Date: 20120531

Docket: DES-7-08

Citation: 2012 FC 669

Ottawa, Ontario, May 31, 2012

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

IN THE MATTER OF A CERTIFICATE SIGNED PURSUANT TO SUBSECTION 77(1) OF THE IMMIGRATION AND REFUGEE PROTECTION ACT (*IRPA*);

IN THE MATTER OF THE REFERRAL OF A CERTIFICATE TO THE FEDERAL COURT OF CANADA PURSUANT TO SUBSECTION 77(1) OF THE *IRPA*;

AND IN THE MATTER OF MOHAMED ZEKI MAHJOUB

REASONS FOR ORDER AND ORDER

[1] By notice of motion dated September 16, 2011, Mr. Mahjoub seeks:

> "(i) A permanent stay of proceedings in conformity with sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms*, [Part I of the *Constitution Act, 1982*, being Schedule B to the

Canada Act 1982 (UK), 1982, c. 11] (hereinafter the *Charter*) and section 50 of the *Federal Courts Act* [R.S.C. 1985, c. F-7];

(ii) An order for the release without conditions of the Applicant;

(iii) An order reserving the right of the parties to present further submissions for the retrieval, sealing or destruction of the co-mingled material;

(iv) in the alternative, such further and other remedy as this Honourable Court considers appropriate and just in the circumstances including the removal of [Department of Justice] DOJ counsel and legal staff on record and CBSA [Canadian Border Services Agency]/ CSIS [Canadian Security Intelligence Service] staff;"

[2] Mr. Mahjoub states the following grounds in support of his motion:

"1. The Department of Justice (DOJ) breached Mr. Mahjoub's right to retain and instruct legal counsel in private, his rights to solicitor-client privilege and to litigation privilege by:

(i) The seizure and the possession, on or about July 20 and 21, 2011, of the entirety of confidential material from

Mr. Mahjoub's file, which was left in the confidential break out room at the Federal Court in Toronto by Public Counsel;

(ii) The manipulation of the confidential material from Mr. Mahjoub's file by DOJ staff members and/or legal counsel between July 20-21 and September 1, 2011;

(iii) The co-mingling of confidential material from Mr. Mahjoub's file by DOJ staff members and/or legal counsel with material from the DOJ's file;

(iv) The review of confidential material from Mr. Mahjoub's file by DOJ staff and one or more litigation counsel;

II. The separation and retrieval of the co-mingled documents would necessarily imply reading a part of the documents by both parties in order to assess what belongs to whom and it is therefore impossible to do without a risk of breach of solicitor-client privilege and/or litigation privilege and a risk of favouring the Ministers.

> III. This breach of Mr. Mahjoub's right to solicitor-client privilege and litigation privilege is aggravated by the fact that the Applicant's right to retain and communicate in private with his lawyers has already been systematically violated by CSIS, since 1996, during the investigation by the application of OPS-211 and during the Court proceedings;"

[3] In essence, Mr. Mahjoub argues that there has been a violation of his section 7 and section 8 *Charter* rights as a result of the Ministers taking possession of his documents and that the only appropriate remedy is a permanent stay of proceedings.

[4] In response, the Ministers argue that Mr. Mahjoub has not established that the materials at issue are privileged, or that the materials have not lost their privileged status by virtue of the privileged information now being in the public domain. They contend that, should the Court find that privilege is established, they have rebutted the legal presumption. They argue that there is no risk that the information will be used to prejudice Mr. Mahjoub should the proceedings continue because no one from the Ministers' team read Mr. Mahjoub's documents. Finally, the Ministers argue that, were the Court to find that they have not rebutted the legal presumption of risk, a stay of proceedings is not the appropriate remedy in the circumstances.

FACTS

[5] The following events give rise to this motion.

[6] On July 14, 2011, the public portion of the reasonableness hearing in Toronto was adjourned. At this time, there remained four witnesses to be called. Although no dates for their testimony had been set, the reasonableness hearing was to resume in late August or early September 2011.

[7] On July 15, 2011, the Designated Registry Officer advised the parties to remove their materials from the Courtroom with the following email:

> Just to let you all know that while Courtroom 6-D needs to be cleaned out by the end of next week you can continue to store any material in your respective breakout rooms until we reconvene in late August early September here in Toronto.

[8] On the same day, the Ministers advised the Designated Registry Officer by email that two legal assistants would arrive at the Court at approximately 2.00 p.m. to assess the situation and to possibly take some or all of the materials back to the DOJ. The Designated Registry Officer replied advising that the Commissionaires on the 6th floor would be expecting them.

[9] The Ministers' legal assistants Ms. Kamal Dean and Ms. Irena Krakowksa attended the Court on that afternoon. A Commissionaire unlocked Courtroom 6-D as well as the adjacent breakout rooms 6013 (the Ministers' breakout room) and 6011 (Mr. Mahjoub's breakout room).

[10] In her affidavit, Ms. Dean claims that the Commissionaire asked them to move the documents from breakout room 6013 to breakout room 6011, as the former was going to be used before the resumption of Mr. Mahjoub's case. A report by the Registry requested by the Court and provided to the parties revealed that the Commissionaire denies having given such instructions. Ultimately, the parties have not disputed the findings of the report nor have they pursued this issue.

[11] The evidence establishes that the Ministers' legal assistants moved documents belonging to the Ministers from the courtroom and the Ministers' breakout room into Mr. Mahjoub's breakout room. Loose papers on the Ministers' counsel table in the courtroom and on the tables in the breakout rooms were packed in several boxes.

[12] Upon their return to the DOJ on the same day, July 15, 2011, Ms. Dean sent an email to the Ministers' litigation team working on the Mahjoub file (Mahjoub team) advising that she and Ms. Krakowska had "emptied courtroom 6D & prep room 6013 [and] moved everything to prep room 6011 for now." The record does not establish who was on the Mahjoub team but the team includes legal counsel, legal assistants and a paralegal. The record also indicates that no one from the Mahjoub team responded to the email.

