Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION TO QUASH
REPLY OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY

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Introduction

1. This is the reply of the Canadian Transportation Agency (Agency) in regards to its motion for an order quashing the judicial review application filed by the Applicant.

Issue

2. The issue is whether this Honorable Court should quash the application for judicial review made by applicant for want of jurisdiction considering that the *Access to Information Act* provides for a recourse to the Federal Court for a review of a matter which relates to a refusal by the head of a government institution following a request for access for government records.

Access to government records

3. The public's right of access to government records and the limit that must be placed on necessary exceptions to that right of access is codified in section 2 of the *Access to Information Act.*

Rubin v. Canada (Minister of Health), [2001] F.C.J. No. 1298, at para. 36

4. The *Access to Information Act* provides for a recourse to the Federal Court for a person who has been refused access to government records.

Section 41 of the *Access to Information Act*, Motion Record of the Canadian Transportation Agency, Appendix A, page 41.

5. In the Federal Court, the government institution must convince the Court that the material requested by the requestor should not be disclosed. The burden of proving that it should not be disclosed is on the government institution.

Rubin v. Canada (Minister of Health), [2001] F.C.J. No. 1298, at para. 37

6. Renaming a request for access for government records, a "Request pursuant to section 2(b) of the *Canadian Charter of Rights and Freedoms*" does not create the right to bypass the available recourse to the Federal Court.

Access to Information: section 2(b) of the *Canadian Charter of Rights and Freedoms*

7. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 30, Motion Record of the Canadian Transportation Agency, at Tab 4

8. If the Federal Court concludes that the government institution was correct in refusing to disclose the material requested, a requestor can always appeal this decision and argue that a right under section 2(b) of the *Canadian Charter of Rights and Freedom* includes a right to access to documents. The burden of proving that is on the requestor.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 31, Motion Record of the Canadian Transportation Agency, at Tab 4

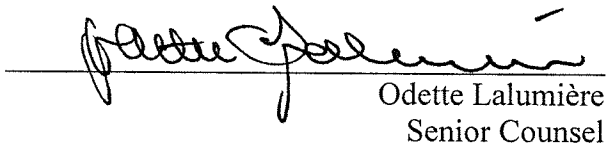
Conclusion

9. Accepting the applicant's arguments would render the process available under the *Access to Information Act* and the power given to the Federal Court over such matter meaningless.

Order sought

10. The Agency respectfully requests that the application for judicial review in this matter be quashed pursuant to this Honorable Court's powers under paragraph 52(a) of the *Federal Courts Act.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at the City of Gatineau, in the Province of Quebec, this 3rd day of September, 2014.



Odette Lalumière
Senior Counsel
Canadian Transportation Agency

LIST OF AUTHORITIES

TAB 1

Indexed as:

Rubin v. Canada (Minister of Health)

Between
Ken Rubin, applicant, and
The Minister of Health, respondent

[2001] F.C.J. No. 1298

[2001] A.C.F. no 1298

2001 FCT 929

2001 CFPI 929

210 F.T.R. 84

14 C.P.R. (4th) 1

107 A.C.W.S. (3d) 713

Docket T-2408-98

Federal Court of Canada - Trial Division
Ottawa, Ontario

Nadon J.

Heard: February 12, 2001.
Judgment: August 21, 2001.

(61 paras.)

Crown -- Examination of public documents -- Freedom of information, legislation -- Disclosure, confidential information supplied by third party -- Freedom of information, bars -- Commercial, scientific or technical information.

Application by Rubin for judicial review, pursuant to section 41 of the Access to Information Act. Rubin requested a report from the Minister of Health regarding the safety of calcium channel blockers. The Minister provided Rubin with an edited version of the report that was created for pub-

lic release. Rubin launched a complaint with the Information Commissioner. A second review of the report was conducted. The Minister contacted all parties affected by the release of the report. Eight third parties provided representations to the Minister against the release of portions of the requested report. A second edited version of the report was sent to Rubin. The Minister indicated that some information had been withheld on the ground that it qualified for exemption under sections 20(1) (b) and 20(1)(c) of the Act. The information consisted of studies by third parties of their products, unpublished scientific reports, information on clinical trials, independent reviews by foreign agencies, unpublished raw data from databases of some of the third parties, market analyses and marketing practices, was of a financial, commercial, technical or scientific nature. The Minister was satisfied that the exempted information was commercial, scientific or technical information supplied to it by third parties and that the information had been treated consistently in a confidential manner by the third party and by Health Canada. Two months later, the Minister informed Rubin that some information had also been withheld pursuant to section 13 of the Act.

