Date: 20080429

Docket: DES-3-07

Citation: 2008 FC 549

Ottawa, Ontario, April 29, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDULLAH KHADR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The United States of America has requested the extradition of Mr. Abdullah Khadr from Canada to face criminal charges in relation to acts which he is alleged to have committed in Pakistan in support of attacks against coalition forces in Afghanistan. In these proceedings, Mr. Khadr seeks to have certain information in the possession of the Canadian government disclosed to him to assist in his defence against the extradition request. The Attorney General of Canada is opposed to the release of that information on the ground that it's disclosure would cause injury to Canada's national security and international relations.

[2] This is an application pursuant to paragraph 38.04 (2) (c) of the *Canada Evidence Act*, R.S.C. 1985. c. C-5 ("the Act" or "CEA"). Notice under section 38.02 of the Act has been served on the Attorney General by a participant in the extradition case that disclosure of certain information could cause injury to the protected interests. The Attorney General has reviewed the information and authorized disclosure of some but not all of the information under section 38.03 of the Act. The starting point in these proceedings is, therefore, that the statute prohibits release of the undisclosed information unless it is authorized by the Court.

[3] The applicant seeks an Order pursuant to subsections 38.06 (1) or 38.06 (2) of the Act authorizing disclosure of the information and an Order for his costs. The respondent requests an Order confirming the Attorney General's decisions, or, in the alternative, that the undisclosed information be released only in the form of a summary and subject to conditions.

[4] Upon considering the evidence and representations of the parties with the assistance of an *amicus curiae*, the Court will exercise its discretion to authorize disclosure of information relevant to the extradition proceedings in the form of a summary and subject to conditions intended to minimize any risk of injury to the protected interests. The summary will be released only to counsel for the parties and its use restricted to the extradition proceedings.

[5] The Attorney General has been ordered to pay the costs of the participation of the *amicus curiae* on this application. No additional order for costs will be made.

PROCEDURAL HISTORY:

[6] Mr. Khadr, a Canadian citizen, was arrested in Pakistan in mid-October, 2004 and detained by Pakistani authorities until his release and repatriation to Canada on December 2, 2005. He was arrested at Toronto on December 17, 2005 on a provisional warrant issued by a Judge of the Ontario Superior Court of Justice under the *Extradition Act*, 1999. c. 18. Mr. Khadr was ordered detained following a bail hearing in that court on December 23, 2005 and has remained in custody since then.

[7] Extradition proceedings were formally commenced by the provision of a Request for Extradition dated February 9, 2006 from the US Attorney's office in Boston, Massachusetts, where the charges against him had been filed, and by an Authorization to Proceed dated March 15, 2006, signed on behalf of the Attorney General of Canada.

[8] The allegations against the applicant in the Record of the Case (ROC) and supplementary ROC's submitted by the requesting state are, in essence, that he procured munitions and explosive components to be used by Al Qaeda militants against US and coalition forces in Afghanistan. The corresponding Canadian crimes identified by the Attorney General in support of the request are terrorism, weapons and explosives offenses contrary to several provisions of the *Criminal Code of Canada*, R.S., 1985, c. C-46**.**

[9] As set out in the ROC and supplementary ROC's, the case against Mr. Khadr rests primarily on inculpatory statements taken from the applicant under caution by agents of the Federal Bureau of Investigation (FBI) in July 2005 while he was detained in Pakistan and in December 2005 at a hotel in Toronto shortly after his repatriation. The US also seeks to rely upon a cautioned statement taken by Royal Canadian Mounted Police (RCMP) officers following the applicant's return to Canada. RCMP officers had also interviewed Mr. Khadr in Pakistan in April 2005 but the US is not relying upon the statements obtained at that time as part of its case. However, the notes taken by the officers during the April 2005 interviews were filed in the applicant's bail hearing and form part of the record of this application.

[10] In August 2006, the applicant filed a motion for disclosure and related relief in the Ontario Superior Court of Justice. Among other things, the applicant requested that the court conduct a *voir dire* to determine the admissibility of the evidence against him and order that the Attorney General of Canada produce all documents relevant to the *voir dire*. The applicant submitted that the statements taken from him and proposed for use in the extradition proceedings must be excluded as products of torture, cruel and inhumane treatment and illegal detention in Pakistan. In the alternative, the applicant submitted that the circumstances of his detention were such as to render the evidence unreliable for the purpose of supporting his extradition from Canada.

[11] Counsel for the Attorney General of Canada, acting on behalf of the requesting state, conceded that based on Mr.Khadr's affidavit evidence, there was an "air of reality" to the contention that his allegations could be substantiated by evidence in its possession if the request for production was satisfied: see *United States of America v. Kwok* 2001 SCC 18, [2001] S.C.J. No.19 at paragraphs100 and 106; *R. v. Larosa*, 163 O.A.C. 108, [2002] O.J. No.3219 (O.C.A.) at paragraph 78. They, therefore, voluntarily undertook to disclose a large number of documents which were in the possession of the Canadian Security Intelligence Service (CSIS), the RCMP and the Department of Foreign Affairs and International Trade (DFAIT).

[12] In February, March and April 2007, Crown counsel issued four notices to the Attorney General under subsection 38.01(1) of the CEA, that certain of the documents which they proposed to disclose contained information of a sensitive nature or information which could injure Canada's international relations or national security if released. As required by the statute, the Attorney General reviewed the material and made decisions with respect to whether disclosure of the information would be authorized or not authorized. In the result, extensive redactions were made to the content of some of the documents disclosed to the applicant. Subsequently, upon receiving consent to disclose from the FBI, the originating agency, some of the redactions were removed or "lifted" and additional information released in the collection of documents.

[13] In a decision rendered on July 24, 2007, the extradition judge, Justice Christopher M. Speyer, ruled that no order for disclosure was required with respect to the material in the possession

of Canadian government departments or agencies as those documents had already been disclosed. He characterized this production as “voluminous” and noted that counsel for the Attorney General had agreed to provide any further material that may come to their attention. Justice Speyer declined to make any order for production against the requesting state. However, he accepted that the applicant's claims of abusive treatment during his detention in Pakistan were sufficient to provide for a realistic possibility that the remedy sought - exclusion of the inculpatory statements - could be achieved: *United States of America v. Khadr* [2007] O.J. No.3140 (S.C.J.).

[14] Justice Speyer noted that it was beyond the scope of his authority to determine whether the circumstances of the extradition proceeding required the production of unredacted copies of the material disclosed by the Canadian authorities as that jurisdiction is assigned to the Federal Court under section 38 of the CEA. On July 26, 2007 he adjourned the extradition proceeding so that an application could be brought under section 38. That application was filed in this Court on August 21, 2007 and was then case-managed by the Chief Justice until a complete record was submitted by the parties.

