Federal Court of Appeal | Cour d'appel fédérale

Date: 20170622

Dockets: A-20-16
A-31-16

Citation: 2017 FCA 135

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
WOODS J.A.

A-20-16

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CALIAN LTD.
AND
INFORMATION COMMISSIONER OF CANADA

Respondents

A-31-16

BETWEEN:

INFORMATION COMMISSIONER OF CANADA

Appellant

and

CALIAN LTD.
AND
ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on January 25, 2017.

Judgment delivered at Ottawa, Ontario, on June 22, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GLEASON J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] These appeals raise the interesting question of the interplay between contractual law and the statutory regime governing access to information in Canada. More particularly, the ultimate result of these appeals turns on the impact of a disclosure clause on the third party information exemptions found under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act). For the reasons that follow, I am of the view that the clause in question constitutes consent to disclosure to the public of otherwise exempt information under the Act. However, such consent is not determinative of whether the information in question must be disclosed. I would therefore grant the appeals in part, but would make no award of costs as success on the various arguments was divided.

I. Background

[2] The respondent Calian Ltd. (Calian) is an Ottawa-based company that provides flexible and short-term personnel services in the engineering, information technology, health care, and telecommunications sectors. A large portion of its business activities arises from the procurement of placement services to the federal government. As such, it routinely participates in federal procurement processes.

[3] In 2009, Public Works and Government Services Canada (PWGSC, represented by the Attorney General of Canada) launched a tendering process by way of a Request for Standing Offer (RFSO) for the provision of research assistance to the Royal Military College of Canada

(RMC or the College). RMC is mandated to equip the Department of National Defence (DND) and a number of other governmental departments with research and other forms of support. As the College's funding to hire research assistants is linked to federal grants obtained by professors, it utilizes the federal procurement process every five years to fulfill its various and complex personnel needs.

[4] The purpose of the 2009 RFSO was framed as seeking to assist RMC in the carrying out of its research and development activities within three Faculties (Arts, Engineering and Science) and two Divisions (Graduate Studies & Research and Continuing Studies). The RFSO required that bidding parties include detailed personnel rates, in the form of "firm all-inclusive hourly rates", for approximately 100 different categories of personnel, along with any annual adjustments to those personnel rates over the five-year life of the contract (see RFSO, Exhibit "A" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at pp. 1849 and following).

[5] The RFSO also specified that PWGSC's 2005 (25/05/07) General Conditions – Standing Offers – Goods and Services (the General Conditions) form a part of the Standing Offer. These General Conditions require that bidding parties agree to the disclosure of their standing offer unit prices or rates pursuant to the following clause (the Disclosure Clause):

> The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.
>
> Disclosure Clause, Exhibit "E" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at p. 1870. See also Clause 3.1 of the RFSO, Exhibit "A" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at p. 1833.

[6] Calian, which had successfully tendered bids in 1997 and 2002 for a similar type of work for RMC, was again successful in its 2009 bid to PWGSC. On November 30, 2009, standing offer W0046-080001/001/TOR (the 2010-14 Standing Offer) was issued to Calian, thereby making it the exclusive supplier of specialized research personnel to RMC for the period of January 1, 2010 to December 31, 2014, with the possibility of extension by PWGSC for a further one-year period.

[7] On November 1, 2013, PWGSC received a request under the Act for a copy of "all contracts, contracts amendments, correspondences and e-mails" relating to the contract awarded to Calian for the period of 2009/11/30 to 2013/03/01 (2013 Access Request, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). Pursuant to subsection 27(1) of the Act, PWGSC consulted Calian before responding to the request regarding the disclosure of certain information. In its correspondence, PWGSC invited Calian to make representations as to why the records subject to the 2013 Access Request should not be disclosed. PWGSC also notified Calian that the disclosure of information clause incorporated in the 2010-2014 Standing Offer prevented it from treating its unit prices and personnel rates as confidential third party information.

[8] In addition to requesting that any information regarding its employees and its own procurement and GST numbers be redacted, Calian took the position that the information contained in its personnel rates was proprietary in nature, and thus exempt from disclosure under paragraph 20(1)(*b*) of the Act. Indeed, in earlier versions of the same RFSO, the Crown had specified "base rates" for different categories of personnel, to which bidders would add their

mark-ups and quote an all-inclusive, "fully-burdened rate" (see Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1415, para. 19). Departing from that practice, the 2009 RFSO did not include the base rates for each labour category, thus requiring bidders to develop competitive pricing without any guidance as to what would constitute an acceptable level of compensation for each category of research contractors. Calian argued that the risk of harm arising from the disclosure of the billing rates found in its 2009 bid was significantly increased, as it had to rely on its extensive and proprietary skills in managing personnel services to develop competitive pricing. Calian further submitted that for the purpose of paragraph 20(1)(*c*) of the Act, disclosure of its rates would result in substantial and important material financial loss.

[9] As for the Disclosure Clause, Calian responded that it did not apply to its personnel rates, mainly for three reasons. First, it argued that the clause had been developed to only apply to material related values (i.e. base rates developed by the Crown for each labour category, as found in previous standing offers), and not to the fully-burdened rates included in the 2009 bid. Second, Calian put forward the past treatment of the Disclosure Clause by DND, the previous contracting authority for the RMC research assistance bid, as evidence of the clause's narrow meaning. It noted that, based on this past experience with the federal procurement process, it understood the Disclosure Clause as constituting consent to disclosure to other government departments, and not as consent to disclosure to the public. Third, and given the modalities of this specific RFSO (i.e. awarding the successful bid to only one supplier, compared to the more common situation where there are multiple vendors), Calian submitted that disclosure in this specific context would cause

irreparable harm from a competitive standpoint, thus heightening the need for a restrictive reading of the clause.

[10] On January 3, 2014, PWGSC communicated its decision under section 28 of the Act to redact only those portions of the 2010-14 Standing Offer referencing (1) Calian's employee names, titles, extensions, cell phone numbers and/or personal phones/fax numbers; (2) Calian's procurement business number; and (3) Calian's GST registration number. PWGSC rejected Calian's request to redact the personnel rates, stating that "[…] as the disclosure of information clause has already been incorporated in the Standing Offer, the unit prices and rates cannot be considered to be confidential third party information that would prejudice your competitive position and we must therefore release them" (see Section 28 Decision, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). While the reasons are not explicit in this respect, it can be inferred that PWGSC considered the Disclosure Clause as an outright bar or waiver from claiming confidentiality under subsection 20(1) of the Act.

