

Federal Court



Cour fédérale

Date: 20231006

Docket: DES-5-22

Citation: 2023 FC 1338

Ottawa, Ontario, October 6, 2023

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SAAD KHALID S AL JABRI

Respondent

and

SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY, NEW DAWN CONTRACTING COMPANY and SKY PRIME INVESTMENT COMPANY

Respondents (moving parties)

ORDER AND REASONS

[1] Sakab Saudi Holding Company and the other corporate respondents [Sakab], bring this motion in the context of the Attorney General of Canada's [AGC] Notice of Application (as amended) pursuant to section 38.04 of the *Canada Evidence Act*, RSC, 1985, c C-5 [CEA] [the Section 38 Application]. For ease of reference, this motion is referred to as the second Sakab motion or Sakab #2. The AGC's Section 38 Application seeks to protect "sensitive information" or "potentially injurious information" from disclosure in a "proceeding", as those terms are defined in the CEA.

[2] The proceeding underlying this Section 38 Application is an action in the Ontario Superior Court of Justice by Sakab alleging fraud against Saad Al Jabri [Al Jabri] launched in January 2021, which seeks damages (of now over \$5 billion) from Al Jabri.

[3] In the Notice of Motion, which Sakab characterises as "the privilege motion", Sakab seeks:

- a declaration that the "second Saad submission" [otherwise described as the "proffer" or solicitor's brief] is not subject to any form of privilege and/or that any such privilege has been waived;
- an order directing the AGC and/or Al Jabri to produce to Sakab a copy of the proffer, once any sensitive or potentially injurious information is redacted by the AGC;
- an order staying and/or adjourning any further steps in the Section 38 Application, including any public or *in camera ex parte* hearing, until the AGC and/or Al Jabri produce a copy of the redacted proffer to Sakab; and,

- costs.

[4] As described below, Sakab subsequently agreed that the public hearing in the Section 38 Application could proceed in stages, even though the AGC had not yet completed the review of the documents at issue. It was understood that a second stage of the public hearing would be convened following the AGC's review and the resolution of other issues.

[5] This motion creates a sense of déjà vu. The Respondents seek to remind the Court what they set out in their written and oral submissions on the first motion and what the Court actually determined in its Order and Reasons issued on January 11, 2023 (2023 FC 40) [*Sakab #1*]. To some extent, the Respondents seek to restate or nuance arguments previously made and suggest that the Court did not fully understand their previous submissions.

[6] Sakab has filed an appeal of *Sakab #1* to the Federal Court of Appeal. This Court will not revisit the arguments made on the first motion or reinterpret them, and will not clarify its Order and Reasons in *Sakab #1*. However, some references to the previous arguments are necessary given the Respondents' submissions on *res judicata* and issue estoppel. Some passages of *Sakab #1* are also noted.

[7] For the reasons that follow, the motion is dismissed.

I. Background

A. *Proceedings up to December 2022 – Sakab #1*

[8] The background to the underlying litigation and to the Section 38 Application and the steps taken in that process up to December 2022 are set out in *Sakab #1*. That background will not be repeated, except to note the subsequent steps in the Section 38 process.

[9] In the context of their arguments on the current motion [*Sakab #2*] regarding the application of the principles of *res judicata* and issue estoppel, the parties have made submissions about what was actually sought in the first Sakab motion, what was argued, and what the Court actually addressed. However, as noted in *Sakab #1* at paras 35-40, the issues evolved between the filing of Sakab’s Notice of Motion and the hearing of the motion in December 2022, including due to the third Section 38 CEA Notice that specifically referred to the “proffer”.

[10] Sakab characterised their first motion as the “jurisdiction motion” because, initially, the issue raised was whether the proffer could be the subject of the second Section 38 CEA Notice given that it did not describe the proffer. Sakab sought an order directing Al Jabri to provide the AGC with the material that Al Jabri was expected to file on Al Jabri’s stay motion in the Ontario Superior Court of Justice (which was scheduled for on or around June 2022, but subsequently adjourned *sine die*). This material was described in the second Section 38 CEA Notice to the AGC, which had been provided by a Canadian Security Intelligence Service [CSIS] official, and which Sakab asserted would include: Al Jabri’s notice of motion, supplementary affidavit, and

other evidence to be filed, including evidence relating to Al Jabri's position that he cannot defend himself without disclosing US state secrets, that issues in the fraud action are non-justiciable, and that the fraud action is barred by the *State Immunity Act*, RSC 1985, c C-18. Alternatively, Sakab sought an order dismissing or staying the Section 38 Application as it related to the material provided to the AGC and/or the Court pursuant to the "second Saad submission" (which is the proffer).

