

Federal Court



Cour fédérale

Date: 20230110

Docket: DES-5-22

Citation: 2023 FC 40

Ottawa, Ontario, January 10, 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]. The AGC's Section 38 Application seeks to protect sensitive or potentially injurious information, as those terms are described in the CEA, from disclosure in a proceeding.

[2] The underlying proceeding is an action by Sakab in the Ontario Superior Court of Justice, launched in January 2021, which seeks damages (of now over \$5 billion) from Saad Al Jabri [Al Jabri]. Sakab alleges that Al Jabri orchestrated a massive international fraud and misappropriated funds from Sakab and the other corporate respondents, which were established to pursue counterterrorism activities for the Kingdom of Saudi Arabia [KSA]. Al Jabri is described as a former Director and Security Advisor to the Minister of the Interior of the KSA and as responsible for the oversight of the Sakab companies. Al Jabri was appointed as Minister of State and to the Council of Ministers, but was relieved of his governmental duties in 2015. After continuing to serve as a member of the KSA Government in an informal capacity, Al Jabri relocated to Canada in 2017.

[3] Sakab alleges that, among other things, Al Jabri amassed funds, purchased properties in various countries, established offshore companies to hold property, and made gifts to his children as part of a fraudulent scheme against his former employers, including the KSA Government and its rulers. Sakab alleges that the majority of Al Jabri's misappropriation of assets occurred after he was relieved of his duties. Al Jabri responds that the funds and property, albeit of significant

amounts, were compensation, profit shares, or bonuses for his services and for the risks he faced in providing such services. Al Jabri contends that some of the information that he will rely on to defend the fraud action cannot be disclosed because it is sensitive or potentially injurious information as those terms are defined in the CEA.

[4] The issue on the AGC's Section 38 Application will be whether the prohibition to disclose the sensitive or injurious information to be identified by the AGC in the documents at issue (pursuant to three notices provided to the AGC in accordance with subsections 38.01(1) and (3) of the CEA), as provided for in paragraph 38.02(1)(a), should be confirmed by this Court pursuant to subsection 38.06(3), or whether disclosure should be authorized, in full or part or subject to certain conditions, pursuant to subsections 38.06(1) or (2).

[5] The next steps in the Section 38 Application cannot proceed until the issues raised in the current motion by Sakab [the Sakab motion] are determined. The Sakab motion challenges whether the document provided pursuant to the Second and Third Notices to the AGC, described as a "solicitor's brief" or "proffer," for which Al Jabri asserts litigation privilege, can be the subject of a section 38 application. The motion also challenges whether Sakab should receive the proffer, once redacted—despite that litigation privilege is asserted by Al Jabri and despite that the proffer has not been filed in the context of the underlying litigation and is not required to be filed—in order for Sakab to make submissions about its relevance or irrelevance to this Court. Sakab argues that Al Jabri's conduct amounts to an abuse of process and that unless the redacted proffer is provided to them, the process will be unfair.

[6] For the reasons that follow, the Sakab motion is dismissed. The Court notes that the AGC has not yet completed the review of the proffer. Many of Sakab's allegations are based on speculation. The Court does not agree that the process to date is unfair to Sakab or that Sakab cannot meaningfully participate in the section 38 determination. As explained below, in the context of determining the Section 38 Application, if the redacted information is relevant to issues in the underlying litigation, the Court will consider whether and how non-injurious summaries of any redacted information can be provided to Sakab or whether and how any injurious information should be disclosed to the trier of fact on appropriate terms and conditions in order for the trier of fact to determine the issues in the underlying litigation with the benefit of this information.

[7] Before setting out the issues in the Sakab motion and the parties' respective submissions, a general description of the relevant statutory provisions and the process, along with the chronology of steps taken to date in this Court is provided for context. This Order and Reasons includes more background information and longer summaries of the parties' arguments than typically necessary given the extensive submissions received by the Court and the parties' references to information that may also be considered in the ultimate determination of the Section 38 Application.

[8] Both Sakab and Al Jabri characterize the proceedings in the Ontario Superior Court of Justice and in the United States [US] Federal District Court (Massachusetts) in different ways. This Court's references to the respondents' accounts of those proceedings do not reflect any

findings of fact or interpretation of the other courts' decisions; these are simply provided for context.

I. Section 38

[9] Sections 38 to 38.15 (collectively section 38) of the CEA set out a procedure whereby information relating to international relations, national defence and national security may be protected from disclosure before a court, person, or body with the jurisdiction to compel the production of information. [The relevant provisions are attached as Annex 1.]

[10] Where information is otherwise required to be disclosed by a participant, or is about to be disclosed, or may be disclosed in connection with a proceeding and that participant, or other person, believes that the information relates to international relations, national defence or national security (i.e. is sensitive or injurious), that person must give notice to the AGC (section 38.01). The AGC, upon review of the information, may authorize disclosure of all or part of the information (section 38.03). However, where the AGC does not authorize disclosure or does not enter into an agreement to permit disclosure of some facts or information subject to conditions (section 38.031), the AGC may apply to the Federal Court for an order confirming the prohibition on disclosure (section 38.04).

[11] The Court must then determine whether the prohibition on disclosure should be confirmed pursuant to subsection 38.06(3); or whether the information, or parts of it, should be disclosed pursuant to subsection 38.06(1); or, alternatively, whether the information or parts of it should be disclosed subject to conditions to limit any injury to international relations, national

defence, or national security pursuant to subsection 38.06(2). The jurisprudence has established that the Court has several options to permit some disclosure, where necessary, on terms and conditions to mitigate any injury, including, for example, providing non-injurious summaries of the information or providing the information at issue only to the judge presiding at the underlying proceeding.

[12] The test to be applied by the Court in determining the Section 38 Application was established by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [Ribic].

[13] In *Canada (Attorney General) v Khawaja*, 2007 FCA 388 [Khawaja FCA] at para 8, the Federal Court of Appeal reiterated the three-part test in the form of questions:

- (a) Is the information in question relevant to the proceeding in which disclosure is sought? If no, the information should not be disclosed. If yes, then,
- (b) Will disclosure of the information in question be injurious to national security, national defence, or international relations? If no, the information should be disclosed. If yes, then,
- (c) Does the public interest in disclosure of the information in question outweigh the public interest in prohibiting disclosure of the information in question? If yes, then the information should be disclosed. If no, then the information should not be disclosed.

[14] The party seeking the disclosure of the information (generally the respondent) must demonstrate that the redacted information is relevant (*Ribic* at para 17). If relevance to an issue or issues in the underlying proceeding is demonstrated, the onus then shifts to the AGC to demonstrate that injury would result from disclosure of the information (*Ribic* at para 20). If both

relevance and injury are established, the party seeking disclosure must then demonstrate that the public interest in disclosure of this information is greater than (i.e., outweighs) the public interest in the non-disclosure (i.e., protection) of the injurious information (*Ribic* at para 21).

[15] As noted by Justice Mosley in *Canada (Attorney General) v Almaki et al*, 2010 FC 1106 at para 60: “[t]he threshold for determining relevance is low. The Court must consider the relevance of the information at issue to the underlying proceeding.”

[16] In *Canada (Attorney General) v Tursunbayev*, 2021 FC 719 at paras 82–86 [*Tursunbayev*], Justice Noël emphasized that the Court must ensure that the redactions proposed by the AGC are justified and supported by evidence that injury from disclosure of the redacted information is probable, not simply possible. Although a degree of deference is owed to the AGC’s assessment of injury given their expertise and access to the information, the Court must still ensure that injury would be probable and then go on to the balancing test.

[17] At the third step of the *Ribic* test, in balancing or assessing whether the public interest in disclosure of the information outweighs the public interest in non-disclosure, the Court conducts a case-by-case assessment. The Court considers any public written or oral submissions of the parties, the *ex parte* submissions of the AGC and *amicus*, other *ex parte* submissions as applicable, and the relevant factors established in the jurisprudence that guide the balancing exercise (see for example *Canada (Attorney General) v Khawaja*, 2007 FC 490 [*Khawaja FC*] at paras 74 and 93; *Tursunbayev*, at paras 88–89. The factors include, among many others, the nature of the public interest sought to be protected; whether the information will probably

establish a fact crucial to the case to be made (i.e., the degree of relevance or importance, or the significance or probative value of the information in the underlying proceeding); and, whether the redacted information is already known to the public, and if so how.

[18] Where the Court concludes that the public interest favours disclosure, the Court may authorize further disclosure in the form and under the conditions that are most likely to limit any injury resulting from disclosure pursuant to subsection 38.06(2) of the CEA.

[19] As noted by the Supreme Court of Canada in *R v Ahmad*, 2011 SCC 6 at para 44 [*Ahmad*], section 38 is designed to operate flexibly:

[44] Section 38 creates a scheme that is designed to operate flexibly. It permits conditional, partial and restricted disclosure in various sections. Section 38.06(1) affirmatively requires the Federal Court judge to consider the public interest in making disclosure along with what conditions are “most likely to limit any injury to international relations or national defence or national security” (s. 38.06(2)). In making this determination, the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding. [...]

II. The Section 38 Process to Date

[20] On June 30, 2021, counsel for Al Jabri gave notice to the AGC in accordance with subsection 38.01(1) with respect to the disclosure of sensitive or potentially injurious information. This First Notice relates to a Confidential Appendix to Al Jabri’s affidavit and an attached exhibit that Al Jabri was required to file on his motion for a stay of proceedings [Stay Motion] in the Ontario Superior Court of Justice.

[21] On May 31, 2022, a Canadian Security Intelligence Service [CSIS] official gave notice to the AGC pursuant to subsection 38.01(3) that the official believed that sensitive or injurious information would be disclosed in a Notice of Motion and supporting Affidavit (related to the renewal of Al Jabri's Stay Motion).

[22] On June 2, 2022, the AGC filed the Section 38 Application seeking an order with respect to the disclosure of information about which notice was given to the AGC in the First Notice and Second Notice. The AGC also sought an injunction prohibiting Al Jabri from disclosing sensitive or potentially injurious information in connection with proceedings in the Ontario Superior Court of Justice. The AGC subsequently requested that the motion for an injunction be held in abeyance pending further discussion with Al Jabri regarding his obligations under section 38.

[23] On June 16, 2022, the Court convened a Case Management Conference [CMC] regarding the next steps in the Section 38 Application. Among other issues discussed, the AGC noted an impediment to counsel for Al Jabri receiving and retaining sensitive and injurious information.

[24] A CMC scheduled for mid-July 2022 was adjourned given delays in clarifying how counsel for Al Jabri could receive and retain the information and its transmission to the AGC for review.

[25] On August 11, 2022, the Court convened a CMC. Sakab expressed concern about the delay in the process, including that Al Jabri had not yet provided the documents subject to the Second Notice to the AGC for review. The appointment of an *amicus* was discussed. The AGC

also noted that the time necessary to review the documents, once received, could not be estimated.

[26] On August 15, 2022, the Court issued an Order appointing Mr. Colin Baxter, a security cleared lawyer, bound to secrecy in perpetuity in accordance with the *Security of Information Act*, RSC 1985, c O-5, as *amicus curiae* [*amicus*] to assist the Court in performing its statutory obligations under section 38 of the CEA. The Order provided, among other things, that the *amicus* shall have access to the confidential information in this Application (i.e., the redacted information, once available); that until such time as the *amicus* has had access to the confidential information and documents, he could communicate with the respondents for the purpose of understanding the information and documents to be reviewed; that once the *amicus* had access to the confidential information and documents he could not have any further communication with the respondents; and, that the *amicus* shall maintain the confidentiality of any information communicated to him in confidence by the respondents or any other person in connection with his role as *amicus* in this proceeding and that solicitor-client or litigation privilege will not be lost by virtue of its communication to the *amicus*. The Order further provided that the *amicus* may participate in any public hearing and shall participate in any *in camera ex parte* hearing in this proceeding, including by cross-examining any witness and presenting written and oral submissions.

[27] On September 12, 2022, this Court ordered that Al Jabri was prohibited from serving and/or filing his Stay Motion and any supporting evidence that may be sensitive or injurious

information, as defined under section 38 of the CEA, unless authorized by the AGC or a further order of this Court. This Order was in response to the AGC's motion for an injunction.

[28] On September 28, 2022, the Court convened a CMC. Among other information shared, the AGC noted that the AGC was in the process of reviewing the exhibit that was part of the First Notice and that the AGC expected additional documents to be provided pursuant to the Second Notice. Al Jabri noted that the document provided to the AGC for review pursuant to the Second Notice was a solicitor's brief that included a great deal of information (describing it as "covering the waterfront.") Al Jabri asserted that the solicitor's brief (also referred to as the "proffer") was subject to litigation privilege. Sakab expressed concern about the packaging of the document as subject to litigation privilege. The respondents jointly proposed that the public hearing—to permit submissions on the relevance of the information in the proffer and other documents—be scheduled, despite that the AGC had not completed the review of the documents, in order to make progress on the Section 38 Application. The public hearing was scheduled to take place on December 6 and 7, 2022.

[29] On October 19, 2022, Sakab filed their Notice of Motion (described more fully below).

[30] On November 3, 2022, the Court convened a CMC to discuss the scheduling of Sakab's motion and its impact on the dates scheduled for the public hearing. The Court concluded that the dates for the public hearing should be set aside and instead used for the hearing of the Sakab motion. The timetable for the exchange of memoranda, responding memoranda and reply submissions on the Sakab motion were established.

[31] On November 15, 2022, the Court convened a CMC to canvass the next steps in light of the need to first determine the Sakab motion. The Court proposed that the public hearing could be scheduled for three days in February 2023. Sakab initially requested that five days would be needed for submissions. The AGC noted that their review and redaction of the information was expected to be completed by the end of December 2022.