[15] The applicant filed affidavit evidence with extensive exhibits on September 20, 2007, including the content of the disclosure motion before the Ontario Superior Court. The bulk of the documents at issue in these proceedings were filed with the Court by the Attorney General in November, 2007, in both redacted and unredacted form, together with affidavit evidence in opposition to the application. These consisted of some 266 documents comprising approximately 1300 pages.

[16] Counsel for the applicant brought a motion for the appointment of *amicus curiae* on November 15, 2007. I was assigned the matter at this time. There was some initial delay in proceeding due to other matters requiring the involvement of counsel. Written submissions were filed and oral argument with respect to the motion was heard on December 20, 2007. In a decision released on January 15, 2008 I granted the motion and appointed Mr. Leonard Shore Q.C., of Ottawa as *amicus* to assist the court by representing the interests of the applicant during the *ex parte* hearings required by the statute: *Abdullah Khadr v. The Attorney General of Canada* 2008 FC 46, [2008] F.C.J. No.47.

[17] In response to a fifth notice served upon the Attorney General by counsel engaged in the extradition proceedings, the respondent filed supplementary *ex parte* affidavits with an additional 36 documents on January 29, 2008. This material was also served on the applicant in redacted form.

[18] During this process, counsel for the Attorney General identified additional sensitive or potentially injurious information which was said to have been inadvertently disclosed to the applicant. This information was initially contained in some 120 of the documents. That number was reduced on consent of the originator and through decisions of the Attorney General to authorize disclosure. In the result, there were 47 items of information in 41 documents, including several that were in the initial collection, for which the Attorney General sought an Order prohibiting further disclosure. For convenient reference, the pages of these documents containing the inadvertently disclosed information were assembled in one binder filed at a hearing on February 11, 2008. Redacted versions of these pages were also provided to counsel for the applicant. Counsel for the applicant continue to hold the original unredacted versions of this information as it was provided by

the Crown in the disclosure process, save for the item referred to in the next paragraph which they destroyed when informed that it was potentially injurious and had been unintentionally released.

[19] The document containing that item of information had already been given to a reporter for *The Globe and Mail* newspaper when counsel were made aware of its sensitivity. The information is set out in a portion of a sentence in an October 2004 briefing note to the Commissioner of the RCMP. Upon being contacted by counsel for the Attorney General, the newspaper withheld publication of the information pending the outcome of these proceedings.

[20] Closed and public hearings were conducted on February 21-22, 2008 in this matter. The private hearings were held for two purposes. The first was to receive representations from both parties and from counsel for *The Globe and Mail* with respect to the information which the Attorney General contends was inadvertently released during the disclosure process and which the Attorney General now seeks to protect through these proceedings.

[21] Counsel for the Attorney General was authorized to provide notice of the private hearings to *The Globe and Mail.* A lawyer for the newspaper appeared at the hearing on February 21st, filed a record in opposition to the Attorney General's request and made submissions concerning the information in the October 2004 briefing note. Counsel for the newspaper did not participate in the remainder of the hearings.

[22] The second purpose of the closed hearings was to provide the applicant with an opportunity to assist the Court with submissions as to the kind of information that would be useful to the defence in the extradition case. An *ex parte* hearing for this purpose is contemplated by the CEA in section 38.11. Counsel for the applicant, however, elected to have the respondent's counsel remain during these submissions on the understanding that any defence strategies or privileged information revealed would not be disclosed to the lawyers acting on behalf of the requesting state in the extradition case. While this was an exceptional procedure, not expressly provided for in the statute, it greatly assisted the Court during the subsequent *ex parte* hearings as the Court could candidly discuss questions of relevance with counsel for the Attorney General and the *amicus* without fear of disclosing information received in confidence from the applicant's lawyers.

[23] At the conclusion of the private hearings on February 22nd, the Court adjourned and resumed in a public session to hear the submissions of the parties with respect to the merits of the disclosure application in open court.

[24] A series of private *ex parte* hearings were conducted at the Court's secure facility in which witnesses from each of the departments and agencies in possession of the information at issue were examined by counsel for the Attorney General and cross-examined by the *amicus curiae*. Mr. Shore had previously been given access to all of the *ex parte* affidavit evidence filed by the Attorney General and was present for each of the private hearings. The redacted information was reviewed in this process and evidence and submissions received as to its relevance to the underlying extradition case and whether injury to the protected national interests would result as asserted by the Attorney General if it were to be disclosed.

[25] Following these hearings, at the request of the Court, counsel for the Attorney General and the *amicus curiae* reviewed the redacted information and allegedly inadvertent disclosures and prepared a list of the information which they, either jointly or individually, believed to meet the threshold test of relevance. The Court then heard further submissions in closed sessions from the Attorney General and the *amicus curiae* with respect to issues arising from this collection of information.

LEGAL FRAMEWORK:

[26] The appropriate test to apply in a proceeding under section 36.04 of the Act was developed by the Federal Court and the Federal Court of Appeal in *Canada (Attorney General) v. Ribic*, 2003 FCT 10, [2003] F.C.J. No. 1965, aff'd 2003 FCA 246, [2003] F.C.J. No. 1964 (*Ribic)*; see also *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2007] F.C.J. No. 622 (*Khawaja I*); rev'd in part but not on the test in *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, [2007] F.C.J. No. 1473: *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* 2007 FC 766, [2007] F.C.J. No. 1081 (*Arar*).

[27] A section 38.04 application is not a judicial review of the Attorney General's decision not to authorize disclosure. Instead, the designated judge must make a determination as to whether the statutory ban on releasing the information sought to be protected, as outlined in subsection 38.02(1), ought to be confirmed or not. In coming to that decision, the judge must assess the information in three steps.

[28] First, the judge must decide whether the information sought to be protected is relevant to the underlying proceeding. That threshold, as determined by the Federal Court of Appeal in *Ribic*, at paragraph 17, is a low one. In the criminal context, this is determined through application of the *Stinchcombe* test for disclosure: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83. If the information at issue may not be reasonably useful to the defence, it is not relevant and there is no need to go any further in assessing it.

[29] The extradition process is not equivalent to a criminal trial: see *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, [1991] S.C.J. No. 63. As stated in *Kindler* at paragraph 160, "… it differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on concepts of reciprocity, comity and respect for differences in other jurisdictions." However, the test of committal for extradition is the same as that required to justify committal for trial or to withdraw the case from a jury: see *United States of America v. Ferras* 2006 SCC 33, [2006] S.C.J. No.33 at paragraph 9. The extradition judge must assess whether there is sufficient admissible evidence to reach a verdict of guilty: *Ferras* at paragraph 46.

[30] In both the criminal trial context and in extradition proceedings which may lead to a criminal trial in another jurisdiction, the person's liberty and security interests are at stake. I consider it appropriate, therefore, that the test of relevance for disclosure of information in the context of an extradition proceeding should be the same as that for a criminal trial, i.e., the *Stinchcombe* test.