[13] On July 19, 2011, the Mahjoub team met and discussed the retrieval and organization of the materials still at the courthouse. It was decided that Ms. Dean would arrange for the return of the materials and Ms. Jill Schneider, a paralegal at the DOJ, would organize the materials once they arrived.

[14] On July 20, 2011, Ms. Dean returned to the Court with legal assistants for the Ministers Larissa Goodyear, Janet Lewicki and Genevieve Rondeau. They collected some of the boxes that were now in Mr. Mahjoub's breakout room and brought them to office 916 at the DOJ in Toronto. Ms. Dean and Ms. Goodyear collected the remainder of the boxes on July 21, 2011. Ms. Dean attests that all of the documents were packed in boxes, which remained closed during transportation.

Also on July 21, 2011, Ms. Dean emailed the Mahjoub team advising that all of the boxes from the Court were now in office 916 at the DOJ.

[15] During the mornings of July 25 to 27, 2011, Ms. Dean assisted Ms. Schneider in sorting documents in boxes stored in office 916. Ms. Dean helped Ms. Schneider verify that the boxes contained a complete copy of each exhibit, as established by an exhibit list. Ms. Dean only looked at the title page and back page of the documents and did not notice any handwritten annotations. Ms. Dean had no further involvement with the materials at issue after July 27, 2011. Ms. Schneider worked alone in office 916 for one to two hours in each of the afternoons of July 25-27, 2011.

[16] On August 8, 2011, Ms. Schneider met with Mr. Daniel Engel, counsel employed by DOJ and a member of the Mahjoub team, for approximately 10 minutes in office 916 for further instructions as to which materials needed to return to the Court for the eventual resumption of the hearing. Together, they opened two or three boxes and "flipped through the material." "It became immediately clear that the contents of the boxes needed to be organized into categories" before further review could take place. Upon giving these instructions to Ms. Schneider, Mr. Engel left office 916 and had no further contact with the materials at issue. He does not recall having seen any materials belonging to Mr. Mahjoub.

[17] During the week of August 8, 2011, Ms. Schneider proceeded with the sorting and organization of the materials into categories on her own. Motion records filed by Mr. Mahjoub were filed in boxes labeled "Mahjoub Documents"; motion records filed by the Ministers were filed in boxes labeled "Ministers' Documents"; exhibits filed in the open court were filed in boxes labeled

"Exhibits" according to the exhibit list kept by the Court. Other boxes were labeled "Court orders and directions", "SIRS", and "Transcripts and summaries".

[18] In organizing the materials, Ms. Schneider looked at the title and the back page of documents to identify them. She did not read or look at the content of the documents and does not recall seeing handwritten notations on the documents that she looked at. She had received instruction from Ministers' counsel to ensure that there be three copies of the exhibits – one to return to the Court, one to remain in the DOJ's offices and a third copy to be kept by the assistant to the lead counsel on the file. To that end, Ms. Schneider photocopied certain exhibits. In her estimation, she photocopied less than 100 pages. She also sent a small number of lengthy documents to be photocopied by Legal Print & Copy Inc., a bonded photocopying service used by the DOJ. The receipt the Ministers believe to be related to the documents sent to Legal Print & Copy Inc. by Ms. Schneider indicates that 1,151 letter sized pages and 2 legal sized pages were photocopied.

[19] Ms. Schneider removed duplicates of documents and placed them on the floor in office 916. She also set aside eight boxes that contained "miscellaneous documents" (correspondence, handwritten notes and case law) for which she required further instructions as to their organization.

[20] On August 12, 2011, Ms. Schneider sent an email to the Mahjoub team explaining how she had organized the materials and asking whether a counsel could "go into office 916 during [her] vacation the following week to review the eight boxes of miscellaneous documents and advise how these documents were to be organized."

[21] Upon Ms. Schneider's return to work on August 22, 2011, she noticed that the eight boxes of miscellaneous documents had not been touched during her absence. She sent another email to the Ministers' team requesting assistance from counsel. Ms. Sharon Stewart Guthrie, counsel of record and member of the Mahjoub team, responded and met Ms. Schneider in office 916 for approximately 10-15 minutes to provide further instructions on organizing the eight boxes containing miscellaneous documents that had been set aside. Ms. Stewart Guthrie opened three of the boxes. In the first box, she saw file folders with French handwritten labels, which she did not open. She then closed the box. In the second box, she saw the first pages of publicly available reports before closing the box. In the third box, she saw printed copies of jurisprudence referred to by both parties during the proceedings, a printed copy of an email between two members of the Ministers' litigation team, and a single handwritten page in handwriting she did not recognize with the name "Tyndale" on the left of the page. As she believed that no one from the Ministers' litigation team would refer to lead counsel Mr. David Tyndale as "Tyndale", she believed that some of the materials in those boxes did not belong to the Mahjoub team. Ms. Stewart Guthrie attests she did not read anything else on the page other than the name "Tyndale". She closed the third box.

[22] After leaving office 916, Ms. Stewart Guthrie spoke with Ms. Nimanthika Kaneira, counsel employed by DOJ and member of the Mahjoub team, as well as with Ms. Dean. Ms. Stewart Guthrie then advised Mr. Tyndale, Senior Counsel of record for DOJ on the Mahjoub team, of the situation. Mr. Tyndale directed Ms. Stewart Guthrie to label and set aside those eight boxes "To be reviewed by Public counsel", and draft an email to Public Counsel advising them of the situation and proposing that the parties meet to separate the materials.

[23] Ms. Schneider continued to work in office 916 and to organize the material contained in the boxes that had not been set aside for most of each day for the remainder of the week of August 22, 2011.

[24] On August 23, 2011, Mr. Tyndale sent the following email to Public Counsel:

> In our review of the material that was returned to our office from the courtroom and our breakout room after we last adjourned, it came to our attention yesterday that some boxes may contain some documents that belong to you. We immediately put those boxes aside and have not read or reviewed these documents. In order to ensure that your materials are returned to you, I suggest we meet at our offices to review (separately, but in the same room) the contents of these boxes. Please let me know if this suggestion is acceptable to you and if so, when one (or more) of you might be available to review the materials.