[32] On November 25, 2022, counsel for Al Jabri provided a Third Notice to the AGC pursuant to subsection 38.01(1) specifically describing the proffer. The AGC confirmed in correspondence to Sakab that the information provided with respect to the Third Notice was the same information provided with respect to the Second Notice.

[33] The Sakab motion was heard on December 6 and 7, 2022. In addition to three sets of submissions from Sakab on the motion, Sakab filed a Responding Record to the Section 38 Application with an Affidavit attaching over 1600 pages of exhibits. Sakab noted that the record was equally useful for the motion. Al Jabri filed submissions and responding submissions and an affidavit attaching a decision of a US Federal District Court. The *amicus* and AGC also filed responsive submissions.

[34] On December 15, 2022, the AGC filed a Further Amended Amended Notice of Application pursuant to Section 38.04 to specifically add the information covered by the Third Notice (which is identical to the information covered by the Second Notice).

III. Overview of the Sakab Motion

[35] The issues on the Sakab motion have evolved since it was filed on October 19, 2022. Sakab initially took the position that this Court does not have jurisdiction to determine whether the information as described in the Second Notice to the AGC can be protected because the document provided by Al Jabri to the AGC differed from that described in the Second Notice and in the AGC's Notice of Application pursuant to section 38.04 of the CEA. The Second Notice, provided to the AGC by an official at CSIS, referred to information that the official believed would be disclosed in a Notice of Motion and Affidavit that Al Jabri was expected to file in the Ontario Superior Court of Justice with respect to Al Jabri's intention to seek a stay of the proceedings in that Court. Sakab submits that although Al Jabri was required to file his Notice of Motion and affidavit in accordance with the timetable agreed upon and ordered by the Ontario Superior Court of Justice and intended to do so on or around June 6, 2021, as noted in various correspondence between counsel, he did not do so, and instead submitted the proffer to the AGC.

[36] Sakab argues that Al Jabri—in an effort to thwart the proper determination of the Section 38 Application and exclude Sakab from the process—provided a different document to the AGC. Sakab alleges that Al Jabri deliberately created the solicitor's brief or proffer and asserted litigation privilege to prevent Sakab from receiving the proffer following the review by the AGC and the redaction of sensitive or injurious information. Sakab asserts that but for the cloak of litigation privilege, Sakab would receive the document following the AGC's review and could

glean information from the unredacted parts that would guide them in their submissions in a public hearing with respect to the relevance—or lack of relevance—of the information.

[37] Sakab initially argued that because the proffer did not reflect the Second Notice, it was not properly subject to the Section 38 Application. Given that counsel for Al Jabri subsequently sent a Third Notice to the AGC, which specifically refers to injurious or sensitive information in the proffer, and the AGC has acknowledged that the information in its possession for review and possible redactions pursuant to section 38 is the same information that the AGC received with respect to the Second Notice, this argument need not be addressed.

[38] Sakab's arguments on this motion now focus on their concern that the section 38 process will be unfair to Sakab. Sakab argues that they are left "in the dark" and cannot meaningfully participate. Sakab alleges that the proffer includes "secret submissions" on the relevance of the factual information to Al Jabri's defence. Sakab notes that the AGC has received the proffer for review and that the *amicus* and the Court will also receive the proffer after the AGC has completed the review and seeks the Court's confirmation of any redactions, leaving Sakab as the only party who will not receive the redacted proffer. Sakab argues that given the complexity of the litigation in the Ontario Superior Court of Justice and given that—according to Sakab—Al Jabri's goal is to have the proceedings stayed by asserting that he is unable to defend himself because he will not be able to rely on sensitive and injurious information which he claims is relevant to his defence, Sakab must have the opportunity to make submissions to the Court that this information is not relevant. Sakab disputes that the appointment of an *amicus* mitigates this

unfairness, noting that the *amicus* is in a unique position because the two respondents, Sakab and Al Jabri, take very different positions.

[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 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.

[40] Alternatively, Sakab seeks an Order dismissing or staying the AGC's Section 38 Application with respect to the Second Notice.

[41] Sakab's Notice of Motion is 24 pages in length and sets out the grounds for the motion; the background to the litigation in the Ontario Superior Court of Justice; the process to date in this Court with respect to the AGC's Section 38 Application; and, an overview of Sakab's position that the information described in the Second Notice does not meet the requirements of

section 38 and that the Court does not have the authority to determine whether to confirm the prohibition on the disclosure of that information.

[42] Sakab also filed the Affidavit of Lorraine Klemens, sworn on November 1, 2022, which is identified as Sakab's Motion Record in response to the AGC's Section 38 Application, and which Sakab advised at the CMC held on November 3, 2022, would be relied on in the Sakab motion. Lorraine Klemens' affidavit describes and attaches 38 exhibits totalling over 1600 pages. The exhibits include the Amended Statement of Claim, Statement of Defence, transcripts of cross-examinations, affidavits relied on in support of Sakab's request for injunctive relief in the Ontario Superior Court of Justice, Orders of the Ontario Superior Court of Justice, and the decision of the US Federal District Court dated December 29, 2021, dismissing Sakab's action in the state of Massachusetts.

IV. Sakab's Submissions

[43] Sakab made extensive submissions to the Court, including providing their perspective on Al Jabri's conduct in Sakab's fraud action.

A. *The Background from Sakab's Perspective*

[44] Sakab points to the record to support their submission that the creation of the proffer in the context of the Section 38 Application was a strategy by Al Jabri to both stall and add new grounds for his Stay Motion. Sakab submits that Al Jabri fully intended to pursue his Stay Motion in June 2022 even in the face of the AGC's Section 38 Application, yet he then created a

new document to shield the same information from Sakab and exclude them from the section 38 process. Sakab submits that Al Jabri's conduct throughout the litigation leads to this conclusion.

[45] Sakab portrays Al Jabri's various motions and responses to Sakab's motions as thwarting Sakab's pursuit of their fraud action. While not a comprehensive account of the various proceedings that have led to Al Jabri's assertion that he cannot defend this action due to the nature of information he possesses that he cannot disclose, Sakab notes several examples.

[46] Sakab first notes that a report prepared by Deloitte traced many payments to Al Jabri or his family members and to offshore companies controlled by Al Jabri. Sakab contends that many payments allegedly made to others for products or services provided "kickbacks" to Al Jabri. A more recent report by Deloitte has led to Sakab amending their Statement of Claim to increase the amount of damages to over \$5 billion.

[47] Sakab explains that the same day that they filed their Statement of Claim on January 21, 2021, the Ontario Superior Court of Justice granted a *Mareva* order freezing Al Jabri's worldwide assets, and granted a Receivership order appointing a Receiver to protect properties located in the US. Sakab submits that these orders followed a finding of *prima facie* evidence of fraud.

[48] In March 2021, Al Jabri's motion to set aside the *Mareva* order was dismissed.

[49] Sakab notes that Al Jabri was required to provide a declaration of his assets in response to the *Mareva* order. On cross-examination, Al Jabri revealed that he had transferred one of his companies and other assets to his son as a gift very soon after he was removed from his position in the KSA in 2015. Sakab's attempt to have the *Mareva* order extended to cover Al Jabri's son led to the further revelation that Al Jabri did not write a gift deed as he had attested for tax purposes, but rather gave verbal instructions regarding this gift.

[50] Sakab notes that Al Jabri's son disputed that the *Mareva* order could apply to him. However, the Ontario Superior Court of Justice found that the entire gift was a "ruse" and that Al Jabri continued to control the assets he purported to transfer by gift.

[51] Sakab also points to Al Jabri's motions to stay the proceedings, including in April 2021, alleging abuse of process. Sakab notes that a day before the motion record was to be filed, on June 30, 2021, counsel for the US Government advised counsel for Al Jabri that disclosure of protected information in the context of that motion would engage Al Jabri's obligations under section 38. Sakab notes that Al Jabri's request to delay filing did not succeed. The Ontario Superior Court of Justice found that a motion was required by the US Government in order for the US to participate in the proceedings. Sakab notes that Al Jabri then complied and filed an extensive affidavit along with a confidential annex, for which the First Notice was given to the AGC regarding the potential disclosure of sensitive information. Sakab characterizes this as one of the first indications that Al Jabri would raise the argument that he could not defend himself because of his inability to rely on sensitive information. This Stay Motion was adjourned

pending Sakab's motion for contempt based on allegations that Al Jabri continued to dissipate assets.

[52] Sakab adds that their contempt proceedings have been stalled due to other applications and motions by Al Jabri.

[53] Sakab explains that they were required to launch proceedings in Massachusetts to give effect to the *Mareva* order given that Al Jabri had several assets in that state. Although Sakab clearly stated in their claim that the litigation would be stayed once the *Mareva* order was recognized, Sakab submits that Al Jabri challenged the claim in order to advance his arguments that he could not defend himself without secret information that was protected in the US. Al Jabri successfully moved to have Sakab's claim heard by the US Federal District Court.

[54] Sakab submits that following the December 2021 decision of the US Federal District Court dismissing Sakab's claim (for which a decision on appeal is pending), Al Jabri added new grounds to his pending Stay Motion in Ontario alleging that he could not defend Sakab's action due to the prohibition on relying on US state secrets.

[55] Sakab also notes that Al Jabri brought a motion in the Ontario Superior Court of Justice requesting that any information relied on in his Stay Motion could not be used in other proceedings, including Sakab's motion for contempt. The Ontario Superior Court of Justice dismissed the motion finding that "use immunity" was not applicable.

[56] Sakab notes that, as a result, Al Jabri was required to file material in support of his Stay Motion on May 8, 2022. Al Jabri requested an extension. The Ontario Superior Court of Justice ordered that the documents be filed by June 6, 2022.

[57] With respect to the current status of Sakab's fraud action, Sakab notes that Al Jabri would be required to file an amended Statement of Defence by December 16, 2022, in response to Sakab's amended Statement of Claim.

[58] Sakab asserts that intervening events in May and June 2022 were unknown to Sakab at that time, including that counsel for the US Government wrote to the AGC advising that counsel for Al Jabri had advised that Al Jabri intended to file his affidavit, which would disclose US national security-related information. The AGC then wrote to counsel for Mr. Al Jabri advising of the obligations pursuant to section 38. Sakab notes that despite this caution, counsel for Al Jabri indicated that his affidavit would be filed unless an injunction prevented him from doing so.

[59] Sakab suggests that Al Jabri's flaunting of his section 38 obligations forced CSIS to give a notice to the AGC (Second Notice). The Second Notice from CSIS to the AGC referred to Al Jabri's Notice of Motion and affidavit that would disclose sensitive information. Sakab adds that even after the AGC received the Second Notice, counsel for Al Jabri continued to dispute the requirements of section 38.

[60] Sakab contends that Al Jabri's conduct up to June 2022 supports the conclusion that Al Jabri had every intention to file his Stay Motion and affidavit. Sakab contends that the affidavit was ready to be filed until Al Jabri reacted to the AGC's intention to pursue an injunction, which Al Jabri later agreed to. Sakab adds that the Ontario Superior Court of Justice then had no other option but to adjourn Al Jabri's Stay Motion given the AGC's Section 38 Application.

[61] Sakab further notes that the proceedings in this Court, following the filing of the AGC's Section 38 Application, evolved. As noted above, Sakab submits that Al Jabri delayed and did not provide the material described in the Second Notice, but rather created the proffer and cloaked it with litigation privilege in a deliberate attempt to thwart Sakab's participation in the section 38 process.

[62] Sakab doubts Al Jabri's explanation that he could not complete or file his affidavit due to the AGC's caution to counsel for Al Jabri that counsel should not receive information without guidance on how to receive and handle sensitive information.

[63] Sakab suggests that Al Jabri has no genuine interest in any disclosure of the information subject to the Notices submitted to the AGC, but rather wants disclosure prohibited in order to advance his argument that he cannot defend himself without this information and, as a result, Sakab's claims should be dismissed.

[64] Sakab submits that Al Jabri's strategy is evident given Al Jabri's more recent submission that he may not renew his Stay Motion as this will depend on the outcome of the Section 38 Application.

[65] Sakab also submits that it is disingenuous for Al Jabri to argue that he raised the issue of his need to rely on sensitive information early in the litigation, noting that Al Jabri did not file any personal affidavit until June 2021.

[66] Against this backdrop of Al Jabri's conduct and allegedly deliberate attempt to stall the litigation and "freeze out" Sakab from the section 38 determination, Sakab argues that the Court must intervene to ensure fairness and guard against abuse of process.

B. *Al Jabri's Conduct is Intended to Exclude Sakab*

[67] Sakab submits that Al Jabri is attempting to manufacture a basis for a stay of proceedings through this Section 38 Application, including by creating this proffer and cloaking it with litigation privilege, rather than providing the Stay Motion and affidavit for review by the Court and then providing that redacted document to Sakab.

[68] Sakab argues that Al Jabri's creation of a proffer is a deliberate attempt by Al Jabri to prevent Sakab from participating in the Section 38 proceedings because Sakab will not receive the redacted proffer due to the assertion of litigation privilege. Sakab submits that this precludes them from making submissions on the relevance—or more particularly, the irrelevance—of the information or on other aspects of the *Ribic* test to assist the Court in its determination of

whether the information is relevant and whether the disclosure of any injurious information should remain prohibited.

[69] Sakab submits that their motion should be granted to address the unfairness and abuse of process because they will not have access to the redacted proffer for their participation in the public hearing in the Section 38 Application. Sakab submits that the Court has an obligation to “level the playing field.”

