Federal Court  Cour fédérale

Date: 20160504

Docket: T-1156-15

Citation: 2016 FC 493

Ottawa, Ontario, May 4, 2016

PRESENT: The Honourable Madam Justice Mactavish

IN THE MATTER OF THE CANADA EVIDENCE ACT AND IN THE MATTER OF AN OBJECTION PURSUANT TO SECTION 37 OF THE CANADA EVIDENCE ACT

BETWEEN:

ZHENUA WANG & CHUNXIANG YAN

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE ATTORNEY GENERAL OF CANADA

Respondents

PUBLIC ORDER AND REASONS

[1] The applicants are Chinese citizens who are seeking refugee protection in Canada, asserting that they are at risk of persecution in China because of their Christian religious faith. The applicants further claim to have a well-founded fear of persecution at the hands of the

Chinese authorities, who, the applicants say, have unjustly accused them of participating in a large-scale Ponzi-type fraud involving millions of dollars and thousands of Chinese victims.

[2] The applicants claim that they are the victims of a fraud that has been perpetrated against them by their former associates Xi "Jessica" Chen and Chileung "Louis" Szeto. According to the applicants, Chen and Szeto initially offered to assist them in obtaining status in Canada, and later became involved in several business ventures with the applicants. The applicants claim that Chen and Szeto then cheated them out of millions of dollars which the applicants have endeavoured to recover by commencing a civil action against Chen and Szeto in the Superior Court of Ontario. The applicants also reported Chen and Szeto's alleged criminal activity to the York Regional Police. The applicants allege that in retaliation, Chen and Szeto then reported the applicants to the Canada Border Service Agency, the American Department of Homeland Security, and citizenship and immigration authorities in the Dominican Republic.

[3] The Minister of Public Safety and Emergency Preparedness has intervened in the applicants' refugee hearing, seeking to have the applicants excluded from the protection of the *Refugee Convention*. In so doing, the Minister is relying, in part, on information obtained from Chen and Szeto.

[4] The Refugee Protection Division of the Immigration and Refugee Board has now held 22 days of hearings in relation to the applicants' refugee claims, and the case is not yet complete.

[5] On July 8, 2015, the last day of hearings, the presiding member ordered the Minister to produce "… all documentation from China, from York Regional Police and all documentation emanating from Chen and Szeto related to the issues in this application …".

[6] The Minister has objected to producing certain documents and videotapes to the applicants in accordance with the Board's July 8, 2015 order, arguing that this material is protected by a specified public interest privilege under section 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The Minister claims that the disclosure of the documents and videos in question would compromise one or more ongoing investigation(s) being carried out by the Canada Border Services Agency.

[7] In response, the applicants have commenced this application, seeking, amongst other things, to have this Court determine the validity of the Minister's privilege claim.

[8] As will be explained below, I have concluded that many of the documents that the Minister has produced in relation to its claim of public interest privilege are not in fact within the scope of the Board's production order and thus need not be produced. I have, moreover, determined that certain other documents are indeed protected by public interest privilege and need not be produced as their disclosure would indeed compromise one or more ongoing investigation(s), and that the balance of relevant considerations favours the Minister. It has not, however, been demonstrated that the remaining documents over which the Minister claims public interest privilege are properly protected by section 37 of the *Canada Evidence Act*, and their disclosure to the applicants will accordingly be ordered.

[9] Finally, I am satisfied that the videotapes of the interviews of Chen and Szeto that were conducted by the York Regional Police should be produced to the applicants, with only very minor redactions.

I. The Format of These Reasons

[10] Before considering the substance of the section 37 issues, I would start by noting that in the interest of transparency, I have elected to prepare a single set of reasons rather than separate public and confidential reasons, as is sometimes done in such cases. The body of these reasons will be provided to the applicants and their counsel, and will be included in the public record. Where it is necessary to discuss specific documents or matters from the *in camera* hearings, I will do so in footnotes, the content of which will be redacted from the reasons before my decision is made public. My reasons will otherwise be identical in their public and confidential forms.

II. Procedural Background

[11] The applicants first came to Canada on September 30, 2012. They were arrested on March 7, 2014, and were held in immigration detention until their release under house arrest in November of 2015. The reason for their detention was the concern that they were flight risks and fugitives from justice.

[12] The applicants applied for refugee protection in July of 2014. As was noted earlier, the applicants claim to have a well-founded fear of persecution at the hands of the Chinese authorities based upon their religious faith and their alleged participation in a large-scale fraud – something that the applicants vehemently deny.