[25] On August 30, 2011, Ms. Teresa Martins, an administration officer with the DOJ in Toronto, accompanied two movers to office 916 with boxes belonging to Ms. Amy Lambiris, a DOJ employee who had been on maternity leave and was to use that office upon her return. To make room for the boxes, the movers moved some stacks of documents from the floor to the desk. Ms. Martins did not read any of the documents in office 916 and did not see the movers read any of the documents.

[26] On September 1, 2011, Public Counsel Ms. Johanne Doyon and Ms. Salma El-Khodari, an assistant in the law office of Public Counsel Mr. Yavar Hameed, attended office 916 at the DOJ in Toronto. Ms. Jocelyn Espejo-Clarke, counsel and member of the Mahjoub team, and Ms. Kaneira accompanied them to office 916.

[27] At the time, Ms. El-Khodary estimated that office 916 contained approximately:

a. 24 boxes of documents that were marked as the Ministers' boxes against one wall;
b. a dozen additional boxes along the other wall;
c. 5 boxes on a table in front of the window;
d. 8 boxes of material in a corner that were marked "to be reviewed by counsel";
e. piles of unboxed and loose documents on a table in the middle of the room.

[28] It has now been established that once the loose documents were placed in boxes, office 916 contained 60 boxes of materials, in addition to the 15 boxes brought by the movers belonging to Ms. Lambiris who had been on maternity leave.

[29] Ms. El-Khodari and Ms. Doyon noticed that some of the loose documents on the table in office 916 appeared to belong to Public Counsel. Ms. Espejo-Clarke also noticed that some of those documents appeared to belong to the Ministers.

[30] Upon realizing that some of the documents on the table were co-mingled and that the co-mingling went beyond the 8 boxes that had been set aside, counsel agreed to seal the office. Ms. Espejo-Clarke provided an undertaking that no one would enter the office.

[31] All keys for office 916, except for those of the DOJ security office and of the landlord, were collected and put in the safe of the Regional Director General of the Ontario Regional Office of the DOJ. The security office and the landlord were instructed that no one could enter the room until further notice. The Ministers claim that no one has entered office 916 after September 1, 2011, until the boxes were eventually ordered returned to the courthouse by Prothonotary Aalto.

[32] Ms. Rhonda Marquis, Deputy Regional Director and Senior Counsel in the Immigration Law Division of the DOJ in Toronto, states in her affidavit:

> Following the securing of office 916, I communicated with every member of the Mahjoub team including the two legal assistants who had originally boxed the materials for their return to our office and to the paralegal who had the most access to the materials. All members of the litigation team, both legal assistants and the paralegal have advised me that they did not review opposing counsel's materials.

[33] Ms. Marquis also attests:

> I have been advised by CSIS counsel, and do verily believe, that they have not entered office 916 at any time since July 15, 2011. I have also been advised and verily believe that no CBSA personnel assigned to the Mahjoub mater [sic] have entered office 916 at any time since July 15, 2011.

[34] On September 2, 2011, Mr. Tyndale emailed Public Counsel to advise them that the amount of Public Counsel's material from the breakout rooms delivered to DOJ's office was more than originally thought.

[35] On September 8, 2011, Mr. Tyndale emailed Public Counsel explaining how the events leading to the co-mingling of the documents unfolded. On the same day, Mr. Tyndale sent a similar letter to the Court.

[36] All members of the Mahjoub team who entered office 916 prior to it being sealed have been removed or temporarily removed from the Ministers' litigation team pending a final determination of this motion. Ethical walls were put in place to ensure that the members of the litigation team who were removed received no further information on the litigation, as well as to ensure that the removed members would not discuss what they saw, if anything, of Mr. Mahjoub's documents,

except for purposes of providing affidavits or clarification to counsel representing the Ministers on this motion. The record does not indicate the number of individuals belonging to the Mahjoub team nor does it identify its members. The record also does not indicate when members of the team were removed or when the ethical walls were put in place. It appears from the record this would have occurred after September 1, 2011.

[37] Mr. Mahjoub served and filed his motion record for a permanent stay on September 20, 2011. The Ministers' responding record was served and filed on September 23, 2011, accompanied with a motion to strike portions of certain affidavits. Mr. Mahjoub filed his reply on September 27, 2011. The parties were heard on the motions on October 3, 2011, in Toronto, and the Court reserved its judgment.

[38] On October 4, 2011, the Court ordered that to determine the proper remedy, if any, that may be appropriate in the circumstances, it was necessary to have the documents separated and returned to the respective parties for the purpose of affording them an opportunity to make submissions on the nature and extent of the alleged prejudice. The order is annexed to these reasons as Schedule A.

[39] Mr. Mahjoub's appeal to the Federal Court of Appeal of the October 4, 2011 Order of the Federal Court was dismissed on October 24, 2011 (2011 FCA 294). His subsequent motion to the Federal Court of Appeal for a stay of the October 4, 2011 Order pending application for leave to appeal to the Supreme Court of Canada was dismissed by Madam Justice Gauthier on November 21, 2011 (2011 FCA 322).

[40] Pursuant to the October 4, 2011 Order, Prothonotary Aalto oversaw the development and execution of the separation process, which began with an initial case management conference on October 5, 2011. A full description of the process can be found in the Prothonotary's report filed with the Court on February 10, 2012, which is annexed to these reasons as Schedule B (Aalto Report). For convenience, I summarize the process and the main findings of Prothonotary Aalto's report below.

Summary of Prothonotary Aalto's report

[41] With input from the parties, Prothonotary Aalto developed a separation protocol that ensured the integrity of the process, and included preserving the chain of continuity of the documents. Delegates designated by the parties who signed undertakings not to divulge any solicitor-client information to which they might be exposed during the process undertook the actual separation of the documents.

