

[5] Many of Mr. Penner's civil claims were struck on the basis of issue estoppel. The Ontario Court of Appeal agreed with the motion judge, and determined that the application of issue estoppel would not work an injustice in this case.

[6] On appeal to this Court, the appellant did not seriously challenge that the preconditions of issue estoppel had been met. The issue is whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner's civil claims. Mr. Penner contends that the application of issue estoppel in this context would work an injustice or unfairness because of the public interest in promoting police accountability. He submits that the courts, as guardians of the Constitution and of individual rights and freedoms, must oversee the exercise of police powers: the importance of this judicial oversight requires that issue estoppel not apply to a disciplinary hearing decision under the *PSA*.

[7] The respondents reply that this case turns upon its own exceptional circumstances, that the civil suit represents a collateral attack on the final decision of the complaints process, and that the courts below were right to apply issue estoppel in order to preclude relitigation of the same issues finally decided in the disciplinary proceedings.

[8] We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and

failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.

I. Background

[9] In January 2003, Mr. Penner was sitting in a Provincial Offences Court while his wife was on trial for a traffic ticket issued by Constable Nathan Parker. It was alleged that Mr. Penner disrupted the proceedings, refused to stop interrupting and to leave when asked to do so, and resisted arrest by Constable Nathan Parker. Constables Parker and Koscinski used force to remove him from the courtroom. Once outside the courtroom, they again used force and handcuffed him. Handcuffed, Mr. Penner was then taken to the Niagara Regional Police station by Constable Parker, where he was strip-searched and put into a holding cell. He sustained a black eye, numerous scrapes, a bruised knee, and a sore wrist, elbow and sore ribs. Mr. Penner was escorted by police to a hospital where he was examined and treated for injuries he had sustained during the arrest. Mr. Penner was subsequently returned to the police station and charged with causing a disturbance, breach of probation and resisting arrest. All charges were withdrawn by the Crown some five months later, in June 2003.

[10] After his arrest, Mr. Penner filed a public complaint under ss. 56 and 57 of the *PSA* against Constables Parker and Koscinski, alleging unlawful or unnecessary arrest, as well as use of unnecessary force. This led to a disciplinary hearing for both police officers. In addition, in July 2003, Mr. Penner filed a statement of claim in the Ontario Superior Court of Justice in relation to the same arrest, by which a civil action was commenced against the Police Services Board, Constables Parker and Koscinski, the Chief of Police and the Court Security Officer. Mr. Penner claimed damages for unlawful arrest, false imprisonment, use of unnecessary force during and after the arrest, an unnecessary strip-search, failure on the part of other officers to prevent his mistreatment, failure to provide timely medical assistance, improper use of handcuffs, malicious prosecution and failure to co-operate with the investigation of his allegations.

II. Summary of the Complaint Proceedings

A. *Disciplinary Hearing Under the PSA (Decision of Superintendent R. J. Fitches, Dated June 28, 2004; A.R., at pp. 99-116)*

[11] Under the *PSA*, a complaint is referred to the chief of police: s. 60(4). (All statutory references are to the legislation as it existed at the relevant time.) The chief is obliged to have the complaint investigated (with some exceptions not relevant here) and, in light of the results, to order a hearing into the matter if he or she is of the opinion that the officer's conduct could constitute misconduct: s. 64(1) and (7). If a hearing is ordered, it is conducted by the chief or a designate on his or her behalf: ss.

64(7) and 76. The chief also appoints the prosecutor: s. 64(8). The complainant is made a party by statute and has participatory rights (s. 69(3) and (4); *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 10 and 10.1), but no access to discovery or production of documents beyond what the prosecution relies on, and there is no right to compel the officer in question to testify: *PSA*, s. 69(7). The issue at the hearing is whether the alleged misconduct has been "proved on clear and convincing evidence" (s. 64(10)) and, if so, what penalty is to be imposed on the officer under s. 68(1) and (5). No remedy or costs may be awarded to the complainant.

[12] Here, disciplinary charges of unnecessary and unlawful arrest and use of unnecessary force were laid against two police officers: O. Reg. 123/98, Part V, Sch., *Code of Conduct*, s. 2(1)(g)(i) and (ii). The Chief appointed a retired police superintendent of the Ontario Provincial Police to conduct the hearing on his behalf. The hearing took place over the course of several days in 2004. Mr. Penner represented himself. As the complainant, he led evidence, cross-examined witnesses and made submissions. Several individuals who were present in the courtroom at the time of Mr. Penner's arrest gave evidence before the hearing officer at the disciplinary hearing: the prosecutor, clerk of the court, court security officer, two lay people awaiting their own respective trials, Mr. Penner, his wife, and Constables Parker and Koscinski.

[13] The hearing officer rejected much of the Penners' testimony. Instead, he relied primarily on the testimony of other witnesses regarding the events surrounding Mr. Penner's arrest and concluded that Constables Parker and Koscinski had reasonable grounds to arrest Mr. Penner for causing a disturbance in a public place. On the issue of whether the officers had the lawful authority to make an arrest in a courtroom under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, while a Justice of the Peace was presiding, the hearing officer concluded that the prosecutor had failed to provide sufficient evidence to show, "in any clear and cogent way, that Mr. Penner's arrest was not authorized by statute": p. xiii (A.R., at p. 111). The hearing officer therefore dismissed the allegation of unlawful arrest and found the constables not guilty of misconduct on this count.

[14] Turning to the allegation of unnecessary use of force, the hearing officer found that the Constables used a level of force that was necessary to gain control over Mr. Penner. Relying upon his review of the video record at the police station, he found that there was "no clear, convincing, or cogent evidence whatsoever" of unnecessary force there either: p. xvi (A.R., at p. 114).

B. *Appeal Before the Commission (Decision Dated April 22, 2005; A.R., at pp. 117-30)*

[15] As a party to the disciplinary hearing, Mr. Penner appealed the decision of the hearing officer to the Commission pursuant to s. 70(1) of the *PSA*. He took the position before the Commission that there were no legal grounds for his arrest.

[16] The Commission concluded that the arrest in the courtroom was unlawful because the Justice of the Peace gave no direction to the Constables to arrest Mr. Penner. The Commission was satisfied that there was clear and convincing evidence that Constables Parker and Koscinski were guilty of misconduct due to an unlawful and unnecessary arrest, and thus any force used was unjustified and unnecessary.

C. *Appeal Before the Ontario Superior Court of Justice — Divisional Court (Parker v. Niagara Regional Police Service (2008), 232 O.A.C. 317)*

[17] On a further appeal by the constables pursuant to s. 71(1) of the *PSA*, the Divisional Court held that the Commission unreasonably ignored findings of fact made by the hearing officer, and that the Commission was not justified in substituting their own findings. The Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's finding that the constables were not guilty of misconduct.

III. History of the Civil Action

[18] Mr. Penner initiated a civil action in July 2003 based on the same events that formed the subject matter of the disciplinary hearing, alleging, among other things, unlawful arrest and use of excessive force. After the decision from the disciplinary hearing was reinstated by the Divisional Court in January 2008, the respondents filed a motion to dismiss the civil action on the basis of issue estoppel.

A. *Ontario Superior Court of Justice (Fedak J.; 2009 CarswellOnt 9420)*

[19] The motion judge concluded that Mr. Penner was estopped from bringing these claims. Mr. Penner's civil action raised, among others, the same two questions that were already decided by the disciplinary hearing and restated by the Divisional Court: (1) was the arrest lawful? and (2) was unnecessary force used, either at the court or at the police station? The judge applied the test outlined in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and concluded that the three preconditions for issue estoppel had been met.

[20] First, the hearing officer's decision was judicial and the hearing fulfilled the requirements of procedural fairness because Mr. Penner made the complaint, appeared before the decision maker, led evidence, examined witnesses and made written submissions. Second, the decision was final. And third, the same parties to the civil action were also engaged in the disciplinary hearing.

[21] As to the second part of the *Danyluk* test, the motion judge stated that there were no grounds to exercise his discretion to not apply issue estoppel.

[22] We are assuming but not deciding that the decision of the hearing officer was admissible before the motion judge for the purpose of considering issue estoppel. This issue was not addressed in the decisions below. Given our disposition, it is not necessary to decide the issue.

B. *Ontario Court of Appeal (Laskin J.A., Moldaver and Armstrong JJ.A. Concurring; 2010 ONCA 616, 102 O.R. (3d) 688)*

[23] The Court of Appeal agreed with the motion judge that the three preconditions for issue estoppel had been met. However, the Court of Appeal found that the motion judge erred in failing to explain why there were no grounds to exercise his discretion to not apply issue estoppel. Accordingly, the Court of Appeal considered whether it would be unfair or unjust to apply issue estoppel despite the satisfaction of the three preconditions.

[24] The Court of Appeal acknowledged that the different purposes of the disciplinary hearing and the civil action weighed against the application of issue estoppel. The Court of Appeal concluded that the legislature did not intend to preclude Mr. Penner's civil action simply because he filed a public complaint under the *PSA*: para. 42. Further, the Court of Appeal considered that Mr. Penner had no financial stake in the disciplinary hearing (as the statute does not provide for compensation to a public complainant affected by police misconduct), although the strength of that factor was diminished, in its view, by the potential benefit to Mr. Penner had there been a finding of misconduct. Despite these factors weighing against the application of issue estoppel, the Court of Appeal concluded that they were not determinative considerations in the discretionary analysis.

[25] The Court of Appeal ultimately concluded that applying issue estoppel would not work an injustice and decided against exercising its discretion to not apply the doctrine based on the following factors:

- on issues of reasonable and probable grounds for arrest, as well as the use of excessive force during arrest, the hearing officer had as much expertise as a court (para. 45);

- the disciplinary hearing had "all the hallmarks of an ordinary civil trial", and, in this case, the different standards of proof in police disciplinary hearings and in civil actions are immaterial (paras. 48-51);

- Mr. Penner actively participated in the disciplinary hearing (para. 52); and

- the *PSA* provides an aggrieved party with the right to appeal to the Commission, a right which Mr. Penner exercised (para. 53).

[26] Accordingly, the Court of Appeal dismissed the appeal.

IV. Standard of Review

[27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts

to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

V. Analysis

A. *Issue Estoppel: The Legal Framework*

[28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

[30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.

[31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

B. *No Public Policy Rule Precluding Issue Estoppel With Respect to Police Disciplinary Hearings*

[32] The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

[33] Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371, at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint "retired police officers not associated with this force is capable of founding such independence as necessary". See also the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

[34] The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

[35] We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

C. *Discretionary Application of Issue Estoppel*

(1) Approach to the Exercise of Discretion

[36] We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns

upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

[37] This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

[38] The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

[39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) *Fairness of the Prior Proceedings*

[40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

[41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

[42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the

judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

[43] Two factors discussed in *Danyluk* — "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.

[44] For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue, it followed that it "was not within the reasonable expectation of either party at the time of those proceedings" that it would be: *Bugbusters*, at para. 30.

[45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

[46] There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and

therefore undermine the purpose of creating the tribunal: *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII), at para. 28; *Minott*, at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

[47] Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

[48] These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in This Case

[49] In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

(a) *The Legislation Establishing the Disciplinary Hearing*

[50] As the Court of Appeal pointed out, "the legislature did not intend to foreclose [Mr. Penner's] civil action simply because he filed a complaint under the [*PSA*]": para. 42. The *PSA* features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

[51] Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.

[52] Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the constables, the Chief of Police or the Police Services Board in his civil action.

(b) *Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations*

[53] The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

[54] The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the *PSA* promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

[55] In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

[56] First, Mr. Penner's civil action was filed in July 2003, almost a year *before* the hearing officer released his decision on June 28, 2004. In *Danyluk*, the civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because "the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings": para. 70.

[57] Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL) (S.C.J.), stated that an acquittal of an officer at a disciplinary hearing *did not* give rise to issue estoppel in relation to the same issues in a subsequent civil action.

[58] Third, a person in Mr. Penner's position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) *Financial Stake in the Disciplinary Hearing*

[59] The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

> This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

[60] In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were

acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[61] By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) *Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings*

[62] Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner's position will have

every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

[63] In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of the disciplinary hearing, or the fairness to the officers in that hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) *The Role of the Chief of Police*

[64] Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

[65] It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account in assessing the fairness of using the results of the disciplinary process to

preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

[66] Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

[67] We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

[68] Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue

estoppel against the appellant in the circumstances of this case was fundamentally unfair.

VI. Conclusion

[69] Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

[70] Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

[71] Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

VII. Disposition

[72] We would allow the appeal with costs to the appellant throughout.

The reasons of LeBel, Abella and Rothstein JJ. were delivered by

[73] LEBEL AND ABELLA JJ. (dissenting) — Litigation must come to an end, in the interests of the litigants themselves, the justice system and our society. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

[74] This appeal concerns the proper approach to the discretionary application of issue estoppel in the context of prior administrative proceedings dealing with police conduct.

[75] The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v.*

Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent, therefore, that governs the application of the doctrine in this case.

[76] The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, *Danyluk* said that the approach should be "fairness" and set out a number of factors for assessing how "fairness" applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court's subsequent jurisprudence starting with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471).

[77] The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a

process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.

[78] The "twin principles" which underlie the doctrine of issue estoppel — "that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation*. This, as the majority said in *Figliola*, is the case whether we are dealing with courts or administrative tribunals. Our colleagues' approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into "fairness" and "injustice" for administrative tribunals and revives an approach that our Court refused to apply in *Figliola*.

I. Background

[79] The appellant, Wayne Penner, filed a public complaint against two police officers alleging that the officers were guilty of police misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15, and the *Code of Conduct* (O. Reg. 123/98, Part V, Sch.). His complaint alleged that the officers made an unlawful arrest and used unnecessary force, both during the arrest and at the police station. Mr. Penner also commenced a civil action in the Ontario Superior Court of Justice seeking damages against the same police officers for unlawful arrest, use of unnecessary force, false imprisonment, and malicious prosecution.

[80] In 2004, Mr. Penner's complaint under the *Police Services Act* proceeded to a disciplinary hearing before a hearing officer, a retired superintendent of the Ontario Provincial Police, who was appointed by the Chief of Police. The hearing took place over the course of several days, during which time 13 witnesses were called, exhibits were filed, including audio and video recordings of the relevant events, and each party including Mr. Penner had the opportunity to make submissions on points of law. Mr. Penner, as the complainant, had the option to retain legal counsel but chose to represent himself. He was active in the proceedings: he testified, participated in cross-examination, and provided written submissions.

[81] The hearing officer gave written reasons for his decision. In his reasons, he dismissed Mr. Penner's complaint and found the police officers not guilty of any misconduct, rejecting most of Mr. Penner's evidence, and preferring the testimony of the other witnesses, as well as the audio and video recordings of the events.

[82] He made the following findings of fact:

- he "was unable to see any evidence whatsoever of any excessive or unnecessary force used on Mr. Penner" (A.R., at p. 112 (emphasis added));

- "there is no clear, convincing or cogent evidence whatsoever to indicate that Mr. Penner was the victim of the unnecessary or unlawful application of force while in custody at the police station" (p. 114 (emphasis added)); and

- he was "convinced that Mr. Penner was exhibiting behaviour that would be consistent with escalating hostility" and that therefore "the force that was used during Mr. Penner's arrest was totally justified" (p. 115 (emphasis added)).

[83] Mr. Penner appealed on the basis of these findings to the Ontario Civilian Commission on Police Services. The Commission overturned the decision of the hearing officer for the reason that the officers did not have the lawful authority to arrest Mr. Penner in a courtroom presided over by a Justice of the Peace.

[84] The respondents sought judicial review of the Commission's decision in the Ontario Divisional Court. The Divisional Court unanimously found the Commission's decision to be unreasonable and restored the hearing officer's decision (*Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317). The Divisional Court found that the findings of fact made by the hearing officer were based on an

"ample evidentiary foundation" and that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication he misunderstood the evidence or drew erroneous conclusions from it" (para. 28). Mr. Penner did not appeal the decision of the Divisional Court to the Ontario Court of Appeal.

[85] Following the conclusion of the judicial review proceedings, the respondents (who are defendants in the civil action) brought a motion under Rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss Mr. Penner's civil claims for unlawful arrest, use of unnecessary force, false imprisonment and malicious prosecution, all on the basis of issue estoppel. The motion judge granted the Rule 21 motion and struck these allegations from Mr. Penner's statement of claim.

[86] The Ontario Court of Appeal dismissed Mr. Penner's appeal (2010 ONCA 616, 102 O.R. (3d) 688). The Court of Appeal agreed with the motion judge that the preconditions for issue estoppel had been met and found that there were no grounds to exercise their discretion not to apply the doctrine in this case.

[87] In his appeal to this Court, Mr. Penner does not directly challenge the Court of Appeal's finding that the preconditions for issue estoppel are satisfied. Rather, his appeal focuses on whether the Court of Appeal properly exercised its discretion to apply issue estoppel and argues that it should have declined to do so.

II. Analysis

A. *The Role of Issue Estoppel*

[88] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the "twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung*, at p. 946; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 4-7).

[89] These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative, and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; Handley, at p. 4; Lange, at p. 7). However, it is clear that the overarching goal underlying both principles is to protect the fairness and integrity of the justice system by preventing duplicative proceedings. In other words, these principles are not competing values, but are fundamentally linked. As this Court recently recognized in *Figliola*, the ultimate goal of issue estoppel is not achieved by simply balancing fairness and finality, but in seeking to protect the "fairness of finality in decision-making and the avoidance of the relitigation of issues already

decided by a decision-maker with the authority to resolve them" (para. 36 (emphasis added)).

[90] The foundational importance of finality to the judicial system and the individual parties was emphatically explained by Doherty J.A. in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), at pp. 264-65, leave to appeal refused, [1999] 1 S.C.R. xiv:

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.
>
> The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change.

[91] As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle — they are "not merely . . . technical rule[s]" but rather, "g[o] to the heart of a system of civil justice that strives for the truth of the

matter [and] recognizes that perfection is an unattainable goal and finality is a practical necessity" (*Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

B. *The Test for Issue Estoppel*

[92] The three preconditions for the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248: (1) whether the same question has been decided; (2) whether the judicial decision which is said to create the estoppel is final; and (3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).

[93] However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel:

> The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied . . . . [Emphasis in original; citations omitted; para. 33.]

[94] Although initially developed in the context of prior court proceedings, issue estoppel has long been applied to judicial or quasi-judicial decisions pronounced by administrative boards and tribunals. In the administrative law context,

"the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided" (*Danyluk*, at para. 21).

[95] Consistent with the principles underlying issue estoppel, the fairness to the parties is focused on preventing parties from undergoing the burden of duplicative litigation — the objective of fairness is linked to the principle of finality. Indeed, in *Danyluk*, Binnie J., writing for the Court, focused on the importance of finality in litigation:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [para. 18]

[96] In other words, Binnie J. stated, "[a] litigant . . . is only entitled to one bite at the cherry" (para. 18). Underlying the application of issue estoppel in this context is the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

[97] This Court revisited the exercise of discretion to apply issue estoppel in the context of prior administrative proceedings in *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279. The Court acknowledged the different purposes of the

competing procedures. Nevertheless, in that case considerable emphasis was placed on the stability and finality of decisions and the importance of deference and adequate alternative remedies in the administrative context as crucial considerations in determining whether issue estoppel should be applied in a particular case:

> The situation in which the respondent could find itself if the principles of *res judicata* or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. [Emphasis added; para. 35.]

[98] More recently, in *Figliola*, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, "should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of . . . relitigation" (para. 36).

[99] In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice:

> Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

[100] This approach is consistent with the long-standing principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

C. *Issue Estoppel and Administrative Decisions*

[101] This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.

[102] In *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), the purpose of administrative tribunals was described as follows:

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more

> expeditiously and more accessibly, but no less effectively or credibly . . . .
>
> . . . The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers. [Emphasis in original; pp. 279-80.]

[103] In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 41).

[104] The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

[105] The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in *Figliola*,

> [r]espect for the finality of a[n] . . . administrative decision increases fairness and the integrity of . . . administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34]

[106] Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that "[p]arties should be able to rely particularly on the conclusive nature of administrative decisions . . . since administrative regimes are designed to facilitate the expeditious resolution of disputes" (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to

administrative decisions (see, for example, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). It also gives effect to the "adequate alternative remedy" principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

[107] The court's residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schweneke*, an overly broad application of discretion in the administrative context would "swallow whole the rule that makes the doctrine

applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39).

[108] This leads us to consider how the principles set out in *Figliola* should be applied to this case.

D. *Application*

[109] The thrust of Mr. Penner's submissions on appeal is that the police disciplinary proceedings lacked the "hallmarks of an ordinary civil trial". In particular, he emphasizes that he had limited rights of participation as a public complainant, that the statutory scheme is incompatible with the application of issue estoppel, that the hearing officer lacked true independence, and that the standard of proof in the disciplinary proceedings was higher than a civil trial. For these reasons, he argues, the Court should exercise its discretion not to apply issue estoppel in this case.

[110] Mr. Penner's submissions are completely inconsistent with this Court's prior jurisprudence and the approach to issue estoppel recently articulated by this Court in *Figliola*. The Court's residual discretion not to apply issue estoppel should be governed by the interests of fairness in preserving the finality of litigation. It should not be exercised in a manner that would impose a particular model of adjudication, undermine the integrity of administrative tribunals, and deny their

decisions the deference owed to them under the jurisprudence of this Court. Applying these principles to the case before us, there is no reason to exercise our discretion not to apply issue estoppel.

[111] The disciplinary hearing conducted by the hearing officer is designed to be an independent, fair, accountable and binding adjudicative process. It was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness: see *Police Services Act*, ss. 64(7) to (10), 69; *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The hearing officer considered sworn testimony and written submissions. Mr. Penner, as a party to the proceedings, had the opportunity to lead evidence, cross-examine witnesses, and make submissions. He had the option to retain legal counsel. Judicial oversight of the proceedings was available under a statutory right of appeal — a right Mr. Penner exercised in this case and which ultimately led to a review of the hearing officer's decision by the Divisional Court.

[112] Thus, the hearing officer's decision was made in circumstances in which Mr. Penner knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding.

[113] This *quid pro quo* of issue estoppel, in turn, bears directly on Mr. Penner's argument that the purpose of the proceedings was different and that, because the disciplinary hearing did not permit him to seek damages, he should be

permitted to pursue a civil action. As the Court of Appeal found, the different purposes of the two proceedings is not determinative in this case, since Mr. Penner had the opportunity to receive an indirect financial benefit in the disciplinary hearing. Had the hearing officer made a positive finding of police misconduct, the application of issue estoppel would have assisted the complainant in a subsequent civil action for damages. Essentially, in such a case, the complainant would be relieved of having to prove liability and the civil case would proceed straight to an assessment of damages. In other words, as the Court of Appeal noted, in the present case, "issue estoppel works both ways" (para. 43).

[114] Mr. Penner further relies on specific provisions of the *Police Services Act*, which he states are incompatible with the application of issue estoppel, since they specifically contemplate parallel civil proceedings. He relies, in particular, on ss. 69(8), 69(9) and 80 (now ss. 83(7), 83(8) and 95), which deal with statutory privilege and confidentiality. We do not find this to be persuasive. These provisions of the *Police Services Act* are designed to ensure the integrity of the disciplinary process. They do not suggest that issue estoppel cannot apply to bar civil proceedings. As Lange observes, where legislatures intend issue estoppel not to apply to an administrative decision, there should be clear language in the statute to foreclose this possibility (p. 122).

[115] Even in cases where the wording of the statute specifically contemplates corollary civil rights or remedies, the courts have applied issue estoppel. For

example, in *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv, the Alberta Court of Appeal considered whether s. 9(1)(a) of the *Employment Standards Code*, S.A. 1988, c. E-10.2, precluded the application of issue estoppel. Section 9(1)(a) provided that "[n]othing in this Act affects any civil remedy that an employee has against his employer". The employee argued that s. 9(1) of the *Code* was intended to preserve a civil action regardless of the fact that he had sought relief under the *Code* and obtained a final decision. The Court of Appeal rejected this interpretation:

> While s. 9(1)(a) does not purport to remove any common law rights, and, in fact, seeks to preserve them, the wording does not preclude the application by the courts of issue estoppel. The legislature has provided the employee with a choice of forum. The employee may commence an action or may pursue remedies under the *Code*. The legislation does not provide that both remedies may be pursued by the employee in respect of the same complaint. [para. 14]

(See also *Rasanen.*)

[116] Similarly, the provisions relied upon by Mr. Penner in this case, which contemplate civil proceedings, do not specifically preclude the application of issue estoppel by a court.

[117] Moreover, to interpret these provisions in a manner that would preclude the application of issue estoppel would be contrary to the purposes of the *Police Services Act*, which is designed to increase public confidence in the provision of police services, including the processing of complaints. Preventing the courts from

applying issue estoppel in the context of disciplinary proceedings would run counter to this purpose — decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the complaints process and in the integrity of the administrative decision-making process more broadly.

[118] Mr. Penner further takes issue with the independence of the hearing officer in this case. In particular, Mr. Penner submits that because the *Police Services Act* required that the chief of police appoint the investigator, prosecutor, and hearing officer to handle the complaint, the disciplinary hearing process lacked an independent and unbiased adjudicator. This issue was raised *de novo* on Mr. Penner's appeal to this Court.

[119] The method used to appoint an adjudicator should not provide a basis for the exercise of the court's discretion not to apply issue estoppel in this case.

[120] In 2004, the Government of Ontario commissioned a report from the Honourable Patrick J. LeSage, Q.C., to review the complaints process under the *Police Services Act* (see the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005)). The LeSage *Report* was published in 2005 and made a number of recommendations with respect to the investigation and hearing of police complaints. In the *Report*, LeSage explicitly rejected concerns with respect to the independence of investigators and adjudicators in the complaints process:

> I also heard submissions advocating an independent hearings process where the matter has arisen from a public complaint. This would include fully independent prosecutions and fully independent adjudication. I appreciate the demands for greater independence in the hearings process. Indeed, there is much merit to the arguments in support of independence. Conflicts of interest need to be avoided. It would be inappropriate for hearings to be staffed entirely by members of the police service who interact with each other on a daily basis. This problem is especially acute in small police services where outside prosecutors and hearing officers would be necessary. This is already addressed in the current legislation by allowing chiefs of police to appoint prosecutors and hearing officers from outside the police service. [Emphasis added; pp. 77-78.]

[121] In short, the LeSage *Report* upheld the method used to appoint investigators and adjudicators under the *Police Services Act*. In fact, LeSage found that concerns with respect to conflicts of interest and independent adjudication were already sufficiently addressed by the very system of appointment Mr. Penner seeks to challenge in this appeal.

[122] In any event, the Chief of Police played no role in the events that formed the basis of the complaints in this case. He designated an outside prosecutor and an independent adjudicator who was a retired superintendent from another police service. There was no challenge to the hearing officer's impartiality at the disciplinary hearing itself or at any of the proceedings below. There is no evidence that the Chief of Police interfered in any manner with the work of the adjudicator. We must add that similar methods of appointment are quite common in labour law, as well as in other areas of law, and are not seen as an obstacle to independent

adjudication. Tenure is not the sole marker and condition of adjudicative independence.

[123] Finally, Mr. Penner argues that issue estoppel should not apply in this case since the burden of proof is different in civil proceedings. The statutory standard of proof under the *Police Services Act* requires that a finding of misconduct against a police officer be "proved on clear and convincing evidence" (s. 64(10); now s. 84(1)). This standard is higher than the balance of probabilities standard required in a civil trial.

[124] Mr. Penner relies on *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL), where the Ontario Superior Court of Justice reasoned that because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard" (para. 11), issue estoppel should not preclude a subsequent civil action.

[125] Unlike *Porter*, however, the standard of proof was immaterial to the hearing officer's decision in this case. The hearing officer made unambiguous findings of fact against Mr. Penner. His findings are unequivocal: he found "no . . . evidence whatsoever" to support Mr. Penner's claims (A.R., at p. 114 (emphasis added)). On judicial review, the Divisional Court found that there was no error in these factual findings and that they were supported by "an ample evidentiary

foundation" (para. 28). The burden of proof is therefore irrelevant in this case — there is simply *no evidence* to support Mr. Penner's claims on any standard.

[126] We see no reason to allow Mr. Penner to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding, which, in this case, would inevitably yield the same result.

[127] We would therefore dismiss the appeal with costs throughout.

Appeal allowed with costs throughout, LEBEL, ABELLA *and* ROTHSTEIN JJ. *dissenting.*

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Solicitors for the respondents: Blaney McMurtry, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Urban Alliance on Race Relations: Stevensons, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

1989 CarswellNat 585
Federal Court of Canada — Trial Division

Air Atonabee Ltd. v. Canada (Minister of Transport)

1989 CarswellNat 585, [1989] F.C.J. No. 453, 27 F.T.R. 194, 27 C.P.R. (3d) 180, 37 Admin. L.R. 245

AIR ATONABEE LTD. c.o.b. CITY EXPRESS v. MINISTER OF TRANSPORT

MacKay J.

Heard: October 19, 1988
Judgment: May 24, 1989
Docket: Doc. No. T-2249-86

Counsel: *Michael L. Phelan*, and *David K. Wilson*, for applicant.
B. McIsaac, for respondent.

Subject: Intellectual Property; Public; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Public Authorities --- Freedom of information — Federal legislation — Grounds for refusal

Public authorities — Freedom of information — Access to Information Act — Exemptions for third party information — Department not bound by reasons advanced initially to justify release — In review by Federal Court under s. 44(1), department entitled to advance other justifications — Access to Information Act, S.C. 1980-81-82-83, c. 111, Schedule I, s. 20.

Public authorities — Freedom of information — Access to Information Act — Exemptions for third party information — Section 20(1)(b) provides exemption to third party supplied — Information treated as confidential where public benefit in fostering relationship between department and agency as part of regulatory process exists — Access to Information Act, S.C. 1980-81-82-83, c. 111, Schedule I, s. 20.

Public authorities — Freedom of information — Access to Information Act — Exemptions for third party information — Section 20(1)(c) requiring demonstration of real possibility of harm to third party resulting from disclosure of information — Access to Information Act, S.C. 1980-81-82-83, c. 111, Schedule I, s. 20.

Following receipt of a request for access to information made under the *Access to Information Act* (the "Act"), the Department of Transport advised AA that the request related to documents concerning its operations and in particular its safety inspections. The letter also sought more information from AA so that it could be determined whether the material was exempt from disclosure under certain of the exceptions created by the Act. AA responded and argued that the documents in question came within two of the Act's exceptions, those created by s. 20(1)(b) and (c) of the Act.

Thereafter, the department indicated that it would nonetheless release the documents in question relying upon s. 20(6). This authorized the release of documents otherwise exempt under s. 20(1) where the "public interest" outweighed possible injury to the third party. That letter also contained the draft of a statement putting the documents in their regulatory context and which was to be released with them. As well, it informed AA of its right to apply to the Federal Court, Trial Division under s. 44 for a review of the department's decision.

Subsequently, the department decided to release more documents and advised AA, whereupon AA did make an application to the Federal Court, Trial Division. About a year later, the department again decided to increase the number of documents released and also informed AA that it was now of the view that s. 20(1) had no application to any of the documents.

Held:

The application was allowed in part.

For the purposes of the review of a departmental decision to release documents over the objections of a third party, the department was not bound to the reasons that it gave initially to support its decision to release. Thus, in this case, the department was not now precluded from arguing that the documents in issue did not come within the s. 20(1) exceptions. Under the Act, there was a duty to disclose non-exempt documents, and that duty should not be compromised by precluding the department from asserting grounds for release other than those advanced initially.

The role of the Court under s. 44(1) was to undertake its own de novo review of the documents in question and determine for itself issues of exemption and severance. This detailed examination was indicated by the statutory language of s. 44 and the Court's powers with respect to the examination of documents (s. 46) as well as the Court's remedial powers and functions ("record or part thereof": ss. 50-51). While the affidavit evidence (which in this case came solely from AA's president) was relevant to this process, the mere fact that evidence came from the applicant alone could not of itself decide the issue in AA's favour.

For the purposes of the exception created by s. 20(1)(b), the information in issue had to meet four criteria:

(i) financial, commercial, scientific or technical information;

(ii) confidential information;

(iii) supplied to a government institution by a third party; and

(iv) treated consistently in a confidential manner by the third party.

(i) To be financial, commercial, scientific or technical, the information in question did not have to have an independent market value. Rather, it was sufficient that it pertain to finance, commerce, science or technical matters as those terms are commonly understood. Marketable value and harm to the third party resulting from disclosure were not relevant to s. 20(1)(b) of the Act even though they pertained to some of the other exemptions (s. 20(1)(a), (c), (d)).

(ii) Confidentiality involved an objective standard which took account of the content of the information, its purposes, and the conditions under which it was prepared and generated. Simply stating that it was confidential was not sufficient. On the other hand, potential harm to the third party was not part of the test nor, in a regulatory context such as this, was any argument that the release of the information would compromise the department's ability to secure that information in future.

While the test adopted by Courts in breach of confidence cases was not particularly helpful, the test which pertained to the privilege against the disclosure or unauthorized use of communications was more useful:

(1) they originate in a confidence that they will not be disclosed;

(2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) the relation be one which in the opinion of the community ought to be sedulously fostered; and

(4) the injury which would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

For information to be confidential, it must not be otherwise available to the public in the sense of other sources to which the public has access or of information that could be obtained by observation or independent study by a member of the public acting alone. Secondly, it had to have originated and have been communicated in a reasonable expectation of confidence. Thirdly, whether supplied mandatorily or gratuitously, it must have been communicated in a relationship between the government and the supplying party which was either a fiduciary one or not contrary to the public interest and the fostering of which would be a public benefit.

Here, the information in issue met the first criterion and also the second insofar as the material provided by AA was concerned. As for the third criterion, to accept that a relation of confidence existed between the department as regulator and AA would be to open the door to the exemption of material supplied in the many other generically similar relationships that exist in the regulatory realm. Nevertheless, there was a public benefit to be achieved in terms of the relationship between the department and AA in conceding confidential status to those communications emanating from AA and treated as confidential by it. That public benefit was that of frankness with the department's inspectors when it was known that access would be restricted. The same, save in exceptional circumstances, did not apply to records from department sources compiled by public officers at public expense.

(iii) A document was not supplied by a third party when it was compiled by public employees from their own observations in inspecting the records, facilities or equipment of the third party. This was not affected by the fact that here the reports were in part prepared from records maintained by AA for inspection purposes as part of a co-operative relationship with the department.

(iv) While none of the documents was marked confidential, it was clear on the evidence that those emanating from AA had, up until then, been treated by both AA and the department as confidential. The consequence of this was that some requests for information made by the department would be revealed but not AA's responses to those requests, without its consent.

To the extent that some of the documents in issue emanated from other third parties or that there was a possibility that other third parties might be affected adversely by the release of the documents, that was a matter for the department at this stage, not for the Court in the context of a s. 44 application.

For s. 20(1)(c) to apply, the following conditions had to be fulfilled:

i. where the disclosure of the information could reasonably be expected to result in material financial loss or gain to a third party, or

ii. where the disclosure of the information could reasonably be expected to prejudice the competitive position of a third party.

In this respect, what had to be demonstrated was "a reasonable expectation of probable harm". However, this did not mean that the release itself had to have the potential to cause harm. It was sufficient that the use of that information had to have that potential, including uses that involved some intervening misunderstanding or distortion.

Nevertheless, AA had not established that any of the documents fell within s. 20(1)(c). While the disclosure of the documents would present only a partial picture of the safety record of AA, the continued licensing of AA and its apparent record for safety were ultimately more significant in terms of the public view of AA. More generally, AA's beliefs about the generation of misunderstandings as to the safety of its operations or the use of the material by third parties to its competitive disadvantage were simply speculative and did not raise a reasonable expectation of probable harm.

Nevertheless, exemptions were justified insofar as the documents included comment about personnel matters, references to identified particular aircraft, particular processes involving third parties or other identified information that could be used to AA's competitive disadvantage, and general opinions of department staff with possible legal implications but not acted upon or previously brought to AA's attention.

Where feasible, severance of the exempt portions of relevant documents was mandated by the Act (s. 25). In this case, the deletion of the exempt material was reasonable in the sense that it would be reasonably proportionate to the quality of access provided.

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s. 2

s. 3

s. 4

s. 20

s. 25

s. 28

s. 29(1)

s. 41

s. 42

s. 44

s. 46

s. 47(1)

s. 50

s. 51

Aeronautics Act, R.S.C. 1985, c. A-2.

Freedom of Information Act (U.S.).

Privacy Act, S.C. 1980-81-82-83, c. 111, Schedule II, [now R.S.C. 1985, c. P-21].

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r. 324

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APPLICATION under s. 44(1) of the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Sched. I for review of decision by Minister of Transport to release information to a requestor.

***MacKay J.*:**

1 This application seeks review of the decision of the Minister of Transport to release to an undisclosed requestor information requested under the *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Sched. I, as am. R.S.C. 1985, c. A-1 as amended, which information relates to the applicant and the applicant's operations. The application, under s. 44(1) of the Act, raises issues about the process under the Act for dealing with requests for information concerning third parties and also about the protections which the Act provides for the interests of third parties.

2 The purpose of the Act as defined by s. 2(1) is:

> ... 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.

The right of access is set out in s. 4(1) which provides:

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

3 Exceptions to the right of access are specified in the Act, including some applicable where the information sought relates to a third party, that is, "any person, group of persons or organization other than the person that made the request or a government institution" (s. 3). A person whose request for information is not met may submit a complaint to the information commissioner, and if the investigation by the commissioner does not result in release of the information sought, may apply to the Court for review of the matter. If the information requested contains personal information about other individuals it is not to be released without consent of the individual concerned except in accord with the *Privacy Act*, R.S.C. 1985, c. P-21 as amended. If the information is not personal as defined by the latter Act but relates to third parties, disclosure is precluded only in certain circumstances defined by the *Access to Information Act*. Where it is intended to release information concerning a third party that might contain information exempt from disclosure, the third party is to be informed and given an opportunity to make representations

after which, if the head of the institution concerned, having considered the representations, decides to release the information requested, the third party may apply to the Court for a review of that decision. It is the last of these circumstances which brings this application before the Court under s. 44(1) of the Act.

Facts

4 In this case the records in question pertain to Air Atonabee Limited which, since 1984, has carried on business under the firm name and style of City Express. Under the latter name a commuter airline service is operated between various points in southern Ontario, Quebec and the United States with operations centred at the Toronto Island Airport. The company was the first commercial operator of the De Havilland Dash 7 and Dash 8 aircraft in Eastern Canada, and its president believes that the company assisted officials of the department in learning about these aircraft and their operation. City Express and the department have dealt with maintenance and inspection matters cooperatively, a relationship which the company's president attributes in large measure to candor in cooperative efforts on both sides and what he and the company have always considered as the confidential nature of their communications. City Express is subject to rigorous inspection procedures carried out by the Aviation Regulation Section of the Department of Transport. That department and the minister who presides over it have broad powers in respect to airline operations and personnel, aircraft equipment and maintenance under the *Aeronautics Act*, now R.S.C. 1985, c. A-2, as amended, and regulations under that Act.

5 On August 6, 1986, the department notified City Express that a request for access to information had been made, that the information sought had been identified and it included records which originated from the company. The letter attached the "pertinent records" consisting of three one-page documents. City Express was advised that the department had reason to believe that the records might contain information as described in subss. 28(1)(a), (b) or (c) of the Act, i.e., information exempt from disclosure, but did not have sufficient information to substantiate this and therefore asked the company to assess the documents concerned and clearly indicate how the release of the information could be injurious to the company. The letter included the statement that "Any representation you make will result in a review of our decision to disclose the records." Information about the *Access to Information Act* and its application was included with specific reference to subs. 20(1)(b), relating to information supplied in confidence, and to s. 25, which requires disclosure of any part of a record if it can reasonably be severed from any part that contains exempt information. City Express responded by a letter dated August 19, 1986 with reasons why release of the requested information would be contrary to subss. 20(1)(b) and (c) of the Act.

6 Thereafter the department advised City Express in a letter dated September 25, 1986 that, while the *Access to Information Act* provides for exemption from disclosure of third party records under certain circumstances, it also provides that the public interest may be taken into account under s. 20(6) and that in this case the department considered "the public interest outweighs possible injury

to your company and it is our intention, therefore, to release records concerning City Express which are pertinent to this Access Request." The company was advised of their right to apply to the Court for a review of that decision pursuant to s. 44 of the Act. The department also advised that in responding to the access request it proposed to include a statement, a draft of which it enclosed with the letter, in order to put into perspective the regulatory system within which the information now proposed to be released had been gathered by the department. It is noted that no opportunity was provided to City Express to respond to considerations of the public interest as a basis for release of information under s. 20(6) of the Act, and that the only opportunity held out for questioning the decision was by application to the Court.

7 Subsequently, counsel for the applicant was informed that the department had decided to release a number of additional documents considered to be pertinent to the access request, and copies of these were provided to counsel. Thereafter on October 14, 1986, City Express applied under s. 44(1) of the Act for review of the decision to disclose the information proposed at that stage to be released.

8 There was some delay in filing an affidavit in support of the application and some procedural differences about whether the affidavit being prepared would be filed in confidence in these proceedings. In the course of that process, a draft of a proposed confidential affidavit of the president of City Express was made available to counsel for the respondent with a view to seeking consent to an order sealing the affidavit in confidence. Thereafter, by letter dated September 21, 1987, the department advised City Express that it proposed to release additional documents, a decision admittedly made following a review of the draft "confidential" affidavit which had prompted the department to conclude that its previous proposals for meeting the access request were inadequate. In the same letter, City Express was notified that, as a result of the review of the additional documents and as a result of information in the draft "confidential" affidavit, the department no longer took the view that any of the provisions of s. 20(1) applied and that it was prepared to release all of the documents excepting some personal information included in them. This additional information was subsequently described in correspondence to the applicant's counsel, and copies of it, consisting of eleven different records or parts of records, were provided for the applicant in December 1987.

9 Thus, from August 1986 when City Express first heard from the department and was asked to comment on three single-page documents, the department's review of the original access request led to two further decisions, each time to increase the information it proposed to release in response. The total of documents, classed for convenience by agreement of counsel as 36 records, finally comprised 78 pages. With each of these later decisions, City Express was informed and copies of the additional documents proposed to be released were provided. The basis of the department's decision was provided for each of the subsequent occasions, but City Express was not invited to comment. Long before the final decision of the department, this application had been initiated for review of the decision to provide information which, at the time of filing this

application, was based on the respondent's assessment of public interest in accord with s. 20(6) of the Act.

10 For the record, I note that the final version of the confidential affidavit of the president of City Express was filed in April 1988 and with consent of counsel was ordered sealed. A second version of that affidavit omitting reference to specific matters the applicant considered confidential was also filed unsealed in the public record of this application. Similar processes were followed in relation to a supplementary affidavit of the president of the company, and the application record and the memorandum of fact and law of the applicant. In addition, copies of the records in question were filed and with consent were ordered sealed. In the course of the hearing of this matter, argument was addressed by counsel for both sides in two phases, first in open Court for much of the argument, and second in camera in relation to matters considered by the applicant to be directly concerned with the records here in issue, which to this time have not been disclosed. These procedural arrangements were made to meet the obligations of the Court under s. 47(1) to take every reasonable precaution to avoid disclosure of matters in issue until resolution of this application.

Third Party Information and the Access to Information Act

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 s. 20, the relevant parts of which for purposes of this case are:

> 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 material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.
>
> . . . . .

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if such public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

The Act provides for intervention and an opportunity for representations by a third party, not in all cases but in certain cases, as follows. (Section 28, quoted here, is from S.C. 1980-81-82-83, c. 111, Sch. I, in force at the times relevant to this application. In R.S.C. 1985, c. A-1, s. 28(1) to (4) below is s. 27 and s. 28(5) to (8) is s. 28.)

28. (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

(a) 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,

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 or part thereof.

(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.

(3) A notice given under subsection (1) 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 (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.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

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

(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

(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.

(6) Representations made by a third party under paragraph (5)(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.

(7) A notice given under paragraph (5)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(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

(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.

(8) Where, pursuant to paragraph (5)(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.

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 s. 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 s. 44(1) accrues: see *Sawridge Indian Band v. Canada (Minister of Indian Affairs & Northern Development)*, [1987] 3 F.C. 368, 26 Admin. L.R. 197, 37 D.L.R. (4th) 270, 10 F.T.R. 48, [1988] 1 C.N.L.R. 159 (T.D.).

13 The Act also provides under s. 29(1) for notice to a third party in a case where the head of the institution has refused to disclose information, the requestor has appealed that decision to the information commissioner, who has investigated and recommended that the information be disclosed, and the head of the institution then decides to disclose the information. In that case, as in the case under s. 28 where the information commissioner has not been involved and release of third party information is proposed after notice is given under this section, the third party has opportunity to apply to the Court for review of the decision to release the information as follows:

> 44. (1) Any third party to whom the head of a government institution is required under paragraph 28(5)(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.
>
> (2) The head of a government institution who has given notice under paragraph 28(5)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.
>
> (3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

14 For the record, I note that in this case the party requesting the records in issue, presumably advised by the respondent of the application filed by City Express, did not seek standing as a party to this review and took no part in the proceedings.

Issues

15 The changes in the department's decisions concerning the information to be released in response to the access request, and the changes in the basis for its decisions, have left differences to be resolved about the issues to be determined in this application.

16 It is the applicant's view that the following issues require resolution (as set out in the applicant's memorandum of fact and law):

> (1) Whether the head of an institution is bound by the grounds for disclosure asserted in a notice of decision provided to a third party pursuant to subsection 28(5) of the *Access to Information Act*.
>
> (2) Whether subsection 20(6) can be invoked to disclose third party records that are otherwise exempt under subsection 20(1) when no evidence has been presented to show that the public interest in disclosure clearly outweighs in importance any injury to the third party.
>
> (3) Whether the head of an institution is permitted to release third party information under subsection 20(6) when the third party has not been given notice of the intention to release under that provision.
>
> (4) Whether the records in question are exempt from disclosure under paragraphs 20(1)(b) and/or (c) of the Act.
>
> (5) Whether release of the records is justified under subsection 20(6) of the Act notwithstanding the injury that disclosure could cause to the Applicant.
>
> (6) Whether the records in question are exempt from disclosure under section 19 of the Act on the basis that they contain personal information.
>
> (7) Whether any of the documents are subject to severance pursuant to section 25 of the Act.

17 The respondent, on the other hand, submits by memorandum of fact and law that only the following issues are to be determined in this review, on the basis of evidence adduced by the applicant:

> a) [whether] the information is financial, commercial, scientific or technical, information, that is confidential information supplied to a government institution by it and consistently treated in a confidential manner by it, [as provided by subsection 20(1)(b)] or,
>
> b) [whether] there is a reasonable probability of material financial loss to it or that its competitive position will be prejudiced if the information contained in the records in question is released, [as provided by subsection 20(1)(c)].

It is the view of the respondent that "there is no issue as to the applicability of subs. 20(6), because, having subsequently concluded that the information in the records in question is not subject to subs. 20(1), the respondent did not then address again the issue of release in the public interest and has not formed an opinion pursuant to subs. 20(6)." No argument is directed by the respondent to the application of s. 20(6) of the Act. Where the respondent has not exercised discretion under s. 20(6), it is not open to the Court to consider that "the public interest override" — as that section was described in argument — warrants refusal to release the records: see *Can. Packers Inc. v. Canada (Minister of Agriculture)* (1988), [1989] 1 F.C. 47, 32 Admin. L.R. 178, 87 N.R. 81, 53 D.L.R. (4th) 246 (C.A.).

18 In these circumstances, with the respondent agreeing that its decision, at least the last decision, which is now subject to review in this application, is not based on the public interest grounds set out in s. 20(6), the issues raised by the applicant in relation to that section are not in dispute between the parties and do not require resolution in this application. Further, counsel for the respondent acknowledges that to the extent that the records in question contain personal information exempt from disclosure under s. 19 of the Act, the respondent recognizes responsibilities in this regard and would ensure that information so exempt is not disclosed in any records that may be released. I note that undertaking and conclude that there is no issue between the parties in regard to personal information which, if any documents are to be disclosed, would be excised.

19 This leaves, as issues to be resolved, those set out in the applicant's list as (1), (4) (which is similar to the respondent's list a) and b)), and (7), namely:

> — whether the respondent is bound by his own decision about the basis for release of the documents made prior to the initiation of this appeal;
>
> — what the role of the Court is under s. 44 of the Act in relation to the documents in question, and if that role leads to assessing the records in light of the exemptions from disclosure under subss. 20(1)(b) or (c), how are the records here to be classified;
>
> — what information, if any, would be disclosed in accord with s. 25 of the Act, which provides for the disclosure of any part of a record that does not contain, and can reasonably be severed from any part that contains, any exempt information.

The Basis for Disclosure

20 The applicant submits that the respondent is bound by the decision and the announced basis for it as provided in the letter of September 25, 1986, the decision against which this application for review was initiated. It is submitted that decision conceded that the information in issue, at that stage three one-page documents but soon thereafter expanded significantly in scope and number of documents, was within exempt classes of information under s. 20(1). That conclusion is drawn

from apparent acceptance of the representations of the applicant that the records were exempt from disclosure under subss. 20(1)(b) and (c); if it were otherwise, the decision of the respondent could not have been attributed to the "public interest override" in s. 20(6). Having abandoned s. 20(6) as a basis for disclosure, the respondent, it is submitted, cannot deny or challenge the applicability of s. 20(1) and cannot point to a new statutory ground for disclosure after initiation of this application for review.

21 For the respondent, it is submitted that the applicant has not been prejudiced or misled in a way that precludes fully addressing at the hearing of this matter the issues that it raises. For more than a year before the hearing, the applicant was aware of the final decision of the respondent and the reason for it and cannot be said to be prejudiced by it in relation to this application for review. If the respondent were bound by the grounds asserted in the original decision, it is submitted this would effectively distort the purpose of the Act as set out in s. 2 and would ignore the right of access as provided by s. 4 for the individual who requested the records.

22 The applicant relies upon *Ternette v. Solicitor General of Canada*, [1984] 2 F.C. 486 at 497, 9 Admin. L.R. 24, [1984] 5 W.W.R. 612, 32 Alta. L.R. (2d) 310, 10 D.L.R. (4th) 587 at 594 (T.D.) per Strayer J., and *Davidson v. Canada (Solicitor General)*, [1987] 3 F.C. 15, 9 F.T.R. 295, 35 C.C.C. (3d) 84 at 87-92, 41 D.L.R. (4th) 533 (T.D.), rev'd in part (1989), 36 Admin. L.R. 251, 47 C.C.C. (3d) 104, 24 C.P.R. (3d) 129 (C.A.) per Jerome A.C.J. Those cases are the obverse of the situation here and are not persuasive in these circumstances. Both arose under the *Privacy Act*, S.C. 1980-81-82-83, c. 111, Sched. II, now R.S.C. 1985, c. P-21, as amended, and each was concerned with review of a decision not to release information requested by an individual under that Act. As is the case under the *Access to Information Act*, the *Privacy Act* requires, unless there be a reason specified in the Act exempting information from disclosure, that information on government files be disclosed. In the case of the *Privacy Act*, personal information about an individual is to be disclosed when that person requests it unless the head of the government institution concerned refuses and indicates the statutorily specified ground for refusal. In *Ternette* and in *Davidson*, the decision refusing to disclose information requested did, as the Act required, specify the grounds for refusal, and the Court did not permit the ground specified to be changed after the application for review had been initiated.

23 The respondent submits that application of the principle in *Ternette* and *Davidson* by analogy in this case would be "overly legalistic" and would frustrate the purpose of the Act, an approach which the learned Associate Chief Justice Jerome declined to adopt in *Ciba-Geigy Can. Ltd. v. Canada (Minister of National Health & Welfare)* (1986), 11 C.P.R. (3d) 98 (Fed. T.D.). In that case the applicant under s. 44(1), a third party seeking review of a decision to release information, argued that the request for information should be strictly and literally read to relate to certain named records that were originated at a date later than that for which information was requested, that since there were no such records at the relevant time, no other information or record could be disclosed, even that considered by the head of the institution concerned to be as close as was

possible in the circumstances to meeting the substance of the request. That submission was not accepted. In my view that case does not directly deal with the issue as raised by the applicant.

24 I appreciate the applicant's frustration in this situation where the respondent's decision to disclose records seems to be based at different stages on different grounds. Those changes do not demonstrate exemplary administrative practice, nor do they foster understanding and goodwill in the necessary continuing relationship between the parties. Nevertheless, I conclude that the respondent ought not to be bound by the grounds identified in the decision letter of September 25, 1986.

25 Unlike the situations in *Ternette* and *Davidson*, where the Court was concerned with decisions not to disclose records and the reasons specified for those decisions, we are here concerned with decisions to disclose records. No reason need be specified for that. The Act requires it. Disclosure is the responsibility of the respondent unless the information requested is among the categories specifically exempt under the Act. Here at the time of the first notification to the applicant in August 1986, the respondent's position that the information sought would be disclosed was qualified by giving the applicant the opportunity, consistent with s. 28 (now ss. 27 and 28) of the Act, to persuade the respondent that the information then in question was within classes exempt from disclosure under s. 20(1). Later, in September 1986, the applicant was notified that the records, soon to be expanded in scope and number of documents, was to be disclosed under the "public interest override", s. 20(6). Finally, in September 1987, the applicant was advised that the respondent planned to release even more information and that none of it was any longer considered to be within the classes of exempt information under s. 20(1). The public interest basis for disclosure under s. 20(6) was abandoned. At least implicitly, the information would be disclosed in accord with the requirements of the Act under s. 4 to give to a person who requests it "access to any record under the control of a government institution". In retrospect at least, though it might hardly have appeared so from time to time throughout, the respondent's position has been consistent in that it has a responsibility under the Act to disclose records requested unless that information is exempt from disclosure under the statute.

26 That is consistent with the purpose of the Act. Both the *Access to Information Act* and the *Privacy Act* are designed in different circumstances to provide access to information maintained by government unless it be within a class specifically exempt from disclosure under the respective Acts. To paraphrase Jerome A.C.J. in *Davidson*, supra, at 35 C.C.C. (3d) 91-92, access to information is to be the norm, exemptions are to be confined to situations explicitly set out in each Act; under both statutes the onus of establishing the basis for not disclosing information requested rests with the party who seeks to avoid disclosure.

The Role of the Court and the Classification of the Records Requested

27 If the respondent is not to be held to the ground enunciated for disclosure of the records that was set out before this application for review was initiated, we are left with the parties essentially in the following positions. The respondent proposes to disclose certain records, except for personal information, in accord with his responsibilities under the Act. The applicant seeks review of that decision pursuant to s. 44(1) and an order under s. 51 directing the respondent not to disclose the records on the grounds that they contain information exempt from disclosure under subss. 20(1)(b) and (c).

28 In light of argument in this application, resolution of this aspect requires clarification first of the role of the Court. In this regard, the applicant invites consideration of this review process, at least in part, by analogy to a normal trial between adversaries. As noted, it is submitted that the respondent cannot challenge the applicability of subss. 20(1)(b) and (c), having implicitly accepted this before the application for review was initiated, a submission that I have already dealt with. It is then submitted that the evidence of the applicant consisting of affidavits and cross-examination of the president of City Express, a man with long and extensive experience in the aviation industry, should be given credence in the absence of any evidence at all to dispute it either as to the confidentiality or other qualities of the records in accordance with subs. 20(1)(b) or as to the reasonableness of the expectation of financial injury in accordance with subs. 20(1)(c). In short, the Court is invited to determine the issue essentially on the weight of the evidence introduced in this review proceeding, and in the absence of evidence produced on behalf of the respondent. I do not accept that as a proper basis for resolution of the vital question at issue between the parties. If the applicant has produced all of the evidence before me that is because it is recognized that City Express has the heavy oar; that is, the onus of establishing that the records here in issue are exempt from disclosure under the Act rests on the applicant: see *Davidson*, supra, and *Merck Frosst Can. Inc. v. Canada (Minister of Health & Welfare)* (1988), 20 C.I.P.R. 302, 20 F.T.R. 73 (T.D.) and cases there cited by Jerome A.C.J. at 76. Evidence adduced by the applicant cannot be ignored. It is helpful. But the mere fact that evidence is adduced by or from the applicant alone is not a basis for deciding the issue.

29 The respondent submits that this review initiated under s. 44(1) is not an appeal or judicial review in the traditional judicial context, with the Court limited to consideration of the evidence before the respondent at the time that the decision to release the records was made. Rather, it is submitted that the Court is to undertake a new and independent review of the whole matter, comparable to a trial de novo, and the third party applicant is free to submit new or additional evidence not available to the respondent at the time of his decision. In practical terms, the Court is left with no alternative in this case, for no attempt has been made to provide all of the evidence before the respondent, including such evidence as the text of the access request, the purposes and the full context of the regulatory regime in which the records here in issue were compiled (except for such evidence as appears from the applicant), and the range of information that might possibly

respond to the request, a range which appears to have increased significantly over time in view of the respondent in this case.

30 That the Court should undertake a review of the records in issue and determine what is exempt from disclosure and what is not, and further what information should be severed from exempt information and then released, may well be an onerous task in some cases. Nevertheless, it is consistent with the role which implicitly Parliament has established for the Court under the Act. Three sections provide for application to the Court for review: by the requestor who is refused information (s. 41), by one who objects to the release of third party information (s. 44), and by the information commissioner when his recommendations for disclosure are not met (s. 42). The first two provide for "review of the matter" and the last for "review of any refusal to disclose a record requested". Section 46 provides in the clearest terms that in proceedings arising from any of these applications "the Court may ... examine any record ... this is under the control of a government institution and no such record may be withheld from the Court on any grounds." Finally, the remedies available by order of the Court imply detailed examination, if necessary record by record, by the Court, both where there has been refusal to disclose a record on a statutorily specified ground when the Court determines that "the head of the institution did not have reasonable grounds on which to refuse to disclose *the record or part thereof*" (s. 50), and where the Court determines that the head of an institution who proposes disclosure "is required to refuse to disclose *the record or part thereof*" (s. 51) (emphasis added). The reference to parts of records obviously reflects the obligation on the head of the institution concerned under s. 25, where this can be reasonably done, to sever and disclose parts of records where those parts do not contain exempt information.

31 The role of the Court, to conduct a "review of the matter" de novo, including examination document by document of the records proposed to be disclosed which the applicant third party seeks to have prohibited from disclosure, does not seem to have been thoroughly discussed previously, perhaps because it has been seen to be so obvious in previous cases that no issue was raised about it. That is, however, the role implicit in the statute, consistent with the purposes of the Act and one that the Court has adopted in practice in previous cases arising under s. 44: see, e.g., *Can. Packers Inc. v. Canada (Minister of Agriculture)*, supra; *Montana Band of Indians v. Canada (Minister of Indian Affairs & Northern Development)*, [1989] 1 F.C. 143, 31 Admin. L.R. 241, [1988] 5 W.W.R. 151, 59 Alta. L.R. (2d) 353, 51 D.L.R. (4th) 306, 18 F.T.R. 15, [1988] 4 C.N.L.R. 69 (T.D.); *Merck Frosst Can. Inc. v. Canada (Minister of Health & Welfare)*, supra. In light of the jurisprudence evolving in relation to the Act, there can no longer be doubt that upon application for review, the Court's function is to consider the matter de novo including, if necessary, a detailed review of the records in issue document by document.

32 Only in circumstances when disclosure is refused by the head of the government institution concerned, or where proposed release is opposed by a third party on grounds which do not meet the statutory requirements for refusal, might detailed review of the documents be unnecessary.

Subsections 20(1)(b) and 20(1)(c)

33 The applicant contends that the records proposed to be disclosed by the respondent are exempt from disclosure under subss. 20(1)(b) and (c), a view the respondent does not share. Both point to the requirements established by subs. 20(1)(b) as elaborated in *Montana*, supra, in *Merck Frosst Can. Inc.*, supra, and in *Can. Packers Inc.*, supra. Both refer to *Can. Packers Inc.* in relation to subs. 20(1)(c), and each suggests other authorities or other considerations in relation to certain of the criteria set out in these two subsections of the statute. I propose to deal with the arguments raised in relation to each of the requirements in light of the developing jurisprudence under the Act.

34 In all there are six criteria set out in the two sections for assessing records in question. The authorities relied upon by both counsel in relation to subs. 20(1)(b), and others, have made clear that exemption from disclosure under that subsection requires that the information in question meet all four of the following criteria: that it be

(1) financial, commercial, scientific or technical information;

(2) confidential information;

(3) supplied to a government institution by a third party; and

(4) treated consistently in a confidential manner by the third party.

In the case of subs. 20(1)(c), there are two circumstances under either of which, as alternatives to the criteria in other subsections and to each other, information is exempt from disclosure, that is:

(1) where the disclosure of the information could reasonably be expected to result in material financial loss or gain to a third party, or

(2) where the disclosure of the information could reasonably be expected to prejudice the competitive position of a third party.

Both of these latter circumstances require a reasonable expectation of probable harm: see *Can. Packers Inc.*, supra, per MacGuigan J. at 60, and speculation or mere possibility of harm does not meet that standard: see *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply & Services)* (1988), 24 F.T.R. 32 (T.D.) per Martin J. at 36.