[31] Where the designated judge in a section 38 proceeding finds that the information is relevant, the next step is a determination whether disclosure would be injurious to international relations, national defence or national security, as outlined in section 38.06 of the *CEA*. At this stage, the judge must give considerable weight to the Attorney General's submissions on the injury which might be caused by disclosure, given the access that officeholder has to special information and expertise.

[32] However, a mere assertion of injury is not sufficient to reach a conclusion that the injury would in fact be caused by the disclosure. The party seeking the prohibition on disclosure, normally the Attorney General, bears the onus of establishing through evidence a factual basis to the allegations of probable injury on a reasonableness standard.

[33] To illustrate the application of the reasonableness standard in the national security context, Canadian courts have referred to comments in *Home Secretary v. Rehman*, [2001] H.L.J. No. 47, [2001] 3 WLR 877 (HL (E)). At page 895 of *Rehman*, Lord Hoffman said that the Court may reject the Executive's opinion when it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held". This statement was cited by the Supreme Court of Canada in describing a similar legislative test in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 33 and by the Federal Court of Appeal in *Ribic* at paragraph 19.

[34] It is clear from the jurisprudence that the judge has the discretion to authorize disclosure if the Attorney General fails to demonstrate injury. As stated by Chief Justice John Richard of the Federal Court of Appeal in the context of a challenge to the constitutionality of the legislative scheme, an "authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure": *Canada (Attorney General) v. Khawaja*, 2007 FCA 388, [2007] F.C.J. No. 1635 [*Khawaja II*] at paragraph 42.

[35] Where the Attorney General can show a reasonable basis for his or her assessment that the disclosure of the information at issue would cause injury to international relations, national defence or national security, the judge must then proceed to the final step of the test. At this point, it must be determined whether the public interest in disclosure is outweighed by the public interest in non-disclosure. In assessing this balance, the threshold is neither the low strict relevancy test of *Stinchcombe* nor the stringent "innocence at stake" exception which applies to informer privilege.

[36] The factors to be considered in determining whether the public interest is best served by disclosure or non-disclosure will vary from case to case, as has been noted often in the Federal Court, including by Justice François Lemieux in the civil case *Canada (Attorney General) v. Kempo*, 2004 FC 1678, [2004] F.C.J. No. 2196. The designated judge is tasked in the third step of a section 38 application with the function of assessing those factors which he or she deems necessary to find the delicate balance between competing public interests of disclosure and non-disclosure.

[37] Some of the factors which may be assessed were outlined by Justice Marshall Rothstein, then a member of the Federal Court, in *Khan v. Canada (T.D.)*, [1996] 2 F.C. 316, [1996] F.C.J. No. 190 at paragraph 26. These factors, set out below, were cited with approval by the Court of Appeal in *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, [2002] F.C.J. No. 1658:

> (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 applicants have established that there are no other reasonable ways of obtaining the information;
> (f) Whether the disclosures sought amount to general discovery or a fishing expedition; (citations removed)

[38] In a different context, that of an application arising from a public inquiry, my colleague Justice Simon Noël developed the following list of factors in *Arar*, above, at paragraph 93:

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

[39] While the last of Justice Noël's factors in *Arar* clearly does not apply in the present case, the remainder together with those identified by Justice Rothstein, varied as necessary, informed my consideration of how to balance the competing interests in the present application.

Inadvertent Disclosures*:*

[40] At common-law, privileges attached to information can be found to have been waived if the information is released by the holder to the opposing party. Inadvertent disclosure does not necessarily constitute a waiver. Waiver will be established when it is shown that the holder of the privilege knew of its existence and demonstrated an intention to waive it. The Court has discretion to consider whether the circumstances of disclosure amount to a waiver: *Stephens v. Canada (Prime Minister)*, [1998] 4 F.C.89, [1998] F.C.J. No. 794.

[41] In *Khawaja I*, at paragraphs 104 to 111, I considered what, if any, effect the inadvertent disclosure of some of the information before the Court should have in a section 38 case. I concluded that the release of information which the Attorney General seeks to protect, not amounting to an informed and intentional waiver, is not enough to justify disclosure. In light of the case-by-case nature of the section 38 test and the importance of the interests at stake, the appropriate approach is to proceed by way of the same three-step assessment as for disclosure generally.

[42] In *Arar*, at paragraph 57, Justice Noël endorsed this approach but added that the circumstances of the "inadvertent disclosure" are of essential importance in determining whether the information can be protected by the Court.

***Other "Public Interest" Considerations**:*

[43] The public interest in disclosure in section 38.06 exceeds the public interest in the fair trial rights of the individual concerned. It is broad enough to encompass other interests such as those noted by Justice Noël in *Arar*, above: human rights issues, the open court principle, freedom of the press and the right of the public to receive information.

[44] Freedom of the press is engaged in this proceeding in light of the inadvertent disclosure of one of the items of information to a newspaper. Freedom of expression including freedom of the press and the public's right to receive information are core values protected by subsection 2 (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982 (U.K.)* 1982, c.11. The scope of the protection afforded freedom of the press must be interpreted "in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee": *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, [1991] S.C.J. No.87 at paragraph 61.

[45] Inextricably linked to those values is the principle of the openness of court proceedings (see *Vancouver Sun*, (Re) 2004 SCC 43, [2004] S.C.J. No.41 and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] S.C.J. No.41). Freedom of the press and the open court principle are not, however, absolute. They must yield on occasion when there are other important interests to be protected such as informant privilege (see *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] S.C.J. No. 43) or to protect the right of an individual to a fair hearing (see *Re Charkaoui*, 2008 FC 61).

[46] The Attorney General plays an important role in protecting the state's interest in national security, national defence and international relations and, as discussed above, the court should give considerable weight to submissions from that office with respect to the injury that the disclosure of the information would cause. However, even where injury is established the court retains the discretion under the statute to determine that the public interest in disclosure of the information outweighs that of nondisclosure. The effect of the decision on the restriction of a core value such as freedom of the press must be a significant factor in that determination.

[47] It is clear now that any court procedures that limit freedom of expression and freedom of the press in relation to legal proceedings, including those imposed by statute, are subject to the test set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R.835, [1994] S.C.J. No.104 and *R. v. Mentuck* 2001 SCC 76, [2001] 3 S.C.R. 442; see also *Toronto Star Newspapers Limited v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188 at paragraph 7. This was affirmed in the section 38 CEA context by Chief Justice Allen Lutfy in *Ottawa Citizen Group Inc. v. Canada (Attorney General),* 2006 FC 1552, [2006] F.C.J. No. 1969.

[48] The *Dagenais/Mentuck* test requires that public access to court proceedings be barred only when the appropriate court in the exercise of its discretion concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. This test is meant to be applied in a flexible and contextual manner. In applying that test to the present context, I conclude that the court must be satisfied that the risk of injury from further disclosure of the information which the

newspaper possesses must be "real, substantial and well grounded in the evidence": *Toronto Star*, above, at paragraph 27.

