

**Date: 20070507**

**Docket: DES-2-06**

**Citation: 2007 FC 490**

**Ottawa, Ontario, May 7, 2007**

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

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**MOHAMMAD MOMIN KHAWAJA**

**Respondent**

**REASONS FOR ORDER**

**INTRODUCTION**

[1] This is an application by the Attorney General of Canada pursuant to section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the “Act”). The respondent, Mohammad Momin Khawaja, faces criminal charges in relation to a conspiracy to commit terrorist acts in the United Kingdom. An indictment has been preferred against him in the Ontario Superior Court of Justice

alleging a total of seven counts under sections 83.2, 83.18(1), 83.21, 83.03(a), 83.18 and 83.19 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The arrest of the respondent took place on March 29, 2004 in Ottawa. On the following day, six individuals were arrested in the UK. A seventh was taken into custody in Pakistan and later arrested on February 8, 2005 when he returned to the UK. The trial of the seven accused in the UK began on March 21, 2006 and resulted in a jury verdict on April 30, 2007. Five of the accused were convicted of terrorism related offences and have been sentenced to lengthy prison terms. Two were acquitted. The UK case is known as “Operation Crevice”. In Canada, the RCMP labelled their investigation “Project Awaken”.

[3] According to affidavit evidence filed in these proceedings, at Mr. Khawaja’s trial the prosecution will be introducing *viva voce* evidence from a number of witnesses, sound and video recordings, documents including electronic communications reduced to writing, and other evidence. In the exercise of the prosecution’s continuing obligation to ensure that the respondent’s fair trial rights under the *Canadian Charter of Rights and Freedoms* are respected, as stipulated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [*Stinchombe*], a large quantity of material has been assembled and disclosed to the respondent some of which has already been used as evidence in the UK trial and may be introduced in the forthcoming trial of the respondent, subject of course to its admissibility under Canadian legal standards.

[4] The disclosure process began in June of 2004 and has continued thereafter on a periodic basis. Some 98, 822 pages have been disclosed to date. Among the disclosure materials relating to

the UK evidence served on counsel for the respondent on July 8, 2005, subject to an undertaking that it be used only for the purpose of the criminal trial, were 226 CDs containing intercepted conversations; 13 VHS surveillance videotapes; an exhibit list prepared for the UK Crown Prosecutor; indexes of statements prepared by the Metropolitan Police; transcripts and surveillance records; photographs taken of the respondent at Heathrow Airport on February 20, 2004 and a closed circuit television tape of the respondent entering and leaving an address in London on the same date.

[5] I mention the quantities of material disclosed to offer some perspective regarding the scale of this proceeding. Among the disclosed material, a relatively small number of documents have been identified in which there is information that the Attorney General seeks to protect from disclosure or further disclosure. Some 515 documents were originally filed with the Court. In the course of the *ex parte* proceedings, it came to the Court's attention that nine of these documents were not in fact subject to the section 38 proceedings and were not served on the respondent as a result. Eight of these documents are work products of the prosecution and subject to solicitor-client privilege. The ninth is a list of the US marshals that were assigned to protect the witness Babar during the UK trial. The final number of documents before the Court is therefore 506. These documents consist of several thousands of pages, among which are about 1700 pages on which information has been redacted. The documents were assembled from the operational, investigative and administrative files of several agencies including the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS) and the Canada Border Services Agency (CBSA). The documents include information obtained in confidence from foreign intelligence and law enforcement agencies.

[6] With the exception of a few documents identified during the *ex parte* hearings for which protection is no longer sought, the Attorney General maintains the position that disclosure of this information will harm Canada's national security and/or international relations. The applicant is not alleging injury or harm to Canada's national defence interests, the third ground upon which protection from disclosure may be sought under section 38.04 of the Act.

[7] The applicant seeks to have the statutory prohibition on disclosure set out in paragraph 38.02(1)(a) of the Act confirmed by the Court. Alternatively, the applicant 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 or international relations.

[8] The respondent has made it clear that he is not seeking the disclosure of any information that would reveal sensitive investigative techniques, the identity of any undercover operatives of law enforcement and/or intelligence agencies, or the targets of any other investigation. The respondent asserts, however, that the withholding of much of the redacted material is not justifiable given the prosecutor's concession that it is relevant. The respondent argues in the alternative that should the Court deem it necessary to protect national security and/or international relations, the information should be disclosed subject to any reasonable conditions such as prohibiting subsequent disclosure and/or requiring that the disclosed information be utilized only in closed-court proceedings.

[9] In these reasons I outline the background to the application, describe the information at issue in general terms, discuss the legal issues raised, the principles that I have applied and the

conclusions I have reached about the material in question. The overall question that is before me to determine is whether the statutory bar to disclosure should be confirmed. Given the volume of the information and the varying claims that are being made for its protection arriving at a determination of that question will require a number of specific decisions. Those decisions will be set out in a schedule to be attached to the order that will issue shortly reflecting the conclusions described at the end of these reasons.

## **PROCEDURAL HISTORY**

[10] Subsection 38.01(1) of the Act provides that 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. "Sensitive information" as defined by the Act, is information relating to international relations or national defence or national security in the possession of the Government of Canada, whether originating from inside or outside Canada, and of a type that the government is taking measures to safeguard. "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.

[11] On October 25, 2006 the senior prosecutor in this case, David McKercher, gave notice to the Attorney General that he is required to disclose or expects to disclose information that would

potentially be injurious to international relations or national security or both. That notice concerned 444 documents consisting in total of about 1, 500 pages.

[12] On November 1, 2006 the Attorney General advised Mr. McKercher of his decision to authorise disclosure of part of the information and of the fact that (a) notice was given to the Attorney General and (b) that an application was being made to the Federal Court under subsection 38.04(2) of the Act. A Notice of Application was filed in the Court the same day together with a motion for directions.

[13] At the direction of Chief Justice Allan Lutfy, the Notice of Application and motion record was served on counsel for the respondent on November 2, 2006. The matter was thereafter case-managed by the Chief Justice pursuant to Rule 383 of the Federal Court Rules through a series of private teleconferences with counsel for both parties and *ex parte* conferences with counsel for the Attorney General.

[14] An *ex parte* affidavit attaching as exhibits 18 binders containing the 444 documents in unredacted form was filed by counsel for the applicant on November 8, 2006. The affidavit and exhibits have been kept confidential by the Court in a secure location. An additional four *ex parte* affidavits made by intelligence and law enforcement officers respecting the content of the binders were sworn and filed on behalf of the applicant between November 15 and 20, 2006. A private affidavit made by an R.C.M.P. officer attaching the redacted versions of the 18 binders as an exhibit was served on counsel for the respondent on November 21, 2006 and filed with the Court on

November 23<sup>rd</sup>. An additional five private affidavits made by officers of several departments and agencies of the Government of Canada were served and filed on November 20, 2006.

[15] On November 16, 2006 Mr. McKercher gave a second notice to the Attorney General respecting an additional group of documents. The same day the Attorney General authorized disclosure of the fact that notice had been given with respect to the additional documents. On December 5, 2006, the Attorney General notified Mr. McKercher of his decision to authorize disclosure of part of the information contained in the documents. A further four *ex parte* affidavits were filed on behalf of the applicant on December 11, 2006 attaching as exhibits five additional binders of documents. Three private affidavits were served on the respondent together with the redacted versions of the five binders of exhibits and were filed with the Court on December 19, 2006. Counsel for the respondent conducted cross-examinations of five of the affiants who had made private affidavits on January 25 and 29, 2007.

[16] On February 6, 2007, the Chief Justice granted leave to the applicant to amend his Notice of Application dated November 1, 2006. An amended Notice of Application was filed on February 7, 2007 addressing both groups of documents for which protection is sought by the Attorney General. By order dated February 19, 2007, the Chief Justice fixed dates for the filing of the parties' memoranda of fact and law.

[17] In accordance with section 38.11 of the Act, the teleconferences with counsel over which the Chief Justice presided in his capacity as case management judge were held in private. Similarly, the affidavits filed by the applicant and served on counsel for the respondent as evidence in support

of the application and the cross-examinations of the affiants were initially treated as private by the Court and the parties. In this context, “private” means counsel for both parties participated but the conferences were not open to the public. Similarly, documents filed as private were served on the opposing party but were not publicly accessible through the Court Registry.

[18] On February 5, 2007, Chief Justice Lutfy rendered his decision in *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128 [*Toronto Star*]. At issue was a motion which challenged the constitutionality of subsections 38.04(4), 38.11(1) and 38.12(2) of the Act. In particular the Toronto Star alleged that the impugned provisions infringed the open court principle, which is a core democratic value inextricably linked to the fundamental freedoms of expression and of the media protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and that the infringement could not be justified under section 1.

[19] The provisions at issue respectively required that confidentiality be maintained in respect of all applications made pursuant to section 38; that section 38 application hearings be heard in private; and that confidentiality be maintained in respect of all court records related to a section 38 proceeding. As was noted by the Court at paragraph 18, the combined effect of subsections 38.04(4) and 38.12(2) in the case at bar was to deny the Toronto Star and the public generally access to the section 38 application and all court records associated with the designated proceeding. This, despite the fact that the existence of the proceeding was already public knowledge, and that certain portions of the proceeding did not concern secret information.

[20] The Chief Justice highlighted that there were in fact two types of hearings in a section 38 proceeding: sessions at which all of the parties are present but which are nonetheless closed to the public (private sessions) and sessions which take place in the absence of one or more of the parties (*ex parte* sessions): *Toronto Star*, above at para. 32. With respect to the former, the Chief Justice emphasized that there is no secret information disclosed. He noted further that the constitutionality of the later had not been raised in the case before him: *Toronto Star*, above at paras. 33-34. The Chief Justice also stipulated that his ruling was only applicable to those cases in which the existence of the designated proceeding had been made public: *Toronto Star*, above at para. 22.

[21] The Chief Justice outlined that it had in fact been accepted by both parties that the impugned provisions violated the open court principle and therefore infringed section 2(b) of the *Canadian Charter of Rights and Freedoms*: *Toronto Star*, above at para. 24. The focus of the decision was therefore on whether the impugned provisions could be saved under section 1 of the *Charter*, and if not, what the appropriate constitutional remedy was that should apply.

[22] By way of comparison to the Supreme Court of Canada decision in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 [*Ruby*] wherein similar provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 were considered, the Chief Justice noted that the Supreme Court had found in that case that the mandatory statutory requirement to exclude the public from portions of the review hearing when there existed no risk that national security information or foreign confidences could be disclosed, was overbroad. The Chief Justice held that the same reasoning applied with equal force in the context of section 38 proceedings, finding that “the impugned provisions do more than is minimally required to safeguard the secret information and therefore trench unduly on the open

court principle”: *Toronto Star*, above at para. 70. He accordingly concluded that the impugned provisions failed at the minimal impairment branch of the *Oakes* test and could not be saved under section 1 of the *Charter*.

