Federal Court  Cour fédérale

TOP SECRET

Date: 20160721

Docket: DES-2-16

Citation: 2016 FC 850

Ottawa, Ontario, July 21, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JOHN STUART NUTTALL and AMANDA MARIE KORODY

Respondents

PUBLIC ORDER AND REASONS
(REDACTED – Confidential Order and Reasons issued June 8, 2016)

[1] This Order responds to the application of the *amici curiae* for the Court to consider and determine two issues raised in the context of the above noted application made pursuant to section 38 of the *Canada Evidence Act*, RSC, 1985, c C-5 (as amended by SC 2001, c 41, s 43) [the Act] despite that the application has been discontinued.

I. The Background

[2] On June 2, 2015, following a jury trial before Justice Catherine Bruce in the Supreme Court of British Columbia, the Respondents were convicted on two counts of terrorism related offences arising from events which occurred in July 2013. The guilty verdicts have not been entered pending the determination of the Respondents' application seeking a stay of proceedings based on entrapment and abuse of process.

[3] The Respondents initially sought production of documents held by the Canadian Security Intelligence Service [CSIS] shortly following the conclusion of their trial in June 2015. However, due to the nature of the information sought and the recent enactment of section 18.1 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, as amended, [*CSIS Act*], the Respondents made an application to this Court pursuant to section 18.1 for the information.

[4] In December 2015, this Court dismissed the Respondents' section 18.1 application (*Nuttall and Korody v Attorney General of Canada*, 2015 FC 1398) for lack of jurisdiction based on principles regarding the retroactive and retrospective application of legislation and following the guidance provided by Justice Mosley in *Attorney General of Canada v Almaki et al*, 2015 FC 1278. Both decisions are under appeal.

[5] The Respondents then immediately applied to the Supreme Court of British Columbia for production and disclosure of the information held by CSIS.

II. The Proceedings in the Supreme Court of British Columbia; December 2015- January 2016

[6] Justice Bruce considered the Respondents' application for an order that CSIS produce to the Court "all records in its possession, whether they are written, photographic, electronic, videotaped, or recorded by any other means, that reflect information provided to CSIS by a person who will be referred to as [redacted] X, or provided to CSIS with the cooperation of [redacted] X, where such records relate to Mr. Nuttall and/or Ms. Korody." On January 6, 2016, (2016 BCSC 28), Justice Bruce found that the records were likely relevant to the allegations of entrapment and abuse of process and ordered CSIS to produce the documents to her for review, in accordance with the two-stage procedure for the production of records from third parties established in *R v O'Connor* (1995), 4 SCR 411[*O'Connor*].

[7] On January 26, 2016, Justice Bruce found that the records were relevant (2016 BCSC 154). Justice Bruce conducted a page-by-page review of the records as part of the second stage of the *O'Connor* procedure, *in camera*, but in the presence of counsel for the Attorney General on behalf of CSIS, and identified the parts of those records to be disclosed to the Respondents.

III. The Proceedings in this Court; The Section 38 Application

[8] On February 2, 2016, counsel for the Attorney General, on behalf of CSIS, notified the Attorney General that the Order of Justice Bruce required CSIS to disclose information that

counsel believed is sensitive or potentially injurious in the proceeding in the Supreme Court of British Columbia.

[9] On February 16, 2016, the Attorney General filed a Notice of Application in this Court pursuant to subsection 38.04(1) of the Act for an order pursuant to subsection 38.06(3) of the Act, to confirm the prohibition of disclosure of the information referred to in the notice given on February 2, 2016. The notice covers the same records and information ordered to be disclosed by Justice Bruce.

[10] Two security cleared counsel permanently bound to secrecy with criminal law expertise were appointed to act as *amici curiae* to assist this Court in the determination of the section 38 application.

[11] The Applicant filed a public affidavit and an *ex parte* affidavit. Counsel for the Respondents also filed an affidavit setting out the chronology of events up to and including the proceedings which continue in the Supreme Court of British Columbia with respect to their application for a stay of proceedings based on entrapment and abuse of process. The affidavit on behalf of the Respondents attached exhibits, including: the "Trial Judge's Chronology of Events and Overview of the Evidence" which covers the period February 23, 2013 to July 1, 2013 and which was provided to the jury at the conclusion of the trial; excerpts of transcripts of testimony at the hearing of the entrapment and abuse of process proceedings; and other material disclosed to the Respondents.

