Federal Court  Cour fédérale

Date: 20141008

Dockets: T-699-13
T-1053-13

Citation: 2014 FC 957

Ottawa, Ontario, October 8, 2014

PRESENT: The Honourable Madam Justice Strickland

Docket: T-699-13

BETWEEN:

BURNBRAE FARMS LIMITED

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Docket: T-1053-13

AND BETWEEN:

BURNBRAE FARMS LIMITED

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

ORDER AND REASONS

[1] This is an application for judicial review, brought pursuant to s. 44 of the *Access to Information Act*, RSC 1985, c A-1 (Act), of two decisions of the Canadian Food Inspection Agency (CFIA) to disclose certain information. The first decision is dated April 2, 2013 and is related to matter T-699-13. The second is dated May 27, 2013 and is related to matter T-1053-13. By Order of this Court dated July 9, 2013, the two applications were consolidated.

Factual Background

[2] The Applicant, Burnbrae Farms Limited, is the owner and operator of egg farms across Canada and sources eggs from farmers in several provinces. As a food processing company, it is subject to inspections by CFIA.

[3] CFIA is established pursuant to the *Canadian Food Inspection Agency Act*, SC 1997, c 6, s 3. As a part of its statutory obligations, CFIA is required to carry out regulatory inspections pursuant to Part IV, Inspection and Certification, of the *Egg Regulations*, CRC, c 284 (*Egg Regulations)* pursuant to the *Canada Agricultural Products Act*, RSC 1985, c 20 (4th Supp). The latter is described as an act to regulate the marketing of agricultural products in import, export and interprovincial trade and to provide for national standards and grades of agricultural products, for their inspection and grading, for the registration of establishments and for standards governing establishments.

[4] CFIA is a government institution as set out in Schedule 1 and s. 3, of the Act.

T-1053-13

[5] CFIA received an access to information request seeking:

> […] the 2009-10 inspection (or audit) reports for the egg-grading and egg-processing operations of:
>
> Burnbrae Farms Mississauga,
>
> *Division of Burnbrae Farms Limited* […]

[6] By letter of March 9, 2011 (mistakenly dated March 9, 2010), referred to therein as the notice, CFIA informed the Applicant that it had received the above request for information. It also advised the Applicant that although it had reason to believe that the records sought might contain certain information described in and potentially exempted from disclosure by s. 20(1)(b), (c), and/or (d) of the Act, it did not have sufficient information in its files to substantiate this; that CFIA was required by the Act to make a decision whether or not to disclose the records, or parts thereof, 30 days after the notice; and, that the Applicant had 20 days from the mailing date of the notice to make written representations to CFIA as to why the records should not be disclosed. The letter attached copies of ss. 19, 20, 27 and 28 of the Act and the records at issue.

[7] Counsel for the Applicant responded by letter dated March 28, 2011 objecting to the release and making submissions as to why the records and information should not be disclosed and were exempt from disclosure under s. 20(1)(b) of the Act.

[8] On April 12, 2011, CFIA sent a letter to the Applicant advising that its representations had been reviewed and that CFIA considered them sufficient to partially withhold the requested information on the basis of s. 19 and s. 20(1)(b) of the Act. However, the documents could not

be withheld in their entirety as they were CFIA records. Copies of the redacted records that CFIA intended to disclose were enclosed. The letter also stated that the Applicant was entitled under s. 44 of the Act to apply to this Court for a review of CFIA's decision within 20 days of the mailing date of that notice.

[9] The Applicant did not apply for judicial review within 20 days and the redacted records, in the form provided in CFIA's April 12, 2011 letter, were released to the requestor.

[10] On August 17, 2011 the requestor made a complaint to the Information Commissioner of Canada (IC). In that regard, the IC sent a Notice of Intention to Investigate and Summary of Complaint to CFIA on August 19, 2011, advising that the IC had received a complaint alleging that CFIA had improperly applied the exemptions, so as to unjustifiably deny access to the records, or portions thereof, requested under the Act.

[11] By letter of June 8, 2012, CFIA informed the Applicant that the complaint had been made and that after further review of the records and the IC's recommendations, it believed more information should be released. As such, it was consulting the Applicant to seek its representations. CFIA enclosed a copy of the records that it intended to disclose to the requestor. It again stated that although it had reason to believe that the records sought might contain certain information described in s. 20(1)(b), (c), and/or (d), it did not have sufficient information in its files to substantiate this. CFIA advised that it was required to make a disclosure decision within 30 days of the notice and that the Applicant had 20 days from the mailing date of the notice to

make written representations as to why the records should not be disclosed. It again attached copies of ss. 19, 20, 27 and 28 of the Act as well as copies of the records at issue.

[12] In response, by letter of July 10, 2012, the Applicant stated that it had previously made written representations, that its position was unchanged and reiterated the content of its March 28, 2011 letter.

[13] On May 27, 2013, CFIA wrote to the Applicant advising that it had reassessed the Applicant's representations and, further to the IC's recommendations, it no longer considered the reasons provided by the Applicant to be sufficient to withhold all the requested information on the basis of s. 20(1)(b) of the Act. Therefore, CFIA intended to now disclose the information to the requestor. It attached the subject records, noting that the darkened portions would be redacted prior to disclosure. It further advised that the Applicant was entitled under s. 44 of the Act to apply, within 20 days of the mailing date of the notice, to this Court for judicial review of its decision.

[14] On June 13, 2013 the Applicant issued a Notice of Application seeking judicial review of CFIA's May 27, 2013 decision.

T-699-13

[15] CFIA received an access to information request seeking:

> […] copies of the results of CFIA random sampling and checking of eggs to determine the accuracy of grading at facilities owned by L.H. Gray and Sons Ltd. and/or GrayRidge Farms Ltd. in the

> province of Ontario, and of Burnbrae Farms Ltd., also in the province of Ontario, for the fourth quarters (October, November and December) of 2009, 2010 and 2011.

[16] By letter of March 28, 2012, referred to therein as the notice, CFIA informed the Applicant that it had received the above request for information. Further, that although it had reason to believe that the records sought might contain certain information described in and potentially exempted from disclosure by s. 20(1)(b), (c), and/or (d), it did not have sufficient information in its files to substantiate this. It advised that CFIA was required by the Act to make a decision whether or not to disclose the records, or parts thereof, 30 days after the notice, and that the Applicant had 20 days from the mailing date of the notice to make written representations as to why the records should not be disclosed. The letter attached copies of ss. 19, 20, 27 and 28 of the Act and the records at issue and noted that the darkened information in those records might be protected pursuant to s. 19(1) of the Act as CFIA believed it to be personal information.

[17] Counsel for the Applicant responded by letter dated April 10, 2012 objecting to the release and making submissions as to why the records and information should not be disclosed and were exempt from disclosure under s. 20(1)(b) of the Act.

[18] On April 27, 2012, CFIA sent a letter to the Applicant advising that its representations had been reviewed and that CFIA did not consider them sufficient to withhold the requested information on the basis of s. 20(1)(b) of the Act. A copy of the records that CFIA intended to disclose were enclosed, CFIA noted that some of the information had been exempted under s. 19(1) and s. 20(1)(b) and (c). The letter also stated that the Applicant was entitled under s. 44 of

the Act to apply, within 20 days of the mailing date of that letter/notice, to this Court for judicial review of its decision.

[19] The Applicant did not apply for judicial review within 20 days and the redacted records, in the form provided in CFIA's April 27, 2012 letter, were released to the requestor.

[20] On July 3, 2012 the requestor made a complaint to the IC. In that regard, the IC sent a Notice of Intention to Investigate and Summary of Complaint, dated July 6, 2012, to CFIA. This advised that the IC had received a complaint alleging that CFIA had improperly applied exemptions, so as to unjustifiably deny access to records, or portions thereof, requested under the Act.

[21] By letter of April 2, 2013, CFIA informed the Applicant that the complaint had been made, it had re-assessed the Applicant's representations and, further to the IC's recommendations, it no longer considered the reasons the Applicant had provided to be sufficient to withhold the requested information on the basis of s. 20(1)(b) or (c) of the Act. Therefore, CFIA intended to now disclose the information to the requestor. It attached the subject records and noted that, pursuant to s. 19 of the Act, the darkened portions would be redacted prior to disclosure to the requestor. Further, that the Applicant was entitled under s. 44 of the Act to apply, within 20 days of the mailing date of the letter/notice, to this Court for judicial review of its decision.

[22] On April 22, 2013 the Applicant issued a Notice of Application seeking judicial review of CFIA's April 2, 2013 decision.

[23] On July 9, 2013 a Confidentiality Order was granted in accordance with Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106 (Rules) and s. 47(1) of the Act.

The Records

[24] The information at issue in these two matters is contained in one of four types of reports:

i) Shell Egg Product Inspection Reports;

ii) Egg Station Inspection/Rating Reports;

iii) Pre-grade/Canada Nest Run Product Inspection Reports; and

iv) Notices of Detention and Notices of Release from Detention.

[25] Shell Egg Product Inspection Reports are CFIA forms. They identify the name and address of the station, the inspection date, and other such information. In tabular form they set out columns headed as: Lot Description; Start Inspection Level; Units in Lot; Sample Size; Acceptance/Rejection Numbers; Undergrades (separated into Cracks and Undergrades Other than Cracks); Accept/Reject Unit; Leakers; Rejects; Accept/Reject Lot; and, End Inspection Level. They are completed by the inspector and signed by both the inspector and on behalf of the operator (these reports are also entitled Shell Egg Product Inspection Report Origin and Shell Egg Inspection Report. Another type of form in this category is the Inspection Report of Shell Eggs / Processed Egg which is of a different format than that described above).