[23] In setting out the appropriate remedy, again referring to the *Ruby* decision by way of comparison, the Chief Justice read down the impugned sections to apply only to the *ex parte* representations provided for in subsection 38.11(2): *Toronto Star*, at para. 83. As in *Ruby*, the Chief Justice outlined that the effect of his decision was that private sessions in section 38 proceedings would be presumptively open to the public, where the existence of those proceedings was already public knowledge.

[24] Counsel for the parties were informed on February 15, 2007 that the undersigned had been designated by the Chief Justice to determine the section 38 application in this matter. At a conference with counsel on March 6, 2007 I advised them that I was adopting the Chief Justice’s reasons in *Toronto Star* as my own, and considering that the existence of the proceedings was already public knowledge, I would therefore apply section 38.11 in the present case as it had been read down in that decision. Thus the March 6, 2007 conference was open to the public and the formerly “private” affidavits and cross-examinations were subsequently made available for release to the public on request, by the Registry. Similarly, memoranda of fact and law filed by the parties were also made accessible to the public with a few minor redactions to black out certain names. The hearing of oral submissions from both parties on March 30, 2007 on the merits of the application was conducted in an open courtroom and these reasons are public.

[25] The applicant filed a separate *ex parte* Memorandum of Fact and Law and nine *ex parte* affidavits. The evidence of four witnesses was heard *ex parte* and *in camera* over the course of eleven hearing days in March during which 8 additional exhibits were filed. This evidence has been kept confidential as required by the statute.

[26] On March 15, 2007 counsel for the respondent served and filed a Notice of Constitutional Question indicating the respondent's intent to challenge the constitutional validity of subsection 38.11(2) of the Act. The grounds cited by the respondent in the Notice were, in essence, that his *Charter* rights to a fair and public hearing and to make full answer and defence, and the open court principle, as protected by sections 7, 11(d) and 2(b) of the *Charter*, were unjustifiably infringed by the *ex parte* proceedings provided for by this subsection, and utilized in this case.

[27] On March 28, 2007 counsel for the respondent submitted a request that I disqualify myself from hearing the application by reason of my involvement in the development of amendments to section 38 which were adopted through the *Anti-Terrorism Act*, S.C. 2001, c.41, known before its enactment as Bill C-36. In reasons delivered at the outset of the hearing on March 30, 2007, I declined to recuse myself from hearing the application on the merits, but agreed to step aside to allow the constitutional question to be decided by another judge, not for the reason put forward by the respondent, but because of the *ex parte* evidence and submissions that I had already heard. I proceeded to hear argument from counsel for the parties on the merits of the application on the same date, advising them that I would reserve a decision until such time as the constitutional question was determined by another judge.

[28] In the course of the hearing on March 30, 2007 I reminded counsel for the respondent that it was open to him to request an opportunity to make *ex parte* representations to the court to assist it in determining what information might be of help to the respondent in making his defence. Counsel at that time indicated that anything that would tend to show what had been offered a material witness in exchange for his testimony would be useful. The respondent did not subsequently request an opportunity to make *ex parte* representations and did not provide any further submissions as to what information might be of assistance to his client.

[29] Arguments on the constitutional question were heard by the Chief Justice on April 4 and 19, 2007. While awaiting his decision I continued my review of the documents and read each of the redacted references in the approximately 1700 pages of material. As required by subsection 38.11(2), I heard *ex parte* oral representations from the applicant on April 17, 2007 and subsequently have received a number of responses in writing to questions I have raised. Counsel for the Attorney General has also provided, at my request, a table of concordance between the materials disclosed to the respondent and the exhibits in the 23 binders served upon him. This will be provided to counsel for the respondent to assist him in comparing the content of the binders to the other materials which he has received.

[30] Chief Justice Lutfy rendered his decision on April 30, 2007. I completed my deliberations in this matter following the release of that decision, wherein the Chief Justice dismissed the respondent's motion. The Court found that section 38.11(2) was in accordance with sections 7 and 11(d) of the *Charter*, and justifiably infringed section 2(b): *Canada (Attorney General) v. Khawaja*, 2007 FC 463 at paras. 59 and 63 [*Khawaja*].

## OVERVIEW OF THE INFORMATION

[31] The information at issue on this application is contained in 23 four inch binders consisting of 506 documents varying in size from a few pages to several hundred. Within the pages of these documents, which have largely been disclosed in unredacted form to the respondent, there are about 1700 pages containing the information which the Attorney General seeks to protect. While it took a considerable amount of time to read through the 23 binders, the 1700 pages are less than 2% of the total volume of 98, 822 pages of material disclosed to the respondent in the criminal proceedings. The claims for protection under section 38 range in scale from a series of successive pages entirely redacted to isolated and brief references scattered amongst many pages of unredacted material. In some documents, there are also extensive claims of privilege at common law or under section 37 of the Act which the Crown may assert at trial.

[32] At first impression, the material in the twenty-three binders consists, in large part, of the miscellaneous flotsam and jetsam that collects in police files in the course of a major criminal investigation. It is not evidence which the Crown will seek to introduce against the accused at trial. That evidence has been disclosed to the respondent. Nor is the information evidence of an exculpatory nature. Indeed it is difficult to see how it could be of assistance to the defence. The only realistic possibility in my view is that some of this material might be used, as counsel for the respondent has suggested, in cross-examination of witnesses at trial. I find even that use doubtful, having read each of the several thousand pieces of information.

[33] There is considerable repetition within the redacted documents, as the same information was often collected by each member of the investigation team as Project Awaken unfolded. It appears that the large team of investigators assembled for the project all attended the same briefing sessions, all took notes of the same information, prepared reports from their notes and thereafter repeatedly recycled the same content in various forms. Information provided on paper was also entered electronically into one or more of the several document management systems which the RCMP seems to have been operating simultaneously during the course of this investigation. The same information repeatedly appears in investigators notes and case files, in print-outs of the electronic entries, in periodic task and status reports and briefing notes to senior personnel. It does not become more material through repetition.

[34] The redacted pages in the first set of 23 binders served on the respondent and filed with the Court in November and December 2006 did not distinguish clearly between information subject to the section 38 claims for protection at issue in the present case and that which may be subject to other claims of privilege not at issue, such as under section 37 of the Act or at common law. It is apparent from my review of the material that there are many pages of redactions which include only sporadic or brief references for which section 38 claims are being made. This obscures the limited scope of these proceedings and confuses the role of this court with that of the trial judge who must determine whether any of the other claims of privilege can be sustained.

[35] To illustrate, document 4511 consists of one of the investigator's notes for the period April 13, 2004 to August 23, 2005. The original notes comprise 187 sequentially numbered pages. The redacted version served on counsel for the respondent in the November binders consists of 74

pages. Page 32 of 74, containing the investigator's notes for Wednesday, February 23, 2005, is blacked out almost completely in the redacted version. On that page there are two brief references for which section 38 claims are made. One is a single line naming persons who attended a meeting at 10:00 a.m. on that date and the other is to a three letter acronym for the name of an agency. The remainder of the redactions relate to other claims of privilege but it is not clear from the redacted document what is section 38 based and what is not or the grounds for claiming the privilege. There are many other non section 38 redactions in these pages.

[36] In an effort to address this problem, a fresh affidavit accompanied by a revised 23 volumes of redacted materials was served on the respondent on February 28, 2007 and filed with the Court on March 1, 2007. This new set is comprised of the same documents as those produced in this matter as exhibits to affidavits dated November 17 and December 19, 2006 with the exception that the new documents include the date the document was printed, the page number and a document identification number at the bottom of each page. The document identification numbers range from 0018 to 6938 corresponding to the number of documents disclosed to the respondent. A table of concordance between these numbers and those of the documents disclosed to the respondent was prepared at the Court's request and will be provided to counsel for the respondent.

[37] The new set of documents distinguishes between the redactions related to section 38 of the Act and those related to other claims of privilege which the prosecution may seek to assert in the criminal proceedings. This was done by including a notation, "s.38 CEA" or "CEA s.38" where appropriate. Where a claim to protect the information under other types of privilege is being sought, there is a notation including the letter "V" and a number on the redacted information. This refers to

“V – codes”, an RCMP internal classification system to identify information which may be subject to privilege claims. The V-code notations also appear in the margins of the documents contained in the original set of 23 binders for all of the redacted material including the section 38 claims. It showed, for example, whether the section 38 claim was for third party information or to protect operational techniques.

[38] While the intention in preparing the revised set of binders may have been to draw a clear distinction between the material subject to this application and any claim of privilege that might be raised before the trial judge under section 37 of the Act or at common-law, the practical effect was to provide rather less information to the respondent about the nature of the information for which a section 38 claim is made. By removing the V-codes from the redacted material subject to the section 38 claim, the reader is left with no inkling as to the type of information sought to be protected. It remains open to counsel for the respondent, as was acknowledged during the March 30, 2007 hearing, to compare the February binders with the earlier set in an effort to determine the general nature of the information for which a section 38 claim is being made.

[39] From my own review of the material and the evidence heard *ex parte*, the v-code notations do not always accurately reflect the content of the redacted information. For example, document 0025 contains five pages of notes made by a member of the investigative team on February 29, 2004. The cover sheet bears as the reason for non-disclosure the code V-11. On Exhibit 1 to the cross-examination of Inspector Chesley Parsons on January 25, 2007 this code is said to relate to the protection of the privacy or security of a third party. While the names of third parties appear in document 0025, the justification advanced by the Attorney General on the application for the

protection of the redacted information in this document is that it reveals investigative techniques and operational methods.

[40] To address this concern, the schedule prepared by the Court briefly describes the nature of the claims for which protection is sought by the Attorney General with respect to the section 38 redactions in each document.

[41] Subject to some additional pieces of information that had been overlooked by the investigators in the course of vetting these documents for the purpose of this application and which were identified by witnesses in the course of the *ex parte* hearings, the portions of each document which the Attorney General seeks to protect from disclosure are clearly highlighted in colour in the material filed with the court.

[42] The *ex parte* affidavits filed with the court identify and categorize in detail the nature of the risks of injury claimed by the Attorney General with specific reference to each document containing sensitive or potentially injurious information. The testimony of the witnesses heard *in camera* and *ex parte* elaborated upon these concerns. Each witness first provided an overview of the nature of the interest of each agency in the material before the court, their relationships with foreign agencies and their concerns about the injuries that might result from disclosure of the information. This evidence was similar to that in the public affidavits.

[43] Counsel for the Attorney General then took each *ex parte* witness to the documents contained in the 23 binders. The witnesses were asked to describe each item of redacted information and explain why it was considered necessary to protect it from disclosure. As each page containing

redactions was addressed, the paper copy bearing the coloured highlighting was presented to the witness and the court reviewed the same page. The court directed questions to the witness, in the nature of cross-examination, to explore and challenge the claims for protection. Where the information was subject to third party express or implied caveats, questions were directed at determining what efforts had been made or continued to be made to seek the consent of the third parties to disclosure. In particular, the witnesses were pressed as to what knowledge they had as to the UK proceedings and the evidence publicly disclosed therein. The relevance of the v-codes was also explored.

