Date: 20060314

Docket: T-984-05

Citation: 2006 FC 335

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 14, 2006

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

LES VIANDES DU BRETON INC.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] Les Viandes du Breton Inc. is seeking a review, pursuant to subsection 44(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), of a decision by the Canadian Food Inspection Agency (the Agency) authorizing the disclosure of inspection reports (form AGR-1427) issued in 2003 and 2004 concerning its abattoirs and meat processing units.

BACKGROUND

[2] The applicant is an agricultural business that produces organic pork. Its principal place of business is in Rivière-du-Loup. As a meat processing unit, it is the subject of regular inspections by Agency inspectors who, when making these inspections, prepare a report of their observations using form AGR-1427.

[3] On March 8, 2005, the Agency received an access to information request from a person whose identity remains confidential, but who is known to be in the [TRANSLATION] “media” category.

[4] The request sought the following information:

> (1) visit and evaluation reports for abattoirs and meat processing units in Quebec (form AGR-1427) for 2001, 2002, 2003 and 2004;
>
> (2) a complete list of the agri-food establishments under the jurisdiction of the Agency in Quebec.

[5] On March 22, the request was amended orally: it now includes only the reports for 2003 and 2004.

[6] In checking the records covered by the request, the Agency identified some fifteen reports on the applicant's facilities. As these records are the subject of a confidentiality order, the Court will deal with the information they contain only in very general terms.

[7] On May 11, 2005, the Agency notified the applicant that it had received the access request [TRANSLATION] “concerning records relating to inspection reports for abattoirs and meat processing units in Quebec (form AGR-1427)”. All the reports the Agency proposed to disclose were attached to this notice.

[8] On May 30, 2005, the applicant notified the Agency that it objected to the disclosure of the inspection reports. First, it submitted that the records the Agency proposed disclosing were not records within the meaning of section 3 of the Act (this argument was discontinued at the hearing).

[9] Then, relying on subsection 20(1) of the Act, the applicant submitted that the disclosure of this information could result in financial loss to the business, as well as prejudicing its competitive position and future negotiations. In the applicant's submission, the reports contain confidential technical information on its facilities and its management and commercial operating methods. It maintained that the reports were also protected by the professional secrecy of the veterinary surgeon who prepared them.

[10] The applicant also requested a copy of the access to information request so it could submit its representations on the correlation between the request and the records the Agency was proposing to make public.

[11] On May 31, 2005, the Agency notified the applicant of its decision to disclose the records sent to it. It explained its decision as follows:

> [TRANSLATION]
>
> We have reviewed your representations and concluded that they do not meet the exception criteria set out in subsection 20(1) of the Act. As federal agencies are required to disclose as much information as possible (section 25), we will accordingly proceed with disclosure of the records to the person requesting access.

[12] In accordance with section 28 of the Act, the Agency informed the applicant of its rights under section 44 of the Act.

[13] It was only as part of the application for review that the applicant was able to obtain a copy of the access request (October 11, 2005) and question the senior analyst who signed the letter dated May 31, 2005.

ISSUES

[14] The applicant submits that the Agency breached its duty of procedural fairness by not giving it a copy of the request. It further submits that no reasons or insufficient reasons were given for the Agency's decision.

[15] The applicant further argues that the Agency cannot disclose the inspection reports because they fall under the exception provided for in paragraph 20(1)(*b*) of the Act and, in addition, are protected by professional secrecy which only the applicant could waive.

ANALYSIS

[16] The Court must first determine the standard of review to be used. Where a breach of procedural fairness is concerned, there is no reason to perform a pragmatic and functional analysis. If there was a breach, the Court must intervene (*Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No 174 (F.C.A.) (QL), paragraphs 42 to 45).

[17] The issue of whether the records are exempt under subsection 20(1) of the Act or are protected by the professional secrecy of the veterinary surgeon is a question of mixed fact and law, since the Agency must interpret the exceptions based on the facts before it. In *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, [2003] F.C.J. No. 916 (F.C.A.) (QL), Chief Justice Richard determined by means of the pragmatic and functional approach the standard of review applicable to a question which I consider to be entirely comparable to the one that was before the Agency in the case at bar. The Court adopts the reasoning found at paragraphs 11 to 15 of *Wyeth-Ayerst*, above, and finds that the standard of review applicable here is correctness.