HELD: Application dismissed. The Minister was justified in refusing disclosure pursuant to section 20(1)(b) of the Act. The information was supplied to a government institution by third parties, and was consistently treated in a confidential manner by the third parties. The Minister also exercised his discretion under section 20(6) of the Act in good faith.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1, ss. 2, 10, 13, 13(1)(a), 20(1)(b), 20(1)(c), 20(6), 41, 43, 48.

Counsel:

Ken Rubin, the applicant, on his own behalf.
Chris Rupar, for the respondent.

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1 **NADON J.** (Reasons for Order):-- This is an application for judicial review pursuant to section 41 of the Access to Information Act, R.S.C. 1985, c. A-1 (the Act). The Applicant requested from the Respondent and was denied parts of a special Health Canada review on the safety of calcium channel blockers (CCB drugs). The review included the available data and the results of research done on CCB drugs, as well as a consultant report by Dr. A. Gelsema on the safety of CCB drugs.

FACTS

2 By letter dated May 30, 1997, the Applicant requested a report from the Respondent entitled "Special Review on the Safety of Calcium Channel Blockers", dated April 1, 1997 (the Report). The Report consisted of a report prepared by Dr. Suzanne Desjardins and ten related attachments. Attachment two of the requested Report was a report by Dr. Aledius Gelsema entitled "Special Review Project on the Safety of Calcium Channel Blockers: Summary of Available Information" (the Gelsema Report), which had been provided under contract 5489 to the Respondent in December of 1996.

3 By letter dated October 17, 1997, the Respondent provided the Applicant with a first edited version of the Report (version 1). This version of the Report, prepared in April 1997 by Dr. Suzanne Desjardins, was created for public release as a result of requests for the Report. It was not prepared in the context of, or in response to any requests made under the Act.

4 On October 21, 1997, the Applicant launched a complaint with the Information Commissioner in respect of the response to his request. As a result of the Applicant's complaint and of the investigation undertaken by the Investigator of the Office of the Information Commissioner, the Respondent undertook a second review of the Report.

5 By letter dated July 15, 1998, the Respondent contacted all third parties affected by the release of the Report, as well as the government of Australia. In response to the Respondent's letter, eight third parties provided representations to the Respondent against the release of portions of the requested Report. Upon receipt of these representations and of those of the government of Australia, the Respondent determined that some portions of the Report should be withheld pursuant to paragraphs 20(1)(b) or (c) of the Act.

6 By letter dated October 20, 1998, the Respondent provided the Applicant with a second edited version of the Report (version 2), and indicated to the Applicant that some information had been withheld as it qualified for exemption under paragraphs 20(1)(b) and (c) of the Act. By letter dated January 12, 1999, the Respondent informed the Applicant that some information had also been withheld pursuant to section 13 of the Act. The reference to section 13 of the Act had been omitted in the October 20, 1998 letter.

7 By letter dated November 5, 1998, the Information Commissioner reported the result of his investigation to the Applicant. With respect to subsection 20(1) of the Act, the Information Commissioner concluded as follows:

> Having reviewed the exemptions under paragraph 20(1)(b), I am satisfied that the exempted information withheld is commercial, scientific or technical information that is confidential information supplied to HC by various third parties and that this information has been treated consistently in a confidential manner by the third party and HC. Disclosure in the public interest under subsection 20(6) was considered and rejected by the department. In my view, the exemptions have been properly applied under paragraph 20(1)(b) of the Act and the discretion contained in subsection 20(6) was properly exercised. Given this view, it is not necessary for me to comment on the application of paragraphs 20(1)(c) and (d) of the Act for the same records.

8 On December 21, 1998, the Applicant filed this application for judicial review of the decision of the Respondent not to disclose the entire Report. By letter dated January 27, 1999, the Respondent notified eight third parties and the government of Australia of the Applicant's application for judicial review, pursuant to section 43 of the Act.

9 Following the notification to third parties, letters were received from a number of them indicating that portions of the withheld information should remain confidential. Since these letters also indicated that some information was no longer considered confidential by the third parties, additional material was released to the Applicant. Also, by letters dated February 5, 1999, one of the

third parties and the government of Australia provided further reasons for the withholding of certain portions of the requested material.

ISSUES:

10

1. Was the Respondent justified in withholding portions of the requested Report pursuant to paragraphs 20(1)(b) and (c) of the Act?
2. Was the Respondent's discretion under subsection 20(6) of the Act properly exercised?
3. Was the Respondent justified in withholding portions of the requested Report pursuant to paragraph 13(1)(a) of the Act?