[70] Sakab notes that Al Jabri stated that he expects to disclose the information to the extent possible in his Stay Motion or in the course of litigation. Sakab, therefore, submits that the Court should order that Al Jabri provide the Stay Motion material now to the AGC for review or provide a new proffer that contains only factual information. Sakab notes that factual content cannot be privileged.

[71] 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.

[72] In oral submissions, Sakab noted a fourth option, suggesting that Sakab would bring a further motion for a determination on a question of law to determine whether the proffer is privileged given that it was provided by Al Jabri to an adversary—the AGC.

C. *The Court must Control its Process*

[73] Sakab submits that this Court has the inherent power to control the integrity of its own process and redress Al Jabri’s abuse of the Court’s process (*Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at para 36 [*RBC Life*]).

[74] Sakab points to *X (Re)*, 2017 FC 136, at paras 31 and 32, where Justice Noël highlighted that this Court has a broad responsibility to ensure fairness in national security matters due to the closed nature of the proceedings, and that this responsibility extends to ensuring that the process is fair.

[75] Sakab suggests that the Court must be alive to the mischief caused by raising evidence that engages section 38 in order to “sabotage” a trial. Sakab points to *Ahmad*, at para 74, where the Supreme Court of Canada noted the concern voiced by the Commissioner in the Air India Inquiry that an accused “might attempt to use the two-court system to sabotage a terrorism trial by intentionally calling evidence that would engage section 38.”

[76] Sakab also points to *Ahmad*, at paras 31–33, where the Court noted that prosecutions should not be derailed because a trial judge is denied access to information that cannot be

disclosed and that the trial judge must have a sufficient understanding of the nature of the withheld information. Sakab submits that this same concern applies in non-criminal proceedings.

D. *Sakab Seeks Meaningful Participation in the Section 38 Application*

[77] Sakab notes that Al Jabri will argue that the information he seeks is highly relevant and essential for his defence, but Sakab will argue the opposite. Sakab further notes that relevance is determined with reference to the issues in the litigation—the causes of action and the defences available. Sakab submits that given the complexity of the litigation, which engages the law of KSA, Sakab must provide the Court with a complete understanding of how their claim will be litigated, including how the sensitive or injurious information is not relevant or probative of Al Jabri’s defences.

[78] Sakab suggests that without Sakab’s meaningful participation and submissions, the Court will not be able to apply the *Ribic* test and determine relevance at the first stage or conduct the balancing at the third stage, which includes consideration of the significance and probative value of the information.

[79] In response to the Court’s question about why the Court requires a complete understanding of the claims and defences and the law of the KSA in order to determine the Section 38 Application, noting that the threshold for relevance at the first stage of the *Ribic* test is low, Sakab responds that some defences to be raised by Al Jabri would not be defences under the law of the KSA. In addition, Sakab submits that they will make formal admissions which will render evidence by Al Jabri on those issues irrelevant.

[80] Sakab submits that Al Jabri deliberately created the proffer to mix facts that are not privileged with his legal arguments about the relevance of that information, which are privileged, in order to shield the whole document from Sakab and oust Sakab from the section 38 process.

[81] Sakab further alleges that Al Jabri created the litigation privileged proffer to gain an advantage in this Court by including non-privileged information—or “secret submissions” on relevance—on an *ex parte* basis in advance of the Court’s receipt of submissions from both respondents at the public hearing about the relevance of this information. Sakab submits that this is an abuse of process that must be addressed. Sakab rejects the Court’s ability to disabuse itself of information in the proffer that is covered by litigation privilege or reflects Al Jabri’s submissions on relevance.

[82] Sakab argues that it is a fundamental principle that a document filed with the Court is shared with all parties. Sakab submits that section 38 is no exception and that once the AGC has completed the review of the information believed to be sensitive or injurious and applies redactions, the redacted document must be provided to the respondents. Sakab submits that basic rules of fairness demand that Sakab receive the redacted proffer in order to be able to make informed and helpful submissions to the Court about how the information that Al Jabri will argue is relevant and necessary for his defence, but unavailable to him, is not relevant at all.

[83] Sakab submits that the *amicus*’ participation is not a substitute for Sakab’s participation and does not mitigate the lack of fairness to Sakab. Sakab points to *Canada (Attorney General) v Telbani*, 2014 FC 1050 at para 27 [*Telbani*], where Justice de Montigny explained the role of the

amicus as representing the interests that are not before the Court. Sakab submits that their interests will not be represented by the *amicus* and that they must advance their own interests given the complexity of this litigation. Sakab submits that their participation is needed to mitigate the risk that Al Jabri will use secret information to sabotage the underlying litigation. Sakab adds that because the respondents have opposing interests, the *amicus* is in a difficult position and cannot adequately raise Sakab's interests.

[84] Sakab disputes that the opportunity for Sakab to request to make *ex parte* submissions (subsection 38.11(1)) would address the alleged unfairness. Sakab submits that there should be no need for *ex parte* submissions because Sakab should be able to make informed submissions at a public hearing based on the redacted proffer. Sakab notes that Al Jabri will not need to request *ex parte* submissions because Al Jabri has buried his "secret submissions" in his proffer.

[85] As noted above, Sakab proposes three options to the Court, including that the Court order that Al Jabri waive litigation privilege given that, in Sakab's view, the proffer was deliberately created to prevent Sakab from receiving it.

[86] Sakab also submits that Al Jabri's assertion of litigation privilege over the proffer is "ridiculous" because Al Jabri provided the proffer to the AGC, an adversary. In response to the Court's question why the AGC would be characterized as an adversary given that the AGC is not a party to the underlying litigation and has a duty to protect the information and to bring a section 38 application where required, Sakab submits that in the AGC's Section 38 Application, Al Jabri and Sakab are both respondents, and therefore, the AGC is an adversary.

[87] With respect to Sakab's proposal that the Court should order that the AGC return the proffer to Al Jabri and order Al Jabri to separate the factual information from information that is litigation privileged then resubmit the revised proffer to the AGC for review, Sakab suggests that the directions set out by Justice Mosley in *Khawaja FC* provide a guide for this Court. In *Khawaja FC*, the section 38 claims were ordered to be distinguished from other claims of privilege. Sakab argues that any inconvenience or delay to the AGC, given that the AGC has already begun to review the proffer and has engaged other agencies that must be consulted, is not a reason to trump the unfairness to Sakab.

[88] Sakab further submits that the public hearing should not proceed as scheduled in February unless a redacted document is provided to them in sufficient time to prepare their public submissions.

V. Al Jabri's Submissions

A. *The Issue*

[89] Al Jabri submits that Sakab's motion should be dismissed or, alternatively, its determination adjourned until the AGC conducts its review and delivers the redacted version of the proffer to Al Jabri and to the Court.

[90] Al Jabri submits that the narrow issue before the Court is whether Sakab is entitled to production of the information in the proffer that is not protected pursuant to section 38 in order to make submissions to the Court regarding the first and third stages of the *Ribic* test.

[91] Al Jabri argues that Sakab's description of the basis of their fraud claim, including the Deloitte report, is not relevant to the Section 38 Application, which should focus on whether the information in the hands of the AGC pursuant to two (and now three) notices is sensitive or injurious. Al Jabri notes that he will respond to the fraud action on its merits in the Ontario Superior Court of Justice.

[92] Al Jabri disputes Sakab's allegations that he is abusing this Court's process. Al Jabri explains that he has taken a proactive approach by drafting the proffer and submitting it to the AGC in order to avoid interrupting the fraud action through multistage section 38 notices and applications as sensitive or injurious information is required to be disclosed (but cannot be disclosed). He explains that he will be guided by the redactions in the proffer, as confirmed by this Court, and will not disclose any injurious information in the litigation. Al Jabri notes that information and documents will be provided in the course of the litigation in accordance with the governing rules of civil procedure. Al Jabri submits that he is not obliged to provide Sakab with information outside the litigation. He further notes that it will be his decision whether to pursue his Stay Motion.

B. *Background*

[93] Al Jabri describes the background and litigation to date differently than Sakab.

[94] According to Al Jabri, in 2015 he was removed from his government role supporting then Crown Prince Muhammad bin Nayef [MBN] but continued to support MBN in a personal capacity afterward. Mohammed bin Salman [MBS] later succeeded MBN as Crown Prince.

Al Jabri states that MBS took retaliatory measures against Al Jabri and his family due to Al Jabri's support of MBN.

[95] Al Jabri submits that Sakab mischaracterizes his defence to the fraud claim. Al Jabri notes that his defence to Sakab's claim includes that: Al Jabri assisted MBN to set up several commercial corporations, now the Sakab companies, to carry out the 2007 Royal Instruction; all the payments made to Al Jabri were authorized by MBN; MBN had broad discretion and the authority to make and approve such payments as a delegate of the King of KSA; the payments were compensation for counterterrorism work and similar operations developed and led by Al Jabri; the payments were made in furtherance of the Sakab companies' security purposes, for which there were intentionally few supporting documents or records, or the records were intentionally misleading to obfuscate the involvement of KSA or its allies in these secret operations; and, Al Jabri continued to be compensated even after being removed from his position in 2015.

[96] In his Statement of Defence, Al Jabri also submits that Sakab did not suffer any harm or loss because the assets used to fund the payments to Al Jabri did not belong to Sakab. Al Jabri raises other defences, including that Sakab's claim is not justiciable as the discretion of the Royal Order is at play; Sakab's claim is barred by the *State Immunity Act* because necessary parties (including the KSA and MBN) cannot be joined to the action, which prevents the Court from adjudicating fairly; and, Sakab's claim is an abuse of process because it is part of the retaliatory efforts of MBS against Al Jabri.

[97] Al Jabri acknowledges that the causes of action asserted by Sakab are governed by the law of KSA. He submits that, accordingly, Sakab must meet a three-part test and demonstrate that Sakab suffered harm, Al Jabri was at fault, and Al Jabri's fault caused Sakab's harm.

[98] With respect to Sakab's argument that Al Jabri was not entitled to any payment from the Sakab companies because the law of the KSA does not permit public officials to be remunerated for unauthorized involvement in private companies, Al Jabri responds that the payments were authorized by MBN under his delegated authority from the King under the "Royal Instruction."

[99] Al Jabri adds that any law restricting a public official from receiving outside compensation is a penal law of KSA and is beyond the authority of the Ontario courts.

[100] Al Jabri notes that in his previous Stay Motion filed in April 2021, he raised several grounds including the non-justiciability of the cause of action and the state immunity of parties that should have been added as defendants. Al Jabri notes that the material filed, including his detailed affidavit, explained that there was information he could not disclose due to its sensitive nature and the application of Section 38. Al Jabri explains that he subsequently added additional grounds for his Stay Motion in the Ontario Superior Court of Justice; in particular, the loss of relevant evidence for his defence due to national security interests.

[101] Al Jabri submits that, contrary to Sakab's allegation, he does indeed want the information in the proffer to be available to permit him to advance his defence, but he is barred from

disclosing the information pursuant to section 38 until the Court determines what he may disclose.

C. *No Abuse of Process*

[102] Al Jabri submits that, contrary to Sakab's submissions, the record demonstrates that he has not abused the section 38 process nor has he manipulated the US Government to assert state secrets privilege in the US litigation.

[103] Al Jabri submits that he raised the issue of his inability to disclose sensitive or injurious information early in the litigation. He points to, for example, his motion record to set aside the *Mareva* order in February 2021, which included his son's affidavit that flagged that highly sensitive information was implicated. He adds that his April 2021 Stay Motion (which did not proceed) also referred to sensitive information that he was not able to disclose.

[104] Al Jabri also notes that he requested a case conference before the Ontario Superior Court of Justice to pursue a request to delay the filing of his Stay Motion material based on the intervention by counsel for the US Government. However, that Court directed that the proper procedure would be for the US Government to seek party status and then bring a motion. Given this direction, Al Jabri was required to file his Notice of Motion and affidavit (which included a confidential annex) and he did so.

[105] Al Jabri disputes that the US litigation triggered a change in his approach in the Ontario litigation, noting that he had previously flagged that the information that he needed to respond to the claims could not be revealed.

[106] Al Jabri describes Sakab's claim in Massachusetts, and its dismissal, from a different perspective than Sakab. Al Jabri explains that Sakab's US claim referred to the parallel action in Ontario and made the same allegations. Although Sakab filed the claim to give effect to the *Mareva* Order, Sakab was required to show that the action would likely succeed. The Director of National Intelligence in the US filed a classified affidavit invoking state secrets privilege resulting in the action being moved to the US Federal District Court. Al Jabri submits that the assertion of the state secrets privilege precluded Sakab's success.

[107] Al Jabri submits that, contrary to Sakab's characterization, the US state secrets privilege issue was litigated. Al Jabri submitted a 50-page statement of defence in response to the US claim. Al Jabri also disputes Sakab's characterization of the dismissal of the action on the court's own motion, noting that US Federal District Court ordered Sakab to show cause why Sakab's action should not be dismissed.

[108] With respect to more recent events, Al Jabri submits that the record does not support Sakab's suggestion that in late May and June 2022, Al Jabri was about to file his Stay Motion and supporting affidavit in the Ontario Superior Court of Justice or that these documents were ready and at hand "in a drawer." Al Jabri points to the May 2022 correspondence with Sakab seeking additional time to file; the Order of the Ontario Superior Court of Justice setting

June 6, 2022, as the deadline for filing; correspondence from counsel for the US Government to the AGC cautioning that information in the motion materials required to be filed by Al Jabri may include sensitive information; and, correspondence from the AGC to Al Jabri cautioning him about the sensitive information and noting that counsel for Al Jabri should not receive sensitive information without the necessary security clearances or other protocols. Al Jabri further submits that given the previous order of the Ontario Superior Court of Justice refusing to extend filing deadlines unless the US Government sought party status and brought the appropriate motion, Al Jabri was of the view that a court order was required to confirm that he could not file his Stay Motion and affidavit at that time and until the sensitive information was redacted.

