Canada's Access to Information Act

The Disclosure of Confidential Third-Party Information

By Sandra L. Corbett and Ryan P. Krushelnitzky

Broad rights of access to government information exist in Canada both to ensure government accountability and to strengthen the free and democratic way of life of all Canadians. The Canadian Access to Information Act facilitates this access. However, for regulatory purposes, the Canadian government routinely collects information from third parties—some of which might include trade secrets and other confidential information that the third parties would not want disclosed to their competitors or to future plaintiffs. As a result, the act tries to strike a balance between the competing objectives of encouraging disclosure and protecting the privacy interests of third parties.

In February of 2012, the Supreme Court of Canada rendered judgment in the *Merck Frosst Canada Ltd. v. Canada (Health)* appeal. The Court explained the limitations in the act on the Canadian government's obligation to disclose information publicly that it collects from third parties. This decision is of interest to product manufacturers doing business in Canada that want to protect trade secrets or other confidential information provided to the Canadian government from being publicly disclosed.

The dispute in *Merck* concerned the Canadian government's decision to disclose to the public information collected from a pharmaceutical manufacturer as part of the approval process for new drugs. The manufacturer sought judicial review of this decision and argued, among other things, that the information was exempt from disclosure under the act. The act's exemptions prevent disclosure of (1) trade secrets, (2) confidential information, or (3) information that could reasonably be expected to cause harm to the third party.

The review judge found that some of the information was exempt. The government appealed, and the Federal Court of Appeal held that the information was not exempt. The manufacturer then appealed to the Supreme Court of Canada. Justice Cromwell, writing for the majority, dismissed the appeal.

Justice Cromwell first explained that the Court must interpret the act to ensure that it struck the appropriate balance as intended by the Parliament between establishing broad public rights to access information and protecting confidential third-party information. To strike this balance, he noted, the act created a process of notification and judicial review when the government intends to disclose third party information. When faced with an access to information request for third-party information, Justice Cromwell held that the government should (1) refuse to disclose third-party information without notice when it is clearly exempt; (2) disclose the third-party information without notice only when it is clearly subject to disclosure and nothing indicates that it is exempt; (3) give notice to the third party of the government's intent to disclose if doubt exists about whether the information is exempt, if disclosing the information aims to comply with requirements of another part of the act designed to serve the public interest, or if the government can reasonably sever nonexempt parts of the information from the exempt parts and disclose the nonexempt parts.

When the government provides notice, the act permits a third party to make representations to the government to explain why the government should not disclose the information. Judicial review is then available if the third party disagrees with the government's decision.

Upon judicial review, when a third party wants to rely on an exemption, Justice Cromwell held that the third party has the onus to demonstrate that the exemption applies based on a balance of probabilities standard, the Canadian version of the American preponderance of the evidence standard.

The first exemption under the act is the "trade secret" exemption. Justice Cromwell held that this exemption applies to information consisting of plans, processes, tools, mechanisms, or compounds that meets four criteria:

- It is secret in an absolute or relative sense,
- It is treated as secret by the possessor of the information,

Think Globally, continued on page 73

■ Sandra L. Corbett is a partner and Ryan P. Krushelnitzky is an associate in Field LLP's Edmonton, Alberta, office. Ms. Corbett's practice focuses on resolution of complex tort and liability matters in the civil litigation area. She is a past DRI board member (2008–2011) and is both a board member and past president of Canadian Defence Lawyers. She is the North American membership chair for DRI International. Mr. Krushelnitzky's practice focuses on insurance defense, product liability and construction litigation.

Think Globally, from page 67

- It is capable of industrial or commercial application, and
- It is possessed by a party with an interest such as an economic interest worthy of protection.

The second exemption, the "confidential information" exemption, relates to financial, commercial, scientific, or technical information. For the exemption to apply, the information must be confidential and consistently treated as such by the third party. And the third party must have supplied the information to the government. Information in the public domain, including information publicly available through another source, is not confidential.

The third exemption, explained Justice Cromwell, applies when a third party has a reasonable expectation of suffering probable harm if the government disclosed the information. While the third party does not need to show that the harm will in fact come to pass, it must show that the harm is more than merely possible. Information not publicly available that a third party shows would give competitors a head start in developing competing products, or that would give competitors an advantage in future transactions, might meet the requirements for this exemption. The third party must demonstrate, however, a direct link between the disclosure and the apprehended harm.

In sum, the *Merck* decision provides important guidance on the types of information that the Canadian government can disclose under the act. Many product manufacturers doing business in Canada must provide information to the Canadian government, for example, under the new Canada Consumer Product Safety Act. Product manufacturers will want to understand which information the government can later disclose and how to establish the exemptions to disclosure established under the act to protect their otherwise confidential information from disclosure to their competitors or other members of the public. FD