Federal Court  Cour fédérale

Date: 20101108

Docket: DES-1-10

Citation: 2010 FC 1106

Vancouver, British Columbia, November 8, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ABDULLAH ALMALKI
KHUZAIMAH KALIFAH
ABDULRAHMAN ALMALKI, by his Litigation Guardian Khuzaimah Kalifah
SAJEDA ALMALKI by her Litigation Guardian Khuzaimah Kalifah
MUAZ ALMALKI, by his Litigation Guardian Khuzaimah Kalifah
ZAKARIYY A ALMALKI, by his Litigation Guardian Khuzaimah Kalifah
NADIM ALMALKI, FATIMA ALMALKI, AHMAD ABOU-ELMAATI
BADR ABOU-ELMAATI, SAMIRA AL-SHALLASH, RASHA ABOU-ELMAATI
MUAYYED NUREDDIN, ABDUL JABBAR NUREDDIN, FADILA SIDDIQU
MOFAK NUREDDIN, AYDIN NUREDDIN, YASHAR NUREDDIN
AHMED NUREDDIN, SARAB NUREDDIN, BYDA NUREDDIN

Respondents

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT

[1] The Attorney General of Canada has applied for an order with respect to the disclosure of information that is the subject of discovery proceedings in actions filed by the respondents in the Superior Court of Justice of Ontario. The application is brought in the Federal Court under section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("the Act").

[2] The information in question is being withheld from the respondents pursuant to a statutory prohibition on disclosure set out in paragraph 38.02(1)(a) of the Act. The Attorney General seeks to have the prohibition confirmed by the Court. Alternatively, the Attorney General requests that the Court exercise its discretion under subsection 38.06(2) of the Act to disclose the information in a form and subject to such conditions as are most likely to limit any injury to national security, national defence or international relations.

[3] The respondents request an order authorizing the disclosure of all of the information that the applicant seeks to withhold. Where grounds sufficient to warrant a lesser remedy are established, the respondents ask that the Court use the available alternative options in the manner that best meets the public interest including their interests in obtaining disclosure to the fullest degree possible in each case.

[4] In these reasons I outline the background to the application, describe the applicable legal framework, and discuss the legal issues raised by the parties and the principles that I have applied in determining whether the information should or should not be disclosed. A Private Order has been signed and filed in the Federal Court's Designated Proceedings Registry setting out the

specific findings I have made regarding the information in question. The order authorizes the disclosure of certain of the withheld information, either in full text or summary form, and confirms the non-disclosure of the remainder. This order has been provided to the Attorney General in accordance with subsection 38.02 (2) (b) to allow the applicant the time specified in section 38.09 of the Act to determine whether to appeal.

[5] For convenience, reference in these reasons to s. 38 encompasses sections 38 to 38.16 of the Act.

BACKGROUND

[6] In the actions filed in the Superior Court of Justice, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, (the "principal respondents"), joined by members of their families, seek compensatory damages from the Government of Canada for, among other things, alleged complicity in their detention and torture in Syria (and Egypt, in the case of Mr. Elmaati) and breach of their rights under the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 ("*Charter*"). The Attorney General of Canada is the representative defendant on behalf of the public servants and government departments and agencies alleged to be responsible for the harms suffered by the respondents pursuant to the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, s. 23.

[7] The respondents' claims were initiated following the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (the "O'Connor Commission"), and

the consequent report (the "O'Connor Report"). In his report, Mr. Justice Dennis O'Connor recommended that the cases of the three principal respondents be reviewed, but in a manner more appropriate than a full-scale public inquiry because of the national security issues involved.

[8] As a result, the Honourable Frank Iacobucci, Q.C. was appointed to conduct the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin* (the "Iacobucci Inquiry"). The mandate of the Iacobucci Inquiry was to examine the actions of Canadian officials relating to Mr. Almalki, Mr.Elmaati and Mr. Nureddin, who were detained and mistreated in Syria and also, in the case of Mr. Elmaati, in Egypt during the period 2001 to 2004 to determine (1) whether the detention and any mistreatment of the three men resulted, directly or indirectly, from the actions of Canadian officials (particularly in relation to the sharing of information with foreign countries), (2) whether, if so, those actions were deficient in the circumstances, and (3) whether there were any deficiencies in the provision by Canadian officials of consular services to the three men while they were in detention.

[9] Commissioner Iacobucci's report was released in October 2008 (the "Iacobucci Report"). A supplementary report was released on February 23, 2010 in which Commissioner Iacobucci provided additional information that could not be disclosed at the time the public report was released because of government concerns that disclosure of the information in the manner then proposed would be injurious to national defence, national security or international relations (the "Supplementary Report").

[10] Commissioner Iacobucci's Terms of Reference directed him, among other things, to submit a confidential report setting out his determinations and a separate report suitable for public release. He was directed to not disclose information in the public report that would be injurious to international relations, national defence, national security or the conduct of any investigation or proceeding. As Commissioner Iacobucci noted, this language is similar to that used in s. 38. In determining what information could be released publicly, Commissioner Iacobucci was guided by the approach taken in the O'Connor Inquiry Report and the factors identified by Justice Simon Noël in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248 ("*Arar*"). If Commissioner Iacobucci disagreed with the position taken by the government, under the terms of reference he could notify the Attorney General, in which case the notice could lead to a proceeding in the Federal Court under s. 38 of the *Canada Evidence Act* to resolve the matter.

[11] With one exception, Commissioner Iacobucci was satisfied that the confidential information omitted from the public version of his report was properly subject to national security confidentiality. Commissioner Iacobucci gave notice to the Attorney General with respect to the exception. The issue was ultimately resolved following extensive further discussions resulting in the disclosure of additional information in the form of a summary. This was addressed in the Supplementary Report released in February 2010.

[12] In response to requests for production of documents by Commission counsel, the Attorney General of Canada produced some 40,000 documents to the Inquiry. These were provided without

redactions, with the exception of certain documents subject to privilege or immunity and information that might disclose the name of a foreign human source.

[13] Proceedings with respect to the respondents' claims in the Superior Court of Justice were held in abeyance pending the outcome of the Iacobucci Inquiry and resumed following the issuance of the Report. In April 2009, the parties agreed to conduct mediations in the fall of 2009. To that end, in July 2009, counsel to the Attorney General disclosed approximately 486 documents to respondents' counsel, of which 290 contained redactions. The 486 documents had been specifically requested by respondents' counsel because of references in the Iacobucci Report to information which the documents contain.

[14] In the 290 documents, information subject to a claim of potential injury to national security, national defence, and international relations is redacted by being blacked out. In addition, there are white redactions blocking the disclosure of information which the applicant considers irrelevant to the litigation or subject to claims of privilege under sections 37 and 39 of the Act or solicitor-client privilege. Those issues will be dealt with by the Superior Court of Justice. In these reasons, references to "redacted content" mean only the information subject to s.38 claims.

[15] When the documents were produced in July 2009, no formal notice had been provided under the Act regarding the redacted information and no determination had been made by the Attorney General as to whether the information could be disclosed. Departmental and agency officials worked with the litigation team acting on behalf of the Attorney General to review the documents

assembled for production and to identify information which could be considered “potentially injurious” or “sensitive” and thus possibly subject to claims of public interest privilege under s.38.

[16] One document, which is now found at tab 171 in the series before the Court, was produced to the respondents without any redactions. It is a report prepared by the Canadian Security Intelligence Service (“CSIS” or “the Service”). On August 18, 2009, a CSIS lawyer advised a senior Department of Justice official that document 171 had been released inadvertently and that notice was being given to the Attorney General pursuant to s. 38.01 that the document contained sensitive information. By letter of the same date, counsel for the Attorney General wrote to counsel for the Elmaati respondents demanding the return of the document. The document was not returned. The Attorney General subsequently authorized disclosure of a redacted version of document 171 which was produced to the respondents on September 9, 2009. Further revisions “lifting” portions of the redactions were authorized by the Attorney General in the version filed with the Court on March 19, 2010 and provided to the respondents.

[17] The applicant refers to document 171 as an inadvertently disclosed document. The respondents say it should properly be described as a “disclosed document”. I will refer to it as document 171. The content of this document is related to the subject matter of Commissioner Iacobucci’s February 2010 Supplementary Report. The evidence is that document 171 had been collected by the litigation team in the process of responding to the request for production and that it was not reviewed by CSIS officials prior to its disclosure on July 19, 2009.

[18] For reasons which are unknown to this Court and are not, presumably, material to these proceedings, the mediation did not proceed as planned in November 2009 and the litigation resumed. On January 15, 2010, the Elmaati respondents brought a motion in the Superior Court of Justice for an order requiring the production of documents without redactions and in the alternative to strike out the Attorney General's statement of defence. It was understood that the outcome would apply to the three actions. Document 171 was filed as an exhibit on the motion in a sealed envelope: Exhibit "B" to the January 15, 2010 Mudryk Affidavit.

[19] On January 18, 2010, a second notice was given to the Attorney General pursuant to s. 38.01(1) that 289 documents of which full discovery was sought in the Superior Court of Justice actions contained sensitive or potentially injurious information the disclosure of which could harm international relations and/or national security. In a decision made in March 2010, the number of documents for which protection was sought was reduced to 268 as the Attorney General authorized additional disclosures. Such decisions are not made personally by the Attorney General. The evidence is that the Attorney General's authority to act in s. 38 matters is delegated to two senior officials in the Department of Justice.

[20] A confidential Notice of Application pursuant to s. 38.04 was filed on February 2, 2010 together with a Notice of Motion and Motion Record seeking direction from the Court. Counsel for the parties appeared by conference call before Chief Justice Allan Lutfy on February 4, 2010 and on several subsequent dates for case management purposes.

[21] As directed by the Chief Justice, a public Notice of Application was filed on February 9, 2010 and these proceedings have been treated as presumptively public since then, save for the portion of the proceedings which has taken place *ex parte* and *in camera*, in keeping with the ruling in *Toronto Star Newspapers Ltd., et al. v. Canada (Attorney General*), 2007 FC 128, [2007] 4 F.C.R. 434 ("*Toronto Star*") which I have adopted and applied.

[22] Pursuant to s. 38.05 of the Act, notice of the application was given to Regional Senior Justice Charles Hackland, case management judge for the Almalki action before the Superior Court of Justice in Ottawa, and to Mr. Justice Paul Perell, case management judge for the Elmaati and Nureddin actions in Toronto.

[23] In response to the Elmaati motion for production, the Attorney General raised a preliminary objection that the Superior Court of Justice lacked the jurisdiction to grant the relief sought, given the grant of jurisdiction to the Federal Court in s.38. In response, Mr. Elmaati filed a motion on March 12, 2010, challenging the constitutionality of s. 38. The two motions were heard by Mr. Justice Perell on March 25, 2010. His decision allowing the constitutional challenge but dismissing the motion for production was issued on April 8, 2010: *Abou-Elmaati v. Canada (Attorney General)* 2010 ONSC 2055, 318 D.L.R. (4th) 459 ("*Abou-Elmaati*").

[24] Mr. Justice Perell held that where a claim is made to enforce the *Constitution Act*, including the *Charter* in a civil proceeding, s. 38 of the *Canada Evidence Act* does not preclude a judge of the Superior Court of Justice from judicially reviewing a claim of Crown privilege at the trial of an

action or the hearing of an application on the grounds of national security, national defence, and international relations. He concluded, however, that during the interlocutory stages of a proceeding it is within the constitutional authority of the Federal Parliament to oust any jurisdiction that the Superior Court may have to review the Federal Government's claims of Crown privilege and to place it with the Federal Court: *Abou-Elmaati*, above, at paras. 109 - 112.

[25] An appeal and cross-appeal have been filed by the parties from Justice Perell's decision. The respondents take the position that this court should defer its review of the documents and privilege claims in issue to the Superior Court of Justice if that court is found on the appeal and cross-appeal to also have inherent and constitutionally protected jurisdiction to conduct a s. 38 review.