[12] This Court held several case management conferences [CMC] to advance the determination of the application. A CMC was convened immediately following receipt of the Attorney General's Notice of Application on February 17, 2016, followed by two CMCs on February 18, 2016 to address the appointment of *amici* and the scheduling of the public hearing and the *ex parte* hearing. The hearings were initially scheduled for March 7 and 8, 2016 respectively, and to continue on March 9 to 11, 2016 as required. These dates were re-scheduled at the request of the parties to March 21 and 24, 2016, and to continue on March 29, April 7 and 8, 2016.

[13] The Applicant's public affidavit was filed on February 24, 2016 and the *ex parte* affidavit on March 3, 2016. The Respondents also filed a confidential affidavit with supporting exhibits on March 3, 2016.

[14] CMCs were also held on March 2, 9 and 11, April 13 and 21, 2016.

[15] A public hearing was held on March 21, 2016 which canvassed the broader issues of the importance of the protection of information of the type gathered in the present case. The affiant, an experienced CSIS Intelligence Officer, provided helpful contextual information, although he did not possess any information about this case. Counsel for the Respondents participated in the public hearing and made written and oral submissions on the relevant issues and the applicable law.

[16] An *ex parte, in camera* hearing was also held on March 21, 2016 in the presence of counsel for the Respondents and the *amici* and in the absence of counsel for the Attorney General of Canada, as contemplated by paragraph 38.04(5)(d).

[17] An *ex parte, in camera* hearing, in the absence of counsel for the Respondents, commenced on March 24, 2016 and continued on April 6 and 7, 2016. The *ex parte* affiant, also an experienced CSIS Intelligence Officer, testified that he had consulted classified information before testifying, including, but not restricted to, the information for which the section 38 notice was given. The *ex parte* affiant's written and oral evidence provided explanations and additional context for the information for which the section 38 notice was given, including general practices in similar circumstances and the type of information generally recorded by CSIS. Among other information, the affiant elaborated on the rationale for CSIS and the Attorney General to seek protection of sensitive information and the importance to the operational effectiveness of CSIS, as well as on the content of the specific records subject to the section 38 notice.

[18] On April 7, 2016 at the conclusion of the *in camera* cross-examination of the *ex parte* affiant, the *amici curiae* highlighted jurisdictional issues, including whether this Court had all the available contextual information to determine whether the information subject to the section 38 notice is injurious to national security and whether the "public interest in disclosure outweighs in importance the public interest in non- disclosure". The Court agreed that submissions on two specific issues should be received from the amici and the Attorney General by the first week in

May, and once the issues were considered and determined, the hearing would resume and dates for the final submissions on the section 38 application would be scheduled.

[19] On April 13, 2016, this Court issued a Communication to apprise Justice Bruce and the parties to the proceedings in the Supreme Court of British Columbia of the status of the section 38 proceedings in this Court, given that the proceedings in the Supreme Court of British Columbia were scheduled to resume in mid-April.

IV. The Discontinuance of the Section 38 Application

[20] On April 15, 2016, counsel for the Respondents informed this Court that they had appeared before Justice Bruce on April 14, 2016 and advised that due to the delay that would be caused to the ongoing criminal trial by the resolution of the section 38 application, their clients had instructed counsel to abandon their request for disclosure of information from CSIS. As a result, Justice Bruce directed that her January 26, 2016 Order, which ordered the disclosure of records and information from CSIS to the Respondents, be rescinded. Counsel for the Respondents invited the Attorney General to discontinue the section 38 application.

[21] The Attorney General filed a Notice of Discontinuance of the section 38 application on April 20, 2016.

[22] On April 19, 2016, the *amici* wrote to this Court and to the Attorney General requesting that the Court consider the submissions of the *amici* on the issues raised at the conclusion of the

April 7, 2016 hearing which were being completed, noting that, despite the decision by counsel for the Respondents to withdraw their request for disclosure of information from CSIS which renders the section 38 application moot, the issues should be determined.

[23] The issues are:

- Whether the Federal Court on a section 38 application has jurisdiction to expand the material covered by the application [redacted] and,
- Whether the Federal Court has jurisdiction to order disclosure to the *amici* of additional relevant material to provide context to the issue in section 38.6.

[24] In an exchange of correspondence, the *amici* argued that the Court should exercise its jurisdiction to consider the issues, although moot, with reference to the relevant factors established in *Borowski v Canada (Attorney General)*, [1989]1 SCR 342 [*Borowski*].