[13] In September of 2014, the Minister gave notice of his intent to intervene in the applicants' application for refugee protection, alleging that the applicants should be excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Notice alleges that the applicants had committed serious non-political

crimes before coming to Canada. The Minister's Notice also raised concerns with respect to the applicants' credibility. The Minister subsequently amended his Notice of Intent to Intervene on July 21, 2015, adding additional grounds of exclusion.

[14] As stated in the Minister's Amended Notice of Intent to Intervene, Zenhua Wang is alleged to have illegally obtained and used a Chinese passport in the name of Changzhi Xie, and to have fraudulently represented himself as Changzhi Xie for the purposes of executing a business transaction in the Bahamas. It is further alleged that Mr. Wang served as a member of the Board of Directors of Inzon Corporation, a Nevada company, while holding an ownership stake in the corporation under the name Chang Zhi Xie According to the Minister's Amended Notice, this violated Nevada law.

[15] The Minister asserts that Mr. Wang's actions constitute the offences of False Pretense and Other Fraud pursuant to the Bahama Penal Code Section 58, 59, 60 and 62, as well as offences under sections 205.380 and 205.095 of the Nevada Criminal Code, namely Obtaining Money, Property, Rent or Labor by False Pretense and Other Acts Constituting Forgery. Had these offences been committed in Canada, the Minister says that these acts would constitute serious criminal offences under the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, specifically Section 362(1)(a) False Pretense or False Statement, an offence that is punishable by a term of imprisonment not exceeding ten years. The Minister further asserts that Mr. Wang has committed offences contrary to sections 366(1), 366(2), and 368(1)(a) of the *Criminal Code*, namely Forgery, Making False Document, and the Use, Trafficking or Possession of Forged Document, all of which are offence that are also punishable by a term of imprisonment not exceeding ten years. Finally, it is alleged that Mr. Wang has committed offences contrary to

Section 57(1) of the *Criminal Code*, namely Forgery of or Uttering Forged Passport, an offence that is punishable by a term of imprisonment not to exceed 14 years.

[16] The Minister asserts that Chunxiang Yan (who is Mr. Wang's wife), also holds Chinese passports in two different names - Fen Yan (which the Chinese authorities believe to be her real identity) and Chunxiang Yan, an identity that was allegedly obtained illegally. The Minister asserts that these actions constitute the offences of Obtaining a Passport in a False Name and Use of a Passport in a False Name that, if committed in Canada, would constitute serious criminal offences under sections 366(2) and 368(1)(a) of the *Criminal Code*, being offences that are punishable by terms of imprisonment not exceeding ten years.

[17] The Minister further alleges that the applicants should also be excluded from refugee protection under Article 1E of the *Refugee Convention* and section 98 of *IRPA* because they enjoy permanent resident status in Malaysia, and because there is, moreover, a safe country of reference for the applicants as they are citizens of the Dominican Republic, in addition to being Chinese citizens.

[18] The Board determined early on in the proceedings that the applicants' refugee hearings should be bifurcated: that is, the Board would deal first with the issue of exclusion, and then, if necessary, would consider the issue of inclusion. The circumstances surrounding the applicants' becoming citizens of the Dominican Republic is thus relevant to the issue of exclusion, in addition to their alleged criminality in China.

[19] The Minister filed 13 volumes of evidence at the applicants' refugee hearing. These documents contain numerous references to Chen and Szeto and to the relationship between the

applicants and these two individuals. Amongst other things, the Minister has disclosed documents and videotapes emanating from the York Regional Police and the CBSA relating to criminal complaints made by the applicants against Chen and Szeto, as well as a complaint that the applicants submitted to the Chinese Embassy with respect to Chen and Szeto. The Minister has also produced numerous documents relating to the civil action that the applicants have commenced against Chen and Szeto in the Ontario Superior Court of Justice.

[20] The applicants brought several motions during their refugee hearing seeking disclosure of various types of information from the Minister. Most of these motions were not ruled on, and they appear to have been held in abeyance.

[21] Mr. Wang has thus far been examined by the Minister's representative over a period of nine days. During the hearing, Mr. Wang was questioned extensively regarding his and Ms. Yan's business relationship with Chen and Szeto and their involvement in the applicants' immigration matters, including their involvement in obtaining Dominican Republic passports for the applicants. Mr. Wang has also been examined at length regarding his own involvement with a number of companies including Hong Kong Yingxin in Hong Kong, Mixculture Tourism in Canada, Inzon in the United States, and Mixculture Capital in the Bahamas. The Minister's representative also questioned Mr. Wang about his complaint to the York Regional Police regarding Chen and Szeto and about the applicants' civil action against Chen and Szeto.

