~~**TOP SECRET**~~

Federal Court  Cour fédérale

Date: 20221011

Docket: DES-3-21

Citation: 2022 FC 1392

Ottawa, Ontario, October 11, 2022

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA PURSUANT TO SECTION 38.04(1) OF THE *CANADA EVIDENCE ACT*, RSC 1985, C C-5

~~TOP SECRET~~ JUDGMENT AND REASONS

[1] The procedural history of this matter is described in *IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA PURSUANT TO SECTION 38.04(1) OF THE CANADA EVIDENCE ACT, RSC 1985, C C-5*, 2021 FC 347.

[2] To summarize, in 2020, I prepared a public version of a top secret decision containing one contested piece of information over which the Attorney General of Canada had sought a redaction – the docket number by which the decision is identified. As a result, the AGC brought an application pursuant to section 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] to

prohibit the disclosure of that information. I appointed an *amicus curiae*, and heard the parties on the preliminary question of whether this Court has jurisdiction over an application made pursuant to section 38 of the CEA when the information the AGC seeks to protect is found in the Court's own decision. I concluded that this Court does have such jurisdiction.

[3] This judgment and reasons addresses the merit of the AGC's section 38 application. In sum, I find that the AGC's request to prohibit disclosure should be dismissed.

I. BACKGROUND

[4] Following my ruling on the preliminary question of jurisdiction, the AGC filed an affidavit in support of his claim that the release of the contested piece of information would be injurious to national security. A hearing was held during which the affiant was examined by counsel for the AGC and cross-examined by the *amicus curiae*. The AGC and the *amicus* then filed written submissions.

[5] The evidence was provided by a Canadian Security Intelligence Service (CSIS or Service) intelligence officer whose current position is head of Litigation Case Management where she is responsible for identifying national security privilege claims.

[6] The affiant explained that the docket number is assigned by Legal Services at the Service when a warrant application is contemplated. [redacted] The instances in which the docket number of a warrant

application appear on a public document are rare as warrant applications are heard in private (s 27, *CSIS Act*). This means that materials are filed confidentially and the hearings are held in a location not accessible to the public. Generally, only when a warrant application raises a novel or complex issue of law or where the legality of the use of new technology is at issue, are reasons drafted with the intention that a public version will be issued.

II. THE APPLICABLE TEST

[7] The three-part *Ribic* test ([2005] 1 FCR 33, 2003 FCA 246) applies on a section 38 application when determining whether the designated judge should confirm the prohibition on disclosure of the information at issue:

i. Is the information relevant?

ii. If yes, would the disclosure of the information be injurious to international relations, national defence or national security?

iii. If yes, does the public interest in disclosure outweighs the public interest in non-disclosure? (The "balancing stage")

i) Is the information relevant?

[8] At the first stage of the *Ribic* test, the AGC submits that the docket number is not relevant. He submits that assessing relevancy in the context of a Court decision should be closely aligned with how relevancy is assessed in the context of a public inquiry: the appropriate standard is whether the information at issue is reasonably useful to help the public understand the Court's decision. According to the AGC, the docket number does not help the public understand any of

the issues raised by in the decision here, and the neutral citation, rather than the docket number, would be used to identify and find the decision.

[9] The AGC also submits that since the *CSIS Act* requires that warrant applications be heard in private (s 27), Parliament has made clear the importance in maintaining secrecy in matters involving CSIS investigations and warrant applications.

[10] The *amicus* submits that the analysis of what constitutes relevant information in a Court decision must have the open court principle as its starting point, which imparts inherent relevance to a court's judgment or reasons. As a result, any redaction to a Court document infringes upon the open court principle because it denies the public part of a court publication. In addition, and more importantly, it conveys a message of secrecy.

[11] I agree with the *amicus* that the open court principle encompasses court decisions. I accept that section 27 of the *CSIS Act* requires that warrant applications and related documents must remain inaccessible to the public. However, when a warrant application raises an issue that a designated judge decides should be addressed in public – understanding that certain information will inevitably be redacted – the information contained in that decision is presumptively relevant.

ii) Would disclosure be injurious?

[12] The alleged injury of disclosing the docket number does not flow from any information contained in the number itself. Rather, the concern is that **[disclosure of the docket number could be one element in a more complex risk of injury to national security.]**

[13] More specifically, the Service's primary argument is that **[the disclosure of the docket number could be used as one element in a more complex risk to national security.]**

[14] However, as the affiant's cross-examination revealed, the possibility of at all is remote. The risk that is even more unlikely. Further, although the docket number would indeed **[disclose some information, other publicly available information]** would similarly **[disclose information that posed the same risk.]**

[15] Making the docket number public could **[be an element in the complex risk described by the Service.]** However, the risk of this kind of injury is highly speculative. It does not meet the threshold required at the second stage of the *Ribic* test.

[16] Accordingly, I am not satisfied on the evidence that disclosure of the docket number would be injurious to international relations, national defence or national security. As a result, there is

no need to proceed to the third step of the *Ribic* test. The AGC's application to prohibit the disclosure of the docket number should be dismissed.

JUDGMENT in DES-3-21

THE COURT'S JUDGMENT is that:

1. The Application to prohibit the disclosure of the redacted information is dismissed.

2. The Attorney General of Canada and the amicus shall propose any redactions to this Judgment and Reasons necessary to protect international relations, national defence or national security, and identify any redactions on which they do not agree, within 30 days of this Judgment.

"James O'Reilly"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-3-21
STYLE OF CAUSE:	IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA PURSUANT TO SECTION 38.04(1) OF THE CANADA EVIDENCE ACT, RSC 1985, C C-5
PLACE OF HEARINGS:	OTTAWA, ONTARIO
DATE OF HEARINGS:	JULY 29, 2021
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	OCTOBER 11, 2022

APPEARANCES:

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Gordon Cameron	*AMICUS*

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