35 The criteria under subs. 20(1)(b) require examination in turn. As to the first, that the information be financial, commercial, scientific or technical, the applicant submits that many of the records here in question contain commercial or technical information. The respondent, however, submits that it is not sufficient if the information merely relates to things financial, commercial, scientific or technical, rather exemption is designed to protect information which

has an independent value in relation to such matters, for example, a customer list or a property appraisal. In reply, the applicant submits that it is not a requirement for classifying information within the terms of this requirement that it have an independent market value, the disclosure of which would cause loss to the third party, and that such a test was rejected in *Montana*, supra. Yet in *Montana*, as I read it, a test of that nature was rejected by Jerome A.C.J. in considering whether the information was confidential, the second of the requirements under subs. 20(1)(b), and he did so in the course of discussing jurisprudence which has developed in United States courts in relation to the *Freedom of Information Act* in that country.

36 Nevertheless, I am not prepared to accept the respondent's submission that information must have an independent value, perhaps, from examples suggested, a market value or a cost value to the third party in acquiring it. Information is in my view essentially neutral as to value in those terms. Its value intimately depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time. Questions about the application of this criterion appear to have been raised in a few cases but without definitive tests yet evolving. In the circumstances, it seems to me that dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood. Insofar as information of this sort may have a marketable value or its disclosure might cause loss to the third party, it would seem that those aspects are protected by Parliament by subss. 20(1)(a), (c) and (d) of the Act.

37 The second requirement under subs. 20(1)(b), that the information be confidential, has been dealt with in a number of decisions. These establish that the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes, and the conditions under which it was prepared and communicated (per Jerome A.C.J., *Montana*, supra, at 25 [F.T.R.]). It is not sufficient that the third party state, without further evidence, that it is confidential (see, e.g., *Merck Frosst Can. Inc.*, supra; *Noel v. Great Lakes Pilotage Authority Ltd.* (1987), [1988] 2 F.C. 77, 20 F.T.R. 257, 45 D.L.R. (4th) 127 (T.D.)). Information has not been held to be confidential, even if the third party considered it so, where it has been available to the public from some other source (*Can. Packers Inc. v. Canada (Minister of Agriculture)*, [1988] 1 F.C. 483 (T.D.) and related cases, appeal dismissed with variation as to reasons on other grounds, [1989] 1 F.C. 47 (C.A.), supra, or where it has been available at an earlier time or in another form from government (*Can. Packers Inc.*, supra; *Merck Frosst Can. Inc.*, supra). Information is not confidential where it could be obtained by observation, albeit with more effort by the requestor (*Noel*, supra). As outlined by Jerome A.C.J. in earlier cases dealing with subs. 20(1)(b):

> It is not sufficient that [the applicant] considered the information to be confidential ... It must also have been kept confidential by both parties and ... must not have been otherwise disclosed, or available from sources to which the public has access.

(*Maislin Industries Ltd. v. Minister for Industry, Trade & Commerce*, [1984] 1 F.C. 939, 8 Admin. L.R. 305, 27 B.L.R. 84, 10 D.L.R. (4th) 417, 80 C.P.R. (2d) 253 at 257 (T.D.), *D.M.R. Associates v. Minister of Supply & Services* (1984), 11 C.P.R. (3d) 87 at 91 (Fed. T.D.))

38 In some cases reference has been made to United States jurisprudence which has defined commercial or financial information as confidential, for purposes of exemption from disclosure under the *Freedom of Information Act* in that country, where disclosure is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained (per Tamm J. in *National Parks & Conservation Assn. v. Morton*, 498 F. (2d) 765 (1974) at 770). That test has not been adopted, indeed as noted above it has been rejected, in considering subs. 20(1)(b), which includes no reference to possible harm from disclosure, a matter dealt with separately in our statute in subss. 20(1)(c) and (d). In *Noel*, supra, Dubé J. referred to the first aspect of that test and concluded that information obtained as a result of a regulatory obligation on a third party to report information to government could not be deemed to be confidential on the ground that its disclosure would be likely to impair government's ability to acquire the information in future, particularly in circumstances where there were advantages accruing to the third party from reporting.

39 In this case, the respondent submits that in considering an appropriate objective standard the Court, in interpreting the words "confidential information", should look to the test adopted in dealing with an action for breach of confidence. Reference was made to *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413 (C.A.), where Lord Greene (at 415 All E.R.) re-affirmed the principles that, to found an action for breach of confidence, the information in issue must have been imparted in a confidential manner and it must also have "the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge". Reference was also made to *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Eng. H.C.); *Amer-Can Development Corp. v. Tele Time Saver Inc.* (1976), 1 C.P.C. 230, 29 C.P.R. 272 (Ont. H.C.); and to *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1987), 62 O.R. (2d) 1, 28 E.T.R. 245, 46 R.P.R. 109, 23 O.A.C. 263, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592 (C.A.), leave to appeal to S.C.C. granted October 2, 1987 [aff'd (1989), 69 O.R. (2d) 287]. While those cases are interesting, they deal with equitable relief in relation to alleged unauthorized use of information provided entirely by one party to another in circumstances of confidence which give rise to a fiduciary relationship or a constructive trust. The cases are of limited value in considering what meaning may most appropriately be assigned to confidential information as used in subs. 20(1)(b), though they emphasize in another context that confidential information for those purposes does not include matters that are in the public domain or known to the public.

40 A more interesting and apt analogy was relied upon by Dubé J. in *Noel*, supra, where he applied the test for a confidential record which was adopted in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 55 D.L.R. (3d) 224, 75 C.L.L.C. 14,263. There, drawing upon *Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961) at para. 2285, the Court adopted as principles necessary to establish a privilege against the disclosure or unauthorized use of communications, at least for evidence against the party providing them, that:

> (1) They originate in a confidence that they will not be disclosed;
>
> (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> (3) The relation be one which in the opinion of the community ought to be sedulously fostered; and
>
> (4) The injury which would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Like other tests referred to, I find this one helpful, though the last of the principles relates particularly to the use of communications as evidence in judicial or quasi-judicial proceedings.

41 In this case, in addition to representations about particular records, the applicant submits the following general considerations as indicia that the records here in question are all confidential in nature.

> The records here were supplied by City Express or by another third party or were based on information supplied by City Express which has always considered information of this sort to be confidential. (As noted above, the view of the company about the nature of the records cannot in itself be conclusive.)
>
> The information was supplied to government in response to the exercise of statutory authority by officials with the department. (This ground was not accepted as sufficient in itself for considering the information confidential in *Noel*, supra.)
>
> There was an express undertaking by departmental officials that the information would be treated as confidential. Moreover, the applicant emphasizes that the records in question have not previously been disclosed, and the information contained in them is not otherwise available to the public. (The allegation of an undertaking and the reference to the fact that the records are not otherwise available are not denied, but the respondent points out these could not preclude the department from meeting its obligations to provide access to information, at least since the Act came into force in 1982. I accept the respondent's recognition of obligations under the Act and thus that any undertaking by staff of the department do not preclude the

respondent from disclosing records requested in accordance with the Act. In light of the purpose of the Act, neither express undertakings of staff nor the previous lack of publication of the records are determinative of whether all the records here are confidential.)

The records by their nature and content reveal sensitive and detailed information about the business operations of City Express, which information has consistently been treated as confidential by the company. (This may be relevant in part in considering the fourth requirement of subs. 20(1)(b) to which we will soon turn.)

These submissions are considered by the applicant to meet the requirements for information to be confidential as set out in *Montana*. In my reading of that case, where on the application of third parties an order was granted not to disclose information supplied to government concerning the finances of various Indian bands, an important element was the fiduciary position of the Minister of Indian Affairs and Northern Development in relation to the information and his responsibilities to the bands affected. That same relationship does not apply in this case.

42 My review of the authorities, facilitated in part by submissions of counsel, is undertaken in order to construe the term "confidential information" as used in subs. 20(1)(b) in a manner consistent with the purposes of the Act in a case where the records in question, under control of a government department, consist of documents originating in the department and outside the department. This review leads me to consider the following as an elaboration of the formulation by Jerome A.C.J. in *Montana*, supra, that whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:

43 (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,

44 (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

45 (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.

46 In this case there is no dispute that much if not all of the information here in question is not available from sources otherwise accessible by the public, and it does not seem to me to be information that could be obtained by observation or independent study by a member of the public. The applicant submits that it considered information it provided was provided in confidence, that it expected the same treatment for information originating from sources at City Express, and they relied on statements of department staff about the information remaining in confidence. At least in

relation to information supplied by City Express, I find that it originated in and was communicated in a reasonable expectation of confidence that it would not be disclosed.

47 As to the third element, the relationship between the parties, the president of the applicant company avers to the special relationship of confidence in communications between the parties here and between the airline industry and the department. He underlines the importance of that relationship in an on-going situation where the department's inspection staff must rely on industry operators for knowledge and experience in the operation of aircraft and where that staff is limited in its resources to oversee an industry that is expanding and diversifying in an era of de-regulation. The special relationship between air industry and inspectors is dealt with in a recent study of the Law Reform Commission of Canada, *Inspection: A Case Study and Selected References*, by John C. Clifford (1988), which generally supports the applicant's view of the current relationship. This report, based in part on substantial field study of the air inspection services of the respondent's department, includes the following pertinent passages at p. 17:

> The author accompanied airworthiness inspectors during routine inspections of aircraft and conversations with air crew. One inspector constantly stressed the importance of relations with airline staff, and underlined the fact that airworthiness inspectors are mainly interested in getting things corrected. This is accomplished by maintaining a strong network of contacts in the industry, checking with manuals, and generally using every available source of information. The airworthiness inspector ... noted that many problems followed from the use of incomplete reports. Additionally, the airworthiness inspector expressed his difference of opinion respecting enforcement: specifically, he did not think it was always appropriate to follow up with enforcement measures when, for example, 'snags' were reported by AMEs. He outlined their responsibilities, and noted the importance of interpersonal relations and shared backgrounds.
>
> . . . . .
>
> The airworthiness inspectors indicated that relations with the AMEs were very important because information about maintenance problems was typically passed on in confidence to the airworthiness inspector. As well, remote sources of problems were discussed.

[Note: AMEs, referred to in these passages, are aircraft maintenance engineers, private sector actors, whether employees of private firms or self-employed.]

48 It is implied from argument of the applicant that the relationship of the parties in this regulatory regime is, or has been, one of confidence that warrants exemption from disclosure of all the records maintained by government arising from this relationship. The relations between them may change if records are disclosed in this or any other case of a request for access to them. Yet Parliament has decided that access should be provided, as ss. 2 and 4 of the Act make abundantly clear, unless the information requested is specifically exempt from disclosure under the Act or

exempt under regulations as the Governor in Council may provide in accordance with the Act. In the final analysis, if the relationship between the parties here, one not generically different from many other regulatory relationships, is to be treated as one of confidence and the records arising in it are to be wholly exempt from disclosure, that decision rests with Parliament or with the executive under the Act, not with the Courts.

49 While I am not persuaded that the relationship here is one of special confidence in which all records should be exempt from disclosure and while it is not one of a fiduciary nature as in *Montana*, supra, it is consistent with the public interest, and the relationship would be fostered for the benefit of the public, in my view, by treating as confidential those communications which originate with the applicant where the applicant has considered them confidential. In this case the third party would be encouraged to be open and frank with inspectors if its understanding about the restricted purposes and circulation of its communications is recognized and respected. Where the records are from department sources not otherwise exempt from disclosure under s. 20(1), the general purpose of the Act — which identifies as a public interest given priority by Parliament the provision of access to government controlled records — should be given effect unless the relationship between the third party and government is exceptional and warrants treating the records as confidential. Thus, for records originating in departmental responsibilities, compiled by public officers at public expense, in this as in other regulatory regimes, unless there be reasons to support an exceptional conclusion that the public interest is better served by treating the records as confidential, the records would not be considered confidential for purposes of the Act. This, of course, suggests there may be public interests taken into account in assessing whether records are to be considered confidential, aside from the special public interests identified in s. 20(6) which may be considered by the head of the government institution concerned. Yet classifying information as confidential because of an identified public interest would not preclude its release under s. 20(6) in a proper case.

50 The third requirement under subs. 20(1)(b) is that the information be supplied to a government institution by the third party. In this case some of the documents in question clearly originated with and were supplied by City Express, the third party applicant. The applicant submits that the others were either supplied by another third party to the department or even if they are records compiled by departmental officers these records were directly based on information supplied by City Express to the department. The respondent submits the records produced by public employees as to actions taken by them do not constitute records supplied by a third party. It is submitted that *Can. Packers Inc.*, supra, makes clear that records compiled by public employees from their own observations in inspecting records, facilities or equipment do not constitute records supplied by a third party. The difference between the parties lies in relation to documents which on their face appear as department documents compiled by public officers reporting on their actions or observations from inspections but which the applicant contends are based on information provided by City Express in the cooperative relationship that had developed between staff of the two parties.

51 In my view, where the record consists of the comments or observations of public inspectors based on their review of the records maintained by the third party at least in part for inspection purposes, the principle established by *Can. Packers Inc.*, supra, applies and the information is not to be considered as provided by the third party. In any other case where there is real doubt about the origin of information leading to the records in issue, I would be prepared to resolve that doubt as urged by the applicant, that is, that the information originates with the applicant City Express who is responsible in every way and at all times for all operations of the company, whereas inspection staff are not, so far as I am informed, exclusively engaged at all times in supervision or inspection of the applicant's operations nor are they responsible for those operations. In this case, on review of the records in issue there are no instances where reliance on such a presumption is necessary.

52 The final requirement under subs. 20(1)(b) is that the records in question be treated consistently in a confidential manner by the third party. None of the documents comprising the records in issue are marked confidential, though that in itself may not be significant. The affidavit evidence of the president of City Express is that records of this sort compiled in the dealings between an airline company and department inspection staff have consistently been treated in a confidential manner by City Express, and others in the industry in similar circumstances, and by the department. There is no dispute about the fact that information in the records has not been disclosed previously and has not otherwise been made available to the public by either the applicant or the respondent. Further, the applicant's president avers that information in the records is sensitive and detailed information about the business operations of City Express and that this information has been treated consistently as confidential by the company. There is no challenge to this statement of the company's practice. At least in relation to the documents provided by the third party here, it seems to me that its practice in treating those as confidential should be respected.

53 Accepting that documents originating with the applicant have consistently been treated as confidential, application of the principles outlined for considering information as confidential under subs. 20(1)(b), in part by reference to the source of the records in issue, is consistent with that subsection and the purposes of the Act. In this case it means that some documents originating with the department which invite or require response by the applicant may be disclosed, and the response of the applicant which completes the full record would not be disclosed unless the applicant agrees. Sometimes the complete record here is a comment or directive from the department with a response on the reverse side of a form, sometimes the response is by separate communication from the applicant. The record originating with the department does not automatically take on the characteristic of confidentiality from that quality, determined by the applicant, of the response record. The applicant third party is free to decide whether it will permit disclosure of its responses, which heretofore it has consistently treated as provided in confidence, and if that is permitted the respondent may then disclose that response in accord with s. 20(5).

54 There are two subsidiary aspects related to its concerns about confidentiality raised by the applicant. One relates to other third parties and their interests. Some of the records here in issue originate with other third parties and in other cases the interests of other third parties might be adversely affected, it is suggested, by disclosure of the records. So far as is known other third parties associated with the records in either of these ways have not been involved in this process of determining access to these records. The interests of other third parties are matter to be of concern to the head of the ministry. Even if other third party interests may be involved that does not provide a basis for classifying information here in issue as confidential in the relationship between the department and City Express.

55 A second aspect involves the concept of fairness in dealings between the ministry and City Express. It is presented by proposed disclosure of intra-departmental records, compiled without input or opportunity to comment by the company though the records relate directly to it. The applicant was ignorant of some records or parts of records now proposed to be disclosed until copies were made available to it following the access request to which the department seeks to respond. It is not surprising that the applicant feels unfairly treated by the proposed disclosure of information from government records about the applicant that were unknown to it before the request and on which there was no opportunity to comment. While this would seem to be a void insofar as legislated responsibility and rights under the Act are concerned, it is one that Parliament could address by amendment. It is also one that the department concerned can in future avoid simply by ensuring that internal records it compiles in its ongoing regulatory process are simultaneously provided by copy to any third parties whose interests are dealt with in the records so that they may, if they wish, respond or comment. That would be good manners. It would provide a measure of fairness if comment or response from the party affected were retained on government files with internal records relating to that party. That in turn ought to foster understanding in an on-going regulatory regime. In this case, that was not the practice and internal departmental documents about City Express operations are not confidential under subs. 20(1)(b), and the only basis for exempting them from disclosure here would be under subs. 20(1)(c).

56 We turn now to the requirements of subs. 20(1)(c). Here both parties point to the decision in *Can. Packers Inc.*, supra, where, in the words of MacGuigan J.A., the exceptions to access require "a reasonable expectation of probable harm". The applicant suggests that the decision of the Australian Administrative Appeals Tribunal in *Re Actors' Equity Assn. of Australia & Australian Broadcasting Tribunal (No. 2)* (1985), 7 A.L.D. 584 at 590 offers guidance about the meaning of a "reasonable expectation". In that case the tribunal, considering subpara. 43(1)(c)(i) of the Australian *Freedom of Information Act, 1982*, dealt with the phrase "which would, or could reasonably be expected to, unreasonably affect" a third party's lawful business or professional affairs. The tribunal in that case said:

> ... we are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effect. It is to that question that the witnesses' evidence had to be directed, and their assertions are incapable of proof in the ordinary way. What there must be is a foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason; not irrational, absurd or ridiculous' (Shorter Oxford Dictionary).

The respondent rightly points out that the tribunal there was concerned with interpreting the Australian Act, which is different from the *Access to Information Act.* Nevertheless, the definition there pointed to seems reasonable, though it is not particularly helpful in resolving the differences between the parties in the application of subs. 20(1)(c)

57 Here the applicant submits that the information proposed to be released is likely to be misunderstood by the general public for it is highly technical in nature and it is incomplete for it is only selected parts of an ongoing process of communications, a dialogue, between the parties. It is said that the information proposed to be released does not provide appropriate contextual or explanatory background to be properly understood. The applicant objects to a brief explanatory note proposed by the respondent to be disclosed with the records and submits that only by providing even more information of the same sort, which would contain matters the applicant considers confidential, would its position be fairly presented in relation to some of the records. Many of the records relate to matters arising in the inspection process, which involves not mere supervision and enforcement, but service and a sharing of information in a regime where both parties have different but shared responsibilities for overall safety in operations. While the applicant has indicated throughout that it does not consider that any of the records, properly understood in context, raise issues of safety in its operations, it is concerned that the opposite will appear to be the case to the uninformed reader. It points to a decision set out in a copy of a letter from the United States Federal Aviation Agency declining to reveal to a requestor, under the *Freedom of Information Act* there, information collected from the industry about certain technical matters, on the ground that the information was susceptible of being misconstrued by members of the public as safety related. It is pointed out by the respondent that the information there in question differed from most, if not all, of the information here in issue and that the decision referred to was that of the agency and was subject to appeal to the Court.

58 The applicant's apprehension gives rise to three serious concerns. First, it is urged that there is a reasonable expectation of harm to the applicant, with a smaller and still developing operation in a highly competitive industry and serving a highly competitive market, where a modest decline in passenger traffic, a mere 1 per cent, would have serious financial implications for the company. The applicant refers to trade journal reports provided by it about experience of two airlines in the United States, which reportedly faced a decline in passenger traffic, in an era of increasing growth for others, following news accounts of concentrated ramp inspections by government regulators.

The respondent notes that the inspections there were of a different nature and for different purposes than the regular ongoing inspection process that resulted in much, if not all, of the records in this case. Nevertheless, the applicant points to the experience of one of the U.S. companies that had its bond ratings decline following news of the inspections, and its decline in passenger traffic persisted, for some time at least, even though the ramp inspection process resulted in a satisfactory outcome. There is a further particular concern of the applicant arising from some intra-department records of which it was unaware until copies were provided to it in connection with the access request here. This relates to comments of department officers in the nature of general opinion which might have legal implications but did not result in any departmental action and which were not brought to the applicant's attention previously.

59 Second, the applicant expresses a concern that the records here, if disclosed, might be expected to be used to adversely affect the company's interests by certain parties. Those parties include competitors, persons knowledgeable about the technical information included in the records, who could by interpretation and with the use of other information available to them estimate with reasonable perception major cost factors borne in some of the applicant's maintenance and other operations. Other information of special interest to competitors, it is submitted, relates to key personnel matters. These factors may be important in gauging the applicant's ability to deal with competitors' pricing and other initiatives. Other parties adverse to the interests of the applicant include individuals and organizations that have been concerned with airport operations in Toronto, about which there has been on-going public discussions and debate. Countering any stepped-up programme adverse to the applicant's use of facilities in that city, as in any other, would, it is submitted, result in expense and possible substantial costs for City Express.

60 These concerns are even more serious in regard to information, not proposed to be released by the respondent, which the applicant considers would more fairly present its position in relation to certain of the inspection records in issue. While I appreciate the applicant's concern about the fairness of any revelation from records released about it, we are not here concerned with records other than those the respondent proposes to release. If additional documents are considered by the applicant as essential to fairly portray its position it will have to decide, if public attention is ever drawn to any documents that may be disclosed, whether the company will then provide further documents from its own records to counter any public misunderstandings.

61 The applicant's third concern, expressed with reference to certain of the records here in issue, is that by referring to specific identified aircraft, disclosure of those records may adversely affect the market or rental value of some of its principal assets or its relationship with suppliers. This concern, like that about possible use by competitors of specific technical or personnel information in the records, does relate directly to the assets or the competitive position of City Express.

62 To all of the applicant's concerns, the respondent submits that they do not provide more than mere speculation as to the future. They are said to be based on an expectation that is not reasonable,

that there will be widespread misunderstanding created by disclosure in this case or deliberate distortion of the information in ways that would lead to harm for the applicant. It is submitted that the exemption in subs. 20(1)(c) was not intended to prevent the disclosure of information which is not in itself harmful but requires some intervening misunderstanding or distortion for the harm to result. I do not accept the last submission because, as earlier suggested, information in itself is neutral; aside from trade secrets which are protected from disclosure, its release could not cause harm. The information must be used in some way that causes harm. One must accept that Parliament, in subs. 20(1)(c), assumed that information disclosed would be used. The requirement of that subsection is whether, assuming use of the information, its disclosure would give rise to a reasonable expectation of probable harm.

63 It is true that the records arise from inspection of operations by the government agency with responsibility for safety standards in air transport and that if disclosed the records will not provide a complete picture. The accurate picture is, of course, the applicant's apparent record for safety in its operations, which the respondent acknowledges, and which is evident from its continuing operation under licence without any major safety incident. The public view of the applicant's concern for safety in its operations depends ultimately on its own performance, not upon the results recorded in routine inspection. Moreover, if disclosure of records were to lead to any general public misunderstanding about safety in operations, the respondent will have some responsibility to react to that, otherwise the inspection system itself may be discredited in the long run.

64 Having considered submissions of counsel in relation to the application of subs. 20(1)(c) to the records here in issue, I conclude that apprehensions about general misunderstandings that might arise from disclosure, either concerning safety in its operations or about use by persons adverse in interest, do not raise more than speculation about probable harm. I am not persuaded that disclosure raises a reasonable expectation of probable harm in the context of possible general misunderstandings.

65 Particular concerns of the applicant about disclosure of certain matters are, however, worth special consideration, in my view. These matters include comment about personnel matters, as well as personal information which is exempt from disclosure. They also include references to identified particular aircraft, to particular processes involving other third parties in the applicant's operations or other identified information that may be used by competitors to the disadvantage and harm of the applicant, and general opinions of department staff with possible legal implications, which opinions were not acted upon by the department and were not previously brought to the attention of the applicant. It is my conclusion that disclosure of these types of information, identified as a particular concern to the applicant, should be exempt from disclosure because disclosure, in the terms of subs. 20(1)(c), could reasonably be expected to result in material financial loss or to prejudice the competitive position of the applicant in this case.

Severance: Sections 25 and 51

66 Counsel for the applicant urged that consideration be given to the reasonable expectation of harm from disclosure not only in regard to individual records but also to the total collection of records that may be disclosed. In the circumstances of this case, it was urged that severance of exempt portions of the records and disclosure of the rest would not be reasonable. It seems to me the answer to these submissions is clear from the Act itself. Access is to be provided, except for those records or portions of records which are exempt under the Act.

67 Section 25 of the Act provides as follows:

> 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.

68 Reflecting the administrator's obligation under this section and consistent with the purposes set out in s. 2, the Court has an obligation under s. 51 as follows:

> 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.

69 In *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551, 32 Admin. L.R. 103, 30 F.T.R. 314 (T.D.), Jerome A.C.J. referred to the matter of severance under this Act and the *Privacy Act* in these terms (at 558-559 [F.C.]):

> Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes.
>
> . . . . .
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

In that case, information relating to opinion about individuals and their training, personality, experience or competence was held to be personal information exempt from disclosure, and the record there in question was ordered to be disclosed subject to severance and deletion from it of entire passages, including such personal information in order to protect the privacy of individuals.

70 In *Montana*, supra (18 F.T.R. at 26-27), Jerome A.C.J., declined to sever from the records there in question, which he held contained confidential information exempt from disclosure, information which the applicant third party conceded was not confidential. In that case the portions of records that might have been severed were minimal portions of the total information contained in the records and were available from published public sources. The information was found not to be reasonably severable where

> To attempt to comply with s. 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. The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide.

71 In this case, counsel for the respondent undertakes that any personal information exempt from disclosure under the Act will be deleted from any records before disclosure. My review of the records here leads me to conclude that severance can be done reasonably, deleting exempt information and disclosing all the rest. In the conclusion which follows, documents classified in categories B(1), (2), (3), (4) and (5) are in accord with my conclusions about exempt information.

Conclusion

72 I have reviewed the records here in issue in light of the requirements and principles set out above in relation to exemptions from disclosure under subss. 20(1)(b) and (c) and in relation to the Court's obligation to consider severance and disclosure of any information in the records that is not exempt where this can reasonably be done.

73 After consideration of the submissions of both parties, in light of the principles and conclusions set out earlier, my conclusions about the records here in issue, identified by reference to the numbers assigned to them by counsel for both parties, are as follows.

> A. Records 28 and 29, the disclosure of which was acknowledged by counsel for the applicant to be without objection, will be disclosed.
>
> B. All other records will be disclosed in toto with the following exceptions.
>
> > (1) Documents originating with the applicant which I find it has consistently treated as confidential will not be disclosed, even those which respond to records originating with the department, unless the applicant agrees to their disclosure, including records numbered
> >
> > 3 (p. 2), 6, 7, 10, 13, 14 (p. 2), 15 (pp. 2 and 4), 16, 17 (p. 2), 20, 24, 25 (pp. 2 and 4), 26 (pp. 2 and 4), 30 (p. 2), 31 (p. 1).

(2) Documents originating in the department which should be considered in toto as exempt in accord with subs. 20(1)(c) and because they relate to important personnel matters and contain personal information, including records numbered

1, 5

(3) Documents originating in the department which require severance of portions before disclosure to exclude information that is exempt under subs. 20(1)(c), including records numbered

18 — p. 3, severing and omitting 5th and 6th last lines of handwriting not including signature;

27 — severing and omitting any reference to another corporate third party and its dealings with the applicant, e.g., in items 5, 7, 8, 10, 11;

34 — severing and omitting on p. 1, lines 1 to 5 after the heading "Maintenance Management"; and on p. 2, para. 2(a) in its entirety and in para. 2(b) the 3rd, 4th, 5th and 6th words after the words "Bonded Stores";

36 — severing and deleting on p. 2, para. 2(a). If the applicant agrees to disclosure of any records listed in B(1) above, which records contain information complementary or otherwise corresponding to the specific references to be severed and deleted in accord with this classification B(3), comparable deletions shall be made in records agreed to be disclosed.

(4) All documents to be disclosed, including any identified in B(1) above, which the applicant may agree to be disclosed, shall have severed and omitted any reference identifying particular aircraft reported upon in those records; if necessary to make intelligible the records disclosed any such reference may be replaced by "[aircraft]".

(5) All documents to be disclosed shall have severed and omitted any reference to any personal information, as counsel for the respondent has undertaken would be done, before disclosure.

74 In the result, the following records or parts of records will be disclosed, a list that may be expanded if the applicant agrees that any of the records listed in B(1) above be disclosed, subject to severance and omission of those portions set out in B(3), (4) and (5) above:

2, 3 (p. 1), 4, 8, 9, 11, 12, 14 (p. 1), 15 (pp. 1 and 3), 17 (p. 1), 18, 19, 21, 22, 23, 25 (pp. 1 and 3), 26 (pp. 1 and 3), 27, 28, 29, 30 (p. 1), 31 (p. 2), 32, 33, 34, 35, 36.

75 An Order will issue under s. 51 of the Act directing the respondent not to disclose those records or parts of records identified above by categories B(1), (2), (3), (4) and (5), except that any records identified in B(1) which the applicant agrees be disclosed may also be disclosed, provided agreement of the applicant is given to the respondent within the time limited for appeal of the Order made in this application.

76 As for this application, it is allowed in part as indicated, with costs to the applicant.

77 Because some of the records or portions of records in issue will not be disclosed, I direct that the documents and records filed herein by the parties on a confidential basis and ordered filed in sealed envelopes continue to be so filed. These would be dealt with at the direction of the Court of Appeal in the event an appeal is taken against the order made in this application, and if no appeal be taken, then they would be retained as filed and sealed on a confidential basis unless otherwise ordered by this Court.

78 Counsel for the applicant is asked to submit a draft order for my signature, in accordance with these reasons, pursuant to para. 2(b) of r. 337 and r. 324 of the *Federal Court Rules*, after approval of the draft as to form by counsel for the respondent.

79 I suggest that counsel for both parties seek to agree on the text of an explanatory statement that may put in appropriate context the records to be disclosed. The Act does not require one. The applicant here objects to the draft originally proposed by the respondent but also objects that the records proposed to be disclosed do not put those records in proper context. If agreement is not possible within the time limited for appeal of the order made in this application, the respondent may determine whether any such statement should accompany disclosure.

Application allowed in part; certain documents ordered not to be released and others to be released with portions deleted.

End of Document

Merck Frosst Canada Ltd. *Appellant*

v.

Minister of Health *Respondent*

and

BIOTECanada *Intervener*

INDEXED AS: MERCK FROSST CANADA LTD. *v.* CANADA (HEALTH)

2012 SCC 3

File Nos.: 33290, 33320.

2010: November 12; 2012: February 3.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information — Third party information — Exemptions — Notice requirements — Severance — Access to information requests filed with Health Canada relating to third party pharmaceutical company's new drug submissions — Whether government institution fulfilled obligations to review records before providing notice of intention to disclose third party's information and in severing non-exempt information — Whether statutory notice requirements triggered — Whether third party information falling within Act's exemptions — Access to Information Act, R.S.C. 1985, c. A-1, ss. 20(1), 25, 27, 28.

Access to information — Appeals — Standard of appellate review — Evidence — Access to information requests filed with Health Canada relating to third party pharmaceutical company's new drug submissions — Whether deference owed to reviewing judge's findings that exemptions from disclosure applied to third party information — Whether pharmaceutical company provided sufficient direct and objective evidence

Merck Frosst Canada Ltée *Appelante*

c.

Ministre de la Santé *Intimé*

et

BIOTECanada *Intervenante*

RÉPERTORIÉ : MERCK FROSST CANADA LTÉE *c.* CANADA (SANTÉ)

2012 CSC 3

N[os] du greffe : 33290, 33320.

2010 : 12 novembre; 2012 : 3 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Accès à l'information — Renseignements concernant un tiers — Exceptions — Obligations en matière d'avis — Prélèvement de renseignements — Demandes d'accès à l'information déposées auprès de Santé Canada visant des présentations de drogue nouvelle d'un tiers, une société pharmaceutique — L'institution fédérale a-t-elle rempli ses obligations d'examiner les documents avant de donner au tiers un avis de son intention de divulguer certains de ses renseignements et de prélever les renseignements non soustraits à la divulgation? — Les exigences légales en matière d'avis ont-elles pris naissance? — Les renseignements du tiers étaient-ils visés par l'une ou l'autre des exceptions prévues par la Loi? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 20(1), 25, 27, 28.

Accès à l'information — Appels — Norme de contrôle en appel — Preuve — Demandes d'accès à l'information déposées auprès de Santé Canada visant des présentations de drogue nouvelle d'un tiers, une société pharmaceutique — Faut-il faire preuve de déférence envers les conclusions du juge siégeant en révision que les exceptions à la divulgation s'appliquent aux renseignements du tiers? — La société pharmaceutique a-t-elle

information falling within exemptions — Access to Information Act, R.S.C. 1985, c. A-1, ss. 20(1), 44.

Health Canada received access to information requests relating to two new drug submissions made to it by M, a pharmaceutical company and third party to the requests. A series of disputes arose between the parties about what information had to be disclosed and what was exempt from disclosure under the *Access to Information Act* ("Act"). In particular, Health Canada identified several hundred pages in response to each request. It reviewed those pages, concluded some contained information that could not be disclosed under the exemptions found in s. 20(1) of the Act, and redacted those pages in part. It also concluded a number of pages did not contain any exempted information and disclosed those pages without notifying or consulting M. Enclosing hundreds of the still undisclosed pages, Health Canada then notified M of the access to information requests and of its intention to disclose the enclosed pages, asking M to explain which portions of the remaining pages M considered confidential under s. 20(1), and why. Following a number of exchanges, Health Canada agreed to further redactions but rejected the balance of M's objections. M filed for judicial review of Health Canada's decisions under s. 44.

The Federal Court found that disclosure by Health Canada without prior notice to M contravened s. 20(1) of the Act and held that over 200 pages were exempted from disclosure, while the remaining pages could be disclosed. The reviewing judge also held that it would be extremely difficult to sever and disclose non-exempt information pursuant to s. 25. The Federal Court of Appeal allowed Health Canada's appeals, ordering that all the remaining pages at issue should be disclosed.

Held (Deschamps, Abella and Rothstein JJ. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Fish, Charron and Cromwell JJ.: The decision of the judge conducting

présenté une preuve directe et objective suffisante pour établir que les renseignements étaient visés par l'une ou l'autre des exceptions? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 20(1), 44.

Santé Canada a reçu des demandes d'accès à l'information visant deux présentations de drogue nouvelle déposées par M, une société pharmaceutique qui était un tiers en ce qui concerne les demandes. Une série de différends sont survenus entre les parties quant à savoir quels renseignements devaient être divulgués et quels renseignements étaient soustraits à la divulgation en application de la *Loi sur l'accès à l'information* (« Loi »). En particulier, Santé Canada a identifié plusieurs centaines de pages répondant à l'une et l'autre des demandes. Il a examiné ces pages, conclu que certaines d'entre elles contenaient des renseignements qui ne pouvaient être divulgués en raison des exceptions prévues au par. 20(1) de la Loi, et expurgé ces pages en partie. Il a aussi conclu qu'un certain nombre de pages ne contenaient aucun renseignement soustrait à la divulgation et les a communiquées au demandeur sans donner de préavis à M et sans la consulter. Santé Canada a ensuite envoyé à M un avis, auquel il a joint les centaines de pages qui n'avaient pas été communiquées, pour l'informer des demandes d'accès à l'information et de son intention de communiquer ces pages, et l'inviter à lui indiquer les parties du reste du dossier qu'elle considérait comme confidentielles en application du par. 20(1) et lui expliquer pourquoi il en était ainsi selon elle. Après un certain nombre d'échanges, Santé Canada a accepté de retrancher des détails supplémentaires, mais a rejeté les autres objections de M. M a déposé une demande de contrôle judiciaire des décisions de Santé Canada en vertu de l'art. 44.

La Cour fédérale a conclu que la divulgation de renseignements par Santé Canada sans donner de préavis à M contrevenait au par. 20(1) de la Loi et que plus de 200 pages étaient soustraites à la communication, mais que les autres pages pouvaient être communiquées. Le juge siégeant en révision a également conclu qu'il serait extrêmement difficile de prélever et divulguer les renseignements non soustraits à la divulgation, en application de l'art. 25. La Cour d'appel fédérale a accueilli les appels de Santé Canada, ordonnant la communication de l'ensemble des pages toujours en litige.

Arrêt (les juges Deschamps, Abella et Rothstein sont dissidents) : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges Binnie, LeBel, Fish, Charron et Cromwell : La décision du juge

a review under the Act, which will often have a significant factual component, is subject to appellate review in accordance with the well-established principles set out by this Court. The Federal Court of Appeal correctly set out and applied the applicable standard of review. The reviewing judge did not make requisite findings of fact and failed either to state the applicable legal principles or to explain how the legal principles applied to the facts before him or, in some cases, both. The Court of Appeal was therefore entitled to intervene and to carry out its own assessment of whether the reviewing judge had correctly applied the Act's exemptions to the records. There is nonetheless some merit to M's complaints. The Act must be interpreted and applied so that it strikes the balance Parliament intended between broad rights of access and protection of third party information. Both the Act and the considerations identified by the reviewing judge and by M support a fairly low threshold to trigger the obligation to give notice under s. 27(1). Observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by mistake. Disclosure without notice is only justified in clear cases where the government institutional head, reviewing all the relevant evidence, concludes that there is no reason to believe that the record might contain exempted material. A head should refuse to disclose without notice where there is no reason to believe that the information is subject to disclosure. M's submission, that there is an automatic right to notice with respect to certain categories of records is not, however, supported by the grammatical and ordinary meaning of s. 27(1), or by the jurisprudence which makes plain that notice is required only if certain conditions are met in the particular circumstances. The institutional head must give notice if he or she is in doubt about whether the information is exempt; intends to disclose exempted material to serve the public interest pursuant to s. 20(6); or intends to disclose third party information by severing the non-exempt information and disclosing only that as required by s. 25. In giving notice, the institutional head cannot simply shift the responsibility to review the records onto the third party. Institutions must make a serious attempt to apply the exemptions by reviewing each individual record to determine which portions, if any, may be exempted. The same principle applies to the severance of material under s. 25. It is also prudent and in accordance with common sense for a third party, who is generally in a better position than the head of the institution to identify information that falls within one of the s. 20(1) exemptions, to be as helpful as it can be in identifying

qui, en application de la Loi, procède à un examen, qui aura souvent un volet factuel important, peut faire l'objet d'une révision en appel conformément aux principes bien établis que la Cour a déjà exposés. La Cour d'appel fédérale a expliqué et appliqué correctement la norme de contrôle applicable. Le juge siégeant en révision n'a pas tiré les conclusions de fait nécessaires et il a omis soit d'énoncer les principes juridiques applicables, soit d'expliquer comment les principes juridiques s'appliquaient aux faits de l'espèce; dans certains cas, il n'a fait ni l'un ni l'autre. La Cour d'appel fédérale pouvait donc intervenir et faire sa propre appréciation de la question de savoir si le juge siégeant en révision avait correctement appliqué aux documents les exceptions prévues par la Loi. Les plaintes de M sont néanmoins fondées en partie. Il faut interpréter et appliquer la Loi de manière à établir l'équilibre recherché par le législateur entre les droits généraux en matière d'accès à l'information et la protection des renseignements de tiers. Il ressort de la Loi et des considérations décrites par le juge siégeant en révision et par M que le seuil à atteindre pour que prenne naissance l'obligation de préavis prévue au par. 27(1) est assez peu élevé. L'application d'un critère peu exigeant en matière de préavis au tiers garantit l'équité procédurale et réduit le risque que des renseignements ne pouvant être divulgués le soient par erreur. La divulgation de renseignements sans préavis n'est justifiée que dans les cas manifestes, si le responsable de l'institution, après avoir analysé toute la preuve pertinente, estime qu'il n'y a aucune raison de croire que le document est susceptible de contenir des renseignements soustraits à la divulgation. Le responsable doit refuser de divulguer des renseignements sans préavis s'il n'existe aucune raison de croire qu'ils peuvent être divulgués. L'argument de M qu'il existe un droit automatique au préavis dans le cas de certains types de documents n'est cependant pas étayé par le sens ordinaire et grammatical des termes utilisés au par. 27(1) ou par la jurisprudence, d'où il ressort clairement que le préavis ne s'impose que si certaines conditions sont réunies dans les circonstances particulières en cause. Le responsable de l'institution doit donner un préavis s'il ne sait pas avec certitude si les renseignements sont soustraits à la divulgation, s'il a l'intention de divulguer, pour des raisons d'intérêt public en vertu du par. 20(6), des renseignements soustraits à la divulgation, ou s'il a l'intention de communiquer un document qui contient des renseignements de tiers en en prélevant les renseignements qui ne sont pas protégés et ne divulguant que ceux-ci, comme l'exige l'art. 25. Lorsqu'il donne l'avis au tiers, le responsable de l'institution ne peut simplement lui transférer

precisely why disclosure is not permitted. In these appeals, it is of limited use to decide if the notice provisions and the appropriate level of review by the institutional head were correctly applied throughout. It may be observed, however, that both M and Health Canada at times took rather extreme positions that were not in accordance with the purpose, letter or spirit of the Act.

The party seeking judicial review bears the burden of demonstrating that the statutory exemptions apply on a balance of probabilities. In relation to the exemptions themselves, M has not shown that any of the pages in issue, as redacted by Health Canada, contain any information exempted under s. 20(1)(*a*), (*b*) or (*c*). First, a "trade secret" for the purposes of s. 20(1)(*a*) should be understood as a plan or process, tool, mechanism or compound, which possesses the following characteristics: 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 he or she has acted with the intention to treat the information as secret; the information must be capable of industrial or commercial application; and the possessor must have an interest (e.g. an economic interest) worthy of legal protection. This approach is consistent with the common law definition and takes account of the legislative intent that a trade secret is something different from the broader category of confidential commercial information protected under s. 20(1)(*b*). While the Court of Appeal correctly defined "trade secrets", it erred in law by insisting the term should be interpreted restrictively and that there was a high threshold for invoking the exemption. The applicable standard of proof is still the civil standard of the balance of probabilities. However, this error did not result in the Court of Appeal reaching the wrong conclusion about how s. 20(1)(*a*) applies here. It did not err in finding that M's evidence was not responsive to the documents as redacted by Health Canada. The reviewing judge's failure to refer to the applicable legal test or

la responsabilité d'examiner les documents. Les institutions doivent véritablement se demander si l'une ou l'autre des exceptions s'applique en examinant chaque document afin de déterminer quelles parties peuvent, le cas échéant, faire l'objet d'une exception. Le même principe s'applique au prélèvement de renseignements en application de l'art. 25. Du point de vue du tiers, qui, de façon générale, est mieux placé que le responsable de l'institution pour relever les renseignements visés par l'une ou l'autre des exceptions prévues au par. 20(1), il est également prudent et conforme au bon sens d'aider le plus possible ce dernier à déterminer précisément pourquoi la divulgation des renseignements en cause n'est pas autorisée. Pour les fins des présents pourvois, il ne sert pas à grand-chose de déterminer si les dispositions en matière de préavis et le degré convenable d'examen ont été correctement appliqués par le responsable de l'institution du début à la fin. Toutefois, il peut être utile de mentionner que M et Santé Canada ont parfois adopté des positions plutôt extrêmes qui ne s'accordaient pas avec l'objet, la lettre ou l'esprit de la Loi.

Il incombe à la partie qui sollicite le contrôle judiciaire le fardeau d'établir, selon la prépondérance des probabilités, que les exceptions prévues par la loi s'appliquent. En ce qui concerne les exceptions elles-mêmes, M n'a pas établi que l'une ou l'autre des pages en litige, sous leur forme expurgée par Santé Canada, contient un quelconque renseignement soustrait à la divulgation en application des al. 20(1)*a*), *b*) ou *c*). Premièrement, le « secret industriel » doit s'entendre, pour les fins de l'al. 20(1)*a*), d'un plan ou procédé, d'un outil, d'un mécanisme ou d'un composé qui possède les caractéristiques suivantes : l'information doit être secrète dans un sens absolu ou relatif (elle est connue seulement d'une ou de quelques personnes); le détenteur de l'information doit démontrer qu'il a agi avec l'intention de traiter l'information comme si elle était secrète; l'information doit avoir une application pratique dans le secteur industriel ou commercial; et le détenteur doit avoir un intérêt (p. ex., un intérêt économique) digne d'être protégé par la loi. Cette approche est conforme à la définition du secret industriel en common law et elle tient compte du fait que le législateur a voulu que le secret industriel soit distinct de la catégorie plus large des renseignements commerciaux de nature confidentielle protégés par l'al. 20(1)*b*). Bien qu'elle ait correctement défini les « secrets industriels », la Cour d'appel fédérale a commis une erreur de droit en insistant pour dire que ce terme devait être interprété de façon restrictive et que le seuil pour invoquer cette exception était élevé. La norme de preuve qu'il convient d'appliquer est toujours la norme de preuve en matière civile, à savoir la prépondérance des probabilités. Toutefois, cette erreur n'a pas amené la Cour d'appel fédérale à tirer la mauvaise

the relevant evidence constituted a material error justifying appellate intervention.

Second, M's submission that the Court of Appeal erred in finding that it had not discharged its burden of proof, and that the documents, as redacted, continued to contain confidential information, must fail. In order to qualify for the s. 20(1)(*b*) "confidential information" exemption, the information must be financial, commercial, scientific or technical information; confidential and consistently treated in a confidential manner by the third party; and supplied to a government institution by a third party. Government reviewers' notes may fall under the exemption to the extent that they contain information communicated to them by a third party. While the Court of Appeal once again applied an unduly onerous standard of proof, finding that the third party opposing disclosure has a heavy burden to establish the exemption, the result did not turn on its description of the standard of proof. Rather, the court's decision rested on the findings that Health Canada conceded that extensive redaction was necessary and that there was no direct and objective evidence from M to show that the remaining information was confidential. Both of these conclusions focussed on the primarily factual question of whether the substance of the information was publicly available. M's submissions, including references to the evidence, are of no assistance in explaining how what is left on the often heavily redacted pages is confidential in the face of Health Canada's evidence that the unredacted material is in the public domain and therefore not confidential. As for the formatting and structure of the new drug submissions, they do not qualify for exemption as confidential information in this case. Generally, as here, the choice about how information is presented or the precise organization and ordering of sections of a document are the subject of publicly available guidelines, although the nature of the information and evidence in the particular case must be considered in deciding whether or not the exemption applies. M's argument that the very fact it listed particular articles and studies otherwise available in the public domain in its new drug submissions is confidential information, because it would be understood by competitors that M had relied on those studies, must also fail. The record shows that M itself proposed that copies of all published articles referred to in the submissions should be provided to the requester. In addition, the fact that M had referred to many studies was

conclusion sur la façon dont il convient d'appliquer l'al. 20(1)*a*) en l'espèce. Elle n'a pas commis d'erreur en concluant qu'il n'y avait pas de lien entre la preuve de M et les documents sous leur forme expurgée par Santé Canada. L'omission du juge siégeant en révision de faire référence au critère juridique applicable ou à la preuve pertinente constituait une erreur matérielle qui justifiait l'intervention en appel.

Deuxièmement, l'argument de M que la Cour d'appel fédérale a commis une erreur en concluant qu'elle ne s'était pas acquittée de son fardeau de prouver que les documents, sous leur forme expurgée, contenaient toujours des renseignements de nature confidentielle n'est pas fondé. Pour être visés par l'exception prévue à l'al. 20(1)*b*), qui porte sur les renseignements « de nature confidentielle », les renseignements doivent être financiers, commerciaux, scientifiques ou techniques, de nature confidentielle, traités comme tels de façon constante par le tiers, et fournis à une institution fédérale par un tiers. Les notes des examinateurs de l'institution peuvent être visées par l'exception dans la mesure où elles contiennent des renseignements qui leur ont été fournis par un tiers. Bien que la Cour d'appel fédérale ait encore une fois appliqué une norme de preuve trop exigeante, déclarant que le fardeau dont le tiers qui s'oppose à la divulgation doit s'acquitter pour que l'exception s'applique est lourd, la conclusion qu'elle a tirée n'était pas tributaire de sa description de la norme de preuve. La décision de la cour reposait plutôt sur les conclusions que Santé Canada en est venu à reconnaître la nécessité de faire d'importantes expurgations et que M n'a soumis aucune preuve directe et objective établissant que les renseignements figurant toujours dans les dossiers étaient de nature confidentielle. Ces deux conclusions étaient axées sur la question de savoir si le contenu des renseignements était accessible au public, ce qui constitue principalement une question de fait. Les observations de M, notamment ses références à la preuve, ne sont d'aucune utilité pour expliquer en quoi le contenu des pages expurgées — dont plusieurs l'ont été de façon importante — est confidentiel compte tenu de la preuve de Santé Canada que les renseignements non retranchés font partie du domaine public et, par conséquent, ne sont pas de nature confidentielle. En ce qui concerne la mise en forme et la structure des présentations de drogue nouvelle, celles-ci ne sont pas visées par l'exception en matière de renseignements confidentiels. En général, comme c'est le cas en l'espèce, la façon de présenter les renseignements ou la structure et l'ordonnancement précis des parties d'un document doivent être conformes à des lignes directrices accessibles au public, bien qu'il faille tenir compte de la nature des renseignements et de la preuve au dossier pour déterminer si l'exception s'applique ou non. Il faut également rejeter l'argument de M selon lequel le fait même qu'elle

already in the public domain as a result of the publication of the Product Monograph (a scientific document which contains the information for safe and effective use of the drug) and other documents. While the possibility of establishing a claim of this nature in cases where the evidence supports it cannot be foreclosed, the evidence does not support it here.

Third, the exemption in s. 20(1)(*c*) applies if disclosure could reasonably be expected to harm the third party. The test to establish the degree of likelihood that harm will result from disclosure is "a reasonable expectation of probable harm". This long-accepted formulation is intended to capture that, while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. There is no reason to reformulate the test. As to whether it is possible that disclosing information already in the public domain can cause harm, publicly available information is generally not exempt information under the harm test. It may, however, be possible in some cases to show that the way in which publicly available information has been compiled for a particular purpose is not, itself, publicly known, giving rise to the risk of harm by disclosure. Information, not already public, that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements of s. 20(1)(*c*). The evidence must convince the reviewing court that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure. Disclosure of information such as dates, numbering and location of information within a new drug submission or the manner of its presentation, as well as lists of studies or acknowledgement that certain studies have been consulted, and information about how the regulatory process works, usually does not give rise to the necessary expectation of harm

a énuméré, dans ses présentations de drogue nouvelle, certains articles et études faisant déjà partie du domaine public constitue un renseignement de nature confidentielle au motif que cela laisse entendre à ses concurrents qu'elle s'est fondée sur ceux-ci. Il ressort du dossier que c'est M elle-même qui a proposé que des copies de tous les articles publiés qui ont été mentionnés dans les présentations soient fournies au demandeur. De plus, le fait que M avait fait référence à plusieurs études était déjà de notoriété publique en raison de la publication de la monographie de produit (document scientifique qui contient les renseignements permettant d'utiliser la drogue de manière sûre et efficace) et d'autres documents. Bien qu'il ne faille pas exclure la possibilité que le bien-fondé d'un tel argument soit établi dans certains cas où il est étayé par la preuve, la preuve en l'espèce est insuffisante à cet égard.

Troisièmement, l'exception prévue à l'al. 20(1)*c*) s'applique si la divulgation des renseignements risquait vraisemblablement de causer un préjudice au tiers. Le critère pour établir le degré de probabilité qu'un préjudice découle de la divulgation des renseignements visés est celui d'« un risque vraisemblable de préjudice probable ». Cette formulation acceptée depuis longtemps vise à cerner un point important, à savoir que même s'il ne lui incombe pas d'établir selon la prépondérance des probabilités que le préjudice se produira effectivement si les documents sont communiqués, le tiers doit néanmoins faire davantage que simplement démontrer que le préjudice peut se produire. L'objectif important visé par l'accès à l'information serait mis en échec par la norme de la simple possibilité qu'un préjudice soit causé. Il faut éviter de refuser la divulgation de renseignements sur le fondement d'une crainte de préjudice qui est fantaisiste, imaginaire ou forcée. Il n'y a aucune raison de reformuler le critère. En ce qui concerne la question de savoir s'il est possible que la divulgation de renseignements faisant déjà partie du domaine public puisse causer un préjudice, les renseignements accessibles au public ne sont généralement pas des renseignements soustraits à la divulgation selon le critère du préjudice. Toutefois, il peut être possible dans certains cas d'établir que la façon dont des renseignements accessibles au public ont été compilés à une fin particulière n'est pas elle-même de notoriété publique, ce qui pose le risque que la divulgation cause un préjudice. La divulgation de renseignements qui n'ont pas déjà été rendus publics et dont on démontre la longueur d'avance qu'ils confèrent à la concurrence dans le développement de produits concurrents, ou l'avantage concurrentiel qu'ils offrent à cette dernière en ce qui concerne des opérations à venir, peut, en principe, satisfaire aux conditions prévues à l'al. 20(1)*c*). La preuve doit convaincre la cour siégeant en révision qu'il existe un lien direct entre la divulgation

or competitive prejudice required in s. 20(1)(*c*). In this case, while Health Canada applied an unduly onerous test of probability of harm, a review of M's submissions and evidence confirms the Court of Appeal's intervention was nevertheless justified. Health Canada's evidence that virtually all of the unredacted information in issue was in the public domain was largely unanswered by M and it did not provide evidence showing how the disclosure of the redacted form of the information could reasonably be expected to give rise to the harm and prejudice it claimed. Moreover, M's submission that the release of some of the information could give an inaccurate perception of the product's safety cannot be accepted. Courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm. Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.

Finally, the Court of Appeal's disposition of the s. 25 issue should be affirmed. M did not provide any submissions and the reviewing judge failed to explain why non-exempt material could not reasonably be severed and disclosed as required under s. 25. The Court of Appeal was obliged to intervene, although it erred to the extent it faulted the reviewing judge for having substituted his view for that of the institutional head. The reviewing judge was required to consider whether the institutional head had properly applied s. 25. The heart of the s. 25 exercise is determining when material subject to the disclosure obligation can reasonably be severed from exempt material. Severance will be reasonable only if disclosure of the unexcised portions of the record would reasonably fulfill the purposes of the Act, having regard to whether what is left after excising exempted material has any meaning and whether the effort of redaction by the government institution is justified by the benefits of severing and disclosing the remaining information. Where severance leaves only

des renseignements et le préjudice appréhendé et que la divulgation risque vraisemblablement de causer ce préjudice. La divulgation de renseignements tels que les dates, la numérotation et la partie d'une présentation de drogue nouvelle où se trouvent les renseignements, la façon dont elle est présentée, les listes d'études ou la déclaration que certaines études ont été consultées, ainsi que les renseignements au sujet du fonctionnement du processus réglementaire ne suscite habituellement pas le risque nécessaire en matière de préjudice ou de perte de compétitivité qu'exige l'al. 20(1)*c*). En l'espèce, bien que Santé Canada ait appliqué un critère trop exigeant pour apprécier la probabilité qu'un préjudice soit causé, l'examen des arguments de M et de la preuve confirme que l'intervention de la Cour d'appel fédérale était néanmoins justifiée. La preuve de Santé Canada que la quasi-totalité des renseignements non retranchés des pages en litige faisait partie du domaine public n'a pas, pour l'essentiel, été réfutée par M, et celle-ci n'a produit aucun élément de preuve démontrant en quoi la divulgation des renseignements sous leur forme expurgée risquait vraisemblablement de causer le préjudice qu'elle invoquait. En outre, l'argument de M que la divulgation de certains des renseignements pourrait donner une impression erronée quant à l'innocuité du produit ne saurait être retenu. Les tribunaux ont souvent — et avec raison — accueilli avec scepticisme les allégations que la mauvaise compréhension, par le public, des renseignements divulgués sera préjudiciable au tiers. Refuser de divulguer des renseignements par crainte que le public les comprenne mal compromettrait l'objet fondamental de la législation en matière d'accès à l'information; il s'agit de permettre aux membres du public de prendre connaissance des renseignements pour qu'ils puissent eux-mêmes les apprécier.

Enfin, il convient de confirmer la décision de la Cour d'appel fédérale relativement à l'art. 25. M n'a présenté aucun argument, et le juge siégeant en révision, aucun raisonnement, expliquant pourquoi les renseignements non soustraits à la divulgation ne pouvaient pas être prélevés et divulgués sans que cela ne pose de problèmes sérieux, comme l'exige l'art. 25. La Cour d'appel fédérale se devait d'intervenir, bien qu'elle ait commis une erreur dans la mesure où elle a reproché au juge siégeant en révision d'avoir substitué son avis à celui du responsable de l'institution. Le juge siégeant en révision était tenu de décider si le responsable de l'institution avait appliqué correctement l'art. 25. Selon l'art. 25, il faut essentiellement relever les parties du document soustrait à la communication qui peuvent, elles, être communiquées et dont le prélèvement ne pose pas de problèmes sérieux. Le prélèvement n'est raisonnable que si la divulgation des passages du document n'ayant pas été retranchés remplissait raisonnablement les objectifs de la Loi, ce qui dépend des questions de savoir si ce qu'il reste après

disconnected snippets of releasable information, disclosure of that type of information does not fulfill the purpose of the Act and severance is not reasonable.

Per Deschamps, Abella and Rothstein JJ. (dissenting): The Federal Court judge reviewing the decision of the head of an institution pursuant to s. 44 of the Act discharges a function similar to a trial judge. An appellate court must defer to a trial judge's findings on questions of fact as well as on questions of mixed fact and law. The standard to be applied on such questions, per *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, is that of a palpable and overriding error. Deferring to trial judges' findings where it is appropriate to do so ensures that judicial resources are used efficiently, enhances access to justice and is consistent with the institutional role of the appellate court. Here, the reviewing judge's findings on the exemptions are fact-based or bear on questions of mixed fact and law, so deference is owed to them. No palpable and overriding error can be found in his judgments. While one may disagree with the result, the judge's conclusions can easily be explained by referring both to his reasons and to the parties' submissions. This Court ought not to be conducting the kind of technical review which is required in order to determine whether information qualifies for an exemption from disclosure under the Act. The size of the record, the time allotted to the parties to argue their cases in this Court, and the Court's institutional role are all factors that militate against reviewing the facts in minute detail. The deferential approach dictated by *Housen* is more consistent with this Court's role. The reviewing judge should not be required to provide a word-by-word, line-by-line, or even page-by-page explanation for his or her decision. The Federal Court of Appeal erred in retrying the case.

Cases Cited

By Cromwell J.

Discussed: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; **referred to:** *Dagg v. Canada*

que les renseignements soustraits à la divulgation ont été retranchés du document a un sens, et s'il ressort que les avantages qu'il y a à prélever et divulguer les renseignements restants à la suite du processus d'expurgation justifient les efforts déployés par l'institution fédérale en vue d'expurger le document. Dans les cas où il ne reste que des bribes de renseignements pouvant être divulgués à la suite du prélèvement, la divulgation de ces renseignements ne remplit pas l'objet de la Loi, et le prélèvement n'est pas raisonnable.

Les juges Deschamps, Abella et Rothstein (dissidents) : Le juge de la Cour fédérale qui révise la décision du responsable d'une institution dans le cadre de l'art. 44 de la Loi exerce une fonction qui s'apparente à celle d'un juge de première instance. Les cours d'appel doivent faire preuve de déférence envers les conclusions tirées par les juges de première instance tant à l'égard des questions de fait que des questions mixtes de fait et de droit. La norme qu'il convient d'appliquer à ces questions, selon *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, est celle de l'erreur manifeste et dominante. Faire preuve de déférence envers les conclusions des juges de première instance, lorsqu'il y a lieu, permet une utilisation efficace des ressources judiciaires, facilite l'accès à la justice et correspond au rôle institutionnel des cours d'appel. En l'espèce, les conclusions du juge siégeant en révision relativement aux exceptions reposent sur les faits ou portent sur des questions mixtes de fait et de droit, et il faut donc faire preuve de déférence à leur égard. Ses jugements ne comportent aucune erreur manifeste et dominante. Quelqu'un peut être en désaccord avec le résultat, mais il n'en demeure pas moins qu'on peut facilement expliquer les conclusions du juge en faisant référence tant à ses motifs qu'aux observations des parties. La Cour ne devrait pas procéder à l'examen technique nécessaire pour déterminer si tel ou tel renseignement est visé ou non par une quelconque exception à la règle de la divulgation prévue par la Loi. L'ampleur du dossier, le temps alloué aux parties pour présenter leurs arguments devant notre Cour ainsi que le rôle institutionnel de celle-ci sont tous des facteurs qui indiquent qu'il n'y a pas lieu de décortiquer les faits. La démarche empreinte de déférence qu'impose *Housen* correspond davantage au mandat de la Cour. Le juge siégeant en révision ne doit pas être tenu de justifier sa décision en faisant référence à chaque mot, chaque ligne, voire chaque page en litige. La Cour d'appel fédérale a commis une erreur en jugeant de nouveau l'affaire.

Jurisprudence

Citée par le juge Cromwell

Arrêt analysé : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; **arrêts mentionnés :**

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Catherine Beagan Flood and *Patrick Kergin*, for the appellant.