[25] The Attorney General disputes that the *Borowski* factors, as they relate to the current facts, support the exercise of the Court's jurisdiction.

[26] The *amici* and the Attorney General elaborated on their preliminary submissions in further written submissions.

V. The Submissions of the *Amici curiae*

[27] The *amici* note that in the course of the section 38 proceedings they had raised the same jurisdictional issues in an effort to provide an opportunity for the Attorney General to consider producing additional information [redacted] and to avoid potential further delays that might result from additional disclosure requests to the Supreme Court of British Columbia that could, in turn, trigger a further section 38 application.

[28] The *amici* reiterated the two specific issues noted above following the cross-examination of the *ex parte* affiant which revealed that [redacted]. In their preliminary and expanded submissions, the *amici* argue that although the application is now moot, the Court should exercise its discretion and proceed to determine the two issues, and that the *Borowski* factors (the existence of an adversarial context, concern for judicial economy and the need to avoid intruding into the role of the legislative branch) support the Court exercising its discretion to consider and determine the issues.

[29] The *amici* note that these important issues, if resolved, would add to the jurisprudence related to the application of the section 38 bifurcated process following the Supreme Court decision in *R v Ahmad* (2011), SCC 6, at para 44, [*Ahmad*], which called for a flexible approach to make the process work, and would facilitate expeditious resolution of future litigation in similar circumstances.

[30] The *amici* submit that an adversarial relationship continues to prevail although there is no live controversy. The *amici* acknowledge that, as friends of the Court, they are not adversaries in the typical sense. However, in the context of a section 38 application, where the Respondents are precluded from full participation, the *amici's* role as friend of the Court should be expanded to both assist the Court and raise issues that would not otherwise be raised in order to provide a balance and to ensure fairness for the Respondents and that this constitutes an adversarial context.

[31] With respect to judicial economy or the appropriate use of judicial resources, the *amici* submit that the Court should consider whether the current use of judicial resources to hear an academic argument is appropriate, as well as whether the use of judicial resources to resolve on-going uncertainty will have benefits for the more efficient use of judicial resources in the future.

[32] The *amici* note that judicial resources have already been expended, as have the resources of the *amici*, the Attorney General and counsel for the Respondents. In addition, the issues raised are likely to arise again in other proceedings. The efforts to date should not be wasted.

[33] The *amici* add that these issues may be evasive of review if the delays occasioned by their resolution in the context of other ongoing section 38 applications lead the party seeking the information to abandon their underlying application for production and/or disclosure (as occurred in this case). The *amici* suggest that the Attorney General's resistance to their earlier

submissions, that it consider voluntarily providing additional contextual information, frustrated the Respondents' ability to obtain the disclosure they sought.

[34] The *amici* add that there is no concern that the determination of the issues will encroach on the legislative role, rather these issues fall within the Court's jurisdiction to determine.

VI. The Submissions of the Attorney General

[35] The Attorney General, in its preliminary and more detailed submissions, emphasizes that the *Borowski* factors do not support the Court's exercise of discretion to determine the issues, which are clearly moot.

[36] The Attorney General disputes the *amici's* assertion that the *ex parte* affiant [redacted]. The Attorney General also noted on several occasions in the course of the section 38 proceedings that this Court should focus only on the information that is subject to the section 38 application.

[37] The Attorney General relies on *Canada (Minister of National Revenue) v McNally*, (2015) FCA 248, where the Court of Appeal notes that the discretion to determine a moot case should be exercised prudently and cautiously. The Attorney General submits that caution should be exercised in the present case.

[38] With respect to the application of the *Borowski* factors, the Attorney General argues that the issues raised by the amici are not rooted in the adversarial system. The *amici* are not parties to the proceedings, merely friends of the Court to assist the Court to determine the section 38 application. Common sense dictates that the mootness exception can only apply where at least one party wants to proceed. The Order of Justice Bruce was rescinded and, as a result, there is no disclosure request by the Respondents. The section 38 application is discontinued.

[39] The Attorney General submits that the Court should not address the issues because, by their actions, it is clear that neither the Applicant nor the Respondents support that the issues be addressed. The Attorney General adds that the issues raised by the *amici* are not the issues initially raised in the application.

