Federal Court  Cour fédérale

**Date: 20240815**

**Docket: T-381-24**

**Citation: 2024 FC 1269**

**Ottawa, Ontario, August 15, 2024**

**PRESENT: The Honourable Mr. Justice Pamel**

**BETWEEN:**

**HIS MAJESTY THE KING**

**Applicant**

**and**

**OSAMA EL-BAHNASAWY**

**Respondent**

# ORDER AND REASONS

## I. Overview

[1] In 2016, Mr. Abdulrahman El-Bahnasawy was arrested by the Federal Bureau of Investigation in the United States of America [U.S.] on terrorism charges and is now serving a 40-year prison sentence in a high-security U.S. prison; his father, the respondent, Osama El-Bahnasawy [Mr. El-Bahnasawy], claims that his son was the subject of a Royal Canadian Mounted Police [RCMP] investigation and that the RCMP was involved in the events leading to his son's arrest in the U.S. As a result, Mr. El-Bahnasawy filed a complaint under the

*National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2 [Act], requesting that the National Security and Intelligence Review Agency [NSIRA] conduct a review of the RCMP's actions during the investigation of his son.

[2] In January 2022, NSIRA requested that the RCMP provide all documents relating to legal advice it sought or obtained in relation to its investigation of Mr. El-Bahnasawy's son, excluding any legal advice specific to the NSIRA investigation into the complaint. The RCMP refused to disclose the documents identified as being relevant to NSIRA's request on the grounds that NSIRA lacked the statutory authority in this case to compel production of legal advice protected by solicitor-client privilege—on behalf of the RCMP, the Attorney General of Canada [AGC] advised NSIRA that while section 9 of the Act expressly allows NSIRA to seek documents subject to solicitor-client privilege within the context of a review, section 10 of the Act (which deals with investigating complaints) does not.

[3] In October 2023, NSIRA released a final report under section 29 of the Act [Final Report] in relation to Mr. El-Bahnasawy's complaint, but reserved for itself the authority to make further inquiries with respect to the documents withheld by the RCMP. Mr. El-Bahnasawy was not satisfied with the result and proceeded in November 2023, on behalf of himself and his family, to file an application for judicial review of the Final Report seeking, *inter alia*, an order requiring NSIRA to exercise its power to compel the RCMP to produce the documents it was withholding. That matter (T-2479-23) is still before this Court; in December 2023, NSIRA reiterated its request and advised the AGC that it would consider issuing a summons requiring the RCMP to produce the documents in question. The AGC remained steadfast in his refusal,

adding that with the issuance of its Final Report, NSIRA had expended its authority under the Act to investigate and that the reservation of jurisdiction on its part was without legal foundation.

[4] On February 14, 2024, NSIRA issued a procedural ruling, where it held that it had the legal authority to issue a summons to compel the RCMP to produce documents subject to solicitor-client privilege in respect of a complaint investigation for which it had issued a Final Report. Shortly thereafter, the AGC, on behalf of His Majesty the King, filed the underlying application for judicial review seeking, *inter alia*, a declaration that NSIRA is without jurisdiction to issue such summons in the context of section 10 of the Act and that in any event NSIRA was *functus officio*, having expended all powers to investigate after the issuance of its Final Report.

[5] With that as background, the present motion concerns a request by the Director of Public Prosecutions [Director] for leave to intervene in the present proceeding, to which the AGC consents and which Mr. El-Bahnasawy does not oppose. If leave is granted, the Director intends to argue that NSIRA is seeking to compel production by the RCMP of the Public Prosecution Service of Canada's [PPSC] own work product, which contains legal advice relating to the PPSC's independent exercise of prosecutorial discretion, something that is impermissible. For the reasons that follow, the Director's motion for leave to intervene is granted.