Bernard Letarte and *René LeBlanc*, for the respondent.

Anthony G. Creber and *John Norman*, for the intervener.

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Catherine Beagan Flood et *Patrick Kergin*, pour l'appelante.

Bernard Letarte et *René LeBlanc*, pour l'intimé.

Anthony G. Creber et *John Norman*, pour l'intervenante.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J. —

I. Overview

[1] Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" ("What Publicity Can Do", *Harper's Weekly*, December 20, 1913, 10, at p. 10).

[2] Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.

[3] The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Fish, Charron et Cromwell rendu par

LE JUGE CROMWELL —

I. Aperçu

[1] Les droits généraux en matière d'accès aux documents de l'administration fédérale servent des fins importantes d'ordre public. Ils contribuent à assurer la reddition de comptes et en bout de ligne renforcent, souhaitons-le, la démocratie. Comme l'a si bien exprimé Louis Brandeis, [TRADUCTION] « [l]a lumière du soleil est, dit-on, le meilleur des désinfectants » (« What Publicity Can Do », *Harper's Weekly*, 20 décembre 1913, 10, p. 10).

[2] Par contre, l'accès aux documents de l'administration fédérale met aussi en jeu d'autres intérêts publics et privés. Par exemple, l'administration recueille auprès de tiers, à des fins réglementaires, des renseignements qui peuvent comprendre des secrets industriels et d'autres renseignements commerciaux de nature confidentielle. Pareils renseignements peuvent avoir une certaine valeur pour les concurrents du tiers qui les a fournis et leur divulgation risque parfois de causer un préjudice financier ou autre à ce dernier. Leur divulgation systématique pourrait même en venir à décourager la recherche et l'innovation. La volonté obstinée de communiquer de tels documents risque par conséquent de faire abstraction de ces intérêts et de causer indirectement bien des dommages. Il doit donc y avoir un équilibre entre l'accès à l'information et la protection de ces autres intérêts dans le cas de certains types de renseignements de tiers.

[3] Les présents pourvois, qui illustrent bien la nécessité d'atteindre cet équilibre, découlent de demandes visant à obtenir des renseignements qu'un fabricant avait fournis à l'administration fédérale dans le cadre du processus d'approbation des drogues nouvelles. Pour obtenir l'autorisation de mettre en marché des drogues nouvelles, les sociétés pharmaceutiques innovatrices, telle l'appelante, Merck Frosst Canada Ltée (« Merck »), doivent fournir une grande quantité de renseignements à l'autorité

good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("Act" or "*ATI*").

[4] The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party. It also provides third parties with procedural protections. These appeals concern how the balance struck by the legislation between disclosure and protection of third parties should be reflected in the interpretation and administration of that legislation.

[5] Health Canada received access to information requests relating to certain new drug submissions made to it by Merck. A series of disputes then arose between Merck, a third party to the requests, and the Minister of Health about what information had to be disclosed and what was exempt from disclosure. An avalanche of paperwork and court proceedings ensued. No fewer than five proceedings before the Federal Courts, generating a record of some 67 bound volumes of material, have brought the parties to this Court. At issue are the interpretation and application of several provisions of the Act that govern the disclosure or non-disclosure of third party confidential commercial information.

[6] Merck says that the balance has swung too far in favour of disclosure, both in the way the Act was administered by Health Canada and in the way it was interpreted by the Federal Court of Appeal. Merck has three main complaints. First, it says

de réglementation du gouvernement, l'intimé, Santé Canada, y compris beaucoup de documents qu'elles ne souhaitent pas, avec raison, voir aboutir entre les mains de leurs concurrents. Or, les concurrents, comme toute autre personne au Canada, ont droit à la divulgation de renseignements de l'administration fédérale en vertu de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« Loi »).

[4] La Loi établit le juste équilibre entre des objectifs parfois contradictoires, à savoir encourager la communication de l'information tout en protégeant les intérêts des tiers. Bien que la Loi oblige les institutions fédérales à divulguer une grande partie de leurs renseignements, elle soustrait à la divulgation certains types de renseignements provenant de tiers, tels les secrets industriels et les renseignements dont la divulgation pourrait causer un préjudice économique à un tiers. Elle accorde aussi aux tiers des garanties procédurales. Les présents pourvois portent sur la façon dont l'équilibre établi par la législation entre la divulgation de renseignements et la protection des tiers doit se refléter dans l'interprétation et l'application de celle-ci.

[5] Santé Canada a reçu des demandes d'accès à l'information concernant certaines présentations de drogue nouvelle faites par Merck. Une série de différends sont survenus par la suite entre Merck, un tiers en ce qui concerne les demandes, et le ministre de la Santé sur la question de savoir quels renseignements étaient assujettis à l'obligation de divulgation et quels renseignements y étaient soustraits. Il s'en est ensuivi une avalanche de paperasses et de procédures judiciaires. Pas moins de cinq procédures devant les cours fédérales, à l'origine d'un dossier de quelque 67 volumes de documents, ont amené les parties devant notre Cour. Le litige porte sur l'interprétation et l'application de plusieurs dispositions de la Loi qui régissent la divulgation ou la non-divulgation, selon le cas, de renseignements commerciaux confidentiels de tiers.

[6] Merck soutient que l'équilibre atteint par la Loi favorise indûment la divulgation, et ce tant dans la façon dont Santé Canada a appliqué la Loi que dans l'interprétation que lui a donnée la Cour d'appel fédérale. Merck se plaint de trois choses.

that Health Canada failed to give it notice and an opportunity to make objections before disclosing some of its confidential information. This complaint raises issues about the threshold under the Act for giving third parties notice before disclosing their information. Second, Merck says that Health Canada failed to conduct an adequate review of the information before making its initial decision that the information was subject to disclosure. The effect of this, Merck claims, is that Health Canada effectively shifted its statutory obligations onto it, resulting in Merck having to expend extensive human and financial resources to deal with the access to information requests. In short, the process itself inflicted undue commercial injury. This point requires analysis of the nature of the government institution's duties under the Act and the role of the third party when it claims exemption for the information sought. Third, Merck contends that both Health Canada and the Federal Court of Appeal held it to too onerous a standard of proof that the information was exempt. This contention requires an examination of the burden and standard of proof on a third party claiming exemptions from disclosure.

Premièrement, elle dit que Santé Canada ne lui a pas donné de préavis ni de possibilité de formuler des objections avant de divulguer une partie des renseignements de nature confidentielle qu'elle lui avait fournis. Cette plainte soulève des questions au sujet du seuil à atteindre pour que prenne naissance l'obligation légale du responsable de l'institution d'aviser les tiers avant de divulguer des renseignements fournis par ces derniers. Deuxièmement, selon Merck, Santé Canada n'a pas examiné convenablement les renseignements avant de prendre sa décision initiale qu'ils pouvaient être divulgués. Merck prétend qu'en procédant ainsi Santé Canada s'est trouvé à lui transférer ses obligations légales, ce qui l'a contrainte à consacrer énormément de ressources humaines et financières pour traiter les demandes d'accès à l'information. Bref, le processus lui-même lui aurait causé un préjudice commercial indu. Cet argument appelle une analyse de la nature des obligations légales de l'institution fédérale et du rôle qui incombe au tiers qui soutient que les renseignements en cause sont visés par une exception. Troisièmement, Merck prétend que Santé Canada et la Cour d'appel fédérale l'ont obligée à s'acquitter d'un fardeau de preuve trop lourd à cet égard. Cette prétention appelle un examen du fardeau et de la norme de preuve qui incombent au tiers qui invoque des exceptions pour s'opposer à la divulgation de certains renseignements.

[7] In addition to these main points, Merck also submits that the Federal Court of Appeal applied the wrong standard of appellate review and misapplied the provisions relating to the disclosure of information that can be reasonably severed from exempt material in the same record.

[7] Outre ces arguments principaux, Merck fait valoir que la Cour d'appel fédérale a appliqué la mauvaise norme de contrôle en appel et qu'elle s'est trompée en appliquant les dispositions en matière de divulgation des renseignements qui peuvent être prélevés, sans poser de problèmes sérieux, des documents soustraits à la communication.

[8] Although my view is that Merck's appeals should be dismissed, there is nonetheless some merit to its complaints. I will take the opportunity the case provides to set out my understanding of when notice must be given to a third party, what the role of the government institution is in applying the third party exemptions and what are the applicable standards and burdens of proof in relation to them. I will address the standard of review on appeal and

[8] Bien que je sois d'avis de rejeter les pourvois de Merck, j'estime néanmoins que ses plaintes sont en partie fondées. Je profiterai de l'occasion que m'offre la présente affaire pour exposer mon avis sur les circonstances dans lesquelles il faut donner un préavis au tiers intéressé, sur le rôle qui incombe à l'institution fédérale dans l'application des exceptions relatives aux tiers ainsi que sur les normes et les fardeaux de preuve qui

how the severance provisions should be applied. Finally, I will deal with the specific rulings about the numerous pages of information still in contention. The main challenge of the appeals is to determine how to interpret and apply the Act so that it strikes the balance Parliament intended between broad rights of access and protection of third party information.

[9] A good deal of background is required in order to understand the precise issues before the Court, which I will provide in the following section.

II. Facts, Proceedings and Issues

[10] The case arises out of two access to information requests made with respect to information submitted by Merck to Health Canada in the course of seeking approval to market two products.

[11] Merck applied to obtain approval to market Singulair®, an asthma medication, by filing a New Drug Submission ("NDS") in early 1997. To obtain Health Canada's approval, Merck had to make full and frank disclosure of all of its knowledge and information about the drug. Approval was granted approximately a year and a half later and, as a result, the drug was marketed and sold in Canada. In 1999, Merck applied for approval of Singulair® in a 4-mg dose that would extend the permitted indications for the drug to patients two to five years of age. This required the submission of a Supplementary New Drug Submission ("SNDS"). An SNDS is submitted to request the authorization to market a drug that has already been approved and for which certain changes have been made, for instance and as in this case, proposing a new dosage. This process of approval, as with an NDS, required Merck to submit a great deal of

s'appliquent à ces exceptions. Je discuterai également de la norme de contrôle en appel et de la façon dont il convient d'appliquer les dispositions en matière de prélèvement de renseignements. Enfin, je traiterai des décisions qui ont été prises relativement aux nombreuses pages de renseignements toujours en litige. Le plus grand défi que posent les pourvois consiste à déterminer comment il faut interpréter et appliquer la Loi de manière à établir l'équilibre recherché par le législateur entre les droits généraux en matière d'accès à l'information et la protection des renseignements de tiers.

[9] Il faut bien connaître le contexte dans lequel s'inscrit la présente affaire pour comprendre les questions précises dont la Cour est saisie. C'est pourquoi je le décrirai en détail dans la prochaine partie.

II. Les faits, l'historique procédural et les questions en litige

[10] Le litige découle de deux demandes d'accès à l'information visant des renseignements que Merck a fournis à Santé Canada en vue d'obtenir l'autorisation de mettre en marché deux produits.

[11] Merck a sollicité l'autorisation de mettre en marché le Singulair®, un médicament contre l'asthme, en déposant une présentation de drogue nouvelle (« PDN ») au début de 1997. Pour obtenir l'approbation de Santé Canada, Merck devait divulguer tout ce qu'elle savait à propos de la drogue ainsi que tous les renseignements dont elle disposait au sujet de celle-ci. Elle a obtenu cette approbation près d'un an et demi plus tard. La drogue a donc été mise en marché et vendue au Canada. En 1999, Merck a demandé l'approbation d'une dose de 4 mg de Singulair® qui permettrait d'en étendre la posologie autorisée aux patients âgés d'au moins deux ans, mais de pas plus de cinq ans. Pour ce faire, elle a dû déposer une présentation supplémentaire de drogue nouvelle (« PSDN »). On dépose une PSDN pour demander l'autorisation de mettre en marché une drogue déjà approuvée à l'égard de laquelle certaines modifications ont été apportées, par exemple

information. The new dosage was approved and the drug marketed.

[12] In due course, Health Canada received access to information requests relating to both Merck's NDS and SNDS. With respect to the NDS, the requester sought access to the Notice of Compliance, the Comprehensive Summary, the Health Canada reviewers' notes, and the correspondence between Health Canada and Merck. With respect to the SNDS, the requester asked for all releasable records.

[13] As we shall see, these access to information requests led to lengthy exchanges between Merck and Health Canada about how Health Canada was processing them and what documents were or were not subject to disclosure, leading ultimately to extensive court proceedings.

[14] These appeals engage two quite complex legislative and regulatory schemes, one relating to new drug approval and the other to access to information. I will, therefore, briefly outline these schemes. I will then set out a brief account of how Health Canada addressed the access to information requests, a brief summary of the ensuing court proceedings in the Federal Courts leading to the appeals to this Court and a statement of the precise issues that must be resolved.

A. *The New Drug Approval Process*

[15] To seek approval to market a new drug in Canada, Merck was required to file an NDS which must comply with the *Food and Drug Regulations*, C.R.C., c. 870, s. C.08.002. This submission is a comprehensive disclosure of all of Merck's information on the new drug. Amongst other things, it

pour proposer une nouvelle posologie, comme c'est le cas en l'espèce. Ce processus d'approbation obligeait Merck à fournir une grande quantité de renseignements, comme dans le cas d'une PDN. La nouvelle posologie a été approuvée, et la drogue mise en marché sous cette forme.

[12] Santé Canada a éventuellement reçu des demandes d'accès à l'information visant à la fois la PDN et la PSDN de Merck. Pour ce qui est de la PDN, le demandeur souhaitait obtenir l'avis de conformité, le sommaire général, les notes des examinateurs de Santé Canada et la correspondance entre Santé Canada et Merck. Pour ce qui est de la PSDN, le demandeur souhaitait obtenir tous les documents pouvant être communiqués.

[13] Comme nous le verrons plus loin, ces demandes d'accès à l'information ont mené à de longs échanges entre Merck et Santé Canada sur la façon dont Santé Canada traitait ces dernières et sur la question de savoir quels documents pouvaient être communiqués au demandeur et quels documents ne pouvaient pas l'être, ce qui a donné lieu en bout de ligne à de longues procédures judiciaires.

[14] Les présents pourvois portent sur deux régimes législatifs et réglementaires plutôt complexes : l'un d'eux vise l'approbation des drogues nouvelles et l'autre, l'accès à l'information. Je décrirai brièvement ces régimes, puis j'expliquerai de façon succincte comment Santé Canada a traité les demandes d'accès à l'information. Enfin, je ferai un court résumé des procédures devant les cours fédérales auxquelles ces demandes ont donné lieu et qui sont à l'origine des présents pourvois, avant d'énoncer les questions précises que notre Cour est appelée à trancher.

A. *Le processus d'approbation des drogues nouvelles*

[15] Pour demander l'autorisation de mettre en marché une drogue nouvelle au Canada, Merck devait déposer une PDN conformément à l'art. C.08.002 du *Règlement sur les aliments et drogues*, C.R.C., ch. 870. Cette présentation constituait une divulgation complète de tous les renseignements

must submit a list of ingredients, the details of the methods of manufacture, details of the tests to be applied to control the potency, purity, stability and safety of the new drug, and detailed reports of the tests made to establish safety. Some of this information is made public upon approval of the new drug. Merck was also required to submit a statement of all representations to be made for the promotion of the new drug respecting the administration of the proposed dosage, the claims to be made and the contra-indication and side effects of the new drug.

[16] Health Canada has issued quite detailed guidelines for the preparation of new drug submissions. The submission is to be in five main parts:

Part 1 — Master Volume;

Part 2 — Chemistry and Manufacturing, which sets out detailed information about the drug substance;

Part 3 — Comprehensive Summary, which sets out investigational studies relating to pharmacology, toxicology, microbiology, published and unpublished investigational articles, clinical studies and research and development of the drug. The Comprehensive Summary is the heart of the NDS, consisting of factual, concise descriptions of the methodology, results, conclusions and evaluations of the relevant investigational animal and clinical human studies;

Part 4 — Sectional Reports detailing investigational and clinical studies; and

Part 5 — Raw data from preclinical and clinical studies.

(*Therapeutic Products Programme Guideline — Preparation of Human New Drug Submissions* (1991))

dont disposait Merck au sujet de la drogue. Merck devait notamment fournir une liste des ingrédients, les détails des procédés de fabrication, les détails des analyses à faire pour contrôler l'activité, la pureté, la stabilité et l'innocuité de la drogue, ainsi que des comptes rendus détaillés des analyses qui avaient été faites pour établir l'innocuité de celle-ci. Certains de ces renseignements sont rendus publics une fois la drogue approuvée. Merck devait aussi remettre une déclaration de toutes les recommandations qui devaient être faites dans la réclame pour la drogue nouvelle au sujet de l'administration de la posologie proposée, des propriétés attribuées à la drogue ainsi que des contre-indications et des effets secondaires de celle-ci.

[16] Selon les lignes directrices assez détaillées que Santé Canada a publiées au sujet de la préparation des présentations de drogue nouvelle, ces dernières doivent se composer de cinq parties principales :

Partie 1 — Volume principal;

Partie 2 — Chimie et fabrication, partie qui contient des renseignements détaillés sur la substance pharmaceutique;

Partie 3 — Sommaire général, partie qui décrit les travaux de recherche relatifs à la pharmacologie, la toxicologie et la microbiologie, les articles de recherche, publiés ou non, les études cliniques et la recherche qui a été faite relativement à la drogue ainsi que l'élaboration de celle-ci. Le sommaire général est le cœur de la PDN et il contient de courtes descriptions factuelles de la méthodologie, des résultats, des conclusions et des évaluations des études cliniques pertinentes qui ont été faites auprès d'animaux et d'êtres humains;

Partie 4 — Rapports de section, partie qui expose en détail les études cliniques et les travaux de recherche qui ont été faits;

Partie 5 — Données brutes tirées des études précliniques et cliniques.

(*Directives du Programme des produits thérapeutiques — Préparation d'une présentation de drogue nouvelle à usage humain* (1991))

[17] Once submitted, Health Canada reviews and evaluates this information. This produces what is referred to in the record as "reviewers' notes". During the review process, the reviewers of course comment on the information provided and frequently pose questions and seek additional information from the manufacturer. These requests, along with other communications passing between Health Canada and the manufacturer constitute what has been referred to in the record as correspondence. Before this Court, information in three types of documents is at issue: the Comprehensive Summary, the reviewers' notes and the correspondence.

[18] When all this information has been reviewed by Health Canada, a publicly available Product Monograph will be approved. This is a scientific document which contains the information for safe and effective use of the drug. It is based on data summarized in the Comprehensive Summary and is drafted and redrafted as Health Canada and the manufacturer discuss the product and exchange information. The final Product Monograph may not include all of the information exchanged between the parties. Rather, it is the result of discussions and compromise between them. It is published as part of the Notice of Compliance issued by Health Canada.

[19] An SNDS follows a similar process.

B. *Access to Information Legislation and Process*

[20] It is useful now to turn to a brief review of the legislative provisions that governed Health Canada's response to the access to information requests relating to Merck's NDS and SNDS. I have set out the most relevant provisions of the Act in the Appendix to these reasons.

[21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three

[17] Ces renseignements doivent être communiqués à Santé Canada pour qu'il en fasse l'analyse et l'étude, d'où résulte ce qu'on appelle dans le dossier les « notes des examinateurs ». Il va de soi qu'au cours de l'analyse les examinateurs commentent les renseignements fournis, posent fréquemment des questions au fabricant et lui demandent des compléments d'information. Ces demandes, auxquelles s'ajoutent les autres communications entre Santé Canada et le fabricant, constituent ce qu'on appelle dans le dossier la correspondance. Le litige que doit trancher notre Cour porte sur l'information contenue dans trois types de documents : le sommaire général, les notes des examinateurs et la correspondance.

[18] Après avoir étudié tous ces renseignements, Santé Canada approuve une monographie de produit accessible au public. Il s'agit d'un document scientifique qui contient les renseignements permettant d'utiliser la drogue de manière sûre et efficace. La monographie de produit repose sur des données résumées dans le sommaire général et elle est rédigée et modifiée à mesure que Santé Canada et le fabricant discutent du produit et échangent des renseignements. Il se peut que la version définitive de la monographie de produit ne contienne pas tous les renseignements échangés entre les parties. Elle constitue plutôt le résultat des discussions qui ont eu lieu entre les parties et du compromis auquel elles sont parvenues. Elle fait partie de l'avis de conformité délivré par Santé Canada.

[19] La PSDN fait l'objet d'un processus similaire.

B. *Législation et processus en matière d'accès à l'information*

[20] Il est utile à ce stade-ci d'examiner brièvement les dispositions législatives qui régissaient la réponse de Santé Canada aux demandes d'accès à l'information visant la PDN et la PSDN de Merck. Les dispositions de la Loi les plus pertinentes sont reproduites en annexe.

[21] La Loi a pour objet d'élargir l'accès aux documents de l'administration fédérale. Elle repose sur trois principes directeurs : premièrement, le

guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).

[22] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, at p. 128; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at para. 49, aff'd (2000), 25 Admin. L.R. (3d) 305 (F.C.A.).

[23] Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the

public a droit à la communication des documents de l'administration fédérale; deuxièmement, les exceptions indispensables à ce droit doivent être précises et limitées; troisièmement, les décisions quant à la communication sont susceptibles de recours indépendants du pouvoir exécutif (par. 2(1)).

[22] Dans l'arrêt *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 61, le juge La Forest (dissident, mais non sur ce point) a souligné que la Loi a pour objet général de favoriser la démocratie et qu'elle réalise cet objet de deux façons : en aidant à garantir, d'une part, que les citoyens possèdent l'information nécessaire pour participer utilement au processus démocratique, et, d'autre part, que les politiciens et bureaucrates soient véritablement tenus de rendre des comptes à la population. La Cour a répété tout récemment cet objet dans *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815, où il était question de la loi ontarienne en matière d'accès à l'information. La Cour a relevé au par. 1 que la législation sur l'accès à l'information « peut accroître la transparence du gouvernement, aider le public à se former une opinion éclairée et favoriser une société ouverte et démocratique ». Cette législation vise donc à appuyer l'un des fondements de notre société, à savoir la démocratie. Il faut donner à la législation une interprétation large et téléologique, et tenir dûment compte du par. 4(1), selon lequel on doit appliquer la Loi nonobstant toute autre loi fédérale : *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1995] 2 C.F. 110, p. 128; *Canada (Commissaire à la protection de la vie privée) c. Canada (Conseil des relations du travail)*, [1996] 3 C.F. 609, par. 49, conf. par 2000 CanLII 15487 (C.A.F.).

[23] Néanmoins, dans les cas où les renseignements en cause sont ceux d'un tiers et constituent des renseignements commerciaux et connexes de nature confidentielle, il faut concilier, d'une part, l'objectif important de la divulgation large et, d'autre part, les intérêts privés légitimes des tiers ainsi que l'intérêt du public à la promotion de l'innovation et du développement. La Loi atteint cet équilibre entre les impératifs de la transparence et de la confidentialité

information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere. These appeals raise significant issues about the interpretation of the substantive protections as well as about how the procedural protections should operate.

[24] I turn now to a brief overview of the most directly relevant provisions of the Act. Section 4 (as extended by the *Access to Information Act Extension Order, No. 1*, SOR/89-207) sets out the right of persons and corporations present in Canada to have, on request, "access to any record [defined to mean any documentary material regardless of medium or form] under the control of a government institution" (s. 4(1)). This right is accorded "[s]ubject to this Act" and, for present purposes, the important qualification of the right is found in s. 20. It sets out the exemptions relating to third party information. (A "third party" is defined to be a person, group of persons or organization other than the requester or a government institution (s. 3).) Subsection 20(1) provides that the government institution has a duty to refuse to disclose certain categories of third party information. The subsection, as material to these appeals, read as follows at the relevant time:

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

en matière commerciale essentiellement de deux façons. Premièrement, elle assure la protection substantielle de l'information en précisant que certains types de renseignements de tiers sont soustraits à la divulgation. Deuxièmement, elle accorde une protection procédurale aux tiers. En effet, le tiers dont les renseignements font l'objet d'une demande peut, avant leur divulgation, tenter de convaincre l'institution que des exceptions s'appliquent dans son cas et solliciter le contrôle judiciaire de la décision de l'institution de divulguer les renseignements qui, selon lui, sont soustraits à la divulgation. Les présents pourvois soulèvent des questions importantes quant à l'interprétation des protections substantielles et la façon dont il convient d'appliquer les protections procédurales.

[24] Je donnerai maintenant un bref aperçu des dispositions de la Loi les plus directement pertinentes. L'article 4 (dont la portée a été étendue par le *Décret d'extension n^o^ 1 (Loi sur l'accès à l'information)*, DORS/89-207) prévoit que les personnes physiques et les personnes morales qui sont présentes au Canada ont droit, sur demande, « à l'accès aux documents [définis comme s'entendant d'éléments d'information, quel qu'en soit le support] relevant d'une institution fédérale » (par. 4(1)). Ce droit est accordé « [s]ous réserve des autres dispositions de la présente loi » et, dans le contexte qui nous occupe, la limite importante qui y est apportée se trouve à l'art. 20, qui prévoit les exceptions applicables aux renseignements de tiers. (Le « tiers » est défini comme une personne, un groupement ou une organisation autres que l'auteur de la demande ou qu'une institution fédérale (art. 3).) Selon le par. 20(1), l'institution fédérale est tenue de refuser la divulgation de certains types de renseignements de tiers. Le passage de ce paragraphe qui intéresse les présents pourvois était ainsi rédigé à l'époque pertinente :

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

is treated consistently in a confidential manner by the third party;

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; . . .

[25] The duty not to disclose these sorts of third party information must be read with s. 25 of the Act, which may be called the severance provision. It requires the institution to disclose any part of a record that does not contain material which the institution is authorized not to disclose and which can reasonably be severed from any part that does contain exempted material. Section 25 provides:

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.

[26] Thus, we see that the general right of access is subject to a duty on government institutions not to disclose these types of third party information, including information that would normally be subject to disclosure, but cannot reasonably be severed from the exempted third party information. These are what I have called the substantive protections.

[27] I turn now to the procedural protections for third parties. The Act, as noted, establishes a process of notification and judicial review. This process permits the third party to mount objections and have them considered before the information is disclosed. Section 27(1) of the Act details the circumstances in which a government institution must make every reasonable effort to give notice of its intention to disclose the third party's information. At the time of the applications it read:

et qui sont traités comme tels de façon constante par ce tiers;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité; . . .

[25] L'obligation de s'abstenir de divulguer ces types de renseignements de tiers doit être interprétée de pair avec l'art. 25 de la Loi, que l'on pourrait appeler la disposition en matière de prélèvement de renseignements. Cet article oblige l'institution à communiquer les parties d'un document dépourvues des renseignements dont elle peut refuser la divulgation, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux. En voici le libellé :

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.

[26] Ainsi, nous constatons que le droit général en matière d'accès à l'information est assujetti à l'obligation des institutions fédérales de s'abstenir de divulguer ces types de renseignements de tiers, y compris les renseignements qui seraient normalement divulgués, mais qui ne peuvent être dissociés des renseignements soustraits à la divulgation sans que cela ne pose de problèmes sérieux. Il s'agit là de ce que j'ai appelé les protections substantielles.

[27] Je passe maintenant à l'examen des protections procédurales dont bénéficient les tiers. Rappelons que la Loi établit un processus d'avis et de contrôle judiciaire. Ce processus permet au tiers de formuler des objections qui devront être examinées avant que les renseignements en cause ne soient divulgués. Le paragraphe 27(1) de la Loi énumère les circonstances dans lesquelles l'institution fédérale doit faire des efforts raisonnables pour donner au tiers un avis de son intention de divulguer ses renseignements. Ce paragraphe était ainsi libellé à l'époque où les demandes ont été faites :

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

(*a*) 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,

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 or part thereof.

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) soit des secrets industriels d'un tiers;

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

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*).

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

[28] When a third party receives such a notice, it must be given the opportunity to make representations pursuant to s. 28 of the Act and the institution must then make a decision whether or not to disclose all or part of the record. Once again, the third party is given written notice of this decision and is accorded 20 days to request a review of it in the Federal Court, as provided for in s. 44. The text of ss. 28 and 44(1) are as follows:

[28] Après avoir donné un tel avis au tiers, le responsable de l'institution est tenu, selon l'art. 28 de la Loi, de lui donner la possibilité de présenter des observations, et de décider par la suite s'il communiquera le document, et, dans l'affirmative, si la communication sera totale ou partielle. Encore une fois, le tiers est avisé par écrit de la décision; il dispose alors d'un délai de 20 jours pour en solliciter le contrôle à la Cour fédérale, comme le prévoit l'art. 44. Voici le libellé de l'art. 28 et du par. 44(1) :

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,

(*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

(*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.

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) 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) 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.

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

(*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

(*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.

(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.

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.

C. *Proceedings*

(1) Health Canada's Response to the Access to Information Requests

[29] Health Canada identified about 550 pages in response to the NDS access to information request. It reviewed those pages and concluded that approximately 30 of them contained confidential information that could not be disclosed under s. 20(1) of the Act. Health Canada redacted those pages in part. It also concluded that 15 pages did not contain confidential information, with the exception of some information on one page that it redacted, and disclosed those pages without first notifying or consulting Merck.

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

a) 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) 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) 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) 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.

C. *Les procédures*

(1) La réponse de Santé Canada aux demandes d'accès à l'information

[29] Santé Canada a identifié quelque 550 pages répondant à la demande d'accès à l'information relative à la PDN. Après avoir examiné les pages en question, Santé Canada a conclu qu'environ 30 d'entre elles contenaient des renseignements de nature confidentielle qui ne pouvaient être divulgués, en application du par. 20(1) de la Loi, et a donc expurgé ces pages en partie. Santé Canada a aussi conclu que 15 pages ne contenaient aucun renseignement confidentiel, sauf quelques renseignements figurant dans une page qui avait été expurgée, et a communiqué celles-ci au demandeur sans donner de préavis à Merck et sans la consulter au préalable.

[30] Health Canada then notified Merck of the access to information request and of its intent to disclose part of the NDS record. It provided Merck with a copy of the over 500 still-undisclosed pages that it sought to disclose to the requester, some of which were partially redacted. By letter dated August 16, 2000, Health Canada specified that some of those pages had already been redacted pursuant to s. 20(1) of the Act, and that others may also be subject to s. 20(1), however they were unable to determine this at the time. It sought Merck's representations on the proposed disclosure pursuant to s. 27 of the Act. In particular, it asked Merck to explain which portions of the remaining record it considered to be confidential under s. 20(1), if any, and why. Merck responded on September 25, 2000. It took the position that, with the exception of the Product Monograph and some published studies, all of the information covered by the *ATI* request — including the already-disclosed pages — was exempt from disclosure under s. 20(1) of the Act.

[30] Santé Canada a ensuite avisé Merck de la demande d'accès à l'information et de son intention de communiquer au demandeur une partie du dossier de la PDN. Santé Canada a remis à Merck une copie des quelque 500 pages qui, selon lui, devaient être communiquées au demandeur, mais qui ne l'avaient pas encore été, dont certaines étaient expurgées en partie. Dans une lettre datée du 16 août 2000, Santé Canada a précisé que certaines de ces pages avaient déjà été expurgées conformément au par. 20(1) de la Loi et que d'autres parties pourraient également être visées par le par. 20(1), mais qu'il n'était pas en mesure de l'établir pour l'instant. Santé Canada a invité Merck, en application de l'art. 27 de la Loi, à lui présenter des observations sur les renseignements qu'il entendait divulguer. Plus particulièrement, Santé Canada a demandé à Merck de lui indiquer les parties du reste du dossier qu'elle considérait comme confidentielles, le cas échéant, et donc visées par le par. 20(1), et de lui expliquer pourquoi il en était ainsi selon elle. Merck a donné sa réponse le 25 septembre 2000. Selon elle, exception faite de la monographie de produit et de certaines études qui avaient été publiées, tous les renseignements visés par la demande d'accès à l'information, y compris les pages déjà communiquées au demandeur, étaient soustraits à la divulgation en application du par. 20(1) de la Loi.

[31] Health Canada considered Merck's response and redacted additional information from approximately 300 pages. Most of those pages were redacted in part, though some were withheld completely. Following these further redactions, approximately 490 pages were still at issue. On January 2, 2001, Health Canada sent Merck a second notice informing it of the additional redactions and enclosing the remaining 490 pages for Merck's review. Health Canada informed Merck that, if Merck continued to object to the redactions, it could file a request for judicial review before the Federal Court in accordance with s. 44 of the Act. Merck filed such a request for judicial review on January 19, 2001.

[31] Santé Canada a examiné la réponse de Merck et retranché des renseignements additionnels d'environ 300 pages. La plupart de ces pages ont été expurgées en partie, alors que d'autres ont été entièrement exclues. À la suite de ces expurgations supplémentaires, il restait environ 490 pages en litige. Le 2 janvier 2001, Santé Canada a envoyé à Merck un second avis l'informant des expurgations supplémentaires, auquel il a joint les 490 pages restantes afin que Merck puisse les examiner. Santé Canada a avisé Merck que si elle n'était toujours pas satisfaite des expurgations elle pouvait présenter une demande de contrôle judiciaire à la Cour fédérale en vertu de l'art. 44 de la Loi, ce qu'elle a fait le 19 janvier 2001.

[32] With respect to the SNDS, Health Canada identified over 300 pages of information that were responsive to the access to information request. It

[32] Santé Canada a identifié plus de 300 pages de renseignements répondant à la demande d'accès à l'information relative à la PSDN, concluant

concluded that about 60 of those pages contained confidential information that could not be disclosed under s. 20(1) of the Act. Those pages were redacted in part, or in a few cases deleted entirely. In addition, Health Canada concluded that eight pages contained no confidential information and could be disclosed to the requester directly. Health Canada disclosed those pages without advance notice to Merck.

[33] Health Canada notified Merck of the access to information request, provided a copy of about 300 pages and solicited Merck's submissions concerning their disclosure. Merck, as it had with respect to the NDS request, took the position that none of the pages could be disclosed, except for the Product Monograph and published studies. Health Canada replied by agreeing to some additional, partial redactions on about 45 pages and rejected the balance of Merck's objections. Merck then sent a further reply based on a review prepared by outside consultants. The review identified as exempt from disclosure all of the information that was not already publicly available and which had not been redacted by Health Canada. In particular, the consultants identified information which Merck had requested Health Canada to withhold (i.e. everything except the Product Monograph or a published study — which were otherwise publicly available), and which was not already published on the U.S. Food and Drug Administration ("FDA") website. Merck maintained that none of this unpublished information could be disclosed. It did, however, agree to the partial disclosure of a number of pages.

[34] In its second and final notice to Merck, Health Canada agreed to withhold additional details from about 10 more pages, but rejected the balance of Merck's objections. Health Canada informed Merck of its right to seek judicial review before the Federal Court in accordance with s. 44 of the Act. Merck filed a request for judicial review in the SNDS file on January 8, 2002.

qu'environ 60 de ces pages contenaient des renseignements de nature confidentielle qui ne pouvaient être divulgués en application du par. 20(1) de la Loi. Ces pages ont été expurgées en partie; quelques-unes ont même été retirées. De plus, Santé Canada a conclu que huit pages ne contenaient aucun renseignement confidentiel et pouvaient donc être communiquées directement au demandeur. Santé Canada a communiqué ces pages au demandeur sans donner de préavis à Merck.

[33] Santé Canada a avisé Merck de la demande d'accès à l'information, lui a remis une copie d'environ 300 pages et l'a invitée à lui présenter des observations sur leur communication. Comme elle l'avait fait à l'égard de la PDN, Merck a affirmé qu'aucune des pages ne pouvait être communiquée, sauf dans le cas de la monographie de produit et des études publiées. Santé Canada lui a répondu qu'elle acceptait d'expurger davantage, du moins en partie, environ 45 pages, mais qu'elle rejetait ses autres objections. En réponse, Merck a fourni une analyse fondée sur une étude réalisée par des experts-conseils indépendants, selon laquelle tous les renseignements qui n'avaient pas encore été rendus publics et que Santé Canada n'avait pas retranchés étaient soustraits à la divulgation. Plus précisément, les experts-conseils ont identifié les renseignements que Merck avait demandé à Santé Canada de retrancher des pages en question (c.-à-d. tout sauf la monographie de produit ainsi qu'une étude publiée — qui, de toute façon, étaient déjà accessibles au public) et que la Food and Drug Administration des États-Unis (« FDA ») n'avait pas encore rendus publics par le biais de son site Web. Merck maintenait qu'aucun de ces renseignements non publiés ne pouvait être divulgué. Elle a toutefois consenti à la communication partielle d'un certain nombre de pages.

[34] Dans son deuxième et dernier avis à Merck, Santé Canada a accepté de retrancher des détails supplémentaires d'environ 10 autres pages, mais a rejeté ses autres objections. Santé Canada a informé Merck de son droit de présenter une demande de contrôle judiciaire à la Cour fédérale en vertu de l'art. 44 de la Loi, ce qu'elle a fait dans le dossier de la PSDN le 8 janvier 2002.

[35] Merck maintained throughout the proceedings that Health Canada did not conduct a sufficiently detailed review of the documents before giving it the notices, while Health Canada maintained that Merck's submissions did not address the exemptions it claimed specifically enough.

(2) Proceedings in the Federal Courts

[36] The initial NDS judicial review was heard in the Federal Court before Harrington J., but the Federal Court of Appeal set aside his decision and directed a new hearing. The new hearing of that judicial review was heard in the Federal Court at the same time as the SNDS judicial review application. Both decisions were appealed to the Federal Court of Appeal. There are thus five decisions leading to the appeals now before the Court and I will briefly summarize them.

(a) *First Federal Court Decision, 2004 FC 959, [2005] 1 F.C.R. 587*

[37] The first decision pertains solely to Merck's application for judicial review in relation to the NDS disclosure. Harrington J. allowed the application in part. He was of the opinion that Health Canada could not disclose any of the NDS record without prior notice to Merck. Further, apart from the one document called the Notice of Compliance, which is a public document published upon approval of the drug, Harrington J. found that although some of the information contained in the record was available in the public domain, it was not available "as such" and therefore remained confidential and should be exempted from disclosure (paras. 53 and 58). In addition, he held that this case was not a case where severance of the confidential information was reasonable. Accordingly, he ordered that no part of the record apart from the Notice of Compliance could be disclosed as, in his view, it was exempt from disclosure pursuant to s. 20(1)(*b*) of the Act. He did not include in his reasons any analysis of ss. 20(1)(*a*) or 20(1)(*c*).

[35] Merck a toujours maintenu que Santé Canada n'a pas examiné les documents de façon assez approfondie avant de lui donner les préavis, tandis que Santé Canada fait valoir que les observations de Merck ne traitaient pas de façon suffisamment précise des exceptions qu'elle invoquait.

(2) Procédures devant les cours fédérales

[36] Le juge Harrington de la Cour fédérale a procédé au premier contrôle judiciaire concernant la PDN, mais la Cour d'appel fédérale a annulé sa décision et ordonné une nouvelle audition. La Cour fédérale a procédé en même temps à la nouvelle audition de ce contrôle judiciaire et à l'audition du contrôle judiciaire concernant la PSDN. Les deux décisions qu'elle a rendues à ces égards ont été portées en appel devant la Cour d'appel fédérale. Ainsi, cinq décisions sont à l'origine des pourvois dont la Cour est saisie, et je vais les résumer brièvement.

a) *Première décision de la Cour fédérale, 2004 CF 959, [2005] 1 R.C.F. 587*

[37] La première décision ne porte que sur la demande de contrôle judiciaire présentée par Merck relativement à la divulgation de renseignements contenus dans la PDN. Le juge Harrington a accueilli la demande en partie. Selon lui, Santé Canada ne pouvait communiquer aucune partie du dossier de la PDN sans donner de préavis à Merck. De plus, il a estimé que, mis à part le document appelé l'avis de conformité, qui est rendu public une fois la drogue approuvée, même si certains des renseignements contenus dans le dossier étaient accessibles au public, ils ne l'étaient pas « comme tel[s] » et, par conséquent, ils demeuraient confidentiels et devaient être soustraits à la divulgation (par. 53 et 58). En outre, il a jugé que l'affaire n'en était pas une où le prélèvement des renseignements confidentiels ne posait pas de problèmes sérieux. Il a donc ordonné qu'aucune partie du dossier, outre l'avis de conformité, ne pouvait être communiquée, car, selon lui, le dossier était visé par l'exception prévue à l'al. 20(1)*b*) de la Loi. Les motifs qu'il a exposés ne comprenaient aucune analyse des al. 20(1)*a*) et *c*) de la Loi.

(b) *First Appeal, 2005 FCA 215, [2006] 1 F.C.R. 379*

[38] The Minister of Health appealed and a unanimous Federal Court of Appeal overturned Harrington J.'s decision. Desjardins J.A. found that Harrington J. erred in law in his interpretation of s. 20(1)(*b*). The Court of Appeal decided that rather than undertaking its own analysis of the records, the interests of justice would be better served by remitting the matter to the Federal Court.

(c) *Rehearing of NDS Judicial Review and SNDS Judicial Review, 2006 FC 1201 (CanLII) and 2006 FC 1200, 301 F.T.R. 241*

[39] The reviewing judge, Beaudry J., heard both the rehearing relating to the NDS (2006 FC 1201) and the SNDS application (2006 FC 1200). Merck sought two remedies: a declaratory order with regard to the lawfulness of the procedure followed by Health Canada in processing the request for access to information and an order prohibiting the disclosure of the NDS and SNDS records.

[40] Turning first to the lawfulness of the process, Merck took issue with the disclosure of some of the record without being notified and objected to the fact that Health Canada had imposed on it the onus of showing why disclosure should be refused without having conducted its own genuine and thorough review. Health Canada argued that Merck could not ask for a declaratory order regarding the decision to disclose without notice because that decision was not properly before the court. The reviewing judge disagreed and held that the court should rule on the matter because not only were the issues serious, but also it would avoid the multiplication of decisions pertaining to the same access to information request. He also held that it was unrealistic to separate the process followed by Health Canada from the substance of the final decision. He held that the disclosure of some of the record without prior notice to the third party contravened

b) *Premier appel, 2005 CAF 215, [2006] 1 R.C.F. 379*

[38] Le ministre de la Santé s'est pourvu en appel contre la décision du juge Harrington, que la Cour d'appel fédérale a infirmée dans un jugement unanime. Selon la juge Desjardins, le juge Harrington a commis une erreur de droit en interprétant l'al. 20(1)*b*). La Cour d'appel fédérale a décidé que les intérêts de la justice seraient mieux servis si elle renvoyait l'affaire à la Cour fédérale, au lieu de faire sa propre analyse des documents visés.

c) *Nouvelle audition du contrôle judiciaire concernant la PDN et audition du contrôle judiciaire concernant la PSDN, 2006 CF 1201 (CanLII) et 2006 CF 1200 (CanLII)*

[39] Le juge siégeant en révision, le juge Beaudry, a procédé à la fois à la nouvelle audition relative à la PDN (2006 CF 1201) et à l'audition de la demande concernant la PSDN (2006 CF 1200). Merck sollicitait deux redressements, à savoir une ordonnance déclaratoire sur la légalité de la procédure suivie par Santé Canada pour traiter la demande d'accès à l'information et une ordonnance interdisant la communication des documents relatifs à la PDN et à la PSDN.

[40] En ce qui concerne tout d'abord la légalité du processus, Merck a réprouvé le fait que le dossier ait été partiellement communiqué sans qu'elle n'ait reçu de préavis, et elle a reproché à Santé Canada de lui avoir imposé le fardeau de démontrer pourquoi la communication devait être refusée sans même que Santé Canada n'ait effectué lui-même un véritable examen approfondi. Santé Canada a soutenu que Merck ne pouvait solliciter d'ordonnance déclaratoire concernant sa décision de divulguer des renseignements sans lui donner de préavis parce que la cour n'avait pas été dûment saisie de cette décision. Ne partageant pas cet avis, le juge siégeant en révision a conclu que la cour devait se pencher sur l'affaire non seulement parce que les questions en cause étaient graves, mais aussi parce que cela permettrait d'éviter la multiplication des décisions relatives à la même demande d'accès à l'information. Il a également dit qu'il n'était pas réaliste de dissocier

the spirit or scheme of s. 20(1) of the Act. Given the potentially irreparable harm to third parties, disclosure without prior notice should not have occurred. The reviewing judge made this finding and concluded that Merck was entitled to declaratory orders in both cases.

le processus suivi par Santé Canada du fond de la décision définitive. Selon lui, la communication partielle du dossier sans préavis au tiers était contraire à l'esprit et à l'économie du par. 20(1) de la Loi. Étant donné le préjudice irréparable que le processus pouvait causer à des tiers, la communication sans préavis n'aurait pas dû avoir lieu. Le juge est parvenu à cette conclusion et a déclaré que Merck avait droit aux ordonnances déclaratoires dans les deux cas.

[41] The reviewing judge then turned to consider disclosure of the records. By the time he heard the NDS and SNDS matters, Health Canada had agreed to further redactions via affidavits so that the number of pages in issue was reduced to approximately 235 for the NDS request and 135 pages for the SNDS request. For the NDS request, the reviewing judge found that over 170 pages were exempted from disclosure pursuant to s. 20(1), while approximately 65 pages could be disclosed. For the SNDS request, he found that almost 60 pages were exempted pursuant to s. 20(1), and that the remaining pages could be disclosed.

[41] Le juge siégeant en révision s'est ensuite penché sur la communication des documents. À l'époque où il a instruit les affaires mettant en cause la PDN et la PSDN, Santé Canada avait déjà consenti à faire d'autres expurgations par le biais d'affidavits, réduisant ainsi le nombre de pages en litige à environ 235 dans le cas de la demande relative à la PDN et à 135 en ce qui concerne la demande visant la PSDN. Pour ce qui est de la PDN, le juge a conclu que plus de 170 pages étaient soustraites à la communication selon le par. 20(1) tandis qu'environ 65 pages pouvaient être communiquées au demandeur. Pour ce qui est de la PSDN, il a conclu que presque 60 pages étaient soustraites à la communication selon le par. 20(1) et que les autres pages pouvaient être communiquées au demandeur.

[42] With respect to the NDS records, the reviewing judge found that three paragraphs of s. 20(1) were implicated. He found that some of the records were exempted from disclosure because they contained trade secrets (s. 20(1)(*a*)), confidential information (s. 20(1)(*b*)) or information that if disclosed could reasonably be expected to result in material financial loss or gain to Merck or prejudice its competitive position (s. 20(1)(*c*)). The reviewing judge was of the view that, where the information contained in the record is more detailed than what is available in the public domain, it may be possible to resist disclosure based on the s. 20(1)(*c*) exemption. He held that in several instances Health Canada had wrongly applied the severance provision in s. 25; he was of the view that the material that was not exempt could not reasonably be severed from the material that was exempt.

[42] En ce qui concerne les documents afférents à la PDN, le juge siégeant en révision a conclu que trois des alinéas du par. 20(1) étaient en jeu. Selon lui, certains des documents étaient soustraits à la communication parce qu'ils contenaient des secrets industriels (al. 20(1)*a*)), des renseignements de nature confidentielle (al. 20(1)*b*)) ou des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers à Merck ou de nuire à sa compétitivité (al. 20(1)*c*)). Le juge était d'avis que, dans les cas où les renseignements contenus dans le document étaient plus détaillés que ceux qui faisaient partie du domaine public, il était possible de s'opposer à leur divulgation sur le fondement de l'al. 20(1)*c*). Il a conclu que, dans plusieurs cas, Santé Canada avait mal appliqué la disposition en matière de prélèvement de renseignements qui figure à l'art. 25. À son avis, les renseignements qui n'étaient pas soustraits à la divulgation ne pouvaient être dissociés de ceux qui l'étaient sans que cela ne pose de problèmes sérieux.

[43] In the SNDS file, the reviewing judge found that some information should be exempted pursuant to s. 20(1)(*b*) and (*c*), but found no trade secrets in these records.

(d) *Second and Third Appeals and Cross-Appeals, 2009 FCA 166, 400 N.R. 1*

[44] For both the NDS and SNDS judgments, Health Canada appealed and Merck cross-appealed. The Federal Court of Appeal heard the two appeals and cross-appeals concurrently and delivered one judgment for all of them. Desjardins J.A., writing for a unanimous court, found that the reviewing judge made several legal errors. The Court of Appeal allowed the appeals and dismissed the cross-appeals, holding that all of the remaining pages at issue for both the NDS and SNDS should be disclosed.

[45] With respect to the requirement to give notice, the Court of Appeal held that the obligation only arises if a record contains, or the head of the government institution has reason to believe that it might contain, information described in s. 20(1) of the Act. Contrary to the opinion of the reviewing judge, the Court of Appeal held that disclosure of records without prior notice to the third party does not contravene the text or spirit of the Act.

[46] With respect to the s. 20(1)(*a*) exemption for trade secrets, the Court of Appeal was of the opinion that the term "trade secrets" should be interpreted narrowly and that when determining whether information constitutes a trade secret, a high threshold applies. The Court of Appeal found that the reviewing judge had failed to present any analysis in support of his decision to exclude some pages based on this exemption.

[43] Enfin, dans le dossier de la PSDN, le juge siégeant en révision a conclu que certains renseignements devaient être soustraits à la divulgation en application des al. 20(1)*b*) et *c*), mais il n'a pas relevé de secrets industriels dans les documents en question.

d) *Deuxième et troisième appels et appels incidents, 2009 CAF 166 (CanLII)*

[44] Santé Canada a porté en appel le jugement sur la demande relative à la PDN et celui sur la PSDN, et Merck a formé un appel incident dans l'un et l'autre cas. La Cour d'appel fédérale a entendu en même temps les deux appels ainsi que les deux appels incidents, qu'elle a tous tranchés dans un seul jugement. S'exprimant au nom de la cour à l'unanimité, la juge Desjardins a conclu que le juge siégeant en révision avait commis plusieurs erreurs de droit. La Cour d'appel fédérale a accueilli les appels et rejeté les appels incidents, jugeant que les pages toujours en litige tant dans le cas de la PDN que dans celui de la PSDN devaient toutes être communiquées.

[45] Pour ce qui est de l'obligation de donner un préavis, la Cour d'appel fédérale a conclu qu'elle ne prenait naissance que si le document en cause contenait des renseignements visés au par. 20(1) de la Loi ou le responsable de l'institution avait des raisons de croire qu'il était susceptible d'en contenir. Contrairement au juge siégeant en révision, la Cour d'appel fédérale a conclu que la communication de documents sans préavis au tiers ne contrevenait ni au texte, ni à l'esprit de la Loi.

[46] Quant à l'exception prévue à l'al. 20(1)*a*) pour les secrets industriels, la Cour d'appel fédérale a estimé que le terme « secrets industriels » devait recevoir une interprétation restrictive et qu'il convenait d'appliquer un critère exigeant pour trancher la question de savoir si les renseignements constituaient pareils secrets. Selon la Cour d'appel fédérale, le juge siégeant en révision n'a présenté aucune analyse pour étayer sa décision d'exclure certaines pages sur le fondement de cette exception.

[47] With respect to the s. 20(1)(*b*) and (*c*) exemptions for confidential information, the Court of Appeal held that there must be direct and objective evidence that the information is confidential in order for either exemption to apply. Merck, in the view of the Court of Appeal, did not provide sufficient evidence to meet its "heavy" burden (para. 62). Accordingly, the reviewing judge erred in refusing to order disclosure of the requested information pursuant to s. 20(1)(*b*). The Court of Appeal also found that Merck's evidence relating to s. 20(1)(*c*) "remain[ed] 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" (para. 93; see also para. 99). Thus, the Court of Appeal held that the reviewing judge erred in fact and law when he refused to order the disclosure of information pursuant to the s. 20(1)(*c*) exemption.

[47] En ce qui concerne les exceptions prévues aux al. 20(1)*b*) et *c*) pour les renseignements de nature confidentielle, la Cour d'appel fédérale a conclu que leur application dépendait de l'existence d'une preuve directe et objective de la nature confidentielle des renseignements. Selon la Cour d'appel fédérale, Merck n'avait pas produit une preuve suffisante pour s'acquitter du « lourd » fardeau qui lui incombait à cet égard (par. 62). C'est donc à tort que le juge siégeant en révision a refusé d'ordonner la divulgation des renseignements visés, en application de l'al. 20(1)*b*). La Cour d'appel fédérale a également conclu que les éléments de preuve présentés par Merck à l'égard de l'al. 20(1)*c*) « demeur[aient] vagues, spéculatifs et silencieux sur précisément comment et pourquoi la divulgation des renseignements demandés entraîner[ait] de façon probable le préjudice allégué par Merck Frosst » (par. 93; voir aussi le par. 99). La Cour d'appel fédérale a donc conclu que le juge s'était trompé tant sur les faits que sur le droit en refusant d'ordonner la divulgation des renseignements au titre de l'exception prévue à l'al. 20(1)*c*).

[48] Finally, the Court of Appeal concluded that the reviewing judge had failed in his obligation to ensure compliance with s. 25 of the Act and to explain why severance was not reasonable. The court also concluded that the reviewing judge erred in law when he substituted his own discretion for that exercised by the head of the government institution where there was no evidence that the head of the institution's assessment was incorrect.

[48] Enfin, la Cour d'appel fédérale a conclu que le juge siégeant en révision avait manqué à son obligation de veiller à ce que l'art. 25 de la Loi soit respecté et d'expliquer pourquoi il n'était pas raisonnable de penser que certains renseignements pouvaient être prélevés des documents en cause. La cour a également conclu que le juge siégeant en révision avait commis une erreur de droit en substituant son propre pouvoir discrétionnaire à celui exercé par le responsable de l'institution en l'espèce alors que rien ne prouvait que ce dernier avait fait une mauvaise appréciation du dossier.

D. *Issues*

D. *Questions en litige*

[49] I will first address the general issues of principle and then turn to the issues relating to particular claims for exemption.

[49] J'examinerai d'abord les questions de principe générales avant de passer aux questions se rapportant aux exceptions invoquées en l'espèce.

[50] The general issues are these:

[50] Voici les questions générales :

(i) What is the standard of appellate review and did the Federal Court of Appeal err in this regard?

(i) Quelle norme de contrôle faut-il appliquer en appel, et la Cour d'appel fédérale s'est-elle trompée à cet égard?

(ii) What is the threshold for triggering the institutional head's duty to give a third party notice of the access to information request and what sort of review of the record is required of the head of the institution in deciding whether or not to give notice?

(iii) What are the applicable burden and standard of proof on a third party claiming a s. 20(1) exemption?

[51] After considering these issues I will turn to the principles relating specifically to the s. 20(1)(*a*), (*b*) and (*c*) exemptions and to the severance provision in s. 25.

III. Analysis

A. *General Issues*

(1) What Is the Standard of Appellate Review and Did the Federal Court of Appeal Err in This Regard?

[52] Merck submits that the Federal Court of Appeal erred in the standard of review it applied in these cases. The Court of Appeal, it argues, intervened based on its own reassessment of the evidence and in the absence of any reversible error on the part of the reviewing judge. The respondent, Health Canada, accepts that the Federal Court of Appeal had to apply the usual standards of appellate review but it contests Merck's position that the Court of Appeal failed to do so.

[53] There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has

(ii) Quel est le seuil à atteindre pour que prenne naissance l'obligation du responsable de l'institution d'aviser un tiers de la demande d'accès à l'information et quel examen du dossier doit-il faire pour décider s'il doit ou non donner cet avis?

(iii) Quels sont le fardeau et la norme de preuve applicables dans le cas d'un tiers qui invoque une exception prévue au par. 20(1)?

[51] Après avoir examiné ces questions, je me pencherai sur les principes propres aux exceptions prévues aux al. 20(1)*a*), *b*) et *c*) et à la disposition en matière de prélèvement de renseignements qui figure à l'art. 25.

III. Analyse

A. *Questions en litige générales*

(1) Quelle norme de contrôle faut-il appliquer en appel, et la Cour d'appel fédérale s'est-elle trompée à cet égard?

[52] Merck soutient que la Cour d'appel fédérale a appliqué la mauvaise norme de contrôle dans ces affaires. Selon elle, la Cour d'appel fédérale a fondé son intervention sur sa propre appréciation de la preuve et en l'absence d'une quelconque erreur du juge siégeant en révision susceptible d'entraîner l'annulation de sa décision. L'intimé, Santé Canada, reconnaît que la Cour d'appel fédérale devait appliquer les normes ordinaires de révision en appel, mais il conteste la position de Merck qu'elle ne l'a pas fait.

[53] Aucune décision discrétionnaire du responsable de l'institution n'est en cause dans la présente affaire. Selon l'art. 51 de la Loi, le juge siégeant en révision doit décider si « le responsable [de l']institution fédérale est tenu de refuser la communication [. . .] d'un document » et, dans l'affirmative, il doit ordonner à ce dernier de ne pas le communiquer. Il s'ensuit que dans les cas où un tiers, telle Merck en l'espèce, demande à la Cour fédérale, en vertu de l'art. 44 de la Loi, de « contrôler » la décision du responsable de l'institution de communiquer tout ou partie d'un document, le juge

correctly applied the exemptions to the records in issue: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 19; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 22. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure: see, e.g., *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at pp. 265-66; *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2003 FC 1422 (CanLII), at para. 3; *Dagg*, at para. 107. The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.

de la Cour fédérale doit déterminer si ce dernier a correctement appliqué les exceptions aux documents visés : *Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale du Canada)*, 2003 CSC 8, [2003] 1 R.C.S. 66, par. 19; *Canada (Commissaire à l'information) c. Canada (Ministre de la Défense nationale)*, 2011 CSC 25, [2011] 2 R.C.S. 306, par. 22. Ce processus a parfois été qualifié d'examen *de novo* de la question de savoir si le document en cause est soustrait à la communication : voir, p. ex., *Air Atonabee Ltd. c. Canada (Ministre des Transports)*, [1989] A.C.F. nº 453 (QL) (1re inst.), par. 29-30; *Merck Frosst Canada & Co. c. Canada (Ministre de la Santé)*, 2003 CF 1422 (CanLII), par. 3; *Dagg*, par. 107. Le terme « *de novo* » n'est peut-être pas, à proprement parler, celui qu'il convient d'utiliser; toutefois, il n'y a aucun désaccord dans ces affaires quant au rôle du juge siégeant en révision dans un tel contexte : il doit décider si les exceptions ont été correctement appliquées relativement aux documents en cause. Les articles 44, 46 et 51 sont les dispositions législatives les plus pertinentes qui s'appliquent au présent contrôle.

[54] The decision of the judge conducting a review under the Act, which will often have a significant factual component, is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, at para. 23.

[54] La décision du juge qui, en application de la Loi, procède à un examen, qui aura souvent un volet factuel important, peut faire l'objet d'une révision en appel conformément aux principes exposés dans *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, et *Canada (Commissaire à l'information) c. Canada (Ministre de la Défense nationale)*, par. 23.

[55] The Federal Court of Appeal correctly set out the standard of review (para. 25). Did it err in applying that standard? In my view, it did not. As I will explain in more detail in my analysis of each exemption provision, the reviewing judge did not make findings of fact and failed either to state the applicable legal principles or to explain how the legal principles applied to the facts before him or, in some cases, both. Generally, he gave no indication of the legal and factual findings that took him to his conclusions. His conclusions are not explicable when the documents and the evidence are reviewed. The Court of Appeal was therefore entitled to intervene and to carry out its own assessment of

[55] La Cour d'appel fédérale a expliqué correctement la norme de contrôle (par. 25). A-t-elle fait erreur en appliquant cette norme? Je ne le pense pas. Comme je l'expliquerai plus en détail dans mon analyse de chaque disposition prévoyant une exception, le juge siégeant en révision n'a pas tiré de conclusions de fait, et il a omis soit d'énoncer les principes juridiques applicables, soit d'expliquer comment les principes juridiques s'appliquaient aux faits de l'espèce; dans certains cas, il n'a fait ni l'un ni l'autre. En gros, il a omis d'exposer les conclusions juridiques et factuelles qui l'ont amené à ses conclusions. Ses conclusions ne résistent pas à un examen des documents et de la preuve. La Cour

whether the reviewing judge had correctly applied the exemptions to the records. It would have been open to the Court of Appeal to remit the matter to the Federal Court for reconsideration by a judge of first instance. However, in light of the fact that this had already been done once in the NDS file, my view is the Court of Appeal was right to conduct its own assessment.

[56] The Federal Court of Appeal did not simply fault the reviewing judge for failing to provide a detailed explanation of every conclusion or for failing to make his reasoning more explicit. The Federal Court of Appeal intervened because the reviewing judge made no findings of fact in the face of conflicting evidence, and generally provided no explanation of the applicable legal principles or how or why they applied to the disputed documents. The Court of Appeal did not err in doing so.

(2) What Is the Threshold for Triggering the Institutional Head's Duty to Give a Third Party Notice of the Access Request and What Sort of Review of the Record Is Required in Deciding to Give Notice?

[57] I briefly reviewed the notice provisions earlier. Before disclosing certain types of third party information, the head of a government institution must make every reasonable effort to give that third party written notice of the request for disclosure, except where the third party has waived the notice requirement. Unless the third party consents to disclosure, the head must also give the third party an opportunity to make representations as to why the record or part of it should not be disclosed (ss. 27(1), 27(2) and 28).