ISSUES:

[49] The issues to be decided by the Court in these proceedings are:

(a) Whether to confirm the prohibition against disclosure of the information redacted pursuant to subsection 38.06(3) of the CEA;

(b) Whether to confirm the prohibition against further disclosure of some information that was inadvertently disclosed; and

(c) If the prohibition against disclosure is not confirmed, in what manner or under what conditions should the information be disclosed so as to limit the harm to national security and international relations?

APPLYING THE THREE STAGE TEST TO THE INFORMATION AT ISSUE:

The Relevance Threshold:

[50] The information at issue in these proceedings is contained in documents which are, for the most part, messages, reports and briefing notes written or compiled by Canadian officials in Islamabad, Pakistan and at CSIS, RCMP and DFAIT offices in Canada and correspondence from foreign officials. A considerable amount of the redacted information was provided by foreign agencies subject to express or implied caveats as to its use and broader distribution by their

Canadian counterparts. There is a great deal of repetition of the same information as the content of messages received by one Canadian agency or department was circulated to the others and recycled in further messages and reports.

[51] Much of the redacted information is, in my view, of no relevance to the underlying proceedings. This includes background analyses of a general nature, frequent references to other on-going investigations and to internal administrative information such as the names and telephone numbers of agents and civilian employees, file numbers, communication systems and databanks. That is not to say that such types of information may never be relevant but that upon review of the documents in these proceedings, I am satisfied that it does not meet the *Stinchcombe* threshold. Counsel for the applicant did not suggest that this type of information would be helpful to the defence. In a particular document, such as a briefing note on a broad range of topics, there may be only a small portion of text that is relevant to Mr. Khadr's case.

[52] Where I have concluded that the redacted information does not meet the low threshold of relevance I have excluded it from further consideration in the next two stages of the test and inclusion in the summary that has been prepared.

[53] The applicant's position is that the relevance of the redacted information ought to be determined by reference to the matters raised in the disclosure motion and examined by Justice Speyer in his decision of July 20, 2007. As noted above, Speyer J. held that the materials filed by the applicant on that motion met the "air of reality" threshold giving rise to a justiciable issue as to

whether the applicant was treated in such an abusive matter that the admission of the statement evidence would be unfair under section 7 of the *Charter*: see *Ferras*, above, at paragraph 60.

[54] I note that any finding that this Court may make regarding relevance is not binding upon the extradition court. Admissibility of evidence on behalf of the person sought in those proceedings is governed by paragraph 32 (1) (c) of the *Extradition Act*, 1999 c.18. That provision permits the reception of evidence which would not be otherwise admissible under Canadian law if it is relevant to the test for committal and considered reliable by the Court. That exception applies to evidence gathered abroad and would include hearsay. Evidence gathered in Canada remains bound by Canadian rules of evidence: *U.S.A. v. Anekwu* [2008] B.C.J. No. 536 (B.C.C.A.). That distinction may have some bearing on the admissibility of the information in the protected documents as it includes third party statements made both in Canada and abroad.

[55] The applicant's allegations of physical and mental abuse and arbitrary detention will be considered by the extradition court in so far as they relate to the issues of admissibility and fairness in those proceedings. The applicant's assumption is that the redacted information reproduced in the affidavit material before this Court will be relevant to those determinations. In particular, he seeks to corroborate his allegations that agents of the United States were behind his capture and detention in Pakistan and complicit in any abuse that he suffered during his detention there.

[56] At paragraph 51 of his reasons, Justice Speyer made the following comments:

> All allegations about American misconduct are denied by the requesting state. The relationship between American and Pakistani authorities in so far as it relates to the detention and treatment of Khadr is entirely a matter of speculation. In my view, this is a fishing trip to determine what, if any, American-Pakistani relationship agreement was in place relating to the arrest of Khadr....

[57] The applicant submits that disclosure of the redacted information will establish that the relationship between the American and the Pakistani authorities is more than a matter of speculation.

[58] The respondent acknowledges that the air of reality test had been met on the disclosure motion but submits that this was achieved solely through the applicant's own evidence and not on the content of the documents voluntarily disclosed, including the redacted information. The respondent does not concede that the redacted information is relevant.

[59] In the context of extradition proceedings, the respondent submits, relevance should be determined in relation to the content and scope of the requesting state’s ROC and supplementary ROCs. In this instance the record consists of the statement taken by the FBI in Pakistan, some eight months after Khadr's arrest, and the statements taken in Toronto by the RCMP and the FBI following his release and repatriation. Thus the redacted information would only be relevant, in the respondent’s view, if it assists in shedding some light on how those statements were obtained.

[60] I agree with the respondent that in a section 38 review of information sought to be disclosed for the purpose of an underlying extradition case, the scope of the relevance inquiry by the designated proceedings court should normally be limited to the parameters of the ROC submitted by the requesting state.

[61] However, the applicant says that the later statements which he made were derived from and are tainted by abusive conduct which he suffered in the initial days following his capture. He claims that he was arrested and detained at the behest of the requesting state; that a bounty was paid for his capture; that he was abused during his initial detention and coerced into making inculpatory statements; and that agents of the requesting state participated in the abuse during the early interrogation.

[62] The requesting state has conceded in affidavit evidence submitted to the extradition court and filed in this court as part of the applicant's record that agents of the United States began to interview Mr. Khadr some four days after his arrest, described as "debriefings", which continued for 17 days while he was within the custody of the Pakistani authorities. A member of the FBI was part of the team that conducted those debriefings.

[63] Inculpatory statements may be ruled inadmissible if tainted by earlier confessions obtained by coercion and where the tainting features which would disqualify the earlier confessions continued to be present or where the making of the prior statements was a substantial factor contributing to the making of the later statement: *R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, [1993] S.C.J. No. 132. The applicant says that when the RCMP and FBI officers interviewed him

later, they possessed information obtained during the early meetings and used it to challenge him on any inconsistency during the subsequent interviews.

[64] I understand that the requesting state takes the position that the FBI team that interviewed Mr. Khadr in Pakistan and again in Toronto was not apprised of the information obtained from him during the early debriefing sessions and that those statements are not tainted by any abuse, inducements or coercion that may have occurred following his capture. They deny involvement in any such actions if they occurred. Nonetheless, on the basis of the applicant's evidence alone, because of the full sequence of events, as alleged, there remains a realistic possibility that the statements taken under caution in Pakistan and Canada may be excluded from consideration in the extradition proceedings. I find, therefore, that any redacted information in the documents before the Court pertaining to the entire period of the applicant's detention in Pakistan may reasonably be useful to the defence and is relevant for the purposes of this determination.

[65] During the course of the hearings on February 21-22, 2008 counsel for the applicant made submissions as to the type of information that would assist the defence in challenging the requesting state's case if it were to be found in the documents at issue. In addition, at paragraph 65 of the applicant's application record, counsel set out a series of specific questions for which answers or relevant information would assist the applicant's defence. This was helpful to the Court during the review of the documents and the Attorney General's *ex parte* evidence.