[22] Ms. Yan has thus far been examined over some four and a half days, and her examination is ongoing. Ms. Yan has been questioned extensively by the Minister's representative with respect to her relationship with Chen and Szeto, their role in obtaining Dominican Republic

passports for Ms. Yan and her husband, the applicants' civil action against Chen and Szeto, and Chen and Szeto's involvement in the applicants' companies.

[23] In June of 2015, it became apparent to the applicants that the Minister had documents that had been obtained from the York Regional Police with respect to the applicants and Chen and Szeto, as well as documents that had been obtained from Chen and Szeto directly, all of which had not previously been disclosed to the applicants. Consequently, the applicants renewed their motion for disclosure, seeking disclosure of all of the evidence that was in the possession of the Minister emanating from Chen and Szeto, as well as evidence obtained from the York Regional Police and the Chinese authorities.

[24] The Minister responded by informing the Board that Chen and Szeto are currently under investigation by the CBSA, and that the existence of this investigation had not yet been made public. As a result, the Minister stated that if applicants' motion for disclosure was granted, he would object to the disclosure of any evidence relating to Chen and Szeto pursuant to section 37 of the *Canada Evidence Act*.

[25] It is notable that while the Minister's representative took the position before the Board that publicly disclosing the existence of the CBSA's investigation into Chen and Szeto would compromise that investigation, this information is contained in the record that was filed by the applicants in this matter. The Minister did not seek a confidentiality order protecting this information from public disclosure, with the result that the existence of the investigation into Chen and Szeto is now a matter of public record.

[26] The Board granted the applicants' disclosure motion on July 8, 2015, ordering the Minister to produce "… all documentation from China, from York Regional Police and all documentation emanating from Chen and Szeto related to the issues in this application …". At a case management conference held the following day, the Board further ordered that the applicants' refugee hearing would not resume until such time as the section 37 issues were resolved.

[27] Pursuant to subsection 37(1) of the *Canada Evidence Act*, the Minister subsequently produced a Certificate from Linda Robertson, an Assistant Director with the CBSA, in which Ms. Robertson certifies that the evidence the Minister seeks to withhold is information respecting one or more ongoing investigation(s) into one or more person(s), the disclosure of which could compromise such investigations.

[28] Ms. Robertson further asserted that the disclosure of the evidence in question could undermine CBSA's ability to take enforcement action against the subject or subjects of the ongoing investigation(s), in that it could lead to evidence being destroyed or cause the subject or subjects to flee. As a result, Ms. Robertson certified that the disclosure of any portion of the evidence in question would be injurious to a specified public interest under section 37 of the *Canada Evidence Act*.

[29] Ms. Robertson also certified that the Minister does not intend to rely on the evidence in question to support his claim that the applicants should be excluded from the protection of the *Refugee Convention*. This position was maintained in the Minister's Amended Notice of Intent to Intervene.

[30] Ms. Robertson had not, however, reviewed the applicants' file before certifying that it would be injurious to one or more investigation(s) if the material in issue was disclosed to them. Nor did Ms. Robertson have any knowledge of the issues that were raised in the applicants' case, beyond what was stated in the Minister's Notice of Intent to Intervene. Indeed, she was not even clear as to the basis for the Minister's intervention, as her affidavit indicates that the Minister was intervening in the applicants' refugee hearing on the ground of "misrepresentation", a patently inaccurate position that was subsequently maintained in her cross-examination.

[31] The applicants have brought this application in which they seek a determination that the Minister's objection pursuant to section 37 of the *Canada Evidence Act* is not sustainable, and an order directing the Minister to disclose un-redacted versions of the evidence in question forthwith. In the alternative, the applicants seek an order providing them with fulsome summaries of the withheld information or admissions of facts. In the further alternative, the applicants seek an order declaring that the respondents' objection is an abuse of process, and an order directing the respondents to provide the applicants with the evidence in question.

III. The Applicable Legal Framework

[32] Before turning to consider the merits of the applicants' application, it is important to identify the legal principles that govern the assessment of objections under section 37 of the *Canada Evidence Act*.

[33] Section 37 of the *Canada Evidence Act* permits a Minister of the Crown to object to the disclosure of information by certifying orally or in writing that the information should not be disclosed on the grounds of a specified public interest such as prejudice to an ongoing investigation: subsection 37(1).

[34] Pursuant to subsection 37(4.1) of the Act, a Court may order the disclosure of the information in question unless the Court determines that such disclosure would encroach upon a specified public interest. If disclosure of the information in question would not encroach on a specified public interest, then the Court may order disclosure: *Goguen v. Gibson*, [1983] 1 F.C. 872.