[58] These appeals, strictly speaking, relate to judicial review applications of the institutional

d'appel fédérale pouvait donc intervenir et faire sa propre appréciation de la question de savoir si le juge siégeant en révision avait correctement appliqué les exceptions aux documents en cause. Elle aurait pu renvoyer l'affaire à la Cour fédérale pour qu'un autre juge de première instance l'examine à son tour. Cependant, compte tenu du fait que cela avait déjà été fait une fois dans le dossier se rapportant à la PDN, j'estime que la Cour d'appel fédérale a eu raison de faire sa propre appréciation du dossier.

[56] La Cour d'appel fédérale n'a pas simplement conclu que le juge siégeant en révision avait commis une erreur en omettant d'expliquer en détail chacune de ses conclusions ou d'exposer son raisonnement de manière plus explicite. Elle est intervenue parce que le juge siégeant en révision, devant des preuves contradictoires, n'a pas tiré de conclusions de fait, et, de façon générale, n'a fourni aucune explication sur les principes juridiques applicables ou sur la question de savoir comment ou pourquoi ces derniers s'appliquaient aux documents en cause. La Cour d'appel fédérale n'a pas commis d'erreur en agissant ainsi.

(2) Quel est le seuil à atteindre pour que prenne naissance l'obligation du responsable de l'institution d'aviser un tiers de la demande d'accès et quel examen du dossier doit-il faire pour décider s'il doit donner cet avis?

[57] J'ai déjà analysé brièvement les dispositions en matière de préavis. Avant de divulguer certains types de renseignements d'un tiers, le responsable de l'institution doit faire tous les efforts raisonnables pour aviser par écrit le tiers de la demande qui lui a été présentée, sauf si ce dernier a renoncé à l'avis. À moins que le tiers ne consente à la divulgation, le responsable doit également lui donner la possibilité de présenter des observations sur les raisons qui justifieraient un refus de communication totale ou partielle du document (par. 27(1) et (2) et art. 28).

[58] Les présents pourvois se rapportent, à proprement parler, aux demandes de contrôle judiciaire

head's decisions to release information in response to two access to information requests. It follows that the focus is on the decisions to disclose. However, the parties have made extensive submissions about how the notice provisions in ss. 27 and 28 of the Act ought to be applied. In light of the importance of the issues and the fact that both parties have made extensive submissions on the notice provisions, I will address them.

[59] There are two main issues about this notice scheme. The first relates to the threshold for triggering the head's obligation to give notice to the third party and the second to the nature of the head's obligation to examine the record before deciding whether or not notice is required.

(a) *The Threshold for Notice Under Section 27(1)*

[60] As noted earlier, s. 27(1) of the Act specifies when the head of the government institution must make reasonable efforts to give notice to a third party. (I will simply refer to this as the notice requirement.) For convenience, the text of the provision as it read at the time of the applications is as follows:

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

(*a*) 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,

visant les décisions du responsable de l'institution en l'espèce de divulguer des renseignements en réponse à deux demandes d'accès à l'information. L'accent est donc mis sur les décisions de divulguer des renseignements. Les parties ont cependant argumenté abondamment sur la façon dont il convient d'appliquer les dispositions en matière de préavis qui figurent aux art. 27 et 28 de la Loi. Étant donné l'importance de ces questions et le fait que les deux parties ont argumenté abondamment sur ces dispositions, je les examinerai.

[59] Ce régime de notification soulève deux questions principales. La première est de savoir quel est le seuil à atteindre pour que prenne naissance l'obligation du responsable de l'institution de donner un préavis au tiers, et la deuxième porte sur la nature de l'obligation du responsable d'examiner le document avant de décider s'il doit ou non donner ce préavis.

a) *Le seuil à atteindre pour que prenne naissance l'obligation de donner l'avis prévu au par. 27(1)*

[60] Comme je l'ai déjà souligné, le par. 27(1) de la Loi précise dans quelles circonstances le responsable de l'institution doit faire des efforts raisonnables pour donner l'avis au tiers. (Je me contenterai de faire référence à l'obligation de donner l'avis.) Par souci de commodité, j'ai reproduit ci-après la disposition telle qu'elle était libellée à l'époque des demandes :

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) soit des secrets industriels d'un tiers;

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

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 or part thereof.

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

[61] In this case, the Health Canada head disclosed some documentation without giving notice to Merck. Merck complains that it should have been given notice before any disclosure was made. In the Federal Court, the reviewing judge (after dealing with a number of procedural arguments that are not in issue before this Court) found that this disclosure without prior notice contravened the spirit of the legislation. Since disclosure without notice could result in irreparable harm to the third party concerned, such disclosure should not have taken place (2006 FC 1201, at para. 64). The Federal Court of Appeal disagreed. It found that s. 27(1) requires notice only if the record contains or might contain information the disclosure of which is prohibited by s. 20(1). In the Court of Appeal's view, both the object of the Act as articulated in s. 2 and the contextual and grammatical analysis of s. 27(1) favour this conclusion.

[61] En l'espèce, le responsable de Santé Canada a communiqué certains documents sans donner de préavis à Merck. Or, Merck soutient qu'elle aurait dû recevoir un tel préavis avant la communication de quelque document que ce soit. En Cour fédérale, le juge siégeant en révision (après avoir tranché un certain nombre d'arguments procéduraux dont nous ne sommes pas saisis) a conclu que cette communication sans préavis contrevenait à l'esprit de la Loi. Selon lui, la communication des documents sans préavis n'aurait pas dû avoir lieu, car une telle façon de faire pouvait causer un préjudice irréparable au tiers (2006 CF 1201, par. 64). La Cour d'appel fédérale n'était pas de cet avis, estimant que le par. 27(1) n'oblige le responsable à donner l'avis que si le document visé contient ou est susceptible de contenir des renseignements dont la divulgation est interdite par le par. 20(1). Toujours selon la Cour d'appel fédérale, tant l'objet de la Loi énoncé à l'art. 2 que l'analyse contextuelle et grammaticale des termes utilisés au par. 27(1) appuient cette conclusion.

[62] Before this Court, Merck argues that the Federal Court of Appeal's decision has the effect of unduly limiting the scope of the s. 20(1) exemptions by narrowing the procedural right conferred on third parties by s. 27. Merck suggests that the test for giving notice and the test for actually applying the exemption must be different. To have procedural fairness in this legislative scheme, s. 27(1) must set a low threshold for notice to affected parties. Merck therefore maintains that certain categories of records, because of their nature, should automatically trigger a right to notice. In its view, NDS and SNDS records, in light of the confidentiality and competitive value of the information they contain, fall within such a category where notice is required.

[62] Merck soutient devant notre Cour que la décision de la Cour d'appel fédérale a eu pour effet de limiter indûment la portée des exceptions prévues au par. 20(1) en restreignant le droit procédural que l'art. 27 accorde aux tiers. Selon elle, le critère en matière de préavis et celui régissant l'application de l'exception doivent différer. L'équité procédurale au sein de ce régime législatif n'est possible que si le par. 27(1) établit un seuil peu élevé en ce qui concerne le préavis aux parties intéressées. Merck maintient donc que certains types de documents, de par leur nature, donnent automatiquement droit au préavis. À son avis, compte tenu de la nature confidentielle et de la valeur concurrentielle des renseignements qu'ils contiennent, les documents afférents à la PDN et à la PSDN relèvent d'une catégorie de documents donnant droit au préavis.

[63] In my view, the text of the statute and the considerations identified by the reviewing judge

[63] À mon avis, il ressort du texte de la Loi et des considérations décrites par le juge siégeant en

and by Merck in its submissions support a fairly low threshold to trigger the obligation to give notice. However, I do not accept Merck's submission that there is any "automatic" right to notice with respect to certain categories of records. Such a right to automatic notice is not supported by the text or purpose of the provisions or by the jurisprudence that has interpreted them.

[64] Following the modern approach to statutory interpretation, the words of a provision 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: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The grammatical and ordinary sense of s. 27(1) makes plain that notice is required only if certain conditions are met in the particular circumstances. The section does not refer to particular categories of documents but rather to particular types of information that are or may be contained in records otherwise subject to disclosure. The subsection sets out specific conditions precedent for engaging the notice requirement. As the Federal Court Trial Division put it in words that were endorsed by the Federal Court of Appeal: "The essential condition precedent to the issuance of the notice is that the respondent has reason to believe the disclosure of the record might be contrary to his obligation under section 20 not to disclose records" (*Twinn v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 368, at p. 373, aff'd (1987), 80 N.R. 263). To the same effect, MacKay J. put it this way in *Air Atonabee*, at p. 257: ". . . 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 [s. 27(1)]".

[65] While this precise issue has not been decided by this Court, the approach taken in *Twinn* and *Air Atonabee* is consistent with comments on this subject by both the majority and dissenting

révision et par Merck dans ses observations que le seuil à atteindre pour que prenne naissance l'obligation de donner l'avis est assez peu élevé. Je ne retiens cependant pas l'argument de Merck qu'il existe un quelconque droit « automatique » au préavis dans le cas de certains types de documents. Ni le libellé des dispositions en cause ni leur objet, pas plus que les décisions des tribunaux qui les ont interprétées, ne donnent à penser qu'un tel droit existe.

[64] Selon la méthode moderne d'interprétation des lois, il faut lire les termes d'une disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec le régime prévu par la loi, l'objet de la loi et l'intention du législateur : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21. Or, il ressort clairement du sens ordinaire et grammatical des termes utilisés au par. 27(1) qu'il ne faut donner l'avis que si certaines conditions sont réunies dans les circonstances particulières en cause. Ce paragraphe ne mentionne pas de catégories particulières de documents; il fait plutôt référence à des types particuliers de renseignements contenus ou susceptibles d'être contenus dans des documents qui par ailleurs peuvent être communiqués. Il énonce également des conditions préalables bien précises à l'application de l'obligation de donner l'avis. Comme la Section de première instance de la Cour fédérale l'a dit dans des termes auxquels a souscrit la Cour d'appel fédérale, « [l]a condition essentielle préalable à l'émission de l'avis est que l'intimé a lieu de croire que la communication du document pourrait aller à l'encontre de son obligation de ne pas en donner communication, imposée par l'article 20 » : *Twinn c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1987] 3 C.F. 368, p. 373, conf. par [1987] A.C.F. nº 834 (QL). Les propos tenus par le juge MacKay dans *Air Atonabee*, au par. 12, vont dans le même sens : « . . . la Loi n'oblige pas à aviser le tiers avant de communiquer des renseignements qui le concernent, sauf dans les cas prévus au [par. 27(1)] ».

[65] Bien que notre Cour n'ait pas tranché cette question précise, l'approche adoptée dans *Twinn* et *Air Atonabee* est compatible avec les commentaires faits à la fois par les juges majoritaires et les juges

judges in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at paras. 41 and 66.

[66] Merck's submission that there is always a right to notice with respect to particular categories of records is thus not supported by the grammatical and ordinary meaning of the words of s. 27(1).

[67] Neither is Merck's position consistent with one of the Act's animating principles, the principle that exceptions to the right of access should be limited and specific (s. 2(1)). The creation of classes of documents as proposed by Merck which would presumptively trigger the notice requirement and be presumptively exempt from disclosure would be inconsistent with this principle.

[68] Finally, Merck's proposed approach is not consistent with the scheme of the Act. It makes provision for giving effect to restrictions on rights of disclosure contained in other statutes. Section 24 provides that disclosure must be refused if disclosure is restricted by any provisions set out in Schedule II of the Act. As the respondent Health Canada points out, Parliament has decided not to establish such a regime for information of the type in issue here; nothing listed in Schedule II restrains the disclosure of information submitted to the Minister with a view to approval of a new medication. There is no statutory indication that the records in issue here — NDS and SNDS records — are intended to be approached on a categorical basis.

[69] I therefore reject Merck's contention that the proposed disclosure of any part of an NDS or an SNDS automatically triggers the duty to give notice. I turn next to the circumstances that do engage the notice requirement.

[70] The institutional head has a general duty, subject to the other provisions of the Act, to provide

dissidents dans *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, 2006 CSC 13, [2006] 1 R.C.S. 441, par. 41 et 66.

[66] L'argument de Merck que le tiers intéressé a toujours droit au préavis en ce qui concerne certaines catégories particulières de documents n'est donc pas étayé par le sens ordinaire et grammatical des termes utilisés au par. 27(1).

[67] La position de Merck n'est pas non plus compatible avec l'un des principes directeurs de la Loi, à savoir que les exceptions au droit d'accès sont limitées et précises (par. 2(1)). La création de catégories de documents, comme le propose Merck, qui amèneraient à présumer que l'obligation de donner l'avis s'applique et que les documents en cause sont soustraits à la communication irait à l'encontre de ce principe.

[68] Enfin, la démarche proposée par Merck n'est pas compatible avec le régime prévu par la Loi. Elle prévoit de donner effet aux restrictions des droits à la communication énoncées dans d'autres lois. Selon l'art. 24, il faut refuser la communication si celle-ci est restreinte par une disposition figurant à l'annexe II de la Loi. Comme le souligne l'intimé, Santé Canada, le législateur a décidé de ne pas établir un tel régime pour les renseignements comme ceux qui sont en cause dans la présente affaire; aucune des dispositions énumérées à l'annexe II ne restreint la divulgation de renseignements fournis au ministre dans le cadre d'une demande d'approbation d'un nouveau médicament. Rien dans la Loi n'indique qu'il faille analyser les documents en cause dans la présente affaire — ceux relatifs à la PDN et à la PSDN — sur la base de leur appartenance à une catégorie.

[69] Je rejette donc la prétention de Merck que la communication proposée de l'une ou l'autre partie d'une PDN ou d'une PSDN déclenche automatiquement l'obligation de donner l'avis. Je passe maintenant aux circonstances qui donnent effectivement naissance à cette obligation.

[70] Sous réserve des autres dispositions de la Loi, il incombe au responsable de l'institution une

access to the record requested (s. 4(1)). This is the duty that Health Canada purported to carry out when it disclosed some documents without giving notice to Merck of its intention to do so. There is also a duty not to disclose information falling within the s. 20(1) exemptions. The notice provisions relate to how the institutional head carries out that duty.

[71] In considering a request for disclosure of third party information under the Act, the institutional head has four main possible courses of action (aside from the exercise of discretion under s. 20(6)), two of which engage the notice provisions. He or she may decide to (i) disclose the requested information without notice; (ii) refuse disclosure without notice; (iii) form an intention to disclose severed material with notice; or (iv) give notice because there is reason to believe that the record requested might contain exempted material. I will review each option briefly.

[72] I turn first to disclosure without notice. The practical realities as well as the text of the notice provision in s. 27(1) suggest a high threshold for disclosure without notice. Such disclosure is only justified in clear cases, that is, where the head, reviewing all the relevant evidence before him or her, concludes that there is no reason to believe that the record might contain material referred to in s. 20(1). The institutional head cannot repent after the fact from an ill-advised decision to disclose. Disclosure without notice and any harm that might follow are irreversible. Giving notice in all but clear cases reduces the risk of irremediable harm to the third party through inappropriate disclosure. Moreover, the institutional head may not have enough information to make a correct judgment about whether the information is exempt; the input of the third party may be required in order for the institutional head's decision to be properly informed. It is, therefore, both prudent and consistent with the text of the Act for the institutional head

obligation générale de donner accès au document demandé (par. 4(1)). Il s'agit là de l'obligation dont Santé Canada dit s'être acquitté en communiquant certains documents sans avoir avisé Merck de son intention de le faire. Il existe aussi une obligation de ne pas divulguer de renseignements visés par l'une ou l'autre des exceptions prévues au par. 20(1). Les dispositions en matière de préavis portent sur la façon dont le responsable de l'institution doit remplir cette obligation.

[71] Lorsque le responsable de l'institution examine une demande de divulgation de renseignements de tiers présentée conformément à la Loi, quatre options principales s'offrent à lui (si l'on exclut l'exercice du pouvoir discrétionnaire prévu au par. 20(6)), dont deux qui font intervenir les dispositions en matière de préavis. Il peut : (i) divulguer les renseignements en cause sans donner l'avis au tiers; (ii) refuser de les divulguer sans lui donner l'avis; (iii) former le projet de divulguer des renseignements prélevés après lui avoir donné l'avis; ou (iv) lui donner l'avis parce qu'il y a des raisons de croire que le document demandé est susceptible de contenir des renseignements soustraits à la divulgation. J'étudierai brièvement chacune de ces options.

[72] Passons d'abord à la divulgation sans donner l'avis au tiers. Les considérations d'ordre pratique pertinentes ainsi que le libellé du par. 27(1), qui prévoit l'avis, donnent à penser qu'il convient d'appliquer un critère exigeant en matière de communication de documents sans préavis. Pareille communication n'est justifiée que dans les cas manifestes, c'est-à-dire si le responsable de l'institution, après avoir analysé toute la preuve pertinente dont il dispose, estime qu'il n'y a aucune raison de croire que le document est susceptible de contenir des renseignements visés au par. 20(1). Le responsable de l'institution ne peut revenir sur une décision inopportune de communiquer des documents, car la communication de documents sans préavis et le préjudice qu'elle pourrait causer sont irréversibles. Donner l'avis au tiers dans tous les cas sauf ceux qui ne présentent aucune ambiguïté permet de réduire le risque qu'une communication inappropriée cause un préjudice irrémédiable à ce dernier. En outre, il se peut que le responsable de l'institution n'ait pas

to disclose without notice only where the exemptions clearly cannot apply.

[73] I turn to the second option, refusal to disclose without notice. It is important to recognize that the institutional head has a duty both to disclose non-exempt material *and* to refuse to disclose exempted material. Just as the institutional head must not deny access without due consideration, he or she also must give due consideration to whether access must clearly be refused. This latter point was well put by MacKay J. in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (T.D.). He noted, at para. 47, that the institutional head's duty under s. 20 to refuse to disclose the information described in that section is not discharged by simply noting the possibility that the information may fall within the duty to refuse disclosure, but leaving it solely up to the third party to prove to the head's satisfaction that it ought not to be disclosed.

[74] Institutional heads must have some reason to believe that access cannot be refused without notice to the third party. They must apply their minds to the record in light of the known circumstances. They should be able to articulate a rational basis, emerging from this initial review, on which the exemptions from disclosure may not apply. To put it simply, institutional heads must take their duty *not* to disclose exempt third party information as seriously as their duty to disclose information that the Act requires to be disclosed.

suffisamment d'information pour décider correctement si les renseignements en cause sont soustraits à la divulgation; il a parfois besoin des observations du tiers pour prendre une décision éclairée. Par conséquent, le responsable de l'institution fera preuve de prudence et se conformera à la Loi en ne communiquant sans préavis que les documents qui ne sont manifestement pas visés par les exceptions.

[73] Passons à la deuxième option, à savoir le refus de divulguer les renseignements en cause sans donner l'avis au tiers. Il importe de reconnaître que le responsable de l'institution est tenu à la fois de divulguer les renseignements qui ne sont pas visés par une exception *et* de refuser la divulgation des renseignements qui, au contraire, le sont. Si le responsable ne doit pas refuser de divulguer de renseignements sans avoir dûment étudié la question, il lui incombe aussi de convenablement examiner la question de savoir s'il doit manifestement rejeter la demande d'accès à l'information. Le juge MacKay a bien formulé cette idée dans *SNC-Lavalin Inc. c. Canada (Ministre des Travaux publics)*, [1994] A.C.F. n^{o} 1059 (QL) (1re inst.), où il a souligné, au par. 47, que le responsable de l'institution ne s'acquitte pas de l'obligation qui lui incombe aux termes de l'art. 20 de refuser de divulguer les renseignements visés à cet article s'il se contente de relever la possibilité que ceux-ci tombent sous le coup de cette obligation, laissant au tiers l'entière responsabilité d'établir à sa satisfaction que les renseignements ne doivent pas être divulgués.

[74] Le responsable de l'institution doit avoir une quelconque raison de croire qu'il ne peut refuser de communiquer les documents en cause sans avoir donné l'avis au tiers s'il en décide ainsi. Il doit donc examiner le dossier eu égard aux circonstances connues de lui afin d'être en mesure de dégager de cet examen initial un fondement rationnel lui permettant de conclure que les exceptions à la communication peuvent ne pas s'appliquer. Pour dire les choses simplement, le responsable de l'institution doit prendre autant au sérieux son obligation de *ne pas* divulguer les renseignements de tiers soustraits à la communication que l'obligation que la Loi lui impose de divulguer les renseignements qui peuvent l'être.

[75] That brings us to the two situations relevant to this case in which notice must be given under s. 27(1): first, when the head has reason to believe that the record might contain information described in s. 20(1); and, second, when the head proposes to disclose information severed from other information as required by s. 25. An element of each of these conditions is that the head "intends to disclose [a] record" and this phrase needs careful consideration. (I put to the side the situation in which the head proposes to use the s. 20(6) public interest override.)

[75] Cela nous amène aux deux situations pertinentes en l'espèce dans lesquelles le responsable de l'institution doit donner l'avis au tiers en application du par. 27(1) : il y a d'abord le cas où il a des raisons de croire que le document est susceptible de contenir des renseignements visés au par. 20(1), et, ensuite, le cas où il compte divulguer des renseignements prélevés conformément à l'art. 25. Dans l'une et l'autre de ces situations, le responsable « a l'intention de donner communication [. . .] d'un document », expression qu'il convient d'examiner attentivement. (Je laisse de côté la situation où le responsable compte se prévaloir de la dérogation prévue au par. 20(6) en matière d'intérêt public.)

[76] I turn first to the situation in which the head "intends to disclose any record . . . that the head of the institution has reason to believe might contain" exempted third party information. How, it may be asked, can the head "inten[d] to disclose" something that he or she has reason to believe is exempt from disclosure? The answer, in my view, is that the phrase "intends to disclose" must be understood in the context of the scheme of the Act. There need not be an actual, present intention to disclose in the sense of a decision taken subject only to being talked out of it by the third party. For the purposes of s. 27(1), the institutional head "intends to disclose" a record that might contain exempt information if the head concludes that he or she cannot direct either refusal or disclosure without notice according to the principles I have just outlined.

[76] Considérons d'abord la situation où le responsable de l'institution « a l'intention de donner communication [. . .] d'un document [qui] est, selon lui, susceptible de contenir » des renseignements de tiers soustraits à la divulgation. On peut se demander comment le responsable pourrait avoir « l'intention de donner communication » de quelque chose s'il a des raisons de croire que cette chose est soustraite à la communication. La réponse, selon moi, réside dans le fait qu'il convient d'interpréter ces mots eu égard au régime prévu par la Loi. Il n'est pas nécessaire que le responsable ait effectivement l'intention de donner communication de la chose, en ce sens qu'il ait déjà décidé qu'il la communiquerait à moins que le tiers ne le convainque de revenir sur sa décision. Pour l'application du par. 27(1), le responsable « a l'intention de donner communication » d'un document susceptible de contenir des renseignements soustraits à la divulgation s'il estime ne pas pouvoir en refuser la communication ou procéder à celle-ci sans donner de préavis à l'intéressé conformément aux principes que je viens d'exposer.

[77] As discussed earlier, in order to disclose third party information without giving notice, the head must have no reason to believe that the information might fall within the exemptions under s. 20(1). Conversely, in order to refuse disclosure without notice, the head must have no reason to believe that the record could be subject to disclosure. If the information does not fall within one of

[77] Comme je l'ai déjà mentionné, pour divulguer des renseignements d'un tiers sans lui donner de préavis, le responsable de l'institution ne doit avoir aucune raison de croire qu'ils peuvent tomber sous le coup de l'une ou l'autre des exceptions prévues au par. 20(1). Inversement, pour refuser de les divulguer sans préavis, le responsable ne doit avoir aucune raison de croire que le document peut être

these clear categories, notice must be given. I would therefore interpret the phrase "intends to disclose" as referring to situations which fall between those in which the head concludes that neither disclosure nor refusal of disclosure without notice is required. In other words, the head "intends to disclose" a record "that the head . . . has reason to believe might contain" exempted information unless the head concludes either (a) that there is no reason to believe that it might contain exempted information (in which case disclosure without notice is required) or (b) that he or she has no reason to believe that disclosure could be required by the Act (in which case refusal of disclosure without notice is required). To the extent that the reasons of the Court of Appeal, at para. 34, suggest the head must have actually formed an opinion on the matter as opposed to simply having no "reason to believe", I respectfully disagree.

[78] The approach I propose sets quite a low threshold for the requirement of giving notice. This is not only consistent with the text of the Act, but properly reflects the balance the Act strikes between disclosure and protection of third parties.

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

communiqué à la personne qui en fait la demande. Si les renseignements en cause n'appartiennent pas à l'une ou l'autre de ces catégories bien définies, le responsable doit donner l'avis à l'intéressé. J'estime donc que les mots « a l'intention de donner communication » font référence à des situations autres que celles où le responsable conclut que ni la communication ni le refus de celle-ci sans préavis ne sont des solutions acceptables. Autrement dit, le responsable « a l'intention de donner communication » d'un document qui « est, selon lui, susceptible de contenir » des renseignements soustraits à la divulgation, sauf s'il conclut a) qu'il n'y a aucune raison de croire que le document peut contenir pareils renseignements (dans ce cas, la communication sans préavis s'impose), ou b) qu'il n'a aucune raison de croire que la Loi impose la communication du document (dans ce cas, le refus de communication sans préavis s'impose). En toute déférence, je suis en désaccord avec la Cour d'appel fédérale dans la mesure où elle affirme, au par. 34 de ses motifs, que le responsable doit s'être fait une opinion à ce sujet au lieu de simplement n'avoir aucune raison de croire.

[78] L'approche que je propose établit un seuil très peu élevé en matière de préavis. Non seulement cela est-il compatible avec le texte de la Loi, mais encore, une telle approche reflète bien l'équilibre atteint par la Loi entre la communication de documents et la protection des tiers.

[79] Vu la nature des exceptions en cause — qui visent les secrets industriels, les renseignements financiers ainsi que d'autres types de renseignements de nature confidentielle —, le tiers dont les renseignements sont visés par une demande d'accès à l'information est, de façon générale, mieux placé que le responsable de l'institution pour relever les renseignements qui tombent sous le coup de l'une ou l'autre des exceptions prévues au par. 20(1). En effet, il connaît et comprend bien l'industrie dont il fait partie et il a une connaissance approfondie des renseignements en cause, de la façon dont ils ont été traités et du préjudice que pourrait causer leur divulgation. Comme l'a dit la juge Deschamps dans *Cie H.J. Heinz*, au nom des juges majoritaires :

The unique notice given to third parties is tied to the specific nature of the exemption. . . . [A] government institution would not have any specific knowledge of the business or scientific dealings of a third party . . . . In the case of confidential business information . . . the assistance of the third party is necessary for the government institution to know how, or if, the third party treated the information as confidential. Indeed, the third party's information management practices may be an important means of determining whether the information actually meets the definition of "confidential" . . . . Whether the information is confidential cannot be determined without representations from the third party. [References omitted; para. 51.]

[80] Moreover, observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by mistake. In addition, because the giving of notice opens the way to judicial review of a decision to disclose, observing a low threshold for third party notice also accords with one of the Act's animating principles — that decisions on the disclosure of government information should be reviewed independently of government — while also being consistent with the principles that government information should be available to the public and that necessary exceptions to the right of access should be limited and specific (s. 2(1)).

[81] The approach to notice I have just outlined makes sense of the statutory direction to give notice when the institutional head "intends to disclose any record . . . that the head of the institution has reason to believe might contain" exempt third party information. But what about the part of the provision that requires the institutional head to give notice when he or she "intends to disclose any record . . . that contains" such information? How, it might be asked, could the head form an intention to disclose any record that falls within the s. 20 exemptions and which he or she therefore has a duty not to disclose? The head obviously cannot form an intention to do what the Act prohibits. In my view, there are two answers. The first lies in s. 20(6), which allows disclosure of some otherwise exempt information in the public interest. This

L'avis unique qui est donné aux tiers est lié à la nature particulière de l'exception. [. . .] [L]'institution fédérale n'a pas une connaissance précise des opérations commerciales ou scientifiques d'un tiers [. . .] [E]n ce qui concerne les renseignements commerciaux confidentiels, l'institution fédérale a besoin de l'aide du tiers pour savoir si celui-ci considère que les renseignements sont confidentiels ou pour connaître le traitement que le tiers leur a réservé. Les méthodes de gestion de l'information utilisées par le tiers peuvent être un moyen important de déterminer si les renseignements correspondent véritablement à la définition de ce qui est « confidentiel » [. . .] Il n'est pas possible de décider si les renseignements sont confidentiels sans les observations du tiers. [Références omises; par. 51.]

[80] De plus, l'application d'un critère peu exigeant en matière de préavis aux tiers garantit l'équité procédurale et réduit le risque que des renseignements ne pouvant être divulgués le soient par erreur. En outre, puisque le préavis ouvre la voie au contrôle judiciaire de la décision de divulguer les renseignements en cause, l'application d'un tel critère concorde aussi avec l'un des principes directeurs de la Loi, à savoir que les décisions en matière de communication des documents de l'administration fédérale sont susceptibles de recours indépendants du pouvoir exécutif, tout en étant compatible avec le principe du droit du public à la communication de tels documents, les exceptions indispensables à ce droit étant précises et limitées (par. 2(1)).

[81] L'approche en matière de préavis que je viens de décrire donne un sens à l'obligation légale qui incombe au responsable de l'institution de donner un avis au tiers intéressé lorsqu'il « a l'intention de donner communication [. . .] d'un document [. . .] s'il est, selon lui, susceptible de contenir » des renseignements du tiers soustraits à la divulgation. Mais qu'en est-il du passage de la disposition obligeant le responsable à donner avis au tiers intéressé de son « intention de donner communication [. . .] d'un document [. . .] si le document contient » pareils renseignements? Il est permis de se demander comment le responsable peut avoir l'intention de communiquer un document qui tombe sous le coup de l'une ou l'autre des exceptions prévues à l'art. 20 et qu'il est tenu, pour cette raison, de ne pas communiquer. De toute évidence, le responsable ne

so-called public interest override is not relevant here.

[82] The second answer lies in the severance provision in s. 25 of the Act. As noted, s. 25 requires the institutional head to disclose information in a record that contains exempted information where the disclosable information can reasonably be severed from the exempted information. Where the institutional head proposes to take the course required by s. 25, he or she "intends to disclose any record . . ., or any part thereof, that contains" exempted material. It follows, in my view, that notice is required whenever the head intends to disclose a record containing third party information by severing the non-exempt information and disclosing only that as required by s. 25.

[83] In this case, a document disclosed by the head to the requester without notice to Merck contained severed information pursuant to s. 25. In my respectful view, this was not in accordance with the requirements of the Act.

[84] To sum up my conclusions on s. 27(1):

(i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.

(ii) The institutional head:

- should *disclose* third party information *without notice* only where the

saurait avoir l'intention de faire ce que la Loi interdit. À mon avis, il y a deux réponses à cette question. La première se trouve au par. 20(6), qui autorise la divulgation, pour des raisons d'intérêt public, de certains renseignements par ailleurs soustraits à celle-ci. Ce principe dit de la dérogation en matière d'intérêt public n'est pas pertinent en l'espèce.

[82] La deuxième réponse se trouve dans la disposition en matière de prélèvement de renseignements qui figure à l'art. 25 de la Loi. Comme je l'ai déjà dit, l'art. 25 oblige le responsable de l'institution qui refuse la communication d'un document qui contient des renseignements soustraits à la divulgation à en communiquer les parties dépourvues de tels renseignements à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux. Le responsable qui compte suivre l'art. 25 a donc « l'intention de donner communication totale ou partielle d'un document [qui] contient » des renseignements soustraits à la divulgation. Il s'ensuit, selon moi, que le préavis est requis dans les cas où le responsable a l'intention de communiquer un document qui contient des renseignements de tiers; dans un tel cas, le responsable doit prélever du document les renseignements qui ne sont pas protégés et ne divulguer que ces renseignements, comme l'exige l'art. 25.

[83] Dans la présente affaire, un document que le responsable de l'institution a communiqué au demandeur sans donner de préavis à Merck contenait des renseignements prélevés en application de l'art. 25. À mon humble avis, une telle façon de procéder n'était pas conforme aux exigences de la Loi.

[84] En somme, voici ce que je conclus au sujet du par. 27(1) :

(i) En ce qui concerne les renseignements de tiers, il incombe au responsable de l'institution une obligation de divulgation de même qu'une obligation de non-divulgation d'égale importance, et il doit prendre l'une tout aussi au sérieux que l'autre.

(ii) Le responsable de l'institution :

- ne doit *divulguer* des renseignements de tiers *sans préavis* que s'ils peuvent

information is clearly subject to disclosure, that is, there is *no reason to believe that it is exempt*;

- should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.

(iii) The institutional head must give notice if he or she:

- is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);

- intends to disclose exempted material to serve the public interest pursuant to s. 20(6); or

- intends to disclose severed material pursuant to s. 25.

(b) *The Nature of the Review by the Head of a Government Institution*

[85] Having established the threshold for notice and for disclosure without notice, the next question is what sort of review the institutional head should conduct in order to determine whether these thresholds have been met. Merck argues that the head of the institution must conduct a "genuine and thorough" analysis of whether a s. 20(1) exemption applies before forming any intention to disclose the record and sending a notice of intent to disclose to a third party (A.F., at para. 40). Forming an intention to disclose without such an analysis, Merck submits, would result in placing the onus on the third party to prove page by page, line by line, that the information falls within one of the s. 20(1) exemptions. Merck maintains that where, as is the

manifestement être divulgués, c'est-à-dire que s'il *n'*y a *aucune raison de croire qu'ils sont soustraits à la divulgation*;

- doit *refuser de divulguer* de tels renseignements *sans préavis* s'ils sont manifestement soustraits à la divulgation, c'est-à-dire s'il n'existe aucune raison de croire qu'ils peuvent être divulgués.

(iii) Le responsable de l'institution doit donner un préavis dans les cas suivants :

- il ne sait pas avec certitude si les renseignements sont soustraits à la divulgation; autrement dit, s'il ne se trouve pas dans la situation décrite au point (ii);

- il a l'intention de divulguer, pour des raisons d'intérêt public en vertu du par. 20(6), des renseignements soustraits à la divulgation;

- il a l'intention de divulguer des renseignements prélevés en application de l'art. 25.

b) *La nature de l'examen que doit faire le responsable d'une institution fédérale*

[85] Ayant établi les critères en matière de préavis et de communication sans préavis, je me pencherai maintenant sur la nature de l'examen que doit faire le responsable de l'institution pour décider s'il a été satisfait à ceux-ci. Selon Merck, le responsable est tenu, avant de former l'intention de communiquer le document et de faire parvenir au tiers intéressé un avis à cet effet, de faire une analyse [TRADUCTION] « véritable et approfondie » de la question de savoir si l'une ou l'autre des exceptions prévues au par. 20(1) s'applique (m.a., par. 40). Merck soutient qu'en formant cette intention sans d'abord procéder à une telle analyse le responsable imposerait au tiers le fardeau d'établir, pour chaque page et chaque ligne, que

case where NDS and SNDS records are involved, the head of the institution already knows that the record contains confidential information which is of value to competitors, it is unreasonable for the head of the institution to form the intention to disclose any part of the record without giving notice.

[86] Both the reviewing judge and the Court of Appeal disagreed with Merck on this point. They concluded that the Act did not require the head of the institution to undertake a genuine and thorough examination of the record before forming the intention to disclose part or all of it: see Beaudry J., at para. 91 (2006 FC 1200); C.A. reasons, at paras. 112-14.

[87] There are important policy and practical considerations that must be balanced in order to decide what sort of review is required of the head when deciding to give notice. First, information should be disclosed whenever required by the Act. Second, third party confidential commercial information must receive the protection which the Act intends for it. Third, it is the duty of the institutional head to make the disclosure decision and respect the rights of third parties without simply shifting that responsibility onto the third party. While the head will often require the assistance of the third party in order to reach a decision about how the Act ought to apply, the duty to decide whether to disclose or not remains with the head. The head does not discharge that duty by simply giving notice at the first sign of potentially exempted information and leaving it to the third party to do all the work. The head is not entitled to simply put the entire onus of review on the third party. Finally, the practical constraints on the head must be considered. The head may not be well informed about the subject matter of the information and may therefore be disadvantaged in assessing it. The head is also bound by the time limits under the Act; one of the responsibilities

les renseignements qui s'y trouvent sont visés par l'une ou l'autre de ces exceptions. Toujours selon Merck, si le responsable sait déjà que le document en cause contient des renseignements de nature confidentielle qui ont de la valeur pour les concurrents du tiers intéressé, comme c'est le cas pour ce qui est d'un document concernant une PDN ou une PSDN, il agira de façon déraisonnable s'il forme l'intention de communiquer l'une ou l'autre partie du document sans donner d'avis à ce dernier.

[86] Le juge siégeant en révision et la Cour d'appel fédérale se sont dits en désaccord avec Merck sur ce point. Ils ont conclu que la Loi n'obligeait pas le responsable de l'institution à faire un examen véritable et approfondi du document avant de former l'intention d'en donner communication totale ou partielle : voir les motifs du juge Beaudry, par. 91 (2006 CF 1200); motifs de la Cour d'appel fédérale, par. 112-114.

[87] Il faut concilier d'importantes considérations de politique et d'ordre pratique pour déterminer le type d'examen que le responsable de l'institution doit faire pour décider s'il doit donner l'avis au tiers. Premièrement, il convient de divulguer les renseignements visés dans chaque cas où la Loi l'exige. Deuxièmement, les renseignements commerciaux confidentiels du tiers doivent bénéficier de la protection prévue par la Loi. Troisièmement, il incombe au responsable de prendre la décision de divulguer ou non les renseignements visés et de respecter les droits du tiers en évitant de simplement lui transférer la responsabilité de prendre cette décision. Certes, le responsable aura souvent besoin de l'aide du tiers pour décider de la façon dont il convient d'appliquer la Loi, mais, en bout de ligne, c'est à lui qu'il incombe de décider de divulguer ou non les renseignements visés. Le responsable ne s'acquittera pas de cette obligation en se contentant de donner l'avis au tiers dès qu'il soupçonne que les renseignements visés sont susceptibles d'être soustraits à la divulgation et en le laissant faire tout le travail. Il ne peut se contenter d'imposer au tiers tout le fardeau d'examiner le dossier. Enfin, il faut prendre en compte les contraintes d'ordre pratique auxquelles le responsable est soumis. Il se peut que le responsable ne

of the head is to provide timely access to the record.

[88] In my view, the head must conduct a sufficient review of the requested material in order to decide if the threshold for notice, as I have discussed it above, has been met. The federal government's Access to Information Policy, Chapter 1-1, published in the Treasury Board Manual at the relevant time, specified that institutions must review each individual record to determine which portions, if any, may be excluded or exempted. This statement, in my view, correctly describes the nature of the review required before the decision is made to give notice to the third party. The institutional head must make a serious attempt to apply the exemptions within the constraints I have noted. The same principle applies, in my view, to the head's severance of material under s. 25. I will discuss that question more fully in the part of my reasons dealing with s. 25. However, my view is that applying s. 25 is part and parcel of the head's initial review, subject of course to the constraints I have mentioned.

[89] Once notice has been given, the third party has an opportunity to make its representations. At this point in the process, I am not convinced that it is useful to speak of the third party having an onus. The material filed on behalf of the respondent insisted that the third party has an onus to persuade it that the exemptions apply. Indeed, in a document entitled *Access to Information Act — Third Party Information — Operational Guidelines*, Health Canada describes what it requires as representations from a third party once a notice has been issued pursuant to s. 27(1). Health Canada refers to the Federal Court jurisprudence which holds that the third party bears the onus of establishing that the information falls under an exemption (p. 3 of the Guidelines). I do not think this

connaisse pas très bien le sujet sur lequel portent les renseignements visés et qu'en conséquence il lui soit difficile de les apprécier. Par ailleurs, le responsable doit respecter les délais que la Loi lui impose, l'un de ses devoirs étant de permettre au demandeur de consulter les documents visés en temps opportun.

[88] Selon moi, le responsable de l'institution doit suffisamment examiner les documents visés par la demande d'accès à l'information pour être en mesure de décider si le seuil en matière de préavis a été atteint comme je l'ai décrit plus haut. La politique de l'administration fédérale en matière d'accès à l'information, qui figurait au chapitre 1-1 du Manuel du Conseil du Trésor à l'époque pertinente, précisait que l'institution devait examiner chacun des documents afin de déterminer quelles parties devaient, le cas échéant, faire l'objet d'une exclusion ou d'une exception. Selon moi, cela décrit correctement la nature de l'examen à faire avant de décider s'il convient ou non de donner l'avis au tiers. Le responsable doit véritablement se demander si l'une ou l'autre des exceptions s'applique, et ce dans les limites que j'ai décrites. À mon avis, le même principe s'applique au prélèvement de renseignements en application de l'art. 25. J'examinerai cette question plus en détail dans la partie de mes motifs qui traite de cet article. J'estime toutefois que l'application de l'art. 25 fait partie intégrante de l'examen initial que doit faire le responsable, sous réserve, évidemment, des limites que j'ai mentionnées.

[89] Une fois l'avis donné, le tiers peut formuler ses observations. À ce stade du processus, je ne suis pas convaincu qu'il soit utile de discuter de la question de savoir si le tiers doit se décharger d'un fardeau. Selon les documents déposés pour le compte de l'intimé, il incombe au tiers de le convaincre que les exceptions s'appliquent. En effet, dans un document intitulé *Lignes directrices opérationnelles concernant la Loi sur l'accès à l'information et l'information portant sur des tiers*, Santé Canada décrit les observations que le tiers doit lui soumettre une fois l'avis donné conformément au par. 27(1). Santé Canada fait référence à la jurisprudence de la Cour fédérale, qui mentionne qu'il incombe au tiers le fardeau d'établir que les renseignements sont visés par une exception (p. 3 des lignes directrices).

reference is apt. There is no doubt that, once the head has given notice of a decision to disclose, the third party has the onus to show why this decision was wrong on judicial review under s. 44: see, e.g., *Maislin Industries Ltd. v. Minister of Industry, Trade and Commerce*, [1984] 1 F.C. 939, at pp. 942-43; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47, at p. 65; *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265, at p. 276; *Air Atonabee*, at p. 263. However, the responsibility to decide whether disclosure is required or prohibited by the Act rests initially with the institutional head.

[90] From the third party's perspective, it is, of course, prudent and in accordance with common sense to be as helpful as it can be in identifying precisely why disclosure is not permitted. Nonetheless, the head must make a serious attempt, with the available information and having regard to the practical constraints, to discharge the responsibility imposed by the Act to apply the requirements to disclose or not to disclose. A cooperative approach is necessary in order for the system to work. The head cannot simply shift his or her responsibility onto the third party and similarly the third party must provide reasonable assistance to the head in carrying out his or her duties under the Act.

[91] At this stage of the proceedings, there is no point in retracing the interchanges between the parties to decide if the notice provisions and the appropriate level of review were correctly applied throughout. I have already indicated that notice must be given if the record is subject to s. 25 and I have described the threshold for giving of notice and the obligations of the institutional head to review the record. However, it may be useful to observe that the impression I have is that both Merck and Health Canada at times took rather extreme positions that were not in accordance with the purpose,

Il a tort de le faire. Il ne fait aucun doute qu'à partir du moment où le responsable de l'institution a fait part de sa décision de divulguer les renseignements visés il appartient au tiers de démontrer, dans le cadre d'un recours en révision judiciaire exercé en vertu de l'art. 44, pourquoi cette décision était erronée : voir, p. ex., *Maislin Industries Ltd. c. Ministre de l'Industrie et du Commerce*, [1984] 1 C.F. 939, p. 942-943; *Canada Packers Inc. c. Canada (Ministre de l'Agriculture)*, [1989] 1 C.F. 47, p. 65; *Rubin c. Canada (Société canadienne d'hypothèques et de logement)*, [1989] 1 C.F. 265, p. 276; *Air Atonabee*, par. 25. Toutefois, c'est d'abord au responsable de l'institution qu'il revient de décider si la Loi impose ou, au contraire, interdit la divulgation des renseignements.

[90] Du point de vue du tiers, il est bien sûr prudent et conforme au bon sens d'aider le plus possible le responsable de l'institution à déterminer précisément pourquoi la divulgation des renseignements en cause n'est pas autorisée. Néanmoins, le responsable doit véritablement tenter, compte tenu de l'information dont il dispose et des contraintes d'ordre pratique, de s'acquitter de l'obligation que la Loi lui impose de décider, sur la base des exigences de celle-ci, s'il doit ou non divulguer les renseignements. Pour que le système fonctionne, il est nécessaire d'adopter une approche axée sur la coopération. Le responsable ne peut se contenter d'imposer au tiers le fardeau qui lui incombe d'examiner le dossier et, dans le même ordre d'idée, le tiers doit prêter raisonnablement assistance au responsable afin de l'aider à s'acquitter des obligations que la Loi lui impose.

[91] À ce stade des procédures, il ne sert à rien de retracer les échanges qui ont eu lieu entre les parties pour décider si les dispositions en matière de préavis et le degré convenable d'examen ont été correctement appliqués du début à la fin. J'ai déjà mentionné que l'avis doit être donné si le dossier est visé par l'art. 25 et j'ai décrit le seuil à atteindre en matière de préavis ainsi que les obligations du responsable de l'institution d'examiner le dossier. Toutefois, il peut être utile de mentionner que, selon moi, Merck et Santé Canada ont parfois adopté des positions plutôt extrêmes qui ne s'accordaient pas

letter or spirit of the Act. The record suggests both that the institutional head emphasized the duty to disclose rather than the equally important duty not to disclose and that Merck was not as helpful as it could have been in making clear and targeted submissions in relation to its various objections. It is to be hoped that the clarifications that I have set out above will lead to more constructive and cooperative approaches to these issues in the future.

(3) What Are the Applicable Burden and Standard of Proof on a Third Party Claiming a Section 20(1) Exemption?

(a) *The Burden of Proof*

[92] Who bears the burden is not controversial. The third party bears the burden of showing why disclosure should not be made when it seeks judicial review (under s. 44 of the Act) of the head's decision to disclose material which has been the subject of a notice under s. 27. This has been clear since the early case law construing the Act: see, e.g., *Maislin Industries.*

(b) *The Standard of Proof*

[93] The applicable standard of proof is less clear. Merck argues that the Federal Court of Appeal erred in applying a heavier standard of proof than that of the balance of probabilities. For example, at para. 62, in the context of her analysis of s. 20(1)(*b*), Desjardins J.A. spoke of there being a "heavy" burden on the objecting party. Similarly, in relation to s. 20(1)(*a*), she referred, at para. 54, to a "high threshold".

[94] This notion of a "heavy burden" appears in many places in the jurisprudence relating to the exemptions: see, e.g., *AstraZeneca Canada*

avec l'objet, la lettre ou l'esprit de la Loi. Il ressort du dossier que le responsable de l'institution en l'espèce a mis l'accent sur l'obligation de divulguer des renseignements plutôt que sur l'obligation tout aussi importante de ne pas en divulguer, et que Merck ne lui a pas prêté toute l'assistance voulue, ses observations à l'égard des diverses objections qu'elle a formulées manquant de clarté et de précision. Il faut espérer que les éclaircissements que j'ai exposés susciteront l'adoption d'approches davantage constructives et axées sur la coopération relativement à ces questions.

(3) Quels sont le fardeau et la norme de preuve applicables dans le cas d'un tiers qui invoque une exception prévue au par. 20(1)?

a) *Le fardeau de la preuve*

[92] La question de savoir à qui incombe le fardeau de la preuve ne suscite aucune controverse. C'est au tiers qui demande le contrôle judiciaire (en vertu de l'art. 44 de la Loi) de la décision du responsable de l'institution de communiquer tout document ayant fait l'objet de l'avis prévu à l'art. 27 qu'il incombe de démontrer pourquoi le document ne doit pas être communiqué. Il y a longtemps que ce principe a été établi dans la jurisprudence relative à l'interprétation de la Loi : voir, p. ex., *Maislin Industries.*

b) *La norme de preuve*

[93] La question de savoir quelle norme de preuve il convient d'appliquer est moins claire. Merck prétend que la Cour d'appel fédérale a commis une erreur en appliquant une norme de preuve plus exigeante que celle de la prépondérance des probabilités. Par exemple, au par. 62, la juge Desjardins mentionne, dans le contexte de son analyse de l'al. 20(1)*b*), qu'il incombe à la partie qui s'oppose à la divulgation un fardeau « lourd ». Dans le même ordre d'idée, elle parle, au par. 54, d'un « seuil [qui] est élevé » relativement à l'al. 20(1)*a*).

[94] Cette notion de « fardeau lourd » figure souvent dans la jurisprudence relative aux exceptions : voir, p. ex., *AstraZeneca Canada Inc. c.*

Inc. v. Canada (Minister of Health), 2005 FC 189 (CanLII) (with supplementary reasons at 2005 FC 648 (CanLII)), at para. 52, aff'd 2006 FCA 241, 353 N.R. 84, and *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427 (T.D.) ("*Canada v. Canada*"), at p. 441. However, it is important to differentiate between the standard of proof and how readily that standard may be attained in a given case. It is now settled law that there is only one civil standard of proof at common law and that standard is proof on the balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40. Nothing in the Act suggests that we should depart from this standard. However, as noted in *McDougall*, "context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences" (para. 40). Proof of risk of future harm, for example, is often not easy. Rothstein J. (then of the Federal Court) captured this point in *Canada v. Canada* where he noted that there is a "heavy onus" on a party attempting to prove future harm while underlining that the obligation to do so requires proof on a balance of probabilities (p. 476). Therefore, I conclude that a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.

Canada (Ministre de la Santé), 2005 CF 189 (CanLII) (avec motifs supplémentaires dans 2005 CF 648 (CanLII)), par. 52, conf. par 2006 CAF 241 (CanLII), et *Canada (Commissaire à l'information) c. Canada (Premier ministre)*, [1993] 1 C.F. 427 (1re inst.) (« *Canada c. Canada* »), p. 441. Toutefois, il est important de faire la distinction entre la norme de preuve et la facilité avec laquelle cette norme peut être satisfaite dans un cas donné. Il est maintenant bien établi en droit qu'il n'existe, en common law, qu'une seule norme de preuve en matière civile, soit celle de la prépondérance des probabilités : *F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41, par. 40. Rien dans la Loi ne donne à penser que nous devrions nous écarter de cette norme. Toutefois, comme il a été souligné dans *McDougall*, « [l]e contexte constitue [. . .] un élément important et le juge ne doit pas faire abstraction, lorsque les circonstances s'y prêtent, de la probabilité ou de l'improbabilité intrinsèque des faits allégués non plus que de la gravité des allégations ou de leurs conséquences » (par. 40). La preuve d'un risque de préjudice futur, par exemple, n'est souvent pas facile à faire. Le juge Rothstein (maintenant juge de notre Cour) a bien expliqué ce point dans *Canada c. Canada*, où il a souligné que la partie qui tente de prouver qu'il existe un risque de préjudice futur doit s'acquitter d'une « lourde charge » et que cette obligation exige une preuve selon la prépondérance des probabilités (p. 476). Par conséquent, je conclus que le tiers doit établir, selon la prépondérance des probabilités, que l'exception prévue par la loi s'applique. Cependant, la preuve qui sera nécessaire pour satisfaire à cette norme dépendra de la nature de la thèse que le tiers cherche à faire valoir et du contexte particulier de l'affaire.

[95] Turning to the Court of Appeal's reasons in the present case, I am of the opinion that they applied a higher burden than the civil standard of the balance of probabilities in relation to the s. 20(1)(*a*) and (*b*) exemptions. As noted, the court called for a "high threshold" in relation to s. 20(1)(*a*) (para. 54) and applied a "heavy" burden in relation to s. 20(1)(*b*) (para. 62). While exemptions are the exception and disclosure the general rule, with any doubt being resolved in favour of disclosure, the applicable standard of

[95] En ce qui concerne les motifs exposés par la Cour d'appel fédérale dans la présente affaire, je suis d'avis que celle-ci a appliqué une norme plus exigeante que la norme civile de la prépondérance des probabilités relativement aux exceptions prévues aux al. 20(1)*a*) et *b*). Comme il a été souligné, la cour a parlé d'un « seuil [qui] est élevé » relativement à l'al. 20(1)*a*) (par. 54) et appliqué un fardeau « lourd » relativement à l'al. 20(1)*b*) (par. 62). Bien que la divulgation soit la règle générale et non pas l'exception et qu'en cas de doute il faille

proof is still the civil standard of the balance of probabilities.

B. *The Section 20(1)(a), (b) or (c) Exemptions*

(1) Overview of the Exemptions

[96] The Act contains a number of exemptions from the general rule of disclosure. The ones relevant to these appeals relate to third party confidential commercial information as set out in s. 20(1). The appeals raise a number of issues about the interpretation of these exemptions. Before turning to those issues, however, it will be helpful to put the s. 20(1) exemptions in the context of the other exemptions in the Act.

[97] The Act sets out a series of exemptions listed from ss. 13 to 26. They may be categorized according to whether they are class- or harm-based exemptions and according to whether they are mandatory or discretionary. Where there is a class exemption, the exemption applies to all records determined to fall into that class of record. However, a harm-based exemption applies only if the specified harm or risk of harm is present. Some exemptions are mandatory: once the record has been shown to fall within the exemption, the head of the institution has no discretion and must refuse to disclose it, subject only to any applicable override, such as the one found in s. 20(6), a topic not in issue here. Other exemptions are discretionary: once there has been an initial determination that the record falls within the statutory exemption, the head has discretion as to whether or not disclosure will be refused or granted.

[98] Turning specifically to the s. 20(1) exemptions for third party confidential commercial information, it is clear that all of these third party exemptions are mandatory: if the record falls within the

la permettre, la norme de preuve qu'il convient d'appliquer est toujours la norme de preuve en matière civile, à savoir la prépondérance des probabilités.

B. *Les exceptions prévues aux al. 20(1)a), b) et c)*

(1) Aperçu des exceptions

[96] La Loi comprend un certain nombre d'exceptions à la règle générale de divulgation. Les exceptions qui sont pertinentes aux présents pourvois sont celles prévues au par. 20(1) à l'égard des renseignements commerciaux confidentiels de tiers. Les pourvois soulèvent un certain nombre de questions concernant l'interprétation de ces exceptions. Toutefois, avant d'aborder ces questions, il serait utile de placer les exceptions du par. 20(1) dans le contexte des autres exceptions prévues par la Loi.

[97] La Loi prévoit toute une série d'exceptions, de l'art. 13 à l'art. 26, qui peuvent être classées selon qu'il s'agit d'exceptions catégorielles ou d'exceptions visant à éviter un préjudice, et selon qu'elles sont obligatoires ou discrétionnaires. L'exception catégorielle est celle qui s'applique à tous les documents appartenant à la même catégorie. Par contraste, l'exception visant à éviter un préjudice ne s'applique que s'il y a préjudice ou risque de préjudice. Certaines exceptions sont obligatoires : s'il est établi que le document en cause est visé par l'exception, le responsable de l'institution n'aura pas le pouvoir discrétionnaire de décider de le communiquer; il devra refuser de le faire, sous réserve seulement de l'application de l'une ou l'autre des dispositions dérogatoires, tel le par. 20(6). Quoi qu'il en soit, nous n'avons pas à nous préoccuper de cette question. D'autres exceptions sont discrétionnaires : si l'on conclut au départ que le dossier est visé par l'exception prévue par la loi, le responsable aura le pouvoir discrétionnaire de décider s'il communiquera ou non le document en cause.

[98] Pour ce qui est des exceptions en matière de renseignements commerciaux confidentiels de tiers prévues au par. 20(1), il est clair que toutes ces exceptions touchant des tiers sont obligatoires : si le

exemption, the head must refuse to disclose it (putting aside the s. 20(6) public interest override):

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

[99] The trade secrets (s. 20(1)(*a*)) and the confidential information (s. 20(1)(*b*)) exemptions are class-based: once information in the record corresponds to the statutory provision, that information is exempted and the head must refuse to disclose it. The s. 20(1)(*c*) exemption is harm-based and applies only if disclosure could reasonably be expected to result in material financial loss or gain or to prejudice the competitive position of a third party.

(2) Section 20(1)(*a*): The Trade Secrets Exemption

(a) *Introduction*

[100] Section 20(1)(*a*) of the Act provides an exemption from disclosure for "any record . . . that contains trade secrets of a third party". The issues for decision here are first, how should "trade secrets" be defined and, second, did the Federal Court of Appeal err in its approach to s. 20(1)(*a*) in this case.

[101] In the NDS matter, the reviewing judge found that some parts of the record contained trade secrets and that they should be exempted from disclosure. However, he did not set out any definition of the term "trade secrets" or any chain of reasoning that led him to this conclusion. In the SNDS file, he did not find any documents to which the trade secrets exemption applied.

[102] The Court of Appeal took issue with the reviewing judge's conclusion about the legal test for trade secrets and the sort of evidence that is

document en cause est visé par l'exception, le responsable de l'institution doit refuser de le communiquer (abstraction faite de la dérogation en matière d'intérêt public prévue au par. 20(6)) :

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 . . .

[99] Les exceptions en matière de secrets industriels (al. 20(1)*a*)) et de renseignements de nature confidentielle (al. 20(1)*b*)) sont catégorielles : si les renseignements contenus dans le document en cause sont visés par la disposition législative, l'exception s'applique et le responsable de l'institution doit refuser de les divulguer. Enfin, l'exception prévue à l'al. 20(1)*c*) en est une qui vise à éviter un préjudice et elle ne s'applique que si la divulgation des renseignements risquerait vraisemblablement de causer des pertes ou des profits financiers appréciables à un tiers ou de nuire à sa compétitivité.

(2) L'alinéa 20(1)*a*) : l'exception en matière de secrets industriels

a) *Introduction*

[100] L'alinéa 20(1)*a*) de la Loi prévoit une exception qui s'applique aux « documents contenant [. . .] des secrets industriels de tiers ». À cet égard, il faut d'abord se demander comment définir les « secrets industriels » et, ensuite, si la Cour d'appel fédérale a commis une erreur en appliquant cet alinéa.

[101] En ce qui concerne la PDN, le juge siégeant en révision a conclu que certaines parties du dossier contenaient des secrets industriels et qu'elles devaient être soustraites à la communication. Toutefois, il n'a ni défini les « secrets industriels », ni exposé le raisonnement qui avait mené à cette conclusion. Pour ce qui est du dossier de la PSDN, il n'a pas conclu que l'un ou l'autre des documents en cause était visé par cette exception.

[102] La Cour d'appel fédérale a mis en doute la conclusion du juge siégeant en révision concernant le critère juridique applicable aux secrets industriels

required to bring a record within the exemption. It noted that the reviewing judge had failed to set out the applicable legal test or how it applied to the documents which he found to be exempt. The Court of Appeal found that the proper test was that set out in the reasons of Strayer J. (as he then was) in *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58 (F.C.T.D.), at pp. 62-63, and as elaborated on by Phelan J. in *AstraZeneca*, at paras. 62-65. The Court of Appeal also concluded that the evidence to support such an exemption would have to meet a "high threshold" and that "[a]nyone who relies on that provision must necessarily furnish specific, objective and detailed evidence that the information constitutes a trade secret" (para. 54). Finding that Merck's statements on trade secrets were very broad and entangled with its s. 20(1)(*b*) claims, the Court of Appeal concluded that Merck had not met its burden of providing objective and specific evidence that any of the records contained information that constituted a trade secret.

et le type de preuve nécessaire pour conclure qu'un document donné est visé par l'exception. Elle a souligné que le juge siégeant en révision n'avait ni mentionné le critère juridique applicable, ni expliqué comment celui-ci s'appliquait aux documents qui, selon lui, étaient visés par l'exception. La Cour d'appel fédérale a conclu que le critère applicable était celui que le juge Strayer (plus tard juge de la Cour d'appel fédérale) a décrit dans les motifs qu'il a exposés dans *Société Gamma Inc. c. Canada (Secrétariat d'État)*, [1994] A.C.F. n° 589 (QL) (1re inst.), par. 7, et que le juge Phelan a expliqués en détail dans *AstraZeneca*, par. 62-65. La Cour d'appel fédérale a également conclu que la preuve nécessaire pour invoquer cette exception devait atteindre un « seuil [qui] est élevé » et que « celui qui l'invoque doit fournir une preuve spécifique, objective et précise qu'un renseignement constitue un secret industriel » (par. 54). Après avoir conclu que ses déclarations à l'égard des secrets industriels étaient très générales et entremêlées à ses demandes fondées sur l'al. 20(1)*b*), la Cour d'appel fédérale a conclu que Merck ne s'était pas acquittée du fardeau qui lui incombait de fournir une preuve objective et spécifique établissant que l'un ou l'autre des documents en cause contenait des renseignements qui constituaient des secrets industriels.

(b) *The Definition of "Trade Secrets"*

[103] I agree with the Federal Court of Appeal that the approach to trade secrets set out by Phelan J. in *AstraZeneca* is correct, although I do not find it helpful to characterize this as a restrictive definition or as setting a high threshold. My reasons follow.