[44] Approximately 350 of the 506 documents contain what may be described generally as internal administrative information such as the names, telephone or fax numbers of agency employees; internal file numbers; or references to the existence or identities of covert officers in Canada or abroad. As stated by counsel for the respondent at the public hearing on March 30, his client does not seek disclosure of this type of information.

[45] While there is overlap among the claims found in the 506 documents, approximately 260 documents refer to the operational methods and techniques of the agencies and telecommunications systems. References to human sources (other than material witnesses) appear in at least 8 documents. These are also categories of information for which counsel for the respondent indicated that his client did not seek disclosure.

[46] Ongoing investigations into targets or persons of interest other than the respondent are the subject of information contained in 138 of the documents for which the Attorney General seeks protection. Approximately 140 documents related to information received in confidence from

foreign third parties or to their involvement in the investigation, some of which was inadvertently disclosed as part of the disclosure process. This included, for example, references to the names and positions of officials who corresponded with the RCMP during the course of their investigation and footers in documents indicating to whom the content of the information was being released and that it was subject to originator control. Much of this information is innocuous, indeed banal, but forms part of documents subject to caveats permitting further disclosure solely on consent. I expect that the name of the US Legal Attaché in Ottawa at the relevant time is within the public domain. It is difficult to understand how disclosure of his name would cause injury but where the name and office appears as part of a document, the entire contents are subject to such caveats. Disclosure of this information would not, in any event, assist the respondent.

#### The United Kingdom information

[47] Some of the confidential information received was provided by UK intelligence and law enforcement agencies. As noted above, much of the evidence which the Crown will seek to introduce at the trial of the respondent was collected in Britain. My understanding is that this evidence has been fully disclosed to the respondent. Some of the evidence tendered by the prosecution in the Crevice trial was the subject of an evidentiary exclusion order and a publication ban imposed in the UK trial.

[48] A certified copy of the UK exclusion order and publication ban was filed in evidence by the applicant. The ruling was issued on Friday, January 13, 2006 and concerned the admissibility of evidence identifying persons (Mohammed Siddique Khan and Shehzad Tanweer) who were alleged

to have associated with some of the Crevice defendants on occasions during 2003 and 2004. The two named individuals were, it is alleged, two of those involved in the bombings of the London underground system on July 7, 2005. The evidence, sought to be adduced by the prosecution, was excluded on the grounds that it was not probative of a fact in issue in the trial. The UK publication ban has now been lifted by the trial judge and the information which it covered is now public knowledge.

[49] The most significant document within the information received from the UK authorities which the Attorney General seeks to protect in these proceedings is an intelligence report. Evidence was received *ex parte* and *in camera* that the originating agency was asked whether the information could be disclosed in the present proceedings or had been disclosed in the Crevice trial. The foreign agency's response, on record in the court file, was that there is no consent to disclose and further, that the report had not been disclosed in the Crevice trial. These inquiries were initially made when the section 38 application was being prepared in October, 2006 and repeated, at the court's direction, during the March hearings.

[50] From my review of the material, this information is not evidence that will be used against the accused, nor does it go to exculpate him or to undermine the Crown's case.

The FBI interviews of Mohammed Junaid Babar

[51] A large proportion of the substantive third party information which the Attorney General seeks to protect in these proceedings is contained in a series of reports of interviews with Mohammed Junaid Babar conducted by FBI agents in New York City following his return to the US in March 2004. He was initially picked up as a material witness. These reports were provided to the RCMP in the form of "letterhead memoranda" with caveats restricting their further use or distribution without the express consent of the FBI. They appear, repetitively, in about 20 of the documents in the 23 binders as copies or prints of electronic versions of the originals and there is frequent reference to their content in other documents.

[52] Babar is a US citizen of Pakistan origin. He is alleged to have met members of the Crevice conspiracy in Pakistan and the UK. Babar entered into a plea agreement with the US Attorney for the Southern District of New York in June 2004 and subsequently pleaded guilty to five terrorism related charges including "conspiracy to provide material support or resources" to Al Qaeda. He testified in the UK trial under immunity and is expected to testify against the respondent.

[53] The reports of the FBI interviews with Babar in the letterhead memoranda do not consist of verbatim transcripts nor are they the actual notes taken by the agents during the interviews. Rather they appear to be abstracts of the agents' notes.

[54] In preparation for the respondent's trial, the RCMP requested that the FBI declassify and release the interview reports. The FBI declined to do so on the grounds that the documents contain information relating to ongoing operational issues. It is clear from the material itself that the FBI agents who interviewed Babar were interested in obtaining information about other matters that

could possibly pose a threat to US security which Babar may have learned about during his travels, beyond those related to Crevice. Information of that nature is not material to the case against the respondent.

[55] The FBI reviewed all of the information they had obtained from Babar prior to June 2006 and provided an unclassified 99 page document that is found as document 6883 in the binders. That document has been disclosed to counsel for the respondent. I have carefully reviewed it and compared it to the FBI's letterhead memoranda containing the reports of the interviews in the 23 binders. During the *ex parte* hearings I closely examined an RCMP witness with regard to the accuracy of the document and at my request, an exhibit was filed with the court identifying the differences between the unclassified document and the interview reports. Those differences are not, in my view, material to the respondent's case.

[56] The materials also contain the statement taken from Babar by two RCMP officers and a member of the Metropolitan Police on March 14, 2005. That statement has been disclosed to the respondent in its entirety and is found in document 2046. The Attorney General seeks to protect just two lines of that 67 page document which refer to the subject of an on-going investigation. Those two lines will not assist the respondent.

[57] Other information of significance contained in the 23 binders relating to Babar concerns the plea agreement he entered into with the US authorities. The formal agreement is set out in a letter to his attorney dated May 28, 2004 from the office of the United States Attorney for the Southern District of New York. That letter was entirely redacted in document 1676 served on the respondent

in these proceedings. At the court's direction, a further inquiry was made concerning the position of the US authorities with respect to this document and they have consented to its release. The transcript of Babar's pleas before the US District Court on June 3, 2004 was initially sealed by order of that court. That order was subsequently rescinded. The transcript of his arraignment and pleas has been disclosed to the respondent. Babar is to be sentenced by the District Court following the completion of his testimony in the UK and Canadian proceedings.

## LEGISLATIVE FRAMEWORK

[58] Subsections 38.01(1) and 38.02(1), and sections 38.04 and 38.06 of the Act are of particular relevance to the present application. They state the following:

### *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.

### *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);

### *Application to Federal Court - Attorney General of Canada*

### *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.

### *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);

### *Demande à la Cour fédérale: procureur général du 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).

*Application to Federal Court – general*

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

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).

*Demande à la Cour fédérale: dispositions générales*

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

General of Canada.

notifie le procureur général du Canada.

*Court records*

*Dossier du tribunal*

(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.

(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*

*Procédure*

(5) As soon as the Federal Court is seized of an application under this section, the judge

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge:

(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;

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

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

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

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

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

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

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

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

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

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

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

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

*Disclosure agreement*

*Accord de divulgation*

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an

(6) Après la saisine de la Cour fédérale d'une demande présentée au titre de l'alinéa (2)c) ou

order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

*Termination of Court consideration, hearing, review or appeal*

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

*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.

*Disclosure order*

(2) If the judge concludes that the disclosure of

l'institution d'un appel ou le renvoi pour examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3) relativement à cette demande, et avant qu'il soit disposé de l'appel ou de l'examen:

a) le procureur général du Canada peut conclure avec l'auteur de la demande un accord prévoyant la divulgation d'une partie des renseignements ou des faits visés aux alinéas 38.02(1)b) à d) ou leur divulgation assortie de conditions;

b) si un accord est conclu, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen.

*Fin de l'examen judiciaire*

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

*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.

*Divulgation modifiée*

(2) Si le juge conclut que la divulgation des

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.

#### *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.

#### *Evidence*

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

#### *Introduction into evidence*

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

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.

#### *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.

#### *Preuve*

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

#### *Admissibilité en preuve*

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

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

*Facteurs pertinents*

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

**THE ISSUES TO BE DETERMINED**

[59] The issues to be determined are as follows:

- 1) What is the appropriate test to apply under ss. 38.06(2) of the Act?
- 2) Whether the right to make full answer and defense is applicable in a s. 38 proceeding;
- 3) What if any affect the inadvertent disclosure of some of the information before the Court should have on the issuance of an order that this information not be further disclosed;
- 4) Whether the Court should confirm the prohibition of disclosure, pursuant to ss. 38.06(3) of the Act, in the present case.

**DISCUSSION****(i) What is the appropriate test to apply under ss. 38.06(2) of the Act?**

[60] The parties are in agreement that the Federal Court must engage in a three step process in assessing whether it should make an order pursuant to section 38.06 of the Act, as was set out by the Federal Court of Appeal in *Canada (Attorney General) v. Ribic*, 2003 FCA 246 at paras. 17-21

[*Ribic*]. The parties are also in general agreement with respect to the nature and onus set out by the Court of Appeal with respect to the first two stages of the test. They differ however on what exactly should be considered by the Court in the context of the third stage of the test.

[61] In *Ribic*, the Court of Appeal made it clear that a section 38.04 application is not a judicial review, it is one in which the judge is required to make an initial determination as to whether or not the statutory ban ought to be confirmed or not.

[62] The first step is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the *Stinchombe* rule, that is to say whether the information at issue may reasonably be useful to the defence: *Ribic*, above at para. 17; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 30; *Stinchcombe*, above at para. 22. This is a low threshold; however the step remains necessary because if the information is not relevant, there is no need to go any further. This step generally involves an inspection or examination of the information at issue in light of this purpose, the onus being on the party seeking disclosure to meet this stage of the test: *Ribic*, above at para. 17.

[63] The second step 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. This step involves an examination of the information at issue with these purposes in mind, the ultimate goal being to assess whether or not injury will result from disclosure.

[64] It is not the role of the judge at this stage of the test to second-guess or substitute his or her opinion for that of the executive. As was highlighted by the Court of Appeal in *Ribic* at paragraph 19, the Attorney General's submissions regarding "his assessment of the injury to national security, national defence or international relations, because of his access to special information and expertise, should be given considerable weight by the judge required to determine, pursuant to subsection 38.06(1), whether disclosure of the information would cause the alleged and feared injury". This is in light of the Attorney General's protective role vis-à-vis the security and safety of the public.

[65] That being said, "[t]he burden of convincing the judge of the existence of such probable injury is on the party opposing disclosure on that basis": *Ribic*, above at para. 20. In determining whether this onus has been met, the judge must consider the submissions of the parties and their supporting evidence. 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)). A mere assertion of injury is therefore not enough.