RELEVANT PROVISIONS OF THE ACCESS TO INFORMATION ACT:

11

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information 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.

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

    (b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

    and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

    (a) the government of a foreign state or an institution thereof;
    (b) an international organization of states or an institution thereof;
    (c) the government of a province or an institution thereof;
    (d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

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.

20. (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.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

43. (1) The head of a government institution who has refused to give access to a record requested under this Act or part thereof shall forthwith on being given notice of any application made under section 41 or 42 give written notice of the application to any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had intended to disclose the record or part thereof.

(2) Any third party that has been given notice of an application for a review under subsection (1) may appear as a party to the review.

* * *

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.

10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et d'autre part :

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

13. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements obtenus à titre confidentiel :

(a) des gouvernements des États étrangers ou de leurs organismes;
(b) des organisations internationales d'États ou de leurs organismes;
(c) des gouvernements des provinces ou de leurs organismes;
(d) des administrations municipales ou régionales constituées en vertu de lois provinciales ou de leurs organismes.

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

(a) des secrets industriels de tiers;
(b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;
(c) des renseignements don't la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(d) des renseignements don't la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

20. (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.

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

43. (1) Sur réception d'un avis de recours en révision exercé en vertu des articles 41 ou 42, le responsable d'une institution fédérale qui avait refusé communication totale ou partielle du document en litige donne à son tour avis du recours au tiers

à qui il avait donné l'avis prévu au paragraphe 27(1) ou à qui il l'aurait donné s'il avait eu l'intention de donner communication totale ou partielle du document.

(2) Le tiers qui est avisé conformément au paragraphe (1) peut comparaître comme partie à l'instance.

SUBMISSIONS

(A) The Applicant

12 The Applicant first submits that the Respondent's decision to refuse to disclose parts of the Report is inconsistent with the purpose of the Act as stated in section 2 of the Act. The Applicant argues that the Respondent, contrary to the paramount release purpose of subsection 2(1) of the Act, has incorrectly considered claims by third parties for confidentiality as sufficient grounds to prevent parts of the Report from being released.

Subsection 20(1)

13 Essentially, the Applicant submits that the severances made to the Report do not meet the established objective tests and evidentiary burden set out in paragraphs 20(1)(b) and (c) of the Act. The Applicant also contends that because the Respondent has linked each claim for exemption in the Report to both paragraphs 20(1)(b) and (c) of the Act, the requirements of both have to be met for the identified sections of the Report to be exempt from disclosure.

Paragraph 20(1)(b)

14 The Applicant submits that the Report was not being sought by the Respondent for commercial purposes, but rather to conduct a post drug registration review under the Food and Drugs Act and Regulations to evaluate the safety of CCB drugs. Therefore, he contends that due to the context, purpose and circumstances of the Report, no objective confidentiality test can be applied. The Applicant claims that the Respondent erred in categorizing the data contained in the Report as commercially confidential instead of as drug safety data.

15 Alternatively, the Applicant contends that if the exempt parts of the Report are considered to be commercial data, there is insufficient evidence to show that the exempt portions of the Record have been consistently kept confidential. He claims that there is no evidence that the information collected is subject to commercial confidentiality agreements.

16 The Applicant further alleges that paragraph 20(1)(b) of the Act does not apply when the data or similar data is public or is shown to have already been in the public domain. He claims that the Respondent accepted assertions made by third parties regarding confidentiality at face value without undertaking its own review to verify if all such data or similar data was really confidential or should still be kept confidential. He argues that the Respondent did not verify through the Internet, trade journals, scientific forums, conference proceedings, hospital newsletters, physician's reference services, visits, or independent experts and other means, whether the drug companies' data or similar data had already been made public. He submits that it is unacceptable for the Respondent to simply rely on drug company assertions or wait until drug companies deem it the right time to withdraw their objections to release.

17 The Applicant further argues that the assertions made by the third parties for confidentiality should not have been withheld from him and that he should be given the opportunity to make submissions in reply to the assertions made in each case.

Paragraph 20(1)(c)

18 The Applicant submits that paragraph 20(1)(c) of the Act places the onus of proof on the government institution to show that specific probable injury would occur from the release of the specific records. He argues that the Respondent must demonstrate a reasonable expectation of probable harm, and that it is not sufficient to demonstrate possible harm (Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.) at 60; Canada (Information Commissioner) v. Canada (Prime Minister), [1992] F.C.J. No. 1054, supra, at 444, 484). He also argues that possible embarrassment and publicity that may accompany the release of the information is insufficient and too much of a speculative reason to claim commercial confidentiality (Air Atonabee Ltd., [1989] F.C.J. No. 453, supra at 216).