[104] Under the modern approach to statutory interpretation, the interpretation of "trade secrets" must take into account the text, purpose and scheme of the legislation (*Rizzo*, at para. 21). Turning first to the text, there is no definition of "trade secrets" in the Act. Given that fact and that the term is a familiar legal term which has only a technical meaning, I infer that Parliament intended that the technical legal definition should apply: see R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 57-58. However,

b) *La définition de « secrets industriels »*

[103] Je suis d'accord avec la Cour d'appel fédérale que l'approche décrite par le juge Phelan dans *AstraZeneca* en matière de secrets industriels est juste, mais je ne crois pas utile de la qualifier de définition restrictive ou d'approche fixant un seuil élevé, et voici pourquoi.

[104] Selon l'approche moderne en matière d'interprétation des lois, l'interprétation du terme « secrets industriels » doit tenir compte du libellé de la loi, de son objectif et du régime qu'elle prévoit (*Rizzo*, par. 21). Tout d'abord, en ce qui concerne le libellé, la Loi ne définit pas en quoi consistent les « secrets industriels ». Compte tenu de ce fait, et comme il s'agit d'un terme juridique familier dont le sens est purement technique, je conclus que le législateur voulait que la définition juridique technique de ce terme s'applique : voir R. Sullivan, *Sullivan on*

although "trade secrets" is a technical legal term, it does not have a comprehensive definition: R. T. Hughes, D. P. Clarizio and N. Armstrong, *Hughes & Woodley on Patents* (2nd ed. (loose-leaf)), at §102; R. T. Hughes and D. P. Clarizio, *Halsbury's Laws of Canada — Patents, Trade Secrets and Industrial Designs* (2007), "Trade Secret", at para. HPT-180.

[105] I turn next to the broad legal context of the term as understood in the civil and common law. In Quebec civil law, two expressions are used to convey the notion of trade secret: "*secret industriel*" and "*secret commercial*". While these are technical legal terms, as they are in the common law, they do not have comprehensive definitions. R. Doray and F. Charette, in *Accès à l'information: loi annotée: jurisprudence, analyse et commentaires* (loose-leaf), at p. II/22-4, in fact suggest that "*secret industriel*" is a common law notion. I would note, however, that the French-language phrase "*secrets industriels*", which is the phrase used in the French version of the Act, suggests that the information referred to must relate to a technical matter capable of commercial or industrial application: see S. Parisien, *Les secrets commerciaux et la Loi sur l'accès à l'information du Québec* (1993), at pp. 22-25, on the meaning of "*secret industriel*" in the equivalent Quebec legislation. At common law, it is clear that a trade secret is a subset of confidential commercial information, but, other than in the employment setting, the common law has tended not to make a clear distinction between trade secrets and the broader category of confidential commercial information: see, e.g., *R. v. Stewart*, [1988] 1 S.C.R. 963, at pp. 974-75; D. Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981), 5 *Can. Bus. L.J.* 253, at p. 258.

[106] Turning next to the scheme of the Act, this distinction between trade secrets and confidential commercial information finds expression in ss. 20(1)(*a*) and 20(1)(*b*). The former provision provides

the Construction of Statutes (5e éd. 2008), p. 57-58. Toutefois, même s'il a un sens technique propre au domaine juridique, le terme « secrets industriels » ne fait l'objet d'aucune définition exhaustive : R. T. Hughes, D. P. Clarizio et N. Armstrong, *Hughes & Woodley on Patents* (2e éd. (feuilles mobiles)), §102; R. T. Hughes et D. P. Clarizio, *Halsbury's Laws of Canada — Patents, Trade Secrets and Industrial Designs* (2007), « Trade Secret », par. HPT-180.

[105] J'examinerai maintenant le contexte juridique général du terme au sens du droit civil et de la common law. En droit civil québécois, deux expressions sont utilisées pour transmettre l'idée de secret industriel : « secret industriel » et « secret commercial ». Bien qu'il s'agisse de termes techniques propres au domaine juridique, comme c'est le cas en common law, ils ne sont pas l'objet de définitions exhaustives. En fait, R. Doray et F. Charette affirment dans l'ouvrage intitulé *Accès à l'information : loi annotée : jurisprudence, analyse et commentaires* (feuilles mobiles), à la p. II/22-4, que le « secret industriel » est une notion de common law. Je souligne toutefois que le terme « secrets industriels », qui est utilisé dans la Loi, donne à penser que les renseignements en cause doivent se rapporter à un aspect technique susceptible d'application commerciale ou industrielle : voir S. Parisien, *Les secrets commerciaux et la Loi sur l'accès à l'information du Québec* (1993), p. 22-25, quant au sens du terme « secret industriel » dans la loi québécoise correspondante. En common law, il est clair que les secrets industriels sont une sous-catégorie de renseignements commerciaux de nature confidentielle, mais, sauf dans le contexte du droit du travail, on a eu tendance à ne pas faire de distinction nette entre les secrets industriels et la catégorie plus large des renseignements commerciaux de nature confidentielle : voir, p. ex., *R. c. Stewart*, [1988] 1 R.C.S. 963, p. 974-975; D. Vaver, « Civil Liability for Taking or Using Trade Secrets in Canada » (1981), 5 *Rev. can. dr. comm.* 253, p. 258.

[106] En ce qui concerne le régime prévu par la Loi, cette distinction entre les secrets industriels et les renseignements commerciaux de nature confidentielle se reflète aux al. 20(1)*a*) et *b*). La première

for an exemption for trade secrets, while the latter provision provides separately for an exemption for confidential financial, commercial, scientific or technical information. This suggests that "trade secrets" in s. 20(1)(*a*) was intended to be a narrower concept than the more general class of confidential, financial, commercial, scientific or technical information set out in s. 20(1)(*b*). That a narrower ambit for trade secrets must have been intended is reinforced by the fact that the trade secrets exemption is not subject to the public interest override in s. 20(6), while the confidential information exemption in s. 20(1)(*b*) is subject to it. This approach also accords with the principle that exceptions to the right of access should be limited and specific (s. 2(1)). In this way, the Act's purpose of providing broad access rights is protected.

disposition prévoit une exception en matière de secrets industriels, alors que la seconde prévoit des exceptions distinctes pour ce qui est des renseignements financiers, commerciaux, scientifiques ou techniques qui sont de nature confidentielle. Cela donne à penser que le législateur a voulu que la notion de « secrets industriels » dont il est question à l'al. 20(1)*a*) soit plus étroite que la catégorie plus générale des renseignements financiers, commerciaux, scientifiques ou techniques de nature confidentielle mentionnés à l'al. 20(1)*b*). Cette hypothèse est étayée par le fait que l'exception relative aux secrets industriels n'est pas visée par la dérogation en matière d'intérêt public prévue au par. 20(6), contrairement à celle qui se rapporte aux renseignements de nature confidentielle prévue à l'al. 20(1)*b*). Cette approche est également compatible avec le principe que les exceptions au droit d'accès aux documents de l'administration fédérale doivent être précises et limitées (par. 2(1)). Ainsi, l'objet de la Loi, qui vise à accorder des droits d'accès étendus, est protégé.

[107] I turn to discuss a few of the leading authorities. One often-cited case is the decision of Chevrier J. in *R. I. Crain Ltd. v. Ashton*, [1949] O.R. 303 (H.C.J.), aff'd [1950] O.R. 62 (C.A.). In the context of an action against a former employee to restrain disclosure of the former employer's trade secrets, several characteristics of a trade secret are set out. These include that it is a plan or process, tool, mechanism or compound known only to its owner and his employees to whom it is necessary to confide it and that it usually is understood to mean a secret formula or process *not patented* but known only to certain individuals using it in compounding some article of trade having a commercial value (pp. 308-9).

[107] J'examinerai maintenant quelques-unes des décisions de principe en la matière. On invoque souvent la décision rendue par le juge Chevrier dans *R. I. Crain Ltd. c. Ashton*, [1949] O.R. 303 (H.C.J.), conf. par [1950] O.R. 62 (C.A.). Dans le contexte d'une action intentée par un employeur contre un ancien employé afin d'empêcher la divulgation de ses secrets industriels, plusieurs des caractéristiques du secret industriel ont été décrites. Il peut s'agir d'un plan ou procédé, d'un outil, d'un mécanisme ou d'un composé, qui n'est connu que de son propriétaire et de ses employés à qui il est nécessaire de le confier, et qui s'entend habituellement d'une formule secrète ou d'un procédé *non brevetés* qui ne sont connus que de certaines personnes qui l'utilisent dans la composition d'un quelconque article de commerce ayant une valeur commerciale (p. 308-309).

[108] I should refer as well to two other influential decisions concerning the definition of a "trade secret". In *Société Gamma*, Strayer J. considered Société's claim that tender submissions it made in connection with its bid to obtain a contract for translation services constituted a trade secret and

[108] Je crois utile de faire aussi mention de deux autres décisions influentes concernant la définition du « secret industriel ». Dans *Société Gamma*, le juge Strayer a examiné la prétention de la requérante selon laquelle les appels d'offres qu'elle avait faits en vue d'obtenir un contrat de services

were therefore exempt from disclosure. He noted that there is no need to demonstrate harm in order to fall within either the trade secret or the confidential commercial information exemption and that there must be some difference between a "trade secret" and something which is merely "confidential" and supplied to a government institution. He then defined "trade secret" as follows, at pp. 62-63:

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.

* This impression is strengthened by the French version which uses the term "secrets industriels" as the equivalent of "trade secret".

[109] Another influential decision is that of Phelan J. in *AstraZeneca*, which was a review of a decision to release records related to an NDS. Phelan J. held that Parliament's intention was to protect genuine trade secrets based on the common law definition of the term. He cited the *Société Gamma* definition, but noted that the question is not whether the interpretation of "trade secrets" should be broad or narrow but whether the record falls within the legal definition of "trade secrets" (paras. 62-63). He referred with apparent approval to Health Canada's *Access to Information Act — Third Party Information — Operational Guidelines*, which sets out four criteria to be met by a trade secret (para. 64). These elements are the same as in the Guidelines in evidence before us, which read:

- the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);

de traduction constituaient un secret industriel et étaient donc soustraits à la communication. Il a souligné qu'il n'était pas nécessaire d'établir l'existence d'un préjudice afin de bénéficier de l'exception en matière de secret industriel ou de celle relative aux renseignements commerciaux de nature confidentielle, et qu'il devait y avoir une certaine différence entre le « secret industriel » et le simple renseignement « confidentiel » fourni à une institution fédérale. Il a ensuite défini comme suit le « secret industriel », au par. 7 :

Pour ma part, j'estime qu'un secret industriel doit être un renseignement, probablement de caractère technique* que l'on garde très jalousement et qui est pour celui qui le possède tellement précieux que sa seule divulgation ferait naître en faveur de ce possesseur une présomption de préjudice.

* La version française, qui donne « secrets industriels » comme équivalent de l'expression anglaise « trade secrets », vient renforcer cette impression.

[109] Je mentionne également la décision influente que le juge Phelan a rendue dans *AstraZeneca*. Il s'agissait de l'examen d'une décision de communiquer des documents liés à une PDN. Le juge Phelan a conclu que l'intention du législateur était de protéger les secrets industriels véritables selon la définition du terme en common law. Il a fait référence à la définition de ce terme dans *Société Gamma*, mais a souligné que la question n'était pas tant de savoir s'il convenait d'interpréter cette définition de façon large ou restrictive, mais plutôt si les renseignements en cause étaient visés par la définition juridique du « secret industriel » (par. 62-63). Il a fait mention, apparemment avec approbation, d'un document de Santé Canada intitulé *Lignes directrices opérationnelles concernant la Loi sur l'accès à l'information et l'information portant sur des tiers*, qui prévoit quatre critères à satisfaire pour que le renseignement visé constitue un secret industriel (par. 64). Ces éléments sont les mêmes que ceux qui figurent dans les lignes directrices dont nous sommes saisis, qui sont ainsi libellés :

- l'information doit être secrète dans un sens absolu ou relatif (c'est-à-dire qu'elle est connue seulement d'une ou de quelques personnes);

- 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 (e.g. an economic interest) worthy of legal protection. [Annex A]

[110] Phelan J. concluded, at para. 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.

[111] Health Canada argues that this is the appropriate definition of "trade secret". I agree. I particularly underline Phelan J.'s comment that the point is not whether the term is to receive a "broad" or a "narrow" definition (para. 63), but rather that the term should be given its traditional legal meaning.

[112] Phelan J.'s reasons, along with the portion of the Guidelines which he adopts, appropriately capture that traditional legal meaning. A "trade secret" for the purposes of s. 20(1) of the Act should be understood as being a plan or process, tool, mechanism or compound which possesses each of the four characteristics set out in the Guidelines which I have quoted above. This approach is consistent with the common law definition of "trade secrets" and takes account of the clear legislative intent that a trade secret is something different from the broader category of confidential commercial information which is separately and specifically protected under the Act. This approach is also consistent with the use of "*secrets industriels*" in the French version of the Act, as discussed above.

[113] Merck suggests that the *Security of Information Act*, R.S.C. 1985, c. O-5, s. 19(4),

- le détenteur de l'information doit démontrer qu'il a agi avec l'intention de traiter l'information comme si elle était secrète;

- l'information doit avoir une application pratique dans le secteur industriel ou commercial;

- le détenteur doit avoir un intérêt (par exemple, un intérêt économique) digne d'être protégé par la loi. [annexe A]

[110] Le juge Phelan a conclu ce qui suit, au par. 65 :

Le genre de renseignements qui est susceptible de tomber dans cette catégorie inclut la composition chimique d'un produit et les procédés de fabrication utilisés. Toutefois, ce ne sont pas tous les procédés ou tous les essais qui se rangeraient dans cette catégorie, surtout lorsque, dans une industrie particulière, le procédé ou l'essai en question est répandu.

[111] Santé Canada prétend qu'il s'agit là de la définition correcte du « secret industriel ». Je souscris à cette opinion. Je souligne en particulier les propos du juge Phelan selon lesquels la question n'est pas de savoir si le terme doit être défini de façon « large » ou « restrictive » (par. 63), mais plutôt si le terme devrait recevoir son sens juridique traditionnel.

[112] Les motifs du juge Phelan, ainsi que la partie des lignes directrices qu'il adopte, traduisent convenablement ce sens juridique traditionnel. Pour les fins du par. 20(1) de la Loi, le « secret industriel » doit s'entendre d'un plan ou procédé, d'un outil, d'un mécanisme ou d'un composé qui possède chacune des quatre caractéristiques énoncées dans les lignes directrices et dont je viens de faire mention. Cette approche est conforme à la définition du « secret industriel » en common law et elle tient compte du fait que le législateur a manifestement voulu que le secret industriel soit distinct de la catégorie plus large des renseignements commerciaux de nature confidentielle, lesquels font expressément l'objet d'une protection légale qui leur est propre. Cette approche est également conforme à l'utilisation du terme « secrets industriels » dans la Loi, comme je l'ai déjà mentionné.

[113] Merck affirme que le par. 19(4) de la *Loi sur la protection de l'information*, L.R.C. 1985, ch. O-5,

and the NAFTA definitions of "trade secret" should colour the definition to be given to "trade secrets" under the Act. Merck, however, stops short of advancing a particular definition, submitting simply that the term must be defined in a way that is consistent with other federal statutes and Canada's international treaty obligations.

[114] Turning to the former point first, Merck argues that "trade secrets" in the Act should be interpreted consistently with the definition of that term in s. 19(4) of the *Security of Information Act*:

19. . . .

(4) For the purpose of this section, "trade secret" means any information, including a formula, pattern, compilation, program, method, technique, process, negotiation position or strategy or any information contained or embodied in a product, device or mechanism that

(*a*) is or may be used in a trade or business;

(*b*) is not generally known in that trade or business;

(*c*) has economic value from not being generally known; and

(*d*) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[115] Merck also argues that the Act's notion of a "trade secret" should be construed according to NAFTA which provides, at art. 1711:

1. Each Party shall provide the legal means for any person to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices, in so far as:

et la façon dont les secrets commerciaux sont définis dans l'ALÉNA doivent avoir une incidence sur l'interprétation du terme « secrets industriels » dans la Loi. Toutefois, Merck ne va pas jusqu'à en proposer une définition particulière, se contentant de faire valoir qu'il convient de définir ce terme d'une manière compatible avec les autres lois fédérales et les obligations du Canada issues de traités internationaux.

[114] En ce qui concerne le premier point, Merck prétend qu'il convient de donner à la notion de « secrets industriels » dans la Loi une interprétation compatible avec la définition de « secret industriel » qui se trouve au par. 19(4) de la *Loi sur la protection de l'information* :

19. . . .

(4) Pour l'application du présent article, « secret industriel » s'entend des renseignements — notamment formule, modèle, compilation, programme, méthode, technique, procédé ou position ou stratégie de négociation, ou renseignements contenus dans un produit, un appareil ou un mécanisme ou incorporés à ceux-ci — qui, à la fois :

a) sont ou peuvent être utilisés dans une industrie ou un commerce;

b) ne sont pas généralement connus dans cette industrie ou ce commerce;

c) ont une valeur économique du fait qu'ils ne sont pas généralement connus;

d) font l'objet de mesures raisonnables dans les circonstances pour en protéger le caractère confidentiel.

[115] Merck soutient également qu'il convient de donner à la notion de « secrets industriels » dans la Loi une interprétation compatible avec l'ALÉNA, qui prévoit ce qui suit à son art. 1711 :

1. Chacune des Parties assurera à toute personne les moyens juridiques d'empêcher que des secrets commerciaux ne soient divulgués à des tiers, acquis ou utilisés par eux, sans le consentement de la personne licitement en possession de ces renseignements et d'une manière contraire aux pratiques commerciales honnêtes, dans la mesure où :

(a) the information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally deal with the kind of information in question;

(b) the information has actual or potential commercial value because it is secret; and

(c) the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.

(*North American Free Trade Agreement*, Can. T.S. 1994 No. 2)

[116] I am not persuaded by these submissions. I am not sure there is much difference between the definition in *AstraZeneca* and the definition in the *Security of Information Act*. Moreover, we cannot simply incorporate into the *Access to Information Act*, which contains no definition of the term "trade secrets", definitions adopted in different contexts. The *Official Secrets Act* was amended in the wake of the September 11, 2001 attacks as part of the *Anti-terrorism Act*, S.C. 2001, c. 41, where it was renamed the *Security of Information Act* (s. 25). The definition of "trade secret" in s. 19(4) was part of that initiative. The purposes of the *Access to Information Act* and the *Security of Information Act* are significantly different. While maintaining national security is not incompatible with ensuring government accountability and democracy, it seems clear that access to information may be limited where issues of national security come into play: see ss. 15 and 16 of the Act. Therefore, it would not be appropriate to import into the access to information context the definition of "trade secret" set out under the heading Economic Espionage in the *Security of Information Act*.

[117] As for the appellant's reliance on art. 1711 of NAFTA, it does not support the conclusion for which Merck contends. Before discussing the

a) les renseignements sont secrets, en ce sens que, dans leur globalité ou dans la configuration et l'assemblage exacts de leurs éléments, ils ne sont pas généralement connus de personnes appartenant aux milieux qui s'occupent normalement du genre de renseignements en question ou ne leur sont pas aisément accessibles;

b) les renseignements ont une valeur commerciale, réelle ou potentielle, du fait qu'ils sont secrets; et

c) la personne licitement en possession de ces renseignements a pris des dispositions raisonnables, compte tenu des circonstances, en vue de les garder secrets.

(*Accord de libre-échange nord-américain*, R.T. Can. 1994 n° 2)

[116] Ces arguments ne me convainquent pas. En effet, je ne crois pas qu'il y ait une grande différence entre la définition énoncée dans *AstraZeneca* et celle qui figure dans la *Loi sur la protection de l'information*. En outre, nous ne pouvons pas introduire tout bonnement dans la Loi — qui ne contient aucune définition du terme « secrets industriels » — des définitions élaborées dans d'autres contextes. La *Loi sur les secrets officiels* a été modifiée dans la foulée des attentats du 11 septembre 2001 par la *Loi antiterroriste*, L.C. 2001, ch. 41, qui en a remplacé le titre par *Loi sur la protection de l'information* (art. 25). C'est à cette occasion que la définition de « secret industriel », qui se trouve au par. 19(4) de cette loi, y a été ajoutée. Les objets que visent la Loi, d'une part, et la *Loi sur la protection de l'information*, d'autre part, diffèrent grandement. Le maintien de la sécurité nationale n'est certes pas incompatible avec le fait d'assurer la responsabilité de l'administration publique et la protection de la démocratie, mais il semble clair que l'accès à l'information peut parfois être limité dans les cas où la sécurité nationale entre en jeu : voir les art. 15 et 16 de la Loi. Par conséquent, il ne conviendrait pas d'introduire dans le contexte de l'accès à l'information la définition de « secret industriel » qui figure dans la *Loi sur la protection de l'information* sous la rubrique qui traite de l'espionnage économique.

[117] Quant à l'argument de l'appelante fondé sur l'art. 1711 de l'ALÉNA, j'estime qu'il n'étaye pas la conclusion que cette dernière cherche à faire

significance of the NAFTA definition, I would note that art. 39 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299 ("TRIPS"), is also potentially relevant. This article calls for the protection of secret, commercially valuable "information". I accept, of course, that to the extent possible domestic legislation should be interpreted so that it is consistent with Canada's international obligations: see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; see also, e.g., *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70; and *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 50. However, Canada is not necessarily required to adopt the treaty definition of "trade secrets" into its access to information law in order to fulfill its treaty obligations. These obligations could be fulfilled in other ways. As the respondent notes, Canada has opted to address these obligations in the pharmaceutical context by focussing on protecting parties against commercial use of their trade secrets by others. The amendments to the *Food and Drug Regulations* in 1995 and 2006 reflect this approach: *Food and Drug Regulations, amendment*, SOR/95-411, and *Regulations Amending the Food and Drug Regulations (Data Protection)*, SOR/2006-241. It would not be appropriate to decide in this case whether this complies with Canada's treaty obligations. This choice of approach, however, undermines Merck's argument that Parliament intended the definition of "trade secret" in s. 20(1)(*a*) to mirror the NAFTA definition.

[118] Similarly, protection of a broader class of confidential commercial information under s. 20(1)(*b*) and the protection of personal information under s. 19 of the Act further weaken Merck's argument in relation to s. 20(1)(*a*). These provisions cover information that may be caught by

valoir. Mais avant de discuter de l'importance de la définition figurant dans l'ALÉNA, j'aimerais souligner que l'art. 39 de l'*Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce*, 1869 R.T.N.U. 332 (« ADPIC »), pourrait aussi être pertinent. Cet article exige la protection des « renseignements » secrets ayant une valeur commerciale. J'accepte évidemment que, dans la mesure du possible, les lois internes devraient être interprétées de façon à être compatibles avec les obligations internationales du Canada : voir *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 53; voir également, p. ex., *Zingre c. La Reine*, [1981] 2 R.C.S. 392, p. 409-410; *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437, par. 137; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 70; et *Schreiber c. Canada (Procureur général)*, 2002 CSC 62, [2002] 3 R.C.S. 269, par. 50. Toutefois, le Canada ne doit pas nécessairement reprendre dans sa loi sur l'accès à l'information la définition des « secrets industriels » qui figure dans les traités afin de remplir ses obligations issues de traités. En effet, il existe d'autres moyens de remplir ces obligations. Comme le souligne l'intimé, le Canada a choisi de s'acquitter de ses obligations dans le contexte pharmaceutique en mettant l'accent sur la protection des parties contre l'utilisation commerciale de leurs secrets industriels par des tiers. Les modifications apportées au *Règlement sur les aliments et drogues* en 1995 et 2006 reflètent cette approche : *Règlement sur les aliments et drogues — Modification*, DORS/95-411, et *Règlement modifiant le Règlement sur les aliments et drogues (protection des données)*, DORS/2006-241. Il n'y a pas lieu de décider en l'espèce si cela est conforme ou non aux obligations du Canada issues de traités. Toutefois, cette façon de procéder mine l'argument de Merck que le législateur voulait que la notion de « secrets industriels » à l'al. 20(1)*a*) soit le reflet fidèle de ce que contient l'ALÉNA.

[118] Dans le même ordre d'idée, la protection d'une catégorie plus large de renseignements commerciaux de nature confidentielle que confère l'al. 20(1)*b*) et celle des renseignements personnels que prévoit l'art. 19 de la Loi affaiblissent davantage l'argument de Merck relativement à l'al. 20(1)*a*).

the purportedly wider art. 1711 of NAFTA and art. 39 of TRIPS. This suggests that Parliament has intended to fulfill its international obligations by means that go beyond protection of "trade secrets" under s. 20(1)(*a*). I conclude that consideration of NAFTA and TRIPS does not indicate that Parliament intended a definition of "trade secrets" that is broader than the definition I have endorsed above.

Ces dispositions portent sur les renseignements susceptibles d'être visés par l'art. 1711 de l'ALÉNA et l'art. 39 de l'ADPIC, dont la portée, fait-on valoir, est plus étendue. Cela donne à penser que le législateur a voulu s'acquitter de ses obligations internationales par le biais de moyens qui dépassent la protection des « secrets industriels » que confère l'al. 20(1)*a*). À mon avis, il ne ressort nullement de l'examen de l'ALÉNA et de l'ADPIC que le législateur a voulu créer une définition des « secrets industriels » dont la portée serait plus large que celle de la définition à laquelle je viens de souscrire.

[119] The Court of Appeal, while citing *AstraZeneca* and the Guidelines, insisted that "trade secrets" should be interpreted restrictively and that the jurisprudential threshold for invoking this exemption is high. These comments, in my respectful view, do not reflect the correct approach to this exemption. The question on review is simply whether the party claiming the exemption has established on the balance of probabilities that the record falls within the definition I have set out above.

[119] La Cour d'appel fédérale, bien qu'elle ait invoqué *AstraZeneca* et les lignes directrices à l'appui de son raisonnement, a insisté que les « secrets industriels » devaient être interprétés de façon restrictive et que le seuil qui se dégage de la jurisprudence pour invoquer cette exception est élevé. Ces commentaires, à mon humble avis, ne reflètent pas la façon dont il convient d'aborder cette exception. La question à trancher est simplement de savoir si la partie invoquant l'exception a établi selon la prépondérance des probabilités que le dossier était visé par la définition que j'ai décrite.

(c) *Application*

c) *Application*

[120] I agree with the Court of Appeal's definition of "trade secrets", but in my respectful view it placed an unduly heavy burden on Merck to establish that the definition applied as I have just outlined. By imposing the burden it did, the Court of Appeal erred in law. However, my view is that this error did not result in the Court of Appeal reaching the wrong conclusion about how s. 20(1)(*a*) applies here. In my respectful view, it did not err in finding that Merck's evidence simply was not capable of establishing that the documents, which the reviewing judge found to be exempted, contained trade secrets or revealed trade secrets.

[120] Je souscris à la définition des « secrets industriels » énoncée par la Cour d'appel fédérale, mais, à mon humble avis, celle-ci a imposé un fardeau indûment lourd à Merck en lui demandant d'établir que la définition s'appliquait comme je viens tout juste de le décrire. En imposant un tel fardeau à Merck, la Cour d'appel fédérale a commis une erreur de droit. Toutefois, selon moi, cette erreur ne l'a pas amenée à tirer la mauvaise conclusion sur la façon dont il convient d'appliquer l'al. 20(1)*a*) en l'espèce. À mon humble avis, elle n'a pas commis d'erreur en concluant que la preuve de Merck ne permettait tout simplement pas d'établir que les documents qui, selon le juge siégeant en révision, étaient visés par l'exception, contenaient des secrets industriels ou révélaient des secrets industriels.

[121] Before this Court, the parties filed a Joint Record of Pages in Issue indicating that Merck relies on the s. 20(1)(*a*) exemption for over 150

[121] Devant la Cour, les parties ont déposé un dossier conjoint sur les pages en litige indiquant que Merck invoque l'exception prévue à l'al. 20(1)*a*)

pages in the NDS and 10 pages in the SNDS, all of which are contested by Health Canada. However, Merck's submissions in this Court focus exclusively on 37 pages in the NDS which the reviewing judge concluded were exempt from disclosure because they contained trade secrets: see Beaudry J., at para. 105 (2006 FC 1201). Of these, the Joint Record indicates that 7 pages are no longer in issue. Merck contends that the records in issue contain details of the specific manufacturing process used for the drug and that such information is quintessentially a trade secret. Health Canada submits that to the extent that portions of these records reveal trade secrets, such information has been redacted.

[122] Health Canada does not seriously contest the proposition that confidential information about the specific manufacturing process used for the drug may be a "trade secret" under s. 20(1)(*a*), provided that the other elements of the definition I have outlined above are satisfied. The difficulty here is not about the definition of "trade secrets" or about how elevated the threshold is, but that Merck's evidence is not responsive to the records as currently redacted. It does not explain how what remains in the records constitutes trade secrets within the meaning of the exemption.

[123] One example will demonstrate the difficulty with Merck's position and the reviewing judge's decision. In its factum, Merck reproduces an excerpt from the affidavit of Robert Sarrazin (sworn June 1, 2001) which sets out Merck's objections to the disclosure of pages 469 and 470 of the records at issue in the NDS file: see C.A. reasons, at para. 49. Merck advances this as "an example of the supporting evidence" which Merck submits shows that "it has met any evidentiary burden upon it in relation to s. 20(1)(a) of the ATIA" (A.F., at para. 155; see also C.A. reasons, at para. 49). The reviewing judge found that both pages were exempt from disclosure, saying simply that they contained information which constituted trade secrets: see

relativement à plus de 150 pages de la PDN et à 10 pages de la PSDN, Santé Canada contestant l'application de l'exception dans chacun de ces cas. Toutefois, l'argumentation de Merck devant la Cour porte exclusivement sur 37 pages de la PDN, qui, selon le juge siégeant en révision, étaient soustraites à la communication parce qu'elles contenaient des secrets industriels : voir les motifs du juge Beaudry, par. 105 (2006 CF 1201). Selon le dossier conjoint, 7 de ces pages ne sont plus en litige. Merck prétend que les documents en litige contiennent des détails sur le procédé de fabrication de la drogue et que les renseignements de cette nature constituent invariablement des secrets industriels. Santé Canada prétend que les parties de ces documents révélant des secrets industriels en ont été retranchées.

[122] Santé Canada ne conteste pas véritablement l'affirmation selon laquelle les renseignements confidentiels sur le procédé de fabrication de la drogue peuvent constituer des « secrets industriels » pour les fins de l'al. 20(1)*a*), dans la mesure où il est établi qu'ils satisfont aux autres éléments de la définition que j'ai décrite. La difficulté, à cet égard, ne porte ni sur la définition de « secrets industriels », ni sur la question de savoir dans quelle mesure le seuil à atteindre doit être élevé, mais plutôt sur l'absence de lien entre la preuve de Merck et les documents sous leur forme expurgée actuelle. En effet, la preuve n'explique pas en quoi les renseignements contenus dans ces documents constituent des secrets industriels qui, à ce titre, sont visés par l'exception.

[123] Il suffit d'un seul exemple pour démontrer en quoi la position de Merck et la décision du juge siégeant en révision sont problématiques. Dans son mémoire, Merck a repris un extrait de l'affidavit de Robert Sarrazin (daté du 1er juin 2001) qui explique les objections de Merck à la communication des pages 469 et 470 des documents en litige en ce qui concerne le dossier de la PDN : voir les motifs de la Cour d'appel fédérale, par. 49. Merck avance qu'il s'agit là d'[TRADUCTION] « un exemple de preuve à l'appui » qui, selon elle, établit qu'« elle s'est acquittée de la charge de la preuve qui lui incombe selon l'al. 20(1)*a*) de la Loi » (m.a., par. 155; voir également les motifs de la Cour d'appel fédérale, par. 49). Le juge siégeant en révision a conclu que ces

Beaudry J., at para. 105 (2006 FC 1201). Although Merck set out this evidence in its factum, it advised after the hearing in this Court that it is no longer seeking exemption for page 470. However, the evidence in relation to these two pages illustrates the deficiencies in the reviewing judge's decision.

[124] In his affidavit, Mr. Sarrazin objects to disclosing pages 469 and 470 because they contain certain information which in his view constitutes trade secrets. However, in the version of pages 469 and 470 which Health Canada proposed to disclose and which was before the reviewing judge, both have been heavily redacted with the entire table on page 470 having been removed: see C.A. reasons, at paras. 49 and 51. Thus, the evidence before the reviewing judge from Merck was that these pages contained trade secrets while Health Canada's evidence was that it had agreed to delete all such content and indeed that the content of the table on page 470 had been deleted more than four years before the hearing before the reviewing judge. On this record, the reviewing judge's conclusion that virtually blank pages constituted trade secrets is a palpable and overriding error.

[125] As noted in *Housen*, the failure of a judge at first instance to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence (para. 39). However, the judge's failure to address relevant matters may constitute a material error justifying appellate intervention if the omission gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his or her conclusion: *Housen*, at para. 39, citing *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15. In this case, the reviewing judge ruled that an essentially blank page is a trade secret. He made this ruling

deux pages étaient soustraites à la communication, en disant simplement qu'elles contenaient des renseignements qui constituaient des secrets industriels : voir les motifs du juge Beaudry, par. 105 (2006 CF 1201). Bien qu'elle ait invoqué cette preuve dans son mémoire, Merck a déclaré, après l'audience devant notre Cour, qu'elle ne s'opposait plus à la communication de la page 470. Cependant, la preuve se rapportant à ces deux pages fait ressortir les lacunes de la décision du juge siégeant en révision.

[124] Dans son affidavit, M. Sarrazin s'opposait à la communication des pages 469 et 470 au motif qu'elles contenaient certains renseignements qui, à ses dires, constituaient des secrets industriels. Mais les versions de ces pages que Santé Canada entendait communiquer et dont le juge siégeant en révision disposait ont toutes les deux été grandement expurgées, le tableau de la page 470 ayant même été éliminé au complet : voir les motifs de la Cour d'appel fédérale, par. 49 et 51. Par conséquent, selon la preuve de Merck dont disposait le juge siégeant en révision, ces pages contenaient des secrets industriels, alors qu'il ressort de la preuve de Santé Canada que le ministère avait accepté de retirer tout le contenu de cette nature, ayant même éliminé le contenu du tableau de la page 470 plus de quatre ans avant l'audition devant le juge. Compte tenu du dossier, la conclusion du juge que des pages qui ne contenaient presque plus rien constituaient des secrets industriels est une erreur manifeste et dominante.

[125] Comme il a été souligné dans *Housen*, l'omission d'un juge de première instance d'examiner en profondeur un facteur pertinent, voire d'aborder la question, ne constitue pas à elle seule un fondement suffisant pour permettre à une cour d'appel d'apprécier la preuve à son tour (par. 39). Cependant, l'omission du juge de traiter de questions pertinentes peut constituer une erreur matérielle justifiant l'intervention de la cour d'appel si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée : *Housen*, par. 39, citant *Van de Perre c. Edwards*, 2001 CSC 60, [2001] 2

without referring to either the applicable legal test or to the relevant evidence. This, in my respectful view, was a material error as discussed in *Housen* and justified the Federal Court of Appeal's intervention. While it could have decided to remit the matter for further review by a judge at first instance, the fact that the record had already been the subject of two review processes in the Federal Court supports its decision to review the record and apply the exemption itself.

[126] I agree with my colleague Deschamps J. that a reviewing judge should not be required to provide a word-by-word, line-by-line, or even page-by-page explanation for his or her decision and that, if appropriate, the judge can address the case on the basis of categories of records. However, there is some considerable distance between a judge not providing a word-by-word explanation and, as here, a judge providing no explanation at all in circumstances that give rise to a reasoned belief that the judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. It is well within the bounds of deference as described in *Housen* for an appellate court to reconsider the record in these circumstances.

[127] I would therefore uphold the decision of the Court of Appeal which set aside the reviewing judge's decision that these documents fall within the exemption.

(3) The Section 20(1)(*b*) Exemption

(a) *Introduction*

[128] Section 20(1)(*b*) provides an exemption for a third party's confidential financial, commercial, scientific or technical information:

R.C.S. 1014, par. 15. En l'espèce, le juge siégeant en révision a conclu qu'une page à peu près vidée de son contenu constituait un secret industriel. Il a tiré cette conclusion sans faire référence au critère juridique applicable ou à la preuve pertinente. J'estime en toute déférence que cela constituait une erreur matérielle au sens de *Housen* qui justifiait l'intervention de la Cour d'appel fédérale. Certes, la Cour d'appel fédérale aurait pu décider de renvoyer l'affaire à un juge de première instance pour qu'il l'examine à son tour, mais le fait que le dossier avait déjà fait l'objet de deux processus de révision en Cour fédérale étaye sa décision d'examiner elle-même le dossier et d'appliquer l'exception invoquée.

[126] Je suis d'accord avec ma collègue la juge Deschamps que le juge siégeant en révision ne doit pas être tenu de justifier sa décision en faisant référence à chaque mot, chaque ligne, voire chaque page en litige, et qu'il peut traiter de l'affaire selon l'approche catégorielle s'il y a lieu. Cependant, l'omission d'un juge de fournir une explication en faisant référence à chaque mot diffère grandement de l'absence de toute explication de la part du juge, comme c'est le cas en l'espèce, dans des circonstances qui donnent lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. La cour d'appel qui fait son propre examen du dossier dans ces circonstances fait preuve d'un niveau de déférence qui respecte tout à fait les limites décrites dans *Housen*.

[127] Je suis donc d'avis de confirmer la décision par laquelle la Cour d'appel fédérale a annulé la décision du juge siégeant en révision que ces documents étaient visés par l'exception.

(3) L'exception prévue à l'al. 20(1)*b*)

a) *Introduction*

[128] L'alinéa 20(1)*b*) prévoit une exception qui s'applique aux renseignements financiers, commerciaux, scientifiques ou techniques de nature confidentielle qui sont fournis par un tiers :

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

. . .

(*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;

[129] The reviewing judge upheld the exemptions Merck claimed with respect to 6 documents or portions of documents in the NDS file, and 49 documents in the SNDS file of which 44 remain in dispute. In both files, the reviewing judge noted that information found in the public domain, even if in a different form, is no longer confidential and then simply stated, without referring to the evidence or offering any further explanation, that certain pages were exempt from disclosure under s. 20(1)(*b*) because they contained confidential information that had been treated as such by Merck and was not in the public domain: see Beaudry J., at paras. 95 and 106 (2006 FC 1201), and at paras. 103 and 113 (2006 FC 1200).

[130] The Federal Court of Appeal set aside these findings. In the NDS file, it found that Merck's evidence was not responsive to the most recent redacted version of the documents in issue and that Merck had not provided any direct and objective evidence bringing those documents within the s. 20(1)(*b*) exemption (paras. 67-77). With respect to the SNDS file, the Court of Appeal similarly found an absence of evidence from Merck that the documents in issue were confidential or treated as such. If the Court of Appeal was correct that there was no evidence to support the reviewing judge's conclusion, appellate intervention was justified (*Housen*, at para. 1).

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

. . .

b) 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;

[129] Le juge siégeant en révision a donné raison à Merck pour ce qui est des exceptions qu'elle a invoquées relativement à 6 documents ou parties de documents contenus dans le dossier de la PDN et 49 documents figurant dans celui de la PSDN, dont 44 sont toujours en litige. Le juge siégeant en révision a souligné, relativement à l'un et l'autre dossier, que les renseignements qui font partie du domaine public, même s'ils sont présentés différemment, ne sont plus confidentiels, et il a ajouté simplement, sans faire référence à la preuve et sans fournir d'autres explications, que certaines pages étaient visées par l'exception prévue à l'al. 20(1)*b*) parce qu'elles contenaient des renseignements confidentiels que Merck avait considérés comme tels et qui ne faisaient pas partie du domaine public : voir les motifs du juge Beaudry, par. 95 et 106 (2006 CF 1201), et par. 103 et 113 (2006 CF 1200).

[130] La Cour d'appel fédérale a annulé ces conclusions. Pour ce qui est du dossier se rapportant à la PDN, elle a conclu que la preuve de Merck ne tenait pas compte de la version expurgée la plus récente des documents en question et que Merck n'avait présenté aucune preuve directe et objective établissant qu'ils étaient visés par l'exception prévue à l'al. 20(1)*b*) (par. 67-77). En ce qui concerne le dossier de la PSDN, la Cour d'appel fédérale a pareillement conclu que Merck n'avait présenté aucune preuve démontrant que les documents en cause étaient confidentiels ou traités comme tels. Or, si la Cour d'appel fédérale a eu raison de conclure à l'absence de toute preuve étayant la conclusion du juge siégeant en révision, c'est à bon droit qu'elle est intervenue (*Housen*, par. 1).

[131] Merck asks us to conclude that all of the documents still in issue for which it claims a s. 20(1)(*b*) exemption should not be disclosed. Thus, it seeks not only exemption with respect to those pages for which the reviewing judge upheld Merck's objections, but also a finding that all of its other claimed s. 20(1)(*b*) exemptions as set out in the Joint Record of Pages in Issue should be upheld.

[132] Merck challenges the Court of Appeal's conclusion that there was no evidence to show the records in issue were exempt. I will address its submissions on that point at the end of this section. Three other issues also arise with respect to s. 20(1)(*b*). Two relate to whether the records are confidential financial, commercial, scientific or technical information. The third issue relates to what constitutes information "supplied to a government institution by a third party". It will be helpful to explain how these issues arise before turning to a more detailed discussion of them.

[133] In order to qualify for the exemption, the information must be (i) financial, commercial, scientific or technical information; (ii) confidential and consistently treated in a confidential manner by the third party; and (iii) supplied to a government institution by a third party. The parties accept the factors identified by MacKay J. in *Air Atonabee* as being appropriate to consider the question of whether information is confidential within the meaning of s. 20(1)(*b*).

[134] The first of those factors considers whether the information in the record has already been made publicly available (*Air Atonabee*, at p. 272). In particular, the question is whether disclosure by the government institution of a compilation of publicly available scientific articles in an NDS or SNDS to a competitor of the third party discloses more information than is already available in the public domain. Merck's position is that the records contain confidential "financial,

[131] Merck nous demande de conclure que l'ensemble des documents toujours en litige à l'égard desquels elle invoque l'exception prévue à l'al. 20(1)*b*) ne doivent pas être communiqués. Ainsi, elle cherche à obtenir non seulement que les pages à l'égard desquelles le juge siégeant en révision a accepté ses objections soient soustraites à la communication, mais également que la Cour fasse droit à toutes les autres exceptions qu'elle a invoquées en se fondant sur l'al. 20(1)*b*) et qui sont énumérées dans le dossier conjoint sur les pages en litige.

[132] Merck conteste la conclusion de la Cour d'appel fédérale selon laquelle aucune preuve n'établissait que les documents en litige étaient visés par l'exception. J'examinerai les observations qu'elle a présentées à cet égard à la fin de la présente partie. Trois autres questions se posent relativement à l'al. 20(1)*b*). Deux d'entre elles portent sur la question de savoir si les documents en cause sont des renseignements financiers, commerciaux, scientifiques ou techniques de nature confidentielle, et la troisième, sur celle de savoir ce qui constitue des renseignements « fournis à une institution fédérale par un tiers ». Il est utile d'expliquer dans quel contexte ces questions se posent avant de les étudier en détail.

[133] Pour être visés par l'exception, les renseignements doivent être (i) financiers, commerciaux, scientifiques ou techniques, (ii) de nature confidentielle et traités comme tels de façon constante par le tiers, et (iii) fournis à une institution fédérale par un tiers. Les parties acceptent que les facteurs énumérés par le juge MacKay dans *Air Atonabee* sont à prendre en considération pour décider si les renseignements visés sont de nature confidentielle au sens de l'al. 20(1)*b*).

[134] Le premier de ces facteurs porte sur la question de savoir si les renseignements contenus dans le document visé ont déjà été rendus publics (*Air Atonabee*, par. 41). En particulier, il s'agit de savoir si la communication à un concurrent du tiers, par une institution fédérale, d'une compilation d'articles scientifiques accessibles au public figurant dans une PDN ou une PSDN équivaut à une divulgation de plus de renseignements que ceux qui font déjà partie du domaine public. Merck soutient que

commercial, scientific or technical information" of two different sorts.

[135] The first type of confidential information is the substantive content of the record, that is, the information directly relayed by its contents. An example is a record that refers to the findings of a confidential study. The confidential information is the substantive content of the study itself. This aspect of Merck's objection was the focus of the Court of Appeal's reasoning. I will come back to this question; for now, it is worth noting that its resolution turns mostly on the evidence about whether Health Canada's redactions had removed this sort of confidential information.

[136] Merck's submission that there is a second type of confidential information depends on a more subtle argument. It contends that, quite apart from whether the substantive contents of the record are confidential, the manner in which the information is presented and the fact that Merck listed a particular study or relied on it in a particular way are both confidential scientific, or technical information within the meaning of s. 20(1)(*b*). I will address these points in turn.

(b) *Formatting and Structure of the Submission*

[137] The Court of Appeal noted that, before it, the scientific or technical nature of the information was not contested (para. 64). In the submissions in this Court, that is also the case with respect to the substantive content of much of the information. However, the parties are divided about whether Merck's formatting and structure of the submission are confidential, financial, commercial, scientific or technical information for the purposes of the s. 20(1)(*b*) exemption. Merck argues that they are.

les documents contiennent deux types de « renseignements financiers, commerciaux, scientifiques ou techniques » de nature confidentielle.

[135] Le premier type de renseignements confidentiels est le contenu substantif du dossier, c'est-à-dire les renseignements directement transmis par son contenu. C'est le cas par exemple d'un document qui fait référence aux conclusions tirées dans le cadre d'une étude de nature confidentielle. Dans un tel cas, c'est le contenu substantif de l'étude elle-même qui constitue les renseignements confidentiels. Cet aspect de l'objection de Merck était l'élément central du raisonnement de la Cour d'appel fédérale. Je reviendrai sur cette question; pour l'instant, il est utile de souligner que la réponse à la question de savoir si l'objection de Merck est fondée dépend surtout de la preuve concernant celle de savoir si Santé Canada avait retranché ce genre de renseignements confidentiels en expurgeant les documents.

[136] La prétention de Merck qu'il existe un deuxième type de renseignements confidentiels dépend d'un argument plus subtil. Selon cet argument, indépendamment de la question de savoir si le contenu substantif du dossier est de nature confidentielle, la façon dont les renseignements sont présentés et le fait que Merck ait mentionné une étude particulière ou qu'elle se soit fondée sur celle-ci d'une quelconque façon constituent tous les deux des renseignements scientifiques ou techniques de nature confidentielle au sens de l'al. 20(1)*b*). J'examinerai ces éléments à tour de rôle.

b) *Mise en forme et structure de la présentation*

[137] La Cour d'appel fédérale a souligné que nul n'a contesté devant elle la nature scientifique ou technique des renseignements (par. 64). Notre Cour pourrait dire la même chose au sujet des observations qui lui ont été présentées relativement au contenu substantif d'une grande partie des renseignements. Toutefois, les parties ne s'entendent pas sur la question de savoir si la mise en forme et la structure de la présentation de Merck sont des renseignements financiers, commerciaux, scientifiques

Disclosure of this information, it contends, allows competitors to use Merck's methods of assembling an NDS or an SNDS but without incurring the significant research and development time and costs that Merck expended.

[138] To address this submission, I begin by accepting three propositions that are well established in the Federal Court's jurisprudence.

[139] First, the terms "financial, commercial, scientific or technical" should be given their ordinary dictionary meanings. As MacKay J. in *Air Atonabee* stated, at p. 268:

> . . . dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.

[140] Second, the case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately "depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time" (*Air Atonabee*, at pp. 267-68).

[141] Finally, I agree that administrative details such as page and volume numbering, dates and location of information within the records are not scientific, technical, financial or commercial information (*AstraZeneca*, at para. 73).

[142] In general, the same can be said about the formatting and structure of submissions such as the choice to use a graph or table to present information or the precise organization and ordering of sections of a document the general contents of which are

ou techniques de nature confidentielle pour les fins de l'exception prévue à l'al. 20(1)*b*). Merck prétend qu'elles le sont. Selon elle, la divulgation de ces renseignements permet à des concurrents de se servir de ses méthodes de présentation d'une PDN ou d'une PSDN, et ce, sans avoir à y consacrer le temps et les ressources qu'elle a investis sur les plans de la recherche et du développement.

[138] Dans l'appréciation de cet argument, j'accepte d'entrée de jeu trois affirmations qui sont bien établies dans la jurisprudence de la Cour fédérale.

[139] D'abord, il convient de donner aux termes « financiers, commerciaux, scientifiques ou techniques » leur sens lexicographique ordinaire. Le juge MacKay a affirmé ce qui suit dans *Air Atonabee*, par. 35 :

> . . . le dictionnaire est le meilleur guide et [. . .] il suffit, pour l'application du paragraphe 20(1)b), que les renseignements concernent des questions financières, commerciales, scientifiques ou techniques, au sens courant de ces termes.

[140] Ensuite, il ressort aussi de la jurisprudence que pour constituer des renseignements financiers, commerciaux, scientifiques ou techniques, les renseignements en cause n'ont pas à avoir une valeur inhérente, comme cela peut être le cas s'agissant d'une liste de clients par exemple : la valeur des renseignements « dépend en dernière analyse de l'utilisation qu'on peut en faire et leur valeur marchande dépendra du marché de ceux qui les veulent et à quelle fin, et cette valeur peut grandement fluctuer avec le temps » (*Air Atonabee*, par. 35).

[141] Enfin, je suis d'accord que les détails administratifs comme la numérotation des pages et des volumes, les dates et les passages des documents où se trouvent les renseignements ne sont pas des renseignements de nature scientifique, technique, financière ou commerciale (*AstraZeneca*, par. 73).

[142] En général, il en va de même de la mise en forme et de la structure des présentations, tels la décision de se servir d'un graphique ou d'un tableau pour présenter les renseignements ou la structure et l'ordonnancement précis des parties d'un document

the subject of publicly available guidelines as is the case here: see, e.g., *Société Gamma*, at pp. 63-64. Of course, whether or not the exemption applies must be considered in light of the nature of the information and the evidence in the particular case.

(c) *Listing of Publicly Available Studies*

[143] Merck further says that the disclosure of a compilation of publicly available scientific articles in an NDS or an SNDS discloses more information than is already in the public domain; the fact that an innovator pharmaceutical company has relied on specific studies to support approval of a specific drug is competitively valuable information that is not otherwise publicly available. Relying on *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252, 367 N.R. 134, aff'g 2005 FC 1633 (CanLII), it submits that the fact it has chosen to rely on particular studies is confidential information which is not disclosed by the publication of the studies.

[144] Merck submits that the Federal Court's jurisprudence on this point is conflicting. It notes that in the first Federal Court of Appeal decision in these matters (2005 FCA 215, a decision that is not before this Court on these appeals) the court held that s. 20(1)(*b*) did not apply to references to publicly available research articles or other public documents in the NDS and SNDS, while in *Janssen-Ortho* the company's evaluation of the studies it had relied on in its submission was found to be confidential.

[145] I can only accept Merck's submissions in part.

[146] As set out earlier, information is not confidential if it is in the public domain, including

dont le contenu général doit être conforme à des lignes directrices accessibles au public, comme c'est le cas en l'espèce : voir, p. ex., *Société Gamma*, p. 63-64. Bien sûr, il convient d'examiner la question de savoir si l'exception s'applique ou non en tenant compte de la nature des renseignements et de la preuve au dossier.

c) *Énumération d'études accessibles au public*

[143] Merck affirme en outre que la divulgation d'une compilation d'articles scientifiques accessibles au public contenue dans une PDN ou une PSDN équivaut à divulguer davantage de renseignements que ceux qui font déjà partie du domaine public; le fait qu'une société pharmaceutique innovatrice se soit fondée sur des études particulières pour étayer sa demande d'approbation d'une drogue donnée est un renseignement précieux sur le plan de la concurrence qui n'est autrement pas accessible au public. Merck invoque *Janssen-Ortho Inc. c. Canada (Ministre de la Santé)*, 2007 CAF 252, [2007] A.C.F. nº 927 (QL), conf. 2005 CF 1633 (CanLII), pour faire valoir que sa décision de se fonder sur des études particulières est un renseignement confidentiel que la publication de ces dernières ne divulgue pas.

[144] Merck soutient que la jurisprudence de la Cour fédérale sur cette question est contradictoire. Elle souligne que la Cour d'appel fédérale a conclu, dans la première décision qu'elle a rendue dans le cadre de ces affaires (2005 CAF 215, décision dont la Cour n'est pas appelée à tenir compte dans le cadre des présents pourvois), que l'al. 20(1)*b*) ne s'appliquait pas aux renvois, dans la PDN ou la PSDN, à des articles de recherche ou d'autres documents accessibles au public, alors que dans *Janssen-Ortho*, elle a jugé que l'évaluation que la société avait faite des études sur lesquelles elle s'était fondée dans sa présentation était confidentielle.

[145] Je ne peux accepter qu'une partie des observations formulées par Merck.

[146] J'ai déjà dit que les renseignements ne sont pas confidentiels s'ils font partie du domaine public,

being publicly available through another source. As MacKay J. put it in *Air Atonabee*, at p. 272, to be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own. It follows that information that has been published is not confidential. Moreover, information which merely reveals the existence of publicly available information cannot generally be confidential: knowledge of the existence of the information can be obtained through independent study by a member of the public. To the extent that Merck submits that its compilations of such studies are confidential for the purposes of s. 20(1)(*b*) because the compilations might help a competitor to learn of the existence of the studies, I do not agree.

notamment s'ils sont accessibles au public par le biais d'une autre source. Comme le juge MacKay l'a affirmé dans *Air Atonabee*, au par. 41, les renseignements sont confidentiels s'ils ne peuvent être obtenus de sources autrement accessibles au public ou si le simple membre du public agissant de son propre chef ne peut les obtenir par suite de ses propres observations ou études. Il s'ensuit que les renseignements qui ont été publiés ne sont pas confidentiels. En outre, l'information qui ne fait que révéler l'existence de renseignements accessibles au public n'est généralement pas confidentielle, car le simple membre du public peut prendre connaissance du fait que les renseignements existent en faisant ses propres recherches. Dans la mesure où Merck prétend que ses compilations de telles études sont confidentielles pour les fins de l'al. 20(1)*b*) parce qu'elles pourraient aider un concurrent à apprendre l'existence de celles-ci, je suis en désaccord avec cette opinion.

[147] Merck's main point, however, is that while *the content* of published studies may not be confidential information for s. 20(1)(*b*) purposes, the fact that it *relied on* certain published studies is not publicly available and is confidential. Merck cites what Simpson J. said in *Janssen-Ortho*, at para. 39 (2005 FC 1633): although a description of information in published studies would normally be disclosed, the fact that the party opposing disclosure considers those findings accurate and trustworthy has not been publicized and therefore may fall within the realm of confidential information. The Federal Court of Appeal upheld this conclusion. Sexton J.A., for the court, noted that the applicant's opinions relating to public documents were confidential and these opinions were not publicly available; the fact that the applicant may have relied upon certain public information was not public knowledge (para. 6).

[147] Toutefois, le principal argument de Merck est que même si *le contenu* des études publiées peut ne pas constituer des renseignements de nature confidentielle pour les fins de l'al. 20(1)*b*), le fait qu'elle *se soit fondée sur* certaines études publiées n'est pas un renseignement accessible au public; il s'agit d'un renseignement confidentiel. Merck fait référence aux propos de la juge Simpson dans *Janssen-Ortho*, par. 39 (2005 CF 1633) : bien qu'une description des renseignements figurant dans les études publiées serait normalement divulguée, le fait que la partie qui s'oppose à la divulgation considère que les conclusions qui y sont tirées sont justes et fiables n'a pas été rendu public et, partant, il pourrait faire partie des renseignements confidentiels. La Cour d'appel fédérale a confirmé cette conclusion. S'exprimant au nom de la cour, le juge Sexton a souligné que les opinions de la partie demanderesse concernant les documents publics étaient confidentielles, n'étant pas elles-mêmes à la disposition du public, et que le fait que cette partie ait pu se fonder sur certains renseignements publics n'était pas connu du public (par. 6).

[148] I do not accept Merck's submission that *Janssen-Ortho* is inconsistent in principle with other jurisprudence of the Federal Courts in this

[148] Je n'accepte pas l'observation de Merck selon laquelle la décision *Janssen-Ortho* est, en principe, incompatible avec d'autres décisions

area. The point is that *the content* of published studies will generally not be confidential because that content is available from another source in the public domain. The decision in *Janssen-Ortho*, as I read Simpson J.'s reasons, accepts this as a general proposition when it concludes that a description of findings in published studies would normally be disclosed. However, the third party's *reliance on or evaluation of those studies* may be shown by the evidence to fall within the definition of confidential information. What took the *Janssen-Ortho* case out of the general proposition was that the record *also* disclosed that the applicant considered the findings to be accurate and trustworthy and that *this information* was *not* publicly available. Simpson J. found that such material, to the extent that it included "expert advice, opinions, conclusions and information about the studies the Applicant considered reliable", was confidential commercial information (para. 40).

[149] In my view, therefore, the simple reference to a publicly available study or a description of its contents in a submission generally is not confidential information; a mere reference simply notes the existence of the study and a description of its contents simply summarizes information which is publicly available. Knowledge both of the existence of the study and of its contents will generally be obtainable by a member of the public, albeit with more effort, through independent study. However, much will depend on the evidence in a particular case.

[150] I underline this last point. Once the relevant legal principles are established, whether or not a record is confidential is primarily a question of fact. Care must be taken, therefore, not to overgeneralize the holdings of particular cases, by failing to give due regard to the evidence which was before the court in those cases. It may be, for example, that the relevance of a particular study to a particular line of inquiry might in some cases be shown to be confidential. Similarly, as in *Janssen-Ortho*,

rendues par les cours fédérales dans ce domaine. Le fait est qu'en général *le contenu* d'études publiées ne sera pas confidentiel vu qu'il figure dans une autre source qui se trouve dans le domaine public. Selon moi, il ressort des motifs exposés par la juge Simpson dans *Janssen-Ortho* qu'elle considère cela comme une proposition générale, car elle conclut qu'une description des conclusions tirées dans des études publiées serait normalement divulguée. Toutefois, il peut ressortir de la preuve que *l'évaluation de ces études* par le tiers *ou le fait qu'il s'y soit fondé* sont visés par la définition de renseignements confidentiels. Ce qui a exclu la décision *Janssen-Ortho* de la proposition générale, c'était que le dossier révélait *également* que la partie demanderesse estimait que les conclusions étaient justes et fiables, et que *cela constituait un renseignement* qui *n'*avait *pas* été rendu public. La juge Simpson a conclu que les renseignements en cause, dans la mesure où ils comprenaient « les avis d'expert, les opinions, les conclusions et les renseignements concernant les études que la demanderesse a jugé fiables », étaient des renseignements commerciaux de nature confidentielle (par. 40).

[149] Selon moi, par conséquent, le simple renvoi à une étude accessible au public ou une description de son contenu dans une présentation n'est pas, de façon générale, un renseignement confidentiel; un tel renvoi ne fait que souligner l'existence de l'étude et une description de son contenu n'est qu'un résumé de renseignements accessibles au public. En général, le simple membre du public peut prendre connaissance de l'existence de l'étude et de son contenu, bien qu'il doive y consacrer davantage d'efforts en faisant ses propres recherches. Toutefois, la preuve au dossier aura une grande incidence à cet égard.

[150] J'insiste sur ce dernier point. Une fois les principes juridiques pertinents établis, la question de savoir si tel ou tel dossier est confidentiel ou non constitue principalement une question de fait. Il faut donc se garder de trop généraliser les conclusions tirées dans des affaires données en omettant de tenir compte de la preuve soumise à la cour dans le cadre de celles-ci. Il se peut, par exemple, que la pertinence d'une étude particulière quant à une demande donnée puisse dans certains cas s'avérer

express or implicit statements of the applicant's evaluation of the reliability of a study will generally meet the definition of confidential information. Of course, where the existence or contents of studies themselves meet the definition of confidential information in s. 20(1)(*b*), references to such studies will also generally be confidential for the purposes of the exemption. Similarly, if the fact that the applicant has evaluated or relied on the study is publicly available, that fact will not be confidential. The key point is that these principles are not self-applying and must be considered in light of the evidence in each case.

[151] It seems to me that the dispute between the parties on this point turns more on a question of fact rather than on a question of legal principle. Merck's affiants acknowledged that numerous articles pertaining to asthma and its treatment are found in the public domain. However, the assertion is that the fact that information in a particular publication was used in a Canadian NDS, in this case Merck's, is not public knowledge. However, Merck's affiants do not assist the Court in understanding whether the information the institutional head proposes to disclose shows Merck's assessment or evaluation of the studies. Health Canada specifically disavows any intent to disclose the unpublished opinions or evaluations by Merck's experts of any study. Moreover, Health Canada maintains that the fact Merck relied on the studies as listed is public information from the Product Monograph and documents published by the U.S. FDA.