[66] As was noted by the applicant, this step of the test is assessed on a reasonableness standard. As was set out by the Court of Appeal in *Ribic* at paragraph 19, if the assessment of the Attorney General "is reasonable, the judge should accept it". As is stipulated by subsection 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 [emphasis mine]. Where a judge finds that disclosure would result in injury, he or she must move on to the third and final stage of the inquiry.

[67] The third step consists of determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure, and it is the party seeking disclosure that bears the burden of proving that the public interest scale is tipped in its favour: *Ribic*, above at para. 21.

[68] In order to properly balance these competing public interests, it is clear that a more stringent test than relevancy is required: *Ribic*, above at para. 22. As noted by the Federal Court of Appeal, if the courts were to endorse a philosophy of general disclosure based on mere relevancy, this would “only lead to and incite fishing expeditions”: *Ribic*, above at para. 13.

[69] The applicant asserts that at this stage of the test, the information should not be disclosed unless the respondent can demonstrate that the information has a direct bearing on his ability to demonstrate in his criminal trial that his innocence at stake. The applicant argues that the discussion of informer privilege by the Supreme Court of Canada in *R v. Leipert*, [1997] 1 S.C.R. 281 [*Leipert*], and its discussion of solicitor-client privilege in *R v. Brown*, [2002] 2 S.C.R. 185 [*Brown*] provide a sound policy basis for applying the same approach to the protection of state secrets.

[70] The applicant further highlights that the Court of Appeal in *Ribic* at paragraph 26 noted that there was “certainly a very important feature of the informer and the State secrecy privileges that is common to both. The informer privilege's purpose is to protect the safety and the security of

the informer: part of the State secrecy privilege invoked in the case at bar aims at protecting the safety and the security of a whole nation.” The Federal Court of Appeal went on to note:

**27** Be that as it may, it is not necessary in this case to determine whether the more stringent test developed in criminal law should apply although, in view of the important feature common to both privileges, I would be inclined to apply that test at least in respect of matters affecting national security or national defence. I am also sensitive to, and cannot ignore, the fact that prejudice to international relations may be of such a nature and magnitude as to compromise national security or defence. ...

The Court of Appeal concluded that since the trial judge had apparently applied the test developed in the civil case of *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470 [*Hijos*], namely whether the information sought would establish a fact crucial to the case of the party seeking it, it would also apply this test as it was more favorable to the accused: *Ribic*, above at paras. 27 and 41.

[71] The applicant asserts on this basis that the innocence at stake test should be applied in the present case under the balancing stage of the test, or in the alternative, that the information should not be disclosed unless the respondent can demonstrate to the satisfaction of the Court that it will establish a fact crucial to the respondent’s case.

[72] The respondent asserts, and correctly so, that the comments made by the Court of Appeal in *Ribic* that support limiting disclosure to the “innocence at stake” exception were made in *obiter*. The respondent argues that if this approach was applied it would place an impossible burden on the accused, particularly in light of the fact that much of the Attorney General’s submissions and evidence have been tendered *ex parte*.

[73] The respondent argues further that the “probably establish a fact crucial to the defence” test formulated by Rothstein J. in *Khan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 316 (T.D.) [*Khan*] is a reasonable compromise between the *Stinchcombe* standard of relevancy rejected as too low by the Court of Appeal in *Ribic*, and the innocence at stake exception.

[74] The respondent further highlights however that this is but one factor that should be considered in balancing the relative public interests under the third step of the test. As is set out at paragraph 26 of *Khan*, “[i]n assessing whether an apparent case for disclosure has been made out, the following factors have been considered”:

- (a) the nature of the public interest sought to be protected by confidentiality;
- (b) whether the evidence in question will “probably establish a fact crucial to the defence”;
- (c) the seriousness of the charge or issues involved;
- (d) the admissibility of the documentation and the usefulness of it;
- (e) whether the [party seeking disclosure] have established that there are no other reasonable ways of obtaining the information; and
- (f) whether the disclosures sought amount to general discovery or a fishing expedition.

[citations removed].

[75] The respondent is correct in this assertion. Though the second factor was found to have played a significant role in the context of the *Hijos* case, the Court of Appeal in that case cited the above passage from *Khan*, recognizing that multiple factors can be taken into consideration by the Court in conducting its balancing analysis. The question then is whether this is in fact the correct approach to apply at the third stage of the section 38.06 assessment.

[76] The Court of Appeal in *Ribic* recognized that, as a general rule, “a person charged with a criminal offence enjoys a qualified right to disclosure of all information relevant to his or her

defence” as this right is subject to the “Crown's discretion and the law and rules of privilege” as set out in *Stinchcombe: Ribic*, above at para. 14. The Court of Appeal went on to note that “[w]here the information to be disclosed or sought to be obtained is sensitive information, **a State privilege to confidentiality and secrecy is triggered and section 38 of the Act establishes the procedure by which the privilege is to be exercised and ultimately secured**” [Emphasis mine], referring later to the concept of “State secrecy privilege”.

[77] This concept has however been more commonly referred to as “Crown privilege” or “public interest immunity”, see for example: D.M. Paciocco and L. Stuesser, *The Law of Evidence*, 4th Ed. (Toronto: Irwin Law, 2005) c. 7(7) (QL); Hamish Stewart, *Evidence: A Canadian Casebook*, 2d ed. (Toronto: Emond Montgomery, 2006) at 817; Alan W. Mewett, “State Secrets in Canada” (1985), 63 *Can. Bar Rev.* 358 at 359. For example, in *Carey v. Ontario*, [1986] 2 S.C.R. 637 at para. 38 [*Carey*], the leading common law decision dealing with Crown privilege, the Supreme Court found that it was “more properly called a public interest immunity”.

[78] *Carey* represents a modern departure from the historical approach of the common law wherein the need for government secrecy had been seen as paramount. The Supreme Court found in particular:

**85** Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the *Burmah Oil* case, *supra*, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

[79] Having developed in the context of the common law, it is also generally accepted that public interest immunity in proceedings under federal jurisdiction are now governed by sections 37 through 38.16 of the Act: Hamish Stewart, above at 818.

[80] As noted above, the applicant has argued that the Court should apply the innocence at stake exception as the only exception to a claim of public interest immunity in the context of the balancing portion of the test under section 38.06, arguing that the principles announced by the Supreme Court in *Leipert* with respect to informer privilege, and in *Brown* with respect to solicitor-client privilege, provide ample support for this approach. Though there are clearly similarities between these concepts, this is not enough to find that the same approach should be applied.

[81] Informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same, it has been described as a rule of fundamental importance to the criminal justice system. It is precisely because of this importance that it has been found that it cannot be balanced against other interests, it is subject only to the innocence at stake exception: *Leipert*, above at paras. 9 -14 and 20.

[82] In *Leipert*, above at paragraph 12, the Supreme Court went on to differentiate between the nature of informer privilege and other kinds of privilege as follows: “Informer privilege is of such importance that once found, **courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as is the case, for example, with Crown privilege** or privileges based on Wigmore's four-part test” [emphasis mine]. The Supreme Court pointed to its earlier decision in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 wherein it was recognized

that although informer's privilege and Crown privilege have several points in common they were distinct concepts. In the case of Crown privilege, the Supreme Court noted that the common law allowed a member of the executive to make the initial decision, but also empowered the judge to review the information and in the last resort to revise the decision by weighing the two conflicting interests "that of maintaining secrecy and that of doing justice". In the case of informer privilege, the Supreme Court found there was no scope for such balancing. Once established, neither the police nor the court possessed discretion to abridge it: *Leipert*, above at para. 14.

[83] The wording of section 38.06(2) arguably carries on the common law tradition characteristic of Crown privilege, allowing a balancing of interests to occur. This was explicitly recognized by my colleague Justice Blanchard in *Ribic v. Canada (Attorney General)*, 2003 FCT 10, in one of two of his decisions that were dealt with in *Ribic* by the Court of Appeal, wherein he described the operation of subsection 38.06(2) as follows:

**22** Subsection 38.06(2) of the Act does not specify the test or the factors to be considered in weighing the competing interests **nor does the Act contemplate an obvious imbalance between the public interest in national security and the public interest in the administration of justice.** I am of the view that the Court **may consider different factors** in balancing the competing public interests. The breadth of the factors **may well vary from case to case.**

**23** **In the context of a case involving serious criminal charges, as in this case, the issue of whether the information at issue will probably establish a fact crucial to the defence is indeed an important factor to be taken into consideration in the balancing process. Other factors also warrant the Court's consideration** such as: 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 applicant has established that there are no other reasonable ways of obtaining the information; whether the disclosures sought amount to a fishing expedition by the applicant; the seriousness of the charges or issues involved. [See *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)* [2002] F.C.J. No. 1658, 2002 FCA 470, Docket A-3-02 at paras 16 and 17]. These factors, by no means constitute an exhaustive list. Other factors may also require consideration in the appropriate circumstances. **It is important, in my view, that each application be dealt with on its own merits.**

[emphasis mine]

[84] Similarly in the civil case *Canada (Attorney General) v. Kempo*, 2004 FC 1678 at paragraph 102 [*Kempo*], the above noted paragraphs were quoted with full support regarding how the balancing factors should be applied. In this case my colleague, Justice François Lemieux, went on to note:

**104** The decision which section 38.06(2) calls for in this case is, having already decided the disclosure of the redacted information would injure national security, is whether the importance of the public interest in disclosure outweighs the importance of the public interest in non-disclosure. **In other words, of those two competing and legitimate interests, which one predominates, is more important or is paramount.**

**105** The case law indicates **that this determination of the relative importance of a particular public interest, for example, the public interest in disclosure in civil or criminal litigation** which concerns the fair administration of justice **will depend upon the particular circumstances of each case.**

**106** For example, Chief Justice Thurlow in *Goguen v. Gibson*, [1983] 1 F.C. 872, at 881, wrote:

- In a small claims action its importance might not easily prevail over that of the public interest in national security or international relations. **In a criminal prosecution for a capital or other serious offence its importance could weigh very heavily if the information is shown to be of critical importance for the defence or for the prosecution.**

**107** **In a civil case** such as the one before me, the case law instructs me to apply the factors identified in *Hijos S.A.*, *supra*, as endorsed in *Ribic*, *supra*.

**108** **At the outset of the analysis, the scales are equally balanced**, that is, the legislation does not in its terms favour the public interest in non-disclosure over the public interest in disclosure. **It is in the application of the factors the scales are tipped one way or another.**

[emphasis mine]

[85] As noted by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para.26 [*Bell ExpressVu*], the modern approach to statutory

interpretation is that there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[86] I will therefore focus on the purpose and context of section 38, and the ordinary sense of the words employed in the context of section 38.06 to determine whether there is in fact any ambiguity with respect to the approach that should be taken under this provision.