[42] The documents were separated into five categories: Neutral documents, Mahjoub documents, Ministers' documents, Contentious documents, Solicitor-client intercept motion documents. Neutral documents are public documents such as motion records and affidavits that have no indicia of ownership, such as original initials or handwriting. Contentious documents are documents that have highlighting, tabs, stickies, underlining or markings but whose ownership could not be determined. As a result of the separation process, there were 32 boxes of Neutral documents; 12 boxes of Ministers' documents; 12 boxes of Mahjoub documents; and 3 boxes containing 66 contentious documents. While Mr. Mahjoub concedes that these contentious documents will not affect his fair trial rights, he contends, nonetheless, that a lesser prejudice results from an incomplete separation process.

[43] The documents were moved from the DOJ to the courthouse on November 10, 2011, and the separation process commenced shortly thereafter. Following a November 24, 2011 case management conference, the Court ordered that the arguments relating to the alleged prejudice be heard on January 9 and 10, 2012. At case management conferences on January 3, January 19, and February 13, 2012, the parties informed the Court that the process was taking longer than anticipated and scheduled hearings dates were progressively pushed back. On January 18, 2012, Mr. Mahjoub started the review of his documents with the view of preparing descriptions as contemplated by the October 4, 2011 Order:

> The parties may make further argument on the nature and extent of any alleged prejudice before the designated judge. To that end, Mr. Mahjoub may prepare a description of any of the returned documents relied upon to demonstrate that prejudice, which description shall not disclose any substantive information that would be subject to solicitor-client or litigation privilege.

[44] At the February 20, 2012 case management conference, Public Counsel informed the Court that they estimated needing an additional four to five weeks to review the documents, and prepare descriptions and arguments.

[45] Consequently, the Court adjourned the hearing until April 10-12, 2012, affording the parties an additional 6 weeks to prepare. These dates were ultimately changed to April 23 and 24, 2012, given a scheduling conflict on the part of Ministers' counsel.

[46] In preparation for the hearing, Mr. Mahjoub prepared charts containing the descriptions for Prothonotary Aalto's approval of the documents he would rely upon to show prejudice. The

descriptions were then redacted to ensure that the designated judge would not have access to any privileged information.

[47] In addition to the descriptions, Mr. Mahjoub developed the following categories to describe the nature of the alleged prejudice in the chart:

> "1. Strategy relating to (a) theory of the case (b) implementation of the theory (such as challenging evidence, presentation of new evidence or argument);
> 2. Tactics;
> 3. Questions (a) whether applicable to witness; (b) content of questions to be asked; (c) content of questions challenging evidence;
> 4. Assessment of the Evidence (a) value (b) knowledge (c) credibility;
> 5. Confidential information, which may not otherwise fit into 1 to 4 and 6;
> 6. Overview in terms of approach, knowledge and/or thought process of public counsel revealed, a) revealing approach and knowledge of public counsel by virtue of certain elements b) reveals though process in general terms."

[48] Mr. Mahjoub also developed the following scale to codify the extent of the alleged prejudice for documents described in the Chart:

> Code 1 – low privileged documents, difficult to articulate prejudice;
> Code 2 – moderate privileged documents, generally public documents with highlighting, side bar, underlining or writing where the impact is functionally no different than a side bar or highlight;
> Code 3 – high: privileged documents, created by Mr. Mahjoub or not disclosed in public, that could give or give an advantage to other side for cross-examination or submissions;
> Code 4 – extreme: privileged documents created by Mr. Mahjoub or not disclosed in public, highly advantageous to other side;
> Code 5 – highest prejudice: solicitor-client or litigation privileged communications that undermines Mr. Mahjoub's case or that could affect the outcome of the case. [Examples cited by Mr. Mahjoub are omitted.]

[49] As a result of the above exercise, Prothonotary Aalto was presented with charts containing descriptions of the documents or parts of documents, which were individually categorized in one or more of the above noted categories and assigned a code of prejudice, 1 of 5, as described above. Prothonotary Aalto was then presented with a version of the charts where the privileged information

contained in the descriptions had been redacted. These redacted charts were filed with the Court. See Schedule C as an example.

[50] Prothonotary Aalto approved the descriptions found in the charts and found that the codes and the descriptions were "reasonable." He wrote at page 8 of the addendum to his report that:

> [t]he coding is a subjective exercise by public counsel based on their approaches and strategy in conducting the case. Public counsel articulated to the Court why a particular code was selected for a particular document and such was based on counsel's assessment of how the document would be used in the proceedings. The Court's acceptance of a particular code is not final and binding on the designated judge. They are also not a finding of actual or any prejudice. Such findings are for the designated judge…It may be that the designated judge will require access to these [unredacted] charts in order to finally determine the nature and extent of any prejudice.

[51] Prothonotary Aalto also wrote at page 29 of his report that "[t]he types of documents that were found to belong to Mr. Mahjoub included … solicitor work product, solicitor-client privileged material, and litigation privileged material."

[52] Mr. Mahjoub alleges that all of his documents were covered by solicitor-client and/or litigation privilege. He contends that approximately one third of the documents from the Mahjoub boxes have been included in the charts. He contends that all of the documents listed in the charts are prejudicial, regardless of their coding. He lists over fifty discrete pieces of information categorized as Code 5, which is the most prejudicial category.

[53] The Court heard the parties' submissions on April 23 and 24, 2012, on the nature and extent of the alleged prejudice and appropriate remedy, if any, in the circumstances.

Preliminary Issue: Admissibility of affidavit of Martha Lori Hendriks

[54] By Order dated January 31, 2012, the Court allowed Mr. Mahjoub to file any additional affidavit evidence prior to the hearing of the final submissions on the nature and extent of the alleged prejudice. It also allowed the Ministers to file responding affidavits. The Ministers filed three affidavits including the affidavit of Martha Lori Hendriks. Mr. Mahjoub objects to the admissibility of paragraph 8 of the Hendriks affidavit on the basis that it does not flow from the opening and review of the boxes. The contested paragraph reads as follows:

> In addition, on my instructions, on September 7, 2011, Ms. Marquis sent an email to all ILD [Immigration Law Division] staff (counsel and support staff), inquiring whether anyone had entered office 916 since July 21, 2011, July 21, 2011, is the date on which the documents were transported from the Court and placed in office 916 which was vacant at the time. I have been advised by Ms. Marquis, and verily believe, that there were no additional persons who responded as having entered office 916.