[40] The Attorney General also submits that there are no parties remaining and the *amici* cannot be characterized as a party. The Attorney General acknowledges that in other circumstances, *amici* could be appointed to provide an adversarial context, however, this would only be appropriate where one of the parties seeks to have the issues determined. In the present circumstances, none of the real parties support the Court's continued attention to the issues.

[41] The Attorney General notes that if the Court were to determine or rule on the issues raised by the *amici*, in the absence of any parties, the decision would be academic. In addition, there would be no way for the Attorney General or the Respondents to appeal since appeals lie only from orders.

[42] The Attorney General further submits that judicial resources should not be expended to address jurisdictional issues that are now academic and which are best left to be determined in a particular factual context. Although the *amici* may have prepared legal arguments on the issues raised, the Attorney General must prepare the responding arguments, a hearing would be required, and additional judicial resources would be expended.

[43] With respect to potentially saving judicial resources in the future by resolving or clarifying issues now, the Attorney General notes that the Court's ruling would be akin to *obiter* comments with limited persuasive effect and, therefore, would not clarify issues for future cases.

[44] With respect to the third Borowski factor, the Attorney General submits that the Court's consideration of the issues, divorced from a real dispute, would exceed the Court's judicial role and set an unnecessary precedent.

[45] Finally, the Attorney General submits that given the content of the submissions of both parties, which includes reference to information and assertions that were made in the *ex parte, in camera* proceedings, the submissions and this Order should be classified.

VII. Should the Court exercise its discretion to consider the issues raised by the amici?

[46] With respect to the Attorney General's response to the *amici's* assertion [redacted], these issues are beyond this Court's jurisdiction to determine. The *ex parte* affiant's evidence clearly indicated that [redacted]

[47] To determine whether the Court should exercise its jurisdiction to consider and determine the issues raised by the *amici*, although the case is moot, the considerations set out in *Borowski* have been applied: whether an adversarial relationship continues to exist; whether judicial resources should be expended; and, whether the court should focus on its role as the adjudicative branch of government. Some factors may not be relevant or applicable. As noted at para 42, "[t]he presence of one or two of the factors may be overborne by the absence of the third, and vice versa".

A. *Does an adversarial relationship or context continue?*

[48] In *Borowski*, the Supreme Court of Canada noted at para 31:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail.

[49] The Attorney General's argument that there is no adversarial context because neither the Respondents nor the Attorney General are parties given that the section 38 application is discontinued and the *amici* are merely friends of the Court overlooks that the Respondents were not full participants in the section 38 proceedings and remain unaware of the issues of concern raised by the *amici*. In section 38 proceedings, the *amici* should raise issues that would otherwise not be brought to the Court's attention.

[50] The role of the Attorney General in a section 38 application differs from the role of the Attorney General where it is also the prosecutor. In the section 38 application, the Attorney General seeks to ensure that information the disclosure of which would be injurious to international relations, national defence or national security is safeguarded and that the prohibition on disclosure resulting from the section 38 notice is confirmed by the Court. The Attorney General's evidence and submissions inform the Court's consideration, in accordance with the test established in *Ribic v Canada (Attorney General)*, 2003 FCA 246 [*Ribic*], of whether the importance of the public interest in disclosure outweighs that of the public interest in non-disclosure. Although there is some adversarial role between the Attorney General seeking to

prohibit the disclosure and the party seeking disclosure, this differs from the adversarial role between the Attorney General and the Respondents in the prosecution and in the entrapment proceedings.

[51] As noted in *Ahmad*, where the Court determines that the information sought to be protected in a section 38 application must be disclosed, the prosecuting Attorney General faces the decision whether to continue with the prosecution or to continue to protect the information and withhold it from the accused. This reflects the primary importance of an accused's right to make full answer and defence.

[52] The Attorney General notes that neither she nor the Respondents now have any stake in the outcome of the determination of the issues raised by the *amici*. This is true only because the Respondents abandoned their disclosure application and the Attorney General discontinued the section 38 application. The Respondents are unaware of the issues raised by the amici. However, if they were aware, they would likely be very interested in the issues and their resolution, despite that there will be no practical effect on the current proceedings in the Supreme Court of British Columbia because the disclosure Order is rescinded.

[53] The Attorney General notes that the issues raised by the amici were not the issues raised in the application. This is true only because it would have been impossible for the Respondents to anticipate that the information ordered to be disclosed would only include information relayed by [redacted] X to CSIS as recorded by CSIS [redacted]

[redacted]

[54] If the Court were to exercise its discretion to consider the issues raised by the *amici*, the participation of the *amici* and the Attorney General would ensure that the Court heard from all perspectives and would provide an analogous adversarial context. However, as noted by the Attorney General, it would be exceptional to proceed without at least one party supporting the determination of the issues and without the determination having some practical effect on the parties.

