Federal Court Cour fédérale

Date: 20240618

Docket: DES-1-21

Citation: 2024 FC 929

Ottawa, Ontario, June 18, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

NAVANTIA S.A., S.M.E. AND LOCKHEED MARTIN CANADA INC. AND IRVING SHIPBUILDING INC.

Respondents

ORDER AND REASONS

[1] The Attorney General of Canada [AGC] filed a Notice of Application (as amended) on January 22, 2021 pursuant to subsection 38.04(1) of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] seeking an order confirming the statutory prohibition on the disclosure of certain sensitive information or potentially injurious information, as those terms are defined in the CEA, contained in 48 documents [the Section 38 Application]. The AGC submits that the documents at

issue include information that, if disclosed, would be injurious to Canada's international relations and/or national defence.

[2] The information at issue is contained in the documents that were provided to Navantia S.A., S.M.E. [Navantia] in redacted form as part of the Certified Tribunal Record [CTR] in two consolidated Applications for Judicial Review (Court Files T-443-19 and T-585-19). These Applications challenge two related decisions regarding the Canadian Surface Combatant project's [CSC Project] request for proposals bearing solicitation number CSC-0001 and the selection of the preferred bidder. (Twenty-two documents relate to T-443-19 and 26 documents relate to T- 585-19).

[3] The AGC now seeks to have the prohibition on the disclosure of the redacted information confirmed by the Court, with the exception of certain documents for which the originator has provided their consent to disclosure on strict and specific terms and conditions.

[4] Navantia seeks disclosure of all the information the AGC seeks to protect. Navantia has suggested several terms and conditions to safeguard the information, including that: the documents be provided on a "counsel's eyes only" basis and only to those counsel with a secret security clearance and to a secret security cleared expert; the documents be maintained in a secure facility; and, the judicial review of the two decisions be conducted in the absence of the public. Counsel for Navantia states that it will comply with any conditions required to safeguard the information.

[5] The Court has carefully considered the submissions of Navantia, the AGC and the Court appointed *amicus curiae* [*amicus*], the affidavits and testimony of the affiants, the additional information provided to the Court at the Court's request, the documents at issue, and the relevant jurisprudence.

[6] These reasons set out the background and context and describe the proceedings to date, the key submissions of the parties and the *amicus,* and the legal principles that have guided the Court in determining the Section 38 Application.

[7] The Court's determination of the Section 38 Application and the terms and conditions upon which additional disclosure of the information in 21 of the 48 documents at issue can be provided, along with directions about how the Applications for Judicial Review can be conducted, is set out in the attached Classified Order.

I. Background /The Underlying Applications

[8] The determination of the Section 38 Application requires the Court to consider the nature of the underlying proceedings in order to assess the relevance of the redacted information and its probative value to those proceedings.

[9] The underlying proceedings challenge decisions made regarding the CSC Project; Canada's procurement process to replace the Royal Canadian Navy's aging fleet with modern warships. The CSC Project has proceeded in several phases. The CSC Project issued a Request

for Proposals [RFP] to identify a preferred bidder and to select a bidder for two contracts: to design the ships and their systems (CSC Definition Subcontract); and, to provide/ design the onboard software to ensure the ships' operational readiness (Combat Management System Software Support Contract).

[10] Navantia is a Spanish state-owned ship building company that specializes in the design and construction of high technology military and civilian vessels. Navantia met the requirements to submit a bid (proposal) and did so. However, Navantia's bid was found to be non-compliant with certain criteria. Lockheed Martin Canada Inc. [Lockheed] was chosen as the selected bidder.

[11] In T-443-19, Navantia challenges the decision made jointly by Irving Shipbuilding Inc. [Irving] and the Minister of Public Works and Government Services [PWGSC] that selected Lockheed as the "selected bidder". The decision at issue was communicated to Navantia on February 8, 2019.

[12] Navantia argues that the decision is unreasonable and was made in breach of the duty of procedural fairness owed to Navantia. Navantia alleges that Irving and PWGSC engaged in a course of conduct of bias and favouritism toward Lockheed and BAE Systems, Irving's business partners. Among other allegations, Navantia alleges that PWGSC and Irving amended the criteria after the bidding process was launched and in progress to unjustifiably remove certain requirements that permitted Lockheed to comply, despite Lockheed's otherwise non-compliance. Navantia alleges that even with these relaxed requirements, Lockheed's bid remains non-

compliant, as it fails to meet mandatory requirements with respect to mature design, personnel accommodation and speed.

[13] Navantia seeks, among other relief, an Order to prohibit the responsible Government Ministers or Departments (PWGSC, Treasury Board, National Defence) from issuing any approvals to Irving to enter into or perform any work under the subcontract with Lockheed pending the disposition of the Application for Judicial Review; an interlocutory stay of the decision pending the final disposition of the Application for Judicial Review; an Order declaring the decision unlawful or quashing the decision and remitting it for redetermination; and, an Order setting aside any decisions that have issued approvals to Irving to enter into or perform any work pursuant to the subcontract with Lockheed.

[14] In T-585-19, Navantia challenges the decision made jointly by Irving and the Minister of PWGSC that the bid submitted by Navantia did not comply with certain criteria. This decision was communicated to Navantia on March 6, 2019.

[15] Navantia argues, as in the related application, that Lockheed's bid did not meet the stated criteria, despite amendments made to the criteria, which Navantia alleges were made to favour Lockheed. Navantia also argues that the grounds for which Navantia's bid was found to be non-compliant were new grounds, not previously disclosed to them, and that the information that Navantia should have been able to provide to respond to the issues raised in the "cure period" could not be provided because Navantia and other bid partners were prohibited from doing so due to the classification of the information as "controlled goods".

[16] Navantia submits that its own bid was fully compliant with the stated criteria and that every aspect of Navantia's purported non-compliance, which is denied, was due to the Government of Canada's failure (or that of its representative agencies) to request information from relevant third-party states (foreign governments) in the required and timely manner. Navantia argues that it was denied fair treatment in the procurement process.

[17] Navantia seeks similar relief as in T-443-19.

[18] In the context of the Applications for Judicial Review, Navantia sought all the documents and information relied on by the decision-makers; in other words, the CTR and other specified documents. Navantia notes that this information is related to the procurement process for the CSC and consists of technical details regarding similar naval vessels or components designed or constructed by bidders for foreign countries.

II. The Issue and Process to Date

[19] Sections 38 to 38.15 (collectively section 38) of the CEA set out the procedure whereby sensitive or potentially injurious information relating to international relations, national defence or national security may be protected from disclosure before a court, person or body with the jurisdiction to compel the production of information.

[20] The issue for the Court is whether the prohibition to disclose the information identified and redacted by the AGC in the documents at issue should be confirmed by the Court pursuant to

subsection 38.06(3), in full or in part, or whether the disclosure should be authorized, in full or in part and/or subject to certain conditions, pursuant to subsections 38.06(1) or (2).

[21] Following the filing of the Section 38 Application on January 22, 2021, the Court convened several Case Management Conferences [CMC] which, among other things, canvassed the volume of information at issue and the possible timetable for filing affidavits, the public hearing and the *in camera, ex parte* hearing. By Order dated June 25, 2021, the Court appointed Mr. Anil Kapoor as *amicus.*

[22] The 48 documents at issue were provided to the Court and to the amicus in unredacted form for the purpose of the Section 38 Application. The redacted parts of the documents are marked in a see-through readable format. The see-through versions were filed with the Court's Designated Proceedings Registry and remain under seal (not public). The amicus has had the opportunity to review these documents. Counsel for Navantia have not had any access to the unredacted documents, but have received the redacted CTR, which is extensive.

[23] Public affidavits from representatives of the Department of National Defence [DND] and Global Affairs Canada and Public Services Procurement Canada [PSPC] identified the type of information that is required to be protected from disclosure and the rationale for this protection. Confidential affidavits were also filed in support of the AGC's position and explain why the redactions to the 48 documents have been made and why the disclosure of this information would be injurious to international relations and/or national defence.

[24] The Section 38 Application was heard in several parts. A public hearing was held on October 25, 2022. Both the AGC and Navantia provided written submissions and affidavits and made oral submissions at the hearing.

[25] An *in camera, ex parte* hearing was held on November 21 and 22, 2022. The AGC filed classified *ex parte* affidavits. The affiants were examined by the AGC and cross-examined by the *amicus.*

[26] The AGC subsequently filed a supplementary classified *ex parte* affidavit, enclosing additional documents, to provide further information in response to questions raised by the *amicu*s and the Court.

[27] Following the *in camera, ex parte* hearing, the Court issued Public Communication #1 to provide an update to Counsel for Navantia, noting that on November 21 and 22, 2022, the Court held an *in camera, ex parte* hearing. The Communication also noted that the AGC called two witnesses, one from DND and one from PSPC, who provided classified affidavits and *viva voce* evidence on the issue of injury to national defence and international relations; the witnesses were examined by the AGC and cross-examined by the *amicus*; the AGC undertook to file an additional classified *ex parte* affidavit in order to file additional documents and did so; and, the *amicus* undertook to review the affidavit and documents and advise whether additional cross-examination would be required.

[28] In accordance with the timetable agreed upon by the parties and the Court, the *amicus* filed a classified *ex parte* Memorandum of Fact and Law on February 24, 2023. The AGC filed a classified *ex parte* Memorandum of Fact and Law on February 27, 2023. The *amicus* and AGC filed classified *ex parte* reply submissions on March 22, 2023.

[29] The Court held an *in camera*, *ex parte* hearing on March 23, 2023.

[30] Based on information provided to the Court at the March 23, 2023 hearing, the Court requested that the AGC and PSPC consider recontacting their foreign partners that had previously advised that they did not consent to the disclosure of any information originating from them to better explain the section 38 regime and the type of terms and conditions that the Court could impose to protect the disclosure of the information in the event that the Court determined that some or all of the information should be disclosed.

[31] In response to an inquiry from Navantia about the status of the Section 38 Application, following the hearing on March 23, 2023, the Court issued Public Communication #2, noting, among other things, that the March 23, 2023 hearing was *in camera, ex parte*, which is not uncommon in the determination of section 38 applications, and that the Court had requested the AGC to consider certain issues that could result in the provision of additional information that could assist in the Court's determination of the Application. The Court explained that this would delay the time for the Court to reach a decision, but that it was not an opportunity for the AGC to bolster their arguments.

[32] PSPC made additional efforts to contact their foreign partners, provided more detailed information about the section 38 process, and again asked for their positions with respect to the disclosure of the information. PPSC received responses in August 2023. The AGC provided a further affidavit summarizing the responses and attaching the original correspondence.

[33] The Court convened a hearing on October 31, 2023 to receive the submissions of the *amicus* and AGC regarding the determination of the Section 38 Application in light of the responses from the foreign partners.

[34] On December 1, 2023, the Court issued Public Communication #3 summarizing the current positions of the AGC and *amicus*. The Communication noted the *amicus'* position that the injurious information could be disclosed to counsel for Navantia if strict terms and conditions are imposed to mitigate the injury of disclosure.

[35] The Communication also noted the AGC's position that the information for which foreign partners have not consented to disclose should not be disclosed because such disclosure would harm important international relationships to the detriment of Canadian interests.

[36] With respect to a particular document for which a foreign partner does not consent to disclose, although that foreign partner consents to the disclosure of other documents on strict terms and conditions, the Court requested the *amicus* and AGC to consider whether a non-injurious summary of that information could be provided and, if so, to share this with the Court.

[37] On January 22, 2024, the AGC advised the Court that it did not agree with the summary proposed by the *amicus*. The AGC proposed a more general summary, which is described later in the Court's reasons.

III. The AGC's Evidence

[38] The AGC filed two public affidavits.

[39] The Affidavit of Daniel Pilon, Director of the International Industrial Security Directorate at PSPC, describes how disclosure of the redacted information would be injurious to international relations. He notes that disclosure would breach four bilateral industrial security agreements between Canada and the United States [US], Australia, the United Kingdom [UK] and the Netherlands respectively.

[40] Mr. Pilon explains the responsibilities of the International Industrial Security Directorate [IISD], which includes negotiating, implementing and monitoring compliance with international bilateral security instruments regarding reciprocal safeguarding requirements for sensitive governmental information exchanged throughout the lifecycle of a contract. Mr. Pilon notes that IISD had negotiated 25 bilateral industrial security agreements to date, including with the UK, the US, Australia, Spain and the European Union. He explains that the content of these instruments cannot be disclosed publicly unless authorization is obtained from the Director of IISD (i.e., Mr. Pilon) and from the respective foreign security authority of the bilateral instrument. Mr. Pilon also notes that IISD ensures that all information exchanged with Canada or

private companies in Canada that falls under one of the bilateral agreements is treated according to the terms of the bilateral agreement, including regarding the protection of information.

[41] Mr. Pilon attests that he reviewed the documents that are the subject to the Section 38 Application. He believes that disclosure of the redacted information would be injurious to international relations.

[42] Mr. Pilon describes the information at issue as information that Canada received regarding the bids for the CSC project and references to that information in other documents prepared for the procurement process, including notes of the evaluators. He states that the information is mainly about technical details and plans of similar war vessels or components created for and by the US, Australia, the Netherlands and the UK. Mr. Pilon explains that the documents at issue contain sensitive information that originated from these four countries and the information is likely subject to the terms of the applicable industrial security instruments.

[43] Mr. Pilon also explains that the industrial security instruments include provisions that prohibit the disclosure of information received in accordance with the instrument without obtaining the consent of the country that provided the information.

[44] With respect to the injury to international relations from disclosure of this information, Mr. Pilon notes that, in the context of a procurement process, it is common practice for governments to share information with their allies under an expectation of confidentiality. The reciprocal exchange of sensitive information throughout the procurement process depends on

cooperation between countries, which is only possible where the countries take all the steps to protect sensitive information from disclosure. He notes that any breach of confidentiality could have negative consequences including cessation of future exchanges, or a restriction of the disclosure to information of very little value or significance. In his view, a reduction of mutual trust and cooperation between Canada and its allies "would deprive Canada of the benefit of accessing key information required to maintain and improve our national defence technologies and assets via procurement processes".

[45] Mr. Pilon attests that, to his knowledge, there have been no breaches of the four instruments since their signature. He adds that a breach of any one instrument would have a negative impact on the other instruments because foreign countries would likely be reluctant to provide sensitive information if Canada were not able to protect it.

[46] The Affidavit of Stephen Ellington, Section Head of the Release and Disclosure Coordination Office, within the Director General Intelligence Policy and Partnerships and Chief of Defence Intelligence at Canadian Forces Intelligence Command of DND, describes how disclosure of the redacted information would be injurious to national defence.

[47] Mr. Ellington explains that his Directorate manages defence intelligence partnerships and provides defence intelligence policy, oversight, communications and security advice and support.

[48] Mr. Ellington explains that the mandate of DND/Canadian Armed Forces [CAF] is, in broad terms, to protect Canada and Canadians, defend North America and contribute to

international peace and security. He also explains that DND and CAF have distinct roles, although both are responsible to the Minister of National Defence.

[49] Mr. Ellington states that DND/CAF seeks to protect information about the performance details and capabilities of the CSC vessels and, the data and equations that would enable an informed person to predict the performance of the vessel with relative certainty. He explains that disclosure of this information would enable hostile forces to modify tactics and take countermeasures. This in turn would risk the lives of Canadian personnel deployed internationally and domestically and would compromise military operations in support of Canadian interests.

[50] Counsel for Navantia cross-examined both public affiants.

[51] The Court also held an *in camera, ex parte* hearing at which time affiants, who submitted classified affidavits explaining how the specific information at issue would cause injury to international relations and /or national defence if disclosed, were examined by the AGC and also cross-examined by the *amicus*.

IV. The Submissions of Navantia

[52] Navantia made extensive submissions at a public hearing regarding the relevance of the redacted information. Navantia argued that the unredacted documents in the CTR provide *prima facie* evidence to support Navantia's allegations; however, highly technical information is

redacted, which is of crucial importance and would confirm that the decisions were unreasonable and procedurally unfair. Navantia submits that the relevance of the information is not disputed; the issue is whether disclosure of the redacted information would cause injury to international relations or national defence and if so, whether the public interest in disclosure—but only to counsel for Navantia—outweighs the public interest in non-disclosure. Navantia's position is that no injury will result given that public disclosure is not contemplated. Navantia proposes disclosure only to security cleared counsel and Navantia's security cleared expert(s) and with many additional safeguards.

[53] Navantia submits that full disclosure of the redacted documents is essential to permit meaningful judicial review, which depends on counsel's access to all the information that the decision-maker relied on to determine that Navantia's bid was non-compliant with the requisite criteria and that Lockheed's bid was compliant. Navantia submits that their arguments to the Court and their interpretation of this technical information are essential to the Court's understanding of the issues and the determination of the judicial review. Navantia submits that the Court's access to the redacted information on its own – i.e., without submissions by counsel for Navantia about this information – will not be sufficient. Navantia argues that without the full information, Navantia and the Court will not be able to weigh the facts necessary to determine the Applications for Judicial Review. Navantia further submits that summaries of the redacted information, which in other circumstances could mitigate any injury, are not an option. Navantia notes that the technical information, which the AGC submits would be injurious to national defence or international relations if disclosed, could not be adequately summarised.

[54] Navantia submits that the Applications for Judicial Review are unlike others due to the nature and complexity of the information underlying the decision-making criteria and the public interest in ensuring the integrity of a government procurement project of this magnitude. Navantia characterizes the procurement process for the fleet of warships as the most expensive and among the most important to date. Navantia submits that the public should be assured that the contracts for Canada's future fleet were properly awarded and that all the essential requirements for the ships will be reflected in the end product.

A. *Information related to T-443-19*

[55] As noted, in T- 443-19 Navantia argues that the decision to select Lockheed as the successful bidder is unreasonable, including because Lockheed failed to meet key criteria. Navantia also alleges a breach of the duty of procedural fairness.

[56] Navantia notes the distinction between the design concepts in the RFP. The Total Ship Reference Point [TSRP] is a design for a proven (i.e., already designed and built) vessel (or one at an advanced design stage). A Bid Compliant Design [BCD] is a design based on a proposed vessel with modifications to meet the requirements of the Royal Canadian Navy.

[57] Navantia explains that their challenge is to the decision that found that Lockheed's bid was compliant with the "mature design" requirements (related to TSRP); in other words, that the vessel had been built and tested. Navantia submits that Lockheed's "Type 26" was only 60%

complete at the relevant time. Navantia argues that disclosure of the redacted documents is essential to establish how it was determined that Lockheed's bid met the mature design criteria.

[58] Navantia also challenges the finding that Lockheed's bid complied with other criteria, specifically speed and personnel accommodation. Among other things, Navantia submits that the only way to verify compliance is to have access to Lockheed's bid submissions, the supporting documents, and the evaluator's notes.

[59] With respect to the procedural fairness issues, Navantia submits that Canada and its agent, Irving, favoured Lockheed and the Type 26 design, including by making 88 amendments to the RFP. Among other allegations, Navantia submits that the amendment to the RFP that assigned responsibility for the evaluation of bids against specific criteria resulted in a "siloed" approach rather than evaluating the bid holistically. Navantia submits that this "siloed" approach may have led to an erroneous finding that Lockheed's bid was compliant. Navantia adds that access to the actual information and documents submitted by Lockheed is the only way for Navantia to demonstrate to the Court that the Lockheed bid was not compliant.

[60] Navantia also submits that the RFP evaluation process may have led to erroneous findings of compliance. Navantia submits that, among other documents, the "General Arrangement" documents must be disclosed in order to assess whether the Lockheed bid was compliant.

B. *Information related to T-585-19*

[61] In T-585-19, Navantia challenges the decision that Navantia's own bid was non-compliant. In addition to the relevance and importance of the information needed to determine T-443-19, Navantia submits that other redacted information relates to government-to-government protocols [G2G], which impeded Navantia's ability to respond to issues raised in the evaluation. Navantia submits that Canada failed to make the requests for this information from other countries in accordance with the protocol.

[62] Navantia argues that this information will show what was relied on to find that Lockheed's bid was compliant and Navantia's bid was non-compliant.

C. *Public Disclosure is not requested; terms and conditions will alleviate or mitigate the injury*

[63] Navantia submits that no injury to international relations or national defence could arise from disclosure to security cleared counsel for Navantia or to its security cleared expert(s) (as necessary); terms and conditions can mitigate or eliminate any injury.

[64] Navantia suggests that the bilateral security agreements between Canada and the four countries would permit a person who holds a security clearance in Canada that is equivalent to the necessary security clearance in the other country to access the classified information addressed in the agreements. Counsel for Navantia note that they possess the required security clearances.

[65] Navantia disputes the AGC's contention that disclosure of the information sought would lead to cessation or reduction in future information sharing between countries with which Canada has bilateral agreements. Navantia submits that this would mean that procurement decisions that involve information supplied by foreign governments would be immune from meaningful judicial review.

[66] Navantia submits that in assessing the consent of foreign governments, foreign governments should be aware that procurement decisions are subject to judicial review, and in the course of judicial review, information must be disclosed. Navantia argues that Canada's international relations would not be injured by the application of the rule of law and the terms and conditions to be imposed on any disclosure.

[67] Navantia emphasizes that they are fully aware of the need to ensure the security of the information and safeguard it from any further disclosure. Counsel for Navantia notes, among other things, that they have necessary security clearances, are registered in good standing with Canada's Controlled Goods Program, are subject to large monetary fines for any breach of the Controlled Goods Program, will build secure facilities for the storage of information or will attend at existing secure facilities to access the information, and are willing to abide by any terms and conditions imposed by the Court on the disclosure of the information sought to be protected by the AGC. In addition, counsel hold a Facility Security Clearance at the NATO SECRET level and have received preliminary approval for Document Safeguarding and Production Capabilities at NATO SECRET level. Navantia notes that this is the same security clearance held by personnel who have already seen the information.

[68] Counsel for Navantia also point to the Confidentiality Order issued in August 2020 that remains in effect. More generally, counsel submit that they do not pose any risk of disclosure and, as a result, there is no risk to international relations or national defence.

D. *Public Interest in limited disclosure trumps non-disclosure*

[69] Navantia submits that the redacted information has significant relevance and probative value; without the full disclosure, it will not be possible for counsel for Navantia to interpret the information in order to make submissions to the Court. Nor will it be possible for the Court to determine if the decision that Navantia's bid was non compliant reflects a rational chain of analysis or if the decision that Lockheed's bid was compliant is supported by the evidence, including the evaluator's notes. Navantia argues that without disclosure of the unredacted information, it will be impossible to determine whether the evaluators missed or misapprehended the facts.

[70] Navantia also submits that the issues raised in their Applications for Judicial Review are matters of public importance; meaningful judicial review is in the interest of all Canadians to ensure the integrity of the government's procurement process. Navantia adds that the Canadian public has an interest in ensuring that the replacement warships can meet current and future capabilities and demands to protect Canada's interest within Canada and abroad. In addition, the Canadian public has an interest in ensuring that its tax dollars are wisely spent and that the government is accountable for its expenditures.

[71] Navantia again submits that summaries of the redacted information are not an option; summaries could not include the technical information without raising the same concerns regarding the injury to international relations or national defence and summaries of charts or drawings are not feasible.

V. The AGC's Submissions

A. *Public Submissions*

[72] The AGC notes that the decisions made by PWGSC, now challenged by Navantia, were based on a wide range of information. The AGC adds that, with respect to procurement decisions, a high level of deference is owed to the decision-maker. (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at paras 21 – 25 [*Irving*]; *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)*, 1995 CanLII 3600 (FCA), [1995] 2 FC 694 (CA) at para 23)

(1) Injury to International Relations

[73] The AGC acknowledges that all the information considered by the decision-makers included in the CTR is relevant, but submits that the disclosure of the information would be injurious.

[74] The AGC submits that Canada is prohibited under the bilateral industrial security instruments between Canada and its foreign partners (UK, US, Australia, Netherlands) from

disclosing the classified documents from these partners without their consent. Disclosing the information would breach the bilateral instruments, which is injurious to international relations.

[75] The AGC disputes the submission of Navantia and the *amicus* that because "public" disclosure is not requested, there is no need to obtain the consent of the other countries.

[76] The AGC explains that the purpose of these instruments is to facilitate the exchange of classified information between governments and their industries in order to allow cooperation in industrial security matters. Trust is needed to allow Canada to benefit from free and frank exchanges of information between public officials and their foreign counterparts (*Canada (Attorney General) v Almalki*, 2010 FC 1106, at para 80, [*Almalki*]; *Canada (Attorney General) v Tursunbayev*, 2021 FC 719, at para 78, [*Tursunbayev*]).

[77] The AGC also submits that, contrary to Navantia's view, these instruments do not explicitly or implicitly allow disclosure to counsel, even with security clearances, for judicial review purposes; the instruments clearly prohibit the disclosure of information received without first obtaining the consent of the originating country that provided the information.

[78] The AGC points to the "third party rule" as analogous. In *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials)*, 2007 FC 766 [*Arar*], the Court explained that the "third party rule" is an understanding among information-sharing partners that information providers will maintain control over its subsequent disclosure and use. A breach of the third-party rule may have a negative impact on the parties' relations, the most

likely of which would be a cessation or reduction of future information sharing. As found in *Arar*, it is often impossible to know the extent to which the relationship has been harmed by a breach (para 79).

[79] The AGC notes that where a request is made to a foreign country to consent to disclose their information, the foreign country can either consent to disclose with conditions, refuse to disclose, or fail to respond. Where the foreign country refuses, the injury to international relations would be greater if the information were disclosed in the face of the refusal. Injury would also result if information were disclosed where the foreign government failed to respond.

(2) Injury to National Defence

[80] The AGC submits that disclosing the information would reveal the performance details of Canada's vessels, enabling hostile forces to develop countermeasures. This would risk the lives of Canadian troops and impair Canada's military operations.

[81] The AGC points to Mr. Ellington's evidence that, if disclosed, Canada's enemies may use the information to create countermeasures that could risk the safety of Canadian personnel and impair military operations.

[82] The AGC submits that in *Arar*, this Court adopted the broad definitions of national defence: "All measures taken by a nation to protect itself against its enemies"; "A nation's

protection of its collective ideals and values is included in the concept of national defence"; and "A nation's military establishment" (at para 62).

[83] The AGC argues that it is not required to establish a direct threat to national defence for the purposes of section 38. Distant events with a real possibility of harming Canadian security would constitute a sufficient threat (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 88).

[84] The AGC submits that the Court should defer to the AGC's assessment of injury given the AGC's access to special information and the AGC's expertise (*Canada (Attorney General) v Ribic*, 2003 FCA 246 at paras 18 – 19 [*Ribic*]; also see *Tursunbayev*, at para 86 ; and *Huang v Canada (Attorney General)*, 2017 FC 662 at para 45; *Canada (Attorney General) v Telbani*, 2014 FC 1050 [*Telbani*] at paras 42 – 43).

[85] The AGC adds that the evidence of injury to national defence and international relations from disclosure greatly surpasses the threshold required under section 38 of the *CEA*.

B. *Classified Ex Parte Submissions of AGC*

[86] The AGC notes that Navantia and the *amicus* concede that injury to national defence and international relations would result from *public* disclosure. The AGC disputes the position of Navantia and the *amicus* that the injury would be mitigated by limited disclosure. The AGC

submits that the extent and nature of the injury arising from even limited disclosure must still be assessed at the third stage of the *Ribic* test.

[87] The AGC adds that limited disclosure on strict terms and conditions does not avoid the need to obtain the consent of the foreign countries.

(1) Correspondence with the UK, the US, Australia and the Netherlands

[88] The AGC submits that PSPC has made reasonable efforts to obtain consent for limited disclosure to security cleared counsel and to the Court to be used in an *in camera* hearing of the Applications for Judicial Review. The AGC notes that PSPC redoubled their efforts to seek consent from the four countries at the Court's suggestion. The AGC points to the extensive correspondence back and forth seeking consent and attempting to explain the section 38 process and the [various responses received].

[89] The AGC described the [various responses received from foreign governments in detail, ranging from a clear refusal to a lack of consent. One response] acknowledged that the Court could reach a different decision and, if so, identified the need for extensive terms and conditions on any disclosure of information.

(2) The documents at issue

[90] The AGC notes that there are [several] documents at issue relating to Lockheed's successful bid to build a ship based on the "Type 26" ship, which BAE (a British company) designed (at issue in T- 443-19). The AGC describes [these] documents as including sensitive and injurious information about the capabilities of the warships under construction that will be used by the Canadian navy and that hostile actors could use to harm Canada's national defence.

[91] The AGC agrees that the information [one country] has consented to disclose can be disclosed to security cleared counsel for Navantia on specific terms and conditions to mitigate the injury to national defence. The AGC further submits that the disclosure of these documents will provide Navantia with sufficient information to meaningfully advance their arguments on judicial review.

[92] [There are] 26 documents originating from [several countries that] relate to Navantia's bid to build a ship based on the F-105 that Navantia built for the Spanish navy, which was then adapted for the Australian navy. Navantia's bid included information or elements provided by subcontractors from Australia, the US and the Netherlands. These documents relate to the decision that Navantia's bid was non- compliant (T-585-19).

[93] The AGC notes that these documents were delivered to the bid evaluation team in accordance with the G2G provisions in the RFP.

[94] The AGC submits that Navantia was fully aware of the G2G protocols and agreed to the RFP process. As such, Navantia was aware of how to seek the documents from other countries via the G2G protocol (i.e., ask the country, then ask Canada to make the request, then the country would provide the documents directly to Canada) and Navantia was also aware that Navantia would not see the information provided. The AGC adds that Navantia was made aware of the concerns to a sufficient extent, based on the evaluator's notes, in order to be able to request additional information from the countries for the "cure period".

[95] The AGC submits that Navantia has not sufficiently established why the redacted information from Australia, the US or the Netherlands would be needed with respect to Navantia's challenge to the decision that Navantia's bid was non-compliant.

[96] The AGC notes that there are [several documents from a second country] at issue. The AGC explains that, initially, [the country responded and] also requested that the information it had provided pursuant to the G2G protocols be destroyed once Navantia's bid was found to be non-compliant.

[97] The AGC notes that in response to the follow up correspondence, [the second country] reiterated its refusal to consent, even with a full understanding of the possible terms and conditions the Court could impose. The AGC submits that, although [the country] acknowledged that the Court would determine whether to confirm the prohibition on disclosure

and proposed terms and conditions in the event that the Court found otherwise despite [their] lack of consent, [their] alternative position does not constitute consent.

[98] With respect to [a third country], the AGC notes that [fewer] documents are at issue, with various security classifications. The [country] clearly responded, twice, that it does not consent to disclosure due to their national security concerns.

[99] [Fewer documents from a fourth country] are at issue with various security classifications. [some documents] include classified information originating from [another country].

[100] The AGC notes that the [fourth country], which means has not consented to disclosure.

(3) Consent required

[101] The AGC submits that any disclosure of the sensitive or injurious information without the consent of the foreign partners-—even on strict terms and conditions-—would injure both national defence and international relations.

(4) The public interest favours non-disclosure

[102] The AGC submits that with respect to the third stage of the *Ribic* test, the public interest favours non-disclosure of the information for which the foreign partners do not consent to disclosure.

[103] The AGC does not agree with the *amicus*' proposal that all documents could be disclosed on strict terms and conditions. The AGC agrees only that the information in the documents from the [first country], which [it] has consented to disclose, can be provided on the proposed terms and conditions. However, the disclosure of information in one UK document and in the documents from the [other countries] - even on the same strict terms and conditions - in the face of the clear refusal or lack of clear consent to disclose would cause significant injury to international relations.

[104] The AGC highlights the extent of the injury to international relations, noting that if Canada breaches the bilateral industrial security instruments, foreign countries may refuse to share key information that Canada needs to maintain and improve its defence technologies, as noted in Mr. Pilon's evidence.

[105] The AGC submits that although the information is relevant, given that it was in the record before the decision-maker and is in the CTR, the Court must consider whether the information is significant and whether it would establish a crucial fact (*Ribic* at para 22; *Telbani* at para 77). The AGC submits that the interests at stake are commercial interests, which are not

commensurate with the injury to Canada's national defence and international relations that would result from disclosure.

[106] The AGC further submits that disclosure of the information in the UK documents, for which the UK consents, will be sufficient disclosure to permit Navantia to participate meaningfully in the judicial review.

[107] The AGC seeks an Order authorizing only the disclosure of 21 [redacted] documents on the strict terms and conditions as proposed by the AGC and confirming the prohibition on disclosure of information in all the other documents from the UK, the US, Australia and the Netherlands.

VI. Classified Ex Parte Submissions of the Amicus

[108] The *amicus* submits that PSPC's initial requests to foreign partners inquiring whether they would consent to disclosure did not sufficiently explain the terms and conditions that could be imposed by the Court, including that disclosure would be to security cleared counsel's eyes only and that the Applications for Judicial Review would be conducted in a secure facility *in camera.*

[109] The *amicus* agrees that the second request to foreign partners better explained the section 38 process, including that the determination regarding disclosure would be made by the Court and that terms and conditions could be imposed to mitigate any injury to national defence or international relations. However, the *amicus* submits that foreign partners may still not fully

appreciate the scope of the terms and conditions that would be imposed on even limited disclosure to counsel for Navantia to safeguard the information.

[110] The *amicus* agrees that public disclosure of the information would be injurious to national defence and international relations. However, the *amicus* submits that the public interest in limited disclosure on specific terms and conditions outweighs the public interest in non-disclosure. The *amicus* argues that any injury arising from this disclosure can be mitigated.

[111] The *amicus* proposes terms and conditions (consistent with those proposed by the AGC with respect to the [first country's] information) to permit the redacted information to be disclosed to security cleared counsel in a manner that would alleviate or mitigate the injury to national defence or international relations and permit an effective judicial review. The *amicus* submits that the proposed terms and conditions would address the concerns of the foreign governments, which relate to public access to the information (which is not contemplated), the need for security clearances and a secure environment. The *amicus* notes that the information at issue is classified at the "secret" level (not TOP Secret) and that counsel for Navantia have security clearances to access secret information.

[112] The *amicus* adds that the redacted information is highly technical and all the supporting data is needed to inform the issues that Navantia seeks to raise on judicial review.

[113] The *amicus* submits that the lack of consent by [one or more countries] (relating to T-585-19) is not determinative, but rather is a factor to be considered.

[114] The *amicus* does not regard [the second country's] response as [redacted], but rather as acknowledging the role of the Court and that any injury can be mitigated or avoided by the imposition of terms and conditions. The *amicus* notes that the extensive terms and conditions proposed by [this country] mirror those proposed by the AGC and also reflect how [this country] would address the protection of such information within their own legislative regime.

[115] The *amicus* additionally proposes that Counsel for Navantia be permitted to retain an expert due to the nature of the information.

VII. The Section 38 Determination

A. *The Test, adapted*

[116] The test to be applied by the Court in determining whether the prohibition on disclosure of the information identified by the AGC in the documents at issue should be confirmed or whether disclosure should be authorized, in full or in part and/or made subject to certain terms and conditions, was established by the Federal Court of Appeal in *Ribic* and reiterated in many subsequent cases (e.g. *Khawaja v Canada (Attorney General)*, 2007 FCA 388, at para 8, [*Khawaja*]). The three-part test asks, first, whether the information in question is relevant to the proceeding in which disclosure is sought. If not, the prohibition on disclosure remains. If yes, then the second part of the test asks whether the information in question is injurious to national security, national defence, or international relations. If not, the information may be disclosed

(i.e., there is no prohibition on disclosure). If the information is both relevant and injurious, the third part of the test calls for a balancing by the Court to determine whether the public interest in disclosure of the information outweighs the public interest in prohibiting disclosure of the information.

[117] There is no dispute that the redacted information is relevant to the Applications for Judicial Review; the threshold to establish relevance is low.

[118] The AGC has also established, through its public and classified *ex parte* affidavits, affiants' testimony and submissions that the public disclosure of the redacted information would be injurious to national defence and/or international relations. Navantia and the *amicus* do not dispute the injury arising from public disclosure.

[119] The AGC argues that even restricted disclosure on the strict terms and conditions proposed – without the consent of the respective foreign governments – will be injurious to international relations given the longstanding relationships between the countries and the adherence to the bilateral agreements, and will also be injurious to national defence given the nature of the information, including that it would reveal details of the performance of models of vessels that would be disclosed.

[120] Navantia and the *amicus* dispute that any injury would arise from the restricted disclosure on the terms and conditions proposed.

[121] The Court's determination of the Section 38 Application is focussed on the third step of the *Ribic* test – the balancing. The Court has applied the *Ribic* test bearing in mind that the public disclosure of the information at issue was never contemplated. In other section 38 applications, the Court would consider the imposition of terms and conditions to mitigate the injury after determining that the public interest in disclosure to the public outweighed the public interest in non disclosure. In this case, the Court must balance the public interest in restricted disclosure against the public interest in non-disclosure and whether the terms and conditions will address the injury arising from that restricted disclosure.

[122] The balancing exercise is guided by the consideration of several factors established in the jurisprudence (e.g. *Khan v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4032 (FC), [1996] 2 FC 316 (TD), (1996) 1 FTR 81 [*Khan*] at para 26; *Khawaja* at paras 74 and 93; *Tursunbayev*, at para 89) as fitting the circumstances. The relevant factors include;

- The extent of the injury arising from disclosure;
- Whether the information will probably establish a crucial fact (i.e., whether the information sought is of significant relevance or importance on judicial review);
- The seriousness of the issues;
- Whether there is any other reasonable way for Navantia to obtain the information;
- The importance of the open court principle; and,
- Whether there are higher interests at stake. (Navantia submits that the public scrutiny of procurement decisions is a higher interest and that effective judicial review requires further disclosure.)

B. *Injury to National Defence*

[123] Mr. Ellington explained how disclosure of the redacted information would be injurious to national defence given that the information in several of the documents at issue would reveal the performance details and capabilities of the CSC vessels to be built. He explained that disclosure of this information would enable hostile forces to take countermeasures, which would compromise military operations in support of Canadian interests. The Court notes, however, that Mr. Ellington's concerns were based on the impact of public disclosure of the information at issue.

[124] The Court also notes that the [redacted] documents, [redacted] which pertain to T-443-19, are of the nature described by Mr. Ellington, yet [a country] has consented to their disclosure ([redacted]) on specific terms and conditions.

[125] The disclosure of the information in [these] documents upon strict terms and conditions reflects the flexibility in section 38, as noted by the Supreme Court of Canada in *R v Ahmad*, 2011 SCC 6 at para 44; the injury to national defence from disclosure that would otherwise result will be alleviated or greatly mitigated and the injury to international relations will be mitigated by the consent of [the country] contingent on the Court's imposition of terms and conditions.

C. *Injury to International Relations*

[126] With respect to the information in the documents from Australia, the US and the Netherlands (all of which relate to T- 585-19), the balancing focuses on the injury to

international relations arising from disclosure in the face of their non-consent (even on strict terms and conditions), the significance of the redacted information and/or whether the redacted information will establish a crucial fact, and whether judicial review can be effective without disclosure of this information to Navantia.

[127] In *Tursenbayev*, at paras 73-86, Justice Noël addressed the scope of "international relations" and what may constitute injury, noting that there is no legislative definition. Justice Noël cited Almalki, at paras 79-80, where the Court described the concept as being linked to both the impact of disclosure of such information on Canada's relations abroad and the importance of frank exchanges between diplomats.

[128] Justice Noël stated at para 78:

> [78] It follows that international relations encompass the exchange of information between foreign nations and the ability to conduct such exchanges in an atmosphere of trust to ensure the information is as complete and accurate as possible. Releasing such information could compromise or impair the trust of not only the nation to whom it relates, but of other foreign nations as well. Canada benefits tremendously from these exchanges and it must maintain the trust of all foreign nations to continue to benefit from those. In addition, for international negotiations to be effective, government officials must be able to report that information and their opinion within the Government of Canada in a candid manner without fear that it will be made public.

[129] Justice Noel clarified, at para 81 that "only information that would be injurious to Canada's international relations if disclosed can be redacted". Justice Noel added a caution, at

para 82, that designated judges "must test the redactions, with the assistance of the amicus, to ensure the redactions are justified, i.e., that disclosure of the information would be injurious."

[130] In this Section 38 Application, the focus is not on whether the disclosure of specific information, currently redacted, would be injurious to international relations, but rather whether the disclosure of the information originating from [some countries], which was shared pursuant to the bilateral agreements, would be injurious to Canada's international relations. In any event, the Court has reviewed the redactions, as has the *amicus.*

[131] The AGC's affiant, Mr. Pilon, explained that the reciprocal exchange of sensitive information in a procurement process depends on cooperation between countries, which requires that the countries protect sensitive information from disclosure. Mr. Pilon described the negative consequences of any breach of confidentiality on Canada's ability to access essential information from its partners including that they would likely be reluctant to provide sensitive information in the future if Canada were not able to protect it.

D. *The Terms and Conditions do not sufficiently mitigate the injury to international relations in the absence of consent to disclosure*

[132] The imposition of terms and conditions (which among other things restrict disclosure to security cleared counsel and a security cleared expert) would mitigate any injury to national defence from disclosure but would not necessarily mitigate the injury to international relations given the refusals to consent to disclosure from [one country] , citing national security concerns, despite understanding the potential scope of the terms and conditions, and the outright refusal

from [another country], also citing national security concerns, and from [yet, another country] with respect to one document. The [redacted] must be interpreted as their refusal to consent.

[133] Although [the second country, as referred to above] acknowledges that the Court has the authority to determine whether to permit disclosure of the information in [their] documents and appears to understand the Section 38 regime, given their [response, the second country's] primary position remains that their information should not be disclosed without their consent. While the injury to national defence or national security from limited restricted disclosure on strict terms and conditions would be mitigated, the injury to international relations remains given that [the country] does not consent.

[134] In addition, the disclosure of [particular] documents would disclose [other] information, for which [another country] has not consented.

[135] The Court finds that, without the consent of foreign partners to disclose their information, the disclosure - even on strict terms and conditions - would be injurious to international relations. The Court is persuaded, based on the evidence of the AGC's affiants, that disclosure would breach the bilateral agreements and would have a negative impact on current and future international relations.

[136] Although Navantia submits that the information received to date in redacted form (an extensive CTR) establishes a *prima facie* case, Navantia argues that they need more information

to confirm their allegations and to ensure that judicial review is effective. The *amicus* also argues that more disclosure to Navantia is needed.

[137] The Court is not persuaded that the Applications for Judicial Review will not be effective without the disclosure of all the redacted information.

[138] With respect to the Application for Judicial Review in T-443-19, given that the [country] has consented to disclose the redacted information in [21 documents] on strict terms and conditions, Navantia will obtain a completely unredacted CTR (with the exception of one document). There will be no impediment to Navantia arising from non- disclosure of information on their Application for Judicial Review in T-443-19.

[139] With respect to the Application for Judicial Review in T-585-19, Navantia has received an extensive CTR, with redactions to parts of 26 documents in that CTR. Navantia explained that this information relates to G2G protocols, which Navantia submits impeded their ability to respond to issues raised in the evaluation of their bid. Navantia asserted that Navantia required this information for their bid, yet Canada failed to request the information from other countries in accordance with the G2G protocol. However, as the AGC noted, Navantia agreed to the protocol and was aware of how to make the request for this information.

[140] The Court is not persuaded that the information Navantia seeks to support these allegations would be found in the documents from [other countries] because Navantia's allegation relates to Canada's conduct. The Court is also not persuaded that the

disclosure of the information from [those other countries] has significant relevance to their allegations.

[141] With respect to Navantia's submission that all information is needed to address the reasonableness of the decision, the Court notes that the Designated Judge, who will hear both Applications for Judicial Review, will have access to all the information in unredacted form. The Court acknowledges Navantia's concern that, due to the specialized nature of the information, it may not resonate with the Designated Judge without tailored submissions from counsel to explain the significance of the information. The Court has also considered that counsel for Navantia and their expert's lack of access to the redacted information may limit their ability to put the information into context; however, this factor is not determinative of the Section 38 Application. As noted, Navantia has an extensive CTR for both Applications, despite the redactions.

[142] Navantia's concerns may underestimate the ability of the Designated Judge to determine the Applications for Judicial Review applying administrative law principles, which focus on reasonableness and the assessment of allegations of procedural unfairness.

VIII. Conclusion

[143] The information in 21 documents from the [country] for which the [country] consents to disclosure on strict terms and conditions is not prohibited from disclosure (i.e., disclosure is authorised pursuant to subsection 38.06(2) of the CEA).

[144] With respect to [redacted] document AGC 0098, for which [redacted] does not consent to disclose, the Court has reviewed the information and concludes that its disclosure—even on the same strict terms and conditions—would be injurious to international relations. A useful non-injurious summary is not feasible. The summary proposed by the *amicus* would reveal the nature of the information and would not sufficiently mitigate the injury from disclosure. The summary proposed by the AGC, although generic, ("*The redacted information is not relevant to the issues on the judicial review*"), is based on the AGC's assessment and tells Navantia nothing about the document.

[145] The Court confirms the prohibition on disclosure of the information in [redacted] [27 documents] pursuant to subsection 38.06 (3) of the CEA. The disclosure of this information without the clear consent of these countries would be injurious to Canada's international relations with these countries and with other countries who have bilateral agreements with Canada. The imposition of terms and conditions would not mitigate the injury to international relations. Disclosure of the information would result in, among other impacts, a lack of trust in Canada's ability to protect information shared pursuant to the bilateral agreements and would negatively affect the reciprocal sharing of information.

[146] In the balancing of interests, the Court finds that the extent of the injury to international relations arising from the breach of the bilateral agreements and the impact on long-standing relationships between Canada and its foreign partners in the procurement context, which rely on confidentiality, is not outweighed by the other relevant factors, including the open court

principle. The Court is not persuaded that the redacted information will establish a crucial fact or that the Applications for Judicial Review (in particular, T- 585-19) will not be effective in scrutinizing procurement decisions if the information at issue is not disclosed. As noted, the judge hearing both Applications for Judicial Review will be able to determine the reasonableness of the decisions (i.e., whether the decisions are justified, transparent and intelligible) and whether the decisions were made in a procedurally fair manner.

[147] As noted, Navantia will be provided with [redacted] [21] documents ([redacted]). The Court agrees that Navantia may retain one expert on the same terms and conditions that apply to the disclosure of [these] documents to assist Navantia. The expert may also assist with respect to the already disclosed information (although the Court's approval is unnecessary with respect to the information already disclosed) and this may further assist Navantia in advancing their arguments with respect to undisclosed information and illuminating its relevance to the Designated Judge.

ORDER in DES-1-21

THIS COURT ORDERS that:

A. Information in the [21 documents], may be disclosed on the terms and conditions noted below [Authorized Documents]. The prohibition on disclosure of all other documents is confirmed [Prohibited Documents].

B. The Attorney General of Canada and the *amicus* shall advise the Court of the need for any redactions to be made to this Order within 20 days, following which the Order will be provided to all parties and made public.

Part I – Authorized Documents

1. Pursuant to subsection 38.06(2) of the CEA, disclosure of un-redacted versions of the documents in **Appendix "A"** (the "**Authorized Documents**") to the lawyers of record for Navantia, Lockheed Martin Canada, and Irving Shipbuilding Inc. (collectively, the "**Private Parties**") in the Federal Court proceedings, T-443-19 and T-585-19 (the "**Underlying Proceedings**"), and to one expert retained by the lawyers of record for Navantia to assist them in their preparations for the proceedings [the expert], is hereby authorized subject to the conditions set out this Order.

2. Before receiving disclosure of the Authorized Documents, each lawyer of record representing a Private party in the Underlying Proceedings and the expert retained by Navantia shall obtain and maintain a SECRET security clearance and FACILITIES SECURITY CLEARANCE

from the Government of Canada and file a copy of the security clearances with the Court. Notwithstanding any term of this Order, all handling, storage, and access requirements of any security policy or program of Canada, including the Policy on Government Security and Contract Security Program, applies to all documents, including the Authorized Documents, which are classified as being subject to such restrictions.

3. Before receiving disclosure of the Authorized Documents, each lawyer of record for a Private Party and the expert retained by Navantia assisting in the Underlying Proceedings shall file a written undertaking with Court that he or she:

    a. Shall use the Authorized Documents and any information derived therefrom under the conditions of this Order exclusively for duties performed in respect of the Underlying Proceedings and no other purpose whatsoever;

    b. Shall keep confidential and not disclose the Authorized Documents, or any information derived therefrom, to any person except for the lawyers of record for the AGC or other lawyers of record assisting in the Underlying Proceedings or the expert retained by Navantia who have filed this undertaking;

    c. Shall not permit the Authorized Documents, or any other documents where information is extracted from the Authorized Documents, to be reproduced in whole or in part except as for the purposes of making submissions to the Court with respect to the Underlying

Proceedings under the condition that they be destroyed in accordance with paragraph 3e below;

d. Shall keep confidential and protect the information disclosed under the conditions of the undertaking in the following manner:

i. Shall store the Authorized Documents, and any information derived therefrom, in a locked vault, safe, or other secure storage device when these documents and/or electronic media are not being used;

ii. Shall store electronic versions of the Authorized Documents, and any information therefrom, on a separate hard-drive or server that is accessible only to lawyers assisting in the Underlying Proceedings and the expert retained by Navantia who have filed an undertaking with the Court (e.g., no third-party cloud service providers);

iii. Shall retain the hard copies of the Authorized Documents or any electronic media containing the Authorized Documents until the appeal period is exhausted; and

iv. Where provided with electronic media containing the Authorized Documents, shall not divulge any access passwords.

e. Shall destroy the Authorized Documents, and any documents which information is extracted therefrom, and file a certificate of their destruction, or deliver the material as ordered by the Court, when the materials are no longer required for the Underlying Proceedings or if he or she ceases to be a lawyer of record for a Private Party assisting in the Underlying Proceedings or ceases to be the expert retained by Navantia.

For greater certainty, this undertaking constitutes an obligation under this Order.

4. Pursuant to subsection 38.06(2) of the CEA, disclosure of the Authorized Documents to the Designated Federal Court judge presiding over the Underlying Proceedings is hereby authorized on the terms set out in this Order.

5. Provided that the Designated Federal Court judge presiding over the Underlying Proceedings agrees to receive the Authorized Documents in accordance with this Order, the Authorized Documents, and any documents with information derived therefrom, that a lawyer of record for any party seeks to submit to the Federal Court in the Underlying Proceedings for any reason, either voluntarily or pursuant to an Order, shall be filed with the Designated Registry of the Federal Court in double-sealed envelopes, and in accordance with any other procedures as required by the Designated Registry. The external envelope shall be prominently marked with the following notice:

SECRET

This envelope contains SECRET classified information protected pursuant to the Order of the Federal Court, dated……, 2024, and shall not be opened except in accordance with the terms of the said Order or upon

further Order of the Court, and all such sealed envelopes shall not be opened except by the Court and its staff.

6. In addition, provided that the Designated Federal Court judge presiding over the Underlying Proceeding agrees to receive the Authorized Documents in accordance with this Order, the Authorized Documents, and any documents with information derived therefrom, shall be marked on each page prominently with the following notice:

SECRET

Subject to Order of the Federal Court dated ……, 2024

7. The lawyers of record are prohibited from disclosing, using, or referencing the Authorized Documents or information derived therefrom in a public hearing conducted in the Underlying Proceedings. If a lawyer of record for any party wishes to disclose, use, or reference the Authorized Documents, or any information derived therefrom, for the purposes of a hearing, the lawyer of record shall bring this Order to the attention of the Designated Federal Court judge presiding at the hearing and ask that the hearing proceed in person, in a secure courtroom not open to the public, and *in camera*, excluding every person from the courtroom except the lawyers of record and the expert retained by Navantia (if necessary) (who have filed a security clearance and an undertaking in accordance with paragraphs 2 and 3 above), the Designated Federal Court judge presiding over the hearing, and Court staff.

8. Nothing in this Order restricts the Government of Canada (including Public Services and Procurement Canada, the Canadian Armed Forces, the Department of National Defence), Irving Shipbuilding Inc., and/or Lockheed Martin Canada Inc. from having access to or use of

the Authorized Documents, or information derived therefrom, in accordance with any rights and obligations they may otherwise have at law.

9. Subject to any further order of this Court, the information of the Underlying Proceedings shall not relieve any of the lawyers of record for a Private Party or the expert retained by Navantia to whom the Authorized Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of the Authorized Documents and information derived therefrom in accordance with this Order and the undertaking at paragraph 3 above.

10. Any lawyer of record for a Private Party to whom disclosure was authorized in accordance with this Order and the expert retained by Navantia, who does not comply with any term of this Order, including the undertaking at paragraph 3 above, shall report the violation to the Court and AGC without delay.

Part II – Prohibited Documents

11. Pursuant to subsection 38.06(3) of the CEA, the prohibition of disclosure of the redacted information in the documents at **Appendix "B"** is hereby confirmed.

12. For greater clarity, the prohibition of disclosure of the redacted information in the documents at **Appendix "B" does not apply to the** Designated Federal Court judge presiding over the Underlying Proceedings.

13. If, before the conclusion of the Underlying Proceedings, Public Services Procurement Canada receives new information from the foreign countries that provided the documents in **Appendix "B"** that is material to the Court's assessment of injury under s. 38 of the CEA, the AGC shall promptly report this new information to the Court.

14. The Court remains seized of this matter until the conclusion of the Underlying Proceedings, including any appeals.

"Catherine M. Kane"

Judge

APPENDIX "A" – AUTHORIZED DOCUMENTS

Count	**AGC No.**	**Title/Description**	**Country of Origin**
1.	AGC0003	[redacted]	[redacted]
2.	AGC0004	[redacted]	[redacted]
3.	AGC0019	[redacted]	[redacted]
4.	AGC0020	[redacted]	[redacted]
5.	AGC0034	[redacted]	[redacted]
6.	AGC0035	[redacted]	[redacted]
7.	AGC0036	[redacted]	[redacted]
8.	AGC0037	[redacted]	[redacted]
9.	AGC0041	[redacted]	[redacted]
10.	AGC0063	[redacted]	[redacted]
11.	AGC0065	[redacted]	[redacted]
12.	AGC0066	[redacted]	[redacted]
13.	AGC0067	[redacted]	[redacted]

14.	AGC0083	[redacted]	[redacted]
15.	AGC0085	[redacted]	[redacted]
16.	AGC0093	[redacted]	[redacted]
17.	AGC0094	[redacted]	[redacted]
18.	AGC0095	[redacted]	[redacted]
19.	AGC0096	[redacted]	[redacted]
20.	AGC0097	[redacted]	[redacted]
21.	AGC0099	[redacted]	[redacted]

APPENDIX "B" – PROHIBITED DOCUMENTS

Count	**AGC No.**	**Title/Description**	**Country of Origin**
1.	AGC0098	[redacted]	[redacted]
2.	AGC0117	[redacted]	[redacted]
3.	AGC0121	[redacted]	[redacted]
4.	AGC0122	[redacted]	[redacted]
5.	AGC0123	[redacted]	[redacted]
6.	AGC0168	[redacted]	[redacted]
7.	AGC0169	[redacted]	[redacted]
8.	AGC0170	[redacted]	[redacted]
9.	AGC0225	[redacted]	[redacted]

10.	AGC0230	[redacted]	[redacted]
11.	AGC0299	[redacted]	[redacted]
12.	AGC0304	[redacted]	[redacted]
13.	AGC0351	[redacted]	[redacted]
14.	AGC0352	[redacted]	[redacted]
15.	AGC0353	[redacted]	[redacted]
16.	AGC0354	[redacted]	[redacted]
17.	AGC0355	[redacted]	[redacted]
18.	AGC0359	[redacted]	[redacted]
19.	AGC0366	[redacted]	[redacted]
20.	AGC0300	[redacted]	[redacted]
21.	AGC0301	[redacted]	[redacted]
22.	AGC0302	[redacted]	[redacted]
23.	AGC0303	[redacted]	[redacted]
24.	AGC0305	[redacted]	[redacted]
25.	AGC0356	[redacted]	[redacted]
26.	AGC0360	[redacted]	[redacted]
27.	AGC0358	[redacted]	[redacted]

~~SECRET~~

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-1-21
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v NAVANTIA S.A., S.M.E. AND LOCKHEED MARTIN CANADA INC. AND IRVING, SHIPBUILDING INC.
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	OCTOBER 25, 2022, NOVEMBER 21-22, 2022, MARCH 23, 2023, OCTOBER 21, 2023
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	JUNE 18, 2024

APPEARANCES:

Nathalie Benoit Andre Seguin Bryce Dillon	FOR THE APPLICANT THE ATTORNEY GENERAL OF CANADA
Frank Metcalf Eric Machum Seamus Ryder	FOR THE RESPONDENT NAVANTIA S.A., S.M.E.
Jenna Anne de Jong Jean-Simon Schoenholz	FOR THE RESPONDENT LOCKHEED MARTIN CANADA INC.
Paul R. Steep Julie K. Parla Robert A. Glasgow	FOR THE RESPONDENT IRVING SHIPBUILDING INC.
Anil Kapoor	*AMICUS CURIAE*

SOLICITORS OF RECORD:

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Norton Rose Fulbright Canada LLP Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT LOCKHEED MARTIN CANADA INC.
McCarthy Tétreault LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT IRVING SHIPBUILDING INC.
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