[11] As the Court described in *Sakab #1* at para 39:

39. In the Notice of Motion filed by Sakab on October 19, 2022, Sakab seeks an order to direct Al Jabri to provide the AGC with the documents subject to the Second Notice given to the AGC. More particularly, Sakab seeks the material that Al Jabri indicated that he would file in the Ontario Superior Court of Justice in support of his motion for a stay of proceedings, including the Notice of Motion to be filed, Al Jabri's supplementary affidavit, and any further evidence relating to Al Jabri's position that: he cannot defend himself in the fraud action without disclosing the US Government's secret information; issues in the fraud action are non-justiciable; and, the fraud action is barred by the *State Immunity Act*, RSC 1985, c C-18. Sakab submits that following the AGC's review, a redacted version of those documents should be provided to Sakab and the section 38 process should proceed to determine the disclosure of the information properly covered by the First and Second Notices.

[12] Sakab sought access to the documents described in the Section 38 CEA Notices once redacted. Once the proffer – which counsel for Al Jabri had described as "covering the waterfront" of information that Al Jabri communicated to counsel and over which Al Jabri claims litigation privilege – came into play, Sakab sought both the documents that Al Jabri was expected to file in the Ontario Superior Court of Justice (but did not) and the proffer. Sakab argued that they should receive the redacted proffer in order to make submissions to this Court in

the context of the determination of the Section 38 Application about the lack of relevance of the information contained therein. Sakab argued that the process to determine the Section 38 Application would be unfair if Sakab is not provided with the redacted proffer in order to make their submissions.

[13] At the hearing of the first motion, Sakab suggested there were three options to achieve the relief they sought and obtain the redacted documents. Although Sakab now suggests that the Court mischaracterised the options proposed and notes that the options were proposed only in reply to Al Jabri's submissions, the Court described the options at para 70 of Sakab # 1 as follows:

70. Sakab proposes three options: first, that the Court order Al Jabri to waive litigation privilege in the proffer; second, that the Court order Al Jabri to hive off the factual information in the proffer from the litigation privileged parts and provide a new document with only the factual information to the AGC for review; or, third, that the Court order Al Jabri to provide the AGC with the Stay Motion and affidavit he indicated he would file and intended to file in June 2022 for the AGC's review.

[14] As also noted in *Sakab #1* at para 110, Al Jabri stated that because the stay motion in the Ontario Superior Court of Justice had been adjourned *sine die*, he was not required to file any material for that purpose.

[15] Sakab indicated their intention to bring a second motion at the conclusion of the hearing of the first motion on December 6-7, 2022, characterising this as the "fourth option".

[16] On December 19, 2022, the Court convened a Case Management Conference [CMC] to canvass the next steps in the Section 38 Application. The Court noted that the Order and Reasons in *Sakab #1* would be issued in early 2023.

[17] Prior to the Court's dismissal of the motion in *Sakab #1*, on January 4, 2023, Sakab filed the current motion, *Sakab #2*.

[18] On January 10, 2023, the Court issued the Order and Reasons in *Sakab #1*.

B. *Events following Sakab #1*

[19] As noted above, Sakab now seeks a declaration that the proffer is not subject to any form of privilege and/or that any such privilege has been waived, and an order directing the AGC or Al Jabri to produce a copy of the proffer to Sakab once redacted by the AGC.

[20] On January 17, 2023, the Court convened a CMC to seek an update from the AGC on the status of the review of the documents subject to the Section 38 CEA Notices and to canvas whether the dates previously scheduled for the public and *in camera ex parte* hearings in the Section 38 Application should be adjourned given that the AGC was awaiting responses from partner agencies and had not yet completed the review of the documents and given that Sakab had filed their second motion. The parties agreed, and the Court confirmed, that the *in camera ex parte* hearing would be adjourned, but that the public hearing would proceed in two stages, with the first stage to be held on February 13-15 (as originally scheduled) and that a second stage of the public hearing would be scheduled after the AGC had completed their review of the

documents at issue and after further steps to resolve whether or how the redacted proffer might be provided to Sakab by Al Jabri.

[21] On January 20, 2023, Sakab filed a Notice of Appeal of *Sakab #1*. Sakab subsequently requested that the Federal Court of Appeal hold the appeal in abeyance pending other steps in the determination of the Section 38 Application.

[22] The grounds set out in the Notice of Appeal are mentioned only because Sakab submits that in *Sakab #1* this Court did not address some of the issues Sakab raises on the current motion. The Notice of Appeal alleges that the Court erred on at least 17 grounds, including: by incorrectly concluding that the Court's jurisdiction flowed from the AGC's Section 38 Application, rather than from the *Canada Evidence Act*; misapprehending the role of the AGC in a section 38 application and incorrectly concluding that the AGC is not in a typically adversarial role; and, that the Section 38 Application is being conducted in a manner contrary to the CEA, which raises issues of procedural fairness.

[23] In the Notice of Appeal, Sakab provides background information and refers to the positions taken regarding the issue of litigation privilege.

[24] On January 31, 2023, the Court invited the parties to advise the Court of their positions with respect to the scheduled public hearing in light of the Notice of Appeal filed by Sakab, which alleged that this Court's determination of the Section 38 process was being conducted in an unprecedented manner and contrary to the statutory provisions and procedural fairness.