(d) *"Supplied to a Government Institution by a Third Party"*

[152] One of the requirements of the s. 20(1)(*b*) exemption is that the information be supplied by the third party to the government institution. There

confidentielle. De la même façon, comme dans *Janssen-Ortho*, des déclarations explicites ou implicites au sujet de l'évaluation que le demandeur a faite de la fiabilité d'une étude répondront généralement à la définition du renseignement confidentiel. Bien entendu, dans les cas où l'existence des études ou leur contenu sont des renseignements de nature confidentielle pour les fins de l'al. 20(1)*b*), les renvois à ces études seront eux aussi, de façon générale, confidentiels pour les fins de l'exception. De la même façon, si le fait que le demandeur a évalué l'étude ou s'est fondé sur celle-ci est un renseignement accessible au public, alors il ne s'agit pas d'un renseignement confidentiel. Le point essentiel est que ces principes ne s'appliquent pas automatiquement; ils doivent être pris en compte en fonction de la preuve au dossier.

[151] Il me semble que le conflit qui oppose les parties sur ce point porte davantage sur une question de fait que sur une question de principe juridique. Les auteurs des affidavits favorables à Merck ont reconnu que les nombreux articles portant sur l'asthme et son traitement font partie du domaine public. Cependant, ce que Merck fait valoir, c'est que le fait que les renseignements figurant dans une publication donnée ont été utilisés dans le cadre d'une PDN au Canada, en l'occurrence la sienne, n'est pas de notoriété publique. Cela dit, les auteurs de ces affidavits n'aident pas la Cour à déterminer si les renseignements que le responsable de l'institution en l'espèce envisage de divulguer contiennent l'appréciation ou l'évaluation que Merck a faites des études en question. En particulier, Santé Canada nie avoir l'intention de divulguer les opinions ou les évaluations non publiées des experts de Merck au sujet de quelque étude que ce soit. En outre, Santé Canada soutient que le fait que Merck se soit fondée sur les études telles que mentionnées constitue un renseignement public provenant de la monographie de produit et des documents publiés par la FDA.

d) *« Fournis à une institution fédérale par un tiers »*

[152] Selon l'une des exigences à satisfaire pour que s'applique l'exception prévue à l'al. 20(1)*b*), il faut que les renseignements visés aient été fournis

remains an issue about whether this requirement was met by certain documents in the record. The documents in issue are reviewers' notes prepared by scientists retained by Health Canada to evaluate the drug, and correspondence between Merck and Health Canada. While these records contain information supplied by Merck, they also contain other information, such as the analysis and observations of the reviewers, their conclusions and recommendations, as well as information from scientific literature. Health Canada says that following the approach set out in *Canada Packers*, it is obliged to release these reviewers' notes after having redacted the material provided by Merck.

par le tiers à l'institution fédérale. Il reste à savoir si cette exigence a été satisfaite dans le cas de certains documents figurant au dossier. Les documents en litige sont des notes d'examinateurs rédigés par des scientifiques que Santé Canada a chargés d'évaluer la drogue ainsi que des échanges entre Merck et Santé Canada. Ces documents contiennent certes des renseignements fournis par Merck, mais ils contiennent aussi d'autres renseignements, comme l'analyse et les observations des examinateurs, leurs conclusions et recommandations, ainsi que des renseignements tirés de publications scientifiques. Santé Canada affirme que l'approche énoncée dans *Canada Packers* l'oblige à produire les notes de ces examinateurs après avoir retranché les documents fournis par Merck.

[153] The parties join issue on what qualifies as information supplied to a government institution by a third party. Health Canada contends that while documents prepared by scientists employed or retained by it to evaluate the proposed medication contain some information that was supplied by Merck, that is not the case with all of the information contained in these sorts of records. They also contain, for example, the reviewers' observations, analyses, conclusions and recommendations, as well as information coming from the scientific literature and the reviewers' questions arising from all of this material. This sort of information is not supplied by Merck. Health Canada also submits that much of the correspondence that passed between it and Merck is similarly not information provided by a third party.

[153] Les parties ne s'entendent pas sur ce qui constitue des renseignements fournis à une institution fédérale par un tiers. Santé Canada allègue que même si les documents rédigés par les scientifiques qu'il a chargés d'évaluer le médicament proposé contiennent certains renseignements qui lui ont été fournis par Merck, ce n'est pas le cas de tous les renseignements contenus dans ce genre de dossier. Ils contiennent également, par exemple, les observations, analyses, conclusions et recommandations des examinateurs ainsi que des renseignements provenant de publications scientifiques et des réponses aux interrogations que l'ensemble des documents ont suscitées chez les examinateurs. Or, Merck n'a pas fourni de renseignements de ce type. Santé Canada fait également valoir qu'une grande partie des échanges qu'il a eus avec Merck ne constituent pas non plus des renseignements fournis par un tiers.

[154] What, then, are the governing legal principles?

[154] Quels sont donc les principes juridiques applicables?

[155] The first is that a third party claiming the s. 20(1)(*b*) exemption must show that the information was supplied to a government institution by the third party.

[155] Le premier principe est que le tiers qui invoque l'exception prévue à l'al. 20(1)*b*) doit établir qu'il a fourni les renseignements à une institution fédérale.

[156] A second principle is that where government officials collect information by their own observation, as in the case of an inspection for

[156] Le deuxième principe est que les renseignements que des fonctionnaires recueillent eux-mêmes, dans le cadre d'une inspection par exemple,

instance, the information they obtain in that way will not be considered as having been supplied by the third party. As MacKay J. said in *Air Atonabee*, at p. 275:

> In my view, where the record consists of the comments or observations of public inspectors based on their review of the records maintained by the third party at least in part for inspection purposes, the principle established by *Can. Packers Inc.*, supra, applies and the information is not to be considered as provided by the third party.

See also *Canada Packers*, at pp. 54-55; *Les viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 335 (CanLII), at paras. 44-49.

[157] A third principle is that whether or not information was supplied by a third party will often be primarily a question of fact. For example, if government officials correspond with a third party regarding certain information, it is possible that the officials have prior knowledge of the information gained by their own observation or other sources. But it is also possible that they are aware of this information because it was communicated to them beforehand by the third party. The mere fact that the document in issue originates from a government official is not sufficient to bar the claim for exemption. But, in each case, the third party objecting to disclosure on judicial review will have to prove that the information originated with it and that it is confidential.

[158] To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own

ne seront pas considérés comme ayant été fournis par le tiers. Voici ce que le juge MacKay a affirmé dans *Air Atonabee*, par. 47 :

> À mon avis, lorsque le document est constitué de commentaires ou d'observations faites par des inspecteurs publics sur le fondement de leur examen des documents conservés par le tiers au moins en partie à des fins d'inspection, le principe posé dans l'arrêt *Canada Packers Inc.*, précité, s'applique et les renseignements ne doivent pas être considérés comme ayant été fournis par le tiers.

Voir également *Canada Packers*, p. 54-55; *Viandes du Breton Inc. c. Canada (Agence canadienne d'inspection des aliments)*, 2006 CF 335 (CanLII), par. 44-49.

[157] Le troisième principe veut que la question de savoir si les renseignements ont été fournis par un tiers est souvent principalement une question de fait. Par exemple, il arrive que les fonctionnaires qui ont des échanges avec un tiers au sujet de certains renseignements connaissent déjà ceux-ci en raison des observations qu'ils ont faites ou des sources qu'ils ont consultées. Mais il est également possible qu'ils connaissent les renseignements parce qu'ils leur ont été transmis au préalable par le tiers. Le simple fait que le document en litige provient d'un fonctionnaire ne suffit pas à rendre irrecevable la demande d'application de l'exception. Mais, dans chaque cas, le tiers qui s'oppose à la divulgation dans le cadre d'une demande de contrôle judiciaire doit établir que les renseignements provenaient de lui et qu'ils étaient de nature confidentielle.

[158] En résumé, la question de savoir si des renseignements confidentiels ont été « fournis à une institution fédérale par un tiers » en est une de fait. C'est le contenu plutôt que la forme des renseignements qui doit être pris en compte : le simple fait que les renseignements figurent dans un document d'une institution fédérale ne règle pas en soi la question. Il faut appliquer l'exception aux renseignements qui révèlent les renseignements confidentiels fournis par le tiers ainsi qu'à ces derniers. De façon générale, les jugements ou les conclusions

observations generally cannot be said to be information supplied by a third party.

(e) *Application*

[159] As noted earlier, Merck's submissions on s. 20(1)(*b*) raise three points. In my respectful view, it fails on all of them.

[160] Turning to Merck's first submission, it contends that the Court of Appeal erred in finding that it had not discharged its burden of proof that the documents, as redacted, continued to contain confidential information. This argument is concerned with the substantive content of the information referred to and turns on whether, as Health Canada contends, all information that is not in the public domain has been redacted.

[161] The Court of Appeal's decision about the s. 20(1)(*b*) exemption turned on this point (paras. 62 and 67). It concluded that Merck had failed to discharge its burden with respect to whether the information was confidential and had been consistently treated as such. The court found that the affidavits submitted by Merck failed to provide "direct and objective evidence" and had not shown that the s. 20(1)(*b*) exemption applied.

[162] I agree with Merck that the Court of Appeal applied an unduly onerous standard of proof. The Court of Appeal stated that the third party opposing disclosure has a "heavy" burden to establish the s. 20(1)(*b*) exemption (para. 62). For reasons I have set out earlier, this is an error of law. The burden is to show on the civil standard that the exemption applies. However, I do not think the result reached by the Court of Appeal turns on its description of the standard of proof. The court's decision rested on what it concluded to be an absence of evidence responsive to the claimed exemptions in light of the

auxquels parviennent les fonctionnaires sur la base de leurs propres observations ne peuvent être considérés comme des renseignements fournis par un tiers.

e) *Application*

[159] Comme je l'ai déjà dit, les observations de Merck relativement à l'al. 20(1)*b*) soulèvent trois points. À mon humble avis, ils sont tous dépourvus de fondement.

[160] Le premier argument de Merck est que la Cour d'appel fédérale a commis une erreur en concluant qu'elle ne s'était pas acquittée de son fardeau de prouver que les documents sous leur forme expurgée contenaient toujours des renseignements de nature confidentielle. Cet argument, qui se rapporte au contenu substantif des renseignements visés, porte sur la question de savoir si, comme Santé Canada le prétend, tous les renseignements qui ne font pas partie du domaine public ont été retranchés.

[161] La décision de la Cour d'appel fédérale sur l'exception prévue à l'al. 20(1)*b*) dépendait de ce point (par. 62 et 67). Elle a conclu que Merck n'avait pas réussi à s'acquitter de son fardeau en ce qui concerne la question de savoir si les renseignements étaient de nature confidentielle et avaient toujours été traités de la sorte. Elle a aussi conclu que les affidavits soumis par Merck ne contenaient aucune « preuve directe et objective » et qu'elle n'avait pas établi que l'exception prévue à l'al. 20(1)*b*) s'appliquait.

[162] Je souscris à l'opinion de Merck selon laquelle la Cour d'appel fédérale a appliqué une norme de preuve trop exigeante. La Cour d'appel fédérale a déclaré que le fardeau dont le tiers s'opposant à la divulgation doit s'acquitter pour que l'exception prévue à l'al. 20(1)*b*) s'applique est « lourd » (par. 62). Pour les motifs que j'ai déjà exposés, j'estime qu'il s'agit d'une erreur de droit. Le fardeau consiste à prouver, selon la norme applicable en matière civile, que l'exception s'applique. Cependant, je ne crois pas que la conclusion tirée par la Cour d'appel fédérale soit tributaire de sa

extensive redactions made by Health Canada. I will explain.

[163] With respect to the NDS, the Court of Appeal's holding turned mainly on the way Health Canada came to concede that extensive redaction was necessary, coupled with Merck's failure to respond specifically to the portions remaining after these final redactions had been made.

[164] In September of 2001, Health Canada filed a new affidavit to which were attached more heavily redacted versions of documents that it proposed to release: see C.A. reasons, at para. 16. Merck did not respond specifically to the newly edited versions of the documents. The Court of Appeal found that the affidavit evidence submitted by Merck before that date was of limited use because it was impossible to tell if an objection continued to apply in light of the new editing. The Court of Appeal also found that the affidavits submitted by Merck after that date did not provide any direct and objective proof that the exemption applied to the documents in their newly redacted form (paras. 75-76). For that reason, the Court of Appeal set aside all of the reviewing judge's conclusions in relation to the s. 20(1)(*b*) exemption for the NDS.

[165] With respect to the SNDS, the Court of Appeal simply concluded that there was no direct and objective evidence from Merck to show that the information remaining in the records was confidential (para. 79).

[166] Both of these conclusions focussed on the question of whether the substance of the information was publicly available.

[167] Merck's factum in this Court addresses these specific conclusions in three short paragraphs.

description de la norme de preuve. Sa décision reposait plutôt sur le fait que, selon elle, aucune preuve n'établissait que les exceptions invoquées s'appliquaient compte tenu des expurgations importantes faites par Santé Canada. Je m'explique.

[163] En ce qui concerne la PDN, la conclusion de la Cour d'appel fédérale portait surtout sur la façon dont Santé Canada en est venu à reconnaître la nécessité de faire d'importantes expurgations, conjuguée à l'omission de Merck de commenter expressément les renseignements qui subsistaient après que les expurgations avaient été faites.

[164] En septembre 2001, Santé Canada a déposé un nouvel affidavit auquel étaient jointes des versions davantage expurgées des documents qu'il envisageait de communiquer : voir les motifs de la Cour d'appel fédérale, par. 16. Merck n'a pas commenté expressément ces versions nouvellement expurgées des documents. La Cour d'appel fédérale a conclu que la preuve par affidavit soumise par Merck avant cette date était peu utile car il était impossible de savoir si une objection s'appliquait toujours, compte tenu des nouvelles expurgations. La Cour d'appel fédérale a également conclu que les affidavits soumis par Merck après cette date n'établissaient pas directement et objectivement que l'exception s'appliquait aux documents sous leur forme nouvellement expurgée (par. 75-76). Pour ce motif, la Cour d'appel fédérale a annulé toutes les conclusions tirées par le juge siégeant en révision relativement à l'application à la PDN de l'exception prévue à l'al. 20(1)*b*).

[165] En ce qui concerne la PSDN, la Cour d'appel fédérale a tout simplement conclu que Merck n'avait soumis aucune preuve directe et objective établissant que les renseignements figurant toujours dans les documents étaient de nature confidentielle (par. 79).

[166] Ces deux conclusions portaient principalement sur la question de savoir si le contenu des renseignements était accessible au public.

[167] Merck traite précisément de ces conclusions dans trois courts paragraphes du mémoire qu'elle

It submits that Merck consistently treats the information in issue confidentially and that, contrary to the findings of the Court of Appeal, there was "ample evidence in the record that Merck treats the information in issue as confidential" (para. 180). As an example, it refers to evidence that access to Merck's facilities is restricted, that its employees and consultants must sign confidentiality agreements, that access to paper and computer discs is restricted on a "need-to-know" basis and in particular that information pertaining to an NDS is accessible to its Regulatory Affairs personnel, and to a restricted number of the company's officers on a "need-to-know" basis.

[168] Respectfully, these submissions are of no assistance with respect to the issue that concerned the Court of Appeal; the submissions do not explain how what is left on the often heavily redacted pages is confidential in the face of Health Canada's evidence that the unredacted material is in the public domain and therefore not confidential. Merck's submissions and my perusal of the record have not persuaded me that the Court of Appeal erred in its conclusion on this point. The consideration of two specific examples will explain why.

[169] In the NDS file, consider by way of example the evidence in relation to page 33 of the records in issue. That page is part of the Comprehensive Summary; specifically, it is from the section setting out certain investigational studies. The page refers to studies by number, the particulars of which are listed elsewhere in the submission.

[170] On Health Canada's final redacted version of page 33, there are redactions made to the list of studies. On page 137, all details have also been redacted from one of the studies referred to on page 33. By way of contrast, the earlier January 2, 2001

a présenté à la Cour, où elle soutient avoir invariablement traité de façon confidentielle les renseignements en litige et affirme que, contrairement aux conclusions tirées par la Cour d'appel fédérale, [TRADUCTION] « le dossier comportait une preuve abondante établissant que Merck traite les renseignements en litige comme étant confidentiels » (par. 180). À titre d'exemple, elle fait référence à de la preuve démontrant que l'accès à ses installations est restreint, que ses employés et ses experts-conseils doivent conclure avec elle des ententes de confidentialité, que l'accès à ses documents sur support papier et support informatique n'est accordé qu'à ceux qui en ont besoin pour faire leur travail, et, en particulier, que l'accès aux renseignements qui ont trait à une PDN n'est accordé qu'aux personnes qui travaillent aux affaires réglementaires et à un nombre limité de dirigeants de la société, dans la mesure où ils en ont besoin.

[168] À mon humble avis, ces observations ne sont d'aucune utilité pour trancher la question sur laquelle s'est penchée la Cour d'appel fédérale; les observations n'expliquent pas en quoi le contenu des pages expurgées — dont plusieurs l'ont été de façon importante — est confidentiel compte tenu de la preuve de Santé Canada que les renseignements non retranchés font partie du domaine public et, par conséquent, ne sont pas de nature confidentielle. Les observations de Merck et mon examen du dossier ne m'ont pas convaincu que la Cour d'appel fédérale a commis une erreur dans la conclusion qu'elle a tirée à cet égard. L'examen de deux exemples précis permettra de comprendre pourquoi.

[169] S'agissant du dossier de la PDN, examinons, à titre d'exemple, la preuve qui se rapporte à la page 33 des documents en litige. Cette page provient du sommaire général; plus précisément, elle appartient à la partie qui décrit certains travaux de recherche. Elle fait référence, par numéro, à des études dont le contenu est décrit ailleurs dans la présentation.

[170] La liste d'études mentionnée dans la version finale expurgée de la page 33 de Santé Canada a été expurgée à certains endroits. En outre, à la page 137, tous les détails ont été retranchés de l'une des études à laquelle il est fait référence à la page 33. Par

version had no redactions from page 33, nor were there any redactions to the details of the studies on page 137: see C.A. reasons, at paras. 68-69.

[171] Merck's affidavit evidence relating to the substantive content of this page is to the effect that its contents reveal confidential results which are not in the public domain. Health Canada's evidence accepts that the page in issue contains specific confidential, financial, commercial, scientific or technical third party information that is properly exempted from disclosure, but maintains that all such information has been redacted and the remaining information either is not confidential by nature (such as the format of the page) or is in the public domain. Merck's evidence does not respond to Health Canada's evidence. Faced with the unanswered evidence that all confidential information had been redacted, and with no explanation from the reviewing judge as to why he had rejected this potentially decisive and unanswered evidence, the Federal Court of Appeal appropriately intervened and made its own assessment: see C.A. reasons, at paras. 72-76.

[172] I turn to the s. 20(1)(*b*) exemptions claimed in the SNDS. Consider by way of example the evidence in relation to page 115 of the records in issue. This page is also part of the Comprehensive Summary. Throughout the process, Health Canada did not redact any part of this page. The reviewing judge found that it contained confidential information and that it was to be exempted from disclosure in its entirety (see Beaudry J., at para. 113 (2006 FC 1200)), a holding which the Court of Appeal reversed.

[173] In its letter dated July 20, 2001, Merck responded to Health Canada's notice and submitted its objections to disclosure. Merck's objections

contraste, aucun passage de la version antérieure de cette page, qui datait du 2 janvier 2001, n'en avait été retranché, et aucun détail des études n'avait été éliminé de la page 137 : voir les motifs de la Cour d'appel fédérale, par. 68-69.

[171] Selon la preuve par affidavit soumise par Merck relativement au contenu substantif de cette page, celle-ci divulgue des résultats confidentiels qui ne font pas partie du domaine public. Dans sa preuve, Santé Canada accepte que la page en litige contient des renseignements financiers, commerciaux, scientifiques ou techniques de nature confidentielle fournis par un tiers qui sont, à bon droit, soustraits à la divulgation, mais elle prétend que tous les renseignements de ce type ont été retranchés et que les renseignements restants ne sont pas confidentiels de par leur nature (comme la présentation de la page) ou encore font partie du domaine public. Merck n'a présenté aucune preuve pour réfuter celle de Santé Canada. Or, compte tenu du silence de Merck au sujet de la preuve que tous les renseignements de nature confidentielle avaient été retranchés et de l'absence de toute explication du juge siégeant en révision sur la raison pour laquelle il avait rejeté cette preuve potentiellement décisive et non contredite, c'est à bon droit que la Cour d'appel fédérale est intervenue et qu'elle a fait sa propre appréciation : voir les motifs de la Cour d'appel fédérale, par. 72-76.

[172] Je me pencherai maintenant sur les exceptions prévues à l'al. 20(1)*b*) invoquées relativement à la PSDN. Examinons, à titre d'exemple, la preuve se rapportant à la page 115 des documents en litige. Cette page fait également partie du sommaire général. Tout au long du processus, Santé Canada n'a retranché aucune partie de cette page. Or, le juge siégeant en révision a conclu qu'elle contenait des renseignements confidentiels et qu'elle devait être complètement soustraite à la communication (voir les motifs du juge Beaudry, par. 113 (2006 CF 1200)), une conclusion que la Cour d'appel fédérale a infirmée.

[173] Dans sa lettre datée du 20 juillet 2001, Merck a répondu à l'avis de Santé Canada et lui a soumis ses objections à la divulgation de certains

address generally the nature and the type of information found in the Comprehensive Summary pages. Merck asserted the confidential nature of this information by noting the limited distribution of the Comprehensive Summary within Merck and that it was submitted to Health Canada with a confidentiality notice. There is no specific comment about the confidentiality of the substantive content of what is found at page 115.

[174] Health Canada responded to Merck on October 2, 2001. It agreed to some additional, partial redactions in other documents, but it rejected the balance of Merck's objections: see Beaudry J., at para. 19 (2006 FC 1200). Health Canada asserted that there could be no blanket exemption on the Comprehensive Summary and that some of its information was already available in the public domain. It provided for no redaction of the information contained at page 115.

[175] Merck sent a further reply on October 31, 2001, based on a review prepared by outside consultants. The review identified all of the information that was not already publicly available, and which had not been redacted by Health Canada: see Beaudry J., at para. 23 (2006 FC 1200). At this time, Merck and the consultants suggested redacting only certain paragraphs and several references to other sections of the SNDS. Merck argued that such information remained confidential. It also argued that its methodology in preparing the SNDS was confidential and therefore the references to other parts of the SNDS should be redacted.

[176] Health Canada sent Merck its final notice on December 19, 2001. It agreed to redact some additional details in other documents, but rejected the balance of Merck's objections: see Beaudry J., at paras. 24-26 (2006 FC 1200). As mentioned above, there was no redaction to page 115, and so Merck applied to the Federal Court for review.

renseignements. Les objections de Merck traitent d'une manière générale de la nature et du type de renseignements figurant dans les pages qui constituent le sommaire général. Merck a fait valoir que ces renseignements étaient de nature confidentielle, soulignant que le sommaire avait été communiqué à certaines personnes seulement au sein de son organisation et qu'il avait été transmis à Santé Canada assorti d'un avis de confidentialité. Aucune remarque n'a été formulée quant au caractère confidentiel du contenu substantif de la page 115.

[174] Santé Canada a répondu à Merck le 2 octobre 2001, acceptant d'expurger partiellement davantage d'autres documents, mais rejetant ses autres objections : voir les motifs du juge Beaudry, par. 19 (2006 CF 1200). Santé Canada a fait valoir que le sommaire général ne pouvait être exclu en entier et que certains des renseignements qu'il contenait se trouvaient déjà dans le domaine public. Elle s'est abstenue d'expurger la page 115.

[175] Merck a envoyé une autre réponse à Santé Canada le 31 octobre 2001 à la suite d'un examen effectué par des experts-conseils dont elle avait retenu les services. L'examen relevait tous les renseignements qui n'étaient pas déjà accessibles au public et qui n'avaient pas été retranchés par Santé Canada : voir les motifs du juge Beaudry, par. 23 (2006 CF 1200). À cette époque, Merck et les experts-conseils étaient d'avis de retrancher certains paragraphes seulement ainsi que plusieurs renvois à d'autres parties de la PSDN. Merck a prétendu que ces renseignements demeuraient confidentiels. Elle a également soutenu que la méthode qu'elle avait suivie pour préparer la PSDN était confidentielle et que, par conséquent, les renvois à d'autres parties de celle-ci devaient être retranchés.

[176] Santé Canada a envoyé à Merck son dernier avis le 19 décembre 2001, acceptant de retrancher certains détails supplémentaires d'autres documents, mais rejetant ses autres objections : voir les motifs du juge Beaudry, par. 24-26 (2006 CF 1200). Comme je l'ai déjà mentionné, la page 115 n'a pas été expurgée. Merck a donc déposé une demande de contrôle judiciaire auprès de la Cour fédérale.

[177] Before the Federal Court, Merck submitted a detailed table listing the parts of the record in dispute and its representations regarding the reasons why they should be exempted from disclosure. With regard to the confidentiality of page 115, Merck referred to an affidavit which says that pharmaceutical companies generally consider this information confidential. It also refers to another affidavit, which similarly states that pharmaceutical companies usually treat this type of information as confidential and that Merck does the same: see C.A. reasons, at paras. 96 and 98.

[178] Once again, I see no error in the Court of Appeal's conclusion that Merck's evidence was not, in law, capable of discharging its onus of showing how the substantive information on page 115 contained confidential information: see C.A. reasons, at para. 79.

[179] I therefore agree with the Court of Appeal to the extent that it held that Merck had not shown that the substantive contents of the records in dispute contained confidential financial, commercial, scientific or technical information. However, the Court of Appeal did not address the other two aspects of Merck's submissions made in this Court in relation to s. 20(1)(*b*).

[180] Merck's second point is that the formatting and structure of the submissions qualifies for exemption. As noted earlier, I do not agree with this submission, for the reasons I set out above.

[181] Merck's third point is that the very fact it listed studies and therefore would be understood to have relied on them in its new drug submissions was confidential information. Even if the studies themselves are in the public domain, Merck maintains

[177] Merck a présenté à la Cour fédérale un tableau détaillé énumérant les parties du dossier qui faisaient l'objet du litige ainsi que des observations dans lesquelles elle expliquait pourquoi, selon elle, ces parties devaient être soustraites à la communication. En ce qui concerne le caractère confidentiel de la page 115, Merck a fait référence à un affidavit mentionnant qu'en général les sociétés pharmaceutiques estimaient que de tels renseignements étaient confidentiels. Elle a aussi fait référence à un autre affidavit qui mentionnait, dans la même veine, que les sociétés pharmaceutiques considéraient habituellement que ce genre de renseignements étaient confidentiels et que Merck avait fait de même : voir les motifs de la Cour d'appel fédérale, par. 96 et 98.

[178] Encore là, je ne constate aucune erreur dans la conclusion de la Cour d'appel fédérale que la preuve soumise par Merck ne lui permettait pas juridiquement de s'acquitter de son fardeau de démontrer en quoi certains des renseignements de fond figurant dans la page 115 étaient de nature confidentielle : voir les motifs de la Cour d'appel fédérale, par. 79.

[179] Je souscris donc à l'opinion de la Cour d'appel fédérale dans la mesure où elle a conclu que Merck n'a pas établi que le contenu substantif des documents en litige comprenait des renseignements financiers, commerciaux, scientifiques ou techniques de nature confidentielle. Toutefois, la Cour d'appel fédérale n'a pas traité des deux autres aspects des observations que Merck a formulées devant notre Cour relativement à l'al. 20(1)*b*).

[180] Le deuxième argument de Merck est que la mise en forme et la structure des présentations sont visées par l'exception. Comme je l'ai déjà dit, et pour les motifs que j'ai déjà exposés, je ne souscris pas à cet argument.

[181] Le troisième argument de Merck est que le fait même qu'elle a énuméré des études dans ses présentations, et que cela laissait donc entendre qu'elle s'était fondée sur elles, constituait un renseignement de nature confidentielle. Même si les

that it assembled the list of articles and studies and that what it chose to include is not in the public domain. The very fact that a particular publication was used in a Canadian NDS is not public knowledge. The list also provides a screening of articles and links them to the product and the NDS/SNDS. Merck also emphasizes that this information confers a competitive advantage on a competitor with concomitant harm to it. This last point, of course, is relevant to the s. 20(1)(*c*) exemption, not the s. 20(1)(*b*) exemption under consideration here.

[182] The problem with Merck's arguments about the listing of studies is that Merck itself proposed that copies of all published articles referred to in the submissions should be provided to the requester: letter from Merck to Health Canada dated September 25, 2000 (see reasons of Harrington J., at para. 38 (2004 FC 959); see also Beaudry J., at para. 16 (2006 FC 1201)). In addition, Health Canada underlines the point that the fact Merck had referred to many studies was already in the public domain as a result of the publication of the Product Monograph and documents published by the U.S. FDA (R.F., at para. 134). I cannot see any difference in principle between published articles and studies otherwise in the public domain. Releasing these articles in response to an access to information request relating to an NDS or an SNDS of course shows that Merck selected the studies and draws the link between the articles and the product and the NDS or the SNDS. This, in my view, completely undermines Merck's claim for confidentiality of the fact that it selected the studies for inclusion or the existence of a link between them to the product and the NDS/SNDS. Having reviewed the relevant evidence, my view is that Merck did not show that the listing of the studies was itself confidential financial, commercial, scientific or technical information. While I would not foreclose the possibility of a claim of this nature being established in some cases in which the evidence supported it, the evidence does not support it here. I would add that the simple listing of studies does not

études elles-mêmes font partie du domaine public, Merck fait valoir qu'elle a elle-même dressé la liste d'articles et d'études et que ce qu'elle a décidé d'y inclure ne fait pas partie du domaine public. Le fait même qu'une publication donnée ait été utilisée dans le cadre d'une PDN au Canada n'est pas de notoriété publique. La liste comprend également une sélection d'articles appariés au produit et à la PDN et la PSDN. Merck souligne également que ce renseignement confère un avantage concurrentiel à ses concurrents, ce qui lui cause du tort. Ce dernier point est, bien entendu, pertinent en ce qui concerne l'exception prévue à l'al. 20(1)*c*), et non quant à celle prévue à l'al. 20(1)*b*), dont il est présentement question.

[182] Les arguments de Merck au sujet de la liste d'études sont problématiques, car c'est Merck elle-même qui a proposé que des copies de tous les articles publiés qui ont été mentionnés dans les présentations soient fournies au demandeur : lettre de Merck à Santé Canada datée du 25 septembre 2000 (voir les motifs du juge Harrington, par. 38 (2004 CF 959); voir également les motifs du juge Beaudry, par. 16 (2006 CF 1201)). De plus, Santé Canada souligne que le fait que Merck avait fait référence à plusieurs études était déjà de notoriété publique en raison de la publication de la monographie de produit et de documents publiés par la FDA (m.i., par. 134). Je ne vois aucune différence, en principe, entre des articles publiés et des études faisant autrement partie du domaine public. La communication des articles en réponse à une demande d'accès à l'information touchant une PDN ou une PSDN démontre que Merck avait choisi les études citées et qu'elle avait établi un lien entre les articles et le produit, et la PDN ou la PSDN, selon le cas. Ceci, selon moi, mine complètement la prétention de Merck que le fait qu'elle ait choisi des études afin de les inclure dans la PDN ou la PSDN, selon le cas, ou que l'existence d'un lien entre ces études et le produit et l'une ou l'autre de ces présentations, est de nature confidentielle. J'ai examiné la preuve pertinente, et j'en conclus que Merck n'a pas démontré que l'énumération des études constituait elle-même un renseignement financier, commercial, scientifique ou technique de nature confidentielle. Je n'exclus certes

engage the *Janssen-Ortho* principle which relates to information revealing the third party's evaluation of those studies.

[183] I would therefore uphold the decision of the Federal Court of Appeal to reject Merck's claims for s. 20(1)(*b*) exemptions on this record.

(4) Section 20(1)(*c*): Disclosure of Information That Could Reasonably Be Expected to Harm the Third Party

[184] I turn now to the harm-based exemption in s. 20(1)(*c*). The exemption applies if the third party establishes that the disclosure "could reasonably be expected to result in material financial loss or gain to, or . . . prejudice the competitive position of, a third party":

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

. . .

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; . . .

[185] Once again, there are submissions from both parties about the applicable principles as well as how those principles apply. The debate in this Court centred on three aspects of this exemption: (i) the degree of likelihood required by this provision that harm will result from disclosure; (ii) whether disclosing information already in the public domain can cause harm; and (iii) the types of harm contemplated by the provision. After a brief review of the decisions below, I will address these issues and deal with the more specific

pas la possibilité que le bien-fondé d'un tel argument soit établi dans certains cas où il est étayé par la preuve, mais, en l'espèce, la preuve est insuffisante à cet égard. Enfin, j'estime que le simple fait d'énumérer des études ne fait pas intervenir le principe de *Janssen-Ortho*, qui se rapporte aux renseignements qui révèlent l'appréciation que le tiers a faite de ces études.

[183] Je suis donc d'avis de confirmer la décision de la Cour d'appel fédérale de rejeter les prétentions de Merck selon lesquelles les exceptions prévues par l'al. 20(1)*b*) s'appliquent en l'espèce.

(4) L'alinéa 20(1)*c*) : renseignements dont la divulgation risquerait vraisemblablement de nuire au tiers

[184] Je vais maintenant examiner l'exception, prévue à l'al. 20(1)*c*), visant à éviter un préjudice. L'exception s'applique si le tiers établit que la divulgation des renseignements « risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité » :

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 :

. . .

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

[185] Là encore, des observations ont été formulées par les deux parties quant aux principes applicables et à la façon dont il convient de les appliquer. Le débat devant la Cour a principalement porté sur trois aspects de cette exception : (i) le degré de probabilité, selon cette disposition, qu'un préjudice découle de la divulgation des renseignements visés; (ii) la question de savoir si la divulgation de renseignements faisant déjà partie du domaine public peut causer un préjudice; et (iii) les types de préjudice visés par la disposition. Après avoir examiné

submissions about how the relevant principles apply in this case.

(a) *Decisions in the Federal Court and the Federal Court of Appeal*

[186] Turning first to the NDS file, it is unclear what threshold of probability of harm the reviewing judge applied. At paragraph 101 (2006 FC 1201), he referred to the burden of "establishing probability of harm" while, at para. 107, he tracked the statutory language of s. 20(1)(*c*) by referring to whether disclosure "could reasonably be expected to . . . prejudice" the third party. He ruled that only one page of the contested reviewers' notes and correspondence between Merck and Health Canada fell within the s. 20(1)(*c*) exemption (para. 93). He also rejected in general terms Merck's position that it would probably suffer prejudice from disclosure of information that was already in the public domain (para. 101). Nonetheless, he found the exemption applied to about 130 documents, mostly in the Comprehensive Summary, because they contained information that was more precise or more detailed than that which was publicly available (para. 104).

[187] With respect to the SNDS file, the reviewing judge applied the same legal framework and found that five documents fell within the s. 20(1)(*c*) exemption on the basis that they contained information that was more precise or more detailed than that available in the public domain and that their disclosure "would likely cause the Applicant significant loss of profit or undermine its competitiveness" (para. 112 (2006 FC 1200)).

[188] The Federal Court of Appeal overturned the reviewing judge's findings in both files and found none of the records was exempt under s. 20(1)(*c*). Desjardins J.A. for the court held that for

brièvement les décisions des juridictions inférieures, je traiterai de ces questions et me pencherai sur les observations plus précises qui ont été formulées quant à la façon dont il convient d'appliquer les principes pertinents en l'espèce.

a) *Les décisions de la Cour fédérale et de la Cour d'appel fédérale*

[186] D'abord, en ce qui concerne le dossier de la PDN, on ne sait pas clairement quel critère le juge siégeant en révision a appliqué pour ce qui est de la possibilité qu'un préjudice soit causé. Au paragraphe 101 (2006 CF 1201), il a fait mention du fardeau de « démontrer [. . .] la probabilité du préjudice », alors qu'au par. 107 il a repris le libellé de l'al. 20(1)*c*) en se demandant si la divulgation « risquerait vraisemblablement [. . .] de nuire » au tiers. Il a statué que seulement une page des notes d'examinateurs contestées et de la correspondance entre Merck et Santé Canada était visée par l'exception prévue à l'al. 20(1)*c*) (par. 93). Il a également rejeté en termes généraux le point de vue de Merck selon lequel la communication de documents contenant des renseignements se trouvant déjà dans le domaine public lui causerait vraisemblablement un préjudice (par. 101). Néanmoins, il a conclu que l'exception s'appliquait à environ 130 documents, dont la plupart figuraient dans le sommaire général, parce qu'ils contenaient des renseignements plus précis ou plus détaillés que ceux qui se trouvaient dans le domaine public (par. 104).

[187] En ce qui concerne le dossier de la PSDN, le juge siégeant en révision a appliqué le même cadre juridique et conclu que cinq documents étaient bel et bien visés par l'exception prévue à l'al. 20(1)*c*) parce qu'ils contenaient des renseignements plus précis ou plus détaillés que ceux qui se trouvaient déjà dans le domaine public et dont la divulgation « risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à la demanderesse ou de nuire à sa compétitivité » (par. 112 (2006 CF 1200)).

[188] La Cour d'appel fédérale a infirmé les conclusions auxquelles le juge siégeant en révision est parvenu à l'égard de l'un et l'autre dossier et a conclu qu'aucun des documents en cause n'était

the third party to benefit from this exemption, the information could not be in the public domain and that the third party had to establish a "reasonable expectation of probable harm" (para. 81, citing *AstraZeneca*). In her view, a mere possibility of harm was not sufficient (para. 84). Desjardins J.A. found that the record did not support the reviewing judge's conclusion that the exemption under s. 20(1)(*c*) applied to any of the documents as redacted. She found that Merck's evidence was 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 (para. 93).

visé par l'exception prévue à l'al. 20(1)*c*). La juge Desjardins, s'exprimant au nom de la Cour d'appel fédérale, a conclu que pour que le tiers puisse se prévaloir de cette exception, les renseignements visés ne devaient pas se trouver dans le domaine public, et que le tiers devait établir qu'il avait une « attente raisonnable d'un préjudice probable » (par. 81, citant *AstraZeneca*). Selon elle, la simple possibilité de préjudice n'était pas suffisante à cet égard (par. 84). Elle a conclu que le dossier n'appuyait pas la conclusion du juge siégeant en révision selon laquelle l'exception prévue à l'al. 20(1)*c*) s'appliquait à l'un ou l'autre des documents sous leur forme expurgée. Elle a conclu que la preuve de Merck était vague, spéculative et silencieuse sur la question de savoir précisément comment et pourquoi la divulgation des renseignements demandés causerait vraisemblablement le préjudice allégué par Merck (par. 93).

[189] Other than four documents from the NDS that are no longer in issue, Merck seeks restoration of all of the s. 20(1)(*c*) exemptions, found by the reviewing judge, as well as exemptions for the other documents for which it unsuccessfully claimed exemptions before the reviewing judge. These latter records amount to over 100 documents in each of the NDS and the SNDS appeals.

[189] Outre quatre documents de la PDN qui ne sont plus en litige, Merck cherche à obtenir le rétablissement de l'ensemble des exceptions prévues à l'al. 20(1)*c*) qui s'appliquaient selon le juge siégeant en révision ainsi que l'application, aux autres documents, des exceptions qu'elle n'avait pas réussi à faire valoir devant ce dernier et qui visaient plus de 100 documents relatifs à la PDN et autant de documents relatifs à la PSDN.

[190] With respect to the s. 20(1)(*c*) exemptions claimed by Merck but rejected by the reviewing judge, Merck's submissions in this Court have not shown how the reviewing judge erred in his rejection of its claims or how the Federal Court of Appeal erred by upholding his findings. The focus of my analysis therefore will be on the s. 20(1)(*c*) exemptions upheld by the reviewing judge but set aside by the Court of Appeal; that is, about 130 documents in the NDS and 5 in the SNDS.

[190] En ce qui concerne l'application des exceptions prévues à l'al. 20(1)*c*) qu'elle cherchait à obtenir mais que le juge siégeant en révision a rejetées, Merck n'a pas démontré, dans ses observations à la Cour, en quoi le juge siégeant en révision a commis une erreur en statuant que ses arguments n'étaient pas fondés, ni de quelle façon la Cour d'appel fédérale a commis une erreur en confirmant les conclusions de ce dernier. Mon analyse portera donc principalement sur les exceptions prévues à l'al. 20(1)*c*) que le juge siégeant en révision a maintenues mais que la Cour d'appel fédérale a annulées, à savoir environ 130 documents dans le cas de la PDN et 5 documents dans le cas de la PSDN.

[191] I return to the three issues identified earlier.

[191] Je reprends maintenant l'examen des trois questions que j'ai déjà relevées.

(b) *The Degree of Likelihood That Harm Will Occur*

[192] For about 20 years, the Federal Courts have read s. 20(1)(*c*) as requiring the third party to demonstrate "a reasonable expectation of probable harm": see, e.g., *Canada Packers*, at pp. 58-60; *Canada v. Canada*, at pp. 440 ff.; *Air Atonabee*, at pp. 277-78 and 280; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480 (T.D.), at pp. 487-88; *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4th) 315 (F.C.A.); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2004 FCA 214, 322 N.R. 388, at paras. 11 ff.

[193] Merck proposes that this line of jurisprudence should be abandoned and that the word "probable" should be omitted. Merck submits that the proper test was articulated by the Nova Scotia Court of Appeal in *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, where the court held that the introduction of "probable" into the language of the test was incorrect. Hence, all that is required is a "reasonable expectation of harm" (para. 37). Merck's proposed test would therefore require the third party to show a "reasonable expectation of harm" resulting from disclosure.

[194] Health Canada maintains that the well-established standard applied by the Federal Court of Appeal in this case should be maintained. As the case law clearly indicates that a mere possibility is insufficient, the proper test is a reasonable expectation of probable harm. Any test in between cannot be conceptualized.

[195] I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including

b) *Le degré de probabilité qu'un préjudice soit causé*

[192] Pendant environ 20 ans, les cours fédérales ont considéré que l'al. 20(1)*c*) exigeait que le tiers démontre l'existence d'« un risque vraisemblable de préjudice probable » : voir, p. ex., *Canada Packers*, p. 58-60; *Canada c. Canada*, p. 440 et suiv.; *Air Atonabee*, par. 52 et 58; *Ottawa Football Club c. Canada (Ministre de la Condition physique et du Sport amateur)*, [1989] 2 C.F. 480 (1re inst.), p. 487-488; *Saint John Shipbuilding Ltd. c. Canada (Ministre des Approvisionnements et Services)*, [1990] A.C.F. nº 81 (QL) (C.A.); *Brookfield Lepage Johnson Controls Facility Management Services c. Canada (Ministre des Travaux publics et des Services gouvernementaux)*, 2004 CAF 214 (CanLII), par. 11 et suiv.

[193] Selon Merck, il faut abandonner ce courant jurisprudentiel et éliminer du critère le mot « probable ». Merck prétend que le critère qu'il convient d'appliquer a été formulé par la Cour d'appel de la Nouvelle-Écosse dans *Chesal c. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, décision où elle a conclu que l'introduction du mot « probable » dans la formulation du critère était erronée. Par conséquent, il suffit de démontrer qu'il existe un « risque vraisemblable de préjudice » (par. 37). Selon le critère proposé par Merck, le tiers devrait donc démontrer que la divulgation occasionnerait un « risque vraisemblable de préjudice ».

[194] Santé Canada prétend qu'il faut conserver la norme bien établie que la Cour d'appel fédérale a appliquée dans la présente affaire. Comme la jurisprudence le mentionne clairement, la simple possibilité qu'un préjudice soit causé n'est pas suffisante : le critère qu'il convient d'appliquer est celui du risque vraisemblable de préjudice probable. Il n'existe pas de solution mitoyenne.

[195] Je ne suis pas convaincu que nous devrions modifier la façon dont les cours fédérales formulent ce critère depuis si longtemps. En effet, une telle modification aurait également une incidence sur d'autres dispositions, car plusieurs autres exceptions prévues par la Loi sont formulées d'une façon

those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes.

[196] It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination — "a reasonable expectation of probable harm" — the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.

[197] I note that in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 58, the Court referred with apparent approval to the "reasonable expectation of probable harm" formulation and to the statement by Richard J. (as he then was) in *Information Commissioner (Can.) v. Immigration and Refugee Board (Can.)* (1997), 140 F.T.R. 140

semblable à l'al. 20(1)*c*), notamment celles relatives à la conduite des affaires fédéro-provinciales (art. 14), à la conduite des affaires internationales et à la défense du Canada (art. 15), aux enquêtes (art. 16), à la sécurité des individus (art. 17), et aux intérêts économiques du Canada (art. 18). De plus, comme le souligne l'intimé, le critère du « risque vraisemblable de préjudice probable » a été appliqué relativement à un certain nombre de lois provinciales en matière d'accès à l'information libellées en des termes similaires. Par conséquent, l'interprétation législative de ce critère est importante tant en ce qui concerne l'application de nombreuses exceptions prévues dans la Loi fédérale que celle de diverses lois provinciales libellées en des termes similaires.

[196] On peut se demander ce que le mot « probable » ajoute au critère. À première vue, le critère du « risque vraisemblable de préjudice probable » semble peut-être quelque peu obscur parce qu'il ajoute des degrés d'incertitude. Une chose « probable » est plus susceptible de se produire que l'inverse. Un « risque vraisemblable » est quelque chose qui est à tout le moins prévu et qui est peut-être susceptible de se produire, mais qui n'est pas nécessairement probable. La juxtaposition des deux expressions — « un risque vraisemblable de préjudice probable » — résulte en une norme qui peut ne pas être claire à première vue. Toutefois, je conclus que cette formulation acceptée depuis longtemps vise à cerner un point important, à savoir que même s'il ne lui incombe pas d'établir selon la prépondérance des probabilités que le préjudice se produira effectivement si les documents sont communiqués, le tiers doit néanmoins faire davantage que simplement démontrer que le préjudice peut se produire. Dans cette optique, je ne vois aucune raison de reformuler le critère.

[197] Je souligne que dans *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 58, la Cour a fait référence, semble-t-il en les approuvant, à la formulation « risque vraisemblable de préjudice probable » et aux propos du juge Richard (plus tard juge en chef de la Cour fédérale) dans *Canada (Commissaire à l'information) c. Canada (Commission de*

(T.D.), that this standard implies a "confident belief" (para. 43). In applying the standard, the Court concluded that the evidence did not "provide a reasonable basis for concluding that disclosure . . . could reasonably be expected to be injurious" so as to result in the harm alleged (para. 61). This comment, while not requiring proof that harm will occur on the balance of probabilities, nonetheless underlines the point that something well beyond a mere possibility of harm must be shown. As for the causal link between disclosure and harm, the Court indicated that there need not be a causal relationship as in tort law, but that there must be proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged" (*Lavigne*, at para. 58; see also *Canada Packers*, at pp. 58-59).

l'immigration et du statut de réfugié), [1997] A.C.F. nº 1812 (QL) (1re inst.), qui a jugé que ce critère indique qu'on doit avoir « des motifs d'y croire » (par. 43). En appliquant cette norme, la Cour a conclu que la preuve ne permettait pas « raisonnablement de conclure que la divulgation [. . .] risquerait vraisemblablement de nuire », soit de causer le préjudice appréhendé (par. 61). Ce commentaire ne veut certes pas dire qu'il faut établir, selon la prépondérance des probabilités, qu'un préjudice sera causé, mais il fait néanmoins ressortir le fait qu'il faut démontrer davantage que la simple possibilité qu'un préjudice soit causé. En ce qui concerne le lien de causalité entre la divulgation et le préjudice, la Cour a affirmé qu'il n'est pas nécessaire qu'il y ait un lien de causalité, comme en droit de la responsabilité délictuelle ou extracontractuelle, mais qu'il faut qu'il y ait « entre la divulgation d'une information donnée et le préjudice allégué un lien clair et direct » (*Lavigne*, par. 58; voir également *Canada Packers*, p. 58-59).

[198] The Court also recently interpreted a similar phrase which occurs in another statutory context. In *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, the majority referred, at para. 60, to language specifying that a foreign national is inadmissible under s. 38(1)(*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, if that individual's health condition "might reasonably be expected to cause excessive demand on health or social services". Abella J. noted that the wording establishes a requirement that "any anticipated burdens on the public purse be tethered to the realities, not the possibilities, of [the] applicants' circumstances" (para. 60 (emphasis added)).

[198] La Cour a aussi récemment interprété une formulation similaire qui figure dans un autre contexte législatif. Dans *Hilewitz c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 57, [2005] 2 R.C.S. 706, les juges majoritaires ont fait référence, au par. 60, à une disposition précisant que l'étranger est interdit de territoire en application du par. 38(1) de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27, si son état de santé « risqu[erait] d'entraîner un fardeau excessif pour les services sociaux et de santé ». La juge Abella a souligné que, selon le libellé, il faut « rattacher toute prévision de fardeau pour les fonds publics à la situation réelle des demandeurs [. . .] et non à l'évolution possible de cette situation » (par. 60 (je souligne)).

[199] I would affirm the *Canada Packers* formulation. A third party claiming an exemption under s. 20(1)(*c*) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose.

[199] Je suis d'avis de confirmer la formulation figurant dans *Canada Packers*. Le tiers qui invoque une exception prévue à l'al. 20(1)*c*) de la Loi doit démontrer qu'il existe beaucoup plus qu'une simple possibilité qu'un préjudice soit causé, mais il n'est pas tenu d'établir, selon la prépondérance des probabilités, que le préjudice se produira effectivement. Cette démarche, selon moi, est fidèle au libellé de la disposition et à l'objet de celle-ci.

[200] As with any question of statutory interpretation, the court must interpret the words of this statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[201] I begin with the English text of the provision. The words "could reasonably be expected to result" seem to avoid either the standard of mere possibility or the standard of probability. We must assume, I think, that both of those standards would clearly have been known to the drafters. This suggests that some middle ground was intended: something cannot reasonably be expected to occur if it is a mere possibility; but something may be reasonably expected even if it is not more likely than not to occur. The word "expected" derives from the verb "to expect", a primary meaning of which is to "regard as likely" (*The Canadian Oxford Dictionary* (2nd ed. 2004), at p. 523). The word "likely" is more difficult to pin down. While it can mean "probable" it may also mean "such as well might happen" (p. 889). In legal usage, the standard of proof on the balance of probabilities is often expressed by saying that something must be shown to be more likely than not. I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.

[202] Turning to the French text of s. 20(1)(*c*), the phrase "*risquerait vraisemblablement de causer*" is a challenging one to interpret. The conditional "*risquerait de causer*" might be rendered into English by either "could" or "would" cause. The drafter here chose the less definite "could". The word "*vraisemblablement*" is capable of meaning "probably" or "likely": see, e.g., *Kwiatkowsky v.*

[200] Comme pour toute question d'interprétation législative, la cour doit lire les termes de la loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de celle-ci, son objet et l'intention du législateur.

[201] Je vais d'abord examiner la version anglaise de la disposition. Les mots « *could reasonably be expected to result* » (« risquerait vraisemblablement de causer ») semblent éviter soit la norme de la simple possibilité, soit celle de la probabilité. Il faut, selon moi, présumer que ces deux normes étaient bien connues des rédacteurs. Cela tend à indiquer qu'on entendait établir une solution mitoyenne : on ne saurait raisonnablement s'attendre à ce qu'une chose se produise si elle ne constitue qu'une simple possibilité; en revanche, on peut raisonnablement s'attendre à ce qu'une chose se produise même s'il n'est pas plus probable qu'elle se produise que l'inverse. Le mot anglais « *expected* » découle du verbe « *to expect* », dont le sens premier est « *regard as likely* » (« considérer comme étant probable ») (*The Canadian Oxford Dictionary* (2e éd. 2004), p. 523). Le sens du mot « *likely* » est toutefois plus difficile à dégager avec précision. Bien qu'il puisse signifier « *probable* » (« probable »), il peut également signifier « *such as well might happen* » (« comme il peut très bien se produire ») (p. 889). En langage juridique, on exprime souvent la norme de preuve de la prépondérance des probabilités en disant qu'il faut établir qu'il est plus probable qu'une chose se produise que l'inverse. J'arrive donc à la conclusion que la version anglaise de la disposition indique qu'il s'agit d'une solution mitoyenne entre ce qui est probable et ce qui est simplement possible. Le seuil envisagé semble exiger considérablement plus qu'une simple possibilité de préjudice, mais moins qu'un préjudice qui est plus probable de se produire que l'inverse.

[202] Je vais maintenant examiner la version française de l'al. 20(1)*c*). Le passage « risquerait vraisemblablement de causer » n'est pas facile à interpréter. Le conditionnel « risquerait de causer » peut être exprimé de deux façons en anglais, à savoir par « *could* » ou « *would* ». En l'occurrence, le rédacteur a choisi d'employer celui des deux mots qui exprime le moins de certitude, c'est-à-dire « *could* ». Par

Minister of Employment and Immigration, [1982] 2 S.C.R. 856, at pp. 863-64. However, it is often used in federal statutes as the equivalent of the English words "likely" or "reasonably" or to convey the sense of risk of something happening or not happening. Some examples follow. In the *Competition Act*, R.S.C. 1985, c. C-34, s. 11(1), "*qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question*" was drafted in English as "that a person has or is likely to have information that is relevant to the inquiry", and in s. 74.11(4) "*s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé*" is drafted in English as "where it is satisfied that subsection (3) cannot reasonably be complied with". In the *Criminal Code*, R.S.C. 1985, c. C-46, s. 25.1(9), "*qui entraînerait vraisemblablement la perte de biens ou des dommages importants à ceux-ci*" is drafted in English as "that would be likely to result in loss of or serious damage to property", and in s. 382.1(2) "*sachant qu'ils seront vraisemblablement utilisés pour acheter ou vendre, même indirectement, les valeurs mobilières en cause ou qu'elle les communiquera vraisemblablement à d'autres personnes qui pourront en acheter ou en vendre*" was drafted in English as "knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security". In the *Insurance Companies Act*, S.C. 1991, c. 47, s. 294(6), "*provoquerait vraisemblablement une modification sensible du prix des valeurs mobilières de la société*" was drafted in English as "might reasonably be expected to materially affect the value of any of the securities of the company".

[203] As noted earlier, the word "likely" is a good fit with the statute's text of "could reasonably be expected to". The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted:

ailleurs, le mot « vraisemblablement » peut avoir le sens de « *probably* » ou de « *likely* » : voir, p. ex., *Kwiatkowsky c. Ministre de l'Emploi et de l'Immigration*, [1982] 2 R.C.S. 856, p. 863-864. Toutefois, il est souvent utilisé dans les lois fédérales comme équivalent des mots anglais « *likely* » ou « *reasonably* » ou pour évoquer le risque qu'une chose se produise ou ne se produise pas. Voici quelques exemples. Au paragraphe 11(1) de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, le passage « qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question » est rendu en anglais par « *that a person has or is likely to have information that is relevant to the inquiry* » et, au par. 74.11(4), le passage « s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé » est rendu par « *where it is satisfied that subsection (3) cannot reasonably be complied with* ». Au paragraphe 25.1(9) du *Code criminel*, L.R.C. 1985, ch. C-46, le passage « qui entraînerait vraisemblablement la perte de biens ou des dommages importants à ceux-ci » est rendu par « *that would be likely to result in loss of or serious damage to property* » et, au par. 382.1(2), les mots « sachant qu'ils seront vraisemblablement utilisés pour acheter ou vendre, même indirectement, les valeurs mobilières en cause ou qu'elle les communiquera vraisemblablement à d'autres personnes qui pourront en acheter ou en vendre » sont rendus par « *knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security* ». Enfin, au par. 294(6) de la *Loi sur les sociétés d'assurances*, L.C. 1991, ch. 47, les mots « provoquerait vraisemblablement une modification sensible du prix des valeurs mobilières de la société » sont rendus par « *might reasonably be expected to materially affect the value of any of the securities of the company* ».

[203] Comme je l'ai déjà mentionné, le mot « *likely* » est tout à fait compatible avec le passage « *could reasonably be expected to* ». Or, il existe une règle d'interprétation des lois bilingues selon laquelle il faut retenir le sens commun à la version anglaise et à la version française : Sullivan, p. 99 et

Sullivan, at pp. 99 ff., and M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 32 ff. By resorting to the shared meaning rule, I would interpret "could reasonably be expected to" in the English version and "*risquerait vraisemblablement*" in the French version as meaning "likely", a standard considerably higher than mere possibility, but somewhat lower than "more likely than not". This sense is captured by the long-standing test enunciated by the Federal Courts: "reasonable expectation of probable harm".

[204] This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: see *Air Atonabee*, at p. 277, quoting *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests*, [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.

[205] Health Canada applied an unduly onerous test of probability of harm. For example, an officer at Health Canada at the relevant time deposed that,

suiv., et M. Bastarache et autres, *Le droit de l'interprétation bilingue* (2009), p. 33 et suiv. Appliquant cette règle, je conclus que le passage « *could reasonably be expected to* », qui figure dans la version anglaise, et le passage « risquerait vraisemblablement », qui se trouve dans la version française, signifient tous les deux l'équivalent de « *likely* » (« vraisemblablement »), une norme exigeant considérablement plus qu'une simple possibilité, mais un peu moins qu'une probabilité plus grande qu'une chose se produise que le contraire, soit l'équivalent de « *more likely than not* ». Ce sens, qui se reflète dans le critère du « risque vraisemblable de préjudice probable » est établi de longue date par les cours fédérales.

[204] Cette interprétation est également conforme à l'objet de la Loi. Il est nécessaire d'atteindre un équilibre entre les objectifs importants de la divulgation et la nécessité d'éviter que celle-ci soit préjudiciable à des tiers. L'objectif important visé par l'accès à l'information serait mis en échec par la norme de la simple possibilité qu'un préjudice soit causé. Il faut éviter de refuser la divulgation de renseignements sur le fondement d'une crainte de préjudice qui est fantaisiste, imaginaire ou forcée. De telles craintes ne sont pas raisonnables parce qu'elles ne sont pas fondées sur la raison : voir *Air Atonabee*, par. 52, citant un extrait de *Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2)* (1985), 7 A.L.D. 584 (Admin. App. Trib.), par. 25. Les mots « risquerait vraisemblablement » [TRADUCTION] « expriment un risque, qui, en toute objectivité, est fondé sur des motifs réels et sérieux » : *Watt c. Forests*, [2007] NSWADT 197 (AustLII), par. 120. Par contre, ce dont il est question, c'est le risque qu'un préjudice soit causé, risque qui dépend de la concrétisation de certaines éventualités. Par conséquent, imposer au tiers (ou, dans d'autres dispositions, à l'administration) le fardeau d'établir que le préjudice est plus susceptible de se produire que de ne pas se produire reviendrait à lui imposer une norme de preuve qui, dans de nombreux cas, serait impossible à satisfaire.

[205] Santé Canada a appliqué un critère trop exigeant pour apprécier la probabilité qu'un préjudice soit causé. Par exemple, un fonctionnaire de Santé

in deciding whether disclosure could be expected to be prejudicial to a third party, the financial loss or the prejudice to a third party's competitive position must be "immediate" and "clear". This approach is not, in my respectful view, consistent with the language of s. 20(1)(*c*).

[206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

(c) *Could Disclosure of Publicly Available Information Cause Harm?*

[207] Merck notes in its submissions that there is no reference to confidentiality in s. 20(1)(*c*). Its position therefore is that in some cases information that is not confidential within the meaning of s. 20(1)(*b*) may still be exempted under s. 20(1)(*c*). It submits, for example, that a compilation of material may fall within s. 20(1)(*c*) even though each item in the compilation is in the public domain. Another example offered is of information which has had very limited previous disclosure. In both of these types of situations, Merck submits, the evidence may establish that harm could reasonably be expected to result from disclosure.

[208] As the respondent points out, it is very hard to show that harm can reasonably be expected to result from disclosure of publicly available information: *AstraZeneca*, at paras. 81 and 109; *Cyanamid Canada Inc. v. Canada (Minister of Health & Welfare)* (1992), 9 Admin. L.R. (2d) 161 (F.C.A.), at paras. 28-29. As Phelan J. put it in *AstraZeneca*, at para. 81, "[a]s a general proposition, publicly available information is not exempt information under section 20 either as a class of documents or under

Canada a témoigné, à l'époque pertinente, que pour conclure que la divulgation risque de causer un préjudice à un tiers, il fallait que les pertes financières ou l'atteinte à la compétitivité d'un tiers soient [TRADUCTION] « immédiates » et « manifestes ». À mon humble avis, cette approche n'est pas compatible avec le libellé de l'al. 20(1)*c*).

[206] En conclusion, la formulation acceptée du critère, à savoir le « risque vraisemblable de préjudice probable », exprime la nécessité d'établir que la divulgation occasionnera un risque de préjudice selon une norme qui est beaucoup plus exigeante que la simple possibilité ou conjecture, mais qui n'atteint cependant pas celle d'établir, selon la prépondérance des probabilités, que la divulgation occasionnera effectivement un tel préjudice.

c) *La divulgation de renseignements accessibles au public peut-elle causer un préjudice?*

[207] Merck mentionne dans ses observations qu'il n'est pas question de confidentialité à l'al. 20(1)*c*). Elle estime donc que, dans certains cas, des renseignements qui ne sont pas de nature confidentielle au sens de l'al. 20(1)*b*) peuvent néanmoins être soustraits à la divulgation selon l'al. 20(1)*c*). Elle affirme, par exemple, qu'une compilation de documents est susceptible de tomber sous le coup de l'al. 20(1)*c*) même si chacun d'entre eux fait partie du domaine public. Merck cite aussi en exemple les renseignements ayant déjà fait l'objet d'une divulgation très restreinte. Dans ces deux types de situations, selon Merck, la preuve peut établir que la divulgation risquerait vraisemblablement de causer un préjudice.