A) Procedural fairness

[18] The applicant emphasizes what it calls the lack of consistency between the access request and the notice it received on May 11, 2005. In its view, if the Agency had given it a copy of the request it could have relied on a further argument, namely, that there are no records corresponding to the access request. In its submission, the inspection reports cannot be regarded as visit and evaluation reports. It further submits that disclosure of the access request, which it specifically requested, would have enabled it to determine the identity of the person requesting access and make

representations in this regard. It considers that there was therefore a breach of its right to make representations [TRANSLATION] “based on accurate information”.

[19] On the duty to provide reasons, the applicant submits that the Agency had a duty to describe its reasoning in greater detail on each of the arguments it made in its letter of May 30.

[20] In its submission, the content of the letter of May 31 did not enable it to fully exercise its right to have the decision reviewed pursuant to section 44 of the Act.[1]

[21] The content of the duty of procedural fairness varies according to the context. As the Supreme Court of Canada indicated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 21, the content of this duty, which is flexible and variable, depends on an appreciation of the context of the particular statute and the rights affected. The Court must accordingly analyze the situation considering *inter alia* the factors mentioned in *Baker*, above.

[22] The first factor, namely, the nature of the decision and the process set out in the Act, is used to determine how close the administrative process is to the judicial process. The Court must consider the decision-maker's function, the nature of the agency and the process to be followed. This analysis will take place at the same time as the analysis of the second factor (the nature of the statutory scheme), the primary purpose of which is to determine whether a right of appeal or judicial review exists.

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[1] At the hearing, the applicant raised a jurisdictional question that it subsequently withdrew. It concerned the absence of evidence as to whether the person requesting access was a Canadian or a permanent resident. In *Wyeth-Ayerst*, above, the third party seeking review had raised before the decision-maker that the person requesting access did not meet the criteria of section 4. That is why in *Wyeth-Ayerst*, above, the respondent had to submit evidence in that regard in the application for review. The context is clearly different here because section 4 was never mentioned in the letter of May 30.

[23] The Act provides that a request for access to a record shall be made in writing to the government institution that has control of the record. A reply is to be given quickly, usually within 30 days. If disclosure is refused, the person requesting access may file a complaint with the Information Commissioner and then ask to have that decision reviewed by the Federal Court.

[24] The primary aim of the Act is to expand access to records of the federal government, establishing the principle of the public's right to their disclosure. Accordingly, the right of a federal institution to refuse disclosure is subject to specific and limited exceptions.

[25] When the federal institution determines that no exception is applicable and that a record should be disclosed, it must under subsection 27(1) give notice of its intention to disclose the record to any third party directly affected by the information to be disclosed within 30 days after the request is received. However, this provision indicates that the notice should only be given if the third party can reasonably be located.

[26] Subsection 27(3) describes certain points that this notice must contain, namely:

> (a) a statement that the head of the government institution giving the notice intends to release a record or 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;

> (c) a statement that the third party may, within 20 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.

[27] The right of the third party to make representations is specifically set out in section 28 of the Act, which also indicates the time limit within which such representations, generally made in writing, must be submitted.

[28] The Act provides that the notice of a decision to disclose a record must be sent after receiving the representations of the third party or after the time limit for receiving such comments has expired. Such notice must mention the third party's right to seek judicial review and indicate that, if this remedy is not exercised, the record will be disclosed in whole or in part.

[29] The right to seek judicial review and the right to complain to the Information Commissioner and seek review of the Commissioner’s decision are an integral part of the purpose of the Act which, as indicated in section 2, provides that decisions of federal institutions should be reviewed independently of government.