[109] Al Jabri further notes that counsel for the AGC attended before the Ontario Superior Court of Justice to explain that sensitive information could not be disclosed pursuant to section 38. As a result, the Ontario Superior Court of Justice agreed to adjourn Al Jabri's Stay Motion.

[110] Al Jabri disputes that he "threatened" to file his motion and affidavit in June 2022 in the face of the AGC's caution regarding section 38. Al Jabri explains that given the events described above, he could not finalize his affidavit until the AGC had reviewed the sensitive or injurious information to be included therein and identified information that would be subject to section 38. He also submits he was under no obligation to file anything because his Stay Motion was adjourned *sine die* on June 8, 2022 by the Ontario Superior Court of Justice.

D. *The Proffer*

[111] Al Jabri disputes that the proffer was manufactured to place information and submissions before this Court and to exclude Sakab.

[112] Al Jabri disputes that he caused any delay in the process for the determination of the Section 38 Application, noting that his counsel was initially precluded from receiving certain sensitive information from him. Al Jabri explains that once this issue was resolved, the proffer was drafted for submission to the AGC for review. Al Jabri submits that there is no doubt that the information in the proffer engages section 38. He describes the proffer as including facts and context about how the facts relate to his defence.

[113] Al Jabri explains that the proffer is a working document drafted by counsel for Al Jabri. The proffer was provided to permit the AGC to identify and redact sensitive information and subsequently for the Court's determination so that Al Jabri would then know what information he could disclose in the litigation as it proceeds. Al Jabri describes it as comprehensive in order to eliminate the need for successive section 38 applications as the information is about to be disclosed in the litigation. He explains that the proffer includes information that he would hope to be able to disclose in the litigation, including on his stay motion; however, he must know what he cannot disclose.

[114] Al Jabri acknowledges that litigation privilege does not cover the factual information included in the proffer. Al Jabri adds that the factual information in the proffer will "almost

certainly” be disclosed in the litigation (i.e., in discovery, motions, and/or trial), except as prohibited pursuant to the section 38 determination.

[115] Al Jabri disputes Sakab’s contention that the proffer includes “secret submissions” on relevance. He notes that the Court will be provided with the proffer in its redacted and unredacted form by the AGC and can readily identify whether there are “secret submissions.” Al Jabri notes that he will make submissions at the public hearing (to the extent possible) about the relevance of the information and Sakab will have the same opportunity.

[116] Al Jabri adds that Sakab had agreed that the public hearing should proceed even before the AGC had completed the review of the proffer in order to move the process along, and appeared to be prepared to make submissions without a redacted document.

E. *No Unfairness to Sakab*

[117] Al Jabri agrees that the Court has jurisdiction to control its own process in the face of abuse. Al Jabri submits that there is no abuse of process or unfairness to Sakab.

[118] Al Jabri disputes Sakab’s claim that Sakab cannot make submissions about the relevance or irrelevance of the sensitive or injurious information at the public hearing without production of the redacted proffer. Al Jabri notes that Sakab has a wealth of information now which permits Sakab to understand the nature of the sensitive information and make their arguments about relevance—or irrelevance. Al Jabri adds that it is not known whether Sakab’s intention to make admissions that will undercut Al Jabri’s defences will actually come to pass or whether such

admissions would have any bearing on the relevance or irrelevance of the information in the proffer.

[119] Al Jabri notes that the ultimate arbiter of what is relevant is the motions judge or trial judge in Ontario Superior Court of Justice. Sakab can still argue before that Court that the evidence Al Jabri hoped to rely on—but may be precluded from disclosing—would not be relevant.

F. *Sakab's Proposals Should be Rejected*

[120] Al Jabri notes that he is entitled to discuss with his counsel how he will respond and participate in the litigation, without any obligation to share such information with Sakab. The proffer reflects this and is protected by litigation privilege.

[121] Al Jabri notes that information will be provided to Sakab as the litigation unfolds and in accordance with the rules of evidence and civil procedure. He also notes that the litigation is at an early stage; pleadings are not yet closed and there have not yet been examinations for discovery. Al Jabri submits that he has no obligation to disclose information outside the civil process. Al Jabri acknowledges that he will be a compellable witness at a later point in the litigation, but he is not yet compellable.

[122] With respect to Sakab's proposals to the Court, Al Jabri submits that this Court cannot direct the format that information is provided to the AGC pursuant to a notice. The AGC must review the information provided in whatever way it is packaged. Al Jabri submits that it is

irrelevant that the information at issue is not packaged in the same form as it would be for a stay motion.

[123] Al Jabri further submits that the Court has no jurisdiction to order the disclosure to Sakab of any information that Al Jabri expects to or may later disclose in his litigation as this compromises Al Jabri's conduct of the underlying litigation, which should and will follow the rules of civil procedure.

[124] Al Jabri notes that he has no obligation to deliver any Notice of Motion or affidavit now or later. Al Jabri notes that the Court's determination of whether information is prohibited from disclosure will inform how he conducts his defence, including whether he will pursue his Stay Motion in the Ontario Superior Court of Justice and on what grounds. He notes that he is not under any order from the Ontario Superior Court of Justice to file material in that court given that his motion was adjourned *sine die* due to the Section 38 Application and the communication from the AGC that sensitive information could not be disclosed. Al Jabri adds that this Court has no jurisdiction to direct him to deliver his Stay Motion and affidavit to the AGC for review as he may ultimately decide not to pursue the motion.

[125] Al Jabri notes that two competing values are at play: Al Jabri's right to control his defence and Sakab's right to participate in the public hearing. Al Jabri again submits that he has control over his litigation in the Ontario Superior Court of Justice and will be governed by the rules of civil procedure. Al Jabri submits that he should be able to maintain control over when non-redacted facts that he will rely on will be disclosed in the litigation.

[126] Al Jabri argues that, in any event, it is premature for the Court to consider whether there is any unfairness to Sakab by not providing Sakab with the redacted proffer. Al Jabri notes that once the AGC has reviewed the proffer and identified any redactions, the proffer will be provided to the Court and the Court will be able to readily distinguish facts from other information. The Court would then be in a position to consider whether any unfairness to Sakab results from not receiving the redacted proffer before making public submissions.

[127] Al Jabri adds that once the document is returned by the AGC to Al Jabri with redactions, it may be apparent to Al Jabri that he should consider producing it to Sakab; for example, if the non-redacted information is already known to Sakab or is in the public domain.

[128] Al Jabri also notes that once the Section 38 Application is determined, Al Jabri may be content to provide the redacted proffer to Sakab.

[129] Al Jabri expressed concern about Sakab's suggestion that the public hearing for the Section 38 Application should be adjourned given that the hearing was scheduled for three days in February and further delays are not warranted. Al Jabri submits that the public hearing should proceed and if supplementary submissions are warranted could be provided at a later date.

[130] Al Jabri also reacted to Sakab's proposed fourth option, noting than any further motion by Sakab that seeks the same relief as this motion would be an abuse of process.

VI. The Amicus' Submissions

[131] The *amicus* does not take a position on the outcome of Sakab's motion but provides explanations regarding the section 38 process.

[132] With respect to Sakab's initial arguments about the propriety of the Second Notice, the *amicus* explains that there are four "pathways" or scenarios where a person must notify the AGC about the future disclosure of sensitive or potentially injurious information, as provided in subsections 38.01(1) – (4). The *amicus* notes that in the present case, the First Notice to the AGC was made pursuant to subsection 38.01(1): "a participant who, in connection with a proceeding, is required to disclose, or expects to disclose..." (In this case, Al Jabri's former solicitor provided the First Notice.) The Second Notice was made pursuant to subsection 38.01(3)—"an official, other than a participant", who believes that sensitive or potentially injurious information "may be disclosed..." (In this case, a CSIS official, who believed that sensitive or injurious information would be disclosed, provided the Second Notice.)

[133] The *amicus* notes that section 38 is a "complete code" of the procedures that apply where the release of sensitive information is at issue (citing *Khawaja FC*, at para 89). The *amicus* notes, in particular, subsection 38.04(5) and sections 38.06–38.09, 38.11, and 38.12.

[134] The *amicus* submits that interpreting section 38 holistically, information that is disclosed to a person's solicitor may be the subject of a Notice to the AGC where some or all of that information is also expected to be later disclosed in connection with a proceeding.

[135] The *amicus* also notes that following the determination of the Section 38 Application, the Court may impose conditions on any authorization to disclose sensitive or injurious information, including to the trier of fact. The *amicus* points to the flexible approach in *Khawaja FC*, at paras 37 and 187, where Justice Mosley directed the AGC to provide the redacted documents to the respondent in a manner that distinguished the section 38 redactions from redactions based on other claims of privilege. In addition, Justice Mosley authorized conditional disclosure in the form of a summary that was released to counsel only and limited to use in the underlying criminal proceedings.

[136] The *amicus* submits that although the “ground has shifted” since Sakab filed their motion, there remains some common ground. The *amicus* notes that no party seeks to jeopardize the disclosure of sensitive information, no party wants to be “played,” the stakes in the underlying litigation are high, and the litigation should proceed on its merits in the Ontario Superior Court of Justice.

[137] The *amicus* does not take a position on Sakab’s proposals. However, the *amicus* offers an additional option as a “middle ground” for consideration.

[138] The *amicus* proposes that the Court could direct Al Jabri to review the proffer he provided to the AGC and colour code it or otherwise distinguish the facts, which are not litigation privileged, from the information that is litigation privileged. This could occur while the AGC reviews the proffer in consultation with other agencies. Once completed, the AGC’s redactions could be compared to Al Jabri’s colour-coded document and the non-litigation

privileged information and the information that remains after the section 38 redactions would be easily identifiable and could be provided by Al Jabri to Sakab.

[139] The *amicus* also notes that upon the Court's determination of the Section 38 Application, the Court may provide summaries of any redacted information to mitigate the injury from disclosure of sensitive information and could provide other guidance to the Ontario Superior Court of Justice.

VII. The AGC's Position

A. *The Motion Should be Dismissed*

[140] The AGC submits that the Sakab motion should be dismissed. The AGC acknowledges that the current motion by Sakab seeks an order directed against Al Jabri, but submits that the AGC has an interest, in particular, that the AGC is able to make a decision regarding the identification of sensitive or injurious information in the document at issue—the proffer—and then pursue the Section 38 Application.

[141] The AGC notes that the review of the information involves consultation with government agencies within and outside Canada, already underway. The AGC notes that they are also consulting with CSIS officials to determine if disclosure of any information may be authorized now pursuant to subsection 38.03(1).

[142] The AGC submits that both the First and Second Notice were proper. The AGC explains that the Second Notice, on May 31, 2022 from a CSIS official, which referred to information that would be disclosed in Al Jabri's Notice of Motion and Affidavit was so described based on information available to the CSIS official at that time. The AGC was notified of the risk of disclosure of the information and acted on that notice.

B. *The Section 38 Process*

[143] The AGC explains that the obligation of the AGC is to protect sensitive information. The AGC submits that the Federal Court's role is limited to the section 38 proceedings; i.e., to confirm whether sensitive or potentially injurious information is prohibited from disclosure or whether it can be disclosed in the underlying proceedings.

[144] The AGC submits that the CEA comprehensively deals with sensitive or injurious information. Section 38 does not address whether or how the information should be disclosed in litigation, rather whether the information is prohibited from disclosure. The AGC has no role in providing the information, once redacted and once this Court makes its determination, to the other Court where the underlying litigation is being pursued.

[145] The AGC notes that the first event in the section 38 process is the intention or likelihood of a party to disclose information in connection with a proceeding. Once there is an intention to disclose sensitive or injurious information in a proceeding, a notice must be given to the AGC by a party or by others. Upon receipt of a notice, the section 38 process requires that the AGC make

the initial decision about the protection of sensitive information. The AGC notes that the information is the focus, not its form or packaging.

[146] The AGC notes that upon review of information provided following a notice, the AGC may authorize that some information can be disclosed (i.e., is not prohibited) or the AGC may prohibit disclosure pending confirmation by the Court. The AGC explains that once the review is complete, the AGC simply returns the information to the person who provided it (with or without redactions).

[147] In the present case, upon completion of the review of the proffer or other information provided, the AGC will identify the sensitive or injurious information, apply the redactions and return the document to counsel for Al Jabri, who submitted the proffer to the AGC. The AGC would then pursue the Section 38 Application, seeking the Court's confirmation of any prohibitions on disclosure. The AGC does not direct the person who provided the information for review about how to use the redacted document, nor does the AGC address any other privilege claims asserted.

[148] The AGC submits that the section 38 process is fair and that unfairness should not be presumed due to the circumstances. The AGC agrees that in the present case the role of the *amicus* is not a perfect solution to Sakab's concerns, but submits that the *amicus*' role is important. In addition, as an officer of the Court, the AGC has a role to play in ensuring the process is fair.

[149] The AGC submits that Sakab is not excluded from the process and will be able to make public submissions regarding relevance—or lack of relevance of the information—even without access to the proffer.

[150] The AGC submits that the section 38 process permits the court to make a fair determination regarding the information at issue. The statute is flexible, with several options to ensure fairness in the underlying litigation once the determination is made.

[151] The AGC notes that the section 38 process is at an early stage. Once the AGC has reviewed the proffer and identified the redactions, the Court will review the proffer, there will be submissions and a public hearing, the *amicus* will make submissions taking into account the competing positions, Sakab may request to make *ex parte* submissions, and the AGC will make *ex parte* submissions. The AGC also notes that subsections 38.11(2) and (3) permit *ex parte* submissions by any party. Contrary to Sakab's submission, there is no unfairness in permitting such *ex parte* submissions.