[26] In these proceedings, evidence was filed by the Attorney General in support of the application in the form of public and private *ex parte* affidavits. The affidavits were made by officials representing the several departments and agencies from which the documents originated. The affiants, for the most part, do not have personal knowledge of the events or facts described in the documents or familiarity with the O'Connor and Iacobucci Reports. With certain exceptions, the public affiants did not review the redacted content of the documents prior to making their affidavits. Their evidence referred in general terms to the type of information relating to national security, national defence and international relations for which protection was sought. The private affiants had knowledge of the redacted content and described the risks of injury claimed by the Attorney General with reference to that content.

[27] The respondents filed an affidavit with extensive exhibit evidence (the "Mudryk Affidavit") in opposition to the application. This evidence related primarily to the claims filed in the Ontario Superior Court of Justice, the Inquiry Reports and the document redactions.

[28] A motion for the appointment of an *amicus curiae* was filed by the respondents on March 19, 2010. Having considered the written and oral representations of the parties as to the necessity for such an appointment and choice of suitable candidates, on March 26, 2010 the Court appointed Me Bernard Grenier and Me François Dadour as *amici curiae* to assist the Court in considering the evidence tendered and the issues raised in the *ex parte* hearings.

[29] Written opening submissions were filed on behalf of the parties. On April 6, 2010 a public hearing was held in Toronto to receive counsel's oral submissions. *Ex parte* hearings to receive the applicant's *in camera* and *ex parte* evidence were conducted at the Court's secure facilities in Ottawa for six days beginning April 19, 2010. Witnesses were examined in chief by counsel for the Attorney General and cross-examined by the *amici curiae*.

[30] The testimony of the witnesses heard *in camera* and *ex parte* elaborated upon the concerns set out in the affidavit evidence. Each witness provided an overview of the nature of the interest of their department or agency in the material before the court, such as relationships with foreign agencies, and discussed the injuries to the protected national interests that, in their view, would result from disclosure of the information. These witnesses were representative in the sense that they did not have personal knowledge of the events or individuals to which the documents refer

but testified based on their work experience and information gleaned from departmental files or received from other officials.

[31] On May 13, 2010 the respondents filed a motion for a confidentiality order with respect to the content of an affidavit filed by the Attorney General in the Court's public Registry. As a result, the Court directed that the copies of the documents filed as exhibits to the affidavit of Pamela Dawson be withheld from public access pending a ruling. Having considered the written representations filed by the parties, the motion was adjourned *sine die* without prejudice to it being brought back before the Court with evidence of the harm that disclosure of the information would cause: *Canada (Attorney General) v. Almalki*, 2010 FC 733.

[32] In submissions to the Court respecting the scheduling of the remaining steps in the proceedings, the respondents proposed to make written *ex parte* and private submissions regarding the content of the document in their possession which the applicant claimed to have been inadvertently disclosed. The applicant opposed this on the ground that the making of such submissions would constitute, in itself, a further disclosure of the information which the applicant seeks to protect before the Court made its determination of the issue. In an Order dated May 21, 2010, and without deciding the issue, I stated that the respondents could make submissions regarding the application of the s. 38 tests to this document without referring to its content.

[33] The respondents conducted cross-examinations of the applicant's public deponents in May and June which the *amici* attended as observers.

[34] The Court received public closing written submissions from counsel for the parties and private written submissions from counsel for the Attorney General and the *amici curiae*. A public hearing was conducted on June 23, 2010 to receive the parties' closing oral submissions. To assist the Court, the respondents provided an annotated list of the documents under review. Final *in camera* submissions were received from counsel for the Attorney General and the *amici curiae* on June 24. In response to questions and requests from the Court during that hearing, counsel for the Attorney General and the *amici* submitted additional written representations and information to the Court through the month of July.

[35] In the course of these proceedings, the Attorney General has revised his position and determined that certain information that had been redacted in the documents filed in the Court would not cause an injury to the protected national interests if disclosed. Revised versions of those documents with redactions removed or "lifted" were produced to the respondents and filed with the Court. Further information in 92 documents was authorized to be disclosed by the Attorney General.

[36] Prior to making closing oral submissions, the *amici* provided the Court and counsel for the Attorney General with detailed written comments on the information which the Attorney General sought to protect. With respect to certain redactions, the *amici* challenged the Attorney General's claims that injury would result from disclosure of the information or argued that, if the Court was satisfied that injury would be caused, the information should be disclosed in the public interest. In other cases, the *amici* proposed alternative forms of disclosure in the form of summaries to provide the gist of the redacted information to the respondents.

[37] Counsel for the Attorney General provided the Court with a series of tables in which they identified the redactions the applicant agreed to and those which the applicant sought to maintain. In a number of instances, they agreed with the summaries proposed by the *amici*. In others, they either maintained the applicant's position that the risk of injury was contrary to the public interest or proposed alternative language for disclosure of the information in a summary form. Revised versions of these tables were provided to the Court following the closing *in camera* hearing in response to the *amici's* submissions and the Court's questions.

[38] In the course of the *in camera* proceedings, the Court was informed that the Royal Canadian Mounted Police ("the RCMP") had sent requests for permission to disclose information that originated with intelligence and law enforcement agencies in all of the relevant foreign countries. In several countries, more than one agency was contacted. On October 13, 2010 the Court was informed that, as of that date, more than half of the agencies had responded and none of them agreed to the disclosure of their information.

LEGAL FRAMEWORK

[39] As the Supreme Court of Canada has observed, the principle that court proceedings are open is fundamental to our system of justice and closely linked to the core values protected by s.2 (b) of the *Charter*. Those values are not, however, absolute and must yield on occasion where there are other important interests to protect, such as informant privilege, or to protect the right of an individual to a fair hearing: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253) *Charkaoui (Re)*, 2008 FC 61, [2009] 1 F.C.R. 507. The open court principle is also subject to

limitation where disclosure would subvert the ends of justice or unduly impair its proper administration: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at para.4.

[40] The limitations on the disclosure of information set out in s.38 of the Act are on their face inconsistent with the open court principle: *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2004 FC 1052, 255 F.T.R. 173, at para.44. In any case in which information is sought by the parties in support of their position in litigation, application of the s. 38 restrictions can only be justified if necessary to protect the identified national interests of security, defence and international relations.

[41] The disclosure obligations of the Federal Crown in a civil action are expressly made subject to section 38: *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C.-50), ss. 27, 34; *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604, ss. 2, 7, 8. The following provisions of section 38, 38.01, 38.02, 38.04 and 38.06 of the Act are of particular relevance to the present application:

38. *Definitions*	38. *Définitions*
"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 >> Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.
"sensitive information" means information relating to international relations or national defence or national security that is in the	<< renseignements sensibles >> Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires

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.

internationales ou la défense ou la sécurité nationale, 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.

Notice to Attorney General of 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.

Avis au procureur général du Canada

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.

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);

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);

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

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

Application to Federal Court – general

(2) If, with respect to information about which notice was given under any of subsections

Demande à la Cour fédérale: dispositions générales

(2) Si, en ce qui concerne des renseignements à

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, authorizes the disclosure of only part of the information or 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

(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.

Notice to Attorney General of Canada

(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.

Court records

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

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, il a autorisé la divulgation d'une partie des renseignements ou a 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) 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.

Notification du procureur général

(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.

Dossier du tribunal

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

Procedure

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

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

…

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,

Procédure

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

c) s'il estime qu'une audience est nécessaire:

(i) spécifie les personnes qui devraient en être avisées,

(ii) ordonne au procureur général du Canada de les aviser,

(iii) détermine le contenu et les modalités de l'avis;

d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations.

…

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

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.

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 des renseignements dont la divulgation est autorisée ou n'est plus assortie de conditions.

Disclosure order

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

Ordonnance de divulgation

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

(2) If the judge concludes that the disclosure of the information 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 of the information, a part or summary of the information, or a written admission of facts relating to the information.

(2) Si le juge conclut que la divulgation des renseignements 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, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

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.

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.

Evidence	*Preuve*
(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.	(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.
Introduction into evidence	*Admissibilité en preuve*
(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 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).	(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 cause des règles d'admissibilité applicables à l'instance, peut demander à un juge de rendre une ordonnance autorisant la production en preuve 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	*Facteurs pertinents*
(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.	(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.

[42] In assessing whether to make an order pursuant to section 38.06 of the Act, the Court must engage in a three step process as held in *Ribic v. Canada (Attorney General)*, 2003 FCT 10, (2003) F.T.R. 161, affirmed in 2003 FCA 246, [2005] 1 F.C.R. 33 (“*Ribic*”). In considering the information at issue, the Court must determine: (1) its relevance to the underlying proceeding; (2) whether its disclosure would be injurious to national security, international relations or national defence; and (3) whether the public interest in disclosure is outweighed by the public interest in non-disclosure.

[43] *Ribic* has been applied in a number of decisions of this Court: *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547 ("*Khawaja*"), rev'd in part, *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, 228 C.C.C. (3d) 1 ; *Arar*, above ; *Khadr v. Canada (Attorney General)*, 2008 FC 807, 331 F.T.R. 1 ("*Khadr* June 2008"); *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80 ("*Khadr* April 2008").

ISSUES

[44] A threshold issue to be addressed is whether this court should defer its review of the documents and the privilege claims in issue to the Ontario Superior Court of Justice?

[45] Barring a decision to defer to the Superior Court of Justice, the question before me is whether the statutory bar to disclosure of the information as set out in s.38.02 (1) (a) should be confirmed as provided for in s. 38.06 (3) of the Act. Specific issues to be determined are as follows:

1) How is the *Ribic* test to be applied to the information in question?

2) What, if any, effect should the disclosure of document 171 have on the claim for protection of its redacted content?

DISCUSSION

Should this Court defer to the Ontario Superior Court of Justice?

[46] This issue arises because the respondents wish to have the issues related to the disclosure of information for which claims of privilege are made by the applicant on the grounds of injury to

national security, national defence and international relations determined by the court that will hear and decide their actions against the federal government. The respondents do not dispute that s.38 confers jurisdiction on this court to determine privilege claims under these three heads of public interest. They maintain that, generally, civil proceedings before the provincial superior courts are governed by the common law and the respective *Evidence Acts* of the provinces and contend that Parliament could not constitutionally divest the provincial superior courts of that jurisdiction through the enactment of the relevant provisions of the *Canada Evidence Act*. They submit that this jurisdiction is part of the irreducible core that is reserved to provincial superior courts by s.96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[47] The respondents maintain, therefore, that this court should defer any review of information subject to discovery proceedings in the Superior Court of Justice to that court, if it is found on the appeal and cross-appeal from Mr. Justice Perell's decision to have inherent and constitutionally protected jurisdiction to conduct a review of the national security, national defence and international relations privilege claims at all stages of the civil litigation process.

[48] The respondents do not question that this Court has statutory jurisdiction under section 38 to conduct the review, but submit that Mr. Justice Perell's decision confirms the jurisdiction of the Superior Court to conduct its own review of the privilege claims, at least at trial. They take issue with his conclusion that practical considerations militate in favour of not exercising jurisdiction at the interlocutory stage of the proceedings, one of the issues under appeal. The respondents submit that the "practical considerations" argument does not answer the principled reasons which support

privilege review in the trial courts as set out in the report of the *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (*the "Major Inquiry"*)*: vol. III, pp 156 to 165.

[49] I agree with the applicant that the respondents' preference to have the s.38 issues adjudicated by the court that will try the merits of their claims against the federal government is legally irrelevant in the present proceedings, given Parliament's deliberate choice to assign that jurisdiction exclusively to this court and absent a binding decision that the legislation is constitutionally invalid. The question of the constitutionality of that choice is not before me.

[50] The issue is currently before the Supreme Court of Canada, at least in respect of criminal proceedings, in an appeal from the decision of the Ontario Superior Court of Justice in *R. v. Ahmad*, [2009] O.J. No. 6166 (QL), 2009 Can LII 84788 (Ont. Sup. Ct.) ("*Ahmad*"). Should the Supreme Court uphold the *Ahmad* decision or the Ontario Court of Appeal support the respondents' position on the appeal of *Abou-Elmaati*, above, questions of jurisdiction or judicial comity will likely arise. But as either event has not occurred, I do not consider it necessary to address the question of deferral to the Superior Court of Justice, at this time.