[35] In so doing, the Court must guard against reliance on "… generalized assertions of possible disadvantage to an ongoing investigation …": *R. v. Toronto Star Newspapers Ltd.*, (2005), 204 C.C.C. (3d) 397 at para. 15, [2005] O.J. No. 5533 (S.C.J.). Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation.

[36] If the Court is satisfied that disclosure of the evidence in question would indeed encroach on a specified public interest, it must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure: subsection 37(5), *R. v. Richards* (1997) 34 O.R. (3d) 244 at 248-249, 100 O.A.C. 215 (C.A.). If it is determined that the public interest in disclosure outweighs the public interest in protecting an ongoing investigation, then the Court may order the disclosure of all, part, or summaries of the information in question and may impose any conditions on that disclosure that the Court considers appropriate.

[37] In carrying out this balancing exercise, Justice Rothstein noted in *Khan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 316, 110 F.T.R. 81 at paragraph 25, that the following factors should be considered:

> (a) the nature of the public interest sought to be protected by confidentiality […];

> (b) whether the evidence in question will "probably establish a fact crucial to the defence" […];
>
> (c) the seriousness of the charge or issues involved […];
>
> (d) the admissibility of the documentation and the usefulness of it […];
>
> (e) whether the applicants have established that there are no other reasonable ways of obtaining the information […]; and
>
> (f) whether the disclosures sought amount to general discovery or a fishing expedition."
>
> [citations omitted throughout]

See also *Canada (Attorney General) v. Tepper*, 2016 FC 307 at para. 15, [2016] F.C.J. No. 288, citing Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at 1073-1074.

[38] If the Court does not order disclosure pursuant to subsection 37(4.1) or subsection 37(5), then the Court shall prohibit disclosure of the information in question, pursuant to subsection 37(6).

IV. The Procedural History of this Application

[39] When faced with an application under section 37 of the *Canada Evidence Act*, the Court must first decide whether the application can be dealt with based upon the affidavit material filed with the Court, or whether an "apparent case" for disclosure has been made out requiring that the Court to examine the evidence in question in order to determine the validity of the privilege claim: *Khan*, above, at para. 24.

[40] After carefully reviewing the public record and the affidavit material that was filed by the Minister on a confidential basis, I determined that an "apparent case" for disclosure had been

established by the applicants, and that it was necessary for me to examine the documents and videotapes in question in order to determine the validity of the Minister's claims of public interest privilege. Consequently, I ordered that the Minister produce this material for my inspection.

[41] The applicants brought a motion for appointment of an *amicus* curiae to assist the Court in any *ex parte* proceedings dealing with the Minister's section 37 objection. I concluded that an *amicus curiae* would be of assistance to me in dealing with the Minister's objection, and Mr. Gordon Cameron was appointed as *amicus curiae* in this case.

[42] The applicants' Notice of Application also raises a constitutional challenge to section 37 of the *Canada Evidence Act*. Counsel for the applicants confirmed during the case management process, however, that they would not be proceeding with this challenge at this stage of the process. Rather, the applicants will decide after the section 37 objection is dealt with by the Court whether it is necessary to pursue their challenge to the constitutionality of the section 37 regime.

[43] Finally, the applicants assert that the failure of the Minister to object to disclosing relevant evidence in a timely fashion constitutes an abuse of process. This abuse is compounded, the applicants say, by virtue of the fact that they had already been questioned for days on end by the Minister's representative, without being aware of the existence or content all of the evidence in issue in this proceeding.

[44] The applicants have confirmed that the abuse of process question will ultimately have to be decided by the Board. While I have certainly been mindful of the applicants' abuse of process

arguments is assessing the section 37 issues in this case, I will make no comments as to the merits of these arguments, given that they will have to be determined by the Board in due course.

[45] Following an exchange of public and confidential affidavits and written submissions, a public hearing was held in this matter on March 23, 2016, and *ex parte, in camera* hearings were held on March 24 and April 14, 2016 in the presence of the *amicus curiae*. In the course of the *in camera* hearing I heard testimony from the Minister's witness, explaining the basis of the claim of public interest privilege. I also received submissions from counsel for the Minister and the *amicus curiae*.

[46] The issue for determination is thus whether the Minister has established that the disclosure of the information in issue here would indeed compromise one or more CBSA investigation(s), and if so, whether the applicants' right to disclosure and the public interest in the administration of justice outweighs the public interest in non-disclosure in this case.