[208] Comme le souligne l'intimé, il est très difficile de démontrer que la divulgation de renseignements accessibles au public risque vraisemblablement de causer un préjudice : *AstraZeneca*, par. 81 et 109; *Cyanamid Canada Inc. c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1992] A.C.F. n° 950 (QL) (C.A.), par. 28-29. Comme l'a dit le juge Phelan dans *AstraZeneca*, au par. 81, « [e]n général, les renseignements accessibles au public ne sont pas des renseignements exemptés

the [harm] test. It requires compelling evidence to dislodge the logical conclusion that information in the public domain will be used, particularly by knowledgeable users."

[209] I accept this general principle. In this case, however, the difference between the parties is more concerned with what the information really consists of than with whether it is publicly available. For example, Merck submits that *the compilation* of publicly available studies is a separate work from the studies themselves and one which is created by Merck's employees with a considerable investment of time and resources. Thus, the information at issue is not the publicly available information that the studies exist or what their content includes. What is not publicly available, says Merck, is the way a group of publicly available studies was compiled for a particular purpose.

[210] I do not think this submission fails as a matter of principle. It may be possible in some cases to show that the way in which publicly available information has been assembled in a particular situation is not, itself, publicly known. Once that is done, the question becomes whether disclosing it has been shown to give rise to the risk of harm required under s. 20(1)(*c*).

(d) *Types of Harm to the Third Party*

[211] I now turn to address the parties' submissions about the types of harm on which a third party may rely in claiming the s. 20(1)(*c*) exemption. It is for the reviewing judge to decide whether the evidence shows that disclosure could reasonably be expected to result in harm of the nature specified in s. 20(1)(*c*). I mention this to underline the point that while the case law can set out general principles governing the provision's application, at the end of the day, there is a significant factual component to the inquiry which will turn on the particular circumstances and evidence in each case.

de divulgation en vertu de l'article 20, soit à titre de catégorie de documents, soit selon le critère du "préjudice". Il faut une preuve convaincante pour déloger la conclusion logique que des renseignements du domaine public seront utilisés, surtout par des utilisateurs avertis. »

[209] Je souscris à ce principe général. En l'espèce, toutefois, le différend entre les parties porte davantage sur la véritable nature des renseignements que sur la question de savoir s'ils sont accessibles au public. Par exemple, Merck affirme que *la compilation* d'études accessibles au public constitue un élément d'information distinct des études elles-mêmes que son personnel a consacré beaucoup de temps et d'énergie à créer. Par conséquent, le renseignement en cause n'est pas l'un des renseignements accessibles au public qui révèlent l'existence des études ou la teneur de celles-ci. Ce qui n'est pas accessible au public, selon Merck, c'est la manière dont des études accessibles au public ont été compilées dans un but précis.

[210] Je ne crois pas qu'il faut rejeter en principe cet argument. Il peut être possible dans certains cas de démontrer que la manière dont des renseignements accessibles au public ont été rassemblés dans une situation particulière n'est pas en soi de notoriété publique. Une fois cette démonstration faite, il faut se demander s'il a été établi que la divulgation de ces renseignements pose le risque de préjudice requis au titre de l'al. 20(1)*c*).

d) *Types de préjudice causé au tiers*

[211] Je passe maintenant aux observations des parties concernant les types de préjudice qu'un tiers peut invoquer pour se prévaloir de l'exception prévue à l'al. 20(1)*c*). Il revient au juge siégeant en révision de décider si la preuve démontre que la divulgation risquerait vraisemblablement de causer un préjudice du type visé à l'al. 20(1)*c*). Je le mentionne afin de souligner que la jurisprudence peut certes établir les principes généraux d'application de la disposition, mais qu'en bout de ligne l'analyse des circonstances particulières et de la preuve dans chaque cas comporte une composante factuelle importante.

[212] To begin, it is worth noting that the list of types of harm in s. 20(1)(*c*) is disjunctive. It is sufficient for a third party to show that disclosure could reasonably be expected to result in any one of a financial loss or gain or in prejudice to the third party's competitive position. In other words, it is not necessary for the third party to show that the "prejudice" to his or her competitive position also results in "harm": see *Brookfield Lepage*, at paras. 9-10.

[213] That brings us to the types of harm alleged by Merck. I will discuss each one briefly. The submissions here focus on material that is not otherwise exempted because it is a trade secret or confidential commercial information which ought to be exempted under ss. 20(1)(*a*) and 20(1)(*b*). Putting aside what may be described as bald assertions, Merck has raised three types of harm: (i) facilitating a competitor's drug development with concomitant losses to Merck; (ii) facilitating a competitor's preparation of an NDS or an SNDS with concomitant losses to Merck; and (iii) giving an incorrect impression concerning Singulair®'s safety. I will briefly comment on each type of harm.

[214] I turn first to the evidence about how release of the pages in issue could cause harm to Merck by facilitating a competitor's new drug development process. In essence, the allegation is that the information could help a competitor bring its drug to market more quickly than it otherwise could and that this in turn would cause prejudice to Merck's competitive position. This point was advanced with respect to a number of types of information:

- Lists of references and cross-referencing: Merck maintains that this information provides a first screening of all articles available in the public domain and is therefore likely to facilitate the competitor's drug development program by identifying key elements

[212] Il convient tout d'abord de signaler que les types de préjudice énumérés à l'al. 20(1)*c*) sont présentés de façon disjonctive. Il suffit au tiers de démontrer que la divulgation risquerait vraisemblablement de causer des pertes ou des profits financiers ou de nuire à sa compétitivité. Autrement dit, le tiers n'a pas à démontrer que l'« atteinte » à sa compétitivité cause également un « préjudice » : voir *Brookfield Lepage*, par. 9-10.

[213] Cela nous amène aux types de préjudice allégués par Merck. J'analyserai brièvement chacun d'entre eux. Cette partie des observations de Merck porte principalement sur des documents qui ne sont pas par ailleurs soustraits à la communication parce qu'ils contiennent un secret industriel ou des renseignements commerciaux de nature confidentielle qu'il faut soustraire à la divulgation en application des al. 20(1)*a*) et *b*). Mis à part ce que l'on peut qualifier d'affirmations sommaires, Merck a invoqué trois types de préjudice : (i) aider un concurrent à développer des drogues, ce qui lui fait subir des pertes; (ii) aider un concurrent à préparer une PDN ou une PSDN, ce qui lui fait subir des pertes; et (iii) donner une impression erronée quant à l'innocuité du Singulair®. Je commenterai succinctement chaque type de préjudice.

[214] Je traiterai d'abord de la preuve concernant le préjudice que la communication des pages en litige pourrait causer à Merck en aidant un concurrent à développer de nouvelles drogues. Merck allègue essentiellement que les renseignements pourraient aider un concurrent à mettre en marché ses drogues plus rapidement qu'il le ferait s'il ne disposait pas de ces renseignements, et que cela nuirait ainsi à sa compétitivité. Elle a présenté cet argument à l'égard de plusieurs types de renseignements :

- Listes de références et de renvois : Merck soutient que ces renseignements fournissent une analyse préalable de tous les articles faisant partie du domaine public et qu'ils pourraient donc vraisemblablement améliorer le programme de développement de drogues du

investigated, developed or used in the NDS or SNDS submission.

- Manufacturing information: information about how the product is manufactured will facilitate and accelerate the competitor's own drug production.

- Merck's responses to questions raised by Health Canada during the review process: this information alerts competitors as to what the issues are in registering this class of product. A competitor's advance knowledge of these issues would expedite its drug development and submission review, jeopardizing Merck's competitive position.

- Disclosure of some information would give a misleading impression of the product's safety and be exploited by competitors with resulting financial loss to Merck.

[215] I do not understand Health Canada to contest the proposition that manufacturing and other scientific information about the product which is not in the public domain may well be exempt from disclosure under either s. 20(1)(*a*) or (*b*). Health Canada maintains, rather, that information of that nature has been redacted from the records which it intends to disclose. For the reasons set out earlier, my view is that Merck's evidence does not effectively answer Health Canada's evidence on this point. I will therefore put to the side Merck's submissions that any such confidential manufacturing or scientific information which is not in the public domain remains in issue under s. 20(1)(*c*). The points to be resolved under s. 20(1)(*c*), therefore, are whether lists of references and cross-referenced published sources, or information about how the approval process unfolded, are exempted under s. 20(1)(*c*).

concurrent, car ils mentionnent les éléments clés qui ont fait l'objet d'études, ont été élaborés ou ont été utilisés dans le cadre de la PDN ou la PSDN.

- Renseignements sur la fabrication : les renseignements sur la fabrication du produit aideront le concurrent à fabriquer ses propres drogues et à le faire plus rapidement.

- Réponses de Merck aux questions posées par Santé Canada dans le cadre du processus d'examen : ces renseignements éveillent l'attention des concurrents sur les questions en jeu dans le cadre du processus d'approbation de cette catégorie de produit. Le concurrent qui connaît ces questions à l'avance pourrait développer des drogues et faire examiner ses présentations plus rapidement, ce qui compromettrait la compétitivité de Merck.

- La divulgation de certains renseignements donnerait une impression erronée quant à l'innocuité du produit et serait exploitée par les concurrents, ce qui causerait à Merck des pertes financières.

[215] Je ne crois pas que Santé Canada conteste l'argument que les renseignements sur la fabrication du produit et les autres renseignements scientifiques relatifs à ce dernier qui ne font pas partie du domaine public peuvent fort bien être soustraits à la divulgation en application des al. 20(1)*a*) ou *b*). Santé Canada maintient plutôt que les renseignements de cette nature ont été retranchés des documents qu'il entend communiquer. Pour les motifs que j'ai déjà exposés, j'estime que la preuve présentée par Merck ne réfute pas effectivement la preuve de Santé Canada à cet égard, et c'est pourquoi je ne m'attarderai pas à son argument suivant lequel il reste à savoir si tout renseignement de cette nature qui ne fait pas partie du domaine public est visé par l'al. 20(1)*c*). La question à trancher en ce qui concerne l'al. 20(1)*c*) est donc de savoir si les listes de référence et les renvois à des sources publiées ou renseignements sur la façon dont le processus d'approbation s'est déroulé sont soustraits à la communication en application de l'al. 20(1)*c*).

[216] I turn then to Merck's submission that its compilations of published studies could allow a competitor to copy its work for the purposes of the competitor's own drug development or approval process, thereby prejudicing Merck's competitive position and causing it financial loss. There are three relevant general principles that need to be borne in mind in this regard.

[217] The first is that disclosure of general information such as dates, numbering and location of information within an NDS or the manner of its presentation generally does not give rise to the necessary expectation of harm or competitive prejudice. The same may be said about lists of studies or acknowledgement that certain studies which have been released to the public have been consulted. Of course, everything will turn on the evidence in the particular case.

[218] Second, knowledge that may be gleaned from the records about how the regulatory process works is, as Phelan J. succinctly put it in *AstraZeneca*, "not the type of information which section 20 is designed to exempt from disclosure" (para. 94). A purpose of access to information legislation is to make the workings of government more transparent. It would be contrary to this purpose to hold that disclosure of information about how the regulatory process works in general, or how it worked in a particular case, confers a competitive advantage or disadvantage.

[219] Third, disclosure of information, not already public, that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements of s. 20(1)(*c*). The evidence would have to convince the reviewing court that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure: see, e.g., *AB Hassle v. Canada (Minister*

[216] J'examinerai maintenant l'affirmation de Merck selon laquelle ses compilations d'études publiées pourraient permettre à un concurrent de s'inspirer de son travail pour les fins du développement ou du processus d'approbation de ses propres drogues, ce qui nuirait à sa compétitivité et lui causerait des pertes financières. À cet égard, il faut garder à l'esprit trois principes généraux pertinents.

[217] Premièrement, la divulgation de renseignements généraux tels que les dates, la numérotation et la partie de la PDN où se trouvent les renseignements ou, de façon générale, la façon dont cette dernière est présentée, ne suscite pas le risque nécessaire en matière de préjudice ou de perte de compétitivité. Cela vaut aussi pour les listes d'études ou la déclaration que certaines études rendues publiques ont été consultées. Bien entendu, tout dépendra de la preuve au dossier.

[218] Deuxièmement, comme l'a dit succinctement le juge Phelan dans *AstraZeneca*, les renseignements que l'on peut tirer des documents au sujet du fonctionnement du processus réglementaire « [ne sont] pas le genre de renseignements que l'article 20 est conçu pour soustraire à la divulgation » (par. 94). La législation en matière d'accès à l'information a notamment pour objet d'accroître la transparence des activités de l'administration. Or, il serait contraire à cet objet de juger que la divulgation de renseignements sur le fonctionnement du processus réglementaire en général ou son fonctionnement dans un cas particulier confère un avantage ou un désavantage concurrentiel.

[219] Troisièmement, la divulgation de renseignements qui n'ont pas déjà été rendus publics et dont on démontre la longueur d'avance qu'ils confèrent à la concurrence dans le développement de produits concurrents, ou l'avantage concurrentiel qu'ils offrent à cette dernière en ce qui concerne des opérations à venir, peut, en principe, satisfaire aux conditions prévues à l'al. 20(1)*c*). La preuve doit convaincre la cour siégeant en révision qu'il existe un lien direct entre la divulgation des

of National Health and Welfare) (1998), 161 F.T.R. 15, at para. 42, aff'd [2000] 3 F.C. 360 (C.A.); *Wells v. Canada (Minister of Transport)* (1995), 103 F.T.R. 17, at para. 9; *Culver v. Canada (Minister of Public Works and Government Services)*, 1999 CanLII 8959 (F.C.T.D.), at para. 17; *Bitove Corp. v. Canada (Minister of Transport)* (1996), 119 F.T.R. 278 (F.C.T.D.), at para. 10; *Coradix Technology Consulting Ltd. v. Canada (Minister of Public Works and Government Services)*, 2006 FC 1030, 307 F.T.R. 116, at para. 31; *Canada Post Corp. v. National Capital Commission*, 2002 FCT 700, 221 F.T.R. 56, at paras. 16-17; *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371, 262 F.T.R. 73, at paras. 32-33; and *Prud'homme v. Agence canadienne de développement international* (1994), 85 F.T.R. 302, at para. 7. Even if information taken in isolation may not seem to fall within the exemption, the information should nonetheless be examined in its entirety in order to determine the likely impact of its disclosure.

[220] I conclude that as a matter of principle, the disclosure of information that is not already in the public domain and that could give competitors a head start in product development, or which they could use to their competitive advantage, may be shown to give rise to a reasonable expectation of probable harm or prejudice to the third party's competitive position. The question here is whether Merck's evidence did so.

[221] The reviewing judge ruled against Merck on many of its claims for exemption under s. 20(1)(*c*) in both the NDS and the SNDS. Merck did not persuade the Federal Court of Appeal that he had erred in those rulings and it advances no document-specific submissions in this Court in relation to any of them. The only document-specific submissions by Merck before us relate to about 25 pages in the NDS to which the reviewing judge found that the

renseignements et le préjudice appréhendé et que la divulgation risque vraisemblablement de causer ce préjudice : voir, p. ex., *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, 1998 CanLII 8942 (C.F., 1re inst.), par. 42, conf. par [2000] 3 C.F. 360 (C.A.); *Wells c. Canada (Ministre des Transports)*, [1995] A.C.F. nº 1447 (QL) (1re inst.), par. 9; *Culver c. Canada (Ministre des Travaux publics et des Services gouvernementaux)*, 1999 CanLII 8959 (C.F., 1re inst.), par. 17; *Bitove Corp. c. Canada (Ministre des Transports)*, [1996] A.C.F. nº 1198 (QL) (1re inst.), par. 10; *Coradix Technology Consulting Ltd. c. Canada (Ministre des Travaux publics et des Services gouvernementaux)*, 2006 CF 1030 (CanLII), par. 31; *Société canadienne des postes c. Commission de la capitale nationale*, 2002 CFPI 700 (CanLII), par. 16-17; *Aventis Pasteur Ltée c. Canada (Procureur général)*, 2004 CF 1371 (CanLII), par. 32-33; et *Prud'homme c. Agence canadienne de développement international* (1994), 85 F.T.R. 302, par. 7. Les renseignements qui, pris isolément, ne semblent pas tomber sous le coup de l'exception doivent néanmoins être examinés dans leur ensemble pour établir l'incidence qu'aurait vraisemblablement leur divulgation.

[220] Je conclus qu'en principe il est possible de démontrer que la divulgation de renseignements qui ne sont pas déjà du domaine public et qui pourraient donner aux concurrents une longueur d'avance dans le développement de produits, ou dont ces derniers pourraient se servir pour accroître leur compétitivité, suscite un risque vraisemblable de préjudice probable ou d'atteinte à la compétitivité du tiers. Il s'agit en l'espèce de savoir si la preuve présentée par Merck le démontre.

[221] Le juge siégeant en révision a donné tort à Merck relativement à plusieurs des cas où elle invoquait l'al. 20(1)*c*) pour empêcher la communication de documents se rapportant à la PDN et d'autres ayant trait à la PSDN. Merck n'a pas convaincu la Cour d'appel fédérale que le juge avait fait erreur en agissant ainsi, et elle n'a présenté à notre Cour aucun argument visant un document précis à l'égard de l'un ou l'autre de ces cas. Les seules observations

s. 20(1)(*c*) exemption applied. That ruling was set aside by the Court of Appeal.

[222] Having reviewed Merck's submissions and the evidence referred to, my view is that the Federal Court of Appeal's appellate intervention was justified and that, in making its own assessment, it did not err in its disposition of these claims for exemption. Health Canada's evidence was to the effect that virtually all of the unredacted information on the pages in issue was in the public domain and it gave extensive and precise references to where the information could be publicly obtained. This evidence was largely unanswered by Merck and it did not provide evidence showing how the disclosure of the redacted form of the information could reasonably be expected to give rise to the harm and prejudice it claimed. I also reiterate here my conclusions in relation to s. 20(1)(*b*) as it applies to lists of studies.

[223] That leaves for consideration Merck's submission that release of some of the pages could give an inaccurate perception of the product's safety. Merck says that refusal to disclose this sort of information under s. 20(1)(*c*) is not problematic because proper information in proper context is provided in the Product Monograph. Moreover, there are reporting requirements relating to information where public safety is concerned and, in an appropriate case, the public interest override could be invoked to release such information even if it is found to be exempt under s. 20(1)(*c*), providing disclosure is in the public interest.

[224] I do not accept the principles inherent in these submissions. The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information

visant des documents précis que nous a présentées Merck portent sur environ 25 pages de la PDN, qui, selon le juge, étaient visées par l'exception prévue à l'al. 20(1)*c*). La Cour d'appel fédérale a annulé cette conclusion.

[222] Après avoir examiné les arguments de Merck et la preuve qui a été invoquée, je suis d'avis que l'intervention de la Cour d'appel fédérale était justifiée et que celle-ci n'a pas commis d'erreur en faisant sa propre appréciation lorsqu'elle a statué sur ces demandes d'application d'exceptions. Selon la preuve produite par Santé Canada, la quasi-totalité des renseignements qui n'ont pas été retranchés des pages en litige faisait partie du domaine public. De plus, Santé Canada a énuméré de façon précise un très grand nombre d'endroits où le public pouvait obtenir ces renseignements. Merck n'a pas réfuté la majeure partie de cette preuve, et elle n'a produit aucun élément de preuve démontrant en quoi la divulgation des renseignements sous leur forme expurgée risquait vraisemblablement de causer le préjudice qu'elle invoquait. Les conclusions que j'ai tirées concernant l'application de l'al. 20(1)*b*) aux listes d'études s'appliquent également dans le présent contexte.

[223] Il reste à examiner l'argument de Merck que la communication de certaines des pages pourrait donner une impression erronée quant à l'innocuité du produit. Selon Merck, le refus de divulguer les renseignements de ce genre en application de l'al. 20(1)*c*) ne pose pas problème étant donné que la monographie de produit fournit les bons renseignements dans un contexte approprié. En outre, il y a des exigences à respecter en matière de présentation des renseignements qui touchent à la sécurité publique et, dans les cas qui s'y prêtent, on peut invoquer la dérogation en matière d'intérêt public pour divulguer de tels renseignements même s'il est conclu qu'ils sont soustraits à la communication en application de l'al. 20(1)*c*), à condition qu'il soit dans l'intérêt public de le faire.

[224] Je ne souscris pas aux principes qui sous-tendent ces arguments. Les tribunaux ont souvent — et avec raison — accueilli avec scepticisme les allégations que la mauvaise compréhension, par

will inflict harm on the third party: see, e.g., *Air Atonabee*, at pp. 280-81; *Canada Packers*, at pp. 64-65; *Coopérative fédérée du Québec v. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)* (2000), 180 F.T.R. 205, at paras. 9-15. If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.

[225] It is particularly important to allow broad access to this sort of information in the context of the pharmaceutical industry. As the respondent points out, Health Canada systematically posts on its website reports about undesirable effects of all drugs sold in Canada. In addition, the *Food and Drug Regulations* require pharmaceutical companies to report adverse reactions of their drugs to Health Canada (s. C.01.017). Information about those reactions is publicly available. It is therefore difficult to see how release of such reports through an access to information request could result in harm to the third party.

[226] Merck has not persuaded me that it established the grounds for a s. 20(1)(*c*) exemption for documents of this nature.

[227] To conclude on s. 20(1)(*c*), Merck has not shown that the Federal Court of Appeal erred in the principles it applied or how it applied them.

(5) Conclusion With Respect to Section 20(1) Exemptions

[228] In my view, Merck has not shown that any of the pages in issue, as redacted, contain any information exempted under s. 20(1)(*a*), (*b*) or (*c*).

le public, des renseignements divulgués sera préjudiciable au tiers : voir, p. ex., *Air Atonabee*, par. 57-61; *Canada Packers*, p. 64-65; *Coopérative fédérée du Québec c. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)* (2000), 180 F.T.R. 205, par. 9-15. Refuser trop facilement de divulguer des renseignements par crainte que le public les comprenne mal compromettrait l'objet fondamental de la législation en matière d'accès à l'information. Il s'agit de permettre aux membres du public de prendre connaissance des renseignements pour qu'ils puissent eux-mêmes les apprécier, et non de les empêcher de les obtenir. À mon avis, une exception ne pourrait être invoquée avec succès sur la base d'un tel argument que dans une situation assez exceptionnelle.

[225] Il est particulièrement important de donner un accès étendu à de tels renseignements dans le contexte de l'industrie pharmaceutique. Comme le souligne l'intimé, Santé Canada publie systématiquement sur son site Web des rapports au sujet des effets indésirables de toutes les drogues vendues au Canada. De plus, le *Règlement sur les aliments et drogues* exige des sociétés pharmaceutiques qu'elles signalent à Santé Canada les réactions indésirables à leurs drogues (art. C.01.017). Les renseignements sur ces réactions sont accessibles au public. Il est donc difficile de concevoir comment la communication de ces rapports en réponse à une demande d'accès à l'information pourrait causer préjudice au tiers.

[226] Merck ne m'a pas convaincu qu'elle a établi les motifs justifiant l'application de l'exception prévue à l'al. 20(1)*c*) aux documents de cette nature.

[227] Pour clore sur l'al. 20(1)*c*), Merck n'a pas établi que la Cour d'appel fédérale a omis d'appliquer les bons principes ou encore qu'elle a commis une erreur en appliquant les principes pertinents.

(5) Conclusion sur les exceptions prévues au par. 20(1)

[228] À mon avis, Merck n'a pas démontré que l'une ou l'autre des pages en litige sous leur forme expurgée contient un quelconque renseignement soustrait à la divulgation en application des al. 20(1)*a*), *b*) ou *c*).

C. *Severance of the Record Under Section 25 of the Act*

[229] When heads of government institutions determine that a requested record contains exempted information in respect of which they are authorized to refuse disclosure, they must go on to consider the issue of severance. By virtue of s. 25 of the Act, they are required to disclose any part of the record that does not contain such exempted information and which can reasonably be severed from any part that does contain exempted information. Section 25 reads:

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.

[230] In this case, the reviewing judge found entire pages were exempt that the institutional head had decided could be disclosed with exempted material redacted. The Court of Appeal found the judge had erred in this regard and Merck challenges that conclusion.

[231] In both the NDS and SNDS files, the reviewing judge found that, apart from a few instances in which he noted specific passages could be redacted, the entirety of all the other pages contained exempted information and should not be disclosed. He held in both the NDS and SNDS files that "it would be extremely difficult to isolate the information that should not be disclosed": see Beaudry J., at para. 114 (2006 FC 1200); see also, Beaudry J., at para. 108 (2006 FC 1201). With respect to the NDS decision (2006 FC 1201), at para. 108, I believe the judge's reference to examples was intended to be to para. 106 rather than to para. 107. The judge did not set out the applicable

C. *Renseignements prélevés en application de l'art. 25 de la Loi*

[229] Le responsable d'une institution fédérale qui décide que le document demandé contient des renseignements dont il peut refuser la divulgation doit ensuite se pencher sur la question du prélèvement. L'article 25 de la Loi l'oblige à communiquer les parties du document dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux. Voici le texte de l'art. 25 :

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.

[230] En l'espèce, le juge siégeant en révision a confirmé que des pages entières étaient visées par l'une ou l'autre des exceptions, pages qui, selon le responsable de l'institution, pouvaient être communiquées après que les renseignements soustraits à la divulgation en eurent été retranchés. La Cour d'appel fédérale en est venue à la conclusion que le juge s'était trompé à cet égard, et Merck conteste celle-ci.

[231] Le juge siégeant en révision a conclu, tant dans le dossier de la PDN que dans celui de la PSDN, que, mis à part quelques cas où il a relevé des passages précis à retrancher, toutes les autres pages contenaient des renseignements soustraits à la divulgation et ne devaient pas être communiquées. Il a conclu, relativement à l'un et l'autre dossier, qu'« il [. . .] paraît sérieusement problématique d[e] séparer [de ces pages] les renseignements dont la communication devrait être refusée » : voir les motifs du juge Beaudry au par. 114 (2006 CF 1200); voir aussi ses motifs au par. 108 (2006 CF 1201). En ce qui concerne la décision relative au dossier de la PDN (2006 CF 1201),

legal principles or indicate how they applied in the circumstances.

[232] The Court of Appeal found fault with the reviewing judge's decision on two grounds. The Court of Appeal faulted the reviewing judge for substituting his discretion for that of the institutional head with respect to s. 25 (para. 104). I respectfully do not agree with the Court of Appeal on this point. As Merck submits, on the s. 44 review, it was the role of the reviewing judge to review the disclosure decision of the institutional head and to determine whether that decision was in accordance with the Act. It follows that the Court of Appeal was in error to the extent it faulted the judge for having "substituted" his view for that of the institutional head. The reviewing judge was required to consider whether the institutional head had properly applied s. 25.

[233] The second error identified by the Court of Appeal was that the reviewing judge failed to explain why the non-exempt material could not reasonably be severed and disclosed. Here, in my view, the Court of Appeal was on firm ground. The reviewing judge did not explain why it would be "extremely difficult" to sever and disclose the non-exempt information. In the absence of any explanation from the reviewing judge (and none being apparent from his reasons read in the context of the whole record), the Court of Appeal was obliged to intervene.

[234] Additionally, in this Court, Merck did not provide any submissions as to why the non-exempt material could not reasonably be severed. In other words, it did not offer submissions in defence of the substance of the reviewing judge's decision. In

je crois que les exemples auxquels renvoie le juge au par. 108 de ses motifs étaient censés être ceux qui figurent au par. 106 plutôt qu'au par. 107. Le juge n'a ni énoncé les principes juridiques applicables, ni précisé en quoi ils s'appliquaient en l'espèce.

[232] La Cour d'appel fédérale a critiqué la décision du juge siégeant en révision à deux égards. D'abord, elle lui a reproché d'avoir substitué son pouvoir discrétionnaire à celui du responsable de l'institution pour ce qui est de l'art. 25 (par. 104). En toute déférence, je ne partage pas l'avis de la Cour d'appel fédérale sur ce point. Comme le soutient Merck, dans le cadre du recours en révision prévu à l'art. 44, il appartenait au juge siégeant en révision de contrôler la décision du responsable de l'institution en matière de divulgation et d'établir si cette décision était conforme à la Loi. Par conséquent, la Cour d'appel fédérale a commis une erreur dans la mesure où elle a reproché au juge d'avoir « substitué » son avis à celui du responsable de l'institution. Le juge siégeant en révision était tenu de décider si le responsable de l'institution avait appliqué correctement l'art. 25.

[233] Ensuite, la Cour d'appel fédérale a reproché au juge siégeant en révision de ne pas avoir expliqué pourquoi les renseignements non soustraits à la divulgation ne pouvaient pas être prélevés et divulgués sans que cela ne pose de problèmes sérieux. Sur ce point, il ne fait aucun doute, à mon avis, que la Cour d'appel fédérale a raison. En effet, le juge siégeant en révision n'a pas expliqué pourquoi il paraissait « sérieusement problématique » de prélever et de divulguer les renseignements non soustraits à la divulgation. En l'absence de toute explication de la part du juge siégeant en révision (d'ailleurs, aucune explication ne ressort de ses motifs lorsqu'on les interprète eu égard à l'ensemble du dossier), la Cour d'appel fédérale se devait d'intervenir.

[234] De plus, Merck n'a présenté à notre Cour aucun argument expliquant pourquoi les renseignements non soustraits à la divulgation ne pouvaient pas être prélevés sans que cela ne pose de problèmes sérieux. En d'autres termes, elle n'a avancé

the absence of such submissions, and in light of my conclusion that appellate intervention was justified, I would uphold the Court of Appeal's decision setting aside the reviewing judge's decision in relation to s. 25.

[235] It will be helpful, however, to reiterate some of the key principles in relation to s. 25.

[236] To begin, it is important to recognize that applying s. 25 is mandatory, not discretionary. The section directs that the institutional head "shall [not 'may'] disclose any part of the record that does not contain" exempted information, provided it can reasonably be severed: see *Dagg*, at para. 80. Thus, the institutional head has a duty to ensure compliance with s. 25 and to undertake a severance analysis wherever information is found to be exempt from disclosure.

[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

aucun argument pour défendre le bien-fondé de la décision du juge siégeant en révision. Faute de tels arguments, et vu ma conclusion que l'intervention de la Cour d'appel fédérale était justifiée, je suis d'avis de confirmer la décision de celle-ci annulant la décision du juge siégeant en révision relativement à l'art. 25.

[235] Il est cependant utile de répéter certains des principes clés applicables en ce qui concerne l'art. 25.

[236] Pour commencer, il importe de reconnaître que l'application de l'art. 25 est obligatoire, et non discrétionnaire. Selon cet article, le responsable de l'institution « est [. . .] tenu [de] communiquer [et non "peut" communiquer] les parties [du document] dépourvues » des renseignements soustraits à la divulgation, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux : voir *Dagg*, par. 80. Le responsable de l'institution a donc l'obligation de veiller au respect de l'art. 25 et de se pencher sur la question du prélèvement s'il est conclu que certains renseignements sont soustraits à la divulgation.

[237] Selon l'art. 25, il faut essentiellement relever les parties du document soustrait à la communication qui peuvent, elles, être communiquées et dont « le prélèvement [. . .] ne pose pas de problèmes sérieux ». J'estime que cet exercice comporte une analyse sémantique ainsi qu'une analyse des coûts et des avantages. D'une part, l'analyse sémantique vise à établir si ce qu'il reste après que les renseignements soustraits à la divulgation ont été retranchés du document en cause a un sens. Dans la négative, il n'est pas raisonnable de procéder au prélèvement. Comme l'a dit la Cour d'appel fédérale dans *Blank c. Canada (Ministre de l'Environnement)*, 2007 CAF 289 (CanLII), au par. 7, « les passages qui ne sont pas protégés doivent toujours être communiqués si cela est utile ». D'autre part, l'analyse des coûts et des avantages sert à déterminer si les avantages qu'il y a à prélever et divulguer les renseignements restants à la suite du processus d'expurgation justifient les efforts déployés par l'institution fédérale en vue d'expurger le document en cause. Même si le texte prélevé n'est pas

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. The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide. [Emphasis added; 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.

[239] Section 25 must also be considered in relation to the question of giving notice to a third party under s. 27. As I discussed earlier, notice is required whenever the institutional head forms the intention to release information that he or she believes might be exempt, including severed material under s. 25. I am also of the view that the institutional head is obliged to do his or her best to apply s. 25 before giving notice and should indicate to the third party what redactions will be made as a result of the institutional head's initial review. I note that the notice provision in s. 27(3)(*a*) and (*b*) refers to the institutional head giving notice of the intention to release "a record or a part thereof" and providing the third party with "a description of the contents of the record or part thereof" that may relate to the third party. This suggests that the institutional

complètement dénué de sens, le prélèvement n'est raisonnable que si la divulgation des passages du document n'ayant pas été retranchés remplissait raisonnablement les objectifs de la Loi. Dans les cas où il ne reste que « [d]es bribes de renseignements pouvant être divulgués » à la suite du prélèvement, la divulgation de ces renseignements ne remplit pas l'objet de la Loi, et le prélèvement n'est pas raisonnable : *Canada (Commissaire à l'information) c. Canada (Solliciteur général)*, [1988] 3 C.F. 551 (1re inst.), p. 558-559; *SNC-Lavalin Inc.*, par. 48. Comme l'a dit le juge en chef adjoint Jerome dans *Bande indienne de Montana c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1989] 1 C.F. 143 (1re inst.) :

> Si l'on se conformait à l'article 25, il en résulterait la communication d'un document complètement censuré, laissant voir tout au plus deux ou trois lignes. Sorties de leur contexte, ces informations seraient inutiles. Le travail de prélèvement nécessaire de la part du Ministère n'est pas raisonnablement proportionné à la qualité de l'accès qui s'ensuivrait. [Je souligne; p. 160-161.]

[238] Cela dit, il ne faut pas perdre de vue l'objet de l'art. 25, qui vise à faciliter l'accès au plus de renseignements possible tout en donnant effet aux exceptions précises et limitées prévues à la Loi : *Ontario (Sûreté et Sécurité publique)*, par. 67.

[239] Il faut aussi tenir compte de l'art. 25 dans le contexte de l'avis à donner au tiers en application de l'art. 27. Comme je l'ai déjà mentionné, le responsable de l'institution qui a l'intention de divulguer des renseignements qui, selon lui, pourraient être soustraits à la divulgation, y compris des renseignements prélevés conformément à l'art. 25, doit donner au tiers intéressé un avis de son intention. J'estime également que le responsable de l'institution doit faire de son mieux pour appliquer l'art. 25 avant de donner l'avis au tiers et qu'il lui incombe d'informer ce dernier des passages qui seront retranchés à la suite de son examen initial. Je souligne que, selon les dispositions en matière d'avis prévues aux al. 27(3)*a*) et *b*), le responsable de l'institution donne au tiers intéressé avis de son intention de donner communication « totale ou partielle [d'un]

head is to make an effort to apply s. 25 at the notice stage.

[240] Of course, the institutional head can only proceed on the basis of the information reasonably available. But consistent with the thresholds for notice which I set out earlier, the institutional head should identify the records he or she has determined clearly fall within the s. 20(1) exemptions and, having done so, go on to determine under s. 25 what information must be disclosed because it can reasonably be severed from the exempt material.

[241] For the reasons set out earlier, I would affirm the Federal Court of Appeal's disposition of the s. 25 issue.

IV. Disposition

[242] I would dismiss the appeals with costs.

The reasons of Deschamps, Abella and Rothstein JJ. were delivered by

[243] DESCHAMPS J. (dissenting) — I have read the reasons of my colleague Cromwell J. I agree with his approach to the issue of notice. The head of the institution must review all the relevant material before him or her and can disclose information without notice only if there is clearly no reason to believe that the record might contain exempt information. I also agree with my colleague that, on the issue of the standard of proof, the Court of Appeal erred in imposing a standard higher than that of proof on a balance of probabilities.

[244] However, in my view, the Federal Court's judgments (2006 FC 1200, 301 F.T.R. 241, and

document » et fournit à ce dernier « la désignation du contenu total ou partiel du document » susceptible de le concerner, ce qui donne à penser que le responsable de l'institution doit s'efforcer d'appliquer l'art. 25 au stade de l'avis.

[240] Bien entendu, le responsable de l'institution ne peut agir qu'en se fondant sur les renseignements qu'il peut raisonnablement obtenir. Toutefois, conformément au seuil à atteindre pour que prenne naissance l'obligation de donner l'avis, que j'ai décrit précédemment, le responsable de l'institution doit relever les documents qui, selon lui, sont clairement visés par l'une ou l'autre des exceptions prévues au par. 20(1), et, une fois cette tâche accomplie, décider, en application de l'art. 25, quels renseignements il doit divulguer parce qu'ils constituent des parties du document soustrait à la communication qui peuvent être prélevées sans poser de problèmes sérieux.

[241] Pour les motifs exposés ci-dessus, je suis d'avis de confirmer la décision de la Cour d'appel fédérale relativement à l'art. 25.

IV. Dispositif

[242] Je suis d'avis de rejeter les pourvois avec dépens.

Version française des motifs des juges Deschamps, Abella et Rothstein rendus par

[243] LA JUGE DESCHAMPS (dissidente) — J'ai lu les motifs de mon collègue le juge Cromwell. Je souscris à sa façon d'aborder la question du préavis. Le responsable de l'institution doit analyser tous les documents pertinents dont il dispose et il ne peut divulguer de renseignements sans donner de préavis que s'il n'y a manifestement aucune raison de croire que le document visé est susceptible de contenir des renseignements soustraits à la divulgation. Par ailleurs, en ce qui concerne la question de la norme de preuve, je suis d'accord avec mon collègue que la Cour d'appel a commis une erreur en imposant une norme de preuve plus exigeante que celle de la prépondérance des probabilités.

[244] Toutefois, selon moi, les jugements de la Cour fédérale (2006 CF 1200, 301 F.T.R. 241, et

2006 FC 1201 (CanLII)) do not contain a palpable and overriding error that would justify this Court's intervention. I would restore the findings of the Federal Court, subject to any agreements the parties may have concluded since its judgments were rendered.

A. Appellate Review

[245] Although my colleague indicates at para. 54 that appellate review is governed by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, his subsequent analysis does not, in my opinion, comport with the principles established in that case. My colleague agrees with the approach of the Federal Court of Appeal, which found that the reviewing judge had not explained in sufficient detail how he came to his conclusions (2009 FCA 166, 400 N.R. 1). Cromwell J. endorses that court's conclusions despite finding that it both applied the wrong standard of proof and inappropriately characterized the definition of "trade secrets" as a restrictive one.

[246] Turning to the Federal Court's judgments, my colleague faults the reviewing judge for failing "either to state the applicable legal principles or to explain how the legal principles applied to the facts before him or, in some cases, both" (para. 55). I cannot accept the requirements my colleague's approach imposes on trial judges or the message it sends to the legal community. The rule from *Housen* is that an appellate court must defer to a trial judge's findings on questions of fact as well as on questions of mixed fact and law. The standard to be applied on such questions is that of a "palpable and overriding error". Deferring to trial judges' findings where it is appropriate to do so ensures that judicial resources are used efficiently, enhances access to justice and is consistent with the institutional role of the appellate court.

2006 CF 1201 (CanLII)) ne contiennent aucune erreur manifeste et dominante qui justifierait l'intervention de la Cour. Je suis d'avis de rétablir les conclusions de la Cour fédérale, sous réserve de toute entente que les parties peuvent avoir conclue depuis que les jugements ont été rendus.

A. Révision en appel

[245] Bien que mon collègue mentionne au par. 54 que la révision en appel est régie par *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, son analyse ultérieure ne respecte pas, selon moi, les principes établis dans cet arrêt. Mon collègue souscrit à la démarche adoptée par la Cour d'appel fédérale, qui a conclu que le juge siégeant en révision n'a pas expliqué de manière suffisamment détaillée comment il était arrivé à ses conclusions (2009 CAF 166 (CanLII)). Le juge Cromwell est d'accord avec les conclusions de la Cour d'appel fédérale bien qu'il ait conclu qu'elle a à la fois appliqué la mauvaise norme de preuve et considéré à tort que la définition de « secrets industriels » est de nature restrictive.

[246] En ce qui concerne les jugements de la Cour fédérale, mon collègue reproche au juge siégeant en révision d'avoir omis « soit d'énoncer les principes juridiques applicables, soit d'expliquer comment les principes juridiques s'appliquaient aux faits de l'espèce », ajoutant que « dans certains cas, il n'a fait ni l'un ni l'autre » (par. 55). Je m'oppose aux exigences que la démarche de mon collègue impose aux juges de première instance et au message qu'elle transmet à la communauté juridique. Selon *Housen*, les cours d'appel doivent faire preuve de respect envers les conclusions tirées par les juges de première instance tant à l'égard des questions de fait que des questions mixtes de fait et de droit. La norme qu'il convient d'appliquer à ces questions est celle de l'« erreur manifeste et dominante ». Faire preuve de respect envers les conclusions des juges de première instance, lorsqu'il y a lieu, permet une utilisation efficace des ressources judiciaires, facilite l'accès à la justice et correspond au rôle institutionnel des cours d'appel.

[247] It must be noted that although the Federal Court is being asked to review an administrative decision, one made by Health Canada in this case, the process is atypical in the sense that it differs from the one that applies to the review of most administrative decisions. The latter process — and the question of which standards ought to govern it — has occupied the forefront of administrative law in the past decade. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court sought to bring clarity to this issue in the context of the first level of review. In the "classic" process, appellate review consists in verifying whether the court at the first level of review has correctly applied the standard in reviewing the administrative decision. What this means in practice is that in "step[ping] into the shoes" of the lower court, an appellate court's focus is, in effect, on the *administrative* decision (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14; *Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77, [2005] 3 S.C.R. 645, at para. 30).

[248] There are exceptions to this classic process. Under s. 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*ATIA*"), the appeal court's focus is on the reviewing judge's findings, and the rule from *Housen* applies to *that court's* decision (*Canadian Imperial Bank of Commerce v. Canada (Chief Commissioner, Human Rights Commission)*, 2007 FCA 272, [2008] 2 F.C.R. 509, at paras. 8, 9 and 72; *Rubin v. Canada (Minister of Health)*, 2003 FCA 37, 300 N.R. 179, at paras. 4-5; *Merck Frosst Canada Ltd. v. Canada (Minister of National Health)*, 2002 FCA 35 (CanLII); *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, 2007 FCA 397, 77 Admin. L.R. (4th) 1, at paras. 2, 3 and 7).

[249] The peculiarities of the review process provided for in s. 44 *ATIA* explain this distinctiveness. The scheme of the *ATIA* reveals that Parliament intended to set up an independent review process — a function which is not fulfilled by the

[247] Il convient de souligner que même si la Cour fédérale est appelée à réviser une décision administrative, celle prise par Santé Canada en l'espèce, le processus est atypique en ce sens qu'il diffère de la démarche à suivre pour réviser la plupart des décisions administratives. Cette dernière démarche — de même que la question de savoir quelles normes devraient la régir — a été au tout premier rang du droit administratif au cours de la dernière décennie. Dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, la Cour a cherché à clarifier la question dans le contexte de la révision de premier niveau. Suivant la démarche « classique », la révision en appel consiste à vérifier si le tribunal de révision de premier niveau a correctement appliqué la norme en examinant la décision administrative. Cela signifie en pratique qu'en se « met[tant] à la place » du tribunal d'instance inférieure la cour d'appel se concentre effectivement sur la décision *administrative* (*Prairie Acid Rain Coalition c. Canada (Ministre des Pêches et des Océans)*, 2006 CAF 31, [2006] 3 R.C.F. 610, par. 14; *Zenner c. Prince Edward Island College of Optometrists*, 2005 CSC 77, [2005] 3 R.C.S. 645, par. 30).

[248] Il existe des exceptions à cette démarche classique. La révision que fait une cour d'appel dans le cadre de l'art. 44 de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« *LAI* »), est axée sur les conclusions du juge siégeant en révision, et la règle de *Housen* s'applique à la décision de *cette cour-là* (*Banque Canadienne Impériale de Commerce c. Canada (Commissaire en chef, Commission canadienne des droits de la personne)*, 2007 CAF 272, [2008] 2 R.C.F. 509, par. 8, 9 et 72; *Rubin c. Canada (Ministre de la Santé)*, 2003 CAF 37 (CanLII), par. 4-5; *Merck Frosst Canada Ltée. c. Canada (Ministre de la Santé nationale)*, 2002 CAF 35 (CanLII); *SNC Lavalin Inc. c. Canada (Ministre de la Coopération internationale)*, 2007 CAF 397 (CanLII), par. 2, 3 et 7).

[249] Les caractéristiques du processus de révision de l'art. 44 de la *LAI* expliquent cette particularité. Il ressort du régime prévu par la *LAI* que l'intention du législateur était d'établir un processus de révision indépendant — une fonction qui

head of the institution (*3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421, at para. 36). Furthermore, the federal Information Commissioner, unlike his or her Ontario and Quebec counterparts (*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Act respecting access to documents held by public bodies and the Protection of personal information*, R.S.Q., c. A-2.1), has no adjudicatory powers and can only make recommendations. The role of the head of the federal institution is as much that of a party as that of a decision maker. The institution's opinion on the obligation to disclose or refuse to disclose is no more authoritative than that of other interested parties (*Canadian Imperial Bank of Commerce*, at para. 63).

[250] The Federal Court judge is thus the first impartial gatekeeper a party seeking disclosure (ss. 41 or 42 *ATIA*) or objecting to it (s. 44 *ATIA*) can turn to. By the time the matter reaches that court, the content of the file will often have evolved (*Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.)). The Federal Court reviews the evidence, which can be extensive. New evidence may be filed and cross-examinations may be conducted, as in the case at bar (ss. 45 and 46 *ATIA*; *Air Atonabee*, at pp. 264-66). The Federal Court may hear new arguments if necessary. The judge makes his or her own findings and draws inferences on the basis of the information in the court's record at that time. The judge may order any remedies he or she considers appropriate (ss. 50 and 51 *ATIA*).

[251] In sum, the judge does *not* conduct the kind of review that is usually conducted in an administrative law context. The Federal Court's task, in essence, is to start afresh and assess the issue *de novo*. This is akin to the role of a trial court. For this reason, the appellate court's role is to review the reviewing judge's decision, not that of the Commissioner or the head of the institution. The appellate court's role may be different in instances in which the decision of the head of the institution

n'est pas exercée par le responsable de l'institution (*3430901 Canada Inc. c. Canada (Ministre de l'Industrie)*, 2001 CAF 254, [2002] 1 C.F. 421, par. 36). De plus, le commissaire fédéral à l'information n'a aucun pouvoir décisionnel et il ne peut faire que des recommandations, ce qui le distingue de ses homologues ontariens et québécois (*Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, ch. F.31; *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q., ch. A-2.1). Le responsable de l'institution fédérale agit autant à titre de partie que de décideur. L'opinion de l'institution sur l'obligation de refuser ou de permettre la divulgation n'a pas plus de poids que celle d'autres parties intéressées (*Banque Canadienne Impériale de Commerce*, par. 63).

[250] Le juge de la Cour fédérale est donc le premier décideur impartial à qui une partie qui sollicite la divulgation (art. 41 ou 42 de la *LAI*) ou une partie qui s'y oppose (art. 44 de la *LAI*) peut s'adresser. Il arrive souvent qu'au moment où cette cour est saisie de l'affaire le dossier aura évolué (*Air Atonabee Ltd. c. Canada (Ministre des Transports)*, [1989] A.C.F. n^{o} 453 (QL) (1re inst.)). La Cour fédérale examine la preuve, qui peut être abondante. De nouveaux éléments de preuve peuvent être déposés et des contre-interrogatoires peuvent avoir lieu, comme cela s'est produit en l'espèce (art. 45 et 46 de la *LAI*; *Air Atonabee*, par. 27-31). La Cour fédérale peut entendre de nouveaux arguments au besoin. Le juge prononce ses propres conclusions et fait ses propres inférences sur la base du dossier tel qu'il existe à ce moment-là. Il peut ordonner les réparations qu'il estime indiquées (art. 50 et 51 de la *LAI*).

[251] En résumé, le juge *ne* fait *pas* le genre d'examen que l'on voit habituellement dans un contexte de droit administratif. La Cour fédérale reprend essentiellement l'affaire depuis le début pour faire un nouvel examen de la question en litige, ce qui s'apparente à ce que fait une cour de première instance. Pour cette raison, la révision que fait la cour d'appel porte sur la décision du juge siégeant en révision plutôt que sur celle du commissaire à l'information ou du responsable de l'institution. Dans

is discretionary by law, but such instances are irrelevant to the case at bar.

B. Did the Federal Court Make a Palpable and Overriding Error in This Case?

[252] In *Housen*, at para. 1, Iacobucci and Major JJ. described the "palpable and overriding error" standard as follows:

> A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion. [Emphasis added.]

[253] They aptly explained at para. 3 what this means for an appellate court by quoting from *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

And, as they soundly observed at para. 4: "While the theory [just described] has acceptance, consistency in its application is missing."

[254] In the case at bar, Beaudry J.'s findings on the exemptions are fact-based or bear on questions of mixed fact and law, so deference is owed to them. There was "some evidence upon which he . . . could have relied" to reach his conclusions. No palpable and overriding error can be found in his judgments. Consequently, the Federal Court of Appeal erred in retrying the case.

[255] Unlike the Federal Court of Appeal, Beaudry J. applied the correct standard, that of proof on a balance of probabilities. He mentioned it

les cas où la loi prévoit que la décision du responsable de l'institution est discrétionnaire, le rôle de la cour d'appel peut être différent, mais ces cas ne nous intéressent pas ici.

B. La Cour fédérale a-t-elle commis une erreur manifeste et dominante en l'espèce?

[252] Dans *Housen*, les juges Iacobucci et Major ont décrit comme suit l'« erreur manifeste et dominante », au par. 1 :

> Il va sans dire qu'une cour d'appel ne devrait modifier les conclusions d'un juge de première instance qu'en cas d'erreur manifeste et dominante. On reformule parfois cette proposition en disant qu'une cour d'appel ne peut réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision. [Je souligne.]

[253] Ils ont bien expliqué, au par. 3, les conséquences que cela comporte pour les cours d'appel en citant *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204 :

> [TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

Et c'est à juste titre qu'ils ont fait la remarque suivante, au par. 4 : « Quoique cette théorie soit généralement acceptée, elle n'est pas appliquée de manière systématique. »

[254] En l'espèce, les conclusions du juge Beaudry relativement aux exceptions reposent sur les faits ou portent sur des questions mixtes de fait et de droit, et il faut donc faire preuve de déférence à leur égard. Il existait « des éléments de preuve qui pouvaient étayer » ses conclusions. Par ailleurs, ses jugements ne comportent aucune erreur manifeste et dominante. Par conséquent, la Cour d'appel fédérale a commis une erreur en jugeant de nouveau l'affaire.

[255] Contrairement à la Cour d'appel fédérale, le juge Beaudry a appliqué la bonne norme de preuve, à savoir la prépondérance des probabilités. Il en a fait

once in each of his sets of reasons. He did not need to refer to it each time he considered a different argument. It is clear that he was mindful of all the submissions made by the parties, including Health Canada's arguments that Merck Frosst Canada Ltd.'s representations were insufficiently specific and that Merck had not discharged its burden of showing that disclosure should be refused. Though his reasons could have been more explicit, a judge is not required to explain every conclusion in detail for reasons to be considered sufficient. Moreover, he referred in his judgments to the evidence and to tables filed by the parties. The tables summarized the parties' evidence for each page or group of pages. Beaudry J. even appended the tables to his judgments. For each exemption category, he reached a decision that he supported by referring to the tables. It is clear from other tables the parties filed jointly with this Court (Joint Record of Pages in Issue) in which the pages at issue are indicated that he did not mechanically endorse the position of either Merck or Health Canada. While one may disagree with the result, Beaudry J.'s conclusions can easily be explained by referring both to his reasons and to the parties' submissions.

mention une fois dans chaque exposé de ses motifs. Il n'avait pas à mentionner cette norme chaque fois qu'il examinait un argument. Il a clairement tenu compte de l'ensemble des arguments des parties, y compris ceux de Santé Canada, qui a avancé que les observations de Merck Frosst Canada Ltée n'étaient pas assez précises et que cette dernière ne s'était pas acquittée de son fardeau de démontrer que la divulgation devrait être refusée. Ses motifs auraient certes pu être plus explicites. Cela dit, il n'est pas nécessaire que les motifs d'un juge expliquent en détail chaque conclusion pour être suffisants. De plus, il a fait référence, dans ses jugements, à la preuve et aux tableaux produits par les parties. Les tableaux résumaient la preuve des parties relativement à chaque page ou groupe de pages. Le juge Beaudry a même joint les tableaux à ses jugements. Pour chaque catégorie d'exception, il a rendu une décision qu'il a étayée en faisant référence aux tableaux. Il ressort clairement des autres tableaux que les parties ont déposés conjointement devant la Cour (dossier conjoint sur les pages en litige) et dans lesquels les pages en litige sont mentionnées qu'il n'a pas adopté inconditionnellement le point de vue de Merck ou celui de Santé Canada. Quelqu'un peut être en désaccord avec le résultat, mais il n'en demeure pas moins qu'on peut facilement expliquer les conclusions du juge Beaudry en faisant référence tant à ses motifs qu'aux observations des parties.

[256] There is, at first glance, a difficulty related to the evidence: prior to the hearing before Beaudry J., Health Canada responded to Merck's last affidavit by redacting additional information, but Merck chose to proceed without responding to these redactions. Merck took the position that the information in the court's record was sufficient and that it was not obliged to respond further. Its stance opens the door to the argument that the evidence it adduced did not respond to changes to the court's record.

[256] À première vue, une difficulté liée à la preuve est le fait que, avant de comparaître devant le juge Beaudry, Santé Canada a caviardé des passages additionnels en réponse au dernier affidavit de Merck, mais que celle-ci a choisi d'aller de l'avant sans répondre à ces caviardages. Merck a avancé que les renseignements contenus dans le dossier de la cour étaient suffisants et qu'elle n'était pas tenue d'y répondre davantage. Sa position ouvre la porte à l'argument que la preuve qu'elle a produite ne répondait pas au dossier de la cour tel qu'il avait évolué.

[257] My colleague accepts Health Canada's submissions and enters into the fray, arguing that one page or another illustrates the vacuity of Merck's position and that Beaudry J. erred in this regard.

[257] Mon collègue accepte les observations de Santé Canada et s'immisce dans le débat, faisant valoir que telle ou telle page fait ressortir la vacuité de la position de Merck et que le juge Beaudry

Health Canada points to one page (p. 470 of the pages in issue in the New Drug Submission file) from which all confidential information was redacted, but that nevertheless found its way onto the list of hundreds of documents which Beaudry J. found to be exempt. In my view, this minor error does not justify this Court's intervention, especially since it was rectified before we heard the case. The page in question is not at issue. With respect to other documents, still at issue, that were redacted to either a limited or a significant extent but were found to be exempt, the extent of the redaction should not be determinative in and of itself. Where information is highly technical — as is the case here — it may mean little to a non-expert but be of significance to a competitor who can "connect the dots" (in the words of Harrington J. in the first review conducted in this case (2004 FC 959, [2005] 1 F.C.R. 587)). Information that is superficially benign because its significance is lost on the person conducting the review can cause harm if disclosed. My colleague's review lacks the insight the reviewing judge gained in the four days the latter spent hearing the case.

[258] Beaudry J. heard all the parties' arguments. More importantly, the same arguments that Merck's representations were insufficiently specific and that its evidence did not respond to changes to the court's record were presented to him. They did not carry the day. Health Canada's statement that all confidential information had been redacted is just an argument. It is not proof that all such information has in fact been redacted. Indeed, at the beginning of the proceedings, Health Canada took the position that none of the information was confidential. The number of documents that either were subsequently found to be exempt in their entirety or were redacted extensively is a clear indication that Health Canada's word cannot be taken as proof. Health Canada does not make a convincing case

s'est trompé à cet égard. Santé Canada a fait référence à une page (p. 470 des pages en litige dans le dossier de la présentation de drogue nouvelle) de laquelle tous les renseignements confidentiels avaient été retranchés, mais qui néanmoins s'était trouvée dans la liste des centaines de documents que le juge Beaudry avait soustraits à la communication. À mon avis, cette erreur mineure ne justifie pas l'intervention de notre Cour, surtout étant donné qu'elle a été rectifiée avant que nous entendions l'affaire. La page en question n'est pas en litige. En ce qui concerne les autres documents, toujours en litige, qui ont été caviardés en partie seulement ou de manière significative, mais ont été jugés soustraits à la communication, l'étendue des passages qui en ont été retranchés ne devrait pas en soi être déterminante. Dans les cas où ils sont de nature très technique — comme c'est le cas en l'espèce —, les renseignements en cause peuvent ne pas paraître significatifs aux yeux du profane, mais avoir une valeur certaine pour le concurrent qui peut « relier les points » (expression utilisée par le juge Harrington dans le cadre du premier contrôle judiciaire (2004 CF 959, [2005] 1 R.C.F. 587)). La divulgation de renseignements dont la nature paraît banale parce que leur importance a échappé à la personne examinant le dossier peut causer un préjudice. Mon collègue procède à un examen du dossier sans bénéficier de la perspective dont jouissait le juge siégeant en révision au terme de quatre jours d'audition.

[258] Le juge Beaudry a entendu tous les arguments des parties. Mais surtout, les mêmes arguments selon lesquels les observations de Merck n'étaient pas suffisamment détaillées et que la preuve de cette dernière ne répondait pas au dossier de la cour tel qu'il avait évolué lui ont été présentés. Ces arguments ne se sont pas avérés déterminants. La déclaration de Santé Canada que tous les renseignements confidentiels avaient été retranchés n'est qu'un simple argument. Elle n'établit pas que tous les renseignements de cette nature l'ont effectivement été. De fait, au début des procédures, Santé Canada a avancé qu'aucun renseignement n'était confidentiel. Le nombre de documents qui ont par la suite été entièrement soustraits à la communication ou caviardés de façon significative indique

that Beaudry J. erred on this point, and I do not think we can dismiss his judgments.

[259] The size of the record, the time allotted to the parties to argue their cases in this Court, and the Court's institutional role are all factors that militate against reviewing the facts in such minute detail. The deferential approach dictated by *Housen* is more consistent with this Court's role. Furthermore, I am not convinced that this Court ought to be conducting the kind of technical review which is required in order to determine whether information qualifies for an exemption from disclosure.

[260] Health Canada and Merck fought tooth and nail for over five years before being heard by Beaudry J. Access to information may be becoming the favourite battleground of innovative and generic drug manufacturers. The quantity of resources, both public and private, expended as a consequence of the war between the parties in the case at bar is appalling. This may be a sign of a more wide-scale problem. If so, the message this Court sends will be particularly important. The message should be that Health Canada and third party applicants in cases such as this must take a responsible approach to disclosure and do the best they can earlier in the process. The redaction of documents could sometimes be simplified by establishing categories rather than reviewing every word. It is clear that the word-by-word approach is not working in cases such as the one at bar. A purposeful review of the file is more apposite.

[261] If, once the parties have reviewed the file and — if possible — established categories, they do not agree, they may take the matter to a

clairement que les arguments de Santé Canada ne peuvent être considérés comme faisant preuve de leur contenu. Santé Canada n'a pas présenté d'arguments convaincants établissant que le juge Beaudry a commis une erreur à cet égard, et je ne pense pas que nous puissions mettre en doute le bien-fondé de ses jugements.

[259] L'ampleur du dossier, le temps alloué aux parties pour présenter leurs arguments devant notre Cour ainsi que le rôle institutionnel de celle-ci sont tous des facteurs qui indiquent qu'il n'y a pas lieu de décortiquer les faits. La démarche empreinte de déférence qu'impose *Housen* correspond davantage au mandat de la Cour. En outre, je ne suis pas convaincue qu'il incombe à notre Cour de procéder à l'examen technique nécessaire pour déterminer si tel ou tel renseignement est visé ou non par une quelconque exception à la règle de la divulgation.

[260] Santé Canada et Merck se sont livrés à une bataille de tous les instants durant plus de cinq années avant d'être entendus par le juge Beaudry. L'accès à l'information semble devenir le théâtre où s'affrontent les sociétés pharmaceutiques innovatrices et celles qui produisent des médicaments génériques. La quantité de ressources, tant publiques que privées, que les parties en l'espèce ont gaspillées à se livrer cette guerre est déplorable. Cela est peut-être le symptôme d'un problème beaucoup plus grave, et, si c'est le cas, le message que notre Cour doit envoyer revêt une grande importance. Ce message doit être que dans les affaires comme celle en l'espèce il incombe à Santé Canada et aux tiers d'adopter une démarche responsable en matière de divulgation de renseignements et de faire de leur mieux plus tôt dans le processus. Il est parfois possible de simplifier le caviardage des documents par l'établissement de catégories; cette méthode remplacerait l'examen de chaque mot. Il est clair que la démarche axée sur l'étude de chaque mot ne convient pas aux affaires comme celle en l'espèce. Un examen du dossier ayant à l'esprit l'objet des exceptions est plus pertinent.