Subsection 20(6)

19 The Applicant contends that considerations under subsection 20(6) of the Act were downplayed by the Respondent. In his opinion, public interest considerations should have overridden the protective concerns for releasing the Report. The Applicant submits that some of the still exempt data touches on problems with the unapproved off-label uses of CCB drugs and on evidence of the need for restrictions, and that it is not in the public interest under section 2 and subsection 20(6) of the Act that this data be withheld.

Paragraph 13(1)(a)

20 Finally, the Applicant claims that the late application of paragraph 13(1)(a) of the Act to exempt a January 1996 summary meeting record in the Report did not follow regular access procedures and is in error. He contends that an exemption cannot be introduced (as done by letter dated January 12, 1999) after the findings of the Information Commissioner are released and once a Court application is filed (Davidson v. Canada (Solicitor General), [1989] 2 F.C. 341 (C.A.) at 349).

21 Alternatively, the Applicant submits that the exemption at paragraph 13(1)(a) of the Act does not apply since the record at issue for which paragraph 13(1)(a) was claimed is not a government created record but rather the summary minutes of a meeting held by a non-government group (the Australia Drug Evaluation Committee) in connection with their meeting with Bayer Australia Ltd. He claims that the meeting was not an internal government meeting. In his opinion, protecting such a meeting on such a subject under paragraph 13(1)(a) is unusual. The Applicant also contends that the data from this meeting is already publicly known, that the data is not an internal government record and that the data is of interest to the Canadian public. He therefore believes that it should not be withheld.

B. The Respondent

22 The Respondent submits that the public's right of access is not absolute, and must be examined in the light of other provisions of the Act and the exemptions contained therein (Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707 (C.A.) at 712; aff'd (1996), 191 N.R. 394 (S.C.C.)).

Paragraph 20(1)(b)

23 With respect to the exemption pursuant to paragraph 20(1)(b) of the Act, the Respondent contends that in order for this exemption to apply, the information must be:

1. financial, commercial, scientific or technical information as those terms are commonly understood;
2. confidential information in its nature by some objective standard which takes account of the information, its purposes and the conditions under which it was prepared and communicated;
3. supplied to a government institution by a third party; and
4. treated consistently in a confidential manner by the third party.

(Air Atonabee Ltd., supra at 207).

24 The Respondent also submits that whether information is confidential must be established objectively (Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. 42 (F.C.T.D.) at 46; Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce, [1984] 1 C.F. 939 (T.D.) at 947). In addition, the Respondent contends that what may also be considered is if the information was communicated with an expectation of confidentiality that it would not be disclosed or additionally with an express provision that the information not be disclosed without permission (Keddy v. Atlantic Canada Opportunities Agency (1993), 66 F.T.R. 227 (F.C.T.D.) at 231-232; Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (F.C.T.D.) at para. 30).

25 As to the first criteria under paragraph 20(1)(b) of the Act, the Respondent argues that it is clear that the information at issue that has been exempted is financial, commercial, technical or scientific. It was provided by the third parties and by the government of Australia to be used in a scientific review and report by the Respondent.

26 With respect to the second criteria, the Respondent claims that the information withheld consists of studies by the third parties of their products, unpublished scientific reports, information on clinical trials, independent review by foreign agencies, and unpublished "raw data" from data bases of some of the third parties, market analysis and marketing practices. As to the purposes and conditions under which the information was collected, the introduction of version 2 of the Report sets out that the requested Report was created to fulfill a mandate from the Director General of the Drugs directorate for a comprehensive review of CCB drugs. In particular, the letters sent out to the various CCB manufacturers that requested material for the review sets out what is required and the purpose of the review. According to the Respondent, this shows the context in which the material was provided.

27 As to the third criteria, the Respondent submits that the information was provided to the Respondent by the various third parties. In addition, the representations of the manufacturers and the government of Australia demonstrate that the material is financial, commercial, scientific or technical in nature and was provided in the context of confidentiality. The Respondent also notes that the members of the Ad Hoc Committee that provided recommendations of specific questions posed to them relating to the use of CCB drugs signed a terms of reference document that indicated that they would maintain as confidential the documents provided to them.

28 With respect to the fourth criteria, the Respondent maintains that the evidence from the third parties, as summarized by the Respondent, is that the information has consistently been treated as confidential by the third parties.