[152] The AGC submits that if the Court has any concerns about the fairness of the process, such concerns can be addressed if and when they arise. In addition, if the Court confirms the prohibition on the public disclosure of any injurious information, the Court may consider whether summaries of redacted information (replacing injurious information) can be disclosed or whether the information can be provided on terms and conditions to the judge in the underlying proceedings.

C. *The Proposals are not Feasible*

[153] The AGC submits that it is premature for the Court to consider Sakab's proposals, again noting that the AGC has not completed the review of the proffer.

[154] The AGC submits that Sakab's proposal, calling for the proffer to be retracted by Al Jabri to exclude the litigation privileged parts resubmitted to the AGC for review is not feasible. The AGC notes that the proffer is a mix of facts and other highly sensitive information that cannot be dissected. Litigation privilege is asserted on the whole document.

[155] The AGC submits that practical considerations favour continuing with the review of the proffer, noting that retracting it and providing a new document to the government agencies that must be consulted will cause confusion, delay and raise concerns about the handling of the information. The AGC notes that the consultation process is in progress. The AGC adds that it is not a secret that the information in the proffer could implicate national security concerns outside of Canada. For example, the decisions of the US Federal District Court show that foreign partners have interests.

VIII. The Motion is Dismissed

A. *The Purpose of the Motion*

[156] The Court has received written submissions, heard oral submissions, and has determined this motion; however, the Court questions its purpose.

[157] At one of the first CMCs convened following the filing of the AGC's Section 38 Application, the Sakab respondents expressed concern about Al Jabri's tactics to slow or thwart their litigation in the Ontario Superior Court of Justice. To address the concern about delay arising from the Section 38 Application, and more particularly, the time necessary for the AGC to review the documents and identify any necessary redactions, both respondents suggested that the public hearing proceed as soon as feasible. It was agreed that the public hearing would be scheduled even though the AGC had not yet completed their review of the information covered by the Second Notice in order to provide an early opportunity for both Sakab and Al Jabri to make submissions on the relevance of the information sought to be protected in a general way. The goal was to use this process, albeit novel, to expedite the next steps, in particular the scheduling of the *in camera ex parte* hearing and the filing of confidential affidavits for that purpose and the ultimate determination of the Section 38 Application. The option of a second public hearing—following the identification of the sensitive or injurious information and redactions and before the *in camera ex parte* hearing—was not foreclosed.

[158] Despite the agreement to proceed with the public hearing, Sakab reconsidered their position and filed the current motion initially focussing on the propriety of the Second Notice to the AGC and Al Jabri's packaging of the information as a "proffer" for which litigation privilege is claimed.

[159] The lack of trust in the Court's process and the Court's ability to control the process is troubling given the early stage of the section 38 process. The AGC has not yet completed the review of the proffer but has noted that it includes highly sensitive information. Once the review

is completed, the extent of the section 38 redactions will be known. If the proffer is heavily redacted, Sakab's concerns about not having access to the redacted proffer in order to make submissions on the relevance of the information (or irrelevance) will be largely moot, because regardless of litigation privilege, the document would not reveal much to further assist Sakab.

[160] In addition, whether the information is irrelevant or relevant and injurious, the overall outcome will be the same.

[161] Typically, in a section 38 application, the respondent is the party seeking disclosure and must establish that the information at issue is relevant. If the information that the AGC seeks to prohibit from disclosure is not relevant to the underlying litigation, its disclosure is prohibited.

[162] Al Jabri submits that the information is relevant and essential for his defence. Sakab will argue that the information is not relevant to Al Jabri's defence.

[163] If the Court finds, at the first stage of the *Ribic* test, that the information is relevant to an issue in the underlying litigation (which is a low threshold to meet) and finds, at the second stage, that the AGC has established that the disclosure of the information would result in injury to international relations, national defence, or national security, then, at the third stage, the party seeking disclosure must demonstrate that the information should be disclosed regardless of the probable injury (i.e., that the public interest in disclosure outweighs the public interest in non-disclosure). As noted above, the Court considers several factors at this stage, including the significance or probative value of the information, or whether the information would provide

facts crucial to the case. In the present case, it is anticipated that Al Jabri would argue that the information has significant probative value and Sakab would argue that it does not.

[164] In both Sakab's and Al Jabri's preferred scenario, the result would be the same: the information would be prohibited from disclosure, either because it is irrelevant or because it is relevant and injurious and the public interest in non-disclosure is greater than the public interest in disclosure.

[165] In either scenario, Al Jabri would not be able to disclose the information that he says he needs to defend himself. The difference is that if the Court finds that the information is both relevant and injurious information and cannot be disclosed, Al Jabri may seek to rely on this Court's reasons for non-disclosure to support his argument that he is unable to use relevant evidence to mount a defence against Sakab's claims. However, Sakab is not prevented from raising the issue of relevance before the Ontario Superior Court of Justice to assert that Al Jabri's defences do not depend on the injurious and prohibited information.

[166] If Sakab succeeds in establishing either that the information in the proffer is not relevant at stage one or, for example, not significantly probative at stage three, the information remains prohibited from disclosure. Al Jabri would not be able to rely on this information—which is what Sakab argues that Al Jabri really wants. However, Al Jabri could still seek to argue in the Ontario Superior Court of Justice that this information is relevant to one or more of his defences. This Court's findings of relevance (or irrelevance) in the context of the Section 38 Application

do not foreclose arguments about the relevance of evidence to the trier of fact in the civil proceedings.

B. *The Court Need not Address the Scope of its Inherent Powers*

[167] The respondents and *amicus* all submit that the Court can make any necessary orders relying on the Court's inherent jurisdiction to control its own process. The Court notes that the powers to control its process, or any abuse of its process, would be exercised in the context of the Section 38 Application. The Court's jurisdiction finds its source in the application before it.

[168] The Court agrees that it has power to control its own process (*RBC Life*, at paras 35–36); however, the Court does not find that there has yet been any abuse of process. As repeatedly noted, the Court's role is to determine the Section 38 Application in accordance with the statute and the jurisprudence. Contrary to Sakab's assertions, Sakab is not excluded or "frozen out" of the section 38 process. Sakab may make public submissions—as they intended—and may request to make additional public or *ex parte* submissions.

[169] In addition, the statutory provisions and the jurisprudence establish that the Court has sufficient flexibility upon determining a section 38 application. (See for example, *Ahmad* at para 44 and *CEA*, section 38.06.) Upon determination of the Section 38 Application, the Court will consider whether and how any sensitive or injurious information that cannot be publicly disclosed should be shared with the trier of fact (whether the motions judge or trial judge) to ensure that they have the necessary information to determine the issues before them; for

example, whether Al Jabri can defend the action without information that is prohibited from public disclosure.

C. *The Background to the Litigation does not Influence the Court's Determination of the Section 38 Application*

[170] Both Sakab and Al Jabri describe their engagement in the litigation to date in different ways. They point to the same record in support of their different perspectives. Sakab alleges that Al Jabri has proceeded in a deliberate way to thwart Sakab's participation in the Section 38 Application and that this conduct is consistent with Al Jabri's conduct in the litigation to date. Sakab goes so far as to suggest that Al Jabri has raised the issue of sensitive and injurious information to invoke Section 38 in order to derail the litigation. Sakab suggests that Al Jabri has abused the process. Al Jabri contends that he is adhering to previous orders in the Ontario Superior Court of Justice and his obligations pursuant to Section 38.

[171] Sakab alleges that Al Jabri has no motive to challenge the AGC's Section 38 Application because Al Jabri's real goal is to argue that the prohibition on disclosure of information makes it impossible for him to defend the fraud allegations and, as result, Sakab's underlying claim at the Ontario Superior Court of Justice should be dismissed. Al Jabri disputes the allegation and insists that he wants to be able to use the information for his defence.

[172] Sakab's caution to the Court, pointing to *Ahmad*, at para 74, and suggesting that Al Jabri has raised evidence that engages section 38 only to disrupt the litigation in Ontario, is not supported by the record. Al Jabri raised the issue of sensitive or injurious information at least as

early as April 2021 and, given the nature of the proceedings, it should not have been a surprise to Sakab that the need to protect sensitive or injurious information would arise.

[173] Both respondents may be pursuing strategies that they regard as in their own interests. However, as the *amicus* noted, no one wants to “be played.”

[174] The Court takes no position on whether Al Jabri’s or Sakab’s conduct is clever, strategic, or borderline bad faith. The Court’s role is to determine the Section 38 Application.

[175] As noted, Sakab has placed several exhibits on the record, including the Statement of Claim, Statement of Defence, several orders issued in the Ontario Superior Court of Justice, decisions of a US Federal District Court, affidavits filed in other proceedings, and transcripts of cross-examinations. The record demonstrates that the litigation is complex. However, this does not change the task at hand for this Court in the Section 38 Application.

D. *The Proffer*

[176] The Court’s task is to determine whether to confirm the prohibition on the information that the AGC has identified as sensitive or injurious (in the First Notice, which is an affidavit and exhibit) and will soon identify as sensitive or injurious (in the Second and Third Notices, which is the proffer).

[177] The AGC received the proffer pursuant to the Second and Third Notices. As explained by the AGC, the form or packaging does not matter; the AGC must review the information

regardless. As noted by the AGC, consultation with other government agencies within and outside Canada is required.

[178] As Al Jabri explained, the proffer was drafted to provide all the information that was likely to be otherwise disclosed in the course of the fraud action to the AGC for review to avoid a series of notices and section 38 applications as the litigation unfolds and to avoid the uncertainty about what information can be disclosed.

[179] The AGC may bring a section 38 application at any time, as necessary, even as a trial is in progress or a witness is about to give evidence. This would halt the underlying proceeding while the section 38 application is determined. In the present case, the AGC could be required to bring one or more section 38 applications as the litigation in the Ontario Superior Court of Justice progresses if and when further notices are given that sensitive or injurious information is about to be disclosed. The AGC may even need to be present to guard against disclosure in the absence of a notice. This *ad hoc* approach would impact the litigation in ways that may be more detrimental than resolving the section 38 claims at the outset, to the extent possible.

[180] Although Sakab views the creation of the proffer and the assertion of litigation privilege with suspicion, it may be more efficient to deal with as much information as possible in one application to avoid further delays in the underlying litigation. Although the Court does not encourage the creation of new documents for a section 38 application, the present circumstances may warrant this approach.

E. *Sakab is not Excluded from the Section 38 Process*

[181] Sakab’s argument that they are “in the dark” is an overstatement and is not consistent with the chronology recounted by both respondents or with the extensive record filed by Sakab.

[182] Sakab is not excluded from the Section 38 process; Sakab may make public submissions—and clearly intended to do so—and could also request to make additional public submissions or *ex parte* submissions. As noted above, the public hearing had been scheduled as agreed by both respondents.

[183] Sakab disputes that they have sufficient information—without the redacted proffer—to make submissions about why the information which Al Jabri will argue is relevant and essential to his defence would not be relevant at all. However, the extensive record includes, among other documents: Al Jabri’s Notice of Motion for a stay of proceedings in April 2021, which was supported by a 100-page affidavit and a Confidential Annex (not produced due to section 38); Al Jabri’s Statement of Defence, which reveals his defences and the nature of the sensitive information that cannot be set out; various orders from the Ontario Superior Court of Justice, including material submitted in the context of the *Mareva* order; Al Jabri’s motion to set aside the *Mareva* order; and Al Jabri’s response to Sakab’s motions for contempt; and, decisions from a US Federal District Court.

[184] From all this, Sakab has discerned and can further discern Al Jabri’s position in the litigation and the nature of the information likely subject to the Section 38 Application in order

to guide Sakab in their submissions about lack of relevance of the sensitive information. In addition, Sakab will receive Al Jabri's written submissions in advance of the public hearing.

[185] Sakab previously advised the Court that five days should be set aside for the public hearing given that Sakab would make comprehensive submissions, among other things, about the applicable law of the KSA, the defences available or unavailable to Al Jabri in the fraud action and admissions Sakab may make which would render certain information irrelevant. Sakab's submissions on these issues do not require access to the redacted proffer.

[186] Once the AGC has completed the review of the information subject to all three notices, the Court's determination of the Section 38 Application will be in accordance with the three-part *Ribic* test.

[187] I reject Sakab's speculative submissions that this Court could not determine the relevance or irrelevance of the redacted information without more extensive submissions from Sakab which would only be possible if they receive the redacted proffer. Given the volume of documents submitted by Sakab, along with their submissions to date, anticipated submissions as described above, and further submissions that Sakab may make in response to those of Al Jabri, the Court should have a sufficient grasp of the underlying litigation and the key issues in order to determine whether the information in the proffer is relevant.

[188] In addition, to the extent that Sakab does not know or cannot anticipate what information may be in the proffer that Al Jabri seeks to rely on to show that he cannot defend himself—at

least with respect to the defence that certain exonerating information cannot be disclosed—there may be scope for this information to be shared by this Court with the presiding Judge in the Ontario Superior Court of Justice in a summary or under very strict conditions without disclosure to Sakab. We are simply not at that point yet.

F. *The Section 38 Process is not Unfair and no Unfairness has yet Been Demonstrated*

[189] The Court acknowledges that the circumstances are unusual given that the proffer that is subject to the Second and Third Notices is not a document that has been filed in the underlying proceedings and is not subject to a production order (as would be a Certified Tribunal Record on an application for judicial review, for example) and that the proffer is cloaked in litigation privilege. However, unusual circumstances are not necessarily unfair.

