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ACCESS TO INFORMATION

Judicial review of respondent's decision to release number of records requested under *Access to Information Act*, R.S.C., 1985, c. A-1 (Act) — Respondent issuing two decisions: first in July 2018 (July decision); second in August 2018 (August decision) — August decision, subject of present application, contemplating release of two types of records: (1) Incident Logs (Logs), (2) Recall Effectiveness Forms (Forms) (collectively, disputed records) — Applicant provided both types of records to respondent during voluntary recall in 2016 of certain models of its Kenmore, Samsung-branded top-load washing machines — Argued that disputed records exempt from disclosure because they (i) contain confidential commercial information, (ii) their release would harm applicant's competitive, financial position — Respondent disagreed; asserting that application procedurally barred because applicant should have brought application for judicial review of July decision but did not do so — Further asserted that August decision underlying this application was invalid because Act not authorizing respondent to make more than one decision — In 2016, applicant became aware of number of incidents involving its washers whereby top lids of certain washers detached while in use, causing damage to property, but no injuries or deaths — Applicant communicated information regarding these incidents to respondent, pursuant to its obligations under *Canadian Consumer Product Safety Act*, S.C. 2010, c. 21 (CCPSA) — Applicant issued press release stating that it was working with respondent regarding washers' potential safety issues; later issued additional press releases, in which initiated recall — Applicant, respondent posted recall notices on their respective websites as part of protocols required by CCPSA — Such notices provided information about affected washers, hazard that led to recall — Respondent received access to information request for disclosure of records related to recall (request) — As required under Act, s. 27(1), respondent notifying applicant of records it had identified as responsive to request; also provided applicant with intended release package (records package) — Applicant responding to notice arguing that some records in records package exempt from disclosure pursuant to Act, s. 20 — Respondent conceded to additional redactions from records package; however, leading up to July decision, disagreement remaining about status of some non-redacted documents within records package, including over disputed records — In July 2018, respondent advised applicant it had sent July decision by mail, which included Act, s. 28 notice letter, package of records that respondent had determined were subject to disclosure under Act — Between two decisions, parties further discussed appropriate scope of disclosure under Act — Respondent made further concessions, notifying applicant that it was officially retracting July decision — Respondent then sending applicant another proposed release package, asking whether applicant objecting thereto — Then issued its August decision against which applicant filing present application within statutory time limit — Preliminary issue which of two decisions standing — Main issue whether respondent incorrectly failed to exempt disputed records from disclosure under Act on basis of confidentiality (s. 20(1)(b)) or harm (s. 20(1)(c)) — Respondent claiming that August decision made in error, without authority, because legislation only allowing Minister of Health to make one decision; contending that only July decision standing — Given facts of case, including respondent's invitation to applicant to provide further representations after having "officially retracted" July decision, notice of imminent "final" decision just prior to issuing August decision, applicant had good reason to rely on respondent's representations regarding July decision, good reason to delay commencement of application for judicial review to continue negotiating with respondent — August decision not mistake; not isolated event but rather one that involved number of considered communications, negotiations — Based on assurances that earlier notice had been "officially retracted", "final decision" would issue, applicant was entitled to rely on department's representations — From statutory compliance perspective, August decision only legal decision under Act, s. 28; institution could not subsequently retract it in favour of earlier, rescinded

decision — Moreover, applicant right in invoking promissory estoppel in arguing that August decision determinative — Given respondent's unambiguous words, conduct, indication to applicant of continuing willingness to negotiate, applicant thus entitled to defend its actions through shield of promissory estoppel; respondent could not, after start of litigation, say that it issued its second decision in error, such that only its first decision stood — Thus, August decision valid, July decision of no force or effect; present application for judicial review properly filed within 20-day statutory deadline — Applicant submitted disputed records to respondent in context of its 2016 recall, pursuant to its obligations under CCPSA recall protocols, s. 14 — Disputed records came into existence after events involving washers meeting statutory definition of "incident" as found in CCPSA, s. 14(1) — Applicant seeking to have disputed records exempt from disclosure under Act, s. 20(1)(b) — Respondent arguing that disputed records not exempt under s. 20(1)(b) in particular because information in disputed records not "financial, commercial, scientific or technical" within meaning of Act; characterized information in disputed records as falling outside scope of s. 20(1)(b); claiming that some of information in disputed records already publicly available — Courts must examine s. 20 exemptions in light of Act's overall purpose, which is to enhance accountability, transparency of federal institutions to promote open, democratic society, to enable public debate on conduct of those institutions (Act, s. 2(1)) — However, Court must also balance this right of access with rights of affected third parties, such that necessary exceptions to right of access should be limited, specific — Third party arguing that information is exempt from disclosure pursuant to s. 20(1)(b) bearing burden of establishing four criteria on balance of probabilities, namely that information in question is: (i) financial, commercial, scientific, or technical in nature; (ii) confidential; (iii) consistently treated in a confidential manner by third party; (iv) supplied to government institution by third party — Failure to establish any one of four criteria will be fatal to third party's claim for exemption — Applicant failed to show that disputed records warrant exemption from disclosure under s. 20(1)(b) for two reasons: portions of disputed records respondent not already exempted from disclosure lacking any "financial, commercial, scientific or technical" information within meaning of Act; information in disputed records not confidential — Parliament not intending to exempt type of information at issue in disputed records — Such information, which respondent not already redacted pursuant to Act, s. 19(1) or s. 20(1)(b) not commercial in nature but rather relating to public safety — Since disputed records containing no "financial, commercial, scientific or technical" information as required by s. 20(1)(b), documents must be disclosed — Disputed records also not "confidential" information — Pursuant to CCPSA, s. 14, applicant had legal obligation to compile, provide disputed records to respondent — Parliament has provided no guidance as to how CCPSA interacts with Act nor have courts interpreted law in context of recalls — Although applicant might have subjectively expected that information in disputed records would remain confidential, such expectation not objectively reasonable — Disputed records came into existence because of recall, in context of CCPSA, which is one of consumer, public safety — Furthermore, much of disputed records' content already disclosed in recall notices — Finally, exempting disputed records from disclosure not enhancing public interest: rather, it would undermine strong public interest in obtaining access to information — Records also not exempt from disclosure under Act, s. 20(1)(c) — Two principal considerations under s. 20(1)(c) are degree of likelihood of harm, type of harm — In applicant's case, evidentiary burden for applicant to successfully claim s. 20(1)(c) exemption cannot be satisfied simply by affidavit evidence affirming that disclosure would cause type of harm described in provision — Instead, further evidence required that establishes that harmful outcomes are reasonably probable — Evidence of harm flowing from disclosure can only be determined on basis of specific records at issue in access request — Such assessment is fact-specific; turning on circumstances of each case — In present case, despite affidavit evidence, much of information regarding recall already made publicly available in notices posted on respondent's, applicant's web sites — Applicant not making clear as to how information on disputed forms would further harm its competitive position — To find disputed records could reasonably be expected to result in material loss or prejudice to applicant's competitive position within meaning of s. 20(1)(c) would unduly expand scope of provision; would undermine both Act's disclosure regime, purpose of Act — Applicant not meeting onus to show evidence beyond mere possibility of harm; thus s. 20(1)(c) exemption not exempting disputed records from disclosure — Application dismissed.

SAMSUNG ELECTRONICS CANADA INC. V. CANADA (HEALTH) (T-1617-18, 2020 FC 1103, Diner J., reasons for judgment dated January 29, 2021, 59 pp.)