[66] Counsel for the Attorney General and the *amicus curiae* also adopted a constructive approach to these proceedings by producing a table of the redacted information which in their joint or separate view could meet the relevance threshold together with a summary of the information. Mr. MacKinnon, counsel for the Attorney General, does not concede that the summary should be released and indeed argued vigorously to the contrary, particularly with respect to specific items. The *amicus curiae*, Mr. Shore, argued equally vigorously for the disclosure of additional information. As an experienced criminal defence counsel, Mr. Shore's view of what would be relevant and of assistance to the defence carried great weight with the Court.

[67] I am grateful to all counsel for their assistance to the Court in this matter. However, as required by the statute, I have made my own determination of what is relevant to the underlying proceedings based on a consideration of all of the evidence and having read all of the information at issue in each of the documents in its unredacted or clear form.

The Respondent's Injury Claims:

[68] As discussed above, the Attorney General bears the onus of establishing injury. In this case, he does not rely upon a claim of injury to national defence. The public affidavits served on the applicant and filed by the Attorney General in these proceedings describe various risks of harm which it is claimed would cause injury to Canada's national security and international relations. These claims were elaborated upon in the private *ex parte* affidavits filed by the respondent and in the evidence of the witnesses heard in the *ex parte* hearings with reference to the redacted information in each document.

[69] In general, the Attorney General submits that disclosure of the information sought to be protected will harm Canada's national security and or international relations by breaching the confidentiality of information sharing relations with third parties; by disclosing methods, techniques or ongoing investigations; by disclosing information about employees engaged in security intelligence work; and by identifying human sources.

[70] Specific concerns are set out in the respondent’s public record for each of the departments and agencies from whom the information at issue in these proceedings was collected. For CSIS, it is submitted, the disclosure of its information would be injurious to the national security of Canada as it would:

a) Identify or tend to identify CSIS's 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 of success or lack thereof of investigations;
b) Identify or tend to identify investigative techniques and methods of operation utilized by CSIS;
c) Identify or tend to identify relationships that CSIS maintains with security and intelligence foreign agencies and would disclose information received in confidence from such sources;
d) Identify or tend to identify CSIS employees or the administrative methodology of CSIS;
e) Identify or tend to identify human sources of information for CSIS or the content of information provided by human sources; and
f) Identify or tend to identify information concerning the telecommunications system utilized by CSIS.

[71] On behalf of DFAIT, it is submitted that confidentiality is fundamental to the collecting and sharing of information between states. International convention and practice requires that diplomatic communications are conducted in confidence unless there is an express agreement to the contrary. The release of the names of confidential sources and information provided by foreign officials with the expectation that the information would remain confidential would have a severe impact on Canada's ability to pursue its foreign-policy objectives and its reputation with other governments including key allies. Failure to protect such information in relation to consular cases could have an adverse effect on Canada's ability to provide consular assistance to detained individuals. Efforts to promote human rights, democracy and good governance would be compromised if candid assessments of Canadian officials about the situation in foreign states were released. Contacts in those states who engage in frank discussions with Canadian officials would be put at risk if their identities were disclosed.

[72] The RCMP is responsible for conducting investigations into terrorism offences as defined in Part II.1 of the *Criminal Code*, R.S., 1985, c. C-46 and for performing peace officer duties under the *Security Offences Act*, R.S. 1985, c.S-7 in relation to "conduct constituting a threat to the security of Canada" within the meaning of the *Canadian Security Intelligence Act*, R.S.C. 1985, c. C-23. It is submitted by the Attorney General that disclosure of information in the documents collected from the RCMP would cause injury to national security in relation to the following sensitive subjects:

a) Investigations, subjects and persons of interest;
b) Investigative methods and techniques;
c) Information received from foreign agencies; and
d) The identity of civilian employees.

The "Mosaic Effect" Theory

[73] As is common in any proceeding relating to national security, the Attorney General relies in part upon the metaphor of a "mosaic effect" to establish injury. In the hands of the informed reader, it is said, seemingly unrelated pieces of information which may not in and of themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. The court is urged to conclude that the assessment of the damage to national security cannot be made looking at each item of information in isolation. The information must be considered in the context of other information which may be released. The more limited the dissemination of information, the less likely it is that an informed reader can put together the pieces and determine targets, sources and methods of operation of the investigative agencies.

[74] This theory has been cited numerous times in US and Canadian jurisprudence relating to national security and access to information held by the intelligence agencies. As a matter of logic, the concept has some appeal but there is no apparent limit to how far it may be taken. Carried to an extreme, the theory would justify the withholding of all information no matter how innocuous. See David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act,* (2005) Yale Law Journal 629 and *CIA v. Sims: Mosaic Theory and Government Attitude*; (2006) 58 Admin. L. Review 845.

[75] In *Khawaja* I, I expressed the view, at paragraph 136, that the mosaic effect on its own will not usually provide sufficient reason to prevent disclosure of what would otherwise appear to be an innocuous piece of information and that further evidence will be required to convince the Court that the information, if disclosed, would be injurious.

[76] In *Khawaja II*, Justice J.D. Denis Pelletier discussed the difficulty in deciding whether information, apparently innocuous on its face, has value to a hostile observer. He concluded, at paragraphs 124-126, that it is this uncertainty about seemingly innocuous information that sets section 38 proceedings apart from other proceedings where the Court must decide whether to disclose information which, at the time of argument, is known only to one of the parties. The *ex parte* procedure allows the Attorney General to address the Court candidly about the injury which would be caused by disclosure.

[77] I agree with Justice Pelletier that the *ex parte* hearings are the opportunity for the Attorney General to connect the dots and present the entire picture. But the Attorney General must present evidence to back up the injury claims. Witnesses from the intelligence community may take the mosaic effect theory as an article of faith, relying upon it as a complete answer to the release of information they consider sensitive or potentially harmful. As stated by Justice Noël in *Arar*, at paragraph 84, "[s]imply alleging the effect is not enough. There must be some basis or reality for such a claim based on the particulars of a given file."

The Applicant's Position on Injury

[78] The applicant does not concede that any of the information at issue before this Court meets the second stage of the section 38.06 analysis. Counsel observed that the applicant's ability to comment upon this aspect of the test is compromised by the *ex parte* aspects of the proceedings. However, the applicant submits that in principle the disclosure of information pertaining to past investigations, information being withheld to prevent the exposure of a foreign government to embarrassment for wrongdoing, information provided by Canada to a foreign government, exculpatory information provided by a foreign government, and information that is protected solely because it is in the possession of CSIS should not be found to cause injury to Canada's national security and foreign relations.