[30] The remedy under section 44 of the Act is a summary proceeding (application for judicial review). It is of a hybrid nature since, as several decisions of this Court and the Federal Court of Appeal have indicated, it is more like a *de novo* proceeding than a typical judicial review proceeding. In most cases, the Court may consider new evidence which was not before the respondent in order to determine whether it was correctly decided that none of the exceptions mentioned in the Act applied and that the records had to be disclosed (*Air Atonabee Ltd. v. Canada*

(Minister of Transport), [1989] F.C.J. No. 453 (F.C.) (QL); *Bacon International Inc. v. Canada (Department of Agriculture and Agri-Food)*, [2002] F.C.J. No. 776 (F.C.) (QL); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2003] F.C.J. No. 1824 (F.C.) (QL); and *Aliments Prince Foods Inc. v. Canada (Department of Agriculture and Agri-Food)*, [2001] F.C.J. No. 144 (F.C.A.) (QL)).

[31] It is clear that the Agency's decision is not final and that as the applicable standard of review indicates, the Court owes little deference to the decision-maker.

[32] On the third factor, the impact of the decision, it is clear that the Agency's decision affects the applicant's rights and may have significant repercussions on its business if, in fact, the exceptions mentioned in subsection 20(1) of the Act apply. In the case at bar, there is no evidence that the decision at issue threatens the very existence of the applicant or its ability to continue conducting its business. Nor was it shown that the disclosure would likely result in material financial loss or prejudice the competitive position or ongoing negotiations of the applicant. At the hearing, the applicant clearly indicated that it was not relying on the exceptions mentioned in paragraphs 20(1)(*c*) and (*d*) of the Act.

[33] There is also no evidence that the applicant had legitimate expectations based on the respondent's promises or accepted practice as to procedure, the details of the decision to be rendered and disclosure of the access request, even though this is clearly not the first time the applicant has been involved in this kind of proceeding (see *Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-Food)*, [2000] F.C.J. No. 2088 (F.C.) (QL)).

[34] Finally, the Court notes the access request is an extremely simple form that contains little information other than the personal information concerning the person requesting access and the details of the information requested. It is not in dispute that if this request were to be given to a third party affected, the respondent would have a duty to redact all personal information concerning the person requesting access.

[35] As I have already indicated, the Agency is not required here to exercise discretion conferred by the Act but to apply the exceptions set out therein.

[36] I conclude from my analysis of the context that the duty of procedural fairness applicable here did not require that the applicant be given a copy of the access request. However, the Agency had to correctly and adequately describe the purpose of the access request.

[37] The Court is satisfied that the description of the purpose of the access request in the letter of May 11, 2005, was entirely adequate. The request clearly concerned all the AGR-1427 forms issued in 2003 and 2004 in respect of the establishments described. That is exactly what was disclosed in the notice sent to the applicant.

[38] This description was sufficient to enable the applicant to fully exercise its right to make representations.

[39] It is clear that in future it would be advisable for the respondent to cite verbatim the description contained in the request (including all amendments). It would thus avoid any misunderstanding or controversy in this regard. It would also be helpful for it to confirm that it is

satisfied the eligibility requirements in section 4 have been met. In the case at bar, this point was not raised in the letter of May 30 and the Court is satisfied that the respondent did not have to present evidence in this regard for purposes of the application for review.

[40] On the duty to provide reasons, the Court is satisfied that, in the circumstances of the case at bar, this was carried out. In view of the exchanges between the parties, the nature of the records to be disclosed and the access request, there was no reason for the respondent to give further details than it did in its letter of May 31.

[41] The Court is completely able to understand the basis for the decision and, in view of the nature of the remedy, the Court is satisfied that the applicant's ability to raise all the arguments it wished to present has not been adversely affected.

[42] The Court finds there was no breach of procedural fairness by the respondent.

B) Merits of the decision

1) Paragraph 20(1)(b)

[43] Paragraph 20(1)(*b*) of the Act provides:

Access to Information Act, R.S.C., 1985, c. A-1:	*Loi sur l'accès à l'information*, L.R.C., 1985, ch. A-1 :
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 de l'institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents

	contenant :
(*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) des renseignements financier, 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;
(Emphasis added.)	(mon souligné)

[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.