[51] I think it appropriate to state, however, that I also agree with the applicant that the assignment of the responsibility to adjudicate s. 38 issues to the Federal Court was an important element of Parliament's decision to implement the recommendations of the McDonald Commission regarding the adjudication of public privilege issues in relation to national security: *Canada, Commission of Inquiry Concerning the Activities of the Royal Canadian Mounted Police,*

(Chairman, Mr. Justice D.C. McDonald) First Report, Security and Information, October 9, 1979. The physical security of such information was one of the reasons Parliament chose to centralize adjudication of the disclosure of potentially injurious information in the Federal Court. Concerns about expertise, uniformity, and security of information continue to underlie section 38's grant of exclusive jurisdiction to the Federal Court.

[52] The parties dispute whether the effect of the enactment of the McDonald Commission recommendations was to adopt a more liberal approach to disclosure of protected information than that which was available to litigants under the common law. The respondents cite *Carey v. Ontario,* [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161, at para. 22, for the proposition that the treatment of public interest privilege at common law had evolved to the point that the Courts recognized that a different balance may be struck between the competing interests, over time and on the facts: at times giving the interests in government secrecy "virtually absolute priority", while at other times "a more even balance was struck".

[53] The respondents are correct to say that the common law had evolved, notably with the 1968 decision of the House of Lords in *Conway v. Rimmer*, [1968] UKHL 2, [1968] A.C. 910 (H.L.), which introduced the concept of a balancing between the interests of the public in ensuring the proper administration of justice and the public interest in the withholding of documents whose disclosure would be contrary to the national interest.

[54] In the United Kingdom, the courts have continued to wrestle with the difficult question of where to find the balance without the benefit of statutory guidance: *Al Rawi and others v. Security Service and others*, [2010] EWCA Civ 482, [2010] 3 W.L.R. 1069 at paras. 23-26 ("*Al Rawi*"); *Al-Sweady & Ors, R (on the application of) v. Secretary of State for Defence* [2009] EWHC 1687 (Admin) ("*Al Sweady*"); *R (on the application of Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA Civ 65, [2010] 4 All E.R. 91 ("*Mohamed*"). Australia has adopted a comprehensive statutory scheme for handling national security information, similar to that in the *Canada Evidence Act*: the *National Security Information (Criminal and Civil Proceedings) Act, 2004* (Cth.).

[55] The United States has adopted comparable legislation in the *Classified Information Procedures Act*, 18 U.S.C. App. III, § 1-16 (1980) for criminal proceedings. In applying the state secrets privilege in civil matters, however, US courts grant exceptional deference to the executive's injury assessment even to the extent of barring actions at the pleadings stage: see for example, *Arar v. Ashcroft*, 585 F.3d 559 (2nd Cir. 2009), certiorari denied 130 S. Ct. 3409 (2010); *Mohamed et al. v. Jeppesen Dataplan Inc.*, 614 F 3d. 1070 (9th Cir. 2010).

[56] It is clear from the Canadian jurisprudence that at common law "virtually absolute priority" was given to claims of national security, national defence and international relations privilege as opposed to other public interests. The issue before the Supreme Court in *Carey* was a claim to protect provincial cabinet documents relating to investments in a tourist lodge. National security, international relations and national defence considerations did not arise. At paragraph 81 of his

reasons for the Court, Justice LaForest stressed that such matters were entirely different and may well justify the withholding of the information even without inspection. He went on to say:

> For on such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long.

[57] This statement reflects the approach taken by the courts to national security claims prior to the enactment of the predecessor to s. 38. Certificates asserting such claims were treated as conclusive. Judges were reluctant to look behind them. The enactment of s. 36.2 in 1982 was a substantial departure from the common law approach: R.S.C. 1980-81-82-83, c.111, s.4; *Goguen v. Gibson*, [1983] 2 F.C. 463 (C.A.), (1984)10 C.C.C. (3d) 492 at p. 504; *R.v. Kevork*, [1984] 2 F.C. 753 (T.D.), (1984) 17 C.C.C. (3d) 426 at p.431; *Henrie v. Canada*,[1989] 2 F.C. 229, at para. 10, 53 D.L.R. (4th) 568 ("*Henrie*").

[58] The amendments enacted by Parliament in 2001, (*Anti-terrorism Act*, S.C. 2001 c. 41) and the subsequent jurisprudence of the Federal Court reflect a continuing evolution of the s. 38 process towards greater disclosure of sensitive information under judicial supervision. The Court now closely examines the content of the information which the Attorney General seeks to protect, unlike in the past, and makes an independent and impartial assessment of the claims. The legislation explicitly provides for a balancing of the public interests involved and, even where injury has been established, authorizes release of the information or a suitable alternative where the judge finds that the public interest in disclosure outweighs the interests in security, defence or international relations.

[59] Turning to the application of the three steps of the *Ribic* test to the information at issue in these proceedings, the starting point is the question of relevance.

Should the statutory bar to disclosure of the information be confirmed?

1. Is the information at issue relevant to the underlying actions?

[60] The threshold for determining relevance is low. The Court must consider the relevance of the information at issue to the underlying proceeding. Where the underlying matter is a criminal case or a proceeding analogous to a criminal case in which the liberty of the subject is at risk, such as an extradition request, and subject to any applicable legislation, the Court should apply the standard for disclosure of evidence set out by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 130 N.R. 277: *Ribic*, above at para. 17. That standard is that there is a reasonable possibility of the information being useful to the accused in making full answer and defence: *R. v. Chaplin*, [1995] 1 S.C.R. 727 at para. 30.

[61] As the underlying matters in this case are civil actions, I think it appropriate to apply the standard of relevance as it relates to the discovery process in civil litigation. In the Federal Court, information is relevant for discovery purposes if it may reasonably be useful to the party seeking production to advance its case or undermine that of the opposing party or may fairly lead to a "train of inquiry" that may have either of these two consequences: Rule 222(2) *Federal Court Rules*, SOR/98-106; *Apotex Inc. v. Canada*, 2005 FCA 217, 337 N.R. 225 at paras. 15-16. The *Apotex* approach to relevance has been applied in Ontario, under the former rules: see for example *Benatta v. Canada (Attorney General)*, [2009] O.J. No. 5392 at para. 20. This conception

of relevance applies not only to information that is direct evidence supporting the respondents' allegations but also to information that will permit inferences of fact to be drawn from the circumstances.

[62] Under the revised Ontario Rules of Civil Procedure, the test is whether the information is "relevant to any matter in issue in an action" (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ss. 30.02(1), 31.06(1), emphasis added). The old rule used the phrase "related to any matter in issue in an action" (emphasis added). The new "relevance" test is more onerous than the "semblance of relevance test" applicable under the old rule: *Nobel v. York University Foundation*, 2010 ONSC 399, [2010] O.J. No. 794 at para. 19).

[63] In the context of this case, the respondents should also have the opportunity to refute any suggestions of wrongdoing that may be found in the redacted content of the impugned documents. I note that Justice Perell alluded to the possibility that the information being withheld is exculpatory of government misconduct: *Abou-Elmaati*, above, at paragraph 81. Thus information will also be relevant if it may be used by the government to support its defence of the actions.

[64] This is not to assume that such information will be admissible at trial if not disclosed to the respondents. The United Kingdom Court of Appeal recently dealt with that issue in *Al Rawi*, above. In the context of an action for damages similar to the underlying actions in this matter, the Court of Appeal held that the trial court could not order a closed hearing to allow the Crown to defend the claims using secret evidence that was not disclosed to the plaintiffs.

[65] Clearly irrelevant information is not subject to disclosure. This would include information, for example, concerning other persons or events where there are no links to the parties or events in question. In this case, the parties have submitted that the redacted information in the documents before the Court should be treated as presumptively relevant. For the most part, I had little difficulty with that proposition as I reviewed the documents. Some of the redacted information, such as administrative details, file and telephone numbers did not appear to be relevant in the absence of some showing of how the information could possibly assist the plaintiffs.

[66] Information that I considered to be highly relevant to the underlying proceedings included, for example, documents that relate to the early interest of CSIS in Mr. Elmaati and contain information that the Service shared with other agencies, both domestic and foreign. The language used by the Service in sharing this information was found by Commissioner Iacobucci to be deficient. The respondents characterize it as inflammatory, inaccurate and unsupported. Without expressing any views as to the merits of the dispute between the parties, it is clear that these documents relate to the core of Mr. Elmaati's case against the government.

[67] Upon finding that the information at issue is relevant to the underlying proceedings, the Court must turn to whether disclosure of the information would result in injury to the protected national interests.

2. Would injury to Canada's national security, national defence or international relations result from disclosure?

[68] The second step of the *Ribic* test is the determination of whether disclosure of the information at issue would be injurious to international relations, national defence or national security, the three grounds listed in section 38.06 of the Act.

[69] For this purpose the Judge may receive into evidence anything that, in the opinion of the judge is reliable and appropriate ("digne de foi et utile") even if it would not otherwise be admissible under Canadian law: s.38.06 (3.1) of the Act.

[70] The judge presiding over a s.38 review must give considerable weight to the Attorney General's submissions on the injury that would be caused by disclosure given the access that office has to special information and expertise. Mere assertions of injury are insufficient: *Khadr* April 2008, above at paras. 31-32. The judge must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence: *Ribic*, above at para. 18, citing *Home Secretary v. Rehman*, [2001] H.L.J. No. 47, [2001] 3 WLR 877, at page 895 (HL(E)).The burden of persuasion rests with the Attorney General and probable injury is assessed on a reasonableness standard: *Ribic*, para.19. While the authority to order disclosure is expressed in the statute in discretionary terms, the Federal Court of Appeal has held that an authorization to disclose will issue if no injury would result to the protected interests: *Ribic*, above, at paragraph 20; see also *Khadr* June 2008, above at paragraph 52.

[71] The respondents argue that the Court should take into account that the information in question in these proceedings is dated. No charges have been laid or other action taken against them for almost a decade notwithstanding that the security agencies had resort to extraordinary investigative techniques with the cooperation of foreign agencies. This is a valid consideration. The need to protect information may lose its significance with the passage of time and changed circumstances: *Khadr* April 2008, above at para. 84.

[72] The respondents assert that the international community requires a state to bear the onus of showing that the "information at issue poses a serious threat to a legitimate national security interest" in order to limit public access to government information. A national security interest will not be legitimate "unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force." In my view, this overstates the burden on the state to justify the restriction.

[73] The words quoted in the preceding paragraph are taken from a United Nations document, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* U.N.Doc. E/CN.4/1996/39 (the "Johannesburg Principles"). This statement of principle resulted from a 1996 meeting of legal experts convened by an anti-censorship organization at Johannesburg. The statement is frequently used as a tool for interpreting Article 19 of the United Nations' *International Covenant on Civil and Political Rights* December 19, 1966, [1976] Can. T.S. No. 47, but has no formal status in international or domestic law.

[74] This court has positively cited Principle 2(b) of the Johannesburg Principles as support for the proposition that governments may not withhold information for oblique purposes: *Arar*, above, at para. 60. Principle 2(b) states that a restriction on freedom of expression or information cannot be justified if its only purpose is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing or to conceal information about the functioning of its public institutions. However, in citing this principle, the Court has not endorsed the narrow conception of legitimate national security interests set out in other portions of the statement.

[75] The experts' view of what constitutes a legitimate national security interest was expressly rejected by Justice Danièle Tremblay-Lamer in *Charkaoui (Re)*, 2009 FC 342, 353 F.T.R. 165 at para. 78. I agree with her comments that the Johannesburg definition is too restrictive and does not take into account other grounds for maintaining the confidentiality of information that have been found to be privileged under Canadian law.

[76] In interpreting the meaning of the phrase "danger to the security of Canada", Justice Arbour stated for the majority in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paragraphs 88-90 ("*Suresh*"), that the phrase must be interpreted flexibly. To insist on direct proof of a specific threat to Canada as the test sets the bar too high. The threat must be serious in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[77] Parliament's reference to both security and defence as national interests to be protected must be taken to mean that they are not synonymous. In *Arar*, above, at paragraph 62, Justice Noël cited the 7th edition of Black's Law Dictionary definition of national defence as including "[a]ll measures taken by a nation to protect itself against its enemies" including protection of the nation's collective ideals and values. The latter aspect of that definition may fall more accurately within the scope of the meaning of "national security" than national defence, but it captures the broad sense of the term.