[190] Sakab argues that they will be the only party on the Section 38 Application that will not see the redacted document and that this creates unfairness. As noted, the AGC has not yet completed the review and redaction of the proffer. The proffer may be significantly redacted—as occurs in some section 38 applications. If Sakab does not receive the redacted proffer, they would be in a similar position as a respondent in a section 38 application who receives a heavily redacted document yet still makes general submissions about the relevance of that information. This Court has determined many section 38 applications where submissions were made regarding a heavily redacted document by a respondent who focused on why certain information could be relevant and important to advance the theory of their particular case. Arguments about irrelevance could similarly be advanced. This may be a challenge for such respondents, but it is

one that is inherent in the section 38 process, which requires injurious information to be protected pending confirmation by the Court.

[191] Sakab also argues that it is a fundamental principle that any document that is filed and served be shared with all parties. However, the proffer has not yet been filed with this Court or in the underlying litigation. There is no obligation on a litigant to share documents or information untethered from the litigation process. The provision or exchange of information would occur in the context of the litigation. As repeatedly noted at the hearing of this motion, if the AGC had not received a notice and made the Section 38 Application, the issue of whether the proffer—a litigation privileged document—should be provided to Sakab would not arise.

[192] Sakab also suggests that litigation privilege cannot attach to the proffer because Al Jabri has provided it to the AGC, rather than providing only the facts without any privileged content. The Court does not regard the AGC to be in a typically adversarial role. The AGC is fulfilling its role pursuant to section 38 in reviewing information in accordance with the notices provided and applying to the Court to confirm the prohibition on any sensitive or injurious information. The AGC is not a party to the underlying litigation between Sakab and Al Jabri. In the context of the Section 38 Application, the AGC must receive the information subject to a notice for review and must follow the provisions of the CEA. Al Jabri provided the proffer to the AGC because Al Jabri believes it includes sensitive or injurious information that would later be disclosed in the fraud action. The AGC is not working against either Sakab or Al Jabri, but rather is fulfilling a statutory duty to protect information that may be injurious if publicly disclosed by anyone.

[193] Sakab also argues that Al Jabri's creation of the proffer is unfair and an abuse of process because it contains "secret submissions" about the relevance of the information to Al Jabri, which gives Al Jabri an advantage by providing *ex parte* submissions to the Court in advance of any public hearing. This allegation is speculative. Al Jabri's description of the proffer as including mixed facts and context does not equate to "secret submissions" to this Court. The Court's focus on any section 38 application is to determine whether the Court should confirm the prohibition on disclosure of the sensitive or injurious information. The Court would not, in any event, consider other parts of the document that are covered by other privileges nor any "secret submissions." In this case, given Sakab's allegations, the Court would be very alert to this concern.

[194] Although Sakab appears to doubt the Court's ability to ignore any such information, the Court is accustomed to ignoring information that is not germane to the issue before it or that should not be before it.

[195] Moreover, there is no need for "secret submissions." The Court will hear submissions from Al Jabri in a public hearing on the relevance of the information he seeks to have disclosed, albeit without any specific references to the redacted information. Al Jabri could explain, in a general way, why or how the information he seeks is relevant. Similarly, the Court will hear submissions from Sakab on the irrelevance of the information at a public hearing. Both respondents could also request to make additional public and/or *ex parte* submissions.

[196] The Court appreciates that in this application, Al Jabri knows the content of the proffer. Al Jabri will know what lies under any redacted text and Sakab will not. The Court also understands that the proffer, for which Al Jabri currently asserts litigation privilege, would not be available to Sakab even after it is redacted, unless Al Jabri provides it voluntarily to Sakab. Although these circumstances differ from some—but not all— section 38 applications where the redacted documents are provided to one or more respondents before submissions are made to the Court, the different circumstances should not be equated with unfairness.

[197] The alleged “unfairness” or “uneven playing field” can also be addressed by the role of the *amicus*, the AGC’s duty of candour, and the Court’s responsibilities in designated proceedings to carefully scrutinize the documents and consider all submissions.

[198] As Sakab notes, in *X (Re)*, Justice Noël explained, at paras 31–33, that a designated judge has an expanded “gatekeeper role” with an “overriding responsibility to ensure fairness and the proper administration of justice.” The Court is alive to its duty to ensure fairness.

[199] With respect to Sakab’s argument that the *amicus* cannot adequately advance their interests given the complexity of the litigation, the Court notes that nothing prevents Sakab from making submissions about the complexity of the litigation in their public submissions. The *amicus* can make additional submissions with the benefit of access to the redacted proffer.

[200] In *Telbani* at paras 27–28, Justice de Montigny described the role of an *amicus* in broad terms:

[27] That said, there is no precise definition of the role of amicus that is applicable to all possible situations where a court may find it beneficial to obtain advice from a lawyer not acting on behalf of the parties: *R v Cairenius* (2008), 232 CCC(3d) 13, at paragraphs 52-59; *R v Samra* (1998), 41 O.R.(3d) 434 (C.A). It is generally agreed that the appointment of an amicus is generally intended to represent interests that are not represented before the court, to inform the court of certain factors it would not otherwise be aware of, or to advise the court on a question of law: see *Attorney General of Canada et al v Aluminium Company of Canada*, (1987) 35 DLR (4th) 495, at page 505 (BCCA).

[28] There is no doubt, however, that the amicus is not the accused's lawyer (in a criminal proceeding) or respondent (in a civil proceeding). The role of an amicus is not any more analogous to that of a special advocate appointed under section 83 of the IRPA in the context of a security certificate. The role of the amicus is to assist the court and ensure the proper administration of justice, and the sole [TRANSLATION] "client" of the amicus is the court or the judge that appointed him or her. As Justice Fish (speaking on behalf of the dissenting judges) pointed out in *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (at paragraph 87), "[o]nce appointed, the amicus is bound by a duty of loyalty and integrity to the court and not to any of the parties to the proceedings"

[My emphasis]

[201] In this case, the *amicus* can and will represent interests not before the Court and assist the Court in ensuring the proper administration of justice. Although the respondents take different positions, the *amicus* can address why the redacted information may or may not be relevant, without advocating for any particular outcome.

[202] With respect to Sakab's reliance on *Ahmad* in support of their argument that the Court must guard against unfairness and abuse of process, the Court is familiar with *Ahmad*, which confirms that the section 38 process does work and permits flexibility to ensure fairness and the proper administration of justice. *Ahmad* provides guidance regarding options for the court once a

section 38 application is determined. This motion deals with a preliminary issue arising well before the Court's ultimate determination of the Section 38 Application. At the appropriate time, the Court will consider whether and how the presiding judge in the proceedings in the Ontario Superior Court of Justice should be provided with summaries or information that this Court may ultimately determine cannot be disclosed due to the injury to international relations, national defence, or national security on any necessary terms and conditions.

[203] The Court has received extensive written submissions to date and has heard oral submissions. Information has also been provided in lengthy case conference briefs and at CMCs that explain the respondents' respective arguments. The Court will consider the relevance of the information with full awareness of the submissions of Sakab and the fact that Sakab has not seen the document.

[204] Once the AGC has reviewed the proffer, identified the redactions and submitted the redacted proffer (and see-through version) to the Court, and once the Court has received and heard the public submissions, if the Court has concerns that the Sakab position has not been well articulated, the Court could invite Sakab to make additional public submissions, including to respond to tailored questions from the Court formulated to protect sensitive or injurious information. Sakab could also request to make *ex parte* submissions.

G. *Sakab's Proposals are not Feasible*

[205] Sakab's proposals are premised on the Court finding that there is unfairness to Sakab because they have been excluded, are "in the dark," or that "secret submissions" will be buried in

the proffer. The Court does not find that Sakab is excluded or is “in the dark.” As noted, the allegations that “secret submissions” are buried in the proffer are speculative.

[206] Although the Court has authority to control its own process, this does not extend to ordering Al Jabri to waive litigation privilege, retract and revise the proffer, or submit a Notice of Motion and Affidavit to the AGC for review.

[207] Moreover, none of the proposals advanced by Sakab would result in Sakab receiving the redacted proffer—unless Al Jabri voluntarily provides it.

[208] As the AGC explained, the AGC reviews the information to identify what is sensitive or injurious and then seeks the Court’s confirmation. 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.

[209] As noted by Al Jabri, his use of the unredacted information will depend on the next steps to be taken in his defence to Sakab's action in the Ontario Superior Court of Justice, which may be a Notice of Motion to stay the proceedings and filing of supporting documents and/or other aspects of the litigation, including the discovery process.

[210] If the solicitor's brief or proffer had simply remained in the hands of Al Jabri's counsel for the preparation of other documents, and was not the subject of a notice to the AGC pursuant to section 38.01, there would be no expectation that this would ever be shared with Sakab.

[211] This Court has no reason to order that the document provided to the AGC pursuant to the Second and Third Notice (the proffer) be revised to delete any information that is litigation privileged and to include only the facts, and then to submit a new document to the AGC.

[212] The proffer is now specifically the subject of a notice to the AGC (pursuant to the Third Notice, and is the same information provided pursuant to the Second Notice). As explained, the AGC received the information and is required to review the information, regardless of its form or packaging. The AGC is in the process of reviewing the proffer and consulting with other government agencies. For the AGC to now retract the proffer and provide a different document to other government agencies who may have been consulted would jeopardize the protection of sensitive and injurious information.

[213] Sakab pointed to *Khawaja* as an example of the Court ordering that section 38 redactions be distinguished from redactions based on other privileges. The Court is aware of the options it

may pursue in the context of determining whether to confirm any redactions yet to be identified by the AGC. In *Khawaja*, the documents at issue had been disclosed to the respondent. Justice Mosley noted that the redactions included those made pursuant to section 38 and other redactions. Justice Mosley did not order that the documents at issue be disclosed; the disclosure was in accordance with the obligations of the prosecution. Sakab appears to rely on Justice Mosley's reference to a fresh affidavit having been provided to distinguish the redactions as a precedent for this Court. However, the present circumstances differ as the AGC has not completed the review and redaction of the proffer and the Court has not yet received the redacted proffer.

H. *The Amicus' Proposal*

[214] Al Jabri notes that the *amicus*' "middle ground" proposal overlooks that Al Jabri has no obligation to provide the proffer—whether or not the litigation privileged parts are removed, except in accordance with the rules of civil procedure. As noted above, the Court agrees. However, Al Jabri should nonetheless consider the *amicus*' proposal, with some modifications.

[215] If Al Jabri remains committed to moving the section 38 determination forward—as he contends—to avoid further delays to the underlying litigation in the Ontario Superior Court of Justice, including his decision whether to pursue his Stay Motion or to hone his defences, Al Jabri could review the proffer now (while the AGC is conducting the review and consulting with other government agencies) to identify and block out the parts that are litigation privileged. Then upon receiving the AGC's redactions of sensitive and injurious information, Al Jabri could consider whether to voluntarily provide the proffer to Sakab, with both the AGC's section 38

redactions and Al Jabri's litigation privileged redactions. Although the proffer may not be dissectible, as the AGC noted, and although the extent of the redactions is not yet known, this approach warrants Al Jabri's consideration.

I. *The Section 38 Determination Should Proceed*

[216] Similarly, if Sakab indeed wants their fraud action to proceed without further delay and without further section 38 applications, which would again temporarily halt those proceedings, Sakab should consider pursuing their initial intention to make public submissions on the Section 38 Application at the February 2023 hearing relying on the extensive information they already possess and the additional submissions Al Jabri will make, to which Sakab can respond.

[217] Sakab's allegations of unfairness are premature. The AGC has not yet completed their review of the proffer and the proffer has not yet been submitted to the Court. If the proffer is significantly redacted and Sakab is so advised, Sakab's arguments regarding their need for the redacted proffer may change; Sakab may make public submissions in the same way and with the same challenges as other respondents who receive a significantly redacted document; and, Sakab's public submissions will be informed by the extensive information already available to them and by the public submissions of Al Jabri.

[218] As noted, once the Court receives the redacted proffer and hears the public submissions, if the Court has concerns that Sakab's perspective regarding relevance has not been sufficiently advanced, the Court may invite Sakab to make additional public submissions and/or respond to specific questions from the Court. Sakab may also request to make *ex parte* submissions.

[219] Also as repeatedly noted, the Court has several options available to ensure fairness while protecting injurious information. These options will be considered in the context of the determination of the three-part *Ribic* test and, in particular, in considering how any injury can be mitigated, while allowing disclosure (of any information determined to be relevant) to the extent possible. The Court is not at this point yet.

[220] Following the Court's determination of the Section 38 Application to confirm whether some or all of the information yet to be redacted by the AGC should remain prohibited from public disclosure, the Court will consider the options available as the circumstances warrant. This includes whether non-injurious summaries of any injurious information may be disclosed or whether injurious information may be shared with the trial judge or motions judge alone, on strict terms and conditions to protect any sensitive or injurious information and any other privileges asserted.

[221] Although Sakab's arguments focus on this early stage of the process, the unfairness they allege relates to their concern that Al Jabri will argue that he cannot defend himself if relevant information he needs to do so is prohibited from disclosure. Sakab is not precluded from advancing their argument that this information is not relevant at all in the litigation in the Ontario Superior Court of Justice. The trial judge or motions judge may consider the relevance—or irrelevance—of any prohibited information with the benefit of some communication and information from this Court.

[222] In addition, this Court will remain seized of any further related section 38 applications that may arise as information not addressed in the current application is sought to be disclosed in the underlying litigation.