V. Determining the Relevance of the Information in Question

[47] In determining whether the information that the Minister seeks to protect should be disclosed to the applicants, I must first determine whether the information is relevant to the issues that are before the Board. In considering this question, I must also consider the significance of the Board's disclosure order, and what role, if any, that order should play in my assessment of the relevance of the documents and videotapes in question.

[48] By making its disclosure order, the Board has implicitly found that the information that is the subject of the disclosure order is relevant to the issues before it. The Board has conducted some 22 days of hearings in this matter, and has also held a number of case management

conferences. It has heard copious amounts of evidence regarding the complex web of dealings between the applicants (and their various corporate vehicles) and Chen and Szeto. The Board is thus intimately acquainted with the issues before it, and the potential significance of the information in question, all of which militates in favor of according considerable weight to the Board's finding that the documents and videotapes within the scope of the order are relevant to the applicants' refugee case.

[49] That said, the Board had not inspected any of the documents or the videotapes in question before making its disclosure order, and it was thus unaware of the actual content or significance of this material.

[50] In these circumstances, while I am mindful of the fact that the Board was clearly of the view that the information being sought by the applicants was potentially relevant to the issues before it, I must nevertheless make my own determination as to the relevance of the documents and videotapes in question.

[51] In making that determination it necessary to have a clear understanding of what issues are before the Board. The Minister takes a narrow view of the issues before the Board, submitting that the Board is only dealing with the applicants' exclusion at this point and that the only issues in are those set out in the Amended Notice of Intent to Intervene. Insofar as Mr. Wang is concerned, these issues are his possession and use of the Changzhi Xie identity, including his use of the Xie identity for the purposes of executing a business transaction in the Bahamas, and his use of the Xie identity to hold shares in Inzon Corporation. Insofar as Ms. Yan is concerned, the only issues before the Board relate to her possession and use of the Fan Yan identity.

[52] The applicants take a much more expansive view of the issues before the Board, submitting that these include issues that have emerged over the course of the proceeding. The applicants point out that the Minister has disclosed videotapes of their own interviews with the York Regional Police, as well as other evidence received from Chen. According to the applicants, this demonstrates the Minister's own understanding that information from these sources is relevant to the issues before the Board.

[53] The applicants further note that they have been questioned extensively by the Minister's representative on subjects beyond those set out in the Amended Notice to Intervene, including the nature and extent of their relationship with Chen and Szeto, and their business dealings in China, Hong Kong, Canada, the United States and the Bahamas, placing all of these subjects at issue in the proceeding. The applicants further argue that their personal history with Chen and Szeto is central to their defence, and has, moreover, become crucial in the determination of the applicants' credibility.

[54] Finally, the applicants submit that the issues of inclusion and country of reference remain live issues before the Board.

[55] The issue of country of reference is clearly a live issue before the Board at this point, as the Minister is seeking to have the applicants excluded under Article 1E of the *Refugee Convention* and section 98 of *IRPA* on the basis that there is a safe country of reference for them based on the fact that they are citizens of the Dominican Republic. As a consequence, issues relating to how the applicants became citizens of the Dominican Republic and the legitimacy of that citizenship are squarely in issue at this stage of the proceedings, as is the role that Chen and Szeto played in helping the applicants obtain that citizenship.

[56] I also agree with the applicants that the issues in their refugee proceedings cannot be determined solely by reference the Minister's Amended Notice of Intent to Intervene. While I agree with the Minister that the grounds of exclusion identified in the Notice provide the foundation for what is at issue during this phase of the applicants' refugee proceeding, the scope of those issues must be considered within the context of the proceedings as they have actually unfolded. As the Federal Court of Appeal has held, the relevance of the evidence at issue in a section 37 application is not to be determined "in the narrow sense of whether it is relevant to an issue pleaded, but rather to its relative importance in proving the claim or defending it": *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470 at para. 17, 235 F.T.R. 158.

[57] It is evident from a review of the transcript of the applicants' refugee hearing that the Minister's representative has questioned the applicants extensively on a variety of topics that go well beyond the specific grounds of exclusion identified in the Amended Notice of Intent to Intervene. This includes numerous questions with respect to the applicants' relationship with Chen and Szeto and their involvement in the applicants' various companies.

[58] Further, when faced with the applicants' repeated objections to these lines of questioning, the Minister's representative justified his expansive cross-examination by arguing that these other areas of questioning were indeed relevant to the determination of the identified grounds of exclusion and to the applicants' credibility – something else that was clearly raised as an area of concern in the Minister's Notices of Intent to Intervene. This undermines the Minister's claim in this Court that the only issues under consideration by the Board are those strictly related to the specific allegations contained in the Minister's two Notices of Intent to Intervene.