[261] Une fois qu'elles ont examiné le dossier et, si possible, établi des catégories, les parties peuvent soumettre l'affaire à un juge siégeant en révision si

reviewing judge. An appellate court owes deference to the product of that judge's review. The reviewing judge should not be required to provide a word-by-word, line-by-line or even page-by-page explanation for his or her decision. If appropriate, the judge can address the case on the basis of categories, provided that the judgment makes it clear which documents or categories of documents are exempt. Unless there is a palpable and overriding error, the Federal Court of Appeal, and this Court, should refrain from embarking on a review of the facts.

[262] My concerns with having an appellate court reassess the evidence and with requiring detailed reasons are not limited to the message this sends to parties and the stringent requirements it imposes on reviewing judges when they draft their reasons. In my view, reviewing the evidence at the appeal level imports a high risk of error in a case such as this. The facts are typically reviewed in the first instance after the parties have argued on the record, and the reviewing judge will often have asked questions about specific documents. This is not, and should not be, done in this Court.

[263] I will provide one example which illustrates the risk the Court runs in conducting a review in a case like this one. My colleague takes note of Merck's argument that the manner in which the articles and studies are presented in the Comprehensive Summary and the fact that it relied on them at a particular stage of the development of the product would be of value to competitors. He endorses, as I do, the ratio of *Janssen-Ortho Inc. v. Canada (Minister of Health)*, 2007 FCA 252, 367 N.R. 134, which supports that argument. However, my colleague dismisses Merck's position on the basis that Merck has agreed to the release of some of the articles and studies. Acquiescence in the publication of certain articles and studies differs from acquiescence in the publication of the Comprehensive Summary, as the latter shows how Merck relied on the articles and studies. This

elles ne parviennent pas à s'entendre. La cour d'appel doit faire preuve de déférence à l'égard de la décision que rend le juge à l'issue de son examen. Ce dernier ne doit pas être tenu de justifier sa décision en faisant référence à chaque mot, chaque ligne, voire chaque page en litige. Il peut traiter de l'affaire selon l'approche catégorielle, s'il y a lieu, pourvu que son jugement indique clairement dans chaque cas quel document ou quelle catégorie de documents font l'objet d'une exception. À moins d'une erreur manifeste et dominante, la Cour d'appel fédérale et notre Cour doivent s'abstenir de s'immiscer dans l'examen des faits.

[262] Mes préoccupations à l'égard d'un réexamen de la preuve par les cours d'appel et de l'exigence de motifs détaillés dépassent à la fois les réserves que j'ai exprimées quant au message que cela envoie aux parties et les exigences rigoureuses que cela impose aux juges siégeant en révision dans la rédaction de leurs motifs. À mon avis, l'examen de la preuve en appel comporte un important risque d'erreur dans une affaire comme celle qui nous occupe. L'examen des faits survient habituellement en première instance après que les parties ont présenté leurs arguments à la lumière du dossier, et il arrive souvent que le juge siégeant en révision pose des questions sur des documents particuliers. Il ne revient pas à notre Cour de faire un tel examen.

[263] Je fournirai un exemple qui illustre bien le risque qu'il y a à examiner un dossier comme celui sur lequel nous nous penchons en l'espèce. Mon collègue note l'argument de Merck que la façon dont les articles et les études sont présentés dans le sommaire général et le fait qu'elle se soit fondée sur eux à une étape particulière de l'élaboration du produit constituent des renseignements qui ont une valeur pour ses concurrents. Il reconnaît, tout comme moi, le bien-fondé de la décision *Janssen-Ortho Inc. c. Canada (Ministre de la Santé)*, 2007 CAF 252, [2007] A.C.F. nº 927 (QL), qui étaye cet argument. Cependant, mon collègue rejette la position de Merck au motif que celle-ci a accepté de fournir des copies de certains des articles et des études. Accepter la publication de certains articles et études n'est pas la même chose qu'accepter la publication du sommaire général, car ce dernier montre de

is what *Janssen-Ortho* protects. Unless the Court can show precisely where Merck consented to the disclosure of the excerpts from the Comprehensive Summary referring to the articles and studies, I do not think it is open to us to infer that it did.

[264] Having reviewed Beaudry J.'s judgments, the record and the parties' arguments, I am of the view that there was clearly "some evidence upon which he . . . could have relied to reach [his] conclusion". To find otherwise would be to fail to show proper deference.

[265] For these reasons, I would allow the appeals, with costs in the Court of Appeal and in this Court, and would restore the judgments of the Federal Court, subject to any agreements entered into by the parties since those judgments were rendered.

APPENDIX

Access to Information Act, R.S.C. 1985, c. A-1

As in force at the time of the applications for judicial review:

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) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

3. In this Act,

. . .

"head", in respect of a government institution, means

quelle façon Merck s'est fondée sur les articles et études en question. Voilà ce que protège *Janssen-Ortho*, et, à moins que la Cour ne soit en mesure d'indiquer précisément où Merck a consenti à la divulgation des extraits du sommaire général faisant référence aux articles et aux études, je ne pense pas que nous puissions inférer qu'elle l'a fait.

[264] Ayant examiné les jugements du juge Beaudry, le dossier, ainsi que les arguments des parties, je suis d'avis qu'il existait clairement « des éléments de preuve qui pouvaient étayer [sa] décision ». Conclure autrement démontre qu'une démarche empreinte de déférence n'a pas été adoptée.

[265] Pour ces motifs, je suis d'avis d'accueillir les pourvois avec dépens en Cour d'appel et en cette Cour et de rétablir les jugements de la Cour fédérale, sous réserve de toute entente que les parties peuvent avoir conclue depuis qu'ils ont été rendus.

ANNEXE

Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1

Telle qu'en vigueur au moment où les demandes de contrôle judiciaire ont été présentées :

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.

(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.

3. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« document » Tous éléments d'information, quels que soient leur forme et leur support, notamment

(*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada presiding over that institution, or

(*b*) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

. . .

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

"third party", in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

As in force at the NDS application:

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 the *Immigration Act*,

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

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally

correspondance, note, livre, plan, carte, dessin, diagramme, illustration ou graphique, photographie, film, microformule, enregistrement sonore, magnétoscopique ou informatisé, ou toute reproduction de ces éléments d'information.

. . .

« responsable d'institution fédérale »

a) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité de qui est placé un ministère ou un département d'État;

b) la personne désignée par décret, conformément au présent alinéa, en qualité de responsable, pour l'application de la présente loi, d'une institution fédérale autre que celles mentionnées à l'alinéa *a*).

« tiers » Dans le cas d'une demande de communication de document, personne, groupement ou organisation autres que l'auteur de la demande ou qu'une institution fédérale.

Telle qu'en vigueur au moment où la demande relative à la PDN a été présentée :

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 de la *Loi sur l'immigration*.

(2) Le gouverneur en conseil peut, par décret, étendre, conditionnellement ou non, le droit d'accès visé au paragraphe (1) à des personnes autres que celles qui y sont mentionnées.

(3) Pour l'application de la présente loi, les documents qu'il est possible de préparer à partir d'un document informatisé relevant d'une institution fédérale sont eux-mêmes considérés comme relevant de celle-ci, même s'ils n'existent pas en tant que tels au moment où ils font l'objet d'une demande de communication. La

used by the government institution shall be deemed to be a record under the control of the government institution.

As in force for the SNDS:

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.

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

(3) For the purposes of this Act, any record requested under this Act that does not exist but can, subject to such limitations as may be prescribed by regulation, be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution.

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;

présente disposition ne vaut que sous réserve des restrictions réglementaires éventuellement applicables à la possibilité de préparer les documents et que si l'institution a normalement à sa disposition le matériel, le logiciel et les compétences techniques nécessaires à la préparation.

Telle qu'en vigueur au moment où la demande relative à la PSDN a été présentée :

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*.

(2) Le gouverneur en conseil peut, par décret, étendre, conditionnellement ou non, le droit d'accès visé au paragraphe (1) à des personnes autres que celles qui y sont mentionnées.

(3) Pour l'application de la présente loi, les documents qu'il est possible de préparer à partir d'un document informatisé relevant d'une institution fédérale sont eux-mêmes considérés comme relevant de celle-ci, même s'ils n'existent pas en tant que tels au moment où ils font l'objet d'une demande de communication. La présente disposition ne vaut que sous réserve des restrictions réglementaires éventuellement applicables à la possibilité de préparer les documents et que si l'institution a normalement à sa disposition le matériel, le logiciel et les compétences techniques nécessaires à la préparation.

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*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

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

. . .

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(*b*), (*c*) or (*d*) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

(2) Such committee as may be designated or established under section 75 shall review every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.

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.

27. (1) Where the head of a government institution intends to disclose any record requested under this Act,

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

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

. . .

(5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

(6) Le responsable d'une institution fédérale peut communiquer, en tout ou en partie, tout document contenant les renseignements visés aux alinéas (1)*b*), *c*) et *d*) pour des raisons d'intérêt public concernant la santé et la sécurité publiques ainsi que la protection de l'environnement; les raisons d'intérêt public doivent de plus justifier nettement les conséquences éventuelles de la communication pour un tiers : pertes ou profits financiers, atteintes à sa compétitivité ou entraves aux négociations qu'il mène en vue de contrats ou à d'autres fins.

24. (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

(2) Le comité prévu à l'article 75 examine toutes les dispositions figurant à l'annexe II et dépose devant le Parlement un rapport portant sur la nécessité de ces dispositions, ou sur la mesure dans laquelle elles doivent être conservées, au plus tard le 1er juillet 1986, ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs.

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) Sous réserve du paragraphe (2), le responsable d'une institution fédérale qui a l'intention de donner

or any part thereof, that contains or that the head of the institution has reason to believe might contain

(*a*) 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,

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 or part thereof.

(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.

(3) A notice given under subsection (1) 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 (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.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(*a*) or (*b*) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

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) soit des secrets industriels d'un tiers;

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

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*).

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

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

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

(4) Le responsable d'une institution fédérale peut proroger le délai visé au paragraphe (1) dans les cas où le délai de communication à la personne qui a fait la demande est prorogé en vertu des alinéas 9(1)*a*) ou *b*), mais le délai ne peut dépasser celui qui a été prévu pour la demande en question.

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,

(*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

(*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.

(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.

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

(*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

(*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.

(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.

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.

(2) The head of a government institution who has given notice under paragraph 28(1)(*b*) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given

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

a) 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) 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) 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) 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.

(2) Le responsable d'une institution fédérale qui a donné avis de communication totale ou partielle d'un document en vertu de l'alinéa 28(1)*b*) ou du paragraphe 29(1) est tenu, sur réception d'un avis de recours en

notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

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.

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Appeals dismissed with costs, DESCHAMPS, ABELLA *and* ROTHSTEIN JJ. *dissenting.*

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

révision de cette décision, d'en aviser par écrit la personne qui avait demandé communication du document.

(3) La personne qui est avisée conformément au paragraphe (2) peut, sur autorisation de la Cour, comparaître comme partie à l'instance.

46. Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, la Cour a, pour les recours prévus aux articles 41, 42 et 44, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

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.

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

Pourvois rejetés avec dépens, les juges DESCHAMPS, ABELLA *et* ROTHSTEIN *sont dissidents.*

Procureurs de l'appelante : Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

Solicitors for the intervener: Gowling Lafleur Henderson, Ottawa.

Procureur de l'intimé : Procureur général du Canada, Ottawa.

Procureurs de l'intervenante : Gowling Lafleur Henderson, Ottawa.

B

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)

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ONTARIO ENERGY BOARD

Rules of Practice and Procedure
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PART I - GENERAL

1. Application and Availability of Rules

1.01 These Rules apply to proceedings before the Board except enforcement proceedings. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.

1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.

1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

2. Interpretation of Rules

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.

2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

3. Definitions

3.01 In these Rules,

"affidavit" means written evidence under oath or affirmation;

"appeal" has the meaning given to it in **Rule 17.01**;

"appellant" means a person who brings an appeal;

"applicant" means a person who makes an application;

"application" when used in connection with a proceeding commenced by an application to the Board, or transferred to the Board by the management committee under section 6(7) of the *OEB Act* , means the commencement by a party of a proceeding other than an appeal;

"Board" means the Ontario Energy Board;

"Board Secretary" means the Secretary and any assistant Secretary appointed by the Board under the *OEB Act*;

"Board's website" means the website maintained by the Board at *www.ontarioenergyboard.ca*;

"document" includes written documentation, films, photographs, charts, maps, graphs, plans, surveys, books of account, transcripts, videotapes, audio tapes, and information stored by means of an electronic storage and retrieval system;

"*Electricity Act*" means the *Electricity Act, 1998*, S.O. 1998, c.15, Schedule A, as amended from time to time;

"electronic hearing" means a hearing held by conference telephone or some other form of electronic technology allowing persons to communicate with one another;

"employee acting under delegated authority" means an employee to whom a power or duty of the Board has been delegated under section 6 of the *OEB Act*;

"file" means to file with the Board Secretary in compliance with these Rules and any directions of the Board;

"hearing" means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

"interrogatory" means a request in writing for information or particulars made to a party in a proceeding;

"intervenor" means a person who has been granted intervenor status by the Board;

"management committee" means the management committee of the Board established under section 4.2 of the *OEB Act*;

"market rules" means the rules made under section 32 of the *Electricity Act*;

"Minister" means the Minister as defined in the *OEB Act*;

"motion" means a request for an order or decision of the Board made in a proceeding;

"*OEB Act*" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, as amended from time to time;

"oral hearing" means a hearing at which the parties or their representatives attend before the Board in person;

"party" includes an applicant, an appellant, an employee acting under delegated authority where applicable, and any person granted intervenor status by the Board;

"*Practice Directions*" means practice directions issued by the Board from time to time;

"proceeding" means a process to decide a matter brought before the Board, including a matter commenced by application, notice of appeal, transfer by or direction from the management committee, reference, request or directive of the Minister, or on the Board's own motion;

"reference" means any reference made to the Board by the Minister;

"reliability standard" has the meaning given to it in the *Electricity Act*;

"serve" means to effectively deliver, in compliance with these Rules or as the Board may direct;

"statement" means any unsworn information provided to the Board;

"writing" includes electronic media, formed and secured as directed by the Board;

"written" includes electronic media, formed and secured as directed by the Board; and

"written hearing" means a hearing held by means of the exchange of documents.

4. Procedural Orders and Practice Directions

4.01 The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. Every party shall comply with all applicable procedural orders.

4.02 The Board may set time limits for doing anything provided in these Rules.

4.03 The Board may at any time amend any procedural order.

4.04 Where a provision of these Rules is inconsistent with a provision of a procedural order, the procedural order shall prevail to the extent of the inconsistency.

4.05 The Board may from time to time issue *Practice Directions* in relation to the preparation, filing and service of documents or in relation to participation in a proceeding. Every party shall comply with all applicable *Practice Directions*, whether or not specifically referred to in these Rules.

5. Failure to Comply

5.01 Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

(a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

(b) adjourn the proceeding until it is satisfied that there is compliance; or

(c) order the party to pay costs.

5.02 Where a party fails to comply with a time period for filing evidence or other material, the Board may, in addition to its powers set out in **Rule 5.01**, disregard the evidence or other material that was filed late.

5.03 No proceeding is invalid by reason alone of an irregularity in form.

6. Computation of Time

6.01 In the computation of time under these Rules or an order:

(a) where there is reference to a number of days between two events, the days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens; and

(b) where the time for doing an act under these Rules expires on a holiday, as defined under **Rule 6.02**, the act may be done on the next day that is not a holiday.

6.02 A holiday means a Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed.

7. Extending or Abridging Time

7.01 The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules, *Practice Directions* or by the Board, on such conditions the Board considers appropriate.

7.02 The Board may exercise its discretion under this Rule before or after the expiration of a time limit, with or without a hearing.

7.03 Where a party cannot meet a time limit directed by the Rules, *Practice Directions* or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.

8. Motions

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion.

8.02 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.

8.03 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence the party seeks to present, and any evidence the party relies on, in appropriate affidavit form.

8.04 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.

PART II - DOCUMENTS, FILING, SERVICE

9. Filing and Service of Documents

9.01 All documents filed with the Board shall be directed to the Board Secretary. Documents, including applications and notices of appeal, shall be filed in such quantity and in such manner as may be specified by the Board.

9.02 Any person wishing to access the public record of any proceeding may make arrangements to do so with the Board Secretary.

9.03 All documents filed in a proceeding, with the exception of documents found by the Board to be confidential, may be accessed through the Board's website or examined free of charge at the Board's offices.

9A Filing of Documents that Contain Personal Information

9A.01 Any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document as follows:

(a) one version of the document must be a non-confidential, redacted version of the document from which the personal information has been deleted or stricken; and
(b) the second version of the document must be a confidential, un-redacted version of the document that includes the personal information and should be marked "Confidential—Personal Information".

9A.02 The non-confidential, redacted version of the document from which the personal information has been deleted or stricken will be placed on the public record. The confidential, un-redacted version of the document will be held in confidence and will not be placed on the public record. Neither the confidential, un-redacted version of the document nor the personal information contained in it will be provided to any other party, including a person from whom the Board has accepted a Declaration and Undertaking under the *Practice Directions,* unless the Board determines that either (a) the redacted information is not personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act,* or (b) the disclosure of the personal information would be in accordance with the *Freedom of Information and Protection of Privacy Act.*

10. Confidential Filings

10.01 A party may request that all or any part of a document, including a response to an interrogatory, be held in confidence by the Board.

10.02 Any request for confidentiality made under **Rule 10.01** shall be made in accordance with the *Practice Directions*.

10.03 A party may object to a request for confidentiality by filing and serving an

objection in accordance with the *Practice Directions* and within the time specified by the Board.

10.04 After giving the party claiming confidentiality an opportunity to reply to any objection made under **Rule 10.03**, the Board may:

(a) order the document be placed on the public record, in whole or in part;

(b) order the document be kept confidential, in whole or in part;

(c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document prepared by the party claiming confidentiality be revised;

(d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality; or

(e) make any other order the Board finds to be in the public interest.

10.05 Where the Board makes an order under **Rule 10.04** to place on the public record any part of a document that was filed in confidence, the party who filed the document may, subject to **Rule 10.06** and in accordance with and within the time specified in the *Practice Directions*, request that it be withdrawn prior to its placement on the public record.

10.06 The ability to request the withdrawal of information under **Rule 10.05** does not apply to information that was required to be produced by an order of the Board.

10.07 Where a party wishes to have access to a document that, in accordance with the *Practice Directions*, will be held in confidence by the Board without the need for a request under **Rule 10.01**, the party shall make a request for access in accordance with the *Practice Directions*.

10.08 Requests for access to confidential information made at times other than during the proceeding in which the confidential information was filed shall be made in accordance with the *Practice Directions*.

10.09 The party who filed the information to which a request for access under **Rule 10.07** or **Rule 10.08** relates may object to the request for access by filing and serving an objection within the time specified by the Board.

10.10 The Board may, further to a request for access under **Rule 10.07** or **Rule 10.08**, make any order referred to in **Rule 10.04**.

11. Amendments to the Evidentiary Record and New Information

11.01 The Board may, on conditions the Board considers appropriate:

(a) permit an amendment to the evidentiary record; or

(b) give directions or require the preparation of evidence, where the Board determines that the evidence in an application is insufficient to allow the issues in the application to be decided.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, the party filing the revision shall:

(a) ensure that each revised document is printed on coloured paper and clearly indicates the date of revision and the part revised; and

(b) file with the revised document(s) a table describing the original evidence, each revision to the evidence, the date each revision was made, and if the change was numerical, the difference between the original evidence and the revision(s). This table is to be updated to contain all significant revisions to the evidence as they are filed.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal

knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

13A. Expert Evidence

13A.01 A party may engage, and two or more parties may jointly engage, one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise.

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

13A.03 An expert's evidence shall, at a minimum, include the following:

(a) the expert's name, business name and address, and general area of expertise;

(b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;

(c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;

(d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence; and

(e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence.

(f) an acknowledgement of the expert's duty to the Board in **Form A** to these Rules, signed by the expert.

13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:

(a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and

(b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the Board, including as to:

(a) scope and timing;

(b) the involvement of any expert engaged by the Board;

(c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A** and **Form A**.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document 24 hours before using it in the proceeding, unless the Board directs otherwise.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

PART III - PROCEEDINGS

15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and appeals referred to in section 36.3(2) of the *Electricity Act*, whichever is later.

16. Applications

16.01 An application shall contain:

(a) a clear and concise statement of the facts;

(b) the grounds for the application;

(c) the statutory provision under which it is made; and

(d) the nature of the order or decision applied for.

16.02 An application shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17. Appeals

17.01 An "appeal" means:

(a) an appeal under section 7 of the *OEB Act*;

(b) a review under section 59(6) of the *OEB Act;*

(c) a review of an amendment to the market rules under section 33 or section 34 of the *Electricity Act*;

(d) a review of a provision of the market rules under section 35 of the *Electricity Act*;

(e) an appeal under section 36, 36.1 or 36.3 of the *Electricity Act*;

(f) a review of a reliability standard under section 36.2 of the *Electricity Act*; and

(g) an appeal under section 7(4) of the *Toronto District Heating Corporation Act, 1998.*

17.02 A notice of appeal shall contain:

(a) the portion of the order, decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** being appealed;

(b) the statutory provision under which the appeal is made;

(c) the nature of the relief sought, and the grounds on which the appellant shall rely;

(d) if an appeal of an order made under the market rules under section 36 of the *Electricity Act*, a statement confirming that the appellant has made use of any dispute resolution provisions of the market rules;

(e) if an application by a market participant for review of a provision of the market rules under section 35 of the *Electricity Act*, a statement confirming that the market participant has made use of any review provisions of the market rules; and

(f) if an appeal of an order, finding or remedial action under section 36.3 of the *Electricity Act*, a statement confirming that the Independent Electricity System Operator has commenced all other reviews and appeals available to it and such reviews and appeals have been finally determined.

17.03 A notice of appeal shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17.04 At a hearing of an appeal, an appellant shall not seek to appeal a portion of the order, decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** or rely on any ground, that is not stated in the appellant's notice of appeal, except with leave of the Board.

17.05 In addition to those persons on whom service is required by statute, the Board may direct an appellant to serve the notice of appeal on such persons as it considers appropriate.

17.06 The Board may require an appellant to file an affidavit of service indicating how and on whom service of the notice of appeal was made.

17.07 Subject to **Rule 17.08**, a request by a party to stay part or all of the order, Decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** being appealed pending the determination of the appeal shall be made by motion to the Board.

17.08 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

17.09 In respect of a motion brought under **Rule 17.07**, the Board may order that implementation or operation of the order, decision, market rules or reliability standard be delayed or stayed, on conditions as it considers appropriate.

18. Dismissal Without a Hearing

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

18.02 Where the Board proposes to dismiss a proceeding under **Rule 18.01**, it shall give notice of the proposed dismissal in accordance with the *Statutory Powers Procedure Act*.

18.03 A party wishing to make written submissions on the proposed dismissal shall do so within 10 calendar days of receiving the Board's notice under **Rule 18.02**.

18.04 Where a party who commenced a proceeding has not taken any steps with respect to the proceeding for more than one year from the date of filing, the Board may notify the party that the proceeding shall be dismissed unless the person, within 10 calendar days of receiving the Board's notice, shows cause why it should not be dismissed or advises the Board that the application or appeal is withdrawn.

18.05 Where the Board dismisses a proceeding, or is advised that the application or appeal is withdrawn, any fee paid to commence the proceeding shall not be refunded.

19. Decision Not to Process

19.01 The Board or Board staff may decide not to process documents relating to the commencement of a proceeding if:

(a) the documents are incomplete;

(b) the documents were filed without the required fee for commencing the proceeding;

(c) the documents were filed after the prescribed time period for commencing the proceeding has elapsed; or

(d) there is some other technical defect in the commencement of the proceeding.

19.02 The Board or Board staff shall give the party who commenced the proceeding notice of a decision made under **Rule 19.01** that shall include:

(a) reasons for the decision; and

(b) requirements for resuming processing of the documents, if applicable.

19.03 Where requirements for resuming processing of the documents apply, processing shall be resumed where the party complies with the requirements set out in the notice given under **Rule 19.02** within:

(a) subject to **Rule 19.03(b)**, 30 calendar days from the date of the notice; or

(b) 10 calendar days from the date of the notice, where the proceeding commenced is an appeal.

19.04 After the expiry of the applicable time period under **Rule 19.03**, the Board may close its file for the proceeding without refunding any fee that may already have been paid.

19.05 Where the Board has closed its file for a proceeding under **Rule 19.04**, a person wishing to refile the related documents shall:

(a) in the case of an application, refile the documents as a fresh application, and pay any fee required to do so; or

(b) in the case of an appeal, refile the documents as a fresh notice of appeal, except where the time period for filing the appeal has elapsed, in which case the documents cannot be refiled.

20. Withdrawal

20.01 An applicant or appellant may withdraw an application or appeal:

(a) at any time prior to the hearing, by filing and serving a notice of withdrawal signed by the applicant or the appellant, or his or her representative; or

(b) at the hearing with the permission of the Board.

20.02 A party may by motion seek leave to discontinue participation in a proceeding at any time before a final decision.

20.03 The Board may impose conditions on any withdrawal or discontinuance, including costs, as it considers appropriate.

20.04 Any fee paid to commence the proceeding by an applicant seeking to withdraw under **Rule 20.01** shall not be refunded.

20.05 If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.

21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

21.03 Where a party has been directed to serve a notice under this Rule, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

22. Intervenor Status

22.01 Subject to **Rule 22.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively

participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

22.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

22.03 Every letter of intervention shall contain the following information:

(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention;

(b) in the case of a frequent intervenor, an attached document describing the intervenor, its mandate and objectives, membership, if any, the constituency represented, the types of programs or activities carried out, and the identity of their authorized representative in Board proceedings, unless such a document was otherwise filed within the previous 12 month period;

(c) subject to **Rule 22.04**, a concise statement of the nature and scope of the intervenor's intended participation;

(d) a request for the written evidence, if it is desired;

(e) an indication as to whether the intervenor intends to seek an award of costs;

(f) if applicable, the intervenor's intention to participate in the hearing using the French language; and

(g) the full name, address, telephone number, and email address, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding.

Subsection (b) applies to letters of intervention filed after June 1, 2014.

22.04 Where, by reason of an inability or insufficient time to study the document initiating the proceeding, a person is unable to include any of the

information required in the letter of intervention under **Rule 22.03(b)**, the person shall:

(a) state this fact in the letter of intervention initially filed; and

(b) refile and serve the letter of intervention with the information required under **Rule 22.03(b)** within 15 calendar days of receipt of a copy of any written evidence, or within 15 calendar days of the filing of the letter of intervention, or within 3 calendar days after a proposed issues list has been filed under **Rule 28**, whichever is later.

22.05 A person may apply for intervenor status after the time limit directed by the Board by filing and serving a notice of motion and a letter of intervention that, in addition to the information required under **Rule 22.03**, shall include reasons for the late application.

22.06 The Board may dispose of a motion under **Rule 22.05** with or without a hearing.

22.07 A party may object to a person applying for intervenor status by filing and serving written submissions within 5 business days of being served with a letter of intervention.

22.08 The person applying for intervenor status may make written submissions in response to any submissions filed under **Rule 22.07**.

22.09 The Board may grant intervenor status on conditions it considers appropriate.

23. Public Comment

23.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who does not wish to be a party in a proceeding, but who wishes to communicate views to the Board, shall file a letter of comment.

23.02 The letter of comment shall include the nature of the person's interest, the person's full name, mailing address, email address and telephone number.

23.03 Before the record of a proceeding is closed, the applicant in the proceeding must address the issues raised in letters of comment by way of a document filed in the proceeding.

23.04 In any proceeding, the Board may make arrangements to receive oral comment on the record of the proceeding.

23.05 A person who makes an oral comment shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

24. Adjournments

24.01 The Board may adjourn a hearing on its own initiative, or upon motion by a party, and on conditions the Board considers appropriate.

24.02 Parties shall file and serve a motion to adjourn at least 10 calendar days in advance of the scheduled date of the hearing.

PART IV - PRE-HEARING PROCEDURES

25. Technical Conferences

25.01 The Board may direct the parties to participate in technical conferences for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

25.02 The technical conferences may be transcribed, and the transcription, if any, shall be filed and form part of the record of the proceedings.

26. Interrogatories

26.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;

(b) simplify the issues;

(c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the proceeding.

26.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;

(b) contain a specific reference to the evidence;

(c) be grouped together according to the issues to which they relate;

(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;

(e) be numbered using a continuous numbering system such that:
- the format is [issue number] [acronym of party] [interrogatory number for that party]
- the "issue number" corresponds to the issues list, or if there is no issues list in the proceeding, to the exhibit or chapter number or letter in the application;
- the "acronym of party" corresponds to the Board-issued list of acronyms;
- the "interrogatory number for that party" is sequential for that party despite a change in issue number (e.g. 2 Staff 4 represents Board staff's fourth interrogatory on issue 2); and
- if a supplementary round of interrogatories is ordered, the "interrogatory number for that party" remains sequential for that party and the suffix "s" is added to the interrogatory number;

(f) be filed and served as directed by the Board; and

(g) set out the date on which they are filed and served.

27. Responses to Interrogatories

27.01 Subject to **Rule 27.02**, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;

(b) group the responses together according to the issue to which they relate;

(c) repeat each question at the beginning of each response;

(d) respond to each interrogatory on a separate page or pages;

(e) number the responses as described in Rule 28.02(e) ;

(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;

(g) file and serve the response as directed by the Board; and

(h) set out the date on which the response is filed and served.

27.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory seeks information that is not relevant, setting out specific reasons in support of that contention;

(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or

(c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

27.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

27.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

28. Identification of Issues

28.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;

(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or

(c) the identification of issues would assist the parties to participate more effectively in the hearing.

28.02 The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

28.03 A proposed issues list shall set out any issues that:

(a) the parties have agreed should be contained on the list;

(b) are contested; and

(c) the parties agree should not be considered by the Board.

28.04 Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

29. Alternative Dispute Resolution

29.01 The Board may direct that participation in alternative dispute resolution ("ADR") be mandatory.

29.02 An ADR conference shall be open only to parties and their representatives, unless the Board directs or the parties agree otherwise.

29.03 A Board member shall not participate in an ADR conference, and the conference shall not be transcribed or form part of the record of a proceeding.

29.04 The Board may appoint a person to chair an ADR conference.

29.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

29.06 The chair of an ADR conference may attempt to effect a settlement of issues by any reasonable means including:

(a) clarifying and assessing a party's position or interests;

(b) clarifying differences in the positions or interests taken by the respective parties;

(c) encouraging a party to evaluate its own position or interests in relation to other parties by introducing objective standards; and

(d) identifying settlement options or approaches that have not yet been considered.

29.07 Subject to **Rule 29.08**, where a representative attends an ADR conference without the party, the representative shall be authorized to settle issues.

29.08 Any limitations on a representative's authority shall be disclosed at the outset of the ADR conference.

29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties.

30. Settlement Proposal

30.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.

30.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and any parties who disagree.

30.03 The parties shall ensure that the settlement proposal contains or identifies evidence and rationale sufficient to support the settlement proposal and shall provide such additional evidence and rationale as the Board may require.

30.04 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.

30.05 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice and reasons to the other parties, and **Rule 30.04** applies.

30.06 Where the Board accepts a settlement proposal as a basis for making a decision in the proceeding, the Board may base its findings on the settlement proposal, and on any additional evidence that the Board may have required.

31. Pre-Hearing Conference

31.01 In addition to technical, issues and ADR conferences, the Board may, on its own motion or at the request of any party, direct the parties to make submissions in writing or to participate in pre-hearing conferences for the purposes of:

(a) admitting certain facts or proof of them by affidavit;

(b) permitting the use of documents by any party;

(c) recommending the procedures to be adopted;

(d) setting the date and place for the commencement of the hearing;

(e) considering the dates by which any steps in the proceeding are to be taken or begun;

(f) considering the estimated duration of the hearing; or

(g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

31.02 The Board Chair may designate one member of the Board or any other person to preside at a pre-hearing conference.

31.03 A member of the Board who presides at a pre-hearing conference may make such orders as he or she considers advisable with respect to the conduct of the proceeding, including adding parties.

PART V - HEARINGS

32. Hearing Format and Notice

32.01 In any proceeding, the Board may hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises.

32.02 The format, date and location of a hearing shall be determined by the Board.

32.03 Subject to **Rule 21.02**, the Board shall provide written notice of a hearing to the parties, and to such other persons or class of persons as the Board considers necessary.

33. Hearing Procedure

33.01 Parties to a hearing shall comply with any directions issued by the Board in the course of the proceeding.

34. Summons

34.01 A party who requires the attendance of a witness or production of a document or thing at an oral or electronic hearing may obtain a Summons from the Board Secretary.

34.02 Unless the Board directs otherwise, the Summons shall be served personally and at least 48 hours before the time fixed for the attendance of the witness or production of the document or thing.

34.03 The issuance of a Summons by the Board Secretary, or the refusal of the Board Secretary to issue a Summons, may be brought before the Board for review by way of a motion.

35. Hearings in the Absence of the Public

35.01 Subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises, the Board may hold an oral or electronic hearing or part of the hearing in the absence of the public, with such persons in attendance as the Board may permit and on such conditions as the Board may impose.

36. Constitutional Questions

36.01 Where a party intends to raise a question about the constitutional validity or applicability of legislation, a regulation or by-law made under legislation, or a rule of common law, or where a party claims a remedy under subsection 24(1) of the Canadian Charter of Rights and Freedoms, notice of a constitutional question shall be filed and served on the other parties and the Attorneys General of Canada and Ontario as soon as the circumstances requiring notice become known and, in any event, at least 15 calendar days before the question is argued.

36.02 Where the Attorneys General of Canada and Ontario receive notice, they are entitled to adduce evidence and make submissions to the Board regarding the constitutional question.

36.03 The notice filed and served under **Rule 36.01** shall be in substantially the same form as that required under the Rules of Civil Procedure for notice of a constitutional question.

37. Hearings in French

37.01 Subject to this Rule, evidence or submissions may be presented in either English or French.

37.02 The Board may conduct all or part of a hearing in French when a request is made:

(a) by a party;

(b) by a person seeking intervenor status at the time the application for intervenor status is made; or

(c) by a person making an oral comment under **Rule 23** who indicates to the Board the desire to make the presentation in French.

37.03 Where all or part of a hearing is to be conducted in French, the notice of the hearing shall specify in English and French that the hearing is to be so conducted, and shall further specify that English may also be used.

37.04 Where a written submission or written evidence is provided in either English or French, the Board may order any person presenting such written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

38. Media Coverage

38.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

38.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

39. Cost Eligibility and Awards

39.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

39.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 39.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

ONTARIO ENERGY BOARD

Practice Direction

On

Confidential Filings

Revised April 24, 2014

ONTARIO ENERGY BOARD

PRACTICE DIRECTION ON CONFIDENTIAL FILINGS

1. INTRODUCTION AND PURPOSE

The purpose of this Practice Direction on Confidential Filings is to establish uniform procedures for the filing of confidential materials in relation to all proceedings that come before the Ontario Energy Board. This Practice Direction is also intended to assist participants in the Board's proceedings in understanding how the Board will deal with such filings.

The Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent, and accessible. The Board therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. That being said, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

The Board and parties to a proceeding are required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings. In this context, it is particularly important that all parties remain mindful that only materials that are clearly relevant to the proceeding should be filed, whether the party is filing materials at its own instance, is requesting information by way of interrogatory or is responding to an interrogatory. Parties are reminded that, under the Board's *Rules of Practice and Procedure*, a party that is in receipt of an interrogatory that it believes is not relevant to the proceeding may file and serve a response to the interrogatory that sets out the reasons for the party's belief that the requested information is not relevant. This process applies to all interrogatories, and is of particular significance in relation to confidential filings given the administrative issues associated with the management of those filings.

The Board's *Rules of Practice and Procedure* govern the conduct of all proceedings before the Board. Those *Rules* require compliance with this Practice Direction.

The Board will continue to monitor the effectiveness of its approach to confidential filings and will revise this Practice Direction on an as-needed basis.

2. APPLICATION

The procedures set out in this Practice Direction are to be followed by all participants in a proceeding before the Board, unless otherwise directed by the Board. This includes proceedings to be determined under delegated authority (see section 3.3) and proceedings commenced on the Board's own motion.

This Practice Direction is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act*, the *Ontario Energy Board Act, 1998*, and the *Statutory Powers Procedures Act,* Board instruments (i.e., licences, codes, rules and Board orders) and the Board's *Rules of Practice and Procedure*.

This Practice Direction does not address the manner in which Board members and Board staff will handle confidential information, which is an issue of the Board's internal processes. The Board has implemented internal procedures that are designed to ensure that confidential information is segregated from other information and is made available within the Board on a limited basis.

3. DEFINITIONS AND INTERPRETATION

3.1. Definitions

3.1.1. In this Practice Direction:

"**Act**" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

"**ADR**" means alternative dispute resolution;

"**applicant**" means a person who makes an application to the Board, and includes a person that is filing a notice under section 80 or 81 of the Act;

"**application**" when used in connection with a proceeding commenced by an application to the Board, means the commencement by a party of a proceeding before the Board, and includes a notice filed under section 80 or 81 of the Act;

"**Board**" means the Ontario Energy Board and includes any panels or delegates thereof;

"**Board Secretary**" means the Secretary of the Board and any Assistant Secretary appointed by the Board under the Act;

"**business day**" means any day which is not a holiday;

"**document**" or "**record**" includes a written document, film, audio tape, videotape, file, photograph, chart, graph, map, plan, survey, book of account, transcript, and any information stored by means of an electronic storage and retrieval system;

"**FIPPA**" means the *Freedom of Information and Protection of Privacy Act* (Ontario);

"**hearing**" means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

"**holiday**" means any Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed for observance of a holiday within the meaning of the *Interpretation Act* (Ontario);

"**party**" includes an applicant, an appellant, any person granted intervenor status by the Board and any person ordered to produce information in a proceeding before the Board; and

"**proceeding**" means a process to decide a matter brought before the Board, including a matter commenced by application, notice of motion, notice of appeal, reference, request of the Minister, Order in Council or on the Board's own motion.

3.1.2. Except as otherwise defined in section 3.1.1, words and expressions used in this Practice Direction shall have the meaning ascribed to them in the Act and the Board's *Rules of Practice and Procedure.*

3.2. Interpretation

3.2.2. In this Practice Direction:

(a) words importing the singular include the plural and vice versa;

(b) words importing a gender include any gender;

(c) words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or

other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

(d) where a word or phrase is defined in this Practice Direction, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning;

(e) a reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision; and

(f) the expression "including" means including without limitation.

3.3. Matters Decided Under Delegated Authority

3.3.1. Under the authority of section 6 of the Act, the management committee of the Board has delegated certain powers or duties to an employee of the Board. In such cases, the delegate is responsible for making determinations in relation to confidential filings. The provisions of this Practice Direction otherwise apply in relation to confidential filings made in the context of a proceeding to be decided under delegated authority.

4. WHEN REQUEST FOR CONFIDENTIALITY IS NOT REQUIRED

4.1. Information Identified as Confidential in Board Templates and Filing Guidelines

4.1.1. The Board has developed certain templates and filing guidelines to assist applicants in preparing licensing and other applications. Certain of these templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences, identify predefined categories of information that will be considered confidential in the normal course. Where a Board template or filing guideline indicates that information will be treated in confidence, no formal request for confidentiality under Part 5 is required. However, to the extent practicable, any such information should be clearly marked "confidential".

4.1.2. Where a Board template or filing guideline indicates that information will be treated in confidence, the information will not be placed on the public record nor provided to any other party unless another party requests access to that information under section 4.1.4 and the Board rules in favour of that request.

4.1.3. In the absence of a request for confidentiality, all information that is not indicated on a template or in a filing guideline as being confidential will be included on the public record. An applicant that wishes information that would normally be included on the public record to be held confidential must follow the procedure set out in Part 5, and the Board will determine the request in accordance with Part 5.

4.1.4. Where a Board template or filing guideline indicates that information will be treated in confidence, a party may request access to that information by filing a request with the Board Secretary and serving a copy of the request on the applicant and each party. The request must address the matters identified in paragraph (b) of section 5.1.7. The applicant will have an opportunity to object to the request for access to confidential information. The applicant must file its objection with the Board Secretary and serve it on all parties within the time specified by the Board. The Board will determine the request for access to confidential information in accordance with Part 5.

4.2. Information filed Under the Board's Reporting and Record Keeping Requirements ("RRR")

4.2.1. The Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities*, *Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements* and *Electricity Reporting and Record Keeping Requirements* require that licensees and natural gas utilities file certain information with the Board on a regular basis. Each of these RRR identify information that the Board intends to treat in confidence. No formal request for confidentiality is required in relation to such information when it is filed with the Board as part of a regular RRR filing. However, to the extent practicable, any such information should be clearly marked "confidential". Where such information is filed as part of a regular RRR filing and is subsequently filed in a proceeding, Parts 5 and 6 apply.

4.3 Personal Information under FIPPA

4.3.1 Subject to limited exceptions, the Board is prohibited from releasing personal information, as that phrase is defined in FIPPA. When a person files a document or record that contains the personal information of another person who is not a party to the proceeding, the person filing the document or record must file two versions of the document or record in accordance with Rule 9A.01 of the Board's *Rules of Practice and Procedure*. As indicated in Rule 9A.02, the confidential, un-redacted version of the document or record will be held in confidence and neither that version of the document or record nor the personal information contained in it will be placed on the public record or provided to any other party, including a person from whom the Board has accepted a Declaration and

Undertaking under section 6.1, unless the Board determines that the information is not personal information or that the disclosure of the personal information would be in accordance with the requirements of FIPPA.

5. GENERAL PROCESS FOR CONFIDENTIALITY IN MATTERS BEFORE THE BOARD

The processes set out in this Part and in Part 6 are intended to allow for the protection of information that has been properly designated as confidential. The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

It is also the expectation of the Board that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record. This will provide parties with a fair opportunity to present their cases and permit the Board to provide meaningful and well-documented reasons for its decisions.

The processes set out in this Part and in Part 6 contemplate that the Board will play a central role in directing and managing the exchange of confidential filings and related materials (such as the Declaration and Undertaking). A party that independently serves other parties with documents containing confidential information other than through or at the direction of the Board does so at its own risk.

5.1. Process for Confidentiality Requests

5.1.1. All filings must be made in accordance with the Board's *Rules of Practice and Procedure*, specifically, Rule 10 of the *Rules of Practice and Procedure*, which deals with confidential documents before the Board.

5.1.2. In accordance with Rule 10.01 of the Board's *Rules of Practice and Procedure,* a party may request that all or part of a document be held confidential.

5.1.3. A request for confidentiality must be addressed to the Board Secretary.

5.1.4. A request for confidentiality must include the following items:

(a) a cover letter indicating the reasons for the confidentiality request, including the reasons why the information at issue is considered confidential and the reasons why public disclosure of that information would be detrimental;

(b) a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document should be marked "confidential" and should identify all portions of document for which confidentiality is claimed by using shading, square brackets or other appropriate markings. If confidential treatment is requested in relation to the entire document, the document should be printed on coloured paper; and

(c) either:

i. a non-confidential, redacted version of the document from which the information that is the subject of the confidentiality request has been deleted or stricken; or

ii. where the request for confidentiality relates to the entire document, a non-confidential description or summary of the document.

5.1.5. A copy of the cover letter requesting confidentiality, together with the non-confidential version or non-confidential description of the document (as applicable) must be served on all parties to the proceeding, and will be placed on the public record. The confidential, un-redacted version of the document will, subject to section 5.1.6, be kept confidential until the Board has made a determination on the confidentiality request.

5.1.6. A party to the proceeding may object to the request for confidentiality by filing an objection with the Board Secretary within the time specified by the Board. The objection must be served on all other parties to the proceeding, including the party that made the confidentiality request. Where the party requires access to the confidential version of the document in order to submit its objection, the party may request that the Board allow access for that purpose under suitable arrangements as to confidentiality. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board. The party that made the confidentiality request may object to the request for access within the time and in the manner specified by the Board.

5.1.7. An objection to a request for confidentiality must address the following:

(a) the reason why the party believes that the information that is the subject of the request for confidentiality is not confidential, in whole or in part, by reference to the grounds for confidentiality expressed by the party making the request for confidentiality; and

(b) the reason why the party requires disclosure of the information that is the subject of the request for confidentiality and why access to the non-confidential version or description of the document (as applicable) is insufficient to enable the party to present its case.

5.1.8. The party requesting confidentiality will have an opportunity to reply to the objection. The replying party must file its reply with Board Secretary and serve it on all parties to the proceeding within the time specified by the Board.

5.1.9. The Board will then assess whether the request for confidentiality should be granted, and may determine that a request for confidentiality is not warranted regardless of whether any party has objected to the request. Some of the factors that the Board may consider in making this assessment are listed in Appendix A, including whether the Board has in the past assessed or maintained the same type of information as confidential. An illustrative list of the types of information that the Board has previously assessed or maintained as confidential is set out in Appendix B, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

5.1.10. In determining the request for confidentiality, the Board may:

(a) order the document placed on the public record, in whole or in part;

(b) order the document be kept confidential, in whole or in part;

(c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document (as applicable) be revised;

(d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality (see Part 6); or

(e) make any other order that the Board finds to be in the public interest.

5.1.11. The Board will notify all parties of its decision in relation to a request for confidentiality.

5.1.12. Where the Board has ordered that information that is the subject of a confidentiality request be placed on the public record or disclosed to another party, in whole or in part, the person who filed the information will, subject to section 5.1.13, have a period of 5 business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board. The Board may deny the request where the information is relevant to a

matter in issue and its probative value would outweigh any unfair prejudice, having regard to the record of the proceeding at the time of the request.

5.1.13. The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the Board.

5.1.14. If the party that made the request for confidentiality indicates, within five business days of the date of receipt of the Board's order, that it intends to appeal or seek review of the decision, the Board will not place the document on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. In the absence of such an indication, the Board will deal with the information in the manner set out in its order.

5.2. Confidentiality Requests Made Orally During an Oral Hearing

5.2.1. The provisions of section 5.1 generally apply to requests for confidentiality made in the context of an oral hearing. However, the Panel presiding over the oral hearing may take such action as it considers appropriate to expedite the process when there is an immediate need for information that the Panel needs to hear.

5.3. Interrogatories

5.3.1. A party may request that all or part of a response to an interrogatory be held confidential. The provisions of section 5.1 apply to requests for confidentiality made in relation to a response to an interrogatory, with such modifications as the context may require.

6. ARRANGEMENTS AS TO CONFIDENTIALITY

Where the Board has agreed to a request for confidentiality, the confidential information will not be placed on the public record. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made, although the Board may limit access to confidential information to those parties that the Board has determined require access to the confidential information in order to present their cases. This Part sets out the principal arrangements that the Board will use in allowing limited and conditional access to confidential information by representatives of parties.

The processes set out in this Part require that parties file a Declaration and Undertaking with the Board. Parties to a proceeding will be notified when the Board has accepted a Declaration and Undertaking from a person. Parties should not independently serve a Declaration and Undertaking on other parties.

The Board considers violations of a Declaration and Undertaking given to the Board under this Part to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the Board. In appropriate cases, the Board may also refuse to accept further Declaration and Undertakings from persons whose future compliance with a Declaration and Undertaking is in question.

6.1 Declaration and Undertaking

6.1.1. The Board may determine that confidential information should, in whole or in part, be disclosed to one or more persons that have signed the form of Declaration and Undertaking attached to this Practice Direction. The Declaration and Undertaking is a binding commitment by the person: (i) not to disclose the confidential information except as permitted by the Board; (ii) to treat the confidential information in confidence; (iii) to return or destroy the confidential information following completion of the proceeding; and (iv) in the case of confidential information in electronic media, to expunge the confidential information from all electronic apparatus and data storage media under the person's direction or control, and to continue to abide by the terms of the Declaration and Undertaking in relation to such confidential information to the extent that it subsists in an electronic form and cannot reasonably be expunged in a manner that ensures that it cannot be retrieved. A signed Declaration and Undertaking must be filed with the Board and will be placed on the public record.

6.1.2. Subject to section 6.1.4, the Board will, except where there are compelling reasons for not doing so, accept a Declaration and Undertaking from the following:

(a) counsel for a party; and

(b) an expert or consultant for a party.

As a general rule, such counsel, expert or consultant cannot be a director or employee of a party.

6.1.3. Subject to section 6.1.4, the Board may accept a Declaration and Undertaking from other persons in appropriate cases. In such a case, a modified version of the form of Declaration and Undertaking will be made available to such person.

6.1.4 The Board shall notify the party that filed the confidential information that would be the subject-matter of a Declaration and Undertaking of the persons from whom a Declaration and Undertaking will be accepted. The party shall have an opportunity to object to the acceptance of a Declaration and Undertaking from such person in the manner and within the time specified by the Board. The

person to whom the objection relates shall have an opportunity to reply to the objection in the manner and within the time specified by the Board. The Board will then decide whether it will accept a Declaration and Undertaking from such person and may, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to that person's access to the confidential information as the Board considers appropriate. Where the Board accepts a Declaration and Undertaking from a person, the Board will notify the other parties to the proceeding or direct that the other parties be notified accordingly. A person should not serve a Declaration and Undertaking on other parties unless directed by the Board to do so. A party is not required to serve confidential information on a person until such time as the party has been notified that the Board has accepted a Declaration and Undertaking from that person.

6.1.5. Where the Board determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the Board may act as the conduit for the service of confidential information on such persons. In such cases, the confidential information need only be filed with the Board Secretary (in the appropriate number of copies), and the Board Secretary will attend to the distribution of the confidential information to persons that have signed a Declaration and Undertaking.

6.1.6. In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) or returned to the Board Secretary for destruction promptly following the end of the proceeding for destruction. A person that chooses to destroy or expunge confidential information must file with the Board Secretary the form of Certification of Destruction attached to this Practice Direction.

6.2. Hearings in the Absence of the Public (*In Camera* Hearings)

6.2.1. Under section 9 of the *Statutory Powers Procedure Act* (Ontario), oral hearings are required to be open to the public except where the Board is of the opinion that "intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public", in which case the Board may hold the hearing in the absence of the public. It is therefore the Board's normal practice is to hold oral hearings in public to comply with this obligation and to facilitate transparency, openness, and accessibility of the Board's processes.

6.2.2. The Board recognizes that there may be some instances where the proceedings may need to be closed to the public. This situation could arise when there is a possibility that information that the Board has agreed is confidential will be

disclosed during an oral hearing. When this occurs, the Board will exclude from the hearing room all persons other than the following:

(a) representatives of the Board (i.e., Board staff, Board consultants, etc.);

(b) representatives of the party that filed the confidential information; and

(c) persons that have signed and returned to the Board a Declaration and Undertaking, provided that the confidential information at issue is covered by the Declaration and Undertaking and that the Board has determined that the persons require access to the confidential information in order to present their cases.

The hearing will then proceed *in camera* for such time as the confidential information is the subject of the hearing or is being referred to.

6.2.3. When part of a hearing is conducted *in camera*, transcripts of the *in camera* portion of the hearing will be dealt with in the same manner as the confidential information at issue. Subject to section 6.2.5, copies of the transcript of the *in camera* portion of the hearing will only be provided to the party that provided the confidential information and to applicable persons that have signed and returned to the Board a Declaration and Undertaking.

6.2.4. The party that filed the confidential information that is the subject of an *in camera* portion of a hearing shall, within five business days or such other time as the Board may direct, review the transcript of that portion of the hearing and shall file with the Board:

(a) a redacted version of the transcript that identifies all portions of the transcript for which confidentiality is claimed, using shading, square brackets or other appropriate markings; or

(b) where the party believes that the entire transcript should be treated as confidential, a letter identifying why the party believes that to be the case and a summary of the transcript for the public record.

6.2.5. The Board will assess the filing made under section 6.2.4 and may, among such other action as the Board may take, do one or more of the following:

(a) provide a redacted version of a transcript prepared under section 6.2.4(a) or this section to all applicable persons that have signed and returned to the Board a Declaration and Undertaking, or direct that it be so provided;

(b) direct that the party that filed a redacted version of a transcript under section 6.2.4(a) or this section prepare and file a revised redacted version of the transcript;

(c) provide a summary of a transcript prepared under section 6.2.4(b) or this section to all parties to the proceeding, or direct that it be so provided;

(d) direct that the party that filed a summary of a transcript under section 6.2.4(b) prepare and file a revised summary or a redacted version of the transcript;

(e) direct that any public testimony that is given *in camera* be placed on the public record and provided to all parties to the proceeding; or

(f) direct that a redacted version of the transcript suitable for being placed on the public record be prepared and provided to all parties to the proceeding.

6.3. Other

6.3.1. Where the Board has made arrangements for the disclosure of confidential information, the Board may give further directions to the parties from time to time to protect the confidential information from disclosure to persons that are not entitled to such disclosure. These directions may include the process for the filing and exchange of interrogatories that contain the confidential information and the manner in which confidential information may be addressed as part of closing arguments or final submissions.

6.3.2. Parties should make every effort to prepare their written argument such that the entirety of the document can be placed on the public record. Where it is necessary to make specific reference to confidential information in a written argument, the party filing the argument should either:

(a) file a public version of the written argument together with a confidential appendix that contains the confidential information; or

(b) file both an un-redacted confidential version of the written argument and a public, redacted version of the written argument from which all confidential information has been deleted.

6.3.3. Where the Board considers that a confidential appendix to, or a redacted version of, a written argument contains information that has not been determined by the Board to be confidential, the Board may order the party filing the written argument to file a revised appendix or redacted version.

7. ADR CONFERENCES

7.1.1. This Practice Direction does not apply to ADR conferences. [1] Confidentiality in the context of ADR conferences shall be governed by the Board's *Rules of Practice and Procedure*, Settlement Guidelines and any other applicable Practice Guidelines.

8. INSPECTIONS AND INVESTIGATIONS

Sections 110 and 111 of the Act contain provisions that address the confidentiality of documents, records and information obtained by an inspector under Part VII of the Act. Sections 112.0.5 and 112.0.6 of the Act are to the same effect in relation to information obtained by an investigator under Part VII.0.1 of the Act.

8.1.1. All documents, records and information obtained by an inspector during the course of an inspection under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act are confidential. Generally speaking, such documents, records and information will not be disclosed to anyone other than Board staff or Board members. By way of exception, documents, records and information obtained during an inspection or investigation may be disclosed:

(a) to counsel for the Board;

(b) as may be required in connection with the administration of the Act or any other Act that gives powers or duties to the Board;

(c) in any proceeding under the Act or any other Act that gives powers or duties to the Board;

(d) with the consent of the owner of the document or record or the person that provided the information; and

(e) where required by law.

8.1.2. No document, record or information obtained by an inspector under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act will be introduced in evidence in a Board proceeding unless the Board has given notice to the owner of the document or record or the person who provided the

[1] For clarity, an ADR conference does not include a technical conference. Any confidentiality issues arising in relation to a technical conference will be addressed in accordance with Parts 5 and 6 of this Practice Direction.

information, and has given that person an opportunity to make representations with respect to the intended introduction of that evidence.

8.1.3. If any document, record, or other information obtained by an inspector or investigator is admitted into evidence in a proceeding before the Board, the Board may determine whether the document, record, or information should be kept confidential and, if so, whether and the extent to which the document, record or information should be disclosed under suitable arrangements as to confidentiality (see Part 6). The Board will determine the matter in accordance with Parts 5 and 6.

9. *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Participants in the Board's processes are reminded that the Board is subject to FIPPA. FIPPA addresses circumstances in which the Board may, upon request, be required to release information that is in its custody or under its control, and generally prohibits the Board from releasing personal information. Accordingly, the Board will have regard to its obligations under FIPPA when making determinations in relation to confidential filings (see section 4.3.1). A brief overview of the more relevant provisions of FIPPA is set out in Appendix C.

10. ELECTRONIC INFORMATION

The Board will not, without the consent of the party that filed the confidential information, transmit materials containing confidential information by electronic mail. Materials containing confidential information, including transcripts of in camera proceedings, may be made available only in paper form or on diskette or other machine-readable media.

11. ACCESS TO CONFIDENTIAL INFORMATION OUTSIDE OF PROCEEDING

Interested persons may wish to see confidential information at times other than during the proceeding in which the confidential information was filed. In such a case, the interested person may request access to that information by filing a request with the Board Secretary. The person that filed the confidential information will have an opportunity to object to the request for access to that information. The objection must be filed with the Board Secretary and served on the person requesting access. The Board will determine the request for access to confidential information in accordance with Part 5.

Appendix A

Considerations in Determining Requests for Confidentiality

The final determination of whether or not information will be kept confidential rests with the Board. The Board will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information. Some factors that the Board may consider in addressing confidentiality of filings made with the Board are:

(a) the potential harm that could result from the disclosure of the information, including:

  i. prejudice to any person's competitive position;

  ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;

  iii. whether the information could interfere significantly with negotiations being carried out by a party; and

  iv. whether the disclosure would be likely to produce a significant loss or gain to any person;

(b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board;

(c) whether the information pertains to public security;

(d) whether the information is personal information;

(e) whether the Information and Privacy Commissioner or a court of law has previously determined that a record should be publicly disclosed or kept confidential;

(f) if an access request has previously been made for the information under FIPPA, whether the information was disclosed as a result of that request;

(g) any other matters relating to FIPPA and FIPPA exemptions;

(h) whether the type of information in question was previously held confidential by the Board; and

(i) whether the information is required by legislation to be kept confidential.

Information that is in the public domain will not be considered confidential.

Appendix B

Types of Information that Have Previously Been Held Confidential

This Appendix contains an illustrative list of the types of information previously assessed or maintained by the Board as confidential, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

1. Individual Personal Records

Personal records of employees or other members of entities seeking licenses that are either filed with the Board or otherwise obtained have previously been held confidential. Individual personal records include police, tax, CPIC, and other personal records.

2. Credit Checks

Personal credit checks. These are credit checks filed with the Board, or obtained by the Board, from a variety of commercial sources including Dunn & Bradstreet and Standard & Poor's.

3. Information Covered by Solicitor-client Privilege or Litigation Privilege

Advice with respect to litigation or other legal information protected by solicitor-client privilege or litigation privilege.

4. Tax Related Information

Information from a tax return or information gathered for the purpose of determining tax liability or collecting a tax.

5. Third Party Information under FIPPA

Third party information as described in section 17(1) of FIPPA, including vendor pricing information.

6. "Forward Looking" Financial Information

"Forward looking" financial information that has not been publicly disclosed and that Ontario securities law therefore requires be treated as confidential.

7. Information Identified as Confidential in Board Templates and Filing Guidelines

Information identified as being considered confidential in Board templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences.

8. Information Filed Under the RRR

Information identified in the Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities*, *Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements* and *Electricity Reporting and Record Keeping Requirements* as being treated as confidential.

Appendix C

Summary of Pertinent FIPPA Provisions

FIPPA allows any person to request access to records or information in the custody or under the control of the Board.

Subject to limited exceptions, the Board is prohibited from releasing personal information.

Following receipt of a request, the Board must release non-personal information that is in its custody or under its control unless the information falls within one of the exemptions listed in the legislation. Some of the exemptions are mandatory (in which case the information must be withheld) and others are discretionary (in which case the information may be withheld). For example, records do not need to be released if disclosure would:

(a) reveal advice to the government from a public servant or a consultant;

(b) interfere with law enforcement;

(c) reveal confidential information received from another government; or

(d) violate solicitor-client privilege.

The exemptions that are likely to be of most relevance in the context of confidential filings with the Board are those contained in section 17 of FIPPA, which relates to commercially sensitive third party information.

Under section 17(1), the Board must not, without the consent of the person to whom the information relates, disclose a record where:

(a) the record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;

(b) the record was supplied in confidence implicitly or explicitly; and

(c) disclosure of the record could reasonably be expected to have any of the following effects:

i. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;

ii. result in similar information no longer being supplied to the Board where it is in the public interest that similar information continue to be so supplied;

iii. result in undue loss or gain to any person, group, committee or financial institution or agency; or

iv. reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Before granting a FIPPA request for access to a record that the Board has reason to believe might contain information referred to in section 17(1) of FIPPA, the Board must give written notice to the person to whom the information relates. That person then has an opportunity to make written representations as to why the record (or a part of the record) should not be disclosed. Where the Board subsequently decides to disclose the record (or a part of the record), the Board must again give written notice to the person to whom the information relates. That person then has an opportunity to appeal the decision to the Information and Privacy Commissioner.

Under section 17(2) of FIPPA, the Board must not, without the consent of the person to whom the information relates, disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.