[25] Sakab confirmed in writing that the public hearing should proceed as scheduled commencing on February 13, 2023 (despite that the Notice of Motion sought to stay the Section 38 Application *vis-à-vis* the proffer until a redacted version had been produced to Sakab). The other parties agreed. The parties filed their written public submissions and attended on February 13-14, 2023 and made oral submissions focussing on the potential relevance or irrelevance of information to the issues in the underlying litigation in the Ontario Superior Court of Justice that may be included in the documents subject to the Section 38 CEA Notices.

[26] On April 5, 2023, the Court convened a CMC in response to requests made by both Respondents to provide this Court with an update on the underlying litigation in the Ontario Superior Court of Justice, including to address how the status of the Section 38 Application in this Court impacts those proceedings. The Respondents also sought an update from the AGC on the status of the AGC's review of the documents subject to the Section 38 CEA Notices.

[27] The Court issued a Direction confirming the updates provided by the Respondents and AGC. The Court noted that the AGC undertook to provide an update to the Respondents by April 26, 2023 to permit them to advise the Ontario Superior Court of Justice of the status of the Section 38 Application. The Direction also noted that Counsel for Al Jabri had advised that there were no other documents in their possession that contain sensitive or potentially injurious information that would be subject to a Section 38 CEA Notice.

[28] On April 25, 2023, the AGC advised the Respondents, *amicus*, and the Court that a response had been received from partner agencies and that the AGC could proceed to identify

and redact the sensitive and potentially injurious information pursuant to Section 38 CEA Notices.

[29] On June 5, 2023, the AGC advised the Court that the redacted documents would be provided to “the notifier” and would be filed with the Court.

[30] On June 22, 2023, the Court convened a CMC to discuss the next steps in the determination of the Section 38 Application and the scheduling of the second Sakab motion. The parties undertook to establish a timetable for the submission of written memoranda. In addition, counsel for Al Jabri undertook to provide to Sakab the redacted documents that were attached to the proffer (referred to as “contemporaneous documents”).

II. Sakab’s Submissions

[31] Sakab submits that the Court has the jurisdiction to determine whether litigation privilege applies to the proffer and to order that the redacted proffer be produced to Sakab.

A. *Res judicata and issue estoppel are not applicable*

[32] Sakab disputes Al Jabri’s argument that the issues raised on this motion were determined in *Sakab #1* and are *res judicata*, including by issue estoppel.

[33] Sakab submits that Al Jabri’s submissions on *res judicata* are based on the false premise that the same relief was sought in *Sakab #1*. Sakab submits that their first motion did not seek to

compel the production of the proffer, but rather the production of the material on Al Jabri's stay motion, which was the subject of the second Section 38 CEA Notice, and that they sought to dismiss the Application with respect to the proffer. Sakab submits that nothing in the Court's Order and Reasons or in Sakab's submissions suggests that they sought to compel the production of the proffer. Sakab argues that the Court could not determine issues that were not raised in their Notice of Motion.

[34] Sakab submits that once counsel for Al Jabri stated that the proffer was the document subject to the second Section 38 CEA Notice, Sakab focussed on the lack of jurisdiction to deal with the proffer pursuant to Section 38. Sakab notes that after the third Section 38 CEA Notice was provided, which specifically referred to the proffer, the jurisdictional issue fell away.

[35] Sakab also submits that on the first motion they did not ask the Court to order that the privilege be waived, but rather argued that Al Jabri should waive the privilege. Sakab further states that they never suggested that the Court could determine litigation privilege, but rather argued that it was open to the Court to control the section 38 process, and proposed three options to do so. Sakab explains that they proposed that the Court could either: compel production of the real documents – i.e., the material that Al Jabri was expected to and had intended to file to support his stay motion in the Ontario Superior Court of Justice – to the AGC for review; that Al Jabri could provide only the facts in the proffer to the AGC for review; or, that the Court could stay the Section 38 Application *vis-à-vis* the proffer. Sakab submits the goal was to be provided with the facts in the proffer that were not subject to litigation privilege.

[36] Sakab submits that there was only an assertion of litigation privilege by Al Jabri and an assumption by the Court that litigation privileged applied to the proffer.

[37] Sakab further submits that if the Court had determined whether litigation privilege applied to the proffer in *Sakab #1*, the Court would have referred to the governing jurisprudence on litigation privilege, assessed any evidence tendered to support the privilege, and determined whether any privilege had been waived, but did not.

B. *The Court has the jurisdiction and can determine litigation privilege*

[38] Sakab acknowledges that in *Sakab #1*, the Court stated that it could not order Al Jabri to waive the privilege, but argues that this finding does not mean that the Court has no jurisdiction to determine whether litigation privilege applies.

[39] Sakab submits that they have challenged the assertion of litigation privilege in this Court and only this Court can determine whether the privilege applies and if it has been waived.