[87] With respect to the purpose of the section 38 provisions, there is no purposive clause included. That being said, as was noted by the Court in *Kempo*, above at paragraph 33 it is generally accepted that “[t]hese sections create a comprehensive and self-contained scheme” that was established “to protect information that, if it were disclosed, could injure international relations, national defence or national security”.

[88] The Federal Court has further described the “purpose” of section 38 as being “to protect information where disclosure could be injurious to national defence or international relations” and to provide “for judicial oversight of government claims of confidentiality for such information”: *Canada (Director of Military Prosecutions) v. Canada (Court Martial, Administrator)*, 2006 FC 1532 at para. 56. It has further been noted by the Federal Court of Appeal that “Section 38 of the Canada Evidence Act seeks to prevent the public release of information relating to or potentially injurious to national security in the course of a proceeding before a court” *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 54 at para. 74 [*Almrei*].

[89] It is clear that section 38 is meant to be a complete code that outlines the procedures to be taken when the release of sensitive information that risks injury to international relations, national defence, or national security is at issue. Keeping this purpose in mind, the ordinary sense of the provisions and words must also be considered. In this regard, it is particularly of note that subsection 38.06(2) specifically 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. This indicates that the release of information in certain circumstances is anticipated by the statutory scheme and that the Court is empowered to assess the degree to which such injury could be limited by the imposition of conditions. As was highlighted in *Charkaoui*, above at paragraph 39, this “flexibility” was not written into the version of section 38 which existed prior to the amendments enacted by the *Anti-terrorism Act*. Subsection 38.06(2) further mandates a balancing of the public interest in disclosure against the public interest in non-disclosure, as evidenced by the use of the term “outweighs”.

[90] Had Parliament intended that there be a presumption of non-disclosure this would have been explicitly included. I would agree with the findings of Justice Blanchard, previously noted above, that subsection 38.06(2) of the Act does not specify the test or the factors to be considered in weighing the competing interests, nor does the Act contemplate an obvious imbalance between the public interest in national security and the public interest in the administration of justice.

[91] As was further recognized in *Ribic*, above at paragraph 13 by the Court of Appeal, the law as it stands has tasked the Federal Court “with the difficult duty of balancing the competing public

interests which, in [that] case, involve the protection of sensitive information and the protection of an accused's constitutional rights to a full answer and defence and to a fair trial.”

[92] Though a certain level of deference is owed to the decision of the Attorney General not to disclose certain information, as evidenced by the approach that is taken by the Court in the second step of the section 38.06 test outlined above, it is equally clear that Parliament has tasked the Federal Court with the responsibility of balancing the competing public interests, subject to the override clause found in section 38.13. As was described recently by Chief Justice Lutfy in *Khawaja*, the three part test set out in *Ribic* in fact “establishes a balanced and nuanced approach to assessing disclosure”: above, at para. 46.

[93] Taking all of the above into account, I endorse the approach taken by Justice Blanchard in *Ribic v. Canada (Attorney General)*, 2003 FCT 10 and Justice Lemieux in *Kempo*. A case by case approach is the most appropriate approach to be taken under subsection 38.06(2) when the balancing step of the test is engaged, and the Court is free to consider those factors it deems necessary in the circumstances including but not limited to those noted by the Federal Court of Appeal in *Hijos* at paras 16, citing *Khan* at para. 26.

[94] As was further noted by my colleague Justice Lemieux in *Kempo* at paragraph 108, there is also no presumed starting point to this analysis, it is in the application of the factors that the scales are tipped one way or another.

**(ii) Whether the right to make full answer and defense is applicable in a s. 38 proceeding;**

[95] The applicant asserts that the right to make full answer and defense is a criminal law based right, and that its interplay with the recognized heads of privilege must therefore occur in the criminal context. As section 38 is an evidentiary provision arising ancillary to the main proceeding, these issues are meant to be left for consideration in that context.

[96] To support this argument, the applicant characterizes section 38 as a complete code. In this respect, the applicant notes that section 38.14 of the Act provides that the “person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding”.

[97] On the basis of this provision, the applicant asserts that it is therefore clearly for the judge in the criminal trial to determine whether the accused’s right to make full answer and defence has been affected by a ruling made under section 38.06 of the Act by a designated judge. It therefore does not form part of the test which the designated judge applies, rather, the section 38 scheme provides for a balancing of public interests. Therefore, if the respondent establishes that without the disclosure information at issue his innocence will be at stake, or alternatively if he establishes that the information is crucial to his defence, then the designated judge can weigh it in the balance against the public interest in non-disclosure.

[98] The respondent submits that the decision of the Court of Appeal in *Ribic* clearly refutes the argument made by the appellant. The respondent asserts that far from being irrelevant, the accused's right to make full answer and defence and right to have a fair trial are central to the balancing test under section 38. While disclosure will not necessarily be the remedy that is granted, these rights must be given full consideration in the balancing process conducted pursuant to section 38.06.

[99] As noted by the respondent, the Court of Appeal in *Ribic* had the following to say at paragraph 13 of its decision:

**13** ... The Federal Court - Trial Division has been tasked with the difficult duty of **balancing the competing public interests** which, in this case, **involve the protection of sensitive information and the protection of an accused's constitutional rights to a full answer and defence and to a fair trial.** ...

[emphasis mine]

[100] Similarly, the applicant himself refers to the words of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 77 [*Charkaoui*], wherein the following was stated with respect to section 38 of the Act: "it illustrates Parliament's concern under other legislation for striking a sensitive balance between the need for protection of confidential information and the **rights of the individual**" [emphasis mine].

[101] As was most recently stated by Chief Justice Lutfy in *Khawaja*, above at paragraph 59, section 38 "achieves a nuanced approach that respects the interest of the state to maintain the secrecy of sensitive information while affording mechanisms which respect the rights of the accused, including the right to full answer and defense, the right to disclosure and the right to a fair trial in the underlying criminal proceeding". The mechanisms referred to by the Chief Justice

included the three-part test as set out in *Ribic*, in addition to section 38.14: *Khawaja*, above at paras. 41 and 46.

[102] Clearly the applicant's interpretation of the section 38 scheme cannot stand. The rights of the respondent, which in this case include in particular his right to a fair trial and his right to make full answer and defense, must be considered in the context of the third stage of the *Ribic* test. Such considerations lie at the heart of the balancing procedure. It is worth noting however that the rights and interests at issue will not be the same in every case.

[103] With respect to applicant's arguments regarding section 38.14 of the Act, this section merely recognizes that the ultimate responsibility to ensure that the right of an accused to a fair trial is respected, falls to the trial judge. It does not however remove the obligation placed on the designated judge in a section 38 proceeding to consider all of the competing public interests that are relevant in a given case, under the balancing portion of the section 38.06 test.

**(iii) What, if any, affect the inadvertent disclosure of some of the information before the Court should have on the issuance of an order that this information not be further disclosed**

[104] There is evidence before me that some of the information now at issue in this proceeding has been inadvertently disclosed in the course of the preparation of the criminal case and in the disclosure of documents by the prosecution to the defence. Indeed it may have been in the possession of counsel for the respondent for many months as the disclosure process began in 2004. Evidence was presented *in camera* and *ex parte* that where the information concerned foreign

agencies they had been informed. No evidence was presented that this inadvertent disclosure had caused any injury to national security or international relations.

[105] The applicant asserts that the inadvertent release of information does not necessarily constitute waiver: *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.), arguing that the court can restrain further use of the material: *Tilley v. Halls* (1993), 12 O.R. (3d) 306 (Ont. Ct. Gen. Div.).

[106] The applicant argues that waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: 1) knew of the privilege, and 2) voluntarily evinces an intention to waive that privilege: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.)(QL). The applicant further asserts that in the present case there is no evidence that the prosecution or the Attorney General ever intended to waive the privilege attached to the information at issue. Furthermore, at the time the documents were released, the statutory prohibition imposed by subsection 38.02(1) had not yet come into existence. As such, the prosecution or police can not be said to have waived a privilege which had not yet crystallized.

[107] In balancing the competing interests in a case involving inadvertent disclosure, the applicant submits that the Court must determine the issue based on the particular circumstances of the case, and that this discretion should be exercised in favour of protection where the disclosure was inadvertent: *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Ont. Ct. Gen. Div.). It is submitted that I should therefore treat the information that was inadvertently disclosed in the same manner as the other information at issue in the present application.

[108] The respondent accepts the argument that privilege may still attach to documents that were inadvertently disclosed to the respondent. That being said, he submits that the fact that these documents were nonetheless disclosed effectively undermines the argument that the disclosure of these materials would be injurious, since there is no evidence that their disclosure has caused any injury. On this basis the respondent asserts that the disclosure of the inadvertently disclosed items should therefore be confirmed.

[109] With respect to disclosures made unintentionally, the traditional common law position was that the privilege was lost and the communication deemed admissible: Paciocco and Stuesser, above at c. 7(1). More recently however, the Courts have been more forgiving, particularly in the civil context. For example, the New Brunswick Court of Appeal in *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96, having reviewed the existing case law, held as follows:

**55** In summary, the general rule is that the right to claim privilege may be waived, either expressly or by implication. **However, inadvertent disclosure of privileged information does not automatically result in a loss of privilege. More is required before the privileged communication will be admissible on the ground of an implied waiver.** For example, knowledge and silence on the part of the person claiming the privilege and reliance on the part of the person in receipt of the privileged information that was inadvertently disclosed may lead to the legal conclusion that there was an implied waiver. In the end, it is **a matter of case-by-case judgment** whether the claim of privilege was lost through inadvertent disclosure.

[emphasis mine]

[110] According to Paciocco and Stuesser however, different principles apply in the context of criminal cases, wherein for example the accused's right to make full answer and defence may discourage courts from using privacy interests to suppress information that might assist the accused; even though they might suppress similar information in a civil case. Conversely, when dealing with

solicitor-client privilege in this context, where privilege usually enures to the benefit of the accused, Justice Arbour remarked in *R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209 at para. 49 that "[u]njustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences".

[111] In the case of public interest immunity, it must be kept in mind that it is the information itself, and not the relationship that is being protected. Taking into consideration the nature of the interests that are sought to be protected from injury in a section 38 application, inadvertent waiver is not enough to justify disclosure. In light of the case-by-case nature of the test, the most appropriate approach is to proceed by way of the same three step assessment; taking into account the fact that inadvertent disclosure of the information has occurred. Inadvertent disclosure may for example make it more difficult for the government to demonstrate injury under the second stage of the assessment. Inadvertent disclosure can also be considered at the balancing stage of the test, as it might weigh in favour of the Court considering the release of the information subject to conditions designed to limit any remaining concerns regarding injury.

**(iv) Whether the Court should confirm the prohibition of disclosure, pursuant to ss. 38.06(3) of the Act, in the present case**

*(1) Relevancy*

[112] To answer the question as to whether the Court should confirm the prohibition of disclosure in the present case, as was previously noted, I must first assess whether or not the respondent has demonstrated that the information at issue is relevant. This is a relatively low threshold.