B. *Should judicial resources be expended to determine the issues now?*

[55] The Court, the *amici*, the Attorney General and counsel for the Respondents have invested significant time and effort in this application.

[56] In *Borowski* at para 35, the Court noted:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.

[57] As noted above, the Respondents may be interested in the issues and supportive of their resolution if they were aware of the issues. However, due to the rescission of the disclosure

Order and the discontinuance of the section 38 application, there would be no practical effect on the parties if the Court determines the issues.

[58] I appreciate that the *amici* have developed legal arguments on the issues raised. If the Court declines to exercise its jurisdiction, their efforts will have been in vain, at least in the context of the present case. I agree that the resolution of the issues, or the development of additional principles in the section 38 jurisprudence, could benefit future proceedings and save judicial resources in the longer term. However, this factor alone is not enough for the Court to pursue the issues now. As the Attorney General notes, in the absence of a full adversarial context or live dispute, the Court's determination may offer little more than *obiter* comments and have minimal persuasive value.

[59] I have considered the *amici's* argument that the issues raised could evade resolution if, in future cases, questions arise about the scope of a disclosure order or a production order made by a trial court that is subject to a section 38 application and where the time necessary to hear the evidence, review the material, and determine the issues leads to the abandonment of the request for disclosure or production, as in this case. The *amici* note the risk that the rights of the party seeking disclosure or production, in this case the rights of the Respondents who allege entrapment and abuse of process, are at stake.

[60] I am concerned about these issues and their impact on the rights of accused persons and on the proper administration of justice. However, I am not persuaded that the issues raised by the *amici* will evade resolution in future cases. I am not aware of other instances where a section 38

application has been discontinued due to the rescission of a disclosure order. The circumstances of the present application raise several concerns but, so far, appear to be unique. There is nothing to suggest that this will be a recurring approach to section 38 applications.

[61] As noted at para 36 of *Borowski*:

> The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[62] While more clarity on the jurisdiction of this Court to order the production to it of additional information would provide guidance to prospective parties, in the event that similar circumstances do arise, it is preferable for this issue to be addressed in the context of particular facts in an ongoing application.

C. *Will the determination of the issues encroach on the role of the legislative branch of Government?*

[63] At para 40 of *Borowski*, the Supreme Court of Canada noted:

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. …. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

[64] I do not agree with the Attorney General that the Court would exceed it judicial role or would encroach on the role of the legislative branch if it were to consider and determine the issues raised by the *amici*. The law on disclosure from the Crown and production and disclosure from third parties has been established and has evolved through the jurisprudence. However, to determine the issues without a real adversarial context or "live dispute" and without practical effects or benefits for the parties of the determination would not be appropriate.

[65] As noted in *Borowski*, there is no factor that trumps the other in the determination whether the Court should exercise its discretion. In the present circumstances, there are no remaining parties to the proceedings in this Court, although the *amici* remain committed to ensure the proper administration of justice by raising issues that the Respondents cannot raise because they are not full participants in the section 38 application. Any determination this Court may make would have no impact on the parties and may have minimal impact on any future applications. Considering all the relevant factors and the circumstances, it would not be appropriate for the Court to exercise its discretion to consider and determine the issues raised by the *amici*. The Court appreciates the contribution of the *amici*, who have at all times provided the Court with valuable assistance and have highlighted that the rights of the Respondents must not be overlooked, while at the same time respecting their role as *amici*.

VIII. Other Observations

[66] The circumstances of this application have raised several issues of concern that cannot be addressed in the context of the particular facts due to the discontinuance of the section 38

application. However, in the interest of how future applications may unfold, particularly those that arise in the context of criminal proceedings, some comments are offered.

[67] With respect to the section 38 application, this Court was placed in an awkward position, partly due to the approach taken by the Attorney General.

[68] Although it appears that counsel for the Attorney General, acting on behalf of CSIS, anticipated that, at some point in the entrapment proceedings in the Supreme Court of British Columbia, CSIS would be required to disclose information that it considered to be injurious to national security, counsel did not give notice to the Attorney General as contemplated by section 38 until after disclosure of that information to the Respondents had been ordered by Justice Bruce.