[40] Sakab argues that it would not be possible for the Ontario Superior Court of Justice to determine whether litigation privilege applies to the proffer if the issue is found to be *res judicata*. They argue that, in any event, there is no opportunity for Sakab to challenge litigation privilege in the Ontario Superior Court of Justice because the proffer has not been filed in that court and Al Jabri has not asserted litigation privilege over the proffer in that court.

[41] Sakab suggests that if there were no proceedings in the Ontario Superior Court of Justice and a proffer was created that included sensitive or potentially injurious information, only this Court would have the jurisdiction to determine litigation privilege, as no other Court would be engaged.

C. *Litigation privilege does not apply to the proffer*

[42] Sakab argues that the proffer is not protected by litigation privilege and, if it were, any privilege has been waived by Al Jabri's conduct. Sakab argues that, as a result, the Court should direct that the proffer be produced.

[43] Sakab submits that litigation privilege is only for documents prepared for the dominant purpose of preparing or responding to actual or contemplated litigation (*Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank*], at paras 8, 59-60).

[44] Sakab maintains that the proffer was created only for the purpose of providing information to the AGC in the context of the Section 38 Application, with Al Jabri knowing that the AGC would be sharing that information with national security partners, in order to get an opinion from the AGC regarding whether any sensitive or injurious information would be redacted. Sakab adds that the proffer includes facts, which cannot be subject to any privilege. Sakab suggests that inserting a litigation strategy into the proffer and asserting privilege over the whole document was a strategic choice by Al Jabri to ensure that Sakab would be excluded from seeing the proffer and for Al Jabri to gain some advantage in making submissions to this Court regarding the relevance of the information.

[45] Sakab also suggests that there was some agreement between Al Jabri and the AGC about how to provide this information to the AGC. Sakab submits that the proffer was not created and then shared with the AGC in a “zone of privacy”.

[46] Sakab further submits that Al Jabri has not provided evidence to establish that litigation privilege applies to the proffer, noting that no affidavits have been provided to describe how or why the proffer was created. Sakab argues that submissions made by counsel for Al Jabri at CMCs asserting privilege and describing the proffer as a solicitor’s brief do not constitute evidence. Sakab suggests that no affidavit evidence was filed in order to shield Al Jabri from cross-examination by Sakab.

[47] Sakab also argues that any litigation privilege has been waived by Al Jabri providing the proffer to the AGC and, in turn, by the AGC’s sharing of the proffer with partner agencies, filing it with the Court, and making it available to the *amicus*. Sakab adds that Al Jabri cannot simultaneously assert litigation privilege while also relying on the proffer in making submissions to the Court about the relevance of the information contained in the proffer.

[48] Sakab points to *United States v Meng*, 2020 BCSC at paras 35-39, where the British Columbia Supreme Court reviewed the law regarding waiver of privilege, which may be explicit or implicit. Sakab argues that Al Jabri’s conduct regarding the proffer is inconsistent with maintaining litigation privilege, which amounts to an implicit waiver.

[49] Sakab submits that Al Jabri's submissions on the first motion and at CMCs – that Al Jabri can control the timing of the disclosure of relevant information in the fraud action in accordance with the Ontario *Rules of Civil Procedure* – ignore that Sakab is entitled to production of the redacted proffer in the Section 38 process as a matter of procedural fairness.

[50] Sakab reiterates that they must have the redacted proffer to permit them to make submissions to the Court about the lack of relevance of the information contained in it and to assist the court in determining the Section 38 Application in accordance with the test established in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [*Ribic*].

[51] Sakab argues that there is no other option for this Court to ensure fairness, and that the options previously suggested would not address the current issue about their entitlement to the redacted proffer.

III. Al Jabri's Submissions

[52] Al Jabri submits that the motion should be dismissed on several grounds: there is no freestanding disclosure obligation; *res judicata* and issue estoppel apply; and, alternatively, if the court finds that *res judicata* and issue estoppel do not apply and litigation privilege remains at issue, litigation privilege applies to the proffer and has not been waived.

[53] Al Jabri submits that the Court need not address whether it has the jurisdiction to determine litigation privilege. The Court could dismiss Sakab's motion on the grounds raised by Al Jabri.

A. *No disclosure obligation*

[54] Al Jabri submits that there is no “freestanding” disclosure obligation. Section 38 applies only to information that may be disclosed in an underlying proceeding and includes information that has not yet been disclosed and/or that a party may not see; in this case, the proffer. Al Jabri distinguishes the proffer from the other documents subject to the Section 38 CEA Notices that have already been produced in redacted form, noting that the other documents were required to be disclosed in accordance with the *Ontario Rules of Civil Procedure*. Al Jabri notes that the information in the proffer that is not sensitive and injurious could be disclosed in the underlying litigation as it progresses, but is not yet required to be disclosed.

[55] Al Jabri submits that the Section 38 process cannot create a requirement for premature disclosure of information by one party.

[56] Al Jabri further submits that providing the proffer to the AGC in accordance with Section 38 is consistent with the requirement that sensitive or potentially injurious information be provided to the AGC and the Court for a determination as soon as possible.