[78] National security is a broad and inherently vague concept that defies precise definition. I have no doubt, however, that it includes a wider range of interests than territorial integrity or the capacity to respond to the use or threat of force. Among other things, in Canada it has been said to encompass "the preservation of a way of life acceptable to the Canadian people" and the protection of our values and key institutions: see the discussion in Craig Forcese, "Canada's National Security 'Complex': Assessing the Secrecy Rules" (2009) 15:1 IRPP Choices 1 at 7; see also *Arar*, above, at paras 63-68. Justice Noël concluded at paragraph 68 of *Arar* that national security means at minimum the preservation of the Canadian way of life including the safeguarding of the security of persons, institutions and freedoms in Canada. I agree with that conclusion.

[79] The third national interest to be considered is the risk of injury to Canada's international relations. Again, this cannot be read as synonymous with either national defence or national security. Parliament deemed it necessary to protect sensitive information that would harm Canada's relations abroad if it were to be publicly disclosed, in keeping with the accepted conventions on diplomatic confidentiality.

[80] This protection extends to the free and frank exchanges of information and opinions between Canada's diplomats and other public officials and their foreign counterparts, without which Canada could not effectively participate in international affairs. Similar protection is contained in mandatory and discretionary terms in the *Access to Information Act*, R.S.C., 1985, c. A-1, ss.13, 15. Absent consent, the head of a government institution shall refuse to disclose any record that contains information that was obtained in confidence from the government of a foreign state or an institution thereof (s.13). The head of a government institution may also refuse to disclose any information which may reasonably be expected to be injurious to the conduct of international affairs (s.15).

[81] Generally, information already in the public domain cannot be protected from disclosure as it will be presumed, subject to evidence to the contrary, that there will be no injury from its further disclosure. This applies in particular where the Crown has deliberately disclosed documents in the course of litigation: *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S. C. R. 3 at paragraph 26. But there may be other situations in which the information has been publicly released and the harm of disclosure, if any, has already occurred. In *Mohamed*, above, for example, related information had already been released in US court proceedings and the substance of the redacted paragraphs at issue could be read or discerned from the public portion of the trial court judgment. The Court of Appeal ordered the release of the paragraphs for that reason and because it was not convinced that injury would result.

[82] The presumption that the disclosure of information already in the public domain will not cause further injury is not irrebuttable. As Justice Noel observed in *Arar* above, at paragraph 56:

> There are many circumstances which would justify protecting information available in the public domain, for instance: where only a limited part of the information was disclosed to the public; information is not widely known or accessible; the authenticity of the information is neither confirmed nor denied; and where the information was inadvertently disclosed.

[83] In the context of this case, the respondents submit that several documents produced in heavily redacted form state that the information they contain was provided by, among others, CSIS, to the Courts or to other agencies of the Government on the basis that it was anticipated that the information may be used in judicial proceedings. It is submitted that this is a waiver of any public interest privilege that might attach to the information. Similarly, the respondents submit that the Statements of Defence in the underlying actions cite and rely on some of the withheld information. I agree with the respondents that these are relevant considerations in determining whether the injury claims can be sustained.

[84] Each of the public affiants identified categories of information which they considered posed a risk of injury to Canada's national security, national defence or international relations. Similar but more specific evidence was received *in camera*. The public affidavit of the CSIS affiant, Bradley Evans, listed the categories of concern to CSIS as information that would:

a. identify or tend to identify the Service's interest in individuals, groups or issues, including the existence or nonexistence of past or present files, the intensity of investigations, or the degree or lack of success of investigations;

b. identify or tend to identify methods of operation and investigative techniques utilized by the Service;

c. identify or tend to identify relationships that the Service maintains with other police and security and intelligence agencies and would disclose information exchanged in confidence with such agencies;

d. identify or tend to identify employees, internal procedures and administrative methodologies of the Service, such as names and file members;

e. identify or tend to identify human sources of information for the Service or the content of information provided by human sources which, if disclosed, could lead to the identification of human sources.

[85] The RCMP public deponent cited concerns about information received from foreign agencies, information about RCMP members and that received from human sources. A manager in the Department of Foreign Affairs and International Trade ("DFAIT") deposed that the department wished to have certain sensitive information protected on the ground that disclosure would be injurious to Canada's international relations. Affidavit evidence was received from a representative of the Canada Border Services Agency (CBSA) regarding certain operational information they wished to protect.

[86] An officer of the Canadian Forces ("CF") deposed that the Forces and the Department of National Defence ("DND") were concerned about certain information that could identify military capabilities and operations in Afghanistan or compromise the safety of individuals engaged in those operations. As I understand the respondents' submissions, they have not questioned the need to protect any information respecting military capabilities and operations or that identifies military personnel that may be in the redacted documents. I am satisfied that the information is entirely peripheral to the issues in the underlying civil claims and is of no evidentiary value, the risk of injury has been established and there is no outweighing public interest in disclosure.

[87] In the context of a security certificate proceeding, *Harkat (Re)*, 2005 FC 393, 261 F.T.R. 52 at paragraph 89, Justice Eleanor Dawson provided examples of the type of information which she considered must be kept confidential as follows:

> 1. Information obtained from human sources, where disclosure of the information would identify the source and put the source's life in danger... As well, jeopardizing the safety of one human source will make other human sources or potential human sources hesitant to provide information if they are not assured that their identity will be protected.
>
> 2. Information obtained from agents of the Service, where the disclosure of the information would identify the agent and put the agent's life in danger.
>
> 3. Information about ongoing investigations where disclosure of the information would alert those working against Canada's interest and allow them to take evasive action.
>
> 4. Secrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient.
>
> 5. Information about the technical means and capacities of surveillance and about certain methods or techniques of investigation of the Service where disclosure would assist persons of interest to the Service to avoid or evade detection or surveillance or the interception of information. [Parenthetical comments omitted]

[88] These factors are frequently cited in proceedings where the confidentiality of government information is in question. At first impression, they are similar to the categories of risk identified by Mr. Evans and the other government witnesses in their evidence. The *Harkat* factors call for a definite conclusion to be drawn that harm would result from disclosure of the information. That is also the finding that the Court must make in the application of the second stage of the *Ribic* test. It is not sufficient that the potential for risk is identified, although that standard may be used by public officials in making public interest privilege claims.

[89] The respondents have raised a number of issues with respect to the applicant's claims that injury would result from disclosure of information falling within the categories identified by the witnesses in the public evidence. I will deal with those issues I think it necessary to address, to the extent that I can in these public reasons.

a) *Quality of the Evidence*

[90] The respondents submit that the applicant's public affidavit evidence is of a deliberately low evidentiary quality and fails to meet the standards required by Rule 81 of the *Federal Courts Rules*. They rely on the fact that the three affiants representing CSIS, the RCMP and DFAIT had no personal involvement in or knowledge of the matters at issue. None of them participated in the events concerning the detention of the three principal claimants, nor played a role in either the O'Connor Commission or the Iacobucci Inquiry. They were not directly involved in responding to the recommendations in those inquiry reports. With the exception of the RCMP affiant, they had not

read the collection of documents produced for disclosure. The CSIS affiant had read document 171. He and the DFAIT affiant relied on information provided by others to support their statements as to the categories which they sought to protect.

[91] The court was urged to give this evidence no weight or to strike it out entirely, as the deponents lacked independence, qualifications and the necessary relevant factual foundation to give proper expert opinion testimony on matters before the Court. The respondents say that the public affidavits consist of advocacy, not evidence, and are therefore worthless except to the extent that they may serve as an aid to argument by the Attorney General as to the categories of protectable interests.

[92] Rule 81(1) provides that affidavits shall be confined to facts within the deponent's personal knowledge, save for in motions, in which statements as to the deponent’s belief with the grounds therefore may be included. Where an affidavit is made on belief, Rule 81(2) provides that an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. As interpreted in the jurisprudence, the requirement that affidavits be confined to personal knowledge does not exclude hearsay evidence: *Éthier v. Canada (RCMP Commissioner)*, [1993] 2 F.C. 659 (C.A). Moreover, it may be apparent from the context why the best evidence is not available: *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360 (C.A.).

[93] In the particular context of s. 38 applications, I think it is apparent that the applicant is unable to put forward public affiants for cross-examination who may have first hand knowledge

of the facts or events at issue or the redacted content of the documents in question. This is because they may inadvertently disclose the very information which the applicant is seeking to protect. The practice of the court in these matters is not to treat these affiants as experts, but as representative witnesses to give evidence as to the nature, in general, of the grounds for which the claims of privilege are asserted. In that sense, their evidence is helpful to the court and to the respondents, but does not carry a great deal of weight with respect to the specific privilege claims.

[94] It should be recalled that it is only a relatively short period of time since these proceedings were heard entirely in private. Chief Justice Lutfy's decision to read down the statutory provisions which required that the proceedings be concealed has had the salutary effect of making the process much more transparent and open: *Toronto Star*, above. But these proceedings are not a trial or a judicial review in which the normal standards for the reception of evidence apply. Section 38 is, in effect, a self contained code for the determination of questions of public interest privilege. That code necessarily includes private hearings in which the Court may hear the evidence of witnesses familiar with the contents of the documents and closely scrutinize the information at issue. This is where the Court must determine whether the quality of the applicant’s evidence is sufficient to uphold the claims.

b) *Deference*

[95] In determining whether injury to national security, national defence or international relations would result from disclosure, the jurisprudence holds that the Court must give considerable weight to the Attorney General’s submissions given the access that officeholder has to special information

and expertise: *Suresh*, above, at paragraph 31; see also *Mohamed*, above, at paragraph 174. The Attorney General assumes a protective role vis-à-vis the security and safety of the public: *Ribic*, para.19. That being said, questions naturally arise. How much deference is appropriate? How does deference apply in a practical sense to a particular item of information? Does the nature of the underlying proceeding make a difference?

[96] The respondents submit that there are flaws in the process used by the Attorney General to determine and submit his claims to withhold information from disclosure, and that these flaws should reduce, or entirely eliminate, any deference that this Court could or should otherwise apply to the applicant's assessment of risk.

[97] The principal flaw which the respondents submit should limit deference is that the assessment of whether injury would result from disclosure is delegated to officials in the Department of Justice and other departments. As noted above, the authority to act in the Attorney General's name is expressly delegated to senior litigation officials in his department. They act on the advice and instructions of officials in other departments and agencies who have responsibility for the subject-matter in question. These officials review the documents to identify "potentially injurious" and "sensitive information" which, in their view, should be redacted. This is an institutional function performed for the most part by staff and managers up to the Director level. Ministers and Deputy Ministers are not directly involved.

[98] The respondents submit that, based on the cross-examination of the applicant's public affiants, in reviewing the documents being produced for discovery, these officials do not consider whether disclosure of a particular item of information would be harmful. Rather they determine whether the information falls into one or more of the pre-identified categories described above. These determinations, it is suggested, are then accepted at face value by the Justice officials who act on behalf of the Attorney General. The respondents argue that the Attorney General has abdicated his responsibility to assess whether disclosure would cause injury to the protected national interests. In the result, they contend, little or no deference is owed to the decisions made in his name.

[99] It is correct, as the respondents submit, that at common law, public interest privilege claims required the issuance of a certificate by the responsible Minister that disclosure of the information in question would be injurious to an important government interest. This is still the practice in the United Kingdom and the United States. The contention is that the effect of taking the claims up the "Ministerial briefing ladder" resulted in only credible and important claims being advanced for which the Minister would be ultimately accountable in the political process. This avoided systemic over-claiming which, the respondents argue, results from the current practice.

[100] It is trite law that a Minister of the Crown is not expected to perform all of the many and varied powers conferred on him or her unless it is expressly required by the statute conferring the powers: *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.); *R. v. Harrison*, [1977] 1 S.C.R. 238; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans),*

[1997] 1 S.C.R. 12. The *Carltona* principle is enshrined in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 24(2).