## II. Relevant Legislation

[6] Rule 109 of the *Federal Courts Rules*, SOR/98-106 [Rules], reads as follows:

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| 109 (1) The Court may, on motion, grant leave to any | 109 (1) La Cour peut, sur requête, autoriser toute |

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| person to intervene in a proceeding. | personne à intervenir dans une instance. |
| (2) Notice of a motion under subsection (1) shall: | (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : |
| (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and | a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; |
| (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. | b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance. |
| (3) In granting a motion under subsection (1), the Court shall give directions regarding | (3) La Cour assortit l'autorisation d'intervenir de directives concernant : |
| (a) the service of documents; and | a) la signification de documents; |
| (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener. | b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre. |

## III. Discussion

[7] I should mention at the outset that the Court is not bound by the parties' consent or non-opposition to the present motion. Although consent is instructive as to the parties' views, the Court must nevertheless consider whether the Director has met the applicable test to be granted leave to intervene in this proceeding and, if so, what conditions may apply to his intervention. In

the end, the Court must be satisfied that the intervention is in the interests of justice (*Gordillo v Canada (Attorney General)*, 2020 FCA 198 [*Gordillo*] at paras 5–6).

[8] The test for intervention consists of three elements: usefulness, genuine interest and consistency with the interests of justice; those elements have been expressed by Justice Stratas of the Federal Court of Appeal as follows:

> I. Will the proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:
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> - What issues have the parties raised?
> - What does the proposed intervener intend to submit concerning those issues?
> - Are the proposed intervener's submissions doomed to fail?
> - Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
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> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills, and resources and will dedicate them to the matter before the Court?
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> III. Is it in the interests of justice that intervention be permitted? A flexible approach is called for. The list of considerations is not closed but includes at least the following questions:
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> - Is the intervention consistent with the imperative in Rule 3 that the proceeding be conducted "so as to secure the just, most expeditious and least expensive outcome"? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

> - Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?
> - Has the first-instance court in this matter admitted the party as an intervener?
> - Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?
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> (*Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 19)

[9] These factors are not meant to be exhaustive, and a "grocery list" approach to intervention criteria is to be avoided. Moreover, one or more of these factors may play a greater role in one intervention motion over another. In the end, whether to grant leave to intervene remains a discretionary decision made in a "unique legal, factual and procedural matrix" in any given case (*Alliance for Equality of Blind Canadians v Canada (Attorney General)*, 2022 FCA 131 at paras 11–12).

[10] First of all, it seems clear to me that the Director has a genuine interest in this proceeding and will be affected by the outcome of this matter as it pertains to the disclosure of the PPSC's own work product. I am convinced that the Director will dedicate the necessary knowledge, skills and resources commensurate with the importance of the issues before the Court.

[11] As to the usefulness of his intervention, key is whether the proposed intervener will offer different and valuable insights that transcend the interests of the parties and that are not already being advanced by the parties to the proceeding. Where a proposed intervener cannot establish

how their position or arguments would be sufficiently different from those of the parties, their participation is unlikely to assist the Court (see *Canada (Attorney General) v Shakov*, 2016 FCA 208 at para 9). Determining whether the proposed intervener's intervention will be useful requires consideration of the issues the parties have raised, what the proposed intervener intends to submit on those issues, whether the proposed intervener's submissions are doomed to fail, and whether their arguable submissions will assist in the determination of the actual, real issues in the proceeding.

[12] In his underlying notice of application, the AGC raises two principal issues, the first being the jurisdiction of NSIRA to compel production of documents subject to solicitor-client privilege within the context of the complaint investigation under section 10 of the Act, and the second being whether NSIRA was now *functus officio*, having expended its authority to investigate when it issued its Final Report pursuant to section 29 of the Act. From what I gather, the fact that the relevant documents are subject to solicitor-client privilege is not contested; rather, the issue is whether NSIRA is entitled to gain access to them in the context of a section 10 investigation as it is entitled to do under a section 9 review (subsection 9(2) of the Act).