[55] Mr. Mahjoub argues that it is implicit in the Court's January 31, 2012 Order that any additional evidence filed by Mr. Mahjoub must relate to the nature and extent of the alleged prejudice, as provided by the October 4, 2011 Order. Consequently, Mr. Mahjoub argues that the Ministers' corresponding responding affidavits must in turn respond to Mr. Mahjoub's additional affidavits. It is argued that paragraph 8 of the Hendriks' affidavit does not.

[56] Mr. Mahjoub further contends that allowing the affidavit into evidence would allow the Ministers to split their case. He submits that it would be the equivalent of allowing the Ministers to reopen its case after having pointed out the gaps in their position and would be contrary to section 7 of the *Charter* pursuant to *R. v. P. (M.B.),* [1994] 1 S.C.R. 555, 113 D.L.R. (4th) 461.

[57] The Ministers acknowledge that paragraph 8 of the Hendriks' affidavit goes some way towards addressing an evidentiary gap relating to who had access to Mr. Mahjoub's documents at the DOJ in Toronto. The Ministers acknowledged the presence of the gap at the October 3, 2011 hearing. However, they argue that that gap was not gleaned from Mr. Mahjoub's argument, but was rather observed and admitted to by the Ministers. Consequently, they contend they are not attempting to reopen the litigation as alleged by Mr. Mahjoub. The Ministers also acknowledge that the information contained in paragraph 8 of the Hendriks affidavit could have been adduced before the October 3, 2011 hearing. Nevertheless, the Ministers argue that the affidavit, including paragraph 8, merely attempts to provide a complete record for the benefit of the Court. They contend that the contested paragraph speaks to the presence and efficacy of their ethical walls, and should be received by the Court.

[58] The October 4, 2011 and January 31, 2011 Orders only allowed the filing of additional affidavit evidence in relation to the separation process and the alleged prejudice, if any. The information in paragraph 8 of the Hendriks affidavit does not result from the process of separating the documents. Rather it seeks to address a gap in the Ministers' evidence that could and should have been dealt with earlier. In my view, it would be inappropriate to allow paragraph 8 into evidence. In the result, paragraph 8 of the Hendriks affidavit will be disregarded.

ISSUE

[59] Has there been a breach of Mr. Mahjoub's *Charter* rights that warrants a permanent stay of proceedings?

APPLICABLE LAW

[60] Mr. Mahjoub claims a breach of his section 7 and section 8 rights and seeks a remedy under section 24(1) of the *Charter*. These sections and subsection are reproduced below:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
8. Everyone has the right to be secure against unreasonable search or seizure.	**8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Section 8

[61] For a search and seizure to fall under the protection of the *Charter*, there must be a reasonable expectation of privacy in the place searched, the thing seized, or both (*R. v. Evans*, [1996] 1 S.C.R. 8, 131 D.L.R. (4th) 654). If such an expectation exists, the search or seizure will be considered reasonable if it is authorized by law, if the law that authorizes the search or seizure is itself reasonable, and if the manner in which the search or seizure is conducted is reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508).

Section 7

[62] There is no dispute that Mr. Mahjoub's section 7 rights are engaged. Mr. Mahjoub claims a breach of his section 7 rights under two separate categories: (i) a violation of his solicitor-client privilege and (ii) an abuse of process.

(i) Violation of solicitor-client privilege

[63] The Supreme Court, in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837, 105 D.L.R. (3d) 745, outlines the required criteria to establish solicitor-client privilege:

(i) a communication between solicitor and client;

(ii) which entails the seeking or giving of legal advice; and

(iii) which is intended to be confidential by the parties.

[64] Solicitor-client privilege has attained the status of a general principle of substantive law in Canada:

> Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences. (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 49, [2002] 3 S.C.R .209 [*Lavallee*]; see also *Maranda v. Richer,* 2003 SCC 67 at para. 12, [2003] 3 S.C.R. 193).
> [My emphasis]

[65] The Supreme Court has recognized that solicitor-client privilege is "fundamental to the justice system," (*R. v. McClure*, 2001 SCC 14 at para. 2, [2001] 1 S.C.R. 445), and that the courts are compelled to "adopt stringent norms to ensure its protection" (*Lavallee*, above at para. 36). A

violation of the privilege also infringes a named person's section 7 rights in the context of a security certificate proceeding (*Jaballah (Re)*, 2010 FC 1084 at para. 48 [*Jaballah*]).

[66] Solicitor-client privilege should be distinguished from litigation privilege, which serves to ensure that the adversarial process is respected. Litigation privilege attaches to documents created for the dominant purpose of litigation (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] S.C.R. 319).

(ii) Abuse of process

[67] The abuse of process doctrine has largely been subsumed into section 7 and amounts to "conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system [which] is also an affront of constitutional magnitude to the rights of the individual accused" (*R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 63, 130 D.L.R. (4th) 235 [*O'Connor*]).

[68] In this instance, the allegation of an abuse of process is separate from the alleged breach of section 7 resulting from the violation of solicitor-client privilege in that it focuses on the right to a fair trial affected by the Crown's conduct, rather than the allegation that privilege has been violated. The propriety of the conduct and intention "are not necessarily relevant to whether or not the accused's right to a fair trial is infringed" (*O'Connor*, above at para. 74). There is also a small residual category of conduct within the abuse of process analysis caught by section 7 of the *Charter* in which the individual's rights to a fair trial are not implicated. This residual category "addresses

the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*O'Connor*, above at para. 73; *R. v. Regan*, 2002 SCC 12 at para. 55, [2002] 1 S.C.R. 297 [*Regan*]; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 89, 151 D.L.R. (4th) 119 [*Tobiass*]).