[101] I think it is clear from the jurisprudence that at common law, Ministers exercised the discretion to issue a certificate by identifying a broad class of documents for which the privilege was claimed rather than, as is the practice now, portions of the content of the documents. In *Carey*, above, for example, the government sought to protect all documents dealing with the transaction in question. Claims were not advanced on the basis of the type of detailed assessment of each item of information that is done now but rather by reference to a class of documents. To-day, to facilitate the process, those doing the assessment rely on the categorization of types of information that has been previously found to risk injury to the protected interests.

[102] I think it doubtful that the personal involvement of Ministers in the process would eliminate or reduce systemic over-claiming, as the respondents suggest. This concern arises most often in the context of third party information, where claims are made that sensitive information subject to express or implied caveats would no longer be provided by intelligence partners if disclosed. Governments rely on the flow of information provided by intelligence sharing arrangements: see, for example, the controversy which arose in the United Kingdom over the disclosure of information provided by the US in the *Mohamed* case: "Hillary Clinton made security help 'threat' to David Miliband over Binyam Mohamed case", *The Daily Telegraph* (29 July 2009); “U.K. Move Could Hinder U.S. Intelligence Sharing”, *The Wall Street Journal* (11 February 2010). Even with a change of government, the effects of the *Mohamed* decision continue to be a matter of concern to UK

ministers: see “Handing Foreign Intelligence to British Courts to be Made Illegal”, *The Daily Telegraph* (7 July 2010).

[103] The fact that the assessment of probable injury is not carried out personally by the Attorney General but rather by a departmental official has no bearing, in my view, on the question of whether deference is due that assessment. Ministers take advice from their officials on questions such as this and the access to special information and expertise referred to by the Court of Appeal in *Ribic*, above, is institutional rather than personal. Ministers and Deputy Ministers come and go and are unlikely to personally gain sufficient knowledge and familiarity with intelligence matters so as to assess whether a claim of injury from disclosure is likely or not. They have to rely on the officials who do this work on a day to day basis, and who gain an appreciation for what will or will not result in the flow of valuable intelligence from foreign partners being cut off, or is otherwise problematic from a security or international relations perspective.

[104] I do not agree with the respondents' submission that "the process followed makes nonsense of the relevant notice and authorization provisions." In my view, the provisions of section 38.01 are deliberately broad to permit notice to be given that sensitive information or potentially injurious information may be disclosed in connection with a proceeding by either a "participant" or an "official". The respondents assume that “official” in the context of s.38.01 refers solely to an employee of one of the departments or agencies who are legal services clients of the Department of Justice. That is incorrect. The legislation does not establish a process in which a claim to sensitivity

or potential injury may be raised only by notice from an official who is an employee of a department other than Justice.

[105] A member of the litigation team is a “participant” who may give notice but that does not preclude notice being given by an official who is not a participant in the litigation but is, otherwise, an employee of the Department of Justice. While the exception in paragraph 38.01(6)(c) provides for disclosure to be authorized by the government institution in which, or for which, the information was produced, or where it was first received, that provision operates in addition to the general scheme under which the Attorney General may authorize disclosure.

[106] The respondents have raised concerns about the timing of the notices provided in this case, particularly with regard to document 171. Notice in respect of that document was given a month after it had been disclosed. The respondents submit that ss. 38.01(3) does not provide for notices regarding information that “was” disclosed but rather is limited to information that “may be” disclosed, in the future. In the context of their request to provide closing *ex parte* written submissions on the content of document 171, the respondents also characterize the applicant’s concern that this would result in a further unauthorized disclosure as “utterly without merit”. I am not convinced that is the case. It seems to me that the legislative scheme contemplates the use of the notice procedure in order to prevent the disclosure of potentially injurious or sensitive information whether or not that information has been disclosed in the past. It is then up to the Court to determine whether the past disclosure vitiates or undermines the injury claim or, if satisfied that injury would still result, whether, on balance, the public interest favours further disclosure.

[107] In the particular context of this case, I believe that there was nothing improper in having members of the litigation team organize the process under which the documents would be reviewed by departmental officials. They had the responsibility of meeting the Attorney General's obligation to produce documents for discovery, and the advantage of having participated in the Iacobucci Inquiry where all of these documents had been produced for the commission's review. It was also proper for them to make the initial identification of documents in which there might be sensitive or potentially injurious information. The ultimate responsibility to make those claims rests with the Attorney General, as delegated to his officials.

[108] It is clear that unnecessarily broad claims were advanced at the outset of this process as they have been in other proceedings. This is evidenced in this case by the fact that the Attorney General has now "lifted" or removed redactions in 92 documents, having made a determination that no injury would result from disclosure of the redacted information. Thus I continue to have the concern I have expressed in other cases about over-claiming. I attribute this in most instances to the exercise of excessive caution on the part of the officials who initially conduct the reviews and their legal advisors. This requires decisions to authorize disclosure or not to be continually revisited, which unnecessarily delays applications before this Court and the underlying proceedings. Much of that could be avoided by closer examination of the claims and supporting grounds at an earlier stage by senior officials. This is an important government responsibility that must be adequately resourced.

[109] To illustrate systemic over-claiming, as the respondents have pointed out, Mr. Evans in his cross-examination conceded that CSIS does not consider the following matters when they conduct their review of the documents:

- The age of the investigation;
- the fact that the information or operating method in question is already publicly known;
- the fact that the information concerns operating methods that are no longer used and policies that are no longer in effect because of identified deficiencies and flaws; and
- whether the use of an appropriate alias would provide sufficient protection to a covert source.

[110] I agree with the respondents that these are all matters which are relevant to a determination of whether injury would result to the protected interests. Mr. Evans also confirmed that in his agency at least, the review process is done primarily by applying the categories he identified in his affidavit to the information contained in the documents. This inevitably will result in an overbroad assessment of risk until these decisions are reviewed. However, contrary to the respondents' submissions, I see no incompatibility between a review conducted on the basis that disclosure "could" result in injury and the test which the Court must employ under section 38.06(1), that disclosure "would" be injurious. Officials must employ the "could injure" standard because that is what is used in the definition of "potentially injurious information" in section 38 for which they are authorized to give notice under subsection 38.01(1).

[111] It is ultimately the responsibility of the Attorney General to decide whether to authorize disclosure of the information and, if not, to seek confirmation of that decision from the Court. I am satisfied that the senior officials to whom this responsibility has been delegated take the Attorney General's task seriously, and do not simply rely on the categorizations employed by the other departments and agencies to impose a blanket claim of privilege. I have seen the process work effectively in several cases, resulting in disclosure decisions made by the Attorney General that are independent of the views expressed by departmental officials. That said, the process takes far too long, resulting in the frustrations expressed by the respondents and by the courts and public inquiries that must deal with these questions.

[112] There is no evidence in the record before me to support the respondents' suggestion that the Attorney General has attempted to prevent disclosure of embarrassing information, or information unfavourable to the government's defence in the underlying civil action, through unwarranted national security claims. But, as discussed above, even where the disclosure of information would expose a government to embarrassment, it may still be the subject of a valid s. 38 claim, provided that avoiding embarrassment is not the "sole or genuine reason" for seeking to prevent disclosure: *Khadr* April 2008, above, at para. 89. I have found no reason to apply that principle in this case.

[113] In the particular context of this matter, the question also arises as to how much deference should be given to the decisions respecting disclosure made by Commissioner Iacobucci. This issue was addressed by Justice Noël in *Arar*, above, at paragraphs 29-36 with respect to the findings of

the O'Connor Commission. His conclusion, which I adopt, was that the Court owed no deference to the Commissioner's findings given the Court's obligations under the statutory framework, the fact that different evidence was heard in public and *in camera* and that the s.38 application process was not a judicial review of the O'Connor Report. That is not to say that Commissioner Iacobucci's findings may not inform the work of the Court, particularly where, as here, information which the government seeks to protect is now in the public domain with the publication of his report and supplement.

[114] The respondents cite a majority report of the House of Commons Standing Committee on Public Safety and National Security, "Review of the Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries" (June 2009), which recommended that the Government of Canada officially apologize to the three principal respondents and pay them compensation for the suffering they endured. While the report is evidence of parliamentary support, albeit divided, for Commissioner Iacobucci's findings, it does not assist the Court with the issues it must address in these proceedings. At best, it reflects a statement of political and, perhaps, popular opinion that is not relevant to my task.

The "Mosaic Effect"

[115] As is common in these applications, the applicant's public deponents state that in forming an opinion on the likelihood of damage to national security which could result from disclosure of the information at issue they had taken the "mosaic effect" into account. As described by Craig Forcese in his text *National Security Law*, (Toronto, Ont: Irwin Law, 2008) at pp. 419-420, this concept,

when invoked by the government, posits that the release of even innocuous information can jeopardize national security if it can be pieced together with other data by a knowledgeable reader. The result is a "mosaic of little pieces of benign information that cumulatively discloses matters of true national security significance" (*National Security Law*, p. 420).

[116] The mosaic effect was described in Mr. Evans' affidavit as follows:

> Assessing the damage caused by disclosure of information cannot be done in the abstract or in isolation. It must be assumed that information will reach the hands of persons with knowledge of Service targets and the activities of this and other investigations. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in and of themselves be or appear to be particularly sensitive, can be used to develop a more comprehensive picture when juxtaposed, compared or added to information already known by the recipient or available from another source.

[117] The respondents submit that the Court should be cautious in relying on the so-called "mosaic effect" to find injury or withhold information. The Major Inquiry report, above, notes at vol. III, pp. 175-76, that there is increasing judicial scepticism about this theory, citing my comments in *Khawaja*, above, at para. 136 and those of Justice Noël in *Arar*, above, at para. 84. The Commission was also skeptical about the validity of the effect in the absence of any evidence to demonstrate that it has occurred.

[118] The mosaic effect may be one of those statements of the obvious that are difficult to prove or disprove. The problem arises in its application. How does the Court discern whether disclosure of a particular item of information will fill a gap in the knowledge of another person? Apart from

reciting the principle, the witnesses heard in this and other cases have generally been unable to assist the Court to resolve that conundrum. In *Khawaja*, above at paragraph 136, I said that "…by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed." That continues to be my view.

[119] Mr. Evans acknowledged on cross-examination that the mosaic effect may also work in reverse when information is taken away, for example, by redaction. Thus, as the respondents suggest, the Court must be alert to the possibility that information which might be clear and relevant if the full context were to be disclosed may become obscure, equivocal, and even misleading when a piece of the context is removed. In one instance, for example, I concluded that an unredacted phrase would mislead the reader about the meaning of the rest of the paragraph that remained redacted. Accordingly, I ordered the disclosure of additional information.

Targets and Status of Investigations

[120] CSIS takes measures to protect information about the targets, subjects and status of investigations it conducts. In the present matter, they did not seek to protect the fact of the Service's investigational interest in the respondents, but claim protection from the disclosure of information that would reveal their investigations of other individuals and the assessments and analyses which are derived from the intelligence they collect. In general, I had little difficulty agreeing with the applicant's position that this information should be protected.

[121] Even where the fact that the Service has conducted an investigation of an individual is publicly known, the Service will seek to have the nature and extent of the investigation protected under s.38, according to the evidence of Mr. Evans, the CSIS affiant. The Service is not entirely consistent about this, as he acknowledged in cross-examination, as such information has been disclosed in some cases but not in others.

[122] The respondents submit that the applicant and CSIS cannot be allowed to make claims to s. 38 privilege or not, as it may suit them. This is said to be a self-interested, tactical and selective use of s. 38 inconsistent with a *bona fide* claim under the statute. In particular, they point to the public disclosure of the name of a person associated with one of the principal respondents without, it is said, regard to the potential impact such disclosure may have on that person and others.

[123] The rationale for protecting such information, as set out in Mr. Evans evidence, is essentially that a security agency cannot operate effectively if the subjects of its investigations are able to ascertain that they are persons of interest or the state of the agency's operational knowledge about them at a particular point in time. This would allow them to take steps to avoid the Service’s investigative efforts. Disclosure of reports and assessments would reveal how the Service analyzes the intelligence it gathers as well as the extent of the Service's knowledge of the network of contacts of the respondents or of its knowledge in relation to other investigations.