[26] Egg Station Inspection/Rating Reports are also CFIA forms. They too identify the name and address of the station, the inspection date and other such information. The form is divided into two main parts: Sanitation Rating and Plant Rating. The part entitled Sanitation Rating is broken down into four subsections. For the first two subsections – Egg Handling and Other Areas – the maximum potential points for each of sanitation and operation in each listed area (e.g. grading room, conveyor, etc.) are assigned. These range from 5 to 20 points, depending on the area. The inspector fills in the number of points actually awarded, the points lost by being below the potential maximum, and any remarks. The next subsection – Temperature and Relative Humidity – sets out permissible temperature ranges for ungraded and graded coolers and relative humidity ranges. The inspector fills in which categories the coolers fell under, any points lost, and can record the actual temperatures and relative humidity under the remarks section. The final subsection – Washwater – is concerned with the condition of washwater and is similarly completed. The inspector ticks either excellent, good, fair, serious or critical in terms of sanitation for that day's inspection and assigns a letter for the Product Inspection Level. The second major part of the form – Plant Rating – includes boxes for demerits on previous inspections, the current inspection, total demerits, a plant rating, as well as additional comments. The form is signed by the inspector and on behalf of the operator.

[27] Pre-grade/Canada Nest Run Product Inspection Reports are also CFIA forms. They identify the name and address of the inspection station, the inspection date, and other such information. They include sections entitled Lot Description; Units in Lot; Sample Size; and Number of Eggs Examined. In tabular form they subdivide into Pregrade and Canada Nest Run. Under Pregrade, there are columns for the number of eggs, percentage, and permissible Pregrade

Standard for each of: cracked shells; inferior shells; dirty shells (three categories); air cell; stain; leakers; and leakers and rejects, to be filled in by the inspector, as well as boxes for a total and an average. Similar information can be entered in the Canada Nest Run section. Haugh Units and Egg Weight can also be recorded. In the Results sections, either Lot Accepted or Lot Rejected is ticked off by the inspector. There is also a remarks section. The form is signed by the inspector and on behalf of the operator.

[28] Notices of Detention and Notices of Release from Detention are again CFIA forms. The Notice of Detention is issued to an entity to be named in the form along with the quantity, date and place of seizure, and detention tag number. The reason for seizure and detention, being the contravention of the identified section of the applicable act and regulation, and the action to be taken is entered by the inspector. The Notice of Release from Detention is to be completed by the inspector and refers to the detention tag number, date of seizure, description and quantity of the product detained, and reason for release from detention.

Legislative Background

[29] The most relevant provisions of the Act are found in the Schedule to this decision.

[30] The Act attempts to balance the right of public access to government records recognized in s. 2(1) with the protection of third party interests in s. 20(1). This was described by the Supreme Court in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 [*Merck Frosst*]:

> [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 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 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. […]

It is within this context that this application for judicial review must be undertaken.

Issues

[31] I agree with the Applicant that the issues on this application for judicial review are as follows:

1. What is the proper standard of review to be applied to decisions of CFIA?
2. Did CFIA correctly apply the s. 20(1) exemptions to the records at issue?
3. Was the Applicant afforded procedural fairness in CFIA's decision-making process?

ISSUE 1: What is the proper standard of review to be applied to decisions of CFIA?

Parties' Submissions

[32] The parties agree that the standard of review for decisions of CFIA challenged pursuant to s. 44(1) of the Act is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 50, 62 [*Dunsmuir*]; *Merck Frosst*, above, at para 53; *Les Viandes du Breton Inc v Canada (Canadian Food Inspection Agency)*, 2006 FC 335 at para 30 [*Les Viandes*]).

Analysis

[33] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing court (*Dunsmuir*, above, at paras 57, 62).

[34] The Supreme Court of Canada in *Merck Frosst* stated that "[u]nder 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." Therefore, it followed that when a third party makes a request pursuant to s. 44 of the Act for a review by this Court of a decision by a head of a government institution to disclose all or part of a record, the Court is to determine whether the institutional head has correctly applied the exemptions to the records in issue: "[T]he 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." This review has sometimes been referred to as a *de novo* assessment of whether the record is exempt from disclosure (*Merck Frosst*, above, at para 53).

[35] Accordingly, the standard of review in this matter is correctness.

ISSUE 2: Did CFIA correctly apply the section 20(1) exemptions to the records at issue?

Section 20(1)(a) Exemption

Applicant's Submissions

[36] The Applicant submits that the information contained in the Egg Station Inspection/Rating Reports satisfies the class test for trade secrets under s. 20(1)(a) of the Act (*AstraZeneca Canada Inc v Health Canada*, 2005 FC 189 (affirmed by FCA 2006 FCA 241) at para 41 [*AstraZeneca*]).

[37] In support of its application in matter T-699-13 the Applicant filed an affidavit of Joseph Edward (Ted) Hudson, Vice President of Retail Sales and Industry Relations for Burnbrae Farms

Limited, dated June 20, 2013 (Hudson Affidavit #1). In support of matter T-1053-13 the Applicant filed an affidavit of Mr. Hudson dated July 29, 2013 (Hudson Affidavit #2).

[38] With respect to the Egg Station Inspection/Rating Reports, Hudson Affidavit #2 deposes that these documents are confidential inspector worksheets and include information that the Applicant provided to CFIA detailing water levels, temperatures, and pH levels during the pre-wash, wash and rinse cycles as well as air temperature and humidity levels in various areas of the Applicant's production facilities. This is technical-scientific information related to the Applicant's operations and facilities practices.

[39] Based on the Hudson affidavits, the Applicant submits that this information meets the criteria for s. 20(1)(a) as:

i) The information relates to the Applicant's own unique facilities management and sanitation methods which is never disclosed to any third party or to the public;

ii) Egg producers and graders in Canada all employ their own methods for sanitation and facilities management. The Applicant diligently protects this information from being disclosed by any employees with access to it by way of its Employment Agreements and Offer Letters. These put employees on notice that it is a condition of their employment to maintain the confidentiality of information. Confidential information includes information relating to the Applicant's business operations, methods, practices, specifications and other technical and business information;

iii) The information relates to the unique way in which the Applicant sanitizes its eggs and the techniques it has developed to accomplish this. It also relates to how it manages and controls its facilities. The methods used have been extremely successful and are part of the reason why the Applicant is an industry leader. The information could easily be applied by a competitor; and

iv) The Applicant has developed these methods through years of experience in the industry and accordingly has a clear legal interest in them that is worthy of protection.

[40] The Applicant submits that the disputed information concerns methodology and is similar to the information considered by this Court in *PricewaterhouseCoopers, LLP v Canada (Minister of Canadian Heritage)*, 2001 FCT 1040 at paras 14-17 [*PricewaterhouseCoopers*].

Respondent's Submissions

[41] The Respondent submits that the information contained in the Egg Station Inspection/Rating Reports is not a trade secret, but represents publicly-available regulatory requirements. The *Egg Regulations* set out standardized regulatory requirements for water temperature, pH levels, air temperature and humidity. The information in the Egg Station Inspection/Rating Reports establishes whether the Applicant has met these regulatory requirements. The fact that the Applicant, for example, maintains an air temperature at a level lower that 10°C, in accordance with the requirements applicable to all operators, is not something of a technical nature which is guarded closely and is of such peculiar value to the owner that harm is presumed by its disclosure. Further, the information represents readings taken by a CFIA inspector at a particular point in time. The documents do not particularize the Applicant's facilities' management and sanitation methods, and documents that do set out such information have been redacted where appropriate, pursuant to s. 20(1)(b) of the Act.

[42] The term 'trade secret' must be given a reasonably narrow interpretation so as not to overlap with other categories of exempted information. It must be something, probably of a technical nature, that is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to the owner is presumed by its mere disclosure (*Société Gamma Inc v Canada* (1994), 79 FTR 42 at para 7 (TD) [*Société Gamma*]).

[43] The fact that the Applicant, like other operators subject to the *Egg Regulations*, follows the established regulatory requirements cannot be found to rise to the definition of trade secret.

Analysis

[44] Section 20(1)(a) of the Act provides an exemption from disclosure under the Act for trade secrets:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	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) trade secrets of a third party;	a) des secrets industriels de tiers;
[…]	[…]

[45] The trade secret exemption is class based. Once information in the record corresponds to the statutory provision, that information is exempted and the head must refuse to disclose it (*Merck Frosst*, above, at para 99; *AstraZeneca*, above, at para 41).

[46] 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 from its mere disclosure" (*Société Gamma*, above, at para 7; *AstraZeneca*, above, at para 62). The point is not whether the term is to receive a broad or a narrow definition, but rather that the term should be given its traditional legal meaning (*AstraZeneca*, above, at para 63,

aff'd in *Merck Frosst*, above, at para 111). Parliament intended to protect genuine trade secrets (*AstraZeneca*, above, at para 63).

[47] In *Merck Frosst*, above, the Supreme Court of Canada conducted an analysis of what comprises a trade secret in the context of s. 20(1) of the Act and concluded:

> [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.

[48] Thus, the Supreme Court confirmed in *Merck Frosst*, above, at para 109 that in order to qualify as a trade secret, the information must consist of a "plan or process, tool, mechanism or compound" that possesses each of the following characteristics:

i) The information must be secret in the absolute or relative sense (known only to a relatively small number of persons);

ii) The third party must demonstrate that it has acted with the intention to treat the information as secret;

iii) The information must be capable of industrial or commercial application; and

iv) The third party must have an interest (e.g. economic) worthy of legal protection.