B. *Res judicata and issue estoppel apply*

[57] Al Jabri submits that Sakab’s motion should be dismissed based on *res judicata* and issue estoppel. Al Jabri argues that the issues raised in this motion were decided in *Sakab #1*. Al Jabri points to Sakab’s written and oral submissions in *Sakab #1*. Al Jabri adds that Sakab’s arguments on this motion overlap with issues raised and rejected by the Court in *Sakab #1*.

[58] Al Jabri submits that although the litigation privilege issue was not directly determined in *Sakab #1*, Sakab's key argument was that he should receive the redacted proffer. Sakab's submissions about the Court's jurisdiction and litigation privilege were related to Sakab's broader submissions that the process to determine the Section 38 Application would be unfair unless Sakab received the redacted proffer. Al Jabri argues that the Court directly addressed and determined the fairness issue in *Sakab #1*.

[59] Al Jabri submits that Sakab now seeks a declaration about privilege as a way to get access to the redacted proffer, which was what he sought on the first motion. Al Jabri submits that Sakab is repackaging the same arguments and is asking the Court for the same relief he was denied on the first motion.

[60] Al Jabri disputes Sakab's submission that Sakab did not raise or join issue on litigation privilege in *Sakab #1*. Al Jabri notes that Sakab's written reply memorandum in *Sakab #1* includes submissions on the law of litigation privilege that are again set out in Sakab's submissions on this motion. Al Jabri also points to Sakab's more extensive oral submissions on litigation privilege, including references to the jurisprudence. Al Jabri notes that Sakab also argued that litigation privilege was waived by providing the proffer to the AGC and by filing it with the Court. Al Jabri adds that the Court addressed the litigation privilege issue and points to several passages in *Sakab #1*.

[61] Al Jabri argues that issue estoppel also applies because litigation privilege was specifically raised in Sakab's first motion. Al Jabri submits that the issue is the same, the parties

are the same, and a final decision on the issue was rendered (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23).

C. *The proffer is protected by litigation privilege*

[62] Al Jabri submits that if the Court does not dismiss the motion on the basis of *res judicata* or issue estoppel, the motion should nonetheless be dismissed because the proffer is litigation privileged and the privilege has not been waived.

[63] Al Jabri notes that Section 38 applies only to information that may be disclosed in a proceeding; in this case, the underlying fraud litigation. Al Jabri reiterates that the proffer was created to prepare for the fraud litigation and, as such, meets the criteria for litigation privilege established in the jurisprudence.

[64] Al Jabri notes that as early as September 2022, Al Jabri indicated that the proffer was litigation privileged, described the proffer in a brief for a CMC as a “solicitor’s brief”, consistently noted that it was litigation privileged at subsequent CMCs, and more extensively in his memorandum for the public hearing. Al Jabri submits that the nature of the proffer is plain and obvious. Al Jabri further submits that Sakab did not challenge the veracity of his counsel’s assertion of litigation privilege.

[65] Al Jabri argues that it could cause a “travesty” of justice if he is required to disclose the proffer in advance of discovery (*Susan Hosiery Ltd v Minister of National Revenue*, 1969 CarswellNat296, [1969] 2 Ex CR 27 at 33-34 [*Susan Hosiery*]).

[66] Al Jabri submits that in *Sakab #1* at para 189, the Court acknowledged that the proffer was created for the dominant purpose of the fraud litigation, and found that although the circumstances were unusual in that the proffer was not filed in the underlying fraud proceedings, is not subject to a production order, and is cloaked in litigation privilege, unusual circumstances are not necessarily unfair.

[67] Al Jabri further argues that litigation privilege has not been waived. The statutory requirement to provide the AGC with the document subject to a Section 38 CEA Notice and its filing with the Court does not constitute a waiver of privilege. Al Jabri submits that the AGC requires the document to determine whether it contains sensitive or potentially injurious information and the Court requires the document to determine the Section 38 Application. Al Jabri again submits that the litigation privileged proffer was the means to communicate Al Jabri's knowledge and recollection in order to facilitate the litigation process.

[68] Al Jabri adds that the Court addressed the waiver issue in *Sakab #1* at para 192.

[69] Al Jabri also argues that, but for the requirements of Section 38 of the CEA (i.e., that sensitive and potentially injurious information cannot be disclosed and that notice must be provided to the AGC that such information might be disclosed in litigation), *Sakab* would not know that the proffer existed and there would be no issue regarding litigation privilege or the production of the proffer.

[70] Al Jabri reiterates that once the Court determines the Section 38 Application, he will comply with his disclosure obligations in the fraud action and Sakab will obtain the relevant facts in that context. Al Jabri emphasizes that the proffer itself will not be disclosed.

IV. The AGC's Submissions

[71] The AGC submits that in the context of the Section 38 Application, this Court does not have the jurisdiction to determine a privilege that falls within the jurisdiction of another court. In addition, the production or disclosure of information in the underlying litigation should be done in accordance with the rules governing the litigation in the Ontario Superior Court of Justice.