[79] In these proceedings I have not found it necessary to consider whether the Attorney General sought to protect exculpatory information provided by a foreign government as that issue does not arise from the record before me. Nor was there any suggestion by the Attorney General that information provided to a foreign government by Canada or information in the possession of CSIS required protection on those grounds alone. In each instance, the Attorney General sought confirmation of his decision on the basis of the three stage test outlined above. However, the Attorney General disputes the contention that information relating to past investigations should never be protected and I consider it necessary to comment on the embarrassment factor.

Past investigations:

[80] The question of past investigations arises in this case because of statements made in the respondent's record to the effect that information pertaining to past national security investigations must be protected from public disclosure. The applicant submits that the information at issue pertains primarily to the investigation of his activities by the RCMP and CSIS. Considerable detail about that investigation is set out in the unredacted portions of the documents filed in these proceedings, in the affidavit evidence filed in support of the interim arrest warrant application, and in the ROC and supplementary ROCs.

[81] The applicant contends that the jurisprudence recognizes the legitimacy of claims for public interest immunity only in respect of ongoing investigations and not past investigations. There is no legitimate government interest he submits, in withholding any further information on this basis, citing *R. v. Chan*, 2002 ABQB 287, [2002] A.J. 363 at paragraphs 122 -127.

[82] *Chan* was a criminal case in which the question of public interest immunity had arisen in the context of the Crown's disclosure obligations under the *Stinchcombe* rule. Upon a review of the case law, the trial judge concluded that a qualified common-law privilege attached to information respecting ongoing investigations, investigative techniques and the safety of individuals. The decision is silent about past investigations and the applicant infers from this that they are excluded from the scope of the privilege.

[83] I note that the Supreme Court of Canada has recently determined that the privilege which attaches to the Crown's litigation work product in a prosecution ends when the case is completed: see *Blank v. Canada (Attorney General)* 2006 SCC 39, [2006] S.C.J. No. 39.

[84] The Attorney General submits that in the national security context, investigations do not often reach a tidy conclusion with a charge, prosecution, trial and conviction or acquittal. Information obtained is added to the body of intelligence collected about known or suspected threats and may assist in other related or unrelated investigations. The question to be addressed by the Court under section 38.06 is not whether the information pertains to an ongoing or completed investigation but whether disclosure would cause injury to the protected interests. The age of the information and present value may be a consideration in determining whether injury is made out or, if established, whether the public interest favours disclosure.

[85] I agree with the Attorney General's view of this question. I would add that from my review of the evidence in the present case, I am satisfied that there can be no clear distinction made between past and on-going investigations. Moreover, disclosure of the status of any possibly inactive investigation conducted by the RCMP or CSIS that may be revealed by the redacted information could cause injury to the protected national security interests.

***Embarrassment for wrongdoing**:*

[86] As noted above, the applicant seeks disclosure of information in support of his claims that he was subjected to abusive treatment amounting to torture and arbitrary detention contrary to both international law and the domestic law of Pakistan. He submits that the policy underlying section 38.06 of the CEA is not to prevent the exposure of a government to embarrassment for wrongdoing.

[87] My colleague Justice Simon Noël addressed this question in *Arar*, above. I agree with his conclusion, at paragraph 60, that information which is critical or embarrassing to the government cannot be protected but would add the qualification that this principle applies only when that is the sole or genuine reason why protection is sought.

[88] That conclusion is, I think, clear from the authorities cited by Justice Noël including the following statement from the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), an instrument for interpreting article 19 of the United Nations *International Covenant on Civil and Political Rights* at Principle 2 (b):

> In particular, a restriction sought to be justified on the ground of national security is not legitimate **if its genuine purpose or demonstrable effect** is to protect interests unrelated to national security, including, for example, to protect the government from embarrassment or exposure of wrongdoing… [Abridged and emphasis added].

[89] I accept this statement as an expression of the principle Justice Noël was referring to in *Arar* with the exception of the inclusion of the words "or demonstrable effect" from the Johannesburg document. Regrettably, in some cases, protecting Canada's security and international relations interests may have the unintended and unwanted effect of protecting a government from

embarrassment or exposure. However, if, based on the Court's examination of the evidence, that is the sole or genuine reason the Attorney General seeks to withhold the information, the information must be disclosed.

[90] In the present case, I do not find that the Attorney General seeks to maintain the statutory prohibition on the redacted information merely because its disclosure would embarrass any foreign government or that of Canada. That may be a consequence of the release of certain information but it is not the "genuine purpose" of the Attorney General's opposition to disclosure in this case. Each claim for protection is legitimately based on other grounds such as the third party rule.

***Third Party Rule**:*

[91] As discussed above, the Attorney General seeks to maintain the statutory bar on disclosure of certain information on the ground that its release would breach the so-called "third party rule" which attaches to confidential communications between governments, their departments and agencies and officials. In some instances, the information is transmitted as classified with express caveats as to its use or further distribution by the receiving agency. In others, confidentiality is implied by the circumstances in which the information is conveyed. Foreign agencies may consent to the disclosure of some or all of their information for use in court proceedings. However, they may also take the position that their information or indeed, any indication of their interest in a particular matter must be protected indefinitely.

[92] As has been recognized repeatedly in the jurisprudence, Canada is a net importer of security intelligence information. The proportion we receive from foreign agencies far exceeds that which we provide in return. While CSIS may operate abroad in the interests of collecting information about threats to the security of Canada, it is not a foreign intelligence agency of the nature of those maintained by our closest allies and international partners. Canada depends upon the continued flow of the information they collect and share. Thus, any violation of the confidential relationship puts that flow of information at risk and could jeopardize Canada's national security. There is also a long-standing presumption of confidentiality in the day to day working relationships of our diplomats and officials with their foreign counterparts abroad and at home.

[93] In this matter, a considerable amount of the redacted information at issue was received from foreign governments. Evidence was received *ex parte* that requests had been made to certain of the agencies concerned to consent to disclosure of the redacted information which had originated with them. The Attorney General takes the position that such inquiries should not be considered to be a prerequisite to a determination by the Court that injury would result from a breach of the principle. In my view, however, the failure to make such inquiries may undermine the claim particularly where, as is often the case, on its face the information appears to be innocuous.

[94] In the case of one foreign agency, no response had been received as of the conclusion of the hearings. I believe it to be unlikely that it would ever agree to such a request given the position it has consistently maintained. With regard to the agency of another government, Canadian officials believed it would be futile to approach them considering the circumstances in which the information had been transmitted. Upon hearing all of the evidence, I agreed with that assessment.

[95] I note that the FBI responded to the request by agreeing to the lifting of redactions on certain information that had been provided by its offices. The Attorney General agreed to disclosure of that information. Those pages were then revised, filed with the Court and sent to applicant's counsel. That reduced the scope of the Court's review of the material.

[96] In this case, I had the benefit of the assistance of the *amicus*, Mr. Shore, to add to the Court's own probing of the justification for the claim of injury which would result from breach of the third party rule and whether steps had been taken to obtain consent to disclosure.