[49] In my view, the water levels, temperatures and pH levels during the pre-wash, wash and rinse cycles in the sanitation of production, as well as the air temperature and humidity levels

contained in the Egg Station Inspection/Rating Reports, is not information that constitutes a trade secret within the meaning of s. 20(1)(a).

[50] The Egg Station Inspection/Rating Reports are a template form generated by CFIA. The form is used by an inspector to record his or her observations made during an inspection and/or information provided by the producer in response to the inspection. Section 9 of the *Egg Regulations* concerns the operation and maintenance of registered egg stations. Every operator is required to operate and maintain the registered egg station in accordance with that section which includes provisions pertaining to temperature and humidity. Section 9(16) states that the relative humidity in any room where eggs are held in a registered egg station shall be maintained at not more than 85%. Section 9(18) states that the temperature of any room where eggs are held in a registered egg station shall be maintained at not more than (a) 10°C in the case of a room holding eggs graded Canada A, Canada B or Canada C; and (b) 13°C in the case of a room holding eggs graded Canada Nest Run, ungraded eggs or eggs bearing a dye-mark. Section 9(31) states that the water that is used to wash eggs shall be at least 11°C warmer than the eggs and, in the case of a system that uses recirculated water, the water shall be maintained (a) at a temperature that is not less than 40°C; and (b) at a pH level that is not less than 10. These standards are all reflected in the form that comprises the Egg Station Inspection/Rating Reports as comparators to be met by the egg station under inspection.

[51] Thus, the information that was entered in each Egg Station Inspection/Rating Report by an inspector is intended to and establishes whether or not the Applicant is in compliance with those regulatory requirements. As noted above, the form sets points for each item and the

inspector records any points lost for non-compliance. It also allows for additional remarks by the inspector concerning sanitation and operations.

[52] In my view, this information as recorded by inspectors in the Egg Station Inspection/Rating Reports at the point in time of the subject inspections does not comprise a "plan or process, tool, mechanism or compound." It is simply data points recorded at a given time. I agree with the Respondent that these records do not particularize the Applicant's facilities management and sanitation methodologies and, while these readings may be related to the Applicant's operations and facilities practices, I am not persuaded that they disclose those operations and practices. In this regard, it is relevant that other documentation such as the Applicant's standard operation procedures and hazard analysis and control points plan, which in fact do describe processes, procedures and operations developed by and specific to the Applicant, have been withheld from disclosure pursuant to the s. 20(1)(b) exemption as proprietary information.

[53] The Applicant also submits that this information is similar to the information considered in *PricewaterhouseCoopers*, above. There, the Department of Canadian Heritage contracted the applicant's services for the purpose of reviewing, analyzing, and recommending changes to its documents being used to contract-out or "outsource" elements of its work. Justice Campbell found that the assignment was conducted within a relationship that had as a fundamental feature a concern for the confidentiality of the two reports produced constituting the results of the assignment. The applicant had applied its own proprietary methodologies and information in order to review, analyze, and make recommendations to the Department. Justice Campbell

concluded that the work product, being the reports, was capable of proving the methodology used to produce it and, therefore, that the reports contained trade secrets.

[54] In my view, *PricewaterhouseCoopers* can be distinguished on its facts. At issue in that case was release of two complete reports that were generated using a confidential methodology. The Egg Station Inspection/Rating Reports are one page documents generated by CFIA for regulatory compliance purposes. Further, the data recorded in the reports is limited and specific and, as noted above, does not amount to a plan, process, tool, mechanism or compound. Nor does it disclose a methodology or permit disclosure of such methodology by way of reverse engineering.

[55] I would also note that in *PricewaterhouseCoopers*, above, the reports themselves contained confidentiality clauses which stated that the information they contained was of a confidential technical nature and was being supplied on that basis. Further, one of the reports stated on its face that the non-confidential disclosure of the information could potentially harm Coopers & Lybrand's competitive position and/or materially interfere with ongoing or future contract/tender negotiations. Finally, each page of each of the reports was marked "STRICTLY PRIVATE & CONFIDENTIAL -- NOT FOR DISCLOSURE OUTSIDE PCH [Canadian Heritage]." Conversely, the Egg Station Inspection/Rating Reports state: "Information may be accessible or protected as required under the provisions of the Access to Information Act."

[56] In considering the scheme of the Act, the Supreme Court in *Merck Frosst*, above, (at para 106) addressed the distinction between trade secrets and confidential information as expressed in

s. 20(1)(a) and (b) and found that this suggested 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). In my view, the subject information contained within the Egg Station Inspection/Rating Reports does not fall within that narrower concept and, therefore, those reports are not exempt from disclosure as a trade secret pursuant to s. 20(1)(a).

Section 20(1)(b) Exemption

Applicant's Position

[57] The Applicant submits that the Shell Egg Product Inspection Reports, Notices of Detention and Notices of Release from Detention contain commercial information that satisfies the class test for s. 20(1)(b) (*Merck Frosst*, above, at paras 139-140, 146, 157-158; *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2003 FCT 250 at para 36; *Fédération des producteurs acéricoles du Québec v Canada (Canadian Food Inspection Agency)*, 2007 FC 704 at para 36 [*Fédération des producteurs acéricoles du Québec*]).

[58] The information contained under the headings "Lot Descriptions" and "Units in Lot" in the Shell Egg Product Inspection Reports identify the Applicant's customers by name or brand as well as the type and volume of product the Applicant ships to them. This customer information is also provided in the Notices of Detention and Notices of Release from Detention. The information is confidential and is not publicly available. While it is possible to determine who the Applicant's customers are by viewing its products in stores, it would not be practical to

obtain information in this manner concerning the volumes that they purchase. The information was supplied to CFIA by the Applicant and it has consistently been treated as confidential by the Applicant.

[59] Customer lists are valuable commercial information and such information is known only by persons within the Applicant's operations on a need to know basis such as those in the marketing, shipping, and sales departments. Employees are also subject to confidentiality and non-disclosure conditions in their contracts of employment. Further, the Applicant has for many years resisted attempts by the Egg Farmers of Canada to require egg graders to provide sales information regarding their customers and the volume and sizes of their orders. The Applicant only provides such information with the express condition that its sales data is amalgamated with that of other graders and, even then, the data is provided by size and not by brand.

Respondent's Position

[60] The Respondent submits that the Applicant has not met the four part *Air Atonabee* test (*Air Atonabee Ltd v Canada (Minister of Transport)*, [1989] FCJ No 453 [*Air Atonabee*] for the s. 20(1)(b) exemption as set out in *Canada Post Corp v National Capital Commission*, 2002 FCT 700 at para 10 [*Canada Post* 2002].

[61] The disputed information is publicly available. It is possible for a competitor to determine who the Applicant's customers are from a plain view of the product offerings found in a store. Further, the CFIA inspectors' reports are a random sample inspection of some of the Applicant's products. They are not complete customer lists nor do they detail the entire type and

volume of customer purchases. There is also no reasonable expectation of confidence and no public interest in maintaining confidentiality of the CFIA inspection reports and notices in this case as per the second criteria of the *Air Atonabee* test (*StenoTran Services v Canada (Minister of Public Works and Government Services)* (2000), 186 FTR 134 at para 9; *Canadian Tobacco Manufacturers' Council v Canada (Minister of National Revenue)*, 2003 FC 1037 at para 114 [*Canadian Tobacco Manufacturers*]; *Brookfield LePage Johnson Controls Facility Management Services v Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 at para 16 (TD); *Société Gamma*, above; *Ottawa Football Club v Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 FC 480, 24 FTR 62 at para 12; *Maislin Industries Ltd v Minister for Industry, Trade and Commerce*, [1984] 1 FC 939 at 947).

[62] While the Applicant's standard operation procedures manual and other documents collected by CFIA may have been submitted with the expectation of confidentiality, there was no such expectation with regard to CFIA's assessment and conclusions. Further, the fact that the information was treated confidentially within the Applicant's business does not alter how it is treated by CFIA or the principles set out in the Act (*Les Viandes*, above, at para 52). Where the records are from department sources, the general purpose of the Act, which identifies the provision of access to government controlled records as a public interest given priority by Parliament, should be given effect (*Air Atonabee*, above, at para 49).

[63] The records at issue were also not supplied to a government institution by a third party as the information is CFIA's opinion, comments and recommendations arrived at in the course of its regulatory mandate. This proposed disclosure reflects the approach in *Canada Packers Inc v*

Canada (Minister of Agriculture), [1989] 1 FC 47 (CA) at para 12 [*Canada Packers*] (see also *Merck Frosst*, above; *Air Atonabee*, above, at para 51; *Les Viandes*, above).

Analysis

[64] Pursuant to s. 20(1)(b), the head of a government institution shall refuse to disclose any record requested under the Act that contains "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."

[65] Like s. 20(1)(a), s. 20(1)(b) creates a class test (*AstraZeneca*, above, at para 41) where the nature or characteristics and treatment of the information is determinative.

[66] To meet the s. 20(1)(b) exemption, the Applicant must satisfy the four part test from *Air Atonabee* as restated in *Canada Post* 2002 at para 10, both above (see also *Merck Frosst*, above, at paras 94-95, 139-140, 146, 157-158) that, on a balance of probabilities, the information is:

1. financial, commercial, scientific, or technical information as those terms are commonly understood;
2. confidential in its nature, according to an objective standard which takes into account the content 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.