[69] At the time that the Respondents applied to this Court pursuant to section 18.1 of the *CSIS Act* in July 2015, the material filed by the Respondents (who were applicants in that proceeding) included the relevant Orders of Justice Bruce. The Orders of Justice Bruce clearly suggested that if a section 38 issue arose, it would be preferable for the Attorney General to make that application simultaneously with the Respondents' section 18.1 application to avoid additional delay. That did not occur. Ultimately, for other reasons, the section 18.1 application was dismissed in December 2015. However, the Attorney General was clearly aware of the Respondents' request for disclosure of information from CSIS as early as July 2015. The

Attorney General should have and likely did anticipate that the Respondents would renew their application for disclosure of the same information.

[70] The Respondents pursued their disclosure application for the same information in December 2015. Counsel for the Attorney General could have given notice in accordance with the section 38 procedure at that time, but did not do so. Instead, CSIS provided the information that it claimed was injurious to national security to Justice Bruce for her review. It was only on February 2, 2016 and after Justice Bruce determined that the information was relevant and should be disclosed to the Respondents that counsel for the Attorney General, on behalf of CSIS, gave notice to the Attorney General that the information was injurious to national security and should not be disclosed.

[71] Justice Bruce's review of the information held by CSIS and produced to her was conducted *in camera*, but in the presence of counsel for the Attorney General, acting on behalf of CSIS, and with submissions only from counsel for the Attorney General regarding the nature of the information and the parts of the information that reflected Justice Bruce's Order.

[72] In this Court, the material already found to be relevant by Justice Bruce was the subject of the section 38 application. Generally, the first step in the application of the *Ribic* test is to determine if the information is relevant to issues in the underlying action. In this case, that determination had already been made, within the context of the issues before Justice Bruce and with the benefit of her understanding of the issues in the prosecution and the entrapment

proceedings. However, Justice Bruce did not have the benefit of evidence of the CSIS affiant who testified in the public hearing or the ex parte affiant who provided evidence *in camera* and *ex parte* in this Court. The experienced CSIS Intelligence Officers explained the information that is typically recorded, how and why it is recorded, and the nature of other information that may exist. The *ex parte* affiant provided extensive testimony about [redacted] and the sources of information in the present case, the type of information that would customarily or usually be collected by CSIS, and the absence of some of this information in the present case. Justice Bruce did not have this context. Justice Bruce was not informed that [redacted]. Rather, Justice Bruce only had the submissions of counsel for the Attorney General, on behalf of CSIS, regarding the CSIS documents. In my view, this did not provide balanced or complete information to Justice Bruce to permit her to determine whether the Order for production by CSIS had been [redacted].

[73] Counsel for the Attorney General emphasized that this Court should focus on the section 38 application and should not look beyond the information found relevant by Justice Bruce (in counsel's expression, to "stick to its knitting"). However, such a narrow focus ignores the reality that this Court is aware [redacted].

[74] [redacted]

[redacted]. Similarly, if the Respondents had been [redacted], they may have expanded their application for disclosure to include more that one-way communication [redacted].

[75] This Court noted its concern throughout the proceedings [redacted]. As noted above, this concern was met with the Attorney General's response to focus only on the information that was the subject of the section 38 notice, which was only the information found to be relevant by Justice Bruce.

[76] This Court heard the *ex parte* affiant who provided important context for the information that was produced and [redacted]. Justice Bruce, who has the jurisdiction to order production and disclosure, found some information to be relevant to the Respondents' allegations of entrapment and abuse of process [redacted]

[redacted]

[77] In other section 38 applications, this Court has ordered the production to it of additional information for context to assist the Court to determine if the information should be protected from disclosure. However, this Court appears not to have ordered the disclosure of additional information where a trial Court has already determined what is relevant. This raises the question how, [redacted], further disclosure applications should be conducted and in which Court. If the trial court is the only forum in which to bring the application for production and disclosure, how can the necessary information be conveyed to the [redacted] party seeking disclosure to provide the foundation for a further production or disclosure application without revealing the information sought to be protected n a section 38 application?