[113] The respondent has indicated that he is not seeking the disclosure of any information that would disclose either investigative techniques or the identity of any operative of any law enforcement and/or intelligence agency, or the target of any investigation. Beyond these redactions in which the respondent has no interest, the respondent asserts that his burden to demonstrate relevance has clearly been met. In this regard, the respondent highlights that the prosecutor, David McKercher, has conceded that the redacted information is relevant as understood in the context of *Stinchcombe*. By giving notice to the Attorney General that he anticipated being required to disclose, or expected to disclose or cause the disclosure of, information that he believed was sensitive information or potentially injurious information pursuant to section 38.01(1) of the Act, the respondent argues that the prosecutor was in fact conceding the relevance of the information at issue in light of the fact that the duty to disclose under *Stinchcombe* only extends to relevant information: *Stinchcombe*, at para. 20. Given the low threshold of the test for relevance, and the fact that there is no public evidence tending to undermine Mr. McKercher's decision, the respondent asserts that his determination should be respected and that the Court should find that the relevance threshold has been met.

[114] I put this question orally to the applicant during the hearing, and counsel did not raise any issue with respect to this claim.

[115] In the present case, I began with the assumption that the information at issue had been demonstrated to meet the relevancy threshold as defined by the Supreme Court in *Stinchcombe*. However, it has become clear to me as I read the information which the applicant seeks to protect

that some of it has no bearing upon the case against the respondent. The prosecutor's concession must be interpreted in my view as a general statement about the documents as a whole and not applicable to each item of information the documents contain.

[116] Many of the investigators on Project Awaken had broader duties to perform and their notes reflect the fact that they had to deal with other matters including on-going investigations unrelated to the case against the respondent. I would include in the irrelevant category analytical reports of a general nature some of which were prepared years before the events that gave rise to the charges against the respondent and are not specific to the context of those charges. In these cases I concluded that there was no need to consider the second or third stages of the *Ribic* approach with respect to that information.

*(2) Injury to international relations, national defence or national security*

Arguments of the Respondent

[117] The second step of the test is the determination of whether disclosure of the information at issue would be injurious to international relations, national defence or national security, the burden being on the party seeking non-disclosure to prove that this is so. The respondent asserts that the case turns on this issue, arguing that the applicant has not met his evidentiary burden in this regard.

[118] The respondent has identified three main issues that militate against a finding that disclosure would be injurious, namely: 1) the applicant has not provided any public evidence tying any of the

specific redactions in this case to the potential to cause injury; 2) there is no public evidence that the applicant has made any efforts to obtain the consent of third parties to release confidential information; and 3) there is no public evidence that the applicant has made an assessment as to whether any of the redacted material is already in the public domain by virtue of the related criminal trial in London, England. The respondent reiterates that it is the Attorney General who bears the onus to demonstrate through evidence that the disclosure of the redacted material would be injurious, and if insufficient evidence has been provided, the court must release the information: *Ribic*, above at para. 18.

[119] With respect to the first point, the respondent highlights that the evidence provided by the respondent is very general in nature. Of the public affidavits provided by the applicant, the respondent argues that none of the affiants offer insight into why the disclosure of the particular information at issue would be injurious. The respondent highlights that many of the affiants have never seen the material, and of those who have only one individual was involved in attaching the privilege claims to that material. Even that individual however did not tie any of the general reasoning provided to detailing why the specific redactions would be injurious. As a result, the respondent asserts that by failing to provide an evidentiary foundation tying the disclosure of the specific redactions to any real and serious possibility of harm, the applicant has failed to meet its burden.

[120] With respect to the second point, the respondent indicates that while it is to be understood that pursuant to the “third party rule” information obtained from a foreign source is to be treated in confidence, this information need not be treated as such if consent to disclose is obtained from that

source. The respondent asserts on this basis that the applicant has a duty to demonstrate that efforts have at least been made to seek such consent, before information can be withheld pursuant to the third party rule. The respondent argues that there is no evidence that any significant efforts have been made in this regard.

[121] With respect to the third point, aside from some evidence from RCMP Inspector Chesley Parsons on cross-examination to the effect that there was another officer (Diane Gagnon) who would have been responsible for determining whether any of the redacted material had been made public in the UK trial, the respondent argues that there is no clear evidence that the applicant has actually discharged its burden in this regard.

#### Arguments of the Applicant

[122] The applicant argues that disclosure of the information at issue in the present case will harm Canada's national security and/or international relations, in several ways, as set out in the private affidavits filed by the applicant which are now in the public record. During oral argument, the applicant referred in particular to the affidavits provided by the representatives of the Royal Canadian Mounted Police (RCMP), the Canada Border Services Agency (CBSA), the Canadian Security Intelligence Service (CSIS), and the Department of Foreign Affairs and International Trade (DFAIT).

[123] The applicant notes in particular that the affidavit of the representative from DFAIT, Alan Kessel, speaks directly to the potential harm that would be posed to international relations in the

event that sensitive or potentially injurious information were disclosed. The affidavit reflects that confidentiality is fundamental to the collection and sharing of information between states, highlighting the importance of the third party rule. The affidavit describes the rule as being an international convention and practice that dictates that all information that is provided by one state to another or by an agency from one state to another is given and obtained in confidence, unless there is an express agreement to the contrary. With respect to this last point, the applicant further highlighted the importance of the originator control principle to the adequate functioning of the third party rule.

[124] The affidavit also noted that Canada is a party to a number of treaties and bound by United Nations Security Council resolutions that address the matter of sharing of information in the context of addressing terrorism, including: *The United Nations Security Council Resolution 1373*, UN SCOR, 2001, 5385<sup>th</sup> Mtg., S/RES/1373 (2001); the *United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) [*UN Convention against Transnational Organized Crime*]; and the *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (Vol. I) (1999) [*Convention for the Suppression of the Financing of Terrorism*]. Under the terms of the latter two, Mr. Kessell asserts that Canada must maintain confidentiality of information that is shared unless there is an agreement to the contrary.

[125] With respect to Inspector Parson's affidavit, the applicant submits that it focussed in particular on the overlap between questions of national security and international relations. The

affidavit highlights the changing nature of the threats to Canada's security in this regard, and the fact that threats posed by terrorism do not recognize national boundaries. As such, these threats call for a coordinated cooperative international response, which in turn requires the sharing of information.

[126] Reference is also made to the third party rule in the context of the work of the RCMP, particularly in light of the reliance that the RCMP places on its relationships with other agencies in Canada and abroad with respect to information and intelligence sharing relating to criminal activity in Canada. The applicant asserts that the continuation of these relationships is imperative to the work of the RCMP, and it is understood in the context of these relationships that the information shared will not be used without the consent of the agency providing it.

[127] The applicant further notes that often an explicit caveat is included with the information shared by such agencies, and although it may not be against the law to breach such a caveat, such an act would represent a significant breach of trust between the receiving and lending agencies. Again it is noted that such a breach could have significant consequences, potentially leading to a refusal to share further information. Even when the documents do not contain such a caveat, the applicant asserts that in the context of the work of the RCMP, such a caveat is always implied. Reference was further made to the fact that Canada is a net importer of security information. A supplementary affidavit by Inspector Parsons characterized this concept in terms of a ratio of 75 to 1, with respect to information received by the RCMP versus that provided by the RCMP to its partners.

[128] Regarding the information held by the CBSA, the applicant similarly highlighted that the CBSA works with other domestic and foreign agencies, and that the disclosure of information provided by these groups could equally risk damaging those relationships. The applicant asserts that the sharing of criminal intelligence and information between CBSA and the other domestic foreign government agencies is crucial to its past, ongoing and future investigations. These arrangements require a high degree of secrecy and are based on a high level of trust. As was highlighted during oral argument however, to the extent that the CBSA has dealings with Canadian agencies, the disclosure of information could not affect international relations, save for the cases in which the original source of the information was a foreign one.

[129] Other types of harm were also identified in the CBSA affidavit including the harm that could be sustained if its investigative methods or techniques were disclosed. In order to be effective, the applicant asserts that certain methods of operation used by the CBSA to collect criminal intelligence and investigate crime require secrecy. Similarly, the disclosure of names of individuals under investigation could cause the subjects of the investigation to change their behaviour to evade further detection. In addition, the disclosure of details of what is known and not known in an investigation could provide the subjects and other persons associated with them with information that could enable them to assess the depth and sophistication of the resources of the CBSA and other agencies. The applicant also asserts that the disclosure of the identities of those involved in ongoing investigations, whether as informants or potential witnesses, before such an investigation is completed and before the cases are brought to court, would cause alarm to such individuals and make them less likely to assist further or in future investigations. It could also place them at risk of harm. Disclosure of the identities of the investigators could also jeopardize their safety and limit

their effectiveness. During oral argument the applicant did recognize however that there is a distinction to be drawn between information which may appear in the materials which relates to other investigations, as opposed to investigations involving the respondent.

[130] With respect to the information collected by CSIS, the applicant highlighted that the affidavit distinguishes the nature of security intelligence gathering from law enforcement investigation, noting that in the case of the former, there is usually no completed offence, investigations are long-range, and the age of the information does not, in itself, therefore determine whether its disclosure would be injurious to national security. Rather, it is the nature of the information, the methods by which it was obtained and the facts of disclosure that may effect national security interests.

[131] The applicant described secrecy as being an integral component to the work of CSIS, in addition to its cooperative relationships with government departments and law enforcement agencies within Canada and abroad. The affidavit evidence provided by CSIS further clarified that though disclosure may occur within these relationships, no disclosure is routine. In many cases information is not collected openly and cannot be subsequently disclosed.

[132] For reasons similar to those already mentioned, the applicant asserts that CSIS has the following general concerns in relation to national security which are engaged by the potential release of information collected during the course of its investigations in that it may:

- a) identify or tend to identify Service employees or internal procedures and administrative methodology of the Service, such as names and file numbers;
- b) identify or tend to identify investigative techniques and methods of operation utilized by the Service;

- c) identify or tend to identify Service interest in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations;
- d) identify or tend to identify human sources of information for the Service or the content of information provided by a human source;
- e) identify or tend to identify relationships that the Service maintains with foreign security and intelligence agencies and would disclose information received in confidence from such sources; and
- f) identify or tend to identify information concerning the telecommunication system utilized by the Service.

[133] This is a useful classification scheme with respect to the grounds advanced by the Attorney General to justify non-disclosure for all of the redacted material including that from other agencies and I have relied upon it generally in assessing the information.

[134] The respondent, during oral argument, clarified for the Court that he is not seeking information relating to items a), b) or f) with respect to CSIS or any other agency. With respect to items c) and d), the respondent stated that he was only interested in such information to the extent that it involved people who were going to be witnesses at the criminal trial, as it would certainly go to their credibility. With respect to item e), the respondent indicated that this item was very much still at issue as he felt that the third party rule had not been properly claimed by the applicant.