[67] As to the first criteria, it is sufficient that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.

Whether the information has a market value or its disclosure might cause loss to a third party is not relevant to s. 20(1)(b) and is addressed by s. 20(1)(a), (c) and (d) (*Air Atonabee*, above, at para 36; *Merck Frosst*, above, at paras 139-140).

[68] It is correct that the Shell Egg Product Inspection Reports, under the heading "Lot Description," lists descriptions of the customer and the brand name on the subject egg cartons or describes them as loose pack. Under "Units in Lot" a figure is listed which, in the reports in dispute, covers a broad range from 24 to 240 units. The *Egg Regulations* define a lot as a quantity of eggs that for any reason is considered separately from any other quantity of eggs for the purpose of an inspection (s. 2).

[69] Mr. Denis Chatelain, ATIP Team Leader with CFIA, provided an affidavit dated September 11, 2013 in support of the Respondent's response to the applications. When cross examined on his affidavit he acknowledged that the entries under "Lot Description" contained information pertaining to the Applicant's clients and included the number of units in each lot that was to be shipped to the customer. He further acknowledged that in the course of the inspections conducted by CFIA, the Applicant provided access to the lots and customer names, and confirmed that the inspectors obtained that information from the Applicant.

[70] Mr. Hudson deposed that the Applicant does not release information regarding its customers, suppliers or the volumes it sells to each of its customers that the volume of product sold and customer lists are valuable information known internally only on a "need to know"

basis (Hudson Affidavit #1 at para 13). The Applicant protects this information by way of its terms and conditions of employment including the following:

> All records, materials and information obtained by you in the course of employment concerning the business or affairs of Burnbrae Farms and its companies, including but not limited to financial information, business plans and strategies, and personal or financial information about employees, *customer lists and information, marketing plans and strategies*, all records, files, memoranda, reports, price lists, drawings, plans, sketches, documents, equipment, and the like, shall remain confidential.
>
> During your employment or at any time thereafter, you will not disclose such Confidential Information to any person without the consent of Burnbrae except as required by law, unless such information is in the public domain. All books, records, documents and information, in any form, containing Confidential Information, whether prepared by you or otherwise coming into you possession, shall remain the exclusive property of Burnbrae Farms. You shall immediately return all such books, records, files and documents in whatever form or medium to Burnbrae Farms upon termination of your employment, without retaining copies.
>
> A condition of your present and/or ongoing employment is your agreement to observe this confidentiality policy.
>
> [Emphasis added]

[71] Attached as an exhibit to Hudson Affidavit #1 is a "template" non-disclosure agreement letter to employees that is deposed to have been in use since 2009. The letter defines "confidential information" as follows:

> **"Confidential Information"** is deemed to include information relating to the Employer's business operations, methods and practices including marketing strategies, financial and business plans and ideas, financial statements and other financial information, produce pricing, produce formulae, *the names and other contact information of or relating to the Employer's customers, producers and suppliers, specifications and other technical and business information of or regarding the customers of the Employer, any other trade secret or confidential or proprietary information in the possession or control of the*

> *Employer*, whether in written, oral or electronic form and including without limitation all databases of information and, in all cases, whether developed by the Employee for the Employer or provided to the Employee otherwise, it being understood that any Confidential Information developed by you by virtue of your employment with the Employer is and remains the property of the Employer.
>
> [Emphasis Added]

[72] Mr. Hudson deposes that the information contained in the subject records, if disclosed, would allow a competitor to gain valuable insight into the Applicant's sales strategies and their results as well as the names of certain customers and their volume purchasing preferences and practices (Hudson Affidavit #1 at para 16). He further deposed that the Applicant does not release the names of its customers connected with their buying practices or the volume of egg products that it sells to them, and did not anticipate that customer names and orders would be disclosed to requesting parties when that information was provided to CFIA for inspection purposes.

[73] In my view, the names of customers and brands listed under the "Lot Description" is commercial information. So too is the number of units in the lot, but only to the extent that it portrays the volume of that product shipped to that customer on that day.

[74] As to whether this information is confidential, Justice MacKay gave some guidance in *Air Atonabee* (a view that was seemingly accepted by the Supreme Court in *Merck Frosst* at para 133) as to how to make this determination:

> 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:
>
> (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 its own,
>
> (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> (c) that the information be communicated, whether 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.

[75] While Mr. Hudson concedes that it would be possible for a competitor to determine who the Applicant's customers are from a view of product offers in stores, he states that it is not practical to obtain information about the volumes they purchase in that manner. The Respondent points out that CFIA reports represent a random sample inspection of some of the Applicant's products and do not represent complete customer lists or detail the entire type and volume of customer purchases. These are both valid points.

[76] However, Mr. Hudson states at paragraph 22 of Hudson Affidavit #1:

> 22. While it would be possible for a competitor to determine who Burnbrae's customers are from a plain view of product offerings "in store", it is not possible to determine the volumes of shipment and the other information contained in these CFIA records or the results of quality control inspections. I can also

> advise that Burnbrae's customer base is vast and without these records it would be a considerable undertaking to develop a complete picture of the diversity of our customers and the volumes we ship to those customers. The records contained in sealed Exhibit "A", to the extent that disclosure requests were made on a continuous basis, would allow a competitor or other person to gather valuable Burnbrae customer data and buying habits. I can advise the Court that we are aware of repeated requests for this information. Burnbrae has instructed its solicitors to make an Application for Judicial Review of an identical request, which demonstrates a serious attempt by the requestor to secure as much of this confidential business information as possible. Further, Burnbrae received notice on June 6, 2013 that further requests are being made for additional CFIA records."

[77] It must be assumed that the second judicial review referenced by Mr. Hudson is T-1053-13 as he has not stated otherwise. A copy of the referenced June 6, 2013 notice was not provided with his affidavit.

[78] What this does confirm is that, at least in theory, by repeated or multi-year requests, a requestor could gather and use this information to identify portions of the Applicant's customer base. In that regard, attached to CFIA's April 2, 2013 letter (T-669-13) are twelve Shell Egg Product Inspection Reports Origin for the period October 6, 2009 to December 12, 2011. And, attached to its May 27, 2013 letter (T-1053-13) are over eighty Shell Egg Product Inspection Reports. Thus, a considerable number of reports resulted from the two confirmed requests. Mr. Hudson deposes that the Applicant does not release the names of its customers connected with their buying practices or the volumes of egg products sold to them as this would provide competitors with insight into emerging markets and the focus of the Applicant's sales efforts with existing clients.

[79] For this reason I am satisfied that the content of the records pertaining to customer names and/or brands combined with the volume of the product specific to each of those customers is information not available from sources otherwise accessible by the public or that could not practicably be obtained by observation or independent study by a member of the public acting on its own.

[80] The next question is whether the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed. Mr. Hudson's evidence on this issue is set out above.

[81] It should also be noted that the bottom of the Shell Egg Product Inspection Reports states the following in fine print:

> The information you provide on this document is collected by (for) the Canadian Food Inspection Agency under the authority of the *Canada Agricultural Products Act* for the purpose of food safety. Some information may be accessible or protected as required under the provisions of the *Access to Information Act*. Information that could cause you or your organization injury if released is protected from disclosure as defined in section 20 of the *Access to Information Act*.

[82] This is, at best, ambiguous.

[83] The Respondent submits that the underlying documents at issue contain CFIA's findings and recommendations arising from its regulatory enforcement requirements and that, accordingly, there was no reasonable expectation of confidentiality with regard to CFIA's assessment and conclusions. While that may be, it appears to me that in regard to the Shell Egg

Product Inspection Reports, the Applicant appears to be only challenging under s. 20(1)(b) the customer information contained in the "Lot Description" column and the volumes contained in the "Units in Lot" column, not the release of the reports as a whole.

[84] The Respondent also submits that the disputed information is not exempt as it was not supplied to government by a third party. The records consist of information that reflects CFIA's opinions, comments and recommendations arrived at in the course of its regulatory mandate. However, my own review of the Shell Egg Product Inspection Reports shows that they do not contain opinions, comments and recommendations, but merely record information that the inspectors observed or, in some cases, were informed of.

[85] In that regard, in *Les Viandes*, above, Justice Gauthier stated, with respect to s. 20(1)(b) and inspection reports:

> [44] As the Federal Court of Appeal indicated in 1989 in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (F.C.A.), at paragraph 13, concerning the reports of a meat inspection audit team on abattoirs in the Kitchener area, none of the information contained in this kind of report was supplied by the appellant. "The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view, no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar."
>
> [45] On the confidentiality of the information collected in the inspection reports, Justice Pinard indicated in *Coopérative fédérée du Québec (c.o.b. Aliments Flamingo) v. Canada(Agriculture and Agri-Food)*, [2000] F.C.J. No. 26 (F.C.) (QL), at paragraph 16:
>
> > Finally, although the applicants do not specifically rely on the exemption contained in paragraph 20(1)(b) of the Act, they do treat the inspection reports as confidential. In this regard, suffice it to recall that these records are collected by a

> government agency and in legal terms constitute records of the Government of Canada subject to the Act (see the recent decision of the Federal Court of Appeal in The Information Commissioner of Canada and The President of the Atlantic Canada Opportunities Agency (November 17, 1999), A-292-96).

[46] The Court has carefully examined each of the reports which were the subject of the application for review and is satisfied that no distinctions need be made here.