2) Veterinary surgeon's professional secrecy

[53] The applicant relies on section 24 of the *Code of Ethics of Veterinary Surgeons*, made under the *Veterinary Surgeons Act*, R.S.Q., c. M-8, and the *Professional Code*, R.S.Q. c. 26, which indicates that a veterinary surgeon may be released from professional secrecy only with the authorization of the client or when so ordered by law.

[54] It also relies on article 2858 of the *Civil Code of Québec*, which provides that a court shall, even of its own motion, reject any evidence obtained in violation of the right of professional privilege. It cites by analogy section 9 of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, which provides that "No person bound to professional secrecy by law . . . may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him . . .".

[55] It appears from the evidence that the inspectors who prepared the reports under consideration were all veterinarians, but there is no evidence that they are or were entered on the roll of the Ordre des médecins vétérinaires du Québec.

[56] Finally, the applicant argues that it is clear that the inspections are acts performed by veterinary surgeons. In this connection, it relies on sections 7 and 8 of the *Veterinary Surgeons Act*, which defines professional acts as follows:

> 7. Every act the object of which is to give veterinary advice, to make a pathological examination of an animal, to make a veterinary diagnosis, to prescribe medications for animals, to practise a surgical operation on an animal, to treat a medical or surgical veterinary disorder by using a mechanical, physical, chemical, biological or radiotherapy process, or to approve or condemn *ex officio* the meat of domestic animals for consumption, constitutes the practice of veterinary medicine.
>
> 8. A veterinary surgeon may in the practice of his profession give advice to prevent animal disease and promote means to ensure animal health.

[57] The defendant submits that the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, states in subsection 12(3) that the President of the Agency may designate any persons as inspectors for the enforcement or administration of any Act or provision that the Agency enforces or administers, whether they are veterinarians or not.

[58] It submits that, in the case at bar, even though the inspectors were veterinarians, the issuing of inspection reports had nothing to do with the practice of that profession and, even admitting just for the purposes of this argument that the *Veterinary Surgeons Act* applies to federal employees,[2] none of the reports in question pertained to acts covered by the provisions of that Act. For example, none of the inspectors condemned “meat of domestic animals” for consumption.

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[2] Relying on the Federal Court of Appeal decision in *The Queen in right of Canada v. M. Lefebvre et al.*, [1980] 2 F.C. 199 and the decision in *Corporation professionnelle des médecins vétérinaires du Québec v. Hardy* (1 December 1986), Montréal 750-27-0492-838 (Qc..S.C.), the respondent argues that, in fact, this statute does not apply to the practice of professionals in the federal government.

[59] The Court is not persuaded that inspections and the issuing of reports are acts subject to this Quebec statute. In any event, the Court is not satisfied that the applicant is a client of the veterinary inspector and that, as I indicated earlier in analyzing the application of paragraph 20(1)(*b*) of the Act, these reports contain confidential information that was disclosed by the applicant.

[60] The Court finds that these reports are not covered by professional secrecy and that the application for review must be dismissed.

[61] It further notes that the respondent undertook to point out in its disclosure letter that the AGR-1427 forms are not visit and evaluation reports, but rather inspection reports, and added the following:

> [TRANSLATION]
> The primary purpose of audit and inspection reports is to identify shortcomings in facilities and operations so that the management of such businesses may undertake the appropriate corrective action. They contain objective observations on conditions existing in a business at the time of the inspection, which are not necessarily those which exist at the present time. Gradual wear and tear of equipment and the normal deterioration of buildings require regular maintenance and repair and, consequently, it is practically impossible to have facilities that are entirely problem-free. The reports do not reflect the entire operations of a business, in that they do not set out conditions which might be regarded as satisfactory.

ORDER

THE COURT ORDERS that:

The application for judicial review is dismissed with costs.

"Johanne Gauthier"

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-984-05
STYLE OF CAUSE:	**LES VIANDES DU BRETON INC.** **-and-** **CANADIAN FOOD INSPECTION AGENCY**
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	March 9, 2006
REASONS FOR ORDER:	GAUTHIER J.
DATED:	March 14, 2006

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