#### The “Mosaic Effect”

[135] The applicant asserts that in weighing these concerns the ability of an informed reader to correlate information must be taken into account. Known as the mosaic effect, this principle

stipulates that each piece of information should not be considered in isolation, as seemingly unrelated pieces of information, which may not be particularly sensitive by themselves, could be used to develop a more comprehensive picture when assessed as a group. The applicant recognized in oral argument however that there is some level of difficulty in applying this in practice.

[136] The mosaic effect was aptly described by the Federal Court in *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 at para. 30 (T.D.), aff'd, 88 D.L.R. (4<sup>th</sup>) 575 (C.A.) [*Henrie*] wherein the Court recognized:

**30** It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such **an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions** regarding the investigation of a particular threat or of many other threats to national security...

That being said, though it is important to keep this underlying principle in mind when assessing whether or not information could be injurious if disclosed, in light of the difficulty of placing oneself in the shoes of such an "informed reader", 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.

[137] National security and the maintenance of international relations are clearly legitimate interests of the state. As was highlighted by the Supreme Court in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at para. 48, the state has a "considerable interest in effectively conducting national security and criminal intelligence investigations and in

protecting police sources”. Similarly, as was noted in *Ruby* at para. 46, the states’ interest in national security and in maintaining foreign confidences is “significant and legitimate”.

#### The “Third Party Rule”

[138] The applicant argues that confidentiality is fundamental to the collecting and sharing of information between foreign states and agencies and that it is in the context of maintaining foreign confidences that the “third party rule” comes into play. Should this rule be violated, the applicant argues that injury could result to Canada’s international relations and national security. As was recently stated by the Supreme Court in *Charkaoui* at para. 68 “Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality”.

[139] Generally speaking, the third party rule dictates that a Canadian agency in receipt of security intelligence from a foreign government or agency, must obtain their consent prior to disclosing any of the information: *Ahani v. Canada*, [1995] 3 F.C. 669 at para. 11 (T.D.) [*Ahani*]. As was similarly noted by the Federal Court in *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1740 at para. 63, citing *Harkat (Re)*, 2005 FC 393 at para. 89, one type of information that the state has a legitimate interest in keeping confidential includes “[s]ecrets 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”.

[140] Most recently the third party rule was described in *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2006 FC 1552 at para. 25 [*Ottawa Citizen*] as concerning “the exchange of information among security intelligence services and other related agencies. Put simply, the receiving agency is **neither to attribute the source of the information or disclose its contents** without the permission of the originating agency” [emphasis mine].

[141] These cases demonstrate that the third party rule is meant to apply to the exchange of information between foreign states and agencies. As noted by the Court in *Ottawa Citizen*, the rule protects both the contents of the information exchanged and its source. That being said, this principle clearly does not apply to protecting potential sources where no information has been exchanged, as this is outside the scope of its purpose. If for example the Attorney General wishes to keep from disclosing the existence of a relationship, other grounds must be asserted.

[142] In addition, as asserted by the applicant, the third party rule is premised on the originator control principle, which is why the consent of the originating agency or state must be sought before any information exchanged is released. The importance of this principle has in fact been recognized by NATO in setting out the Security System for the North Atlantic Treaty Organization. Brussels: NATO Archives. December 1, 1949. DC 2/1: 4 wherein it is stated:

The parties to the North Atlantic Treaty ... will make every effort to ensure that they will maintain the security classifications established by any party with respect to the information of that party's origin; will safeguard accordingly such information; ... and will not disclose such information to another nation without the consent of the originator.

[143] There are other international conventions to which Canada is signatory that similarly recognize the need to seek the consent of an originating state with respect to using shared confidential information. For example, Article 12(1) and Article 12(3) of the *Convention for the Suppression of the Financing of Terrorism*, which entered into force on April 10, 2002, state:

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings

...

3. The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request **without the prior consent of the requested Party.**

[emphasis mine]

[144] Similarly, Article 18(19) and Article 18(20) of the *UN Convention against Transnational Organized Crime*, which entered into force September 29, 2003 state in a similar context that:

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request **without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person.** In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. **The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.** If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

[emphasis mine]

[145] 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.

[146] 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 has not in fact been made to the original foreign source.

[147] Second, as noted by the Court in *Ottawa Citizen*, where a Canadian agency is aware of information prior to having received it from one or more foreign agencies, “the third party rule has no bearing”. In such a case the information should be released unless another valid security interest has been raised: *Ottawa Citizen*, above at para. 66. By way of comparison, it can similarly be argued that where information is found to be publicly available before or after it is received from a foreign source, the third party rule equally has no bearing so long as it is the public source that is referenced.

[148] Third, as previously highlighted, the third party rule does not operate to protect the mere existence of a relationship between Canada and a foreign state or agency, absent the exchange of information in a given case.

[149] It seemed to me in reading the materials before the Court in the present case, that in some instances, the rule had been utilized beyond its proper scope by the redaction of any reference to a foreign agency even where it was apparent from the context which country and agency was involved and where there was no exchange of information which needed to be protected. This was apparent, for example, with respect to peripheral contacts with a foreign intelligence agency which insists that no mention is to be made of its involvement in the case, however marginal. Moreover, the notion of what constitutes a third party seems to have been confused on occasion with those holding the black pen extending it to information obtained from other Canadian agencies as opposed to their foreign counterparts or simply to mentions of the Canadian agency. This applies in particular to the involvement of CSIS.

[150] CSIS has acknowledged an investigative interest in the respondent up to his arrest on March 29, 2004, assistance and involvement with surveillance of his movements and their presence on the date of the RCMP search of his home. But those holding the black pens seem to have assumed that each reference to CSIS must be redacted from the documents even where there is no apparent risk of disclosure of sensitive information such as operational methods or investigative techniques or the identity of their employees. I acknowledge that there can be instances in which an informed reader will connect the dots to obtain such information but that does not apply in every case.

[151] There are multiple appearances in the materials, for example, of a table listing indices which had been periodically checked for information (documents 1009 - 1017, 1264, 1279) such as the Canadian Police Information Centre (CPIC). This table includes the law enforcement and intelligence sources that one would expect to see checked for information concerning a possible security threat to Canada. One would expect CSIS to be included and surprised if they were not. References to “CSIS” are the only third party rule claims on these pages. The witnesses could not satisfactorily explain to me how disclosure of that fact, obvious from the context, could cause injury to national security.

[152] The question of what efforts have been made to obtain consent to disclosure from foreign agencies where the third party principle was being invoked was an issue of particular concern to me as I heard the *ex parte* and *in camera* evidence of witnesses from each of the concerned agencies. I pressed them repeatedly to describe the efforts and the responses received. I am satisfied from the evidence of the witnesses that good faith efforts were made and continue to be made to obtain such consent. It is my understanding that responses had been received from most agencies prior to the completion of the hearings confirming the positions earlier conveyed through the caveats attached to their information.

[153] Correspondence from a UK intelligence agency was filed with the court. The correspondence referred to the information provided to their Canadian counterparts and explained in terms which I found reasonable why consent could not be given to its disclosure. This pertained to the continuing severe security threat to that country and to ongoing investigations. In another

instance, a US agency agreed during the hearing to the disclosure of a significant document that had been previously subject to a restrictive caveat.

[154] Accordingly, I am not prepared to find that the Attorney General has failed in his obligation to seek consent to the disclosure of relevant information that is subject to the third party rule. I note, however, that it remains open to the Attorney General at any time to exercise the discretion afforded him by section 38.03 to disclose information which is subject to the prohibition under subsection 38.02(1).

#### Other evidentiary considerations

[155] The importance of protecting international relations and its link with national security has been well recognized. For example, in *Ribic*, above at paragraph 27 the Court of Appeal referred to “the fact that prejudice to international relations may be of such a nature and magnitude as to compromise national security and defence”. One can also clearly imagine how these concepts could be intertwined in the context of the same documentary material.

[156] There is also ample support for the position that the disclosure of information such as the identity of targets of investigations, the identity of sources, the identification of means and methods, the identification of those involved, and in some cases whether or not an investigation is being carried out, can all reasonably lead to the conclusion that an injury to national security could result if such information was disclosed: *Kempo*, above at paras. 88 – 91; see also: *Gold v. The Queen in Right of Canada*, [1986] 2 F.C. 129 (C.A.) at 139 [*Gold*] and *Henrie* at paras. 29 -31. Recognizing

the force of this position, the respondent has made it clear that he is not interested in the disclosure of this type of information.

[157] I must also ensure that there is a sound evidentiary basis to every claim, though a considerable amount of deference is owed to the opinion of the Attorney General with respect to the nature of the injury that would result from disclosure in light of the Attorney General's protective role vis-à-vis the security and safety of the public, and though I must accept his assessment of the injury where it is reasonable, see: *Ribic*, above at paras. 18 - 19.

[158] In addition, as was noted by the Supreme Court of Canada in *Ruby* at para. 27: “[i]n all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld”. As was further noted in *Charkaoui (Re)*, 2004 FCA 421 at para. 153 “[t]he principle of full and frank disclosure in *ex parte* proceedings is a fundamental principle of justice”, see also: *Khawaja*, above at para. 22. The Attorney General is therefore under an obligation to ensure that the information presented to the Court is complete, and that due diligence has been met with respect to ensuring that the privileges are properly claimed.

[159] Counsel for the applicant devoted a considerable amount of time with the witnesses during the hearings reviewing the claims. In this process, some information was found to have been misidentified and classified under the wrong claim heading. With respect to six documents, no

section 38 claims were found at all. Counsel responded to all of the questions raised by the court and a witness was recalled to address inconsistencies in the documents and the affidavit evidence.

[160] Due diligence also means taking steps to ensure that the information over which a claim is asserted under section 38, is not already publicly available. In the context of this case, the question was largely whether the information at issue had been disclosed at the UK trial and was therefore in the public domain. At the outset of this proceeding, I had assumed that to be the case. As my understanding of the information at issue increased, it became evident that this was not going to be a significant factor. I would stress again, however, that the respondent is already in possession of the key evidence introduced against the Crevice defendants through the disclosure process.

[161] The Attorney General provided *ex parte* evidence that certain information which had been disclosed by the UK authorities to their Canadian counterparts had not been introduced at the London trial and indeed, had not been disclosed to the prosecution team in that case as it was not relevant to the particulars of the offences charged, notably the time-frame. It also became apparent that much if not most of the information constitutes intelligence that while shared with other countries, had been protected at source, was not admissible evidence and had not been publicly disclosed by the originator.

[162] I would also note that it was open to the respondent to provide evidence or submissions to the Court as to what had been publicly disclosed abroad had he been in possession of that information. That was not done, as counsel said during oral argument, due to a lack of resources. The Attorney General does not, of course, suffer from the same financial constraints. Nonetheless, I

am satisfied that the Attorney General did not seek to protect evidence that was introduced and made public in the UK proceedings. Evidence from that case that is material to the charges against him has been disclosed to the respondent.