Do the alleged Charter breaches require the existence of privilege?

[69] Aside from the residual category of an abuse of process, Mr. Mahjoub's alleged *Charter* breaches require that privilege in the documents exists. To establish a reasonable expectation of privacy to show that his section 8 rights have been violated, he must demonstrate that his documents were protected by solicitor-client privilege and/or litigation privilege. Similarly, solicitor-client privilege and/or litigation privilege must also be established in order to maintain a section 7 violation.

[70] Once the existence of privilege is established, there is a legal presumption that the privileged information will be used to the prejudice of the opposing party. I will now turn to the law on this issue.

Rebutting the risk of prejudice

[71] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249 [*MacDonald Estate* cited to S.C.R.], Justice Sopinka, writing for the majority of the Supreme Court, established the test to apply to disqualify counsel in cases where counsel allegedly has confidential information belonging to the other party:

(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?

(2) Is there a risk that it will be used to the prejudice of the client?

[72] This two-step test was reaffirmed by a unanimous Supreme Court decision in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 [*Celanese*]. The Court applied the test in the context of an *Anton Pillar* order during which the searching party had come into the possession and reviewed privileged emails. Justice Binnie, on behalf of the unanimous Court, held that once possession of privileged information was established, the receiving party bore the onus of showing there is no real risk such confidences will be used to the prejudice of the moving party. The Court also held that for the presumption to apply, the initial onus was on the moving party to establish that the receiving party was in possession of privileged information.

[73] The presumption of prejudice can be rebutted, "on the basis of clear and convincing evidence" by showing that "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" to prejudice the moving party (*MacDonald Estate*, above at 1260 and 1262; see also *Celanese*, above at para. 42).

[74] Even though *MacDonald Estate* and *Celanese*, above, specifically address motions to remove solicitors of record, Justice Binnie in *Celanese*, held that:

> The relevant elements of the *MacDonald Estate* analysis do not depend on a pre-existing solicitor-client relationship. The gravamen of the problem here is the possession by opposing solicitors of relevant and confidential information attributable to a solicitor-client relationship to which they have no claim of right whatsoever. (para. 46)

[75] This Court in *Jaballah*, above, held that the principles in *Celanese* were not restricted to the context of removing counsel for having in their possession privileged information belonging to the opposing party (paras. 58-68). Here, both parties accept that the principles in *Celanese* are applicable in the circumstances. Accordingly, if a breach of solicitor-client or litigation privilege is established and the risk of prejudice is not rebutted, it is open for the Court to grant an appropriate remedy, which may include a permanent stay of proceedings (*R. v. Bruce Power Inc.*, 2009 ONCA 573, 98 O.R. (3d) 272).

Determining the appropriate remedy

[76] A permanent stay of proceedings is a drastic remedy to be awarded only in the "clearest of cases" (*O'Connor*, above at para. 68). As explained by Justice Lebel writing for the majority in *Regan*, above at paragraphs 54-56, it will only be appropriate when two criteria are met:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

[77] Where uncertainty remains about whether the abuse of process is sufficient to warrant a stay of proceedings, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits (*Tobiass*, above at para. 92; *Regan*, above at para. 225).

[78] The courts have also engaged in the balancing exercise in cases falling within the residual category where the fairness of the trial is not in question, but rather where the act of going forward would put the administration of justice into disrepute. For example, the Ontario Court of Appeal in *R. v. Zarinchang*, 2010 ONCA 286 at paragraphs 58-61, 99 O.R. (3d) 721, wrote:

> Where the residual category is engaged, a court will generally find it necessary to perform the balancing exercise referred to in the third criterion. When a stay is sought for a case on the basis of the residual category, there will not be a concern about continuing prejudice to the applicant by proceeding with the prosecution. Rather, the concern is for the integrity of the justice system.
>
> When the problem giving rise to the stay application is systemic in nature, the reason a stay is ordered is to address the prejudice to the justice system from allowing the prosecution to proceed at the same time as the systemic problem, to which the accused was subjected, continues. In effect, a stay of the charge against an accused in the residual category of cases is the price the system pays to protect its integrity.
>
> However, the "residual category" is not an opened-ended means for courts to address ongoing systemic problems. In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. It seems to us that a court will be required to look at the particulars of the case, the circumstances of the accused, the nature of the charges he or she faces, the interest of the victim and the broader interest of the community in having the particular charges disposed of on the merits.
>
> Thus, in our view, a strong case can be made that courts should engage in the balancing exercise set out in the third criterion in most cases coming within the residual category. [My emphasis]

[79] Where the abuse of process falls within the residual category, in “exceptional” and “relatively rare cases” a stay of proceeding will be granted where past conduct is so egregious that

going forward would be offensive to society's sense of justice. At paragraph 55 of *Regan*, above, the Supreme Court of Canada wrote:

> As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive." (*Tobiass* at para. 91) [My emphasis]

[80] A permanent stay should be assessed against a complete factual record concerning the prejudice. In *R. v. La*, [1997] 2 S.C.R. 680 at paragraph 27, 148 D.L.R. (4th) 608, the Supreme Court wrote that:

> [t]his is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit.

[81] Where a permanent stay of proceedings is not an appropriate remedy, the Supreme Court in *Celanese*, above at paragraph 59, suggested the following six non-exhaustive factors to be considered in determining whether solicitors should be removed:

(1) how the documents came into the possession of the plaintiff or its counsel;

(2) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;

(3) the extent of review made of the privileged material;

(4) the contents of the solicitor-client communications and the degree to which they are prejudicial;

(5) the stage of the litigation;

(6) the potential effectiveness of a firewall or other precautionary steps to avoid mischief.

[82] If the risk of prejudice has not been rebutted and a remedy short of removing the solicitors will address the violation of privilege, it should be considered (*Celanese*, above at para. 56).