[11] As a result of PWGSC's section 28 decision, Calian filed the first judicial review application underlying the current appeals pursuant to section 44 of the Act. During the course of this application, it became clear that additional records responsive to the request had been identified but not included in the original third party consultation. PWGSC therefore conducted further consultations with Calian with respect to these additional records, which ultimately led to the same result regarding disclosure of the personnel rates. Calian applied for judicial review of that second decision, and the two applications were consolidated and ordered to be heard

together by order dated September 18, 2014. A decision was made by Justice Brown of the Federal Court (the Judge) on December 18, 2015 (reported as *Calian Ltd. v. Canada (Attorney General)*, 2015 FC 1392).

II. The Federal Court's decision

[12] The Judge first identified the applicable standard of review as being that of correctness. Relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 53, [2012] 1 S.C.R. 23 [*Merck*], he found that there are no discretionary decisions under subsection 20(1) of the Act, and that the application of the exemptions to the requested records must be reviewed without any deference to the decision-maker.

[13] The Judge then made a number of factual findings that bore on his interpretation of the relevant statutory provisions. He started off by noting that the personnel rates were much more "business-sensitive" and "confidential" in nature than those included in previous RFSOs, given the absence of "base rates" for each labour category in the 2009 RFSO (see Reasons at para. 47). This meant that bidders had to develop pricing from the ground up. He also noted that pricing was the most important factor weighing in the decision to award the 2009 RFSO, constituting 60% of the assessment (Reasons at para. 41).

[14] As for the history of the parties' dealings, the Judge found that it was both of the parties' intention to treat and consider the personnel rates as exempt. His conclusion on this point rested primarily on the treatment of an access request filed in 2009 in relation to one of Calian's previous successful bids (the 2003-09 Standing Offer) which resulted in an exclusion from

disclosure of the "fully-burdened" unit prices pursuant to paragraph 20(1)(*c*) and subsection 24(1) of the Act. In comparing the 2003-09 Standing Offer with the one currently at issue, the Judge noted that both involved the same government contracting party, namely, the Crown (despite the change in contract administration from DND to PWGSC); both covered the same subject matter, being the supply of specialized consultancy services to RMC; and both contained a similarly worded disclosure clause. He thus found no basis upon which to treat the 2013 Access Request differently than the one submitted in 2009. If anything, he noted that there were more important confidentiality concerns regarding the information contained in the 2010-14 Standing Offer (given the nature of the personnel rates and the structure of the contract now being silent on the "base rates" for each labour category) which gave rise to a heightened expectation that disclosure would reasonably result in material financial loss and/or prejudice to Calian's competitive edge (Reasons at paras. 49-54).

[15] In light of the above findings, the Judge concluded that disclosure of the personnel rates would result in prejudice or harm to Calian's competitive position under paragraph 20(1)(*c*) of the Act. He determined that such disclosure would allow competitors to "spring board" off the skills and experience of Calian, effectively harming its ability to submit a winning bid, and that the risk of undermining Calian's competitive advantage was more than a mere possibility (Reasons at para. 61). The Judge based this finding on the fact that, given the tendering cycle in the provision of personnel services to RMC, Calian had every reason to believe that another bidding process would soon be launched (Reasons at para. 59).

[16] On the issue of the impact of the Disclosure Clause, the Judge found that it was but one factor to be taken into consideration when determining what "could reasonably be expected" under paragraph 20(1)(*c*) of the Act, in conjunction with, for instance, the history of the dealings between the parties. He accepted the evidence of Calian to the effect that its understanding of the clause was shaped by years of experience and discussions with several governmental entities, and that its inclusion was meant to allow the disclosure of rates between various government departments. As the Crown did not file any evidence on its understanding of the Disclosure Clause, the Judge found that the parties reasonably intended the clause to permit disclosure of the personnel rates only to other governmental departments. He thus exempted disclosure of the personnel rates in accordance with paragraph 20(1)(*c*) of the Act (Reasons at paras. 65-78).

[17] The Judge also found that the personnel rates were exempt from disclosure under paragraph 20(1)(*d*) of the Act, determining that such information could reasonably be expected to interfere with contractual or other negotiations of a third party. Relying on the test for interference set out in *Burnbrae Farms Limited v. Canada (Canadian Food Inspection Agency)*, 2014 FC 957 [*Burnbrae*], according to which it must be more than speculative and may not merely consist in the heightening of competition, he concluded that the risk of Calian's customers seeking to improve their negotiating position following the disclosure of its rates was probable. He also determined that this would put pressure on Calian to pay its consultants at higher rates. For the same reasons outlined above, the Judge did not see in the Disclosure Clause an outright bar to claiming the exemption under paragraph 20(1)(*d*). Again, he determined that the Disclosure Clause had to be read together with all of the other relevant factors in order to assess whether exemption from disclosure would be warranted in the circumstances. He thus

exempted the personnel rates on the additional ground of paragraph 20(1)(*d*) of the Act (Reasons at paras. 79-88).

[18] Finally, the Judge also found that the decisions should be set aside, independently of his findings related to paragraphs 20(1)(*c*) and 20(1)(*d*), on the basis that PWGSC failed to consider its discretion to refuse to disclose otherwise exempt information under subsection 20(5) of the Act. Having found that PWGSC missed a critical step in its reasons that could not be cured, the Judge decided to quash the decisions on this additional basis (Reasons at paras. 89-101). On the other hand, the Judge determined that neither paragraph 20(1)(*b*), nor section 18 of the Act, could be relied upon by Calian to support its request for redaction (Reasons at paras. 102-107).

III. Issues

[19] The Attorney General of Canada (File No. A-20-16) and the Information Commissioner of Canada (File No. A-31-16) (the Commissioner) both appealed the decision of the Judge. By Order dated April 6, 2016, the files were consolidated and ordered to be heard together.