[59] It is also significant that the Board has consistently allowed the Minister's representative to cross-examine the applicants on a wide range of topics on the basis that these questions were in fact relevant to the determination of the issues before the Board.

[60] As a result, I am of the view that the issues that have been canvassed by the Board have not been strictly confined to the narrow grounds of exclusion raised in the Amended Notice of Intent to Intervene, but have encompassed a wide variety of subjects relating to the applicants' personal history with Chen and Szeto, and the applicants' business dealings in Hong Kong, Canada, the United States, and the Bahamas.

[61] With this understanding of the nature and scope of the hearing before the Board, I will next consider the merits of the Minister's claim that various documents and videotapes should be exempt from disclosure on the basis of public interest privilege.

VI. Should the Information in Issue be Disclosed to the Applicants in this Case?

A. *Category One Documents*

[62] The Minister and the *amicus curiae* agree that there are 24 documents or groups of documents that have been produced by the Minister in response to the applicants' application that clearly do not come within the parameters of the Board's July 8, 2015 disclosure order because the documents do not emanate from China, nor were they received by the CBSA from either the York Regional Police or from Chen and Szeto.[1] I agree with that assessment.

[1] [redacted]

[63] As I understand the evidence of the Minister's witness, these documents were produced – not because the Board has ordered their production – but to provide the Court with an understanding of the nature and extent of the CBSA's ongoing investigation(s).

[64] My task is to determine whether the material that the Board has ordered be produced by the Minister should be exempted from disclosure (in whole or in part) on the basis of a specified public interest privilege. Given that the documents identified in footnote 1 are not within the scope of the Board's production order, no section 37 issue arises in relation to these documents and they need not be produced by the Minister.

B. *Category Two Documents*

[65] There is a second group of 14 documents or groups of documents[2]. Two of these documents also fall within Category One[3], while three others clearly fall within the scope of the Board's disclosure order.[4] This leaves nine other documents that potentially come within the scope of the Board's order.[5] I say "potentially", because the Minister has failed to provide any evidence regarding the provenance of a number of the documents under review.

[66] The source of the documents in the possession of the CBSA is a matter within the knowledge of the CBSA and the applicants have no way of ascertaining where these documents came from. As a result, I understand the Minister's counsel to agree that where the Minister has failed to provide evidence as to how he came into possession of certain documents, it is appropriate to draw an adverse inference against the Minister, and assume that the documents in question do fall within the parameters the Board's disclosure order.

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[2] [redacted]
[3] [redacted]
[4] [redacted]

[67] Counsel for the Minister and the *amicus curiae* agree that the documents in Category Two are indeed protected by investigative privilege. They further agree, moreover, that the salutary benefit of disclosing the documents to the applicants is outweighed by deleterious effect that such disclosure would have on one or more CBSA investigation[s]. Having carefully examined these documents, I agree with counsel's assessment.

[68] These documents relate to ongoing CBSA investigation(s) into matters that are not at issue before the Board. I am, moreover, satisfied that the disclosure of these documents to the applicants would indeed jeopardize ongoing CBSA investigation(s) and that this is not a situation where the impact on the ongoing investigation(s) could be mitigated by the production of summaries or redacted forms of the documents in question.[6] Consequently the balance favours the Minister in relation to the Category 2 documents and disclosure of these documents will not be ordered.

C. *Category Three – The Videotapes*

[69] The Board's July 8, 2015 disclosure order required the production of all information in the possession of the Minister that emanated from Chen and Szeto or was obtained from the York Regional Police. The Minister has refused to produce some seven hours of videotaped interviews of Chen and Szeto that were conducted by the York Regional Police.[7]

[70] These videotapes are clearly within the scope of the Board's disclosure order, as they were provided to the CBSA by the York Regional Police. They are, moreover, clearly relevant to the issues that are before the Board, as the applicants' relationship with Chen and Szeto has

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[5] [redacted]
[6] [redacted]

assumed a central role in the applicants' refugee hearings. Indeed, the Minister's own representative submitted to the Board that "we have to understand the relationship between Mr. Wang, Ms. Yan and [Chen]. It is these actions that they take amongst one another that go to the heart of the fraud".