Paragraph 20(1)(c)

29 The Respondent submits that the test for the application of the exemption pursuant to paragraph 20(1)(c) is that of a "reasonable expectation of probable harm" (Canada Packers Inc., supra at 60; Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services) (1990), 107 N.R. 89 (F.C.A.) at 91; Société Gamma Inc., supra at 46).

30 According to the Respondent, the information is exempt from disclosure pursuant to paragraph 20(1)(c) where: i) the disclosure of the information could reasonably be expected to result in material financial loss or gain to a third party; or ii) the disclosure of the information could reasonably be expected to prejudice the competitive position of the third party (Air Atonabee Ltd., supra at 207; Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs), [1997] F.C.J. No. 676 at para. 55-59).

31 In the present case, the Respondent submits that the representations from the third parties clearly set out the harm that will occur if the material is released. The representations of the third parties are set out in summary form at paragraph 14 of the confidential affidavit of Ms. Parent.

Subsection 20(6)

32 In response to the Applicant's argument that the Respondent has not adequately reviewed the public interest in having the Report released, the Respondent submits that discretionary decisions made pursuant to subsection 20(6) of the Act should be reviewed on the basis of whether the discretion was exercised in good faith, in accordance with the principles of natural justice and where reliance has not been placed upon irrelevant or extraneous considerations, rather than on a de novo basis. The Respondent contends that there is no evidence that in the exercise of discretion, the Respondent relied on extraneous considerations, abused the discretion or did not abide by the principles of natural justice.

Paragraph 13(1)(a)

33 The Respondent submits that it did apply section 13 of the Act to certain materials in the record received from the Government of Australia, and that the invocation of paragraph 13(1)(a) was on the material provided to the Applicant.

34 The Respondent further contends that section 13 of the Act provides for a mandatory exemption if the criteria of that section are met. In this matter, the Respondent claims that it is clear that the material provided by the Therapeutic Goods Administration (TGA) of Australia was provided in confidence and was not to be provided for public distribution. According to the Respondent, a letter dated September 8, 1998 from Dr. John McEwen of the TGA demonstrates that the information relating to the regulatory drug process in Australia was provided in confidence.

ANALYSIS

35 First, it must be noted that in the case of an application for judicial review under the Act, this Court must review the matter de novo, as established by MacKay J. in Air Atonabee, supra, at page 206:

> 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.

Therefore, this Court must review the documents requested by the Applicant and determine whether or not the Respondent was correct in refusing to disclose the requested material.

36 Section 2 of the Act codifies the public right of access and the basic premise that the public should have access to government records, and that exceptions to the right of access should be limited and specific. It has also been established that the burden of demonstrating that access to documents should be denied rests on the party opposing disclosure. In Maislin Industries Ltd., supra, Jerome J. stated the following:

> It should be emphasized however, that since the basic principle of these statutes is to codify the right of public access to Government information two things follow: first, that such public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the Government.

37 With respect to applications for judicial review under section 41 of the Act, as in the present instance, this principle is codified in section 48 of the Act. Therefore, the onus rests on the Respondent to convince this Court, with direct evidence, that the material requested by the Applicant should not be disclosed and that it can benefit from the exemptions set out in subsection 20(1) of the Act. In addition, it is clearly established in the jurisprudence that the standard of proof to be applied in respect of subsection 20(1) of the Act is that of balance of probabilities.

Paragraph 20(1)(b)

38 As pointed out by the Respondent, exemption from disclosure under paragraph 20(1)(b) of the Act requires that the material meet all four of the criteria established in Air Atonabee Ltd., supra at page 207:

> The authorities [...] in relation to s. 20(1)(b) [...] have made it 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.

39 With respect to the first criteria, MacKay J. in Air Atonabee, supra at page 208 indicated that "it is sufficient for the purposes of s. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood".

40 As to the second criteria, MacKay J. stated the following at page 208:

> The second requirement under s. 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 [...]. It is not sufficient that the third party [the party opposing disclosure] state, without further evidence, that it is confidential [...].

41 Therefore, the question of whether the information is confidential must be established objectively, taking into account the content and purposes of the information, as well as the context in which it was prepared and communicated. In Keddy, supra, MacKay J. outlined other factors which can be considered in order to establish the confidential nature of the information, at pages 231 and 232:

> I am persuaded that the information in each of the reports requested is financial or commercial information, and that it is confidential. It relates to planned and projected commercial operations of third parties. It is not available from any other source. It was communicated not only in a reasonable expectation of confidence that it would not be disclosed in light of [the respondent's] undertaking that it would treat the information as confidential, in each case the consultant preparing the report had included an express provision that the information not be referred to or disclosed without its permission. The information was consistently treated by the third parties concerned as confidential. These are factors that support a conclusion that the information is confidential within the meaning of s. 20(1)(b) of the Act [...].