[124] The public interest in protecting such information is, I believe, self-evident. The question for the Court to determine is whether the evidence in relation to a specific item of information supports

a finding that disclosure would cause an injury to the protected national interests and, if so, whether the public interest favours disclosure nonetheless. The fact that CSIS may have disclosed this type of information for its own purposes is a relevant consideration but is not determinative of either an injury finding or the balancing of interests. There may be other factors that weigh heavily in favour of maintaining the prohibition.

Methods of Operations and Investigation

[125] Claims for the protection of information under this rubric are asserted on behalf of CSIS, CBSA and the CF. As discussed above, I do not believe that the CF claims are at issue in these proceedings. The CBSA claims are also incidental. The main issues arise from the CSIS claims. The service seeks to protect information that would reveal the capabilities as well as the limitations of its methods and the degree of its operational expertise. It is apparent that this could assist current and future subjects of investigation to counter the Service's investigative efforts, as stated by Mr. Evans in his affidavit.

[126] The respondents submit that the cross-examination of Mr. Evans supports findings that the claims to protect information falling within this category are overbroad. They are asserted notwithstanding that the existence of the investigations in question may be in the public domain or may have been completed; the techniques used are standard and publicly known investigative methods, and they may reveal flaws and deficiencies in the actions of Canadian officials, which have been remedied by changes in operation or policy.

[127] The respondents argue that this approach attempts to "bootstrap" the common law privileges preserved by s. 37 of the CEA, which are outside the proper scope of this application. On this, I agree with the applicant that the fact that claims of privilege under this heading are adjudicated by other courts in other types of proceedings under the common law or under section 37 of the Act does not detract from the legitimacy of the Federal Court's consideration and adjudication of such questions in proceedings before it: *Henrie*, above, at paragraph 29. Nor am I persuaded that the decision of the Supreme Court of Canada in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 alters the landscape in this context, as argued by the respondents. It remains open to the applicant to adduce evidence in public or private that disclosure of the information would have the harmful effects that Parliament was concerned about in enacting s.38.

[128] The respondents are correct, however, to caution that accepting such claims may deny access to information which goes to the essence of the respondents' *Charter* claims against the government in the underlying proceedings. That is, I believe, a valid consideration to take into account in the balancing phase, if the court is satisfied that an injury to national security would result from disclosure of this type of information.

Relationships and Third Party Information

[129] The disclosure of information obtained in confidence from other governments is of concern to DFAIT, the RCMP, CBSA and CSIS. The DFAIT public affiant deposed that it would have an adverse effect on the ability of Canada's diplomats to receive confidential information from their counterparts in other countries, the department's ability to serve Canadians abroad, to influence

global security objectives and to constructively engage with countries on human rights and other sensitive issues. The RCMP, CBSA and CSIS affiants asserted that disclosure of the information they have received from other law enforcement and intelligence agencies would jeopardize their information sharing arrangements with those agencies and diminish the capacities of their respective agencies to investigate threats to the security of Canada.

[130] This concern is not without a substantial foundation. The maintenance of Canada's effectiveness in international relations and security investigations are public interests of considerable importance. The importance of this "pressing and substantial concern" has been recognized by the Supreme Court: see for example *Ruby v. Canada (Solicitor General)* 2002 SCC 75, [2002] 4 S.C.R. 3, at paragraphs 43 and 54 ("*Ruby* 2002").

[131] As has been said in other cases, Canada is a net importer of intelligence information. The capacity of its law enforcement and intelligence agencies to defend our collective security is largely dependent upon intelligence sharing arrangements with foreign partners. The respondents submit, however, that this category of potential injury to the national interest also goes to the heart of the claims in the underlying actions which allege complicity with foreign governments and agencies with regard to the arbitrary detention and mistreatment of the principal respondents in Syria and Egypt. They say, with considerable justification, that they require the information being withheld on this ground as evidence in support of those claims.

[132] The applicant's evidence and submissions cite what is commonly known as the "third party rule" or "control principle". This principle is considered to apply when there is a sharing or exchange of information between police forces or intelligence agencies, particularly between those in different countries. By agreement between the agencies, express or implied, the agency receiving information is neither to attribute the source nor to disclose its content without the permission of the originating agency: *Ottawa Citizen Group v. Canada (Attorney General)*, 2006 FC 1552 at para. 25, 306 F.T.R. 222.

[133] The third party rule is not a principle of law and it is not absolute. It cannot be used as a categorical ground of public interest immunity. Its application in each case must be scrutinized, and actual risk of harm to the national interest established: *Mohamed*, above at paras. 44 and 46.

[134] The respondents observe that in the aftermath of 9/11, there was agreement between Canadian and US investigators that "caveats were down" and information was exchanged expressly without any requirement for consent of the originator before it was used. They submit that it is not now open to the applicant to contend that an implicit requirement for such consent must now be applied retroactively after the information was used to their detriment. I do not accept the proposition that the control principle was not applicable during the events in question. It is clear from the evidence as a whole that whatever agreement there may have been at the operational level between Canadian and American investigators, it did not alter the general principle of confidentiality applicable to intelligence sharing and diplomatic exchanges between the two countries, nor those which Canada had with other jurisdictions.

[135] The respondents submit that this Court should keep in mind the acknowledgement of the DFAIT witness that Canada's intelligence partners are well aware of Canada's legislation regarding disclosure. Even knowing that this Court has the power to authorize disclosure of information notwithstanding that it has been found to be injurious to international relations, Canada's intelligence partners still maintain information sharing relationships. Accordingly, the respondents argue that this Court should not give undue weight to speculation that foreign sources will, as a result, no longer communicate information to Canada.

[136] This is not idle speculation. Relationships will continue where the partners consider it in their mutual interest to maintain them, but the nature and extent of the information provided may be affected for some time. Examples of this may be found in the history of the intelligence sharing arrangements in which Canada has participated with its principal allies since World War II: see for example, Richard J. Aldrich, *GCHQ: The Uncensored Story of Britain's Most Secret Intelligence Agency*, (London: Harper Press, 2010); Richard Aldrich, "Allied code-breakers Co-operate – but not always" *The Guardian* (24 June 2010). The respondents are correct to suggest that these arrangements work to the benefit of all of the countries involved but Canada is, unquestionably, a junior partner in contributing and receiving intelligence.

[137] The respondents note that under Rule 30.02 of the Ontario Rules of Civil Procedure, the applicant's obligation to produce documents includes a positive obligation to obtain them, or to obtain consent to release them, by request from third parties. This is said to be consistent with the jurisprudence of the Federal Courts on the third party rule. The respondents argue that there is no

public evidence that the Attorney General has yet fulfilled this obligation, or made efforts to ensure that the third parties in question are not consenting to disclosure. It is correct that there is no public evidence of such efforts but, as noted above, the Court has received such evidence in private.

[138] In *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589, at paras. 101-111, (reversed on other grounds, *Ruby*, 2002, above), in the context of an application arising under the *Privacy Act*, R.S.C., 1985, c. P-21, the Federal Court of Appeal stated that "the reviewing Judge ought to ensure that CSIS has made reasonable efforts to seek the consent of the third party who provided the requested information". *Ruby* did not turn on the question of consent to disclosure, but rather the constitutionality of the *ex parte* provisions of the *Privacy Act*. In *Arar*, above, at para. 73, Justice Noël held that *Ruby* stood for the proposition that "law enforcement and intelligence agencies have a duty to prove that they have made reasonable efforts to obtain consent to disclosure or they must provide evidence that such a request would be refused if consent to disclosure was sought."

[139] In *Khawaja*, above, at paras. 145-46 I stated the following:

> Clearly, the purpose of the third party rule is to protect and promote the exchange of sensitive information between Canada and foreign states or agencies, protecting both the source and content of the information exchanged to achieve that end, the only exception being that Canada is at liberty to release the information and\or acknowledge its source if the consent of the original provider is obtained.
>
> In applying this concept to a particular piece of evidence, however, the court must be wary that this concept is not all-encompassing. First there is the question of whether or not Canada has attempted to obtain consent to have the information released. I would agree with the respondent that it is not open to the Attorney General to merely

> claim that information cannot be disclosed pursuant to the third party rule, if a request for disclosure in some form is not in fact made to the original foreign source.

[140] *Khawaja* related to the investigation of a conspiracy to commit terrorist acts abroad. The information in question had been provided by foreign law enforcement and intelligence agencies and formed part of the Crown's case in a criminal prosecution in Canada. The Crown was bound by the strict disclosure obligations set out in *R. v. Stinchcombe*, above. In those circumstances, I considered that there was a positive obligation on the Attorney General to seek consent.

[141] Similarly, in *Charkaoui (Re),* 2009 FC 476, 179 A.C.W.S. (3d) 301 at paragraphs 28-29, a security certificate case, Justice Tremblay-Lamer held that the Ministers were obliged to demonstrate that reasonable efforts had been made to obtain consent to disclosure. Factors which she took into consideration in deciding that she should hold the Ministers to this standard included the fact that the Ministers had used information in the past that came from the same foreign agencies in support of the confidential security intelligence report at issue; the fact that information or intelligence exists that was provided by foreign agencies had been known publicly since the public release of the summary of the intelligence report; the fact that it is public knowledge that the foreign authorities were involved in the case; and the fact that some of the information was dated and it was therefore unlikely that the secret and confidential nature of the information was still of particular interest to the originating country.

[142] In both *Khawaja* and *Charkaoui*, section 7 security of the person interests were engaged by on-going government efforts to prosecute Mr. Khawaja and to remove Mr. Charkaoui. Such considerations do not arise in the underlying proceedings in this application.

[143] Justice Noël was somewhat less categorical about whether there is an obligation to seek consent in *Arar,* above. At paragraphs 75 and 94 of his *ex parte* reasons issued in a redacted form subsequent to the release of his public reasons (2009 FC 1317), Justice Noël held that the fact that Canada, through its officials, had not sought consent to release certain information covered by the third party rule was to be taken into consideration. However, he declined to draw a negative inference from the decision made by the Attorney General not to make such a request, stating that the evidence to show that such a request would be useless was on the record.

[144] In *Khadr* April 2008, above, at paragraphs 93 and 94, I expressed the view that a failure to make inquiries of foreign source countries regarding disclosure of their information may undermine a privilege claim. However, in the circumstances of that case, I agreed with the Attorney General that it would be futile to make a request of certain countries for consent to disclose their information.

[145] As noted above, in the course of the present proceedings, I received evidence *in camera* in relation to the question of whether requests had been made to foreign countries for consent to disclose information which originated with their agencies or officials. Given the evidence I have heard, the responses to the requests for consent, the experience of the Iacobucci Inquiry and the

nature of the underlying proceedings, I did not consider that the failure to seek consent in the other instances weighed heavily in the balance in this case.

[146] The third party information of greatest interest to the respondents in this matter emanated from Syria, Egypt and the United States. I note that at an early stage in the Iacobucci Inquiry, counsel to the inquiry sent letters to the appropriate authorities in these three countries (and to Malaysia) requesting that they provide relevant documentation and information. The authorities in these countries did not respond to the Commission's initial or follow-up requests to provide information.

[147] Because of the legal obligations assumed by Syria and Egypt pursuant to the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 (the "*Convention Against Torture*"), the respondents submit that no damage to Canada's relations with either nation should result from disclosure of all relevant documents in its possession that originated with either country, or which concern Canada's dealings with them, that relate to the principal respondents' complaints of torture in the underlying proceedings. It is clear from the evidence I have heard *in camera* that neither country shares that perspective.

[148] I accept, in general, the proposition that disclosure of information that countries have provided in confidence would have an adverse effect on diplomatic relations and intelligence sharing arrangements with those countries. However offensive this may be to our principles when it arises in relation to certain countries, it is a factor to be taken into consideration in balancing the

public interests. Canada needs to call on other countries that do not share our values or legal traditions for consular or other assistance to protect its citizens or to advance its global interests. The Court cannot simply disregard that factor in considering whether injury would result from disclosure and, if so, whether the public interest favours disclosure and in what form.