[20] The issues in both appeals overlap considerably, and different formulations are used by the parties to address similar questions. In essence, the issues to be decided by this Court boil down to the following questions:

A. Are the personnel rates exempt from disclosure under paragraphs 20(1)(*b*), 20(1)(*c*), and/or 20(1)(*d*) of the Act?

B. What is the proper interpretation of the Disclosure Clause?

C. How does the Disclosure Clause interact with the scheme of the Act?

[21] As will soon become apparent, I am of the view that both PWGSC and the Federal Court erred in their reading of the Disclosure Clause. PWGSC erred in finding that it constitutes waiver to treat the information as exempt and the Federal Court erred in finding that the Disclosure Clause provided a limited consent. In my view, the proper course of action would have been to first determine whether the information sought to be protected would otherwise be exempt under the Act. Such will be the question I answer under issue A. On a proper interpretation of the Disclosure Clause as consent to disclosure to the public of otherwise exempt information, which I will canvass under issue B, it must be decided whether there are any circumstances militating against disclosure, notwithstanding consent to such a clause. This aspect of my analysis, which will be dealt with under issue C, pertains to the discretion given to the head of the government institution to refuse to disclose information which would be treated as exempt had it not been for the presence of the Disclosure Clause. My findings on this front will bear on the appropriate remedy to be granted in the current appeals.

IV. The relevant legislative provisions

[22] The purpose of the Act is to extend the right of access to information under government control, subject only to limited and specific exceptions set out in the Act (s. 2(1)). As stated by Justice La Forest in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61, 148 D.L.R. (4th) 385 (dissenting but not on this point), "[t]he overarching purpose of access to information legislation […] is to facilitate democracy", first by ensuring "that citizens have the information required to participate meaningfully in the democratic process", and second "that politicians and bureaucrats remain accountable to the citizenry". Consistent with that goal, the head of a government institution must disclose, where a request is made for access to a record,

any portion of that record that does not contain information that warrants exemption and that can reasonably be severed from information that calls for being withheld (s. 25 of the Act).

[23] One of the exceptions to the disclosure principle relates to third party information. The relevant excerpts of subsection 20(1) provide as follows:

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 :
…	…
(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 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) 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 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;	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 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) 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,	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa

a third party; or	compétitivité;
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	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.

[24] Even when such exemptions apply, the third party may consent to the disclosure, and where such consent is given, the head of the government institution possesses discretion as to disclosure:

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.	(5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

[25] The Act also requires that notice be given to third parties if the head of a government institution intends to disclose a record that the head has reason to believe might contain information described in paragraphs 20(1)(*b*), 20(1)(*b.1*), 20(1)(*c*) or 20(1)(*d*) (see subs. 27(1) of the Act). The third party to whom such a notice is given may then make representations, within 20 days after the notice is given, as to why the record or parts thereof should not be disclosed (subs. 28(1)). If the head of the government institution nevertheless decides to disclose the record or part thereof, the third party may apply to the Federal Court for review of the matter (subs. 44(1)).

V. The standard of review

[26] The parties are all in agreement that appellate review in the context of the Act must be conducted in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, 2002 2 S.C.R. 235 [*Housen*]. This is consistent with the position taken in *Merck*, where the Supreme Court stated that "[t]he decision of the judge conducting a review under the Act, which will often have a significant factual component, is subject to appellate review in accordance with the principles set out in Housen [...]" (at para. 54). Accordingly, the focus of this Court's review is on the decision of the Federal Court, and the standard is that of correctness on questions of law, and of palpable and overriding error on findings of fact and of mixed fact and law. Where a question of mixed fact and law contains an extricable legal question, the standard of review will also be that of correctness.

[27] The impact, if any, of the subsequent decision rendered by the Supreme Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559, is better left for another day. While this Court is obviously not bound by the parties' agreement as to the applicable standard of review, the argument should nevertheless be fully canvassed before setting aside an established line of cases in the absence of clear indication from the highest court. Not only have such discussions not taken place here, but it would in any event be of an academic nature in light of my conclusion that the Judge's reasons with respect to the first question withstand scrutiny on the most exacting standard of review.

[28] Indeed, I am of the view that the Judge did not commit a reviewable error in determining that the decision to disclose or not to disclose must be judicially reviewed on the correctness standard. As the Supreme Court properly noted in *Merck*, there is no discretion involved when the institutional head of a government institution determines whether a record can be disclosed or not (at para. 53). Pursuant to the opening words of subsection 20(1) of the Act, a record "shall" not be disclosed if it contains the type of information described in paragraphs (*a*) to (*d*). As a result, the reviewing court must examine whether the exemptions to the general principle of disclosure have been applied correctly to the requested records:

> […] It follows that when a third party […] requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue […]
>
> *Merck* at para. 53

[29] The Judge was therefore called upon to determine whether Calian's personnel rates were correctly found to fall outside the exemptions from disclosure under the Act. This is not to say that there is no factual component in such an assessment. As recognized by the Supreme Court in *Merck*, the relevant legal principles cannot be applied in a contextual vacuum and must always be considered in light of the evidence disclosed in each case (at para. 150). With this *caveat* in mind, I shall therefore proceed to determine whether the Judge erred in respect of the first question identified above.

[30] As for the second and third questions, being ones of contractual interpretation and of the interplay between the clause and the Act, the applicable standard of review is that of correctness. The Supreme Court of Canada recently held in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014

SCC 53 at para. 50, [2014] 2 S.C.R. 633 [*Sattva*] that questions of contractual interpretation, being so intricately connected to the facts of any given case, will generally be construed as questions of mixed fact and law. Absent a showing of an "extricable question of law", such a characterization considerably limits the scope of appellate intervention, and is a clear call for deference on these types of questions. In the administrative context, the reasonableness standard of review will thus generally be said to apply to such questions. In the appellate context, it will be that of overriding and palpable error.

[31] Appellate courts have wrestled, in the period following the *Sattva* decision, with identifying the circumstances under which the interpretation of a contract will properly be said to involve an "extricable question of law", thus attracting a more scrutinized form of review by way of the correctness standard. One line of recent cases has held that a lower threshold of judicial intervention should apply to standard form contracts (see for instance *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663 [*MacDonald*]; *True Construction Limited v. Kamloops (City)*, 2016 BCCA 173, 386 B.C.A.C. 82; *Ledcor Construction Limited v. Northbridge Indemnity Insurance Company*, 2015 ABCA 121, 386 D.L.R. (4th) 482 [*Ledcor*, ABCA]). The Supreme Court recently endorsed this approach (see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 [*Ledcor*, SCC], reversing *Ledcor*, ABCA (though affirming, in part, the Court of Appeal's analytical framework)).