42 Consequently, the Respondent is correct in suggesting that this Court, in evaluating the confidential nature of the information, can consider if the information was communicated with an expectation of confidentiality or with an express provision that the information not be disclosed without permission.

43 One of the Applicant's contentions is that the Respondent did not try to establish on its own that the information in question was still confidential, but rather accepted statements to that effect by third parties. The Applicant is correct in asserting that the exemption should not apply if the information is public. A summary of the jurisprudence to that effect can be found in Air Atonabee, supra at page 208:

> 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 (Canada Packers Inc. v. 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 (F.C.A.)), or where it has been available at an earlier time or in another form from government (Canada Packers Inc., supra; Merck Frosst Canada Inc., [1988] F.C.J. No. 290, supra). Information is not confidential where it could be obtained by observation albeit with more effort by the requestor (Noel, [1987] F.C.J. No. 947, supra). As outlined by Jerome, A.C.J., in earlier cases dealing with s. 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 and Commerce et al., [1984] 1 F.C. 939; 10 D.L.R. (4th) 417; 80 C.P.R. (2d) 253 (T.D.), at p. 257 C.P.R.); (DMR Associates v. Minister of Supply and Services (1984), 11 C.P.R. (3d) 87, at 91 (F.C.T.D.)).

44 Therefore, the Respondent must not only demonstrate that the information was consistently treated as confidential by the third parties, but also that it was kept confidential by both parties. However, I do not agree that there exists an obligation on the part of the Respondent to search all publications, journals, etc. to verify if the information was released in any shape or form to the public, while the sources of the information, the third parties, maintain that it still is confidential. I was unable to find any case law on this issue, nor did the Applicant suggest any applicable jurisprudence.

45 After careful review of the material in respect of which the Applicant seeks disclosure, I have come to the conclusion that the Respondent was correct in refusing disclosure under paragraph 20(1)(b).

46 Firstly, I have no doubt that the information which the Respondent refuses to disclose -- which consists of studies by third parties of their products, unpublished scientific reports, information on clinical trials, independent reviews by foreign agencies, unpublished raw data from databases of some of the third parties, market analyses and marketing practices -- is of a financial, commercial, technical or scientific nature.

47 It also cannot be disputed that this information was supplied to a government institution by third parties. My review of the material also leads me to the conclusion that this information has been consistently treated in a confidential manner by the third parties.

48 The sought after information was gathered so as to create a record enabling the Director General of the Drug Directorate to fulfill a mandate for a comprehensive review of the safety of CCB drugs. As the introduction to version 2 of the Record indicates, most of the information gathered comes from the CCB manufacturers. In that context, I have no difficulty concluding that the information which has been exempted from disclosure by the Respondent is, on an objective view of the matter, confidential information.

49 I therefore come to the same conclusion as the Information Commissioner regarding the Respondent's refusal to disclose based on paragraph 20(1)(b).

50 In view of my conclusion regarding paragraph 20(1)(b), I need not address the submissions regarding paragraph 20(1)(c). I will, however, address the issues pertaining to sub-section 20(6) and paragraph 13(1)(a).

Subsection 20(6)

51 Subsection 20(6) of the Act allows the head of a government institution to exercise its discretion and disclose material that should be exempted from disclosure under paragraphs 20(1)(b), 20(1)(c) or 20(1)(d) if it believes that the public interest in disclosure clearly outweighs any prejudice to a third party.

52 In her confidential affidavit, Yvette Parent, the Access to Information Coordinator for the Respondent, describes as follows the steps taken to evaluate if the information should be disclosed pursuant to subsection 20(6) of the Act:

> 15. As Access to Information Coordinator for the Department, it falls into my Director's powers, duties and functions, as delegated by the Minister of Health under Schedule 2 of the Department of Health Access to Information Act Designation Order, to make decisions concerning the disclosure or denial of third party information (section 20 of the Act) which also includes the public interest clause (section 20(6) of the Act). A true copy of the of the [sic] Department of Health Access to Information Act Designation Order dated March 27, 1997 is attached as Exhibit "A" to my public affidavit.
> 16. As for the application of the public interest clause to the information withheld in the requested records, the Department had considered this clause and the actions undertaken by the Department to address the safety of Calcium Channel Blockers as described below and, determined that there was no public health, public safety or protection of the environment condition in relation to the above that would justify disclosure of this information in the public interest pursuant to section 20(6) of the Act.