[149] The respondents also argue that it is important to consider the effect on Canada's international relations of court-sanctioned withholding of evidence of a violation of the *Convention Against Torture*, including evidence of engagement in or complicity in torture. I agree with that proposition. It is consistent with Canada's obligations under the *Convention Against Torture*. Recognizing the importance of those obligations does not exclude consideration by the Court of whether there may be alternative means to disclose information in a form, such as a summary, that would minimize any injury that would otherwise result.

[150] I would also note that all countries and agencies are not equally important to Canada in terms of intelligence sharing. It is obvious that the consequences of a breach of an arrangement with Canada's major allies such as the United States and the United Kingdom would be far greater than those which may result from disclosure of information received from a country or agency not so closely linked to our national interests. As stated by Justice Noel in *Arar*, above, at paragraphs 80-81:

> When determining whether disclosure would cause harm, it is also important to consider the nature of Canada's relationship with law enforcement or intelligence agencies from which the information was received. It is recognized that certain agencies are of greater importance to Canada and thus that more must be done to protect our relationship with them. Consequently, care must be taken when

> considering whether to circumvent the third party rule in what concerns information obtained from our most important allies.
>
> This being said, the severity of the harm that may be caused by a breach of the third party rule can be assessed under the third part of the section 38.06 test when the reviewing judge balances the public interest in disclosure against the public interest in nondisclosure.

[151] One approach to the disclosure of third party information that has been used in other proceedings is to minimize the risk and scope of injury. As described by Justice Tremblay-Lamer in *Charkoui (Re)*, 2009 FC 476, above, at paragraph 35, the information "can be neutralized by purging the parts that could be sensitive to the originating country". As far as I considered it was possible, I have adopted that approach in deciding whether injury would result or whether the public interest favoured disclosure in some form.

[152] In the Iacobucci Report, for example, the Commissioner systematically refers to a "U.S. Agency", or, in the French version, "une organization américaine" rather than to the actual names of the organizations in question, one of which goes to extraordinary lengths to avoid being identified as the originator or recipient of information. The Report is not entirely consistent in that respect as there are variations between the two language versions and in some instances the acronyms of the U.S. agencies concerned are disclosed, possibly inadvertently. Nonetheless, references to U.S. agencies as the originator or recipient of information that is highly relevant to the underlying actions are now in the public domain. There does not appear to have been any serious consequences from those disclosures, nor were they the subject of objections to the Report by Ministers that were brought to the attention of this Court.

[153] In these proceedings, the applicant has consistently sought to protect information that would disclose U.S. involvement in the events that are the subject of the underlying actions. As discussed above, that involvement is now in the public domain as a result of the publication of the Iacobucci Report. I was not persuaded that disclosure of references to U.S. agencies in the documents that were under review in this application would cause injury to the protected interests or, if injury resulted, that the public interest in non-disclosure outweighed the public interest in disclosure. The approach adopted by Commissioner Iacobucci to refer to the U.S. institutions generically as "U.S. agencies" will minimize any impact such disclosure would have.

[154] In this case, the *amici* made a number of valuable suggestions as to how certain third party information might be neutralized, several but not all of which were endorsed by the applicant. The applicant also put forward similar proposals in relation to other redacted information. While I found these efforts to have been of great assistance, I have made my own decisions as to what would cause injury to the protected interests and what should be disclosed.

Employee Information

[155] The applicant seeks to protect from disclosure information that would tend to identify CSIS employees including names, position titles, work location, telephone numbers or Internet addresses. Mr. Evans's affidavit evidence is that the identification of CSIS employees, particularly those engaged in or who may become engaged in covert activities, would impair the ability of the employee and the Service to investigate threats to the security of Canada. In addition, there are

concerns that disclosure of identifying information would lead to harassment or threats to Service personnel.

[156] The identities of certain CSIS employees involved in the events which are the subject of the underlying actions have been publicly disclosed. The applicant relies on s. 18 (1)(b) of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (the "CSIS Act"), which prohibits the disclosure of the identity of service employees who have been or are engaged in covert activities. I agree with the respondents that this does not, in itself, preclude the identification of an employee who could in the future be asked to take on a covert role. But the Court must be cognizant of the fact that CSIS employees may be called upon to perform a covert role whether they have done so in the past or not. This is not speculative but a reality of their employment.

[157] If the evidence is capable of supporting a claim that the person concerned has committed a civil wrong or a *Charter* violation against the respondents, or caused or contributed to their damages resulting from such wrongs, I agree with the respondents that the Court must also consider their rights to name the employees as individual defendants and to seek discovery from them. This was previously agreed to by the Attorney General under the terms of the case management process.

[158] The RCMP have similar concerns, although to a lesser extent, about disclosure of the identity of some members. As was acknowledged in cross-examination of the RCMP witness, the identity of several members that were involved in the investigations at issue in the underlying

actions has already been publicly disclosed. As a result, I considered whether there was any need to further protect such information in these proceedings and whether there was evidence to support such a finding.

[159] The concern for DND and the CF is in relation to identifying military personnel engaged in sensitive operations in Afghanistan. As indicated above, I am satisfied that this information should be protected.

Administrative Information

[160] The evidence of the CSIS witness was that disclosure of information pertaining to the Service's internal procedures and administrative methods could reveal how the Service manages its investigations, how messages are generated and to whom they are sent, how file numbers are utilized to distinguish between targets, sources of information, investigations and what types of investigations are conducted in a specific area. They are also concerned about disclosure of information that could identify the secure telecommunication systems used by the Service.

[161] CSIS collects information outside of Canada and for that purpose maintains a number of foreign offices. With the exception of offices in Washington, London and Paris, the location of these posts is classified. The evidence is that the identification of such locations would jeopardize the Service's foreign relationships and potentially put their employees posted abroad at risk.

[162] In other proceedings, it has generally been conceded that this type of information is not relevant. In the present case the respondents have not made that concession, preferring that the question remain open should some significance to the information later arise. Proceeding on the dubious assumption that the information is relevant, I have accepted the applicant's submission that injury would result from its disclosure.

Human Source Information

[163] As noted above, the applicant seeks to protect information that would identify or tend to identify human sources of information or the content of information provided by human sources which, if disclosed, could lead to the identification of human sources. Having reviewed the unredacted content of the documents at issue, I can say that this is not a significant issue in these proceedings. However, I think it necessary to express my view of the matter given the likelihood of further proceedings involving other documents that may be produced on discovery to the respondents.

[164] The respondents characterize the evidence of the CSIS witness, Mr. Evans, as claiming a categorical protection for human sources that is broader than the police informant privilege recognized by the Supreme Court in *R.v. Leipert* [1997] 1 S.C.R. 281, 143 D.L.R. (4th). They submit that CSIS' practice of encouraging its human sources to provide information as the norm, rather than the exception, serves no public interest. It is argued that the offence in section 18 of the CSIS Act that makes it is crime to disclose the identity of a person who is or was a confidential source of information or assistance to the Service merely incorporates the common law principle. Unless,

they submit, the information covered by this category also engages some other legitimate national security or international relations interest it should not fall within the scope of section 38.

[165] The respondents request that this Court order the disclosure of all information related to or received from human sources, including their identity or identifying information, subject however, to a right of the Attorney General, if so advised, to apply to the Superior Court of Justice for a protective order based upon the common law informant principle.

[166] The existence of a covert intelligence source privilege was discussed by Justice Noël in *Harkat (Re)* 2009 FC 204, [2009] 4 F.C.R. 370. Justice Noël found, at paragraph 18, that the police informant privilege and the innocence at stake exception to that privilege did not apply, *per se*, to confidential intelligence sources. However, he considered that the criteria for recognizing or extending a privilege, as set out by the learned author of the text *Wigmore on Evidence*, were met in the case of covert human sources who were assured confidentiality by CSIS in return for providing intelligence information relating to national security. Justice Noël's analysis is, I believe, consistent with the common law framework for recognizing whether a privilege may be claimed on a case by case basis as recently approved by the Supreme Court of Canada in *Globe and Mail v. Canada (Attorney General)* 2010 SCC 41.

[167] At paragraph 28 of his reasons, Justice Noël stated the following:

> If the Service is unable to protect the identity of its sources or is required to produce them in the context of a Court proceeding (even one that is closed to the public), the number of individuals

> willing to come forward with information would be reduced. Indeed, there is evidence before this Court that the recruitment of human sources would be harmed if the guarantees of confidentiality given by the Service were not upheld by this Court.

[168] I agree with Justice Noël and, in general, adopt his reasoning in this regard. As a general proposition, I accept that the identity of covert human sources and information provided by such sources that would tend to identify them will be subject to a public interest privilege. I accept also that the Court should be conscious of the effect that a decision to order disclosure of such information may have on the recruitment of human sources. CSIS is a relatively small agency in comparison to its international partners and relies heavily on its capacity to recruit and develop human sources. Its ability to do so is a public interest of considerable importance.

[169] However, I do not accept that the privilege should apply in every instance to persons who provide information to CSIS. The Service tends to treat virtually everyone who provides information as a confidential source whether there is any real expectation of confidentiality on the part of the source, a risk of harm to the source or likelihood that they would not be forthcoming without such assurances. This extends to employees of law enforcement agencies, public utilities and business corporations who provide information that may be publicly available. In reviewing documents for disclosure, Service officials routinely redact the names of such persons and related identifying information. In my view, the Service approach is overbroad.

[170] I recognize that the redacted information may be of little or no relevance to the underlying proceedings. However, if relevant, as discussed above, the Court has to consider whether injury

would result from disclosure and whether the privilege is justified on a case by case basis. In some instances, this will not be difficult as the circumstances relating to the recruitment and development of the source will make it clear that the information should be treated as privileged. However, the public interest in nondisclosure of the information will not in every case outweigh the public interest in disclosure. That assessment has to be made in the third and final stage of the inquiry.

3. *The balancing test*

[171] In carrying out the third part of the analysis under s. 38.06, the Court must determine whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. If the Court is satisfied that the public interest favours disclosure, subsection 38.06(2) provides for the authorization of disclosure of information in the form and under the conditions that are most likely to limit any injury to international relations or national defence or national security.

[172] The party seeking disclosure bears the burden at this stage of proving that the public interest scale is tipped in its favour: *Ribic*, above at para. 21. The Act does not specify the standard to be employed in determining whether the balance favours disclosure. The respondents submit that no higher standard should be employed than the minimal threshold of a "serious question to be tried" used in applications to obtain interim relief and assert that it is clearly met in this case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[173] As the respondents are not facing criminal charges and are not involved in an immigration proceeding in which their liberty and security of the person interests are engaged, I consider that the

standard for determining whether the balance favours disclosure is that developed in the civil case of *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, 299 N.R. 154 ("*Hijos*") and confirmed in *Ribic*, at para. 22, namely whether the information sought would establish a fact crucial to the case of the party seeking it. As discussed above, this may include a fact that would undermine an opposing party's case. I also think it necessary to take into account that the information may provide the missing pieces of the overall mosaic or picture of the case necessary for a full adjudication of the issues between the parties.

[174] Factors identified in the jurisprudence that the Court may take into account in weighing the competing interests include: the nature of the interest sought to be protected; the admissibility and usefulness of the information; its probative value to an issue at trial; whether the party seeking disclosure has established that there are no other reasonable ways of obtaining the information; whether the disclosures sought amount to a fishing expedition; the seriousness of the issues involved: *Ribic v. Canada (Attorney General)*, 2003 FCT 10, above at paragraph 23; *Khan v. Canada (T.D.)*, [1996] 2 F.C. 316 at para. 26, 110 F.T.R. 81; *Hijos*, above, at paragraphs 16 and 17; Canada *(Attorney General) v. Kempo*, 2004 FC 1678 at para. 102, 294 F.T.R. 1 ("*Kempo*").

[175] Justice Noël identified a non-exhaustive list of the factors to be considered in the context of an underlying public inquiry in *Arar*, above, at paragraph 98. The list is useful in the present matter as it applies to an analogous context in which accountability was being sought for past acts and omissions of Canadian officials in relation to the detention of a Canadian citizen in Syria.