[97] In general, I agree with the exercise of the Attorney General's discretion to protect information on the ground that it would harm Canada's interests by breaching the third party rule. The people who do the internal assessments that support that exercise of discretion are experienced, knowledgeable and in day to day contact with their foreign counterparts. The evidence of the harm that would result from unilateral disclosure presented by the *ex parte* witnesses put forward by the Attorney General was credible and trustworthy. The witnesses were candid when they did not know why the foreign agency would want to protect the information but firm in their view of the results if those views were disregarded.

[98] Nonetheless, it is my view that too much of the routine communications between foreign and Canadian agencies is protected by the Attorney General in application of the third party principle. In this case there were examples that simply did not stand up to scrutiny. I am equally of the view that most of that type of information in this case is irrelevant to the underlying proceedings. There is no point in making a *pro forma* injury determination or balancing assessment of such information when it can be of no assistance to the applicant.

[99] I accept that, overall, the Attorney General has satisfied his burden to establish that disclosure of the information which I have found to be relevant would cause injury to Canada's national security and international relations. The next step then is to consider whether, notwithstanding that finding, the public interest in disclosure outweighs the public interest in non-disclosure.

Balancing the Public Interests:

[100] With respect to the third step of the analysis - the balancing of the public interests - the Attorney General relies on the evidence tendered on injury and submits that the public interest in nondisclosure of the protected information outweighs any public interest in its disclosure. In the alternative, the Attorney General submits, if it is determined that all or part of the information ought to be disclosed the court should exercise its discretion to disclose the information in a manner or impose conditions that are most likely to limit any injury pursuant to subsection 38.06(2).

[101] The applicant submits that any injury to the interests protected by section 38 can be eliminated by the imposition of appropriate conditions. As such, all information should be disclosed in a manner which prevents its disclosure to anyone other than on a "need to know" basis. The options for disclosure which the applicant proposed, in his descending order of preference, are as follows:

a) Disclosure of relevant documents and information publicly and unconditionally;
b) Disclosure of a summary of the relevant documents and information publicly and unconditionally;
c) Disclosure of all relevant information to the applicant's counsel on the condition that it may only be disclosed to the extradition judge during an *in camera* proceeding and not to any other party, including the applicant,
d) Disclosure of all relevant information to an *amicus curiae* appointed by the court on the condition that it may only be disclosed by the *amicus curiae* to the extradition judge during an *in camera* proceeding and not to any other party including the applicant.

[102] During oral argument, counsel for the applicant indicated that they were no longer proposing the fourth option. I had expressed the view that it was highly unlikely that I would presume to impose a requirement that the extradition judge permit an appearance *in camera* by an *amicus* appointed by this Court. However, counsel submitted that this Court has the jurisdiction to order that information only be disclosed in the context of an *in camera* hearing, leaving it to the discretion of the extradition judge to order any such proceeding should he or she deem it necessary.

[103] There are strongly competing public interests in this case. The public has an interest in ensuring that information that would be relevant to the extradition proceedings against the applicant is disclosed to him for the purposes of his defence. That interest reflects Canadian values and is enshrined in the guarantee of fundamental justice set out in section 7 of our *Charter*. The public also has a profound interest in maintaining the capacity of Canada's intelligence and investigative agencies to respond to threats to our collective security and the ability of our foreign affairs officers to conduct candid and effective relations with other countries.

[104] There is an additional factor that may call for additional deference to the Attorney General's position in these proceedings. Consideration of the public interest must include the fact that the security of Canada's troops and civilians in Afghanistan is in part dependent upon the cooperation of other governments in the region and that of the other members of the international security force deployed there. In that context, disclosure of the information at issue may have a much more serious impact if it were to result in a withdrawal or diminution of that cooperation.

[105] As discussed above, balancing the public interests in this case must also take into account the *Charter*'s guarantee of freedom of the press including the public's right to receive information which the press may obtain and choose to report upon.

[106] In the present case, *The Globe and Mail* obtained certain information because it was disclosed by the Crown to counsel for the applicant and was to be filed in an open court proceeding. It was only determined following service of the applicant's materials upon Crown counsel that the information was sensitive and might cause injury to a protected interest. The newspaper acted responsibly in not publishing the information when alerted by counsel that there was a concern. But for the subsequent intervention of a notice served on the Attorney General pursuant to the Act, however, the newspaper would have been free to publish the information and the public would have known of its content and been able to consider its implications. If not released through these proceedings, the public may never come to know of the information.

[107] The information in question refers to the payment of a bounty of USD $500,000 for Mr. Khadr's capture in Pakistan. The Pakistani authorities had reasons of their own for wanting to arrest Mr. Khadr given his alleged activities in that country. The information does not say that the bounty was actually paid or, if it was paid, by whom. The originating source of the information is not disclosed in the document. But it is clear that Canadian officials were told that a bounty had been paid shortly after the applicant's capture and included that information, presumably considered reliable, in briefing their superiors, in this instance the RCMP Commissioner.

[108] It is a reasonable inference from the public evidence filed in this application that the bounty was offered and paid by the US Government. Counsel for *The Globe and Mail* led evidence that the payment of bounties by the US has been freely disclosed in comparable contexts and, indeed, celebrated by US officials as a valuable tactic in apprehending suspected terrorists in the region. General Musharraf, the Head of State of Pakistan, published memoirs in which he writes of the

receipt of US bounties by his country as an illustration of its contribution to the so-called “Global War on Terror”.

[109] The Attorney General submits that the fact a bounty may have been employed in this instance has never been publicly acknowledged, that the release of the information would cause injury to Canada’s interests and that the Court should issue an Order barring its further disclosure.

[110] The evidence heard *in camera* supports the conclusion that the bounty was offered and paid by the US. I accept that the information was conveyed to Canadian officials in confidence and that the Attorney General seeks to protect it in a good faith application of the third party rule. However, the sole justification that was provided to the Court as to why publication of the information should be prohibited is that the originator does not want the information disclosed. No further explanation has been provided.

[111] Counsel for the applicant submits that disclosure of this fact is crucial to his defence. On the evidence before me I am satisfied that the information is relevant to the allegations made by the applicant. I am unable to conclude that release of the information would cause harm to Canada’s national security or international relations. It is now more than three years since the information was received by Canadian officials, the general practice is in the public domain, no human source would appear to be at risk and the circumstances in Pakistan have changed since these events took place.

[112] Had I concluded that the assertion of injury had been made out, I would have determined that the public interest in disclosure outweighs the public interest in non-disclosure of the information. As discussed above, the "public interest" includes the interests of the applicant to a full and fair airing of matters relevant to the admissibility of the case against him. In my view, that includes the information that a bounty was paid for his capture.

[113] The fact that a foreign state paid a bounty for the apprehension of a Canadian citizen abroad and that Canadian officials were aware of it at an early stage is also a matter in which the public would have a legitimate interest. While I considered whether it would be sufficient to authorize disclosure of the information to the applicant solely for the purpose of his defence to the extradition request, I have concluded that the newspaper should be allowed to publish the information and inform the public in furtherance of the core values of freedom of expression and freedom of the press. The prohibition on disclosure of this information will, therefore, not be confirmed.