[72] The AGC explains that in a Section 38 Application, the AGC's goal is to protect against the disclosure of sensitive or injurious information in proceedings and nothing more. The AGC is not a party to the underlying litigation and has no role, interest, or position regarding the underlying litigation or how the information subject to the Section 38 CEA Notices is shared or used in the underlying litigation.

[73] The AGC notes that although the issue of litigation privilege was not squarely before the Court in *Sakab #1*, it was the subject of submissions by both Respondents. The AGC submits that the Court addressed the issue by finding that it did not have jurisdiction to determine whether litigation privilege applied or to order that the proffer be disclosed to Sakab.

[74] The AGC submits that the Court cannot consider other privileges beyond the Section 38 regime. The AGC points to *R v Ahmad*, 2011 SCC 6, at para 68, where the Supreme Court of

Canada stated, “[t]he Federal Court judge’s sole concern under the [section 38] scheme is the protection of the public interest in sensitive or potentially injurious information”.

[75] The AGC notes the specific wording of section 38 compared to the privileges governed by sections 37 and 39 of the CEA. The AGC submits that if Parliament had intended that this Court could also engage in the determination of other privileges, in the context of the section 38 regime, it would have so stated.

[76] The AGC submits that the authority of the Court to control its own processes does not extend to non-section 38 privileges. The AGC notes that the Court addressed this in *Sakab #1* at para 206. The AGC explains that the jurisdiction to determine other privileges rests with the court where the underlying action is filed.

[77] The AGC notes that Sakab accepted the Court’s limits in Sakab’s submissions in the first motion, given their argument that the statutory authority of the Court is limited to reviewing and adjudicating the disclosure of information subject to the Section 38 CEA Notices.

[78] With respect to Sakab’s ongoing allegation that the Section 38 process is unfair, the AGC acknowledges that the process may not be ideal to Sakab but argues that it remains a fair process. The AGC notes the role of the AGC as an officer of the Court and that of the *amicus* in ensuring a fair process.

[79] The AGC adds that the AGC has filed the redacted documents with the Court and has filed an *ex parte* affidavit and is ready to proceed to the next steps of the Section 38 Application as expeditiously as possible.

V. The Motion is Dismissed

A. *Both motions are very similar*

[80] There is no need to address the issue of *res judicata* or issue estoppel. As noted by the AGC, the Court did not have the jurisdiction to determine litigation privilege or to order production of the redacted proffer in *Sakab #1*. Nothing has changed.

[81] Although Sakab submits that the specific issues raised and the relief sought in *Sakab #2* differ from the issues set out in Sakab's first Notice of Motion, the issues are similar and related, as are the submissions. Sakab seeks the same ultimate relief in both motions; to obtain the redacted proffer. No amount of re-characterization of the submissions made on the first motion avoids the conclusion that the same basic issues were raised in *Sakab #1*.

[82] Sakab's current arguments about what they actually sought on the first motion are not supported by their oral submissions as the issues evolved. As Sakab notes, their Notice of Motion in *Sakab #1* and written submissions did not specifically request that the Court determine whether litigation privilege applied. Nor did the Court refer to the jurisprudence or the test to establish privilege. However, Sakab raised the issue of litigation privilege in *Sakab #1*, including

whether it had been waived, in the context of their overall submission that the process would be unfair without access to the redacted proffer.

[83] Sakab's current submission – that they only sought the stay motion material and not the proffer in *Sakab #1* – overlooks their previous oral submissions, which clearly argued that production of the redacted proffer was required to address their allegation of unfairness.

[84] Moreover, what would be the point of seeking only production of the stay motion materials (which had not been filed and were not required to be filed in the Ontario Superior Court of Justice because that motion was adjourned *sine die*) or production of the proffer only to the AGC, without also seeking an order that it be produced to Sakab? The three options proposed by Sakab at the hearing of the first motion were all made with a view to obtaining a copy of the proffer once redacted.

[85] Sakab's submission that nothing in the Court's Order and Reasons in *Sakab #1* suggests that Sakab sought to compel the production of the redacted proffer is contradicted by several passages in *Sakab #1*, including at paras 69, 82, 159, 190, 191 and 196.

[86] Clearly, the relief sought on the two motions, regardless of how the first motion was initially framed, boils down to Sakab's goal to obtain the redacted proffer *in lieu* of Al Jabri's stay motion materials. Their argument that without the redacted proffer the process will be unfair because they will not be able to make submissions about the lack of relevance of the redacted

information in the proffer informed by the unredacted information in the proffer is similarly replicated.

[87] On this motion, which is characterised as a privilege motion, Sakab stated in their written memorandum that the only issue is whether the redacted proffer should be produced. In oral submissions, Sakab stated that they only seek a declaration about litigation privilege. However, in their Notice of Motion, Sakab sought both a declaration about litigation privilege and an order that the redacted proffer be provided to them. Sakab has linked the two issues, as in the first motion.