The factors identified by Noël J. to be assessed and weighed in determining where the public interest lies are:

> (a) The extent of the injury;
>
> (b) The relevancy of the redacted information to the procedure in which it would be used, or the objectives of the body wanting to disclose the information;
>
> (c) Whether the redacted information is already known to the public, and if so, the manner by which the information made its way into the public domain;
> (d) The importance of the open court principle;
>
> (e) The importance of the redacted information in the context of the underlying proceeding;
>
> (f) Whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc;
>
> (g) Whether the redacted information relates to the recommendations of a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.

[176] The applicant submits that the respondents already have sufficient information to make their cases in the underlying applications. He asserts that the respondents' detailed submissions and their references to the Iacobucci Report show that as plaintiffs, they already have considerable knowledge of the facts. As part of establishing an interest for further disclosure, the respondents must persuade the Court that they need the disclosure of injurious information to prove civil liability. That information may support a claim against the Government in itself is not grounds for the information to be disclosed, according to the applicant. If a plaintiff already has sufficient information to make its case, and/or can be expected to obtain more through discovery and

examination, there will be no compelling reason to cause national injury through disclosure, the applicant submits.

[177] It is perhaps trite to observe that knowledge of the facts does not equate to admissible evidence to prove those facts. Absent production of unredacted information in the government's possession, the respondents may not be able to prove the facts that Commissioner Iaccobucci relied on to make findings of deficiencies in the actions and omissions of government officials based on his examination of the information in an unredacted form. As stated by the Supreme Court in *Globe and Mail v. Canada*, above, at paragraph 62 "[a] crucial consideration in any court's determination of whether [the] privilege has been made out will be whether the facts, information or testimony are available by any other means."

[178] The primary public interest in disclosure is to ensure that the trial court has the fullest possible access to all relevant material. But that is not, in itself, an overriding consideration that will compel a decision to disclose when national security interests are at stake. As was stated in *Parkin v. O'Sullivan* [2009] FCA 1096, 260 A.L.R. 503 at para. 32, a decision of the Federal Court of Australia, the fact that a plaintiff may not be able to make out their claim without disclosure does not generally amount to exceptional circumstances that will outweigh the public interest in keeping information secret, given that it will often be the case that public interest immunity will exclude the information a plaintiff hopes to rely on.

[179] The issues raised in the underlying actions, including the alleged *Charter* breaches, are very serious. At paragraph 181 of their opening written submissions, the respondents have framed this aspect of the public interest in the following terms:

> There can be no greater public interest than ensuring that participation in egregious human rights breaches are brought into the open and assessed by a court with the view to ensuring that just and appropriate reparation is ordered. The underpinning of a just and democratic society is lost if impunity is permitted. In the absence of criminal prosecutions, a civil remedy which is premised on accountability is the only effective domestic remedy whereby accountability and reparation may be achieved.

[180] I note that Mr. Justice Perell recognized that the decision of the Supreme Court in *Canada (Prime Minister) v. Khadr* 2010 SCC 3, [2010] 1 S.C.R. 44, "establishes a precedent that demonstrates that Mr. Elmaati has at least pleaded a viable claim that his *Charter* rights were violated": *Abou-Elmaati*, above at para.77.

[181] The respondents submit that the underlying civil actions are the only means that they have available to obtain answers concerning the events that led to their arbitrary detention and mistreatment, which are part of the redress to which they are entitled under international law: *Convention Against Torture*, above Art. 14(1) and Canada's international human rights obligations. Any evidence of complicity in the infliction of torture or mistreatment of the principal respondents on the part of Canadian officials would bring them within the scope of the *Convention Against Torture* and invokes Canada's obligations. Moreover, the actions of the CSIS, RCMP and DFAIT officials in question are reviewable for compliance with the *Charter*: *R.v. Hape*, 2007 SCC 26,

[2007] 2 S.C.R. 292 at para 106; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 at para 19; *Abdelrazik v. Canada (Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267. Evidence of the participation of Canadian officials in the respondents' mistreatment will engage their s.7 rights: *Khadr* 2010 SCC 3, above.

[182] The public interest in holding government accountable for the alleged actions and omissions of its servants is an important consideration in this case. Mr. Justice La Forest stated the following in *Carey*, above, at page 673:

> There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed.

[183] The right to obtain an appropriate and just remedy for *Charter* breaches is part of our constitutional framework: *Mills v. The Queen*, [1986] 1 S.C.R. 863. As was recognized by Noël J. in *Arar*, above, at para. 98 the Court must take higher interests such as this into account in the balancing exercise.

[184] In the particular context of this case, the Court must also take into consideration that the respondents' present liberty interests do not depend on the outcome of their civil actions against the government: *Kempo*, above, at paragraph 115. Unlike other cases in which s.38 privilege claims

have been raised in which the liberty interests of a party have been directly engaged such as *Khawaja* and all of the *Khadr* cases cited above, the underlying actions in this matter are civil proceedings seeking remedies in damages. While the respondents claim damages for past alleged breaches of their *Charter* rights, the alleged harm has been done and those rights are not presently at stake in the underlying proceedings. While maintaining access to the courts to achieve redress for civil wrongs is an important public interest, the Court must be cognizant of the risk of present and future damage to Canada's national interests if injurious information is ordered to be disclosed.

[185] The respondents argue that s.24(1) of the *Charter* provides this Court with a broad jurisdiction, apart from s.38 itself, to ensure that an appropriate and just remedy for the breach of their *Charter* rights is available in the trial court. They base that submission on the argument that the findings in the Iacobucci Report and the Supplementary Report already have established that the respondents *Charter* rights were likely breached by Canadian officials through their involvement in the principle respondents' detention and torture in Syria and Egypt. But this Court is not in a position to make findings of fact sufficient to craft a s.24 (1) remedy, nor can it rely on Commissioner Iacobucci's findings, for the reasons discussed above, to make such a determination.

Whether document 171 is subject to the s. 38 process?

[186] The respondents submit that the bar to disclosure in s.38.02(1) following the giving of notice to the Attorney General does not apply to a document that has already been disclosed in an unredacted form to opposing parties and their counsel. The statute prohibits disclosure of information that has not yet been disclosed and about which a notice to prevent the possibility of

disclosure has been validly given. Where disclosure has already taken place, they submit, the statute no longer applies. Moreover, they contend, there is nothing in the statute that empowers this Court to order that such information be returned to the Attorney General.

[187] The respondents maintain that the Supreme Court's decision in *Babcock*, above, with respect to the effect of disclosure in respect of cabinet confidences which fall within the scope of s. 39 of the Act, is equally pertinent to s. 38: *Arar*, above, at para. 54. They submit that in *Babcock*, the Supreme Court recognized that where a deliberate disclosure of a cabinet confidence has occurred there may be other bases upon which the government may seek protection against further disclosure at common law separate and apart from the *Canada Evidence Act* procedures: *Babcock*, above, at para. 26. The same reasoning should apply to documents for which claims of public interest privilege under s. 38 are raised, they contend.

[188] The applicant's position is that the *Babcock* rationale does not apply where the document was inadvertently disclosed. They note that Perell J. has already rejected the same argument from the respondents: *Abou-Elmaati,* above, at para. 45. Inadvertence should be inferred in this case because disclosure of the content of the document was inconsistent with the position taken with respect to other information of a similar nature and the error was recognized within a month of the production of the document. The error ought not to prevent the issuance of an order that the redacted information not be further disclosed if the Court is satisfied that the test under s. 38.06(3) of the Act is otherwise met.

[189] Should the Court hold that it has jurisdiction to deal with disclosed documents, the respondents ask the Court to find that there is no evidence of "inadvertence", in the disclosure of document 171. They argue that the document was released without redactions by one or more of the people designated by the Attorney General to make final decisions regarding disclosure under s.38, following the process designed for that purpose. It is argued that if that process and the criteria for review were flawed, they were flawed by design, not inadvertence - there is no evidence of the alleged inadvertence, which this Court has said is "of the essence when determining whether inadvertently disclosed information can be protected by the Court": *Arar*, above, at para. 57. If the Court determines that the disclosure was inadvertent, the respondents submit that the Court must still go on to consider whether the information sought to be protected meets the test under s. 38.

[190] This Court has previously held that inadvertent release of information for which a claim of privilege is advanced under s.38 information is not a waiver: *Khawaja*, above, at para. 111, *Khadr*, April 2008, above, at paras. 40-42 and 114-118; *Arar* at paras. 56-57. The respondents seek to distinguish those cases on the basis that none of them concerned a situation where the disclosure occurred in proceedings before a provincial superior court and no challenge had been made to the jurisdiction of the Federal Court. In *Arar*, the Court was dealing with proceedings before a federal commission of inquiry. However, both *Khawaja* and *Khadr* related to underlying cases in the Superior Court of Justice. *Khawaja* is more on point, as it concerned inadvertent production to the defence pursuant to the Crown's disclosure obligations. In *Khadr*, the document in question had been released to a newspaper, giving rise to *Charter* freedom of the press considerations.

[191] I accept the applicant's submission that the evidence points to a series of errors in the internal government review and redaction process, and in the final preparation of the electronic version of the documents sent to the respondents. The steps taken by counsel for the applicant to notify counsel for the respondents, and to give formal notice to the Attorney General, when the mistake was discovered, are also inconsistent with advertent disclosure. I find, therefore, that the disclosure was not deliberate and the circumstances of its release do not constitute a waiver of the claimed privilege. The information in question in document 171 is, therefore, subject to the same three-step analysis as the other information at issue: *Khadr*, 2008 SCC 28 above, at para. 40.

[192] There is no dispute as to the relevancy of the redacted information in the document, aside from some file numbers and other minor administrative details. The redactions, notwithstanding the most recent "lifts", continue to withhold information that Commissioner Iacobucci believed should be disclosed to the public. The Supplementary Report discloses much but not all of the substance of the redacted information. And the Report does not constitute admissible evidence. The content that is still redacted was thoroughly parsed in the testimony and submissions heard *in camera*. As a result, I am not persuaded that the disclosure of certain of the redacted parts of the document would result in injury. With regard to other portions, I am satisfied that the respondents have demonstrated that the public interest favours disclosure.

CONCLUSION

[193] In reviewing the information which the Attorney General seeks to protect, I have considered whether: a) the information is relevant to the underlying proceedings; b) the applicant has met his

onus of demonstrating that disclosure of the information would cause injury with factual evidence and on a reasonableness standard; and c) where I have found that injury has been established, that the respondents have met their onus of showing the public interest in disclosure outweighs the public interest in non-disclosure.

[194] For the most part, I am satisfied that the redacted information is relevant to the underlying civil actions. That which I consider not relevant is primarily administrative detail. With regard to certain of the redacted information, I am satisfied that the applicant has not met his onus of demonstrating injury and an order to disclose the information will follow, subject to any other claims of privilege which the applicant may assert before the trial court. Where injury has been established, I have considered whether the respondents have shown that the public interest favours disclosure. Where I have concluded that there should be further production in such cases, I have considered whether the injury may be neutralized by disclosing the information in the form of a summary that does not reveal particularly sensitive information such as the names of foreign officials or agencies.

[195] The results of these decisions are set out in a table attached as “Annex A” to the Order that has been released to the applicant pursuant to paragraph 38.02 (2) (b) of the Act. The information which is ordered to be disclosed will be provided to the respondents on the expiry of the periods for appeal accorded the applicant in section 38.09 and, if any application for leave to appeal is made to the Supreme Court of Canada, in 38.1 of the Act. I have also indicated in the Order, as the Act is not clear in this regard, that the period for any appeal by the respondents should run from the date on

which the further disclosures are made to them. That is, of course, subject to any further time for appeal that the Federal Court of Appeal may consider appropriate under s.38.09 of the Act.

[196] I am grateful to the *amici* and counsel for the Attorney General for their diligent efforts to assist the Court in dealing with the *ex parte* and *in camera* aspects of this application. I also appreciate the efforts of counsel for the respondents to provide meaningful opening and closing submissions notwithstanding the difficulties they faced in addressing issues obscured by their inability to have full disclosure of the information in the government's possession.

"Richard G. Mosley"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT AND JUGMENT OF THE HONOURABLE MR. JUSTICE MOSLEY

DATED:	**November 8, 2010**

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