ANALYSIS

[83] I propose to address the issue raised in this motion by answering the following questions:

(1) Has Mr. Mahjoub established that confidential information attributable to a solicitor-client relationship or to litigation privilege was in the possession of the Ministers?

(2) If so, have the Ministers rebutted the presumption that there is a risk that privileged material belonging to Mr. Mahjoub and held by the Ministers will be used to the prejudice of Mr. Mahjoub should the proceedings continue?

(3) If the presumption is not rebutted, does the gravity of the breach of Mr. Mahjoub's *Charter* rights warrant a stay of proceedings or a lesser remedy?

(4) Does the conduct of the Ministers connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process? If so, what is the appropriate remedy?

(1) Has Mr. Mahjoub established that confidential information attributable to a solicitor-client relationship or to litigation privilege is in the possession of the Ministers?

[84] In *Celanese*, above, the Supreme Court adopted its prior jurisprudence in *MacDonald Estate*, where it held that in circumstances where the opposing firm of solicitors is shown to have received

> …'confidential information attributable to a solicitor and client relationship relevant to the matter at hand' (p. 1260), the court will infer 'that lawyers who work together share confidences' (p. 1262) and that this will result in a *risk* that such confidences will be used to the prejudice of the client, unless the receiving solicitors can show 'that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur' (p. 1260). (at para. 42)

[85] The affidavit evidence filed on behalf of Mr. Mahjoub attests that the materials at issue consist of the following:

- Pleadings/procedures annotated by Public Counsel and by Mr. Mahjoub;
- Handwritten and/or computerized notes on legal strategy and other privileged information by Public Counsel and by Mr. Mahjoub;
- Public Counsel's preparation of cross-examinations of past and future witnesses;
- All exhibits with handwritten annotations, underlining and marginal notes.

[86] The affidavits filed in support of Mr. Mahjoub's motion also attest more specifically that:

- "one folder had [the handwriting of an assistant working for Mr. Mahjoub's counsel] on it" and another document "contained Me Hameed's [counsel for Mr. Mahjoub]

initials and a piece of paper stuck to the document with Hameed's handwritten notes/comments containing visible confidential information."

- "Many of public counsel's documents in the break-out room contained, on their cover page, post-it notes written by [counsel for Mr. Mahjoub] and by Mr. Mahjoub that could easily be read by any person who looks at the document."
- Documents in Public Counsel's break-out room "contained strategic information sensitive to the preparation of Mr. Mahjoub's case."
- "[M]ost of the documents on the table on their face belonged to public counsel including, among others: public counsel's notes, public counsel's marginal notes, underlining, annotations and other information added to most if not all exhibits, transcripts and other materials belonging to public counsel, Mr. Mahjoub's notes on exhibits, public counsel's cross-examination preparation documents, etc."

[87] Mr. Mahjoub contends that the above evidence establishes that some of the material in the possession of the Ministers is privileged.

[88] The Ministers "do not dispute that some of the documents in [their] possession may contain privileged information" but contend that Mr. Mahjoub's evidence "lacks the sufficient detail or the identification of specific documents as required at law to discharge their evidentiary burden." The Ministers argue that affidavits supporting the existence of privilege must establish a sufficient factual basis and be construed strictly. They also submitted at the October 3, 2011 hearing that it may be appropriate for the Court to review the materials to determine whether privilege attaches to any of the documents. Finally, the Ministers contend that it is necessary for Mr. Mahjoub to establish privilege over every document.

[89] The jurisprudence teaches that there is

> no onus on the moving party to adduce any further evidence as to the nature of the confidential information beyond that which was needed to establish that the receiving lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at hand. (*Celanese*, above at para. 42)

[90] There is no dispute that the Ministers took documents from Mr. Mahjoub's breakout room, situated in immediate proximity to the courtroom, after an adjournment late in the proceedings. The Ministers acknowledge that some of the materials at issue "may" be privileged.

[91] There is also no dispute that the materials at issue belonged to Mr. Mahjoub, were stored in a breakout room assigned to Mr. Mahjoub's litigation team and were documents used by Mr. Mahjoub in the conduct of the litigation. Mr. Hameed's affidavit confirms that some of the documents contained handwritten and/or computerized notes on legal strategy and other privileged information written by Public Counsel and by Mr. Mahjoub.

[92] I accept Mr. Mahjoub's submission made at the October 3, 2011 hearing that it would have been difficult to adduce more information on the nature or content of his documents since the documents were not in his possession at the time he filed his record.

[93] Further, the report subsequently filed by Prothonotary Aalto following the separation process mandated by the Court's October 4, 2012 Order, confirms that materials seized included "solicitor work product, solicitor-client privileged material, and litigation privileged material" belonging to Mr. Mahjoub (Aalto Report at p. 29).

[94] The Prothonotary is well-suited to make such determinations. As a motions judge, he is routinely tasked with determining whether solicitor-client privilege attaches to contested documents during the disclosure stage of a proceeding. Such decisions determine the content of the record that is before the hearing judge.

[95] I am therefore satisfied that Mr. Mahjoub has met his onus and has established that the Ministers' counsel had possession of confidential information attributable to a solicitor-client relationship which was relevant to the matter at hand. It follows from the above-cited jurisprudence that the Ministers now bear the onus of rebutting the legal presumption that there is a risk that such confidences will be used to the prejudice of Mr. Mahjoub.

(2) Have the Ministers rebutted the presumption that there is a risk that privileged material belonging to Mr. Mahjoub and held by the Ministers will be used to the prejudice of Mr. Mahjoub should the proceedings continue?

[96] The Ministers have the onus of demonstrating on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41), with "clear and convincing evidence" (*McDonald Estate*, above at 1262; *Celanese*, above at para. 42) "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (*McDonald Estate*, above at 1260).