[32] The Supreme Court came to that conclusion for two reasons. First, it held that the factual matrix is much less relevant to the interpretation of a standard form contract than it generally is

for contractual interpretation. As the Ontario Court of Appeal put it in *MacDonald*, at paragraph 33:

> The importance of the factual matrix is far less significant, if at all, in the context of a standard form contract or contract of adhesion where the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition. Any search for the intention of the parties in the surrounding circumstances of these contracts "is merely a legal fiction". [references omitted]

[33] Second, unlike the majority of contractual interpretation cases where the decision has no impact beyond the interests of the parties to the dispute, a court's interpretation of a specialized standard form contract will have a wide impact with significant precedential value. Consistency is essential where numerous parties will be impacted by shifting interpretations of a particular contract clause:

> […] It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts – "ensuring the consistency of the law" (*Sattva*, at para 51) – is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.
>
> *Ledcor*, SCC at para. 39

[34] In the case at bar, the terms of the Disclosure Clause, and indeed of the procurement contract as a whole, were clearly not negotiated by the parties (Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1419, para. 33). Calian does not dispute that the General Conditions were in fact a standard form contract.

[35] The Attorney General further argues that this Court's interpretation of the Disclosure Clause will have an impact beyond the interests of the parties to the current dispute, as the General Conditions are standard form terms which apply to all standing offers for goods and

services and have been used for more than 10 years. In fact, it appears that the clause at issue in the present case has been the subject of repeated adjudication (see *Stenotran Services v. Canada (Minister of Public Works and Government Services)* (2000), 186 F.T.R. 134 (T.D.) [*Stenotran*]; *Top Aces Consulting Inc. v. Canada (National Defence)*, 2011 FC 641, 391 F.T.R. 14 [*Top Aces*], affirmed 2012 FCA 75, 430 N.R. 260). Counsel for the Attorney General also notified this Court that a stay has been granted in another matter pending the resolution of this case, given that it bears on similar legal issues as the ones involved in the current appeals (*The Typhon Group Ltd. et al. v. Attorney General of Canada*, File No. T-1246-15, Order of Prothonotary Aalto issued December 14, 2015).

[36] Counsel for Calian, however, submits that there is no precedential value in interpreting the meaning of the Disclosure Clause, as this question is but one among many other relevant factors in determining whether a record is exempt from disclosure under the Act. Calian further opines that the present case involves a meaningful factual matrix that is specific to the parties and that sheds particular light on how the contract should be interpreted. Counsel relies for that proposition on the Supreme Court's cautioning in *Ledcor*, SCC that the interpretation of a standard form contract may call for deferential review on appeal in some circumstances, notably when "the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation" (at para. 48).

[37] Calian's first argument is without merit. The interplay between the Disclosure Clause and the various exemptions to disclosure found in subsection 20(1) of the Act, and whether the Disclosure Clause operates as a total bar to the exemptions or must be construed as but one

factor in assessing the application of paragraphs 20(1)(*b*), 20(1)(*c*) and (*d*), is a pure question of law. Moreover, these questions are separate and distinct from the contractual interpretation issue. Therefore, no deference is owed to the Judge.

[38] Calian's second argument is at first sight more appealing but must nevertheless similarly be rejected. The subjective intention of one party to a contract cannot be relied upon to interpret the meaning of a contract, particularly where a standard form contract is involved as this would be contrary to the principles of contractual interpretation and antithetical to the need for certainty, consistency and predictability in the interpretation of clauses that are widely used in a particular field of activity. This is particularly true in a case like the present one, where a number of reasons could explain why a different government department decided not to disclose the information requested in a previous access to information request. At the end of the day, to quote from Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 37, 144 D.L.R. (4th) 1 (relied upon by the majority in *Ledcor*, SCC at para. 48), it seems to me that the dispute is first and foremost over a "general proposition", and not about "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future". Accordingly, I am of the view that the interpretation of the Disclosure Clause and how it interacts with the scheme of the Act involve extricable questions of law, and thus the standard of review applicable to the second and third issues identified above must be that of correctness, pursuant to the *Housen* appellate standard of review.

VI. Analysis

A. *Are the personnel rates exempt from disclosure under paragraphs 20(1)(b), 20(1)(c), and/or 20(1)(d) of the Act?*

[39] The general rule of disclosure enshrined in the Act is subject to a number of exemptions. Of relevance to this appeal are various exemptions relating to third party confidential commercial information set out in subsection 20(1). Of particular relevance are paragraphs 20(1)(*b*), 20(1)(*c*) and 20(1)(*d*), which have been reproduced at paragraph 23 of these reasons.

[40] There is no dispute between the parties as to the legal principles underlying the application of paragraph 20(1)(*c*). Indeed, the appellant Commissioner acknowledges that the Judge correctly cited the legal test for determining the applicability of paragraph 20(1)(*c*). Relying on *Merck*, the Judge set out the following principles:

- The onus is on the applicant to establish its entitlement to the exemption, which depends on the nature of the material and the particular context of the case;
- A third party claiming an exemption under paragraph 20(1)(*c*) must show that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, based on evidence provided by the party opposing the disclosure, but need not prove on a balance of probabilities that disclosure will in fact result in such harm;
- The types of harm covered by paragraph 20(1)(*c*) are disjunctive (financial loss to the third party or gain to its competitors, on the one hand, and competitive prejudice on the other).

  Reasons at para. 38

[41] Counsel for the Commissioner submitted that the Judge failed to properly apply these principles, and erred in finding that Calian's evidence was sufficient to establish a reasonable expectation of probable harm under paragraph 20(1)(*c*). Relying on a number of cases from this Court and from the Federal Court, counsel argued that the evidentiary burden required to claim the exemption provided by paragraph 20(1)(*c*) cannot be satisfied by affidavit evidence that simply affirms that disclosure would cause the type of harm described in that provision (*Merck* at para. 227, affirming 2009 FCA 166 at paras. 84-86, 400 N.R. 1, citing *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 at para. 43, 49 A.C.W.S. (3d) 211 (T.D.). See also *Brainhunter (Ottawa) Inc. v. Canada (Attorney General)*, 2009 FC 1172 at para. 32, 182 A.C.W.S. (3d) 244; *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)*, 2007 FC 1091 at para. 27, 62 C.P.R. (4th) 337; *AstraZeneca Inc. v. Canada (Health)*, 2005 FC 1451 at para. 90, [2005] F.C.J. No. 1775, affirmed 2006 FCA 241, 353 N.R. 84; *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2003 FCA 257 at para. 20, 305 N.R. 317; *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 F.C.T. 254 at para. 21, 121 A.C.W.S. (3d) 397, affirmed 2004 FCA 214 at para. 18, 322 N.R. 388; *Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-food)* (2000), 198 F.T.R. 233 at para. 9, 107 A.C.W.S. (3d) 3 (T.D.); *Canadian Broadcasting Corp. v. National Capital Commission* (1998), 147 F.T.R. 264 at paras. 25-27, [1998] F.C.J. No. 676 (T.D.) [*Canadian Broadcasting Corp.*]).

[42] In my view, the Judge correctly applied the *Merck* framework and committed no reviewable error in concluding, on the basis of the evidence that was before him, that releasing Calian's detailed personnel rates would give its competitors a "free ride" and "tilt the level

playing field" against Calian (Reasons at para. 58). Contrary to the position taken by the Commissioner, the Judge did not merely rely on bald and unsupported assertions found in the affidavit of Calian's Vice President of Operations (Mr. Jerry Johnston). He came to the conclusion, based on his own assessment, that the personnel rates individually and in the aggregate were the most significant factor in the success of Calian's bid and were crucial to Calian's competitive position (Reasons at para. 41). He also accepted Mr. Johnston's evidence that the development of the personnel rates was effected through the confidential and proprietary salary and other information that Calian directly obtained from, or negotiated with, the numerous potential providers of the required specialist labour services, in addition to its own business analyses of overhead, other costs, and profit (Reasons at para. 45). While the absence of cross-examination and of contradictory evidence is not conclusive one way or another, the Judge could certainly take these factors into consideration to determine whether Calian had met its burden of establishing a reasonable expectation of probable harm.

[43] That being said, the Judge erred in taking the history of past dealings between the parties as a factor to be considered for the purposes of assessing whether the information sought to be disclosed could reasonably be expected to result in material financial loss or gain to Calian or to prejudice its competitive position. In that respect, the Judge wrote (at para. 51):

> While the Respondents [appellants before this Court] disagree, in my view, the inference arising from the parties' past dealings and course of conduct is compelling in terms of what is asked for under paragraph 20(1)(*c*) of the *Act*. In 2009, the Crown recognized that disclosure of the fully burdened unit prices could reasonably be expected to result in material financial loss to the Applicant, could reasonably be expected to result in material financial gain to a competitor, or could reasonably be expected to prejudice the Applicant's competitive position. While we know that paragraph 20(1)(*c*) was relied upon in 2009, we do not know which part(s) of it the head of the institution actually based his or her decision on. But we do know the head of the institution, as required by paragraph 20(1)(*c*),

> redacted the fully burdened unit price information from the disclosure and did so notwithstanding his or her consideration of the same Disclosure Clause now raised by the Respondents [appellants before this Court].

[44] I agree with the Commissioner that such evidence should not have been considered by the Judge when deciding whether the paragraph 20(1)(*c*) exemption applied to the information at issue in these appeals. First of all, we do not know why the head of the government institution redacted the information relating to the personnel rates in 2009. Secondly, the Judge assumed that the previous decision made by DND was correct and binding. Finally, and more importantly, the evidence of harm flowing from disclosure can only be determined on the basis of the specific records at issue in an access request; such an assessment is fact specific and turns on the circumstances of each case.

[45] Despite this flaw in his reasoning, it was open to the Judge to come to the conclusion that there was sufficient evidence before him to meet the *Merck* standard. There was no need for Calian to provide specific evidence about its competitors or the ability of these competitors to compete for comparable future service contracts in response to future requests for standing offers. Neither the Act, nor the case law, exact such a high standard.

[46] The Supreme Court made it clear in *Merck* that "[i]t is for the reviewing judge to decide whether the evidence shows that disclosure could reasonably be expected to result in harm of the nature specified in s. 20(1)(*c*)" (at para. 211). The Supreme Court went on to say that disclosure of information "that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements of s. 20(1)(*c*)" (at para. 219). This is precisely what the Judge found, on the basis of

"broadly-sourced" evidence that he characterized as reliable and credible from a "very senior officer" of Calian (Reasons at paras. 74 and 59). These findings were available to him, and I see no basis upon which to interfere with his conclusion.

[47] The same is true for the exemption provided by paragraph 20(1)(*d*). Once again, the Judge correctly identified the applicable principles and made it clear that the obstruction or interference with contractual or other negotiations of a third party "must be probable and not merely speculative" (Reasons at para. 80). He also accepted that evidence of heightened competition or increased competitive pressure is not sufficient to establish that the harm described in paragraph 20(1)(*d*) can reasonably be expected to occur. These principles have been consistently applied by the Federal Court, and I see no reason to depart from them (see *Burnbrae* at paras. 124-125; *Oceans Ltd. v. Canada (Newfoundland and Labrador Offshore Petroleum Board)*, 2009 FC 974 at para. 64, 356 F.T.R. 106; *131 Queen Street Ltd. v. Canada (Attorney General)*, 2007 FC 347 at paras. 42-43, 334 F.T.R. 298; *Canada Post Corp. v. Canada (National Capital Commission)*, 2002 F.C.T. 700 at para. 18, 115 A.C.W.S. (3d) 353 (T.D.); *Canadian Broadcasting Corp.* at paras. 28-29; *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 at para. 10, 47 A.C.W.S. (3d) 898 (T.D.)).

[48] Applying these principles, the Judge concluded that it was probable that two forms of pressure, both working against Calian, were at play and risked negatively impacting negotiations with both its employees and potential suppliers, separately and in combination (Reasons at para. 83). Specifically, the Judge found that if Calian's personnel rates, and in particular, the precise micro-level unit rates, were disclosed, its other customers, who are currently paying more, would

probably seek to pay less, and its specialized consultants would probably demand higher rates of remuneration (Reasons at para. 81).

[49] Counsel for the Commissioner objected to the Judge's assessment and argued that Calian offered no specific evidence of any actual or ongoing negotiations with other customers or regarding the identity of said customers. The Commissioner further noted that there was also no evidence regarding the bargaining strength of Calian's current or prospective employees or the likelihood of these individuals insisting on higher pay rates should Calian's personnel rates be disclosed.

[50] For many of the same reasons spelled out earlier in the context of paragraph 20(1)(*c*), I find that the interference with contractual or other negotiations that would result from the disclosure is not merely speculative but rests on cogent, credible and reliable evidence. As noted by the Judge, Mr. Johnston spoke both from his many years of experience and for others in his company with whom he had consulted. His experience with Calian goes back 25 years, and his credibility was not challenged by the appellants. There is every reason to believe that the risks Mr. Johnston alluded to in his affidavit were heightened given the upcoming tender. Having carefully considered the case law marshalled by the appellants in support of their argument, I have not been convinced that the level of specificity that they have insisted upon to establish a reasonable expectation of probable harm is warranted. As frequently mentioned in those cases, there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable. Accordingly, it was open to the

Judge to find that Calian could rely on the paragraph 20(1)(*d*) exemption to request the redaction of its personnel rates.

[51] Finally, I see no reason to vary the Judge's finding with respect to paragraph 20(1)(*b*). The Judge correctly found that to claim the exemption under that provision, an applicant must meet the four-part test outlined in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453 at para. 34, 16 A.C.W.S. (3d) 45 (T.D.), as summarized in *St-Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 F.C.T. 274 at para. 41, 112 A.C.W.S. (3d) 812 (T.D.):

> 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.

[52] The Judge found that the first and third parts of the test were met, but not the second and fourth, since Calian agreed to some type of disclosure, albeit limited in scope. In other words, Calian was unable to meet the requirement that the information be communicated with a reasonable expectation of confidentiality since the personnel rates, though confidential in nature, were both prepared and communicated under an understanding of the Disclosure Clause which allowed, in Calian's view, disclosure to other government departments.

[53] Calian submitted that agreement to disclosure of information to other departments within government does not constitute an outright waiver of confidentiality, as it is perfectly possible for numerous government departments to have a party's confidential information while maintaining the confidentiality of that information *vis-à-vis* the public. Given my interpretation of the Disclosure Clause, which, as will be more fully explained below, does not expressly nor impliedly limit disclosure of the personnel rates to other government institutions, there is no need to address Calian's submissions on this point.

[54] Having found that the Judge committed no reviewable error for the purposes of issue A, I am therefore in agreement with the Judge that PWGSC erred in determining that the information requested could not be treated as third party exempt information under the Act.

B. *What is the proper interpretation of the Disclosure Clause?*

[55] So far, I have addressed the issue as if the situation was exclusively governed by the application of subsection 20(1) of the Act. What are we to make, however, of the Disclosure Clause that forms part of the 2010-14 Standing Offer? As previously noted, the Judge found that the Disclosure Clause was not, in and of itself, determinative and did not operate as a complete bar to a finding that the exemptions found under subsection 20(1) of the Act could apply. Instead, he was of the view that it was only one of the considerations to be taken into account when assessing what could reasonably be expected by a third party in the context of paragraphs 20(1)(*c*) and 20(1)(*d*). As he stated (Reasons at para. 72):

> […] In other words, the *Act*, in asking what "could reasonably be expected" requires the Court to engage in a comprehensive analysis of relevant circumstances, not the one-dimensional truncated review advanced by the

> Respondents [appellants before this Court]. Specifically, while I agree the Court must consider the Disclosure Clause, it must also assess the history of dealings between the parties, their past experiences dating back to 1997 including the 2009 access request, the 2009 decision to redact notwithstanding a materially identical Disclosure Clause. The Court for the same reasons must also assess and consider the Applicant's [respondent before this Court] understanding of how and why that clause would be applied. These are components of the required analysis of the statutory test.

[56] Against this backdrop, the Judge came to the conclusion that the Disclosure Clause had to be interpreted in accordance with the reasonable understanding of Calian, which was shaped by its years of experience and discussions with various government procurement officers. As a result, he accepted Calian's understanding of the clause according to which it was only meant to allow PWGSC to share its personnel rates with other government departments, but not with its competitors or to the public at large. He therefore concluded as follows (Reasons at para. 76):

> Assessing the matter generally, and assessing it at the time of signing the 2010-14 Standing Offer, which I believe is appropriate, the Applicant was reasonably expecting that any access request related to the Personnel Rates would have similar outcomes to the 2009 and other access requests, where the Crown redacted similar information under paragraph 20(1)(*c*). Indeed, it is likely this was the reasonable expectation of both parties given the 2010-14 Standing Offer was essentially contemporaneous with the 2009 decision to release with redactions. These facts, together with the Applicant's credible and reasonable understanding of the limited nature of the Disclosure Clause, and the fact that such rates were not disclosed over the Applicant's objections, in my respectful view, have the effect of depriving the Disclosure Clause of the determinative effect urged by the Respondents; the Disclosure Clause is not fatal to this application.

[57] In my view, this reasoning is flawed for a number of reasons. First, as previously indicated, it is by now well established that the interpretation of a standard form contract is a question of law. Following the decision of the Supreme Court in *Ledcor*, SCC, recourse to the reasonable expectations of a party and to its subjective intent clearly have no place in the analysis of a standard form contract. Such a contract is not negotiated in any meaningful way; as

recognized by Mr. Johnston, a standing offer is "a framework agreement which sets out pre-negotiated terms and conditions against which specific orders (call-ups) can be made by authorized users" (Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1412, para. 7). In that context, it would be illusory to suggest that anything could be inferred about the meaning of the contract from the facts surrounding its formation or from the subjective understanding of one of the parties.

[58] Moreover, consistency is of particular importance when interpreting standard form contracts. The meaning of a given RFSO's disclosure clause cannot change from one bidder to the next based on the bidder's prior history with any government institution and the bidder's subjective understanding of the clause's meaning. Fairness among bidders requires consistency and predictability.

[59] As a matter of fact, the clear language of a contract must always prevail over the surrounding circumstances, even when interpreting a negotiated contract. As the Supreme Court stated in *Sattva* (at para. 57):

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [references omitted]

[60] In the case at bar, I agree with the appellants that the Disclosure Clause is unambiguous on its face. Whether read in isolation or within the context of the General Conditions, there is no

explicit or implicit restriction to the type of disclosure agreed upon by the Offeror regarding its standing offer unit prices or rates. This interpretation is consistent with previous Federal Court decisions confirming that clauses of this sort constitute consent to disclose records not only within government, but also to the general public (see *Stenotran* and *Top Aces*).

[61] Counsel for Calian tried to distinguish these two cases on their facts. It is true that in *Top Aces*, the Federal Court was considering whether a disclosure clause amounted to "consent" for the purposes of section 30 of the *Defence Production Act*, R.S.C. 1985, c. D-1, thereby removing the information in question from the protection afforded by subsection 24(1) of the Act. Nevertheless, the disclosure clause in that case was virtually identical to the one at issue here, and both the Federal Court and this Court found that it amounted to consent to disclosure by the third party of its unit prices without any restriction. Likewise, I accept that the Federal Court relied on a similarly worded clause in *Stenotran* to conclude that the third party had not met its burden of proving that the information was confidential and should not be disclosed under paragraph 20(1)(*b*) of the Act. While this finding does not speak directly to the third party's consent to disclosure, it is nonetheless further evidence of the disputed Disclosure Clause's broad application.

[62] In addition to the clear wording and the principles established by these two cases, there are further reasons why the Disclosure Clause must be interpreted as encompassing consent to disclosure not only to other government institutions, but also to the public at large. First, the Act itself does not distinguish between disclosure within government and disclosure to the public. In the absence of a contrary indication, be it explicit or implied, it must be presumed that the

Disclosure Clause found in the General Conditions was meant to be consistent with the intent and spirit of the Act.

[63] Second, the Disclosure Clause appears to be superfluous if it were to be interpreted merely as a licence for government departments to share between themselves standing offer unit prices or rates. Neither party raised the issue at the hearing, but it is well established that departments have no legal personality distinct from that of the Crown, and are mere administrative divisions under the control of a minister acting on behalf of the Crown (see René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1985) at p. 85; Patrice Garant, *Droit Administratif*, 6th ed. (Cowansville, Qc.: Éditions Yvon Blais, 2010), at p. 20, citing *R. v. Wood* (1877), 7 S.C.R. 634 at p. 645 (Ex. Ct.). See also *Canada (National Harbours Board) v. Langelier*, [1969] S.C.R. 60 at p. 71, 2 D.L.R. (3d) 81). To the extent that the information sought to be protected by Calian does not fall within a statutory or policy limitation on disclosure within the government, such as section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21, which prevents the circulation of "personal information", there seems to be no impediment to government departments sharing that kind of information.

[64] As a matter of fact, the Judge himself seemed to acknowledge in his Reasons, the principle that government departments are pure emanations of the Crown, stating, at paragraph 50, that the 2003-09 and 2010-14 Standing Offers "both involved the same government contracting party, namely, the Crown (represented by DND in 2003 and PWGSC in 2010)". He reiterates this view a few paragraphs later, as part of his discussion relating to the relevance of the 2009 Access Request and of the decision then made by DND to redact the requested

information. Responding to the appellants' argument that the 2009 decision involved a different decision-maker and a different subject matter, the Judge wrote (at para. 54):

> These are not persuasive grounds to deny the Applicant [respondent before this Court] the statute's protection from public disclosure of the Personnel Rates. The institutions implementing and managing the RFSO processes and the processes under the *Act* in this case are materially the same, whether DND which redacted in 2009 or PWGSC which refused to redact in 2014. The executive authority in both cases is the Crown, acting through the relevant head of the institution. To accept otherwise would see form triumph over substance. There is no evidence the change of delegated contracting administration or management from DND to PWGSC made any difference to the outcome of this case, given the nature of the information is the same. And, as noted already, the Disclosure Clauses are materially the same. [emphasis added]

[65] If, therefore, the Crown is managing the procurement process and is ultimately the designated contracting authority, I see no reason why a disclosure clause would be needed in order to enable the government to share the information contained in a bid between its various departments. If such were the case, the Disclosure Clause would be redundant and deprived of any meaningful significance; it would, in effect, merely state the obvious. As a result, it seems to me that the correct interpretation of the Disclosure Clause, consistent not only with its clear wording but also with the general scheme and purpose of the Act together with basic principles of administrative law, must be to permit disclosure not only within government but also more broadly to the public at large.

[66] In conclusion, I find that the Judge erred in accepting Calian's subjective understanding of the scope of the Disclosure Clause instead of focusing on the unambiguous wording of that clause and on the judicial interpretation of similarly worded clauses. That approach led him to an erroneous and overly restrictive interpretation of the Disclosure Clause, which in turn skewed his overall appreciation of the Act.

[67] I would even venture to add that the interpretation given by the Judge to the Disclosure Clause is not only incorrect, but also cannot stand on the overriding and palpable error standard of review. Even assuming that surrounding circumstances could be taken into account in interpreting the terms of this standard form contract, Calian's subjective understanding of the Disclosure Clause cannot be given effect on the record before us. There is simply no evidence that such an interpretation was shared by the government.

[68] In his affidavit, Mr. Johnston asserted that the government had always protected detailed billing rates in contracts, and put much emphasis on the 2009 Access Request to DND. The Judge accepted Mr. Johnston's evidence, and found in particular that Calian "was reasonably expecting that any access request related to the Personnel Rates would have similar outcomes to the 2009 and other access requests, where the Crown redacted similar information under paragraph 20(1)(*c*)" (Reasons at para. 76). Yet, a careful examination of what took place in 2009 leads to a more nuanced evaluation of DND's prior treatment of the Disclosure Clause.

[69] In response to DND's request for Calian's views and recommendations on the disclosure of the information involved in the 2009 Access Request, counsel for Calian offered a number of grounds of objection to its unit prices being disclosed. In its letter providing Calian with an opportunity to submit representations regarding the disclosure of the contract, DND had drawn Calian's attention to the fact that as of August 15, 2006, standing offers are subject to the General Conditions, which form part of the procurement contract and contain a standard disclosure clause. Counsel for Calian responded that retroactive changes to the General Conditions could not give rise to either a right or an obligation on DND to disclose Calian's

pricing information, unless those terms were incorporated by reference into the original contract. Calian acknowledged that a similar disclosure clause had in fact been included in the draft contract that was produced for review, but noted that it had not been signed (see Exhibit "D" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1483).

[70] In its submissions to DND, Calian also communicated its understanding that the disclosure clause at issue for the purposes of the 2009 Access Request, and in particular its reference to the disclosure of "unit prices or rates", referred only to the disclosure of the Crown's base rates (which had already been disclosed as part of the RFSO), and not to the fully burdened rates offered by Calian or any of its competitors (see Exhibit "D" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1483).

[71] Following further discussions about the confidential pricing information and the redactions Calian had proposed, DND eventually refused to release the fully burdened rates, yet provided no detailed reasons for doing so. In these circumstances, I am unable to accept the Judge's inference that DND's decision was based on its acceptance of Calian's restrictive interpretation of the Disclosure Clause. In the absence of any evidence to the contrary, there might be a number of explanations for DND's course of action, including the non-retroactivity of the General Conditions and the unenforceability of a clause found in an unsigned contract. As submitted by the Commissioner, DND may even have been of the view that the non-finalized contract with Calian was not responsive to the 2009 Access Request for a "[*c*]*opy of an existing contract*" (Call for submissions regarding 2009 Access Request, Exhibit "C" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1479 [emphasis in the

original]). Considering the range of possible rationales for DND's refusal to release the requested information, it was a palpable and overriding error for the Judge to conclude that based on past treatment, Mr. Johnston's understanding of the Disclosure Clause should prevail. This is particularly so considering that Calian made no attempt to confirm with departmental officials that its reading of the Disclosure Clause was shared by the government.

C. *How does the Disclosure Clause interact with the scheme of the Act?*

[72] I have determined, above, that the Disclosure Clause constitutes consent to disclosure to the public at large of otherwise exempt information under the Act. As previously mentioned, the Judge found (in *obiter*) that there was a further ground upon which the decisions to disclose the personnel rates ought to be set aside. According to the Judge, the head of the government institution failed to discharge his or her legal duty to consider the discretion he or she had to refuse to disclose the information which stems from the use of the word "may" in subsection 20(5). I am of the view that the Judge came to a proper determination on this front, but for different reasons.

[73] The Judge held, at paragraphs 94 and 95 of his Reasons, that this Court's pronouncement in *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, 337 D.L.R. (4th) 552 regarding the discretionary exemption found in subsection 15(1) of the Act was applicable to this case, because the two subsections are worded very similarly. With all due respect, these two provisions cannot be analogized. While they both call for the use of discretion by the head of a government institution, they operate in a completely different set of circumstances. Subsection 15(1) allows the head of a government institution to "refuse to disclose" a record, whereas

subsection 20(5) allows the head of a government institution to "disclose" a record even if it falls within one of the exemptions provided in subsection 20(1), and then only with the consent of the third party to whom the information relates. In other words, subsection 20(5) does not provide a further (discretionary) ground of exemption over and above the enumerated grounds found in subsection 20(1). Quite to the contrary, it allows the disclosure of a record that would otherwise be exempted, provided the affected third party consents to that course of action. Such is precisely the case in the current instance.

[74] The discretion granted to the head of a government institution is entirely compatible with the purpose of the Act, which is meant to provide for a general right of access to information contained in records under the control of government, subject to necessary and limited exceptions (section 2 of the Act). Where the third party that is protected by an exemption to the right of access consents to disclosure, there may be public policy objectives served by continuing to refuse access. The same logic underpins section 19 of the Act, which protects personal information. Pursuant to subsection 19(2), the head of a government institution may disclose information falling within the scope of the mandatory exemption for personal information if, *inter alia*, "the individual to whom [the information] relates consents to the disclosure" (para. 19(2)(*a*)).

[75] That being the case, I find that the Judge was correct in coming to the conclusion that the decisions be set aside for failure to consider the discretion found under subsection 20(5). PWGSC decided that as the exemptions claimed by Calian with respect to its personnel rates did not apply, there was no residual discretion to refuse the disclosure of the information requested.

In finding that the exemptions did not apply, I am of the view that PWGSC proceeded on an incorrect reading of the Disclosure Clause. In its first section 28 decision, PWGSC noted that the clause prevented Calian from treating the information as "confidential third party information that would prejudice your competitive position and we must therefore release them" (see Section 28 Decision, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). As mentioned above, it appears that PWGSC construed the Disclosure Clause as an outright bar to claiming the third party information exemptions, which led to its finding that there was no residual discretion to exercise under subsection 20(5) of the Act.

[76] With respect, this interpretation is not supported by the language of the clause, or by the scheme of the Act. In fact, it proceeds on a conflation between the wording of the clause and its effect. The Disclosure Clause merely stipulates that the Offeror is agreeing to disclosure of certain information which may otherwise be treated as exempt under the Act. A necessary corollary to this involves, as I have explained above, an initial determination that the information would in fact be treated as exempt under the Act had it not been for the existence of the clause. Thus it cannot be said that the clause precludes certain information from being characterized as third party confidential information, nor can it be said to convey that parties agreeing to its contents are outright prevented from claiming the exemptions found under the Act. In other words, the clause's impact is not that the exemptions found under subsection 20(1) do not apply; rather, it is that despite them applying, the third party nonetheless agrees to disclosure.

[77] PWGSC's reading of the Disclosure Clause as a waiver of claiming the section 20(1) exemptions is at odds with the scheme of the Act. I am of the view that agreeing to the Disclosure Clause simply constitutes the sort of consent contemplated by subsection 20(5) of the Act. Parliament clearly envisioned the situation under which information otherwise considered as third party confidential information could be disclosed by way of consent, and I must give effect to its intent. By making such a provision discretionary in nature, Parliament unequivocally considered that there would be circumstances where notwithstanding consent to disclosure, the head of the government institution may still decide to not disclose the requested information. One could think of a host of scenarios under which, despite the existence of consent, disclosure of requested information would still be misguided. On such a reading of the interaction between the Disclosure Clause and the scheme of the Act, it becomes clear that the reasons behind a section 28 decision must show that the head of the government institution turned its mind to the discretion afforded to it under subsection 20(5). Such was not done here.

[78] PWGSC decided, on the basis of an erroneous reading of the Disclosure Clause, that it had to order disclosure because the exemption regime found under subsection 20(1) of the Act had been waived by Calian. In so doing, it incorrectly interpreted the terms of the Disclosure Clause, and was not alive to the situation codified in subsection 20(5) under which Calian clearly fell. Accordingly, it failed to consider the discretion afforded to it under that provision. Such was a reviewable error warranting that the matter be remitted back for reconsideration.

VII. Conclusion

[79] For all of the foregoing reasons, I am therefore of the view that the proper framework under subsections 20(1) and 20(5) of the Act in the face of a disclosure clause of this type requires that the head of a government institution (1) determine whether the information would otherwise be treated as exempt under the Act, and then (2) decide whether any circumstance militates against the information being shared with the public, notwithstanding the consent to disclosure. Both the Judge and PWGSC erred in their interpretation of the Disclosure Clause. Had a proper analysis of that clause been conducted, it would have been found to constitute Calian's consent to disclosure to the public of otherwise exempt information pursuant to subsection 20(5) of the Act, thus triggering the discretion found under that provision. PWGSC made a reviewable error in not turning its mind to the discretion afforded to it as head of a government institution under that provision.

[80] I would grant the appeals in part and set aside the decision of the Federal Court. Making the decision that the Federal Court ought to have made, I would grant the applications for judicial review, and remit the matters back to PWGSC for redetermination in accordance with these reasons. The parties shall be allowed to make representations as to the proper exercise of PWGSC's discretion. As there has been divided success on appeal, no costs should be awarded.

"Yves de Montigny"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GLEASON J.A. WOODS J.A.
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