[88] Sakab's arguments disputing that litigation privilege applies to the proffer and that any such privilege was waived are made for the purpose of obtaining the redacted proffer. However, as noted below, any determination of litigation privilege would not resolve the production issue.

B. *A Section 38 Application requires a "proceeding"*

[89] Sakab submits that the proffer at issue was created by Al Jabri only for Section 38 Application and that the "proceeding" is the Section 38 Application, which is litigation in its own right. The Court disagrees. As noted, Al Jabri describes the proffer as information that he expects will be disclosed or could be disclosed at some point in the litigation in the Ontario Superior Court of Justice in his defence to Sakab's fraud action.

[90] Counsel for Sakab suggests that a document could be subject to a Section 38 notice in the absence of litigation. This theory ignores that the Section 38 regime clearly requires that there is

an underlying proceeding. The AGC would not review information to determine whether it is sensitive or injurious in the absence of an underlying proceeding in which that information might be disclosed. Section 38 defines “proceeding” as “a proceeding before a court, person or body with jurisdiction to compel the production of information”. The notice requirements, which trigger the Section 38 Application process, are based on the existence of a proceeding and arise in specific circumstances: where a participant in the proceeding is required to disclose information; where a participant in the proceeding believes that information is about to be disclosed by them or by another person; and, where an official (a non-participant) believes that information is about to be disclosed. All these circumstances are “in connection with a proceeding”.

[91] As noted, without an underlying proceeding, there would be no Section 38 CEA Notice and no subsequent Section 38 Application or determination. But for the litigation in the Ontario Superior Court of Justice, the proffer would not likely have existed and, even if it did, there would be no requirement to give notice to the AGC that the proffer may include sensitive or potentially injurious information.

[92] The Court regards the proffer as created for the purpose of the underlying fraud litigation (i.e., the “proceeding”) in the Ontario Superior Court of Justice. As noted in *Sakab #1*, including at paras 178-180, in the circumstances, the Section 38 CEA Notice over the proffer may be a preferable approach rather than several Section 38 applications and determinations as the litigation progresses and as information is required or anticipated to be disclosed in the litigation,

either in the context of discovery or at trial. As noted, that approach would likely disrupt and further delay the progress of the fraud litigation.

C. *The Court has no jurisdiction to determine litigation privilege in the context of a Section 38 Application.*

[93] Sakab relies on *Blank* regarding the criteria to establish litigation privilege. In *Blank*, the Supreme Court of Canada ultimately found that any litigation privilege in the documents at issue had expired, but first addressed the test and concluded that litigation privilege attaches to documents prepared for the dominant purpose of litigation, noting at para 60:

60. I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

[94] In *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 39, [*Lizotte*] the Supreme Court of Canada confirmed, as it found in *Blank*, that only documents for which the dominant purpose is litigation are covered by litigation privilege. The Court noted the differences between litigation privilege and solicitor-client privilege identified in *Blank* (at paras 27-41), including that the purpose of solicitor-client privilege is to protect a relationship, while the purpose of litigation privilege is to ensure the efficacy of the adversarial process, and that solicitor client privilege is absolute and permanent, while litigation privilege is not absolute and is temporary in duration.

[95] In *Susan Hosiery* at 33-34, the Court explained why a “lawyer’s brief” is privileged:

Turning to the “lawyer’s brief” rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer’s preparation of his client’s case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other’s briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

[96] The Supreme Court of Canada’s references to disclosure in *Blank* and to the adversarial process in *Lizotte* support this Court’s view that any litigation privilege arises in the context of the underlying fraud litigation where disclosure obligations arise. Similarly, in *Susan Hosiery*, the Court’s explanation of the purpose of “the lawyer’s brief rule”, including the potential for the “distortion of the truth” and the caution against dipping into briefs by way of the discovery process, further supports this Court’s view that the litigation to which any litigation privilege might apply is the fraud litigation and that the assertion of litigation privilege can only be addressed in the context of that litigation.

[97] As noted in *Sakab #1* and above, the proceeding underlying the Section 38 Application is the fraud action in the Ontario Superior Court of Justice. Sakab’s disagreement overlooks the statutory provisions and the jurisprudence explaining the context of litigation privilege.

[98] The determination of whether the proffer is subject to litigation privilege is beyond the jurisdiction of this Court. In the Court's view, any challenge to the disputed assertion of litigation privilege should be pursued in the Ontario Superior Court of Justice.

D. *Regardless of whether the Court has jurisdiction to determine litigation privilege and whether the proffer is protected by litigation privilege, the Court has no role in ordering its production*

[99] The Court cannot order production of the proffer to Sakab, whether or not it is litigation privileged.

[100] As the Court noted in *Sakab #1*, including at paras 191, 196, 208 and 210, whether certain information or documents are required to be produced or provided (e.g. in answer to questions) in the underlying proceeding is governed by the Ontario *Rules of Civil Procedure*. Al Jabri states that he is not yet required to disclose the unredacted information in the proffer in the fraud litigation.