[114] With regard to all of the so-called "inadvertent disclosures", including the item in the possession of the newspaper, the applicant submits that the circumstances of the release of the information to his counsel clearly demonstrated an informed intention on the part of the Crown to waive any privilege attaching to the documents. Crown counsel took some seven months to review information in the possession of the government that would be relevant to a determination of the issues in the extradition proceedings following their concession that the "air of reality" test had been met. They then proceeded to disclose that information. It was only during a subsequent review, presumably by other Government personnel, that the claims of public interest immunity under section 38 were raised. Indeed, counsel states that until the documents were filed in these

proceedings the only inadvertent disclosure of which he had been made aware concerned the October 2004 briefing note released to *The Globe and Mail*.

[115] The Attorney General submits that there is no evidence that the Crown ever intended to waive the privilege that attaches to the information. At the time the documents were disclosed to the applicant, the statutory prohibition imposed by subsection 38.02 (1) had not yet come into existence with respect to the information at issue. In those circumstances, it is submitted, the Crown could not be said to have waived a privilege which had not yet crystallized. In the decisions taken under section 38.03, the Attorney General confirmed the statutory prohibition and confirmed that there had been no intention to waive privilege.

[116] The applicant contends that the circumstances of this case are different from those in *Khawaja I* as in that case it was clear that mistakes had been made in redacting documents in the disclosure process. Having dealt with both cases I see no real difference, apart from the fact that the quantity of material in *Khawaja* was considerably larger. Both cases illustrate that there are systemic difficulties in asserting section 38 claims where voluminous disclosure is being made and the public interest requires a thorough review of the material. There are a limited number of people who can do this work. Despite efforts to be consistent, mistakes will be made and information redacted in one document may be disclosed in another. Counsel for the Attorney General filed a table of concordance with the Court that demonstrates that the information in each of the claimed inadvertent disclosures had been consistently redacted in other documents. I am satisfied, therefore, that there was no informed waiver in these circumstances.

[117] I see no reason in this case to depart from the conclusion I reached in *Khawaja I* that the three stage test should be applied to any information in respect of which notice is served on the Attorney General even belatedly. In reviewing the unredacted pages containing this information in the present case, it is clear that much of it consists of internal administrative information such as telephone or fax numbers or identifies the names and phone numbers of agency personnel. There are several references to the investigation of another individual. That information would not be of assistance to the applicant. It was properly redacted in other documents and I am satisfied that the failure to do so in this case was inadvertent oversight.

[118] However, I see no practical purpose would be achieved at this time by requiring counsel for the applicant to destroy or return their copies of the unredacted inadvertent disclosures. These documents have remained in their possession for over a year without any apparent resulting harm to the protected national interests. I think it sufficient that the information not be further disclosed. There is some information in the list of inadvertent disclosures which counsel for the applicant indicated could be of assistance to his client. Those details are included in the summary which is to be provided to counsel and may be used in the extradition proceedings.

CONCLUSION

[119] With regard to most of the information at issue in these proceedings, I am satisfied that the risk of injury has been established by the Attorney General. In balancing the public interests, I conclude that the interest in disclosure outweighs that of non-disclosure. I will exercise my discretion pursuant to subsection 38.06 (2) of the Act to authorize disclosure of the relevant information in the form of a summary to be used solely for the purposes of the extradition hearings. A separate Private Order to that effect will be issued to counsel for the parties with the summary attached as an annex.

[120] The information contained in the October 20, 2004 briefing note to the Commissioner of the RCMP is relevant to the underlying extradition proceedings. I am not satisfied that the Attorney General has met his onus to establish that disclosure of the information would cause injury to Canada's national security or international relations. Flowing from that conclusion, I do not believe that it is necessary to impose conditions to limit any injury that could possibly result to the protected interests. I will, therefore, exercise my discretion to authorize disclosure of that information without conditions.

[121] The applicant seeks his costs for this application. There has been no request for the payment of the costs of *The Globe and Mail*. The Attorney General has been directed to pay the reasonable fees and disbursements of the *amicus curiae* as there is no other readily accessible source of funds for that purpose. Apart from that obligation, an award of costs is within the discretion of the Court.

In section 38 proceedings, the Attorney General performs an important public function imposed by Parliament. While I have concerns about the length of time that it took to complete the review of the material for disclosure purposes, I accept that this was a function of the sensitivity of the information and insufficient resources. I note further that Crown counsel voluntarily undertook to make disclosure beyond the scope of the requesting state's Record of the Case when they recognized that there was an "air of reality" to the applicant's claims. In those circumstances, I will make no costs award.

ORDER

THIS COURT ORDERS THAT:

1. Pursuant to paragraph 38.02 (2) (b) of the Act, these Public Reasons for Order and Order shall be released to the Attorney General of Canada on the date of issuance, and the same shall be released to counsel for the applicant and to the public upon the expiry of the period for appeal provided in sections 38.09 and 38.1 of the Act;
2. The prohibition on disclosure of the information contained in RCMP document 1008, an October 20, 2004 briefing note to the Commissioner, is not confirmed and disclosure of that information is authorized unconditionally pursuant to subsection 38.06 (2) of the Act;
3. A summary of the other relevant information about which notice was given to the Attorney General in this matter shall be disclosed subject to conditions in the form of an Annex to Private Reasons for Order and Order which will be issued solely to counsel for the parties;
4. Subject to the foregoing exceptions, the information specified as “inadvertent disclosures” in a list filed with the Court on February 11, 2008, shall not be further disclosed by counsel for the applicant;
5. Counsel for the applicant may retain their unredacted copies of the “inadvertent disclosures” for the purpose of preparing for the extradition hearing but shall not disclose the information further except as it is summarized in the Annex to the Private Order to be issued in this matter;

6. The Court shall remain seized of this matter pending the outcome of the extradition proceedings and counsel for the parties may seek clarification of these Public Reasons for Order and Order at any time in writing with notice to the other party;
7. The Court Records relating to the hearing shall be kept in a location to which the public has no access pursuant to subsection 38.12 of the Act; and
8. The Order of January 15, 2008 shall continue in effect respecting the payment of the reasonable fees and disbursements of the *amicus curiae*; apart from that, the parties shall bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**DES-3-07**
STYLE OF CAUSE:	**ABDULLAH KHADR –v- ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Ottawa. Ontario
DATE OF HEARING:	**Ex parte / In Camera hearing dates** January 23. 24. 25. 29, 30, 2008 February 11, 12, 2008 March 7, 20. 2008 **In Camera hearing dates** February 21, 22, 2008
REASONS FOR ORDER:	MOSLEY J.
DATED:	April 29, 2008

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Mr. P. M. Jacobsen	FOR THE GLOBE AND MAIL
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