[97] Mr. Mahjoub argues that the seizure of the materials at issue by the Ministers was egregious and negligent. He maintains that no explanation is offered as to why certain members of the

Ministers' litigation team did not file affidavit evidence. Mr. Mahjoub further points to the fact that the Ministers admit that at least one counsel for the Ministers viewed contents of several boxes. As a result, he argues the Ministers are aware of the substance of some of his privileged information. Mr. Mahjoub argues that the Ministers' evidence fails to provide sufficient basis to rebut the legal presumption of risk of prejudice. He also contends the seizure is but one of several violations of solicitor-client privilege since 1996 and that the Court should consider these past violations as context when considering the alleged violation at issue.

[98] Regarding the latter argument advanced by Mr. Mahjoub, the Court is well aware of the record in the underlying proceedings relating to the alleged violations of Mr. Mahjoub's solicitor-client privilege. However, those allegations are disputed and have yet to be decided. Both parties agree that those issues are not to be decided on this motion. Consequently, such disputed allegations cannot be relied upon to decide the within motion.

[99] The Ministers contend that they have rebutted the presumption of risk of prejudice "because the documents in question were either not reviewed or reviewed only in a cursory fashion before the access to the documents was completely sealed."

[100] The taking and co-mingling of Mr. Mahjoub's documents with the Ministers' documents were the direct result of a serious lack of diligence by members of the Ministers' team in the conduct of the litigation. In particular, senior members of the team failed to give proper and clear direction to junior members and legal assistants. The seriousness of the possible consequences that flow from such negligent conduct on behalf of the Ministers cannot be overstated. At a minimum, the negligent actions of the Ministers' litigation team resulted in a further significant delay in

proceedings already plagued by numerous procedural delays. The Ministers alone bear responsibility for this delay. However, notwithstanding the seriousness of the failures of the Ministers' litigation team, I am satisfied that the mistakes made were not intentional or pre-mediated. On the evidence, I find no *mala fides* on the part of the Ministers or their litigation team.

[101] The Ministers first recognized that they were in possession of materials that belonged to Mr. Mahjoub when Ms. Stewart Guthrie attended office 916 on August 22, 2011, in response to the email sent on the same day by Ms. Schneider to review the contents of the miscellaneous boxes. Upon seeing a single handwritten page in one of the boxes, she saw the name "Tyndale" written on the left of the page in handwriting she did not recognize. It is at this point that Ms. Stewart Guthrie believed that some of the notes may not belong to the Ministers. She closed the box and spoke with Ms. Schneider, a paralegal, and Ms. Kaneira, DOJ counsel, both on the Mahjoub team, telling them she believed they had brought back materials from the Court that were not theirs.

[102] Mr. Tyndale, Senior Counsel on the Mahjoub team, upon being informed of the situation by Ms. Stewart Guthrie, instructed her to label the boxes containing Mr. Mahjoub's materials "To be reviewed by Public counsel" and to draft an email to Public Counsel advising them of the situation and proposing that the parties review the materials to separate them. This was done on the same day.

[103] While I accept that the eight miscellaneous boxes containing "correspondence, handwritten notes and case law" were set aside for review by Public Counsel and so labeled, Ms. Schneider continued to work in the office for the remainder of the week sorting documents in other boxes. No action was taken to seal and control access to the room until Public Counsel visited the office on September 1, 2011. Given that certain materials found in the eight miscellaneous boxes may have

contained privileged information, the Ministers should have moved to seal the eight boxes at that time.

[104] I also note that no actions were taken by anyone on the Mahjoub team on July 15, 2011, when Ms. Dean, upon her return from Court, had sent an email to the team advising its members that she and Ms. Krakowska, a legal assistant on the Mahjoub team, had "emptied courtroom 6D and prep room 6013 [Ministers' breakout room] and had moved all of the materials into prep room 6011 [Mr. Mahjoub's breakout room]." At this juncture, before any materials were moved to the DOJ, the Ministers' team should have known that there was a problem with members of the team accessing both breakout rooms and moving "all" of the materials in Mr. Mahjoub's breakout room. Immediate action at that time may have served to mitigate potential harm that, arguably, would flow from the taking and co-mingling of documents.

[105] Following Public Counsel's visit to office 916 on September 1, 2011, where the extent of the problem involving the co-mingling of the documents was made clear, the office was locked and a yellow caution tape was affixed to the entrance to the office. Keys of the office were secured at that point and the office has remained sealed until the materials were ordered back to the courthouse pursuant to the order of Prothonotary Aalto.

[106] All members of the Ministers' litigation team, including the paralegal with the most exposure to the documents, who had entered office 916 prior to it being sealed, have been temporarily removed from the team pending final determination of the motion.

[107] Further, certain ethical walls were set up to ensure that the removed members of the team would not discuss what they saw, if anything, of the documents in office 916 nor have access to the files relating to the case. The evidence of the Regional Director with the DOJ in Toronto, Martha Hendriks, indicates that the ethical walls put in place were rigidly applied and have been respected since their implementation.

[108] I find that the measures put in place by the Ministers after September 1, 2011, to secure office 916 and the materials were appropriate and effective in the circumstances.

[109] To rebut the legal presumption that there is a real risk that Mr. Mahjoub's privileged materials will be used to the prejudice of Mr. Mahjoub, the Ministers filed a number of affidavits in evidence. The Deputy Regional Director and Senior Counsel in the Immigration Law Division of the Ontario Regional Office of the DOJ, Ms. Rhonda Marquis, attests that she communicated with every member of the Mahjoub team, including the two legal assistants who had originally boxed the materials for their return to office 916**,** Ms. Dean and Ms. Krakowska, and the paralegal who had the most access to those materials, Ms. Schneider, and confirmed that the members of the Mahjoub team with whom she communicated had advised her that they did not review opposing counsel's materials. There is no evidence that Ms. Marquis entered office 916 or otherwise had access to the Mr. Mahjoub's documents. Ms. Marquis further attests that CSIS counsel advised her that they had not entered office 916 at any time since July 15, 2011. She was also advised that no CBSA personnel assigned to the Mahjoub matter have entered office 916 at any time since July 15, 2011.

[110] In addition to the affidavit of Ms. Marquis, the Ministers filed the