53 In Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 (T.D.), a case similar to the case at bar, in which the Respondent had not provided much information on its consideration of subsection 20(6) of the Act, Gibson J. wrote the following:

> [25] The applicant argues that the Minister erred in a manner justifying relief to the applicant by failing to demonstrate, on the face of the letter denying access, that she or he engaged in an analysis of whether subsection 20(6) of the Act should apply in favour of the applicant and whether the requested document is severable and therefore should have been at least partially disclosed pursuant to section 25 of the Act. [...]
>
> [26] The letter addressed to the applicant advising her of the Minister's decision not to disclose by reason of the exemptions under paragraphs 18(1)(b) and 20(1)(b), (c) and (d) makes no mention of subsection 20(6) or section 25. It gives no indication whatsoever that either provision was considered. In contrast, an affidavit filed and sworn by the Minister's delegate who responded to the applicant's request contains the following paragraph:
>
> > I also considered whether portions of the requested records could be severed and disclosed or whether other provisions of the Access to Information Act, namely subsections 20(2), (5) and (6) could permit disclosure. I determined that these provisions were not applicable and that all of any records responsive to the Applicant's request were exempt from disclosure based on the sections of the Access to Information Act which I have identified in paragraph 5 of my Affidavit [paragraphs 18(1)(b) and 20(1)(b), (c) and (d)].

> [27] In Stevens v. Canada (Privy Council) [(1997), 144 D.L.R. (4th) 553 at 570 (T.D.).], Mr. Justice Rothstein considered the discretionary exemption contained in section 23 of the Act with respect to a requested record that contains information that is subject to solicitors-client privilege. He wrote:
>
> > There is explicit reference to section 23 being a "discretionary exemption". I think a reasonable inference can be drawn that regard was had by the decision maker to section 23 and the fact that it contemplates a discretionary exemption. In the circumstances I am satisfied that a discretionary decision not to disclose was made.
>
> I am satisfied that the same can be said here with respect to the discretionary "public interest" authority for disclosure contained in subsection 20(6) and the mandatory requirement of section 25 of the Act to examine for severability and disclose any part of a requested record that can reasonably be severed from exempt portions. I reach this conclusion particularly in light of the paragraph quoted above from the affidavit of the Minister's delegate.
>
> [28] The situation here at issue is to be contrasted on its facts with that in Rubin v. Canada (Canada Mortgage and Housing Corp.), [[1989] 1 F.C. 265 (C.A.).] where a request for access to a broad range of records (some thirteen lineal feet) was received by the government institution in question on the 6th of March 1985 and rejected outright the next day. In such circumstances, it was reasonable to conclude that the government institution in question had simply failed "... to enter into the severance exercise required pursuant to the provisions of section 25 of the Act." Here, the requested record is quite slim. A review under subsection 20(6), the public interest disclosure provision, and the severability examination could quite reasonably have been carried out in the time between receipt of the request for access on the 26th of May, 1996 rejection of the request on the 29th of June, 1996. The Court has before it the uncontradicted evidence of the Minister's delegate to the effect that he considered both of the provisions. In the absence of evidence to the contrary, the delegate's evidence should be accepted.
>
> [29] Once again, I have myself reviewed the requested document against the provisions of subsection 20(6) and section 25. I find no reason to conclude that the decision not to rely on the discretionary authority to disclose under subsection 20(6) and not to sever under section 25 was other than reasonable.

54 In my view, a similar reasoning can be applied in this case. The Respondent has the discretion under subsection 20(6) of the Act to disclose the information if it is in the interest of the public. However, it does not have the obligation or duty to do so. I agree with the Respondent's statement to the effect that this Court must examine whether the discretion was exercised in good faith, rather than conduct a de novo review of the exercise of the discretion. Ms. Parent indicates in her affidavit that subsection 20(6) of the Act was considered. As there is no evidence to the contrary nor evidence of bad faith on the part of the Respondent, in my opinion, the exercise of the Respondent's discretion not to disclose the information pursuant to subsection 20(6) of the Act was proper.

Paragraph 13(1)(a)

55 Paragraph 13(1)(a) of the Act allows the head of a government institution to refuse to disclose any record that contains information obtained in confidence from the government of a foreign state or an institution of that state.