*(3) Balancing of public interests*

[163] As previously noted, the third step of the test consists of determining whether the public interest in disclosure outweighs the importance of the public interest in non-disclosure, and it is the party seeking disclosure that bears the burden of proving that the public interest scale is tipped in its favour: *Ribic*, above at para. 21. This assessment is made on a case-by-case basis.

[164] There is clearly a public interest in maintaining the confidentiality of the information at issue, particularly in the context of national security. As was similarly found by the Court in *Kempo*:

**110** As to the nature of the public interest sought to be protected, **the redacted information relates to how CSIS, Canada's intelligence service, operates. Clearly, as I have found, such disclosure is injurious to the public interest.** I adopt the words chosen by Justice MacKay in *Singh (J.B.) v. Canada (Attorney General)*, [2000] F.C.J. No. 1007, a case where the R.C.M.P. Public Complaints Commission sought disclosure of documents related to the 1997 APEC Conference. Justice MacKay, at paragraph 32, stated:

- The public interest served by maintaining secrecy in the national security context is weighty. In the balancing of public interests here at play, that interest would only be outweighed in a clear and compelling case for disclosure. [*emphasis mine*]

[165] The Court in *Kempo* ultimately found that the importance of disclosing the redacted information did “not outweigh the public interest in keeping that information from disclosure”: above, at para. 109. The Court stated further that the case for disclosure had been measured “by factors such as whether the redacted information would provide evidence which would assist the plaintiff to prove a fact crucial to his claim; whether there exists alternative ways of proving the

plaintiff's case without disclosing the injurious information and how serious ... the issue being litigated" was: *Kempo*, above at para. 111. In the Court's assessment, none of those factors favoured the disclosure of the information to the plaintiff.

[166] In the present case, the respondent acknowledged that the nature of the public interests sought to be protected in the present case are national security and international relations but argued that these interests must be juxtaposed against the corresponding rights of the accused to make full answer and defense and to have a fair trial. According to the respondent, there can be no comparison between *Charter* protected rights and the government's objective of national security. As such, where a section 38 application operates in the criminal law context, the Court must give greater weight to the constitutionally protected rights. While I agree with the respondent that his fair trial rights are an important factor, I do not accept that they "trump" national security or international relations in every case particularly where, as here, it is not at all clear that there would be any infringement of the right to make full answer and defence by non-disclosure of this information.

[167] Beyond noting that whether the evidence in question will "probably establish a fact crucial to the defence" is but one factor to be considered, little further argument was offered by the respondent to explain how the information at issue would assist him with presenting a defence at trial. Is it of note that it was open to the respondent to seek the leave of the Court to present *ex parte* evidence in his own right to address this issue, however he choose not to exercise this option.

[168] The respondent emphasizes that the charges against him are very serious, and upon conviction, would almost certainly result in a lengthy period of imprisonment. As such, the respondent asserts, correctly in my view, that this factor favours him.

[169] Having not seen the information, the respondent states he cannot comment on whether its admissibility should be a relevant factor. To the extent any of the information is not directly admissible, the respondent asserts that it will undoubtedly at minimum provide a useful basis for cross-examination of various Crown witnesses in a trial where the reliability and credibility of the Crown witnesses will be a central issue. As I have observed above, this is a dubious proposition. With the possible exception of the Babar material, it is not at all clear to me from my detailed review of the information that it will be of assistance to the respondent for the purpose of cross-examination. With regard to Babar, I question whether the abstracts of the FBI interview notes could serve as a proper basis for cross-examination. In any event, the respondent has available to him the lengthy summary of those notes, which I have found to be accurate, complete and not inconsistent with the abstracts, Babar's statement to the police and his testimony at the UK trial.

[170] The respondent further highlights that the main obligation rests on the Crown to demonstrate that other reasonable ways to get the information have been tried, such as obtaining consent from third parties and/or ensuring that the information is not already available publicly. I have discussed this factor above in relation to the evidence tendered in the *ex parte* hearings.

[171] The respondent asserts that this proceeding can hardly be considered a general discovery or fishing expedition as the prosecutor has conceded the relevance of the information. As noted, this concession has to be interpreted as general in nature and not specific to each item of information.

[172] During oral argument the Court requested what further assistance the respondent could provide to the Court, to assist the Court in understanding what types of information he felt would be useful to him in the criminal trial, and in determining what approach the Court should take in assessing the information.

[173] The respondent suggested that the Court utilize the v-codes which appear in the first version of the volumes. As discussed above, I have found that the v-codes are not a consistently accurate guide to the nature of the privilege claims.

[174] For those redactions that concern matters solely of investigative technique, the name of an informant, or the name of an operative, the respondent reiterated that these redactions could be excluded from consideration. So too could items clearly falling solely under section 37 claims. With respect to the remaining redactions, those which were claimed solely or in part on the basis of national security, international relations, the third party rule and so on, the respondent argued that before the Court considered the substance of the document, the Court must first assess whether there was any evidence supporting the rationale claimed. If the burden was not met, there was no need to go any further. It was only if anything remained after all these considerations were taken into account that the Court would even need to turn its mind to the balancing test.

[175] With respect to the material witness Babar, the Court asked if there was particular information that the respondent would be interested in receiving. The Court invited further written submissions on the subject, though none were provided. Orally, the respondent stated that it had

been confirmed that this individual had met with police officials from the United States, Canada and England for a number of days with no video or audio recordings being made. The respondent highlighted that this was a “tremendous concern”. He further noted that the specifics of the “compensation package” that had been offered was also being withheld. He stated that these issues went to the credibility of a key witness, a witness that the Crown proposed to call first in the trial. The respondent therefore requested that if there was any documentation at all amongst the 506 documents at issue that in any way related to what the authorities did with this man, particularly with respect to what they promised him and what they had delivered to him so far, then they would like to have that information.

[176] The respondent confirmed he had the transcript relating to Mr. Babar’s plea, as well as the summary of a series of interviews conducted with the witness in New York City. When asked what else the respondent wanted, he reiterated that he wanted to know what was promised to the witness. The respondent further stated that the summary and plea were not enough. He also wanted to know what documentation had been put before this individual during the nine or ten days he was in police custody.

[177] The plea agreement with the US Attorney's office referred to above indicates that the US Attorney undertook to seek a departure from the normal sentencing guidelines that would apply to the charges to which Babar pleaded guilty and would support his entry into the US witness protection program in exchange for his pleas and his testimony. From my review of the 23 volumes before the court, there is no information which the Attorney General seeks to protect that would describe any other formal or informal arrangements entered into between the US authorities and

Babar. Similarly, the terms under which he was granted immunity to testify in the UK, or presumably in Canada, are not included in the redacted information before the court.

[178] As was noted by the Court in *Canada v. Singh*, 2002 FCT 460 at para. 9 [*Singh*] it is not enough for the respondent to simply assert a public interest in having a fair and equitable trial. The assessment required by section 38 of the Act requires that **each party** present his point of view and support it, if necessary, with appropriate evidence.

[179] In the present case the respondent has not provided the Court with much assistance in performing its task. It has been difficult in particular to assess what information, if any would “probably establish a fact crucial to the defence” as the respondent has not shared any information with the court as to what his defence or defences might be, apart from what was noted above. This is a factor to consider at the balancing stage of the test, particularly in light of the significance of releasing information which has passed the second stage of the test.

## CONCLUSIONS

[180] In reviewing the information which the Attorney General seeks to protect, I have considered whether: a) the respondent has met his onus of demonstrating the relevance of the information in the sense that it may reasonably be useful to the defence; b) the applicant has met his onus of demonstrating that disclosure of the information would cause the alleged and feared injury with

factual evidence and on a reasonableness standard; and c) where I have found that injury has been established, that the respondent has met his onus of showing that the public interest in disclosure outweighs the public interest in non-disclosure.

[181] I wish to stress, as was stated by my colleague Justice Blanchard in *Ribic v. Canada (Attorney General)*, 2003 FCT 10 at paragraph 22 of his reasons, in every section 38 application “I am of the view that the Court may consider different factors in balancing the competing public interests” and that “[t]he breadth of the factors may well vary from case to case.”

[182] As previously noted, notwithstanding the prosecutor’s concession that the information is *Stinchcombe* relevant, there is a considerable amount of information in the documents that is immaterial to the case against the respondent and will not reasonably be useful to his defence. Accordingly, I have determined that the respondent has not met his onus to demonstrate the relevance of that information and I will confirm the prohibition of disclosure.

[183] With respect to the witness Babar, I am satisfied that document 6883 is a fair and accurate rendition of the content of the FBI interview notes in so far as they relate to Operation Crevice and to the respondent’s alleged involvement in that conspiracy. The information excluded from the content of those notes relates to other ongoing investigations and is neither exculpatory nor contradictory to what is contained in document 6883. The Attorney General’s decision to protect the FBI documents is reasonable in these circumstances and the public interest in their non-disclosure outweighs the respondent’s interest in their release particularly as the information relevant to the respondent is available to him in another form.

[184] Regarding certain other information in the documents, some of which I have described above, I am satisfied that no injury has been demonstrated by the applicant. Those documents will be identified in the order to follow and will be ordered disclosed to the respondent subject to any other claims of privilege which the Crown may assert before the trial court.

[185] I conclude that the Attorney General has met the onus upon him to establish that the disclosure of most of the information at issue would be injurious to national security or to international relations. This includes certain information which has been inadvertently disclosed to the respondent and is currently in the possession of his counsel. As such, this information will be restricted from further disclosure.

[186] However, I have also concluded that in the particular context of this application where the respondent faces serious criminal charges for which he could receive a lengthy sentence of imprisonment should he be convicted; the public interest in disclosure outweighs the public interest in non-disclosure to the extent that it would be appropriate to provide a summary of the information as contemplated by subsection 38.06(2) of the Act.

[187] Accordingly, I will provide a summary in the form of a schedule to my order which will list each of the documents, the pages on which the section 38 redactions are to be found, a brief description of the subject matter, the grounds upon which the Attorney General has based his claims for protection and my decisions with respect to whether further disclosure is authorized or not for each item. The schedule will be released to counsel for the parties, subject to the condition that its

use be limited to the criminal proceedings as required and that it not be further disclosed. The order will include a direction that the schedule be made available to the prosecutor and to the trial judge should it prove necessary for the trial court to consider whether the respondent's fair trial rights have been infringed as a result of this process.

“Richard G. Mosley”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-2-06

**STYLE OF CAUSE:** THE ATTORNEY GENERAL OF CANADA  
and  
MOHAMMED MOMIN KHAWAJA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** March 30, 2007

**REASONS FOR JUDGMENT:** MOSLEY J.

**DATED:** May 7, 2007

**APPEARANCES:**

Lawrence Greenspon	FOR THE APPLICANT
Linda J. Wall Derek Rasmussen	FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Lawrence Greenspon Greenspon, Brown & Associates Ottawa, Ontario	FOR THE RESPONDENT