[47] The Court cannot accept the applicant's interpretation that, as it [TRANSLATION] "opened its doors" to the inspectors, it to some extent provided the information contained in the reports. The applicant is legally required to allow inspectors to go about their work.

[48] Further, as I indicated at the hearing, in view of its past experience, it is clear that Les Viandes du Breton Inc. could not reasonably think that these inspection reports were or could be kept confidential by the respondent.

[49] In fact, in all cases where the disclosure of such reports has been challenged, the courts have upheld the decision to disclose (see, for example, *Canada Packers Inc. v. Canada (Minister of Agriculture)*, above; *Intercontinental Packers Limited v. Canada (Minister of Agriculture)*(1987), 14 F.T.R. 142 (F.C.); *Gainers Inc. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 133 (F.C.), aff'd. (1988), 87 N.R. 94 (F.C.A.); *and Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-Food)*, above).

[50] Accordingly, the Court attaches little weight to paragraphs 34, 35 and 37 of Mr. Breton's confidential affidavit, which does not explain the basis for his statements about the way in which the Agency treats such reports.

[51] In view of the foregoing, the applicant knew or should have known that, as a rule, these reports are disclosed to persons requesting them under the Act.

[52] The fact that the reports and the information they contain are treated confidentially within the business does not in any way alter the way in which they are treated by the Agency or the principles set out in the Act.

[86] In *Canada Packers*, above, a request was made to the Department of Agriculture under the Act for access to the meat inspection team audit reports for meat packing plants in Kitchener. With respect to s. 20(1)(b), the Federal Court of Appeal held:

> [11] Paragraph 20(1)(b) relates not to all confidential information but only to that which has been "supplied to a government institution by a third party". Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been *supplied* by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore para. 20(1)(b) is irrelevant in the cases at Bar."

[87] While *Les Viandes* and *Canada Packers* dealt with audit reports, the same analysis would apply to inspection reports. Also, they illustrate that information provided – such as volumes and, in the case of the Applicant, customer names – can properly be redacted from inspection reports.

[88] Finally, in *Air Atonabee*, above, Justice MacKay stated:

> [50] […] 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 contents 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."

[89] This was summarized by the Supreme Court in *Merck Frosst*, above:

> [154] What, then, are the governing legal principles?
>
> [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.
>
> [156] A second principle is that where government officials collect information by their own observation, as in the case of an inspection for 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 observations generally cannot be said to be information supplied by a third party.

[90] The evidence before me is that, with respect to the Shell Egg Product Inspection Reports, the Applicant provided the customer names and brands to the inspectors. This was commercial information that the Applicant treated as confidential. As the exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself, CFIA erred to the extent that it refused to exempt from those records, under Lot Description, the customer names and brands. As to the Units In Lots, in my view, once the customer name and brand information is severed, there is no longer any connection that can be gleaned from the Shell Egg Product Inspection Reports that would render the information pertaining to the product volume confidential. Mr. Hudson's evidence in this regard links the volumes to the customer identities. Accordingly, once that link is severed by removal of the customer identification, there is no longer ongoing confidentiality regarding the volumes set out in the Shell Egg Product Inspection Reports.

[91] As stated in *Air Transat AT Inc v Canada (Transports Canada)*, 2001 FCJ No 108 at para 14, var'd on appeal, 2002 FCA 404 [*Air Transat*]:

> […] In my view, the fact that a document is considered as a federal government document covered by the Act is not sufficient to support a conclusion that the content of the document cannot fall within the exception set out in s. 20(1)(b). A distinction should be

> made between the analysis done by the government organization from information obtained during the inspection and the information supplied directly to the inspectors by the third party. Where there is an inspection report, which additionally is a federal government document covered by the Act, anyone seeking an exception to the Act must prove the confidentiality of the information initially supplied *as well as showing the ongoing confidentiality of the information*. In other words, in my opinion it is necessary to establish that the information was confidential when it was given to the inspectors and had to remain confidential throughout the inspection report, which includes the information contained in the final report. This must be shown by the submission of real direct evidence. […]
>
> [Emphasis Added]

[92] Thus, while the Shell Egg Product Inspection Reports viewed as a whole do not meet the s. 20(1)(b) exemption requirements, the customer names and brands, for the reasons above, do fall within that exemption.

[93] I would apply the same reasoning to the Notices of Detention and Notices of Release from Detention such that only the customer names and brands fall within the exemption pursuant to s. 20(1)(b) of the Act.

Section 20(1)(c)

Applicant's Position

[94] The Applicant submits that the disputed information in the Shell Egg Product Inspection Reports, Notices of Detention, and Notices of Release from Detention, which discloses the identity of its customers with the type and volume of product they purchase, would prejudice the

Applicant's competitive position and provide an unearned and obvious financial advantage to its competitors (*Wells v Canada (Minister of Transport)*, (1995) 103 FTR 17 at para 9).

[95] The Applicant also submits that, in addition to the disputed commercial information, the release of the information contained in various of the reports relating to sanitation and the weight and quality of the eggs inspected has had a demonstrated negative effect on the Applicant's business and reputation as evidenced by an online article that was published in May, 2013 (*Les Viandes*, above, at para 9). The Applicant submits that it can reasonably be anticipated that the erroneous and defamatory implication of this article will continue to appear in other articles if the records are disclosed. Information in the Pregrade/Canada Nest Run Product Inspection Reports could be manipulated and misinterpreted with negative effect if reported separately from the overall sample size.

[96] If disclosed, information in the Pregrade/Canada Nest Run Product Inspection Reports could also have a significant prejudicial effect on the Applicant's contractual relationships with the producers. Furthermore, disclosure of CFIA's findings, sanitation ratings and remarks contained in the Egg Station Inspection/Rating Reports would have a negative impact on the Applicant's reputation in the marketplace. Additionally, that the exemptions in s. 20(1) apply to reviewers' notes and correspondence (*Merck Frosst Canada & Co v Canada (Minister of Health)*, 2004 FC 959 at paras 45 and 47).

Respondent's Position

[97] The Respondent submits that the Applicant has not met the s. 20(1)(c) exemption requirement that it establish a reasonable expectation of probable harm (*Merck Frosst*, above, at paras 196, 199; *Canada Packers*, above, at para 20) and that affidavit evidence that is speculative is insufficient (*Canada Post Corporation v Canada (Minister of Public Works and Government Services)*, 2004 FC 270 at paras 45-47 [*Canada Post* 2004]; *AstraZeneca*, above, at para 46).

[98] The Hudson evidence is speculative and points only to a single blog post as evidence of harm. There is no evidence as to how the online post would actually harm the Applicant, particularly when the Applicant confirms that the posting is erroneous (*SNC-Lavalin v Canada (Minister of Public Works)*, [1994] FCJ No 1059 at para 43 (TD) [*SNC-Lavalin*]). There is also no risk that release of the disputed information would allow competitors insight into the Applicant's customers and its marketing and sales strategies as the information reflects CFIA's assessments and conclusions, and the information about the Applicant's customers is publicly available. Knowledge of how the regulatory process works is not information which s. 20 is designed to exempt from disclosure (*AstraZeneca*, above, at para 94; *Merck Frosst*, above at para 218).

[99] The Respondent states that the Applicant's claim that the release of the disputed information could be manipulated and misinterpreted with negative effect is not a valid objection under s. 20(1)(c) (*Merck Frosst*, above, at para 224; *Air Transat*, above, at para 25).

Analysis

[100] Pursuant to s. 20(1)(c), the head of a government department shall refuse to disclose a requested record that contains "information the disclosure of which could reasonably be expected to result in material finance loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party."

[101] In *AstraZeneca*, above, Justice Phelan provided the following guidance as to the exemptions:

> [41] Subsection 20(1) creates two types of tests for exemptions. Paragraphs (a) and (b) create a "class" test where the nature or characteristics and treatment of the information is determinative. If a document falls within the class, no further inquiry is called for.
>
> [42] Paragraphs (c) and (d) create a "harms" test under which the party claiming exemption must establish material financial loss or gain or prejudice to competitive position or interference with contractual or other negotiations.
>
> [43] In each case, the burden of proof is upon the person seeking the exemption. It must be real proof, mere recitation in an affidavit of the legal test found in the statute is not sufficient. For example, phrases such as "release of the record will cause the company material financial loss" without a clear showing of how that result might occur is of little assistance.
>
> [44] While paragraphs (a) and (b) do not admit to speculation, paragraphs (c) and (d) do. The standard is "could reasonably be expected". The legislation recognizes that with respect to proof of harm, the Court must engage in reasonable speculation.
>
> [45] Adequacy of proof of expected harm must be flexible and the Court must recognize that in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosure of that type of evidence may never have occurred.

> [46] Recognizing the inherently speculative nature of proof of harm does not however relieve a party from putting forward something more than internally held beliefs and fears. Evidence of reasonably expected results, like forecasting evidence, is not unknown to courts and there must be a logical and compelling basis for accepting the forecast. Evidence of past documents of information, expert evidence, evidence of treatment of similar evidence or similar situations is frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.
>
> [47] However, each case must turn on the evidence presented. It cannot be assumed that a certain type of document will be accepted for exemption from disclosure merely because a similar document was exempt in another case.

[102] In order to rely on the s. 20(1)(c) exemption, the Applicant must demonstrate, on a balance of probabilities, that there is a "reasonable expectation of probable harm" (*Merck Frosst*, above, at paras 192, 199; *Canada Packers*, above, at para 20; *AstraZeneca*, above, at para 77).