ORDER in DES-5-22

THIS COURT ORDERS that:

1. The Motion of the Respondent, Sakab *et al*, is dismissed.
2. No costs are ordered.

"Catherine M. Kane"

Judge

ANNEX 1

Relevant provisions of the *Canada Evidence Act* (R.S.C., 1985, c. C-5)
 Dispositions pertinentes de la *Loi sur la preuve au Canada* (L.R.C. (1985), ch. C-5)

38 The following definitions apply in this section and in sections 38.01 to 38.15.

38 Les définitions qui suivent s'appliquent au présent article et aux articles 38.01 à 38.15.

judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04. (*judge*)

juge Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l'article 38.04. (*judge*)

participant means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (*participant*)

participant Personne qui, dans le cadre d'une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements. (*participant*)

potentially injurious information means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. (*renseignements potentiellement préjudiciables*)

renseignements potentiellement préjudiciables Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales. (*potentially injurious information*)

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information. (*instance*)

instance Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements. (*proceeding*)

prosecutor means an agent of the Attorney General of Canada or of the Attorney General of a province, the

poursuivant Représentant du procureur général du Canada ou du procureur général d'une province, particulier qui agit à

Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding. (*poursuivant*)

titre de poursuivant dans le cadre d'une instance ou le directeur des poursuites militaires, au sens de la Loi sur la défense nationale. (*prosecutor*)

sensitive information means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. (*renseignements sensibles*)

renseignements sensibles
Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les relations internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection. (*sensitive information*)

Notice to Attorney General of Canada

Avis au procureur général du Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

38.01 (1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

During a proceeding

Au cours d'une instance

(2) Every participant who believes that sensitive information or potentially

(2) Tout participant qui croit que des renseignements sensibles ou des

injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a

renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Avis par un fonctionnaire

(3) Le fonctionnaire — à l'exclusion d'un participant — qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

Au cours d'une instance

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables

proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, other than a summary hearing as defined in subsection 2(1) of that Act, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Instances militaires

(5) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une audience sommaire au sens du paragraphe 2(1) de cette loi, les avis prévus à l'un des paragraphes (1) à (4) sont donnés à la fois au procureur général du Canada et au ministre de la Défense nationale.

Exception

(6) This section does not apply when

(a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;

(b) the information is disclosed to enable the Attorney General of Canada,

Exception

(6) Le présent article ne s'applique pas :

a) à la communication de renseignements par une personne à son avocat dans le cadre d'une instance, si ceux-ci concernent l'instance;

b) aux renseignements communiqués dans le cadre de l'exercice des attributions du

the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

c) aux renseignements dont la divulgation est autorisée par l'institution fédérale qui les a produits ou pour laquelle ils ont été produits ou, dans le cas où ils n'ont pas été produits par ou pour une institution fédérale, par la première institution fédérale à les avoir reçus;

d) aux renseignements divulgués auprès de toute entité mentionnée à l'annexe et, le cas échéant, à une application figurant en regard d'une telle entité.

Exception

(7) Les paragraphes (1) et (2) ne s'appliquent pas au participant si une institution gouvernementale visée à l'alinéa (6)c) l'informe qu'il n'est pas nécessaire, afin d'éviter la divulgation des renseignements visés à cet alinéa, de donner un avis au procureur général du Canada au titre du paragraphe (1) ou de soulever la question devant la personne présidant une instance au titre du paragraphe (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

Disclosure prohibited

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

Annexe

(8) Le gouverneur en conseil peut, par décret, ajouter, modifier ou supprimer la mention, à l'annexe, d'une entité ou d'une application figurant en regard d'une telle entité.

Interdiction de divulgation

38.02 (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

Entités

(1.1) Dans le cas où une entité mentionnée à l'annexe rend, dans le cadre d'une application qui y est mentionnée en regard de celle-ci, une décision ou une ordonnance qui entraînerait la divulgation de renseignements sensibles ou de renseignements potentiellement préjudiciables, elle ne peut les divulguer ou les faire divulguer avant que le procureur général du Canada ait été avisé de ce fait et qu'il se soit écoulé un délai de dix jours postérieur à l'avis.

Exceptions

(2) La divulgation des renseignements ou des faits visés au paragraphe (1) n'est pas interdite :

a) si le procureur général du Canada l'autorise par écrit au titre de l'article 38.03 ou par un accord conclu en application de l'article 38.031 ou du paragraphe 38.04(6);

b) si le juge l'autorise au titre de l'un des paragraphes 38.06(1) ou (2) et que le délai prévu ou accordé pour en appeler a expiré ou, en cas d'appel ou de renvoi pour examen, sa décision est confirmée et les recours en appel sont épuisés.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

Disclosure agreement

Autorisation de divulgation par le procureur général du Canada

38.03 (1) Le procureur général du Canada peut, à tout moment, autoriser la divulgation de tout ou partie des renseignements ou des faits dont la divulgation est interdite par le paragraphe 38.02(1) et assortir son autorisation des conditions qu'il estime indiquées.

Instances militaires

(2) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une *audience sommaire* au sens du paragraphe 2(1) de cette loi, le procureur général du Canada ne peut autoriser la divulgation qu'avec l'assentiment du ministre de la Défense nationale.

Notification

(3) Dans les dix jours suivant la réception du premier avis donné au titre de l'un des paragraphes 38.01(1) à (4) relativement à des renseignements donnés, le procureur général du Canada notifie par écrit sa décision relative à la divulgation de ces renseignements à toutes les personnes qui ont donné un tel avis.

Accord de divulgation

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

Application to Federal Court — Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure

38.031 (1) Le procureur général du Canada et la personne ayant donné l'avis prévu aux paragraphes 38.01(1) ou (2) qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais veut divulguer ou faire divulguer les renseignements qui ont fait l'objet de l'avis ou les faits visés aux alinéas 38.02(1)b) à d), peuvent, avant que cette personne présente une demande à la Cour fédérale au titre de l'alinéa 38.04(2)c), conclure un accord prévoyant la divulgation d'une partie des renseignements ou des faits ou leur divulgation assortie de conditions.

Exclusion de la demande à la Cour fédérale

(2) Si un accord est conclu, la personne ne peut présenter de demande à la Cour fédérale au titre de l'alinéa 38.04(2)c) relativement aux renseignements ayant fait l'objet de l'avis qu'elle a donné au procureur général du Canada au titre des paragraphes 38.01(1) ou (2).

Demande à la Cour fédérale : procureur général du Canada

38.04 (1) Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la

of information about which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

divulgence de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).

Demande à la Cour fédérale : dispositions générales

(2) Si, en ce qui concerne des renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4), le procureur général du Canada n'a pas notifié sa décision à l'auteur de l'avis en conformité avec le paragraphe 38.03(3) ou, sauf par un accord conclu au titre de l'article 38.031, n'a pas autorisé la divulgation des renseignements ou n'en a autorisé la divulgation que d'une partie ou assorti de conditions son autorisation de divulgation :

a) il est tenu de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements si la personne qui l'a avisé au titre des paragraphes 38.01(1) ou (2) est un témoin;

b) la personne — à l'exclusion d'un témoin — qui a l'obligation de divulguer des renseignements dans le cadre d'une instance est tenue de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements;

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

c) la personne qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais qui veut en divulguer ou en faire divulguer, peut demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements.

Notice to Attorney General of Canada

Notification du procureur général

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

(3) La personne qui présente une demande à la Cour fédérale au titre des alinéas (2)b) ou c) en notifie le procureur général du Canada.

Court records

Dossier du tribunal

(4) Subject to paragraph (5)(a.1), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to section 38.12, take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

(4) Sous réserve de l'alinéa (5)a.1), toute demande présentée en application du présent article est confidentielle. Pendant la période durant laquelle la demande est confidentielle, l'administrateur en chef du Service administratif des tribunaux judiciaires peut, sous réserve de l'article 38.12, prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

Procedure

Procédure

(5) As soon as the Federal Court is seized of an

(5) Dès que la Cour fédérale est saisie d'une demande

application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, with respect to making the application public;

(a.1) shall, if he or she decides that the application should be made public, make an order to that effect;

(a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

présentée au titre du présent article, le juge :

a) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la Loi sur la défense nationale, autre qu'une audience sommaire au sens du paragraphe 2(1) de cette loi — sur l'opportunité de rendre publique la demande;

a.1) s'il estime que la demande devrait être rendue publique, ordonne qu'elle le soit;

a.2) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une *audience sommaire* au sens du paragraphe 2(1) de cette loi — sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;

b) décide s'il est nécessaire de tenir une audience;

- | | |
|--|---|
| <p>(c) if he or she decides that a hearing should be held, shall</p> | <p>c) s'il estime qu'une audience est nécessaire :</p> |
| <p>(i) determine who should be given notice of the hearing,</p> | <p>(i) spécifie les personnes qui devraient en être avisées,</p> |
| <p>(ii) order the Attorney General of Canada to notify those persons, and</p> | <p>(ii) ordonne au procureur général du Canada de les aviser,</p> |
| <p>(iii) determine the content and form of the notice; and</p> | <p>(iii) détermine le contenu et les modalités de l'avis;</p> |
| <p>(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.</p> | <p>d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations.</p> |

Disclosure agreement

Accord de divulgation

- | | |
|--|--|
| <p>(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,</p> | <p>(6) Après la saisine de la Cour fédérale d'une demande présentée au titre de l'alinéa (2)c) ou l'institution d'un appel ou le renvoi pour examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3) relativement à cette demande, et avant qu'il soit disposé de l'appel ou de l'examen :</p> |
| <p>(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and</p> | <p>a) le procureur général du Canada peut conclure avec l'auteur de la demande un accord prévoyant la divulgation d'une partie des renseignements ou des faits visés aux alinéas 38.02(1)b) à d) ou leur divulgation assortie de conditions;</p> |
| <p>(b) if an agreement is entered into, the Court's consideration of the application or any</p> | <p>b) si un accord est conclu, le tribunal n'est plus saisi de la demande et il est mis fin à</p> |

hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter

l'audience, à l'appel ou à l'examen.

Fin de l'examen judiciaire

(7) Sous réserve du paragraphe (6), si le procureur général du Canada autorise la divulgation de tout ou partie des renseignements ou supprime les conditions dont la divulgation est assortie après la saisine de la Cour fédérale aux termes du présent article et, en cas d'appel ou d'examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3), avant qu'il en soit disposé, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen à l'égard de tels renseignements dont la divulgation est autorisée ou n'est plus assortie de conditions.

Rapport sur l'instance

38.05 Si la personne qui préside ou est désignée pour présider l'instance à laquelle est liée l'affaire ou, à défaut de désignation, la personne qui est habilitée à effectuer la désignation reçoit l'avis visé à l'alinéa 38.04(5)c), elle peut, dans les dix jours, fournir au juge un rapport sur toute question relative à l'instance qu'elle estime utile à celui-ci.

relating to the proceeding that the person considers may be of assistance to the judge.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written

Ordonnance de divulgation

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements ou des faits visés au paragraphe 38.02(1), sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

Divulgation avec conditions

(2) Si le juge conclut que la divulgation des renseignements ou des faits porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements ou des faits, d'un résumé des

admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

When determination takes effect

(3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a

renseignements ou d'un aveu écrit des faits qui y sont liés.

Confirmation de l'interdiction

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une ordonnance confirmant l'interdiction de divulgation.

Prise d'effet de la décision

(3.01) L'ordonnance de divulgation prend effet après l'expiration du délai prévu ou accordé pour en appeler ou, en cas d'appel, après sa confirmation et l'épuisement des recours en appel.

Preuve

(3.1) Le juge peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

Admissibilité en preuve

(4) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (2), mais qui ne pourra peut-être pas le faire à

proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

cause des règles d'admissibilité applicables à l'instance, peut demander à un juge de rendre une ordonnance autorisant la production en preuve du fait, des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, dans la mesure où telle forme ou telles conditions sont conformes à l'ordonnance rendue au titre du paragraphe (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Facteurs pertinents

(5) Pour l'application du paragraphe (4), le juge prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve au cours de l'instance.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

Avis de la décision

38.07 Le juge peut ordonner au procureur général du Canada d'aviser de l'ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) toute personne qui, de l'avis du juge, devrait être avisée.

Automatic review

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the

Examen automatique

38.08 Si le juge conclut qu'une partie à l'instance dont les intérêts sont lésés par une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) n'a pas eu la possibilité de présenter ses observations au titre de l'alinéa 38.04(5)d), il

judge shall refer the order to the Federal Court of Appeal for review.

renvoie l'ordonnance à la Cour d'appel fédérale pour examen.

Appeal to Federal Court of Appeal

Appel à la Cour d'appel fédérale

38.09 (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

38.09 (1) Il peut être interjeté appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) devant la Cour d'appel fédérale.

Limitation period for appeal

Délai

(2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

(2) Le délai dans lequel l'appel peut être interjeté est de dix jours suivant la date de l'ordonnance frappée d'appel, mais la Cour d'appel fédérale peut le proroger si elle l'estime indiqué en l'espèce.