56 The Applicant contests its application herein due to the fact that the Respondent only invoked the exemption, apparently forgotten when version 2 of the Report was disclosed to the Applicant, in a letter dated January 12, 1999, after the report of the Information Commissioner. Pursuant to subsection 10(1)(b) of the Act, if the head of a government institution refuses to give access to a record or part of a record, it must state in the notice to the requester the specific provision of the Act on which the refusal was based. Although the provision does not specify that the application of a particular provision must be announced within a definite period of time, section 10 indicates that the notice sent to the requester must also state that the person can make a complaint to the Information Commissioner. This seems to indicate that the specific provision which will be relied upon by the institution must be indicated to the requester before the complaint is made to the Information Commissioner.

57 In Davidson, supra, one of the issue was whether the head of an institution was bound by the provisions of the Privacy Act, S.C. 1980-81-82-83, c. 111 initially asserted in the notice of refusal. Paragraph 16(1)(b) of the Privacy Act, supra, almost identical to paragraph 13(1)(a) of the Act, read as follows:

> 16. (1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(a)
>
> (a) that the personal information does not exist, or
> (b) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the information existed,
>
> and shall state in the notice that the individual who made the request has a right to make a complaint to the Privacy Commissioner about the refusal.

58 MacGuigan J.A., for the Federal Court of Appeal, came to the conclusion that the grounds stated in the notice to the requester could not be subsequently substituted, at pages 347-349:

> What [the appellant's] argument [to the effect that he ought to be able to substitute the grounds of exemption] fails to take into account, it seems to me, is the extent to which a person seeking access to personal information is entitled to rely upon the complaint mechanism provided through the Commissioner. The complainant may lodge a complaint about a denial of access to personal information with the Commissioner (paragraph 29(1)(b)), who will undertake an investigation (section 31 ff.), which will allow both the complainant and the head of the government institution concerned to make representations (subsection 33(2)) and which may involve the Commissioner in entering government premises, examining government records, and obtaining evidence under oath (section

> 34). Following the investigation, the Commissioner may, in addition to reporting the complainant, make recommendations to the head of the government institution, including a request for notification of implementation of recommendations (section 35).
>
> It is no doubt true, as the appellant argued, that a Federal Court trial judge, on a review of a refusal of access by an institution head which, as here, is upheld by the Commissioner, has adequate powers of review over the decision of the institution head, though it must be said that a judge sitting in Court lacks the investigative staff and flexibility of the Commissioner. More important, if new grounds of exemption were allowed to be introduced before the judge after the completion of the Commissioner's investigation into wholly other grounds, as is the issue in the case at bar, the complainant would be denied entirely the benefit of the Commissioner's procedures. He would thus be cut down from two levels of protection to one. [...]
>
> But in my view, the ultimate reason a complainant cannot be denied recourse to the Commissioner's stage is that, if the Commissioner finds in his favour but the institution head remains obdurate, the complainant may have the benefit, in the discretion of the Commissioner, of the Commissioner's appearing in Court in his stead or as a supporting party (section 42).
>
> [...]
>
> All of these considerations persuade me of the Trial Judge's wisdom in holding that the institution head was bound by the grounds originally stated in the notice of refusal, with no possibility of subsequent amendment.

59 It is true that in the case at bar, the Respondent does not wish to substitute all grounds of exemption, and only seeks to add one ground for a specific section of the Report. However, the exemption pursuant to paragraph 13(1)(a) of the Act was not before the Information Commissioner when he investigated. The Commissioner's report states the following with respect to section 13:

> In my report to you, I will deal with the unresolved matters not covered in my predecessor's findings about your delay complaint #3100-10400/001 or in my Deputy Commissioner's interim report of July 8, 1998. As well, since HC has dropped its reliance on paragraphs 13(1)(a) and (b) and section 68 of the Act, I need not comment on those provisions. (underline mine)

60 In my view, since the Respondent had dropped its reliance on section 13 of the Act at the time of the Commissioner's investigation, it could not, a few months later, suddenly invoke that section again. The Respondent claims that it should be allowed to rely on paragraph 13(1)(a) since it was invoked on the material provided to the Applicant, although it was forgotten in the original notice. However, in my view, this is not sufficient. The Act clearly states that the provisions relied upon by the Respondent must be included in the notice. Therefore, I must agree with the Applicant that the Respondent is precluded from relying on section 13 of the Act before this Court.

CONCLUSION

61 As I have concluded that the Respondent was justified in refusing disclosure, pursuant to paragraph 20(1)(b) of the Act, the Applicant's application will be dismissed. As a result, the Respondent shall be entitled to its costs.

NADON J.

cp/d/qladj/qlhcs