[71] Further, the applicants' relationship with Chen and Szeto is relevant to one of the Minister's allegations in his Amended Notice of Intent to Intervene regarding Mr. Wang's alleged involvement with a Bahamian company using two different identities. The applicants' defence to this allegation is that Mr. Wang did not sign the document giving rise to the allegation, and that it was either Chen or Szeto who signed the document in question in the name of "Changzhi Xie", as part of a larger scheme to defraud the applicants out of millions of dollars.

[72] The Minister's representative has, moreover, already provided the Board with a number of documents emanating from Chen and Szeto, further confirming the relevance of the relationship of the applicants to Chen and Szeto insofar as the applicants' refugee claims are concerned. This Court has previously held that once the Minister chooses to disclose information dealing with an issue, fairness requires that any such disclosure must be complete: *B135 v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 871 at para. 26, 438 F.T.R. 128.

[73] The question, then, is whether the Minister has established that the disclosure of the videotapes of the Chen and Szeto interviews would compromise one or more CBSA investigation(s) and where the balance for and against disclosure should be struck.

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[7] [redacted]

[74] Disclosure obligations in the refugee context are not absolute and can be limited by valid claims of privilege or other mechanisms for withholding disclosure: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2001 SCC 1 [2002] at para. 122, [2002] 1 S.C.R. 3; *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at paras. 53, 57-61, [2007] 1 S.C.R. 350.

[75] Investigative privilege is not a class privilege: *Conway v. Rimmer et al.*, [1968] A.C. 910, [1968] 1 All E.R. (H.L.); Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, above at 1084. The Ontario Court of Appeal has, moreover, determined that while there is "an obvious reason for caution in disclosing the contents of any document in the possession of police … this has never been accepted as a reason for excluding such documents as a class": *Smerchanski v. Lewis Smerchanski v. Asta Securities Corporation Limited*, (1981), 31 O.R. (2d) 705 at para. 20, 120 D.L.R. (3d) 743 (C.A.).

[76] Investigative privilege has, moreover, been described as a "fairly narrow" basis for secrecy – and "one that of necessity needs to be determined on a case by case basis": *R. v. Toronto Star Newspapers Ltd.*, (2005) 204 C.C.C. (3d) 397 at para. 14, [2005] O.J. No. 5533 (S.C.J.).

[77] There is no evidence in this case that would suggest that either Chen or Szeto were police informers, or that they were given any promise of confidentiality with respect to the information that they provided in their police interviews. Chen and Szeto are obviously aware of the fact that they were interviewed by the York Regional Police, and they would, moreover, know what they told the police. Chen and Szeto would also be aware that they were under investigation, at least

by the York Regional Police, as they were advised of their right to counsel before the interviews started, and their statements were given under caution.

[78] The applicants are, moreover, already aware of the fact that Chen and Szeto are under investigation by the CBSA, as the Minister's representative expressly advised the Board of this fact at the July 8, 2015 hearing. I also have to question the depth of the Minister's concern as to the deleterious effect that the disclosure of the existence of the CBSA's investigation of Chen and Szeto would have on that investigation, given that no attempt was made by the Minister to protect this information from disclosure in this section 37 proceeding, with the result that it is now part of the public record.

[79] While I have not been provided with all of the documents that have been produced in the context of the applicants' civil action against Chen and Szeto, it is apparent from the applicants' public record that Chen and Szeto have made many different allegations of misconduct on the part of the applicants in that action.[8] It is also evident that Chen and Szeto have provided extensive documentary disclosure in the civil action, producing many documents relating to their dealings with the applicants and their various companies. The Minister has not identified any specific information that is disclosed in either Chen or Szeto's police interviews that has not already been disclosed to the applicants in the context of the civil action.[9]

[80] Chen and Szeto's interviews were provided in the context of a police investigation into specific allegations or criminality that had been made against them by the applicants. While the interviews would naturally cover subjects that may have been of interest to the York Regional

[8] [redacted]
[9] [redacted]

Police, the videotapes do not disclose anything about what topics might be of interest to the CBSA in the context of its own investigation(s).

[81] As a result, the Minister has failed to establish that the disclosure of the videotapes of Chen and Szeto's interviews with the York Regional Police should be protected from disclosure on the basis that their disclosure would compromise one or more CBSA investigation(s). The Minister will, therefore, be ordered to provide the applicants with copies of Chen and Szeto's interviews with the York Regional Police within 30 days of the date of my Order in this matter.[10]

[82] That said, there are four very brief portions of the videotapes that are similar in nature to the information contained in the Category 2 documents.[11] I have already concluded that the disclosure of this type of information would jeopardize one or more ongoing CBSA investigation(s) and that this is not a case where the impact on ongoing investigations(s) could be mitigated by the production of summaries or redacted forms of the video extracts in question. Consequently the balance favours the Minister in relation to the brief extracts of the videotapes identified in footnote 8, and these portions of the videos should be protected from disclosure.