Limitation periods for appeals to Supreme Court of Canada

Délai de demande d'autorisation d'en appeler à la Cour suprême du Canada

38.1 Notwithstanding any other Act of Parliament,

38.1 Malgré toute autre loi fédérale :

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 10 days after the day on which the judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

a) le délai de demande d'autorisation d'en appeler à la Cour suprême du Canada est de dix jours suivant le jugement frappé d'appel, mais ce tribunal peut proroger le délai s'il l'estime indiqué en l'espèce;

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the

b) dans les cas où l'autorisation est accordée, l'appel est interjeté conformément au paragraphe

<i>Supreme Court Act</i> but within the time specified by the Supreme Court of Canada.	60(1) de la <i>Loi sur la Cour suprême</i> , mais le délai qui s'applique est celui qu'a fixé la Cour suprême du Canada.
Special rules — hearing in private	Règles spéciales : audience à huis clos
38.11 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make an order that the hearing be held, or the appeal or review be heard, in private.	38.11 (1) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) peut ordonner que l'audience, l'appel ou l'examen soit tenu à huis clos.
Special rules — hearing in National Capital Region	Règles spéciales : audience dans la région de la capitale nationale
(1.1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the <i>National Defence Act</i> , other than a <i>summary hearing</i> as defined in subsection 2(1) of that Act, the Minister of National Defence, be held or heard, as the case may be, in the National Capital Region, as described in the schedule to the <i>National Capital Act</i> .	(1.1) À la demande soit du procureur général du Canada, soit du ministre de la Défense nationale dans le cas des instances engagées sous le régime de la partie III de la <i>Loi sur la défense nationale</i> , autre qu'une <i>audience sommaire</i> au sens du paragraphe 2(1) de cette loi, l'audience prévue au paragraphe 38.04(5) et l'audition de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) ont lieu dans la région de la capitale nationale définie à l'annexe de la <i>Loi sur la capitale nationale</i> .
Ex parte representations	Présentation d'arguments en l'absence d'autres parties

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, the opportunity to make representations *ex parte*.

***Ex parte* representations — public hearing**

(3) If a hearing under subsection 38.04(5) is held, or an appeal or review of an order made under any of subsections 38.06(1) to (3) is heard, in public, any *ex parte* representations made in that hearing, appeal or review shall be made in private.

Protective order

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or

(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une *audience sommaire* au sens du paragraphe 2(1) de cette loi — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)d).

Observations en l'absence d'autres parties : audience publique

(3) Sont faites à huis clos les observations présentées en l'absence d'autres parties lors d'une audience, tenue en public, prévue au paragraphe 38.04(5) ou lors de l'audition, tenue en public, de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3).

Ordonnance de confidentialité

38.12 (1) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une

review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing, appeal or review relates.

Court records

(2) The court records relating to a hearing that is held, or an appeal or review that is heard, in private or to any ex parte representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing, appeal or review be sealed and kept in a location to which the public has no access.

Certificate of Attorney General of Canada

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may

ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) peut rendre toute ordonnance qu'il estime indiquée en l'espèce en vue de protéger la confidentialité de tout renseignement sur lequel porte l'audience, l'appel ou l'examen.

Dossier

(2) Le dossier ayant trait à l'audience, à l'appel ou à l'examen tenu à huis clos ainsi que celui se rapportant aux observations présentées en l'absence d'autres parties sont confidentiels. Le juge ou le tribunal saisi peut ordonner que tout dossier ou partie d'un dossier ayant trait à une audience, un appel ou un examen tenus à huis clos ou en public soit placé sous scellé et gardé dans un lieu interdit au public.

Certificat du procureur général du Canada

38.13 (1) Le procureur général du Canada peut délivrer personnellement un certificat interdisant la divulgation de renseignements dans le cadre d'une instance dans le but de protéger soit des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, soit la défense ou la sécurité nationales. La

only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

délivrance ne peut être effectuée qu'après la prise, au titre de la présente loi ou de toute autre loi fédérale, d'une ordonnance ou d'une décision qui entraînerait la divulgation des renseignements devant faire l'objet du certificat.

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a summary hearing as defined in subsection 2(1) of that Act, the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence.

Instances militaires

(2) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une audience sommaire au sens du paragraphe 2(1) de cette loi, le procureur général du Canada ne peut délivrer de certificat qu'avec l'assentiment du ministre de la Défense nationale donné personnellement par celui-ci.

Service of certificate

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

(a) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(b) every party to the proceeding;

(c) every person who gives notice under section 38.01 in connection with the proceeding;

Signification

(3) Le procureur général du Canada fait signifier une copie du certificat :

a) à la personne qui préside ou est désignée pour présider l'instance à laquelle sont liés les renseignements ou, à défaut de désignation, à la personne qui est habilitée à effectuer la désignation;

b) à toute partie à l'instance;

c) à toute personne qui donne l'avis prévu à l'article 38.01 dans le cadre de l'instance;

(d) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;

(e) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;

(f) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

(g) any other person who, in the opinion of the Attorney General of Canada, should be served.

Filing of certificate

(4) The Attorney General of Canada shall cause a copy of the certificate to be filed

(a) with the person responsible for the records of the proceeding to which the information relates; and

(d) à toute personne qui, dans le cadre de l'instance, a l'obligation de divulguer ou pourrait divulguer ou faire divulguer les renseignements à l'égard desquels le procureur général du Canada a été avisé en application de l'article 38.01;

(e) à toute partie aux procédures engagées en application du paragraphe 38.04(5) ou à l'appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) en ce qui concerne les renseignements;

(f) au juge qui tient une audience en application du paragraphe 38.04(5) et à tout tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) en ce qui concerne les renseignements;

(g) à toute autre personne à laquelle, de l'avis du procureur général du Canada, une copie du certificat devrait être signifiée.

Dépôt du certificat

(4) Le procureur général du Canada fait déposer une copie du certificat :

(a) auprès de la personne responsable des dossiers relatifs à l'instance;

(b) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

b) au greffe de la Cour fédérale et à celui de tout tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3).

Effect of certificate

Effet du certificat

(5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate.

(5) Une fois délivré, le certificat a pour effet, malgré toute autre disposition de la présente loi, d'interdire, selon ses termes, la divulgation des renseignements.

***Statutory Instruments Act* does not apply**

Exclusion

(6) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

(6) La *Loi sur les textes réglementaires* ne s'applique pas aux certificats délivrés au titre du paragraphe (1).

Publication

Publication

(7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

(7) Dès que le certificat est délivré, le procureur général du Canada le fait publier dans la *Gazette du Canada*.

Restriction

Restriction

(8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

(8) Le certificat ou toute question qui en découle n'est susceptible de révision, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que sous le régime de l'article 38.131.

Expiry

(9) The certificate expires 10 years after the day on which it is issued and may be reissued.

Durée de validité

(9) Le certificat expire dix ans après la date de sa délivrance et peut être délivré de nouveau.

Application for review of certificate

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

Demande de révision du certificat

38.131 (1) Toute partie à l'instance visée à l'article 38.13 peut demander à la Cour d'appel fédérale de rendre une ordonnance modifiant ou annulant un certificat délivré au titre de cet article pour les motifs mentionnés aux paragraphes (8) ou (9), selon le cas.

Notice to Attorney General of Canada

(2) The applicant shall give notice of the application to the Attorney General of Canada.

Notification du procureur général du Canada

(2) Le demandeur en avise le procureur général du Canada.

Military proceedings

(3) In the case of proceedings under Part III of the *National Defence Act*, other than a summary hearing as defined in subsection 2(1) of that Act, notice under subsection (2) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Instance militaire

(3) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, autre qu'une audience sommaire au sens du paragraphe 2(1) de cette loi, l'avis prévu au paragraphe (2) est donné à la fois au procureur général du Canada et au ministre de la Défense nationale.

Single judge

(4) Notwithstanding section 16 of the *Federal Court Act*, for the purposes of the application, the Federal Court

Juge seul

(4) Par dérogation à l'article 16 de la *Loi sur la Cour fédérale*, la Cour d'appel fédérale est constituée d'un

of Appeal consists of a single judge of that Court.

seul juge de ce tribunal pour l'étude de la demande.

Admissible information

Renseignements pertinents

(5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence.

(5) Pour l'étude de la demande, le juge peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut se fonder sur cet élément pour rendre sa décision au titre de l'un des paragraphes (8) à (10).

Special rules and protective order

Règles spéciales et ordonnance de confidentialité

(6) Sections 38.11 and 38.12 apply, with any necessary modifications, to an application made under subsection (1).

(6) Les articles 38.11 et 38.12 s'appliquent, avec les adaptations nécessaires, à la demande présentée au titre du paragraphe (1).

Expedited consideration

Traitement expéditif

(7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

(7) Le juge étudie la demande le plus tôt possible, mais au plus tard dans les dix jours suivant la présentation de la demande au titre du paragraphe (1).

Varying the certificate

Modification du certificat

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security,

(8) Si le juge estime qu'une partie des renseignements visés par le certificat ne porte pas sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité ni

the judge shall make an order varying the certificate accordingly.

sur la défense ou la sécurité nationales, il modifie celui-ci en conséquence par ordonnance.

Cancelling the certificate

Révocation du certificat

(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security, the judge shall make an order cancelling the certificate.

(9) Si le juge estime qu'aucun renseignement visé par le certificat ne porte sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, ni sur la défense ou la sécurité nationales, il révoque celui-ci par ordonnance.

Confirming the certificate

Confirmation du certificat

(10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security, the judge shall make an order confirming the certificate.

(10) Si le juge estime que tous les renseignements visés par le certificat portent sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, ou sur la défense ou la sécurité nationales, il confirme celui-ci par ordonnance.

Determination is final

Caractère définitif de la décision

(11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court.

(11) La décision du juge rendue au titre de l'un des paragraphes (8) à (10) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel ni de révision judiciaire.

Publication

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the *Canada Gazette*

(a) the certificate as varied under subsection (8); or

(b) a notice of the cancellation of the certificate under subsection (9).

Protection of right to a fair trial

38.14 (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

Publication

(12) Dès que possible après la décision du juge, le procureur général du Canada fait publier dans la *Gazette du Canada*, avec mention du certificat publié antérieurement :

a) le certificat modifié au titre du paragraphe (8);

b) un avis de la révocation d'un certificat au titre du paragraphe (9).

Protection du droit à un procès équitable

38.14 (1) La personne qui préside une instance criminelle peut rendre l'ordonnance qu'elle estime indiquée en l'espèce en vue de protéger le droit de l'accusé à un procès équitable, pourvu que telle ordonnance soit conforme à une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) relativement à cette instance, à une décision en appel ou découlant de l'examen ou au certificat délivré au titre de l'article 38.13.

Ordonnances éventuelles

(2) L'ordonnance rendue au titre du paragraphe (1) peut notamment :

- | | |
|---|---|
| <p>(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;</p> | <p>a) annuler un chef d'accusation d'un acte d'accusation ou d'une dénonciation, ou autoriser l'instruction d'un chef d'accusation ou d'une dénonciation pour une infraction moins grave ou une infraction incluse;</p> |
| <p>(b) an order effecting a stay of the proceedings; and</p> | <p>b) ordonner l'arrêt des procédures;</p> |
| <p>(c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.</p> | <p>c) être rendue à l'encontre de toute partie sur toute question liée aux renseignements dont la divulgation est interdite.</p> |

Fiat

Fiat du procureur général du Canada

38.15 (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.

38.15 (1) Dans le cas où des renseignements sensibles ou des renseignements potentiellement préjudiciables peuvent être divulgués dans le cadre d'une poursuite qui n'est pas engagée par le procureur général du Canada ou pour son compte, il peut délivrer un fiat et le faire signifier au poursuivant.

Effect of fiat

Effet du fiat

(2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.

(2) Le fiat établit la compétence exclusive du procureur général du Canada à l'égard de la poursuite qui y est mentionnée et des procédures qui y sont liées.

Fiat filed in court

Dépôt auprès du juge ou du tribunal

(3) If a prosecution described in the fiat or any related

(3) L'original ou un double du fiat est déposé devant le

process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.

tribunal saisi de la poursuite — ou d'une autre procédure liée à celle-ci — engagée par le procureur général du Canada ou pour son compte.

Fiat constitutes conclusive proof

Preuve

(4) The fiat or a copy of the fiat

(4) Le fiat ou le double de celui-ci :

(a) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and

a) est une preuve concluante que le procureur général du Canada ou son délégué a compétence pour mener la poursuite qui y est mentionnée ou les procédures qui y sont liées;

(b) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

b) est admissible en preuve sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du procureur général du Canada.

Military proceedings

Instances militaires

(5) This section does not apply to a proceeding under Part III of the *National Defence Act*.

(5) Le présent article ne s'applique pas aux instances engagées sous le régime de la partie III de la *Loi sur la défense nationale*.

Regulations

Règlements

38.16 The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of sections 38 to 38.15, including regulations respecting the

38.16 Le gouverneur en conseil peut, par règlement, prendre les mesures qu'il estime nécessaires à l'application des articles 38 à 38.15, notamment régir les avis, certificats et fiat.

notices, certificates and the fiat.

Annual report

38.17 Each year the Attorney General of Canada shall prepare and cause to be laid before each House of Parliament a report for the previous year on the operation of sections 38.13 and 38.15 that includes the number of certificates and fiats issued under sections 38.13 and 38.15, respectively.

Rapport annuel

38.17 Chaque année, le procureur général du Canada établit et fait déposer devant chaque chambre du Parlement un rapport portant sur l'application des articles 38.13 et 38.15 au cours de l'année précédente qui contient notamment le nombre de certificats et de fiats délivrés au titre de ces articles.

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: DECEMBER 6–7 2022

REASONS FOR ORDER AND ORDER: KANE J.

DATED: JANUARY 10, 2023

APPEARANCES:

Mr. Andre Seguin FOR THE APPLICANT

Munaf Mohamed KC FOR THE RESPONDENTS, SAKAB SAUDI
Jonathan G. Bell HOLDING COMPANY ET AL.
Howard Krongold

John J. Adair FOR THE RESPONDENT, SAAD AL JABRI
Anil Kapoor

Colin Baxter *AMICUS CURIAE*

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.

AGP LLP
Ottawa, Ontario

Adair Goldblatt Bieber LLP
Toronto, Ontario

FOR THE RESPONDENT, SAAD AL JABRI

Kapoor Barristers
Toronto, Ontario

Colin Baxter
Ottawa, Ontario

AMICUS CURIAE