[101] In the context of this Section 38 Application, the Court does not have any role in ordering the production of documents for the underlying litigation to the parties. The Court's role is to determine the AGC's Section 38 application; i.e., to determine whether the sensitive or potentially injurious information identified and redacted by the AGC should remain redacted, in whole or in part, and be prohibited from disclosure. In the event the Court determines that some or all information need not be prohibited from disclosure, the Court does not go on to order disclosure or production of that information.

[102] For example, in *Sakab #1* at para 208, the Court stated:

The section 38 determination will identify the information that cannot be disclosed—not information that should or must be disclosed. The remainder of the information (i.e., the non-injurious information) may or may not be used in the underlying litigation. The determination of a section 38 application does not result in this Court ordering that certain information be produced or disclosed. The disclosure or the production of the information would be in accordance with the applicable rules. For example, if the information that is subject to a section 38 application were in a Certified Tribunal Record, ordered to be produced to the applicant in a judicial review in accordance with the *Federal Courts Rules*, then the redacted information would be provided to the decision-maker, who would then be required to provide the redacted document to the applicant in accordance with those rules. Similarly, in other civil litigation, the production of a document to a party would be in accordance with the applicable rules of civil procedure.

[103] The Court is not reaching a different conclusion on this motion.

[104] Sakab’s suggestion that removing the litigation strategy from the proffer and providing only the facts to the AGC for review would have “solved the problem” overlooks that the Court rejected this option in *Sakab #1* and explained at para 208 that the Court has no role in ordering production.

[105] Al Jabri’s proffer continues to be an obstacle in moving the determination of the Section 38 Application forward. As noted in *Sakab #1*, the present circumstances may be unusual. Regardless, the proffer is the subject of a Section 38 CEA Notice and this Court must determine whether to confirm the prohibition on the non-disclosure of the information identified by the AGC as sensitive or injurious in the proffer and in the other documents at issue.

[106] This Court is at an impasse and questions whether the Respondents prefer to prolong the determination of the Section 38 Application. The status of the proffer and the Respondents' respective positions have created a "catch 22". The Court cannot determine litigation privilege in a document purportedly prepared for litigation in the Ontario Superior Court of Justice. The Court cannot order production to Sakab of the redacted proffer whether or not it is litigation privileged, or even if the parts over which Al Jabri claims litigation privilege are deleted because the production and/or disclosure of information in the fraud litigation is governed by the Ontario *Rules of Civil Procedure*. Al Jabri maintains that he is not yet required to disclose the information in the proffer. However, when Al Jabri is required to disclose information included in the proffer in the fraud action, he will be prohibited from disclosing any information identified by the AGC as sensitive or potentially injurious, and that information will remain prohibited from disclosure until the Court determines the Section 38 Application. It is in the interest of both Respondents that the Section 38 Application is determined so that their litigation can progress. As a result, the Court should proceed to determine the Section 38 Application in accordance with the statutory provisions and the jurisprudence.

[107] The Court remains confident that it can fairly determine the Section 38 Application and will be setting out the next steps at a Case Management Conference.

[108] In conclusion, the Motion is dismissed. The Court finds that it does not have the jurisdiction to determine whether litigation privilege applies to the proffer in the context of the AGC's Section 38 Application. The Court also finds that even if it had such jurisdiction and made a determination regarding litigation privilege, this would not result in the production of the

redacted proffer to Sakab. The Court has no role in ordering production of documents or disclosure of information prepared for the underlying litigation; in this case the production and disclosure is governed by the Ontario *Rules of Civil Procedure*.

[109] No costs are ordered.

ORDER in DES-5-22

THIS COURT ORDERS that:

1. The Motion is dismissed.
2. No costs are ordered.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-5-22

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA v SAAD KHALID AL JABRI AND SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY, NEW DAWN CONTRACTING COMPANY and SKY PRIME INVESTMENT COMPANY

PLACE OF HEARING: OTTAWA

DATE OF HEARING: AUGUST 17, 2023

REASONS FOR ORDER AND ORDER: KANE J.

DATED: OCTOBER 6, 2023

APPEARANCES:

Andre Seguin Christine Arcari	FOR THE APPLICANT
Munaf Mohamed KC Jonathan G. Bell	FOR THE RESPONDENTS, SAKAB SAUDI HOLDING COMPANY ET AL.
Anil Kapoor Sean Pierce	FOR THE RESPONDENT, SAAD AL JABRI
Sean Grassie (Agent for Colin Baxter)	<i>AMICUS CURIAE</i>

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE APPLICANT

Bennett Jones LLP
Toronto, Ontario

FOR THE RESPONDENTS, SAKAB SAUDI
HOLDING COMPANY ET AL.

Abergel Goldstein & Partners LLP
Ottawa, Ontario

Adair Goldblatt Bieber LLP
Toronto, Ontario

FOR THE RESPONDENT, SAAD KHALID S AL
JABRI

Kapoor Barristers
Toronto, Ontario

Colin Baxter
Ottawa, Ontario

AMICUS CURIAE