[13] For his part, the Director argues that the interpretation of the scope of NSIRA's jurisdiction to compel production of materials in the possession of government offices and investigative forces, and to review and assess those materials is the justiciable issue in this matter. That may be so, but alone, that is an issue that, at this stage, I see the RCMP being able to address. The Director agrees that it is for the RCMP to address the issue of solicitor-client privilege from the RCMP's perspective, but takes a different path. He argues that his office's

relationship with the RCMP is somewhat different from a simple solicitor-and-client one in that, when the Director provides legal advice to an investigative agency, such advice is oftentimes also a predictive statement as to how the Director will exercise his discretion in a particular circumstance, thus falling within the realm of prosecutorial discretion and independence. The Director claims that he has constitutional authority and is duty-bound to challenge the disclosure of materials that may infringe upon the prosecutorial independence of the PPSC and the exercise of prosecutorial discretion, so that his office may remain free from outside influence and interference. Therefore, the Director is asserting an independent right to seek the abrogation of any policy, procedure, request for information or statute that may infringe on the lawful exercise of the PPSC's prosecutorial independence and proposes to make submissions on the danger posed to the prosecutorial independence of his office by what he claims is a misplaced accountability requirement under the Act. In short, the Director claims that the privilege attached to the documents in issue belongs not only to the RCMP—in the form of solicitor-client privilege—but also to the Director himself in the form of privilege of prosecutorial independence, which is what he is now seeking to protect. Thus, the Director claims that he has a standalone right to restrict the disclosure to NSIRA of the information contained in the relevant documents.

[14] I must admit that an argument regarding how, why and to what extent the disclosure of the relevant information to NSIRA may impact the prosecutorial independence of the PPSC is an argument a judge of this Court may be eager to hear, and I cannot see how either of the other parties is in a position to legitimately make it. I also cannot say at this stage that such an argument is doomed to fail. If, as the Director states, there are constitutional principles that

prevent the disclosure of documents that would negatively impact his office's prosecutorial independence, the Court would be well served by hearing the Director's submissions on this issue; submissions that inform the exercise of statutory interpretation may be of use to the Court (*Gordillo* at paras 15–17). Accordingly, I am convinced that it is in the interests of justice to permit the intervention; the issues raised by the Director are of significant importance, and so the perspective of the Director should be heard.

[15] I would therefore grant this motion to intervene. As to terms, the Director has undertaken to work collaboratively with the parties to ensure that submissions are not duplicated and that he will not seek to supplement the record, save to the extent it is relevant to the issues and arguments he now seeks to raise and has identified in his brief before me. I also understand from a letter received on behalf of all the parties dated July 23, 2024, that, in the event leave is granted, the Director is to serve and file his submissions on the date upon which Mr. El-Bahnasawy is to file his respondent's record in accordance with the Scheduling Order to be issued by this Court.

**ORDER in T-381-24**

**THIS COURT ORDERS that**:

1. The present motion for leave to intervene is granted.

2. The Director shall be served with any documents filed by the parties.

3. The Director's memorandum of fact and law contained in his motion record shall be no more than 15 pages in length (exclusive of the front cover, any table of contents, the list of authorities, appendices and the back cover), and shall be served and filed on the date upon which Mr. El-Bahnasawy is to file his respondent's record in accordance with the Scheduling Order to be issued by this Court.

4. The Director is not permitted to supplement the record with additional evidence.

5. The remaining parties are permitted to serve and file written representations not to exceed 10 pages in length responding to the Director's submissions within 10 days of being served with the Director's record.

6. The Director is permitted to present oral submissions at the hearing of the underlying application not exceeding one hour.

7. No costs are granted on this motion.

"Peter G. Pamel"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-381-24 |
| **STYLE OF CAUSE:** | HIS MAJESTY THE KING v OSAMA EL-BAHNASAWY |

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

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| **ORDER AND REASONS:** | PAMEL J. |
| **DATED:** | AUGUST 15, 2024 |

**APPEARANCES:**

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| Mark Covan<br>Samir Adam | FOR THE PROPOSED INTERVENER |
| Derek Rasmussen | FOR THE APPLICANT |
| John Kingman Phillips | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Public Prosecution Service of Canada<br>Halifax, Nova Scotia | FOR THE PROPOSED INTERVENER |
| Attorney General of Canada<br>Ottawa, Ontario | FOR THE APPLICANT |
| Waddell Phillips Professional Corporation<br>Toronto, Ontario | FOR THE RESPONDENT |