[103] In *Merck Frosst*, above, the Supreme Court of Canada stated:

> [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.

[104] Similarly, in *Aventis Pasteur Ltd v Canada (Attorney General)*, 2004 FC 1371 at para 31, Justice Kelen of the Federal Court stated that "it is not sufficient for the applicant to generally speculate as to the probability of harm which the disclosure would cause, rather the applicant must clearly show that the disclosure will probably cause it harm."

[105] In *Canada Post* 2004, this Court addressed the evidentiary requirement of s. 20(1)(c):

> [44] The remaining issue is whether the Applicant has met the test for exemption against disclosure pursuant to subsection 20(1)(c). According to the jurisprudence, an exemption from access pursuant to this subsection requires proof, on a balance of probabilities, of a "reasonable expectation of probable harm": *Canada Packers Inc.*, *supra* and *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)*(1989), 24 F.T.R. 32 at 36, aff'd (1990), 107 N.R. 89 (F.C.A.).
>
> [45] Affidavit evidence that is vague or speculative is insufficient to establish the reasonable expectation of probable harm that is required pursuant to subsection 20(1)(c); see *SNC-*Lavalin, supra and *Canadian Broadcasting Corporation*, *supra*.
>
> [46] I acknowledge the affidavit evidence filed by the Applicant as part of the confidential Application Record contains many details concerning the alleged harm that could enure to the Applicant if the records were disclosed. However, the detail of an affidavit is not determinative of whether certain records meet the criteria for exemption pursuant to subsection 20(1)(c).
>
> [47] In *Canadian Broadcasting Corporation, supra*, the Court said the following at paragraphs 25 and 28:
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> > In *SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994),* 79 F.T.R. 113 at page 127 (F.C.T.D.), the court held the applicant cannot merely affirm by affidavit that disclosure would cause the harm discussed in paragraph 20(1)(c) of the Act. The court stated that these affirmations are the very findings that the court must make and so further evidence establishing probable harm is needed.
> >
> > […]
>
> It is also not enough to merely speculate that the applicant may suffer some probable harm if the requested information is made public.

[106] In this matter the Applicant submits that the disputed information in the Shell Egg Product Inspection Reports, Notices of Detention and Notices of Release from Detention would

prejudice its competitive position as this information could be used to develop a picture of the Applicant's customer base, their shipping volumes, buying habits, product preferences, and needs. The Applicant further submits that the information in these same reports and in the Pregrade/Canada Nest Run Inspection Reports relating to sanitation and the weight and quality of eggs inspected has had a demonstrated negative effect on the Applicant's business and reputation.

[107] As to the first point concerning the Applicant's commercial practices, I have already determined that the customer name and brand information should not be disclosed. Without information to identify the customers, the volume data is not sufficient to meet the burden as stated in *Merck Frosst*, above, at para 192. To satisfy the s. 20(1)(c) exemption, the Applicant must show a reasonable expectation of probable harm by demonstrating 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." If the volume data cannot be tied to specific customers, the risk of harm arising from its disclosure is less than a mere possibility.

[108] In support of its concern of a loss of business and reputation as a result of disclosure of information regarding sanitation and the weight and quality of eggs inspected, Hudson Affidavit #1 refers to an excerpt from a blog article, published on May 31, 2013, which states:

> Reports of random-sampling testing of eggs processed by Canada's two largest egg-grading companies indicate they are putting cracked, dirty and wrong-sized eggs into their retail-ready cartons.
>
> […]
>
> I have obtained the CFIA reports relating to the Maple Lynn Foods Ltd plant. Burnbrae runs at Strathroy.

> […]
>
> The Information Commissioner court case relates to an Access-to-Information request I filed in February, 2012, for "copies of the results of random sampling and checking of eggs to determine the accuracy of grading at facilities owned by L.H. Gray and Son Ltd. and/or Grayridge Farms Ltd. in the province of Ontario, and of Burnbrae Farms Ltd., also in the province of Ontario, for the fourth quarters of (October, November, and December) of 2009, 2010 and 2011."
>
> […]
>
> Because they are from CFIA's random sampling, they should be representative of all the eggs the two companies market in Ontario. They hold about 90 per cent market share in the province.
>
> […]
>
> I obtained 11 CFIA reports on Maple Lynn from the Ottawa court records, and every one of them identifies cracked eggs packed in Grade A cartons.
>
> (Blog article dated May 31, 2013, Exhibit D to Hudson Affidavit #1)

[109] Mr. Hudson states that the erroneous and defamatory implication of this article is that the Applicant systematically includes cracked, dirty and wrong-sized eggs within retail ready cartons and, while this is farfetched, that it can reasonably be anticipated that these types of articles will continue to appear if the records are released.

[110] Mr. Hudson does not explain why, if the blog post he relies on is erroneous and far fetched, it can reasonably be anticipated that similar articles will follow. Nor does he explain how the blog post demonstrates a reasonable expectation of probable harm. The question is whether this blog post is sufficient to demonstrate 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.

[111] While the blog post is unflattering and, according to Mr. Hudson's evidence, erroneous, there is no evidence that it has or is likely to cause actual harm. In my view, given the jurisprudence on s. 20(1)(c) and the evidence necessary to demonstrate that the anticipated harm from disclosure "could reasonably be expected," the blog post is insufficient to clearly demonstrate probable harm.

[112] It also seems to me that, in the social media reality within which individuals and companies now live and work, the idea that a single blog post could serve to defeat the purpose of the Act by precluding disclosure of inspection reports designed to address regulatory compliance should not easily be accepted. If such posts are defamatory then the remedy is an action against its author, not the precluding of disclosure of inspection reports under the Act.

[113] In that regard in *Les Viandes du Breton Inc v Canada (Department of Agriculture and Agri-food)*, [2000] FCJ No 2088 at para 11 (TD), Justice Nadon, then a judge of the trial division, held that it is not sufficient for the plaintiff to show a possibility of harm or to speculate as to the probability of harm which the disclosure would cause. Rather, the plaintiff must clearly show that the disclosure will probably cause it harm. Justice Nadon also noted that the consequences discussed by the plaintiff in that case were a result of speculation rather than of thorough analysis or study. Similar to this case, the plaintiff in that case had argued that the likelihood of harm from disclosure was linked to the possibility of unjust or incorrect coverage

of the content of the reports by the media. The plaintiff alluded to unjust press coverage which had occurred in the past. Justice Nadon relied on *Coopérative fédérée du Québec v Canada (Agriculture and Agri-food)*, [2000] FCJ No 26 (TD) and held that the media coverage cannot be presumed to be unfair or negative, noting that the plaintiff had other legal remedies if there was unfair or unfounded coverage.

[114] Hudson Affidavit #2 states that the Pregrade/Canada Nest Run Inspection Reports record CFIA quality checks on certain lots of ungraded eggs from the Applicant's producers. The records also include the weight and quality of the eggs inspected, the number of rejected eggs and the reasons the eggs were rejected. It goes on to state that disclosure could damage the Applicant's relationships and contracts with its producers who would not expect their information to be communicated to third parties or the public, "especially if they are experiencing difficulties." Further, the information could easily be manipulated and misinterpreted with negative effect. For example, information regarding the number of rejected eggs could be reported separately from the overall size sample as was the case of the blog post. Such suggestions could undermine a producer's reputation and damage the goodwill they have developed with key industry partners such as their feed supplier, pullet grower, hatchery, and other industry partners.

[115] In my view this is purely speculative. The Pregrade/Canada Nest Run Inspection Reports identify the inspection location (the Applicant's facility), the name of the producer, lot description (e.g. white eggs, green trays and plastic divides), the number of units in the lot (e.g. 480 x 15 dozen), the sample size, and the number of eggs examined. For Pregrades, the number

of eggs with cracked shells, inferior shells, dirty shells, etc are set out as well as whether the lot is accepted or not, and any additional remarks. For Canada Nest Run eggs, the number of cracked shells, dirty shells, and leakers and rejects are set out. It is not apparent to me how disclosure of this information by CFIA to a requestor would cause damage to the Applicant's relationships with its producers. The reports disclose only the results of the inspection. While a producer may not like the fact that the information is disclosed, this is an issue between CFIA and the producer. Similarly, any reputational damage is as between the producer and the party who uses the disclosed information. If the information is misrepresented then a producer's remedy is against the party misusing the information. Otherwise, the information simply sets out the results of the regulatory inspections and is not exempt from disclosure as discussed above.

[116] Hudson Affidavit #2 also notes that the additional remarks of inspectors contained in some of the documents such as the Pregrade/Canada Nest Run Inspection Reports and the Egg Station Inspection/Rating Reports may include recommended practices designed to strengthen sanitation and other practices. However, that it may not be apparent to the lay reader that those comments do not reflect failings on the part of the Applicant. Hudson Affidavit #1 states that the release of the sampling data would cause significant damage that would not be warranted considering the industry context and the volumes of eggs graded by the Applicant on a daily basis. This would have a substantial impact on its competitive position in the marketplace. The Applicant's customers would very likely question the quality of its product, leading to undeserved prejudice in negotiations with its customers.

[117] Again, the harm described by the affidavit evidence is speculative. Further, to accept this reasoning would provide a basis for non-disclosure of all inspection reports in all industries, which would be contrary to the object of the Act.

[118] As stated in *Merck Frosst*, above:

> [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 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.