[78] If this Court had the jurisdiction to order additional production or disclosure, the information would remain protected. However, this would likely invite the criticism that this Court is not sufficiently aware of the issues at trial in order to determine production and disclosure. If the trial Court is the only forum to order production or disclosure, there could be a continuing cycle of disclosure orders followed by section 38 applications, with the consequent delays to the ongoing trial proceedings. The impact of additional disclosure applications in the

trial court and further section 38 applications in this Court was noted in the present proceedings and the possibility for delay was flagged. As noted by the *amici*, the Attorney General was not receptive to the suggestion that it consider disclosing some information to the Respondents to avoid the likelihood of further applications for production and disclosure, or that it assert additional section 38 claims in anticipation of the disclosure of additional information to avoid the delays that could ensue.

[79] The past criticisms of the bifurcated section 38 process include the delay inherent in the need for this Court to determine the application while the trial process is held in abeyance. Delay is likely inevitable regardless of bifurcation given the volume of material sought to be protected, the need to ensure that the information is securely held and carefully safeguarded, the time required for careful review of the information and other factors. In the present circumstances, this Court proceeded as expeditiously as possible. As noted above, if the Attorney General had chosen to bring the section 38 application at an earlier stage, the application would likely have been resolved within a time frame to permit the continuance of the proceedings in the British Columbia Supreme Court as scheduled, even if the outcome of the section 38 application resulted in additional applications by the Respondents for production and disclosure. Additional requests for production were contemplated by Justice Bruce's earlier orders.

[80] As noted above, the Attorney General filed its notice of application in this Court on February 16, 2016. The Court was cognisant of the impact of delay and convened a CMC immediately upon receipt of the notice by the Attorney General, then moved expeditiously to set

aside time to ensure the application was determined in a time frame to respect the ongoing proceedings in the Supreme Court of British Columbia. A section 38 application cannot be determined without evidence. In this case, the records sought to be protected were filed a few days after the notice of application and the affidavits of the public affiant and the *ex parte* affidavit were filed one and two weeks later. The Court accommodated the parties and the affiants with respect to the scheduling of the hearings. In the future, the Court may be more inclined to set firm dates for filing the documents and the hearings to permit a timely determination of the application, particularly where the material is not voluminous, and balanced with the need for the full consideration of the issues.

[81] The time necessary to determine the section 38 application was clearly a factor in the Respondents' decision to abandon their request for the CSIS documents. While this was the Respondents' decision to make, and they are represented by capable counsel, the Court is of the view that had the application proceeded earlier, as it could have, the Respondents would not have been faced with the decision to request an adjournment of the proceedings in the British Columbia Supreme Court or to forego their request for disclosure of information from CSIS which could possibly support their allegations of entrapment and abuse of process. This Court will continue to ensure that in other cases the application proceeds as expeditiously as possible. The steps in the process, some of which can be influenced by the steps that the Attorney General must take to file the application, provide the documents and file the affidavits and other evidence should not exhaust the resources of the party seeking the information or impair their rights or the proper administration of justice.

[82] The outcome of the present proceedings was not anticipated by this Court. In hindsight, perhaps it should have been. It is possible that if this Court had required specific time frames for filing all material and affidavits and scheduling the hearings, along with permitting some limited and specific communication between the *amici* and counsel for the Respondents, there would have been a different outcome. It is also possible that had the Respondents been advised that jurisdictional issues were raised, they may have alerted the Court to their preference (if it had been their preference) that the Court focus on its determination of the section 38 application with the evidence provided to date. If that had occurred, the Court would have requested, by mid-April, the submissions of the Attorney General and the *amici* on whether the information sought to be protected as injurious to national security should be protected. History cannot be re-written and the jurisdictional issues raised by the *amici* are important and should have been raised. There may be no easy resolution to the jurisdictional issues. The approach to this application has highlighted concerns to be addressed or avoided in the future and that the rights of all parties must be considered.

[83] This Court remains concerned that [redacted]. This Court acknowledges that the entrapment and abuse of process

allegations focus on the conduct of the investigating police service and that CSIS is a third party in these proceedings. [redacted].

[84] As noted above, the role of the Attorney General in this section 38 application is to protect the disclosure of information that would be injurious to national security. The determination of a section 38 application requires a balancing of interests. The success of the prosecution is not part of that balancing.

THIS COURT ORDERS that it declines to exercise its discretion to determine the jurisdictional issues given the discontinuance of the section 38 application.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 17, 18, 2016 MARCH 9, 11, 21, 22, 24, 2016 APRIL 6, 7, 21, 2016
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CONFIDENTIAL VERSION DATED:	JUNE 8, 2016
PUBLIC VERSION DATED:	JULY 21, 2016

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