[83] The *amicus curiae* and the Minister shall consult with each other in order to ensure that only the portions of the videos relating to the information referred to in footnote 8 are edited from the videos before they are disclosed to the applicants in accordance with these reasons. If there is any question or dispute as to the extent of the redactions required, I may be spoken to.

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[10] [redacted]
[11] [redacted]

D. *Category Four Documents*

[84] There are a number of documents that clearly emanate from Chen and/or Szeto and thus come squarely within the parameters of the Board's disclosure order.

[85] The first is a group of 13 documents that were provided to the York Regional Police by Chen during one of her police interviews.[12] The fact that the documents are now in the hands of the CBSA does not reveal anything about the CBSA's own areas of interest, or the nature or scope of any ongoing CBSA investigations. The Minister further acknowledges that several of these documents have already been produced in the context of the Ontario litigation.[13] I have not been persuaded that the disclosure of most of these documents would have any negative effect on any ongoing CBSA investigation(s). The documents discussed in footnote 12 must therefore be produced, subject to the exceptions discussed in footnote 13.

[86] There is a second group of documents that the CBSA obtained directly from Chen that are therefore clearly within the parameters of the Board's disclosure order.[14] I have not been persuaded that the disclosure of most of these documents would have any detrimental effect on any ongoing CBSA investigation(s). The documents identified in footnote 14 must therefore be produced, subject to the redactions identified in the footnote.

E. *Miscellaneous Documents*

[87] This leaves five documents or groups of documents that do not fit neatly into any of the previously discussed categories of documents. These documents will, therefore, be considered on a document-by-document basis.

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[12] [redacted]
[13] [redacted]
[14] [redacted]

[88] The first document appears twice in the Minister's affidavits.[15] The Minister has not provided any evidence regarding the provenance of this document, and for the reasons previously given, I will assume that the document falls within the parameters the Board's disclosure order.

[89] This document is relevant to the issues before the Board. Given that there is no information regarding the source of the document, I have thus not been persuaded that the disclosure of this document would cause any harm to any investigation(s) being carried out by the CBSA as it has not been established that the disclosure of the document would reveal anything about any CBSA area of interest. The document described in footnote 15 must therefore be disclosed.

[90] These latter comments also apply to a second group of documents.[16] Here again, I have not been provided with any information as to the source of the documents in question, and I have thus not been persuaded that their disclosure would cause any harm to any investigation(s) in which the CBSA may be involved, and the documents must therefore be disclosed.

[91] There are two other documents whose origins are also unknown, and I will therefore assume that these documents fall within the scope of the Board's disclosure order.[17] I have not, however, been persuaded that these documents are relevant to the issues before the Board, and they thus need not be produced.

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[15] [redacted]
[16] [redacted]
[17] [redacted]

[92] The last document emanates from the York Regional Police and thus falls within the scope of the Board's production order.[18] We do not know who prepared the document in question, but given that it comes from the York Regional Police, it does not disclose anything about what areas might be of interest to the CBSA in the context of its own investigation(s).[19] The document described in footnote 18 must therefore be produced.

VII. Conclusion

[93] For these reasons, the applicants' challenge to the Minister's assertion of a public interest investigative privilege under section 37 of the *Canada Evidence Act* is granted, in part. The Minister shall, within 30 days of this decision, disclose the documents and videotapes that have been identified for disclosure in these reasons, in the form discussed in the footnotes to these reasons. The costs of this motion shall be in the cause.

[18] [redacted]
[19] [redacted]

ORDER

THIS COURT ORDERS that:

1. The applicants' challenge to the Minister's assertion of a public interest investigative privilege under section 37 of the *Canada Evidence Act* is granted, in part;

2. The Minister shall, within 30 days of this decision, disclose the documents and videotapes identified for disclosure in these reasons in the form discussed in the footnotes to these reasons; and

3. The costs of this motion shall be in the cause.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1156-15
STYLE OF CAUSE:	ZHENUA WANG & CHUNXIANG YAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO (MARCH 23, 2016) OTTAWA, ONTARIO (MARCH 24, 2016 and APRIL 14, 2016)
DATE OF HEARING:	MARCH 24, 2016, APRIL 14, 2016 (*IN CAMERA*) MARCH 23, 2016 (PUBLIC)
PUBLIC ORDER AND REASONS:	MACTAVISH J.
DATED:	MAY 4, 2016

APPEARANCES:

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