[119] Similarly, in *Air Transat*, above:

> [22] In *Canada Packers Inc. v. Canada (Department of Agriculture)*, [1989] 1 F.C. 47 (F.C.A.), the Court of Appeal indicated that the exception contained in s. 20(1)(c) required a reasonable expectation of probable harm (at p. 60 of the judgment). The plaintiff should show that the reports are so unfavourable that they could reasonably be expected to result in material financial loss or to prejudice its competitive position or interfere with contractual or other negotiations (*Canada Packers*, at 64-65).
>
> [23] In its memorandum the plaintiff alleged that [TRANSLATION] "a substantial quantity of information contained in the inspection report . . . called into question whether Air Transat A.T. Inc. was in compliance with certain of the rules contained in the Canadian Aviation Regulations". Further, [TRANSLATION] "such findings, when made in a field like that of air transport where customer confidence often depends on intangibles, could if it were released to third parties without being adequately placed in context irreparably injure the image of Air

> Transat A.T. Inc., and this would have an immediate effect on its goodwill".
>
> [24] The affidavits filed in support of the application do not discuss the question of the anticipated harm at any length. The affidavit of Denis Pétrin, the plaintiff's vice president, finance and administration, indicated that [TRANSLATION] "the disclosure of the information . . . without being previously placed in context and without further explanation would give the public a false image of the safety level of the company". Further, [TRANSLATION] "In a highly competitive market, such disclosure would by its negative impact on the public be very likely to give our competitors an advantage". Finally, he added [TRANSLATION] "In such a situation, financial loss could reasonably be expected to result". The other affidavits filed in support of the application are more or less to the same effect.
>
> [25] With respect, these general comments might be capable of applying to any situation in which an inspection report contains negative information on a company. In my view, showing that a reasonable expectation of probable harm exists requires more than mere general allegations of the type contained in the affidavits filed by the plaintiff. In the case at bar, there is no evidence of the extent of the harm anticipated. Further, the plaintiff gave no indication of the link between the information and the harm described. It also did not appear to take into account the fact that the report also contains several positive conclusions about it. Further, the plaintiff cannot assume, as it did, that the public could not properly interpret the information contained in the reports without supporting its arguments by concrete evidence (see *Coopérative fédérée du Québec et al. v. Agriculture and Agrifood Canada and Bernard Drainville*, F.C., File No. T-1798-98, January 7, 2000).

Also see *Fédération des producteurs acéricoles du Québec*, above, at paras 24-26.

[120] In *SNC-Lavalin*, above, Justice MacKay stated that it is simply not sufficient for the Applicant to establish that harm might result from disclosure. Speculation, no matter how well informed, does not meet the standard of a reasonable expectation of material financial loss or prejudice to the Applicant’s competitive position (para 43).

[121] Similarly, in my view, the affidavit evidence in this matter merely speculates as to the harm to the Applicant's business and reputation and is insufficient to demonstrate a reasonable expectation of material financial loss or prejudice to the Applicant's competitive position. Further, the Applicant has not suggested that the records are so unfavourable that they could reasonably be expected to have that result.

Section 20(1)(d)

Applicant's Position

[122] The Applicant submits that the disclosure of the disputed information will also have a significant prejudicial effect on its contractual negotiations with its producers and accordingly, that it meets the s. 20(1)(d) exemption (*Canadian Tobacco Manufacturers*, above, at paras 133-134). Releasing a producer's pregrade information has led to the false suggestion that they are involved in packaging cracked, dirty and wrong sized eggs, which suggestion undermines a producer's reputation and damages good will. Producers may become unwilling to continue their contractual relations with the Applicant if it means that their pregrade information will be communicated to third parties and the public.

Respondent's Position

[123] The Respondent submits that to apply the s. 20(1)(d) exemption, the Applicant must show an obstruction to negotiations rather than merely the heightening of competition that might flow from disclosure (*Canadian Broadcasting Corp v Canada (National Capital Commission)*, [1998] FCJ No 676 at para 29 (TD) [*Canadian Broadcasting Corp*]). Further, the Applicant

must show that there is a reasonable expectation that actual contractual negotiations it is involved in will be subject to interference; speculative evidence is not enough (*131 Queen Street Limited v Canada (Attorney General)*, 2007 FC 347 at paras 41-42; *Canadian Broadcasting Corp*, above, at para 29). Here, the Applicant has not provided evidence of contractual or other negotiations it is actually and currently involved in which will be affected. Its assertions are therefore speculative.

Analysis

[124] In *Saint John Shipbuilding Ltd v Canada (Minister of Supply and Services)*, [1990] FCJ No 81, 67 DLR (4th) 315 (CA), the Court of Appeal held that s. 20(1)(d) requires that there must be interference in the nature of obstruction, and that the standard must be one of probability rather than mere speculation.

[125] The s. 20(1)(d) exemption requires obstructions to negotiations rather than merely the heightening of competition (*Canadian Broadcasting Corp*, above, at para 29). In addition, there must be actual contractual negotiations which will be subject to interference, and not speculative evidence. In *Canada (Information Commissioner) v Canada (Minister of External Affairs)*, [1990] 3 FC 665, [1990] FCJ No 614, Justice Denault found that the s. 20(1)(d) exemption requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the third party will be obstructed by disclosure. Hypothetical problems concerning foreign suppliers and local customers were found to be insufficient to establish a reasonable expectation that any particular contract or negotiations would be

obstructed by disclosure. The 20(1)(d) exemption is intended to catch contractual situations not covered by s. 20(1)(c) (*Canada Packers*, above, at para 13).

[126] In the present case, the evidence is limited to the above described assertions in the Hudson affidavit evidence. The Applicant has not provided any evidence of actual contractual negotiations which will be obstructed by disclosure. The Applicant has therefore not met its burden so as to fall within the s. 20(1)(d) exemption.

ISSUE 3: Was the Applicant afforded procedural fairness in CFIA's decision-making process?

Applicant's Submissions

[127] The Applicant submits that CFIA's decisions to disclose the records, based on the IC's recommendations, lacked procedural fairness and transparency. Enabling statutes may set out a detailed list of procedural requirements that decision-makers must follow in making specific decisions (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 38; G Van Harten, G Heckman & D McMullan, Administrative Law, Cases, Text and Materials, 6th ed (Toronto: Emond Montgomery Publications) at p 77). The Act provides a detailed list of procedural requirements that must be followed when CFIA receives a request for information that could be exempt from disclosure pursuant to s. 20(1). Among these is s. 35, which provides that in the course of an investigation of a complaint by the IC, a third party shall be given "a reasonable opportunity to make representations" if the IC intends to recommend the disclosure of a record that the IC has reason to believe might contain information falling under any of the s. 20(1) exemptions.

[128] With respect to the decision in T-1053-13, the Applicant submits that it was not provided with a reasonable opportunity to make representations during the IC investigation. While the Applicant was asked for submissions, it was CFIA, not the IC that made the request. And while the Applicant responded to CFIA and there is a record of the IC requesting a copy, there is no evidence of CFIA ever having provided the submissions to the IC.

[129] In the alternative, even if the IC received the Applicant's representations, this does not amount to a "reasonable opportunity" to make representations as required by the Act. The Applicant was not made aware of what considerations the IC was reviewing as part of its investigation and was not permitted to make representations to the IC directly. Further, the Applicant was not contacted by the IC even after it offered to provide clarity to CFIA. Therefore, the Applicant was only able to resubmit its previous representations to CFIA and ask for more clarification.

[130] With respect to the decision in T-699-13, the Applicant was not contacted by the IC or CFIA during the investigation following a complaint by the requestor. The Applicant was not provided with any opportunity to make representations to the IC.

Respondent's Submissions

[131] The Respondent submits that the Applicant relies on s. 35 of the Act in claiming that it was not afforded a reasonable opportunity to make representations to the IC. However, this is a review under s. 44 of the Act and not s. 35. The IC's investigation is not relevant to this s. 44 review (*Merck Frosst*, above, at para 53). The role of this Court is to determine whether the

claimed exceptions apply to the contested records; questions related to the Respondent's decision-making process are not relevant to a s. 44 review (*Merck Frosst Canada & Co v Canada (Minister of Health)*, 2003 FC 1422 at para 3 as cited by the Supreme Court of Canada in *Merck Frosst*, above, at para 53). In any case, the Applicant was not denied procedural fairness. It was afforded ample opportunity to make its case and to object to the disclosure of the disputed information. It was given notice as required by s. 27 of the Act and the documents at issue have not changed. In T-1053-13, it was given a further opportunity to provide additional comment prior to the issuance of CFIA's s. 29 notice.

[132] Without admitting this allegation, even if there was a breach of procedural fairness, it is cured by the comprehensive nature of the s. 44 review process. At this late stage, CFIA is still entitled to change its mind about the portions of the requested records which are exempt under s. 20 (*AstraZeneca Canada Inc v Canada (Health)*, 2005 FC 648 at para 9).

Analysis

[133] In *Ermineskin Band of Indians v Canada (Minister of Indian Affairs and Northern Development)*, [1988] FCJ No 344 [*Ermineskin Band*] it was submitted that fairness arguments to set aside an administrative decision are properly made as an application under s. 18 of the *Federal Court Act* rather than under a s. 44 review. The Court did not agree and found that the "rather comprehensive nature of a section 44 review ought to cure whatever procedural defects may have been present when the decision was made" (see also *Canada Post Corp v Canada (Minister of Public Works)*, [1993] FCJ No 975 at para 17 (TD)).

[134] Based on *Ermineskin Band*, in my view it is not necessary to delve into the content of the procedural fairness requirements in this case as any procedural defect will be cured by the present *de novo* review.

ORDER

THIS COURT'S ORDERS AND ADJUDGES that

1. The application for judicial review is granted in part;
2. With one exception, the information contained within the disputed records does not fall within the s. 20(1)(a), (b), (c) or (d) exceptions;
3. The customer names and/or brand names found within the Shell Egg Product Inspection Reports, Notices of Detention and Notices of Release from Detention fall within the s. 20(1)(b) exception. Accordingly, CFIA is hereby ordered to sever that information prior to disclosure of those documents; and
4. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

Schedule "A"

Access to Information Act, R.S.C., 1985, c. A-1

Purpose	**Objet**
2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.
Complementary procedures	**Étoffement des modalités d'accès**
(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.	(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.
Definitions	**Définitions**
3. In this Act,	3. Les définitions qui suivent s'appliquent à la présente loi.
"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	« 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

a government institution.

Right to access to records

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.

Third party information

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;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of

fédérale.

Droit d'accès

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.

Renseignements de tiers

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;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la

emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(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.

mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la Loi sur la gestion des urgences et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

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.

Notice to third parties

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort

Avis aux tiers

27. (1) Le responsable d'une institution fédérale qui a l'intention de communiquer un document fait tous les efforts raisonnables pour 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 des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication

to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

risquerait vraisemblablement, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

Waiver of notice

(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.

Renonciation à l'avis

(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.

Contents of notice

(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.

Contenu de 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.

Extension of time limit

(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.

Prorogation de délai

(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.

Representations of third party and decision

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.

Observations des tiers et décision

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.

Representations to be made in writing

(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.

Observations écrites

(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.

Contents of notice of decision to disclose

(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.

Contenu de l'avis de la décision de donner communication

(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.

Disclosure of record

(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

Communication 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

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.

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.

Where the Information Commissioner recommends disclosure

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

(a) the person who requested access to the record; and

(b) 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 at the time of the request intended to disclose the record or part thereof.

Recommandation du Commissaire à l'information

29. (1) Dans les cas où, sur la recommandation du Commissaire à l'information visée au paragraphe 37(1), il décide de donner communication totale ou partielle d'un document, le responsable de l'institution fédérale transmet un avis écrit de sa décision aux personnes suivantes :

a) la personne qui en a fait la demande;

b) le tiers à qui il a 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.

Contents of notice

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

(a) a statement that any third party referred to in paragraph (1)(b) 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

Contenu de l'avis

(2) L'avis prévu au paragraphe (1) 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;

who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

Receipt and investigation of complaints

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(a) from persons who have been refused access to a record requested under this Act or a part thereof;

(b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a

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 du document.

Réception des plaintes et enquêtes

30. (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :

a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

b) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;

c) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;

d) déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent comme contre-indiqué le délai de communication relatif à la traduction;

d.1) déposées par des personnes qui se sont vu refuser la communication des

request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

(e) in respect of any publication or bulletin referred to in section 5; or

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

Complaints submitted on behalf of complainants

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

Information Commissioner may initiate complaint

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

Written complaint

31. A complaint under this Act shall be made to the

documents ou des parties en cause sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;

e) portant sur le répertoire ou le bulletin visés à l'article 5;

f) portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

Entremise de représentants

(2) Le Commissaire à l'information peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.

Plaintes émanant du Commissaire à l'information

(3) Le Commissaire à l'information peut lui-même prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

Plainte écrite

31. Toute plainte est, sauf dispense accordée par le

Information Commissioner in writing unless the Commissioner authorizes otherwise. If the complaint relates to a request by a person for access to a record, it shall be made within sixty days after the day on which the person receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist.

Commissaire à l'information, déposée devant lui par écrit; la plainte qui a trait à une demande de communication de document doit être faite dans les soixante jours suivant la date à laquelle le demandeur a reçu l'avis de refus prévu à l'article 7, a reçu communication de tout ou partie du document ou a pris connaissance des motifs sur lesquels sa plainte est fondée.

Notice of intention to investigate

32. Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

Avis d'enquête

32. Le Commissaire à l'information, avant de procéder aux enquêtes prévues par la présente loi, avise le responsable de l'institution fédérale concernée de son intention d'enquêter et lui fait connaître l'objet de la plainte.

Notice to third parties

33. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof and receives a notice under section 32 of a complaint in respect of the refusal, the head of the institution shall forthwith advise the Information Commissioner of 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

Avis aux tiers

33. Dans les cas où il a refusé de donner communication totale ou partielle d'un document et qu'il reçoit à ce propos l'avis prévu à l'article 32, le responsable de l'institution fédérale mentionne sans retard au Commissaire à l'information le nom du tiers à qui il a 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.

institution had intended to disclose the record or part thereof.

Regulation of procedure

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

Investigations in private

35. (1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

Right to make representations

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(a) the person who made the complaint,

(b) the head of the government institution concerned, and

(c) a third party if

(i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains - or that the Information

Procédure

34. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.

Secret des enquêtes

35. (1) Les enquêtes menées sur les plaintes par le Commissaire à l'information sont secrètes.

Droit de présenter des observations

(2) Au cours de l'enquête, les personnes suivantes doivent avoir la possibilité de présenter leurs observations au Commissaire à l'information, nul n'ayant toutefois le droit absolu d'être présent lorsqu'une autre personne présente des observations au Commissaire à l'information, ni d'en recevoir communication ou de faire des commentaires à leur sujet :

a) la personne qui a déposé la plainte;

b) le responsable de l'institution fédérale concernée;

c) un tiers, s'il est possible de le joindre sans difficultés, dans le cas où le Commissaire à

Commissioner has reason to believe might contain - trade secrets of the third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of the third party, and

(ii) the third party can reasonably be located.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person.

l'information a l'intention de recommander, aux termes du paragraphe 37(1), la communication de tout ou partie d'un document qui contient ou est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

Findings and recommendations of Information Commissioner

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(a) the findings of the investigation and any

Conclusions et recommandations du Commissaire à l'information

37. (1) Dans les cas où il conclut au bien-fondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document un rapport où :

a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;

recommendations that the Commissioner considers appropriate; and

(b) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

Compte rendu au plaignant

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)b), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

Matter to be included in report to complainant

(3) Where a notice has been requested under paragraph (1)(b) but no such notice is received by the Commissioner within the time specified therefor or the action described

Éléments à inclure dans le compte rendu

(3) Le Commissaire à l'information mentionne également dans son compte rendu au plaignant, s'il y a lieu, le fait que, dans les cas prévus à l'alinéa (1)b), il n'a

in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

pas reçu d'avis dans le délai imparti ou que les mesures indiquées dans l'avis sont, selon lui, insuffisantes, inadaptées ou non susceptibles d'être prises en temps utile. Il peut en outre y inclure tous commentaires qu'il estime utiles.

Access to be given

(4) Where, pursuant to a request under paragraph (1)(b), the head of a government institution gives notice to the Information Commissioner that access to a record or a part thereof will be given to a complainant, the head of the institution shall give the complainant access to the record or part thereof

(a) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(b) in the matter; or

(b) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(b), if that notice is given, unless a review of the matter is requested under section 44.

Communication accordée

(4) Dans les cas où il fait suite à la demande formulée par le Commissaire à l'information en vertu de l'alinéa (1)b) en avisant le Commissaire qu'il donnera communication totale ou partielle d'un document, le responsable d'une institution fédérale est tenu de donner cette communication au plaignant :

a) immédiatement, dans les cas où il n'y a pas de tiers à qui donner l'avis prévu à l'alinéa 29(1)b);

b) dès l'expiration des vingt jours suivant l'avis prévu à l'alinéa 29(1)b), dans les autres cas, sauf si un recours en révision a été exercé en vertu de l'article 44.

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested

Recours en révision

(5) Dans les cas où, l'enquête terminée, le responsable de l'institution fédérale concernée n'avise pas le Commissaire à

under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

l'information que communication du document ou de la partie en cause sera donnée au plaignant, le Commissaire à l'information informe celui-ci de l'existence d'un droit de recours en révision devant la Cour.

Review by Federal Court

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.

Révision par la Cour fédérale

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.

Third party may apply for a review

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

Recours en révision du tiers

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

notice is given, apply to the Court for a review of the matter.

la Cour.

Hearing in summary way

45. An application made under section 41, 42 or 44 shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the Federal Courts Act.

Procédure sommaire

45. Les recours prévus aux articles 41, 42 et 44 sont entendus et jugés en procédure sommaire, conformément aux règles de pratique spéciales adoptées à leur égard en vertu de l'article 46 de la Loi sur les Cours fédérales.

Access to records

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.

Accès aux documents

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.

Court to take precautions against disclosing

47. (1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

Précautions à prendre contre la divulgation

47. (1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.

a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

Order of Court where reasonable grounds of injury not found

50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which 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.

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court not to disclose record

51. Where the Court determines, after considering an application under section

Ordonnance de la Cour obligeant au refus

51. La Cour, dans les cas où elle conclut, lors d'un recours exercé en vertu de l'article 44,

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.

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-699-13
STYLE OF CAUSE:	BURNBRAE FARMS LIMITED v CANADIAN FOOD INSPECTION AGENCY
AND DOCKET:	T-1053-13
STYLE OF CAUSE:	BURNBRAE FARMS LIMITED v CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

Christopher J. Edwards	FOR THE APPLICANT
Craig Collins-Williams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Templeman Menninga LLP Barristers and Solicitors Kingston, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT