Federal Court of Appeal | Cour d'appel fédérale

Date: 20210924

Docket: A-468-19

Citation: 2021 FCA 191

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

CANADA (MINISTER OF HEALTH)

Appellant

and

ELANCO CANADA LIMITED

Respondent

Heard by online video conference hosted by the registry on June 22, 2021.

Judgment delivered at Ottawa, Ontario, on September 24, 2021.

PUBLIC REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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PUBLIC REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the Judgment of the Federal Court dated November 19, 2019 (2019 FC 1455) allowing the application of Elanco Canada Limited (Elanco) that it had brought under section 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act).

[2] A third party had requested the records related to Elanco's submissions to Health Canada for approval of a certain veterinary medicine. It would appear that Health Canada proposed to release 166 pages of information. Elanco objected to the disclosure of several parts of the record.

[3] The Federal Court reviewed the types of information that Health Canada cannot disclose under section 20 of the Act and, in each case, agreed with Elanco's position on the information that was exempt from disclosure.

[4] In *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95 (*Canada v. Canada*), this Court acknowledged that there is a debate concerning the role of this Court in reviewing a decision of the Federal Court in an application under section 44 of the Act. On the one hand, do the principles as set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (*Agraira*) apply, *i.e.* does this Court step into the shoes of the Federal Court? Alternatively, does this Court review the decision of the Federal Court applying the standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Housen*), *i.e.* the standard of review for any findings of fact and mixed fact and law made by the Federal Court Judge is palpable and overriding error and the standard of review for any question of law is correctness? The resolution of this debate is at the heart of this appeal.

I. The Judgment issued by the Federal Court

[5] The Judgment issued by the Federal Court is worded too broadly and must be set aside, regardless of the resolution of the issue concerning the role of this Court. In allowing the application for judicial review, the following Judgment was issued by the Federal Court:

> **THIS COURT'S JUDGMENT is that** the judicial review is allowed and I declare that Health Canada's decision to disclose the Records is invalid. Elanco is entitled to costs.

[6] The term "Records" is defined in paragraph 4 of the reasons of the Federal Court Judge:

> [4] […] The records requested by an unknown third party relate to Elanco's submissions to Health Canada for approval of the veterinary medication Fortekor Flavour Tabs in the 2.5 mg, 5 mg, and 20 mg concentrations (Fortekor) (the Records).

[7] As a result, it would appear that the defined term "Records" means all of the records requested by the third party and not just the portion that Elanco submits should not be disclosed. Elanco concedes that there are several portions of the record that are not confidential and that can be disclosed. However, the Judgment, as written, would prohibit Health Canada from disclosing any part of the requested records, including any part that contains information that is not protected from disclosure under section 20 of the Act. Prohibiting the disclosure of all the Records is not in accordance with the Act.

[8] The Judgment dated November 19, 2019 also provides that Elanco is entitled to costs. In the notice of appeal signed by counsel for the Crown on December 16, 2019 and filed on December 18, 2019, the Crown indicated that it was appealing the award of costs. A subsequent order of the Federal Court dated January 17, 2020 stated "Health Canada will pay Elanco Canada Limited costs and disbursements in the all inclusive amount of $12,900.00".

[9] The notice of appeal filed on December 18, 2019 is not an appeal from the Order dated January 17, 2020 specifying the amount of costs that Health Canada must pay. The Crown has not filed a notice of appeal from the Order dated January 17, 2020.

II. Background

[10] An application was made under section 6 of the Act for Health Canada to disclose certain records over which it has control. The records in question were the submissions made by Elanco for approval of Fortekor. The requested information was therefore the third-party information submitted by Elanco to Health Canada. Health Canada notified Elanco of the request and the records that it was proposing to disclose.

[11] Section 20 of the Act provides that certain third-party information that is within the control of a government institution is not to be disclosed:

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record	**20 (1)** Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la

requested under this Part that contains	communication de documents contenant :
(a) trade secrets of a third party;	a) des secrets industriels de tiers;
(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, a third party; or	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(d) 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.

[12] Elanco advised Health Canada that under section 20 of the Act, significant parts of the information were not to be disclosed to the person making the request. Health Canada initially

agreed that parts of the information were exempt from disclosure but, prior to the hearing before the Federal Court, reversed its position.

[13] The Federal Court Judge reviewed the evidence in relation to the application of each paragraph of subsection 20(1) of the Act (other than paragraph (b.1)). In each case, the Federal Court Judge agreed with the position of Elanco and found that the portions of the record that Elanco submitted were exempt from disclosure were not to be disclosed. Elanco's submissions only related to certain information in the 166 pages that Health Canada was proposing to disclose. It would, therefore, appear that the Federal Court Judge intended to only order that Health Canada was not to disclose the information identified by Elanco as exempt from disclosure and not that Health Canada was prohibited from disclosing the entire 166 pages.

III. Sections 44 and 44.1 of the Act

[14] Subsection 44(1) of the Act provides a third party (Elanco in this case) the right to apply to the Federal Court to review the decision of the head of a government institution (Health Canada in this case) to disclose information:

44 (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) to give notice of a decision to disclose a record or a part of a record under this Part may, within 20 days after the notice is given, apply to the Court for a review of the matter.	**44 (1)** Le tiers que le responsable d'une institution fédérale est tenu, en application de l'alinéa 28(1)b), d'aviser de la décision de donner communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

[15] Section 44.1 of the Act, which was added to the Act on June 21, 2019, provides that, for greater certainty, the application under section 44 is to be heard and determined as a new proceeding:

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	**44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

IV. Issue and Standard (or Standards) of Review

[16] An important issue in this case is the standard of review to be applied by this Court in reviewing the decision of the Federal Court (or if applicable, the standards of review). The Crown, in its memorandum, submitted that the decision of the Supreme Court of Canada in *Agraira* applies and, therefore, the role of this Court is to determine whether the Federal Court chose the appropriate standard of review and applied it correctly. Since the matter before the Federal Court was a new proceeding, the Federal Court made its own findings of fact and mixed fact and law. As a result, the Crown submitted that any findings of fact or mixed fact and law made by the Federal Court are to be reviewed on a correctness standard. This would mean that there would only be one standard of review – correctness – for any question of law or fact.

[17] Elanco, in its memorandum of fact and law, did not dispute that the principles as set out in *Agraira* applied in this appeal.

[18] At the hearing of the appeal, it was noted that section 44.1 was added to the Act on June 21, 2019, which was prior to the hearing of the application by the Federal Court on August 20, 2019. Subsequent to the hearing of this appeal, the parties filed additional written submissions on the standard of review. The Crown maintained its position that *Agraira* still applied and, therefore, that any findings of fact or mixed fact and law that were made by the Federal Court Judge are to be reviewed on the standard of correctness.

[19] Elanco, on the other hand, submitted that the principles as set out in *Agraira* do not apply. Rather, the appellate standards of review as set out in *Housen* are the appropriate standards of review. Therefore, the standard of review for any findings of fact and mixed fact and law made by the Federal Court Judge is palpable and overriding error and the standard of review for any question of law is correctness.

[20] The first issue to be resolved in this appeal is what is the appropriate standard (or standards) of review.

[21] Since the Crown had proceeded on the basis that the findings of fact and mixed fact and law are to be reviewed on the correctness standard, if the applicable standard of review for findings of fact or mixed fact and law is palpable and overriding error, then this will resolve most of the issues raised in this appeal.

V. Analysis

A. *The Standards of Review to be Applied in this Appeal*

[22] For the reasons that follow, I do not agree with the position of the Crown that the principles as set out in *Agraira* apply to this Court in this appeal. In my view, the principles as set out in *Housen* apply in this appeal.

[23] The wording of section 44.1 makes it clear that when a party, such as Elanco, makes an application under section 44 of the Act for a review of a decision that certain information should be disclosed, the application is to be heard and determined as a new proceeding. This would mean that the Federal Court judge who is hearing the particular application is not reviewing a decision of the Minister *per se* but rather is making their own determination of whether the exemptions from disclosure as set out in section 20 of the Act are applicable. Any findings of fact or mixed fact and law that would be required to make this determination would be the findings of fact or mixed fact and law made by the Federal Court judge.

[24] Since this is a new proceeding, it is the same as any trial or hearing commenced in the Federal Court where the judge hears the evidence and makes findings of fact. Appeals from such decisions are subject to the appellate standards of review as set out in *Housen*. There is no reason why the findings of fact or mixed fact and law made by the Federal Court Judge in this particular case should be treated any differently than those made in any other matter commenced as a new proceeding in the Federal Court. If factual findings made by the Federal Court Judge are reviewed on the standard of correctness, then, in effect, the appeal to this Court also becomes a

“new proceeding” with this Court making its own findings of fact. However, section 44.1 of the Act only applies to the application to the Federal Court, not to an appeal from the decision of the Federal Court.

[25] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, (*Merck Frosst*) Justice Cromwell, writing on behalf of the majority of the Supreme Court of Canada, addressed the issue of the appropriate standard of review to be applied by this Court in reviewing a decision of the Federal Court on an application under section 44 of the Act:

> [53] There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, 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: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 19; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 22. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure: see, e.g., *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at pp. 265-66; *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2003 FC 1422 (CanLII), at para. 3; *Dagg*, at para. 107. The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.
>
> [54] The 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 v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, at para. 23.

[26] Following the decision in *Merck Frosst*, the Supreme Court released its decision in *Agraira*. The Supreme Court set out the appropriate approach to be adopted by this Court on an appeal from a decision of the Federal Court on an application for judicial review:

> [45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted [by Justice LeBel]).

[27] In *Merck Frosst*, although Justice Deschamps wrote dissenting reasons, she did not disagree with the approach that should be taken by this Court when reviewing a decision by the Federal Court on an application under section 44 of the Act:

> [244] However, in my view, the Federal Court's judgments (2006 FC 1200, 301 F.T.R. 241, and 2006 FC 1201 (CanLII)) do not contain a palpable and overriding

> error that would justify this Court's intervention. I would restore the findings of the Federal Court, subject to any agreements the parties may have concluded since its judgments were rendered.
>
> A. Appellate Review
>
> [245] Although my colleague indicates at para. 54 that appellate review is governed by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, his subsequent analysis does not, in my opinion, comport with the principles established in that case. My colleague agrees with the approach of the Federal Court of Appeal, which found that the reviewing judge had not explained in sufficient detail how he came to his conclusions (2009 FCA 166, 400 N.R. 1). Cromwell J. endorses that court's conclusions despite finding that it both applied the wrong standard of proof and inappropriately characterized the definition of "trade secrets" as a restrictive one.
>
> [246] Turning to the Federal Court's judgments, my colleague faults the reviewing judge for failing "either to state the applicable legal principles or to explain how the legal principles applied to the facts before him or, in some cases, both" (para. 55). I cannot accept the requirements my colleague's approach imposes on trial judges or the message it sends to the legal community. The rule from *Housen* is that an appellate court must defer to a trial judge's findings on questions of fact as well as on questions of mixed fact and law. The standard to be applied on such questions is that of a "palpable and overriding error". Deferring to trial judges' findings where it is appropriate to do so ensures that judicial resources are used efficiently, enhances access to justice and is consistent with the institutional role of the appellate court.

[28] The disagreement in *Merck Frosst* was not with respect to whether *Housen* applied but rather with respect to how the principles enunciated in *Housen* should be applied.

[29] The description of “step[ping] into the shoes’ of the lower court” that was adopted in *Agraira* should be read in the context in which it was made in *Merck Frosst*:

> [247] It must be noted that although the Federal Court is being asked to review an administrative decision, one made by Health Canada in this case, the process is

> atypical in the sense that it differs from the one that applies to the review of most administrative decisions. The latter process - and the question of which standards ought to govern it - has occupied the forefront of administrative law in the past decade. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court sought to bring clarity to this issue in the context of the first level of review. In the "classic" process, appellate review consists in verifying whether the court at the first level of review has correctly applied the standard in reviewing the administrative decision. What this means in practice is that in "step[ping] into the shoes" of the lower court, an appellate court's focus is, in effect, on the *administrative* decision (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14; *Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77, [2005] 3 S.C.R. 645, at para. 30).
>
> [248] There are exceptions to this classic process. Under s. 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*ATIA*"), the appeal court's focus is on the reviewing judge's findings, and the rule from *Housen* applies to *that court's* decision (*Canadian Imperial Bank of Commerce v. Canada (Chief Commissioner, Human Rights Commission)*, 2007 FCA 272, [2008] 2 F.C.R. 509, at paras. 8, 9 and 72; *Rubin v. Canada (Minister of Health)*, 2003 FCA 37, 300 N.R. 179, at paras. 4-5; *Merck Frosst Canada Ltd. v. Canada (Minister of National Health)*, 2002 FCA 35 (CanLII); *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, 2007 FCA 397, 77 Admin. L.R. (4th) 1, at paras. 2, 3 and 7).
>
> […]
>
> [251] In sum, the judge does *not* conduct the kind of review that is usually conducted in an administrative law context. The Federal Court's task, in essence, is to start afresh and assess the issue *de novo*. This is akin to the role of a trial court. For this reason, the appellate court's role is to review the reviewing judge's decision, not that of the Commissioner or the head of the institution. The appellate court's role may be different in instances in which the decision of the head of the institution is discretionary by law, but such instances are irrelevant to the case at bar.
>
> [emphasis added]

[30] When the expression “stepping into the shoes of the lower court” is read in context, it is clear that Justice Deschamps was using this description in relation to the “classic” appeal of a

judicial review decision, and not to an appeal from a decision arising from an application made under section 44 of the Act, which she described as an exception to the "classic process". In adopting Justice Deschamps' description of "stepping into the shoes of the lower court" in *Agraira*, the Supreme Court was adopting it as she intended – in relation to the "classic process", which was the process in *Agraira*.

[31] While there are decisions of this Court that have adopted *Agraira* in deciding appeals from a decision of the Federal Court in relation to an application brought under section 44 of the Act, the most recent such decision is *Canada v. Canada*. In that case, this Court acknowledged that the debate (concerning whether the principles as set out in *Housen* or *Agraira* should apply to an appeal from a decision rendered on an application under section 44 of the Act) would be academic if section 44.1 of the Act was enacted:

> [29] I readily acknowledge that the debate is far from over, and could eventually become academic if Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act* and to make consequential amendments to other Acts, 1st Sess., 42nd Parl., 2017, s. 21 (as passed by the House of Commons on December 6, 2017) comes to be adopted (since a new section 44.1 would provide, "for greater certainty", that an application under sections 41 or 44 will be the subject of a *de novo* review).

[32] In my view, to the extent that there was any dispute with respect to the applicable standard of review to be applied on an appeal from a decision of the Federal Court on an application under section 44 of the Act, the addition of section 44.1 to the Act ends any such debate. The principles as set out in *Housen* are applicable in this appeal.

[33] Therefore, the standard of review for any question of law is correctness and for any question of fact or mixed fact and law is palpable and overriding error.

B. *Application of the Applicable Standards in this Appeal*

[34] In this appeal, the Crown, in paragraph 58 of its memorandum, asserted that the Federal Court Judge made an error of law in only applying one part of the test prescribed for confidentiality under paragraph 20(1)(b) of the Act. However, the immediately following paragraph of the memorandum only addresses the assessment of the evidence focusing on whether the information is in the public domain. None of the remaining paragraphs in the memorandum related to paragraph 20(1)(b) of the Act refer to any missing parts of the test for confidentiality. As a result, the Crown cannot succeed in this appeal based on any alleged error of law in relation to paragraph 20(1)(b) of the Act.

[35] In relation to the exemption under paragraph 20(1)(c) of the Act, the Crown alleged that the Federal Court Judge erred in law by making the presumed identity of the person requesting the information a factor (paragraph 77 of the Crown's memorandum). The reference to a competitor is in paragraph 78 of the reasons of the Federal Court Judge and arises in the context of whether Elanco has established a reasonable expectation of harm if the information is released:

> [78] In the circumstances, I am satisfied based upon Mr. Kahama's evidence, that Elanco has established a reasonable expectation of harm if this information is disclosed. The evidence is that Elanco is an industry leader for this medication. Their investment in research and development is undoubtedly the reason. To

> allow the information [to] be released, presumably to a competitor, would result in financial harm to Elanco.

[36] The reference to the presumption that a competitor was seeking the information was simply an illustration of how harm could result to Elanco if the information is disclosed. I do not agree that this reference to the possible identity of the person seeking the information in this context resulted in error that would warrant our intervention.

[37] The remaining errors identified by the Crown are alleged errors of fact or mixed fact and law. The Crown's arguments in relation to these alleged errors are all based on the assumption that this Court would be reviewing the findings of fact and mixed fact and law on the correctness standard. The Crown does not address the principles that are applicable when factual findings are reviewed on the palpable and overriding error standard.

[38] Since the applicable standards of review are those as set out in *Housen*, findings of fact or mixed fact and law can only be set aside if the Federal Court Judge made a palpable and overriding error. As noted by the Supreme Court in *Hydro-Québec v. Matta*, 2020 SCC 37:

> [33] Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law made by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-37; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77, [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions": quoted in *Benhaim*, at para. 39. The beam in the eye

> metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

[39] In *Salomon v. Matte-Thompson*, 2019 SCC 14 the majority of the Supreme Court noted:

> [33] […] The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38).

[40] The Crown in this case, in essence, is asking this Court to review all of the evidence and reach our own conclusions, which would be necessary if we were to review these findings on the correctness standard. The Supreme Court in *Housen*, in relation to the rationale for an appellate court to show deference to the factual findings made by the trial judge, stated, in part:

> [14] […] The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. <u>As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.</u>
>
> […]
>
> [18] The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.
>
> [emphasis added]

[41] Although only affidavit evidence was introduced at the proceeding before the Federal Court, the Supreme Court in *Housen*, at paragraph 25, emphasized "that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge -- that of palpable and overriding error".

[42] The Supreme Court in *Housen* also noted in paragraph 14 that "appeals are unsuited to reviewing voluminous amounts of evidence" and "appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole".

[43] The role of this Court is not to review all of the evidence presented at the Federal Court hearing and determine whether we would make the same findings of fact or mixed fact and law that were made by the Federal Court Judge. The role of the Crown, as the appellant in this matter, is to demonstrate where the Federal Court Judge made a palpable and overriding error in making a particular finding of fact or mixed fact and law. As noted by this Court in *Liddle v. The Queen*, 2011 FCA 159, in relation to an appeal from the Tax Court of Canada:

> [4] […] In this Court, the onus is on the appellant to demonstrate that the Tax Court judge's factual findings are vitiated by palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. […]

[44] The Crown in this appeal has not demonstrated that the Federal Court Judge made a palpable and overriding error in making her findings of fact or mixed fact and law in relation to the exemptions from disclosure found in paragraphs 20(1)(a), (b) or (c) of the Act as applied to the information identified by the Federal Court Judge.

[45] With respect to paragraph 20(1)(d) of the Act, the Federal Court Judge's analysis of the application of this paragraph is brief. Prior to setting out the positions of the parties, the Federal Court Judge acknowledges, in paragraph 82 of her reasons, that evidence of the effect of disclosure on actual contract negotiations is required:

> [82] The case law indicates that evidence of the possible effect of disclosure on other contracts is generally held to be insufficient to qualify under this exemption. Evidence about the effect on actual contractual negotiations is required […]

[46] In *Canadian Broadcasting Corp. v. National Capital Commission*, 147 F.T.R. 264, [1998] F.C.J. No. 676 (QL), the Federal Court, Trial Division discussed the requirement for evidence with respect to the effect on actual contractual negotiations:

> [29] In *Information Commissioner (Can.) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 665; 35 F.T.R. 177 (T.D.), at pp. 682-683 [F.C.], the court held that s. 20(1)(d) of the *Act* requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the applicant will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems were held to be insufficient to qualify under the exemption. Similar reasons were provided in *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (T.D.), where the court stated that s. 20(1)(d) must refer to an obstruction to negotiations rather than merely the heightening of competition which might flow from disclosure. Finally, in *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)* (1990), 107 N.R. 89 (F.C.A.), the court stated at p. 91 that mere speculation or possibility is insufficient to ground an exemption under s. 20(1)(d). Given the lack of evidence about the effect on actual contractual negotiations, I have no difficulty finding that the applicant has failed to satisfy s. 20(1)(d) of the *Act*.

[47] In making the finding that Elanco had satisfied paragraph 20(1)(d) of the Act with respect to information given to Elanco by its suppliers (the Supplier Information, the Packaging and

Supplier Information, the [redacted] Benazepril Manufacturing Information, and the [redacted] Manufacturing Information), the Federal Court Judge referred to paragraphs 39, 41, 42 and 44 of the reply affidavit of Anthony Kahama. However, these paragraphs only indicate that the particular contracts include confidentiality provisions – they do not refer to any actual contractual negotiations with any suppliers or how disclosure of the information sought to be exempt from disclosure under this paragraph would interfere with contractual or other negotiations of Elanco. The references to these four paragraphs of the reply affidavit of Anthony Kahama cannot support the findings made by the Federal Court Judge in relation to the exemption claimed under paragraph 20(1)(d) of the Act.

[48] As a result, in my view, the Federal Court Judge committed a palpable and overriding error in concluding that Elanco had established that paragraph 20(1)(d) of the Act applied to exempt information based only on paragraphs 39, 41, 42 and 44 of the reply affidavit of Anthony Kahama.

[49] However, it is only necessary that information is found to be exempt from disclosure under any one of the paragraphs of subsection 20(1) of the Act. Since the information was only described in very general terms in the reasons, it may well be that one of the other exemptions would be applicable to some or all of the information that was found to be exempt from disclosure under paragraph 20(1)(d) of the Act.

[50] There is, however, one category of information that is not specifically addressed in the reasons of the Federal Court Judge. In paragraph 8 of her reasons, the Federal Court Judge identifies eight categories of information:

- Concentration Information
- Benazepril Acceptance Criteria
- Solubility of Benazepril Information
- Identity of Suppliers and Contractual Agreements
- Packaging and Storage Information
- Stability Information
- Fortekor Acceptance Criteria
- Yeast Powder Information

[51] An additional four categories were added in paragraph 11 of her reasons:

- Fortekor Manufacturing Information
- Fortekor Palatability Information
- [redacted] Benazepril Manufacturing Information
- [redacted] Benazepril Manufacturing Information

[52] One of the listed categories is “Identity of Suppliers and Contractual Agreements”, which appears to be two separate categories – the names of the suppliers and the contents of the particular agreements with suppliers.

[53] The information that Elanco was seeking to exempt from disclosure under paragraph 20(1)(a) of the Act is set out in paragraph 23 of the reasons and corresponds to the categories of information listed in paragraph 8 of the reasons, other than “Identity of Suppliers and Contractual Agreements”, and to the four additional categories added in paragraph 11 of the reasons.

[54] In paragraph 45 of her reasons, the list of categories of information considered in relation to paragraph 20(1)(b) of the Act includes “Supplier Information”. Paragraph 48 provides an explanation of what the Federal Court Judge considered to be included in “Supplier Information”:

> [48] The Supplier Information details information on Elanco’s confidential commercial relationships with its suppliers and would disclose information regarding the cost of production.

[55] It appears that “Supplier Information” was treated as information concerning the contents of the agreements with suppliers and therefore was intended to refer to the second part of the category identified as “Identity of Suppliers and Contractual Agreements”. It is far from clear that “Supplier Information” was intended to include the “Identity of Suppliers”. There is nothing in the Federal Court Judge’s analysis of the application of paragraph 20(1)(b) of the Act

(paragraphs 63 to 68) that would indicate that “Supplier Information” was intended to include the “Identity of Suppliers”.

[56] None of the subsequent references to “Supplier Information” in the reasons of the Federal Court Judge in relation to the other exemptions under paragraphs 20(1)(c) and (d) of the Act provide any insight with respect to whether “Supplier Information” included the “Identity of Suppliers”. As a result, it appears that whether the “Identity of Suppliers” was exempt from disclosure was not addressed by the Federal Court Judge.

C. *Conclusion on the Application of the Standards of Review*

[57] As a result, in my view, the matter should be remitted back to the Federal Court Judge to determine what information, if any, was only exempt from disclosure under paragraph 20(1)(d) of the Act, and therefore should not have been exempted based only on paragraphs 39, 41, 42 and 44 of the reply affidavit of Anthony Kahama. The matter should also be remitted back to the Federal Court Judge to determine whether the “Identity of Suppliers” is exempt from disclosure.

D. *Severance of Information*

[58] The Crown also raised the issue of the severance of the information that can be disclosed from the information that cannot be disclosed. Section 25 of the Act provides:

25 Notwithstanding any other provision of this Part, where a request	**25** Le responsable d’une institution fédérale, dans les cas où il pourrait,

is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Part by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.	vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente partie pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente partie, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[59] Since, as noted above, the Judgment of the Federal Court purports to exempt the entire 166 pages from disclosure, this is contrary to section 25 of the Act, which requires the disclosure of information that can reasonably be severed from the information that is not to be disclosed. The Federal Court Judge erred by not providing for the disclosure of the parts of the records that are not exempt from disclosure.

VI. Conclusion

[60] As a result, I would allow the appeal and set aside the Judgment rendered by the Federal Court. I would remit this matter to the Federal Court Judge to:

(a) determine what information, if any, was only exempted from disclosure as a result of the application of paragraph 20(1)(d) of the Act;

(b) determine if the "Identity of Suppliers" is exempt from disclosure; and

(c) issue a judgment that requires Health Canada to disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any

information or material that as a result of the decision of the Federal Court is exempt from disclosure under section 20 of the Act.

[61] Allowing this appeal and setting aside the Judgment may, as a result of the decision of this Court in *The Queen v. MacDonald*, 2021 FCA 6, render the Order dated January 17, 2020, fixing costs in the amount of $12,900, a nullity. The Federal Court should therefore address the issue of costs in its judgment that will be rendered.

[62] Elanco is entitled to its costs in relation to this appeal.

"Wyman W. Webb"
J.A.

"I agree
D. G. Near J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT AND AN ORDER OF THE FEDERAL COURT DATED NOVEMBER 19, 2019 (CITATION NO. 2019 FC 1455) DOCKET NO. T-2092-17

DOCKET:	A-468-19
STYLE OF CAUSE:	CANADA (MINISTER OF HEALTH) v. ELANCO CANADA LIMITED
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JUNE 22, 2021
PUBLIC REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. LASKIN J.A.
DATED:	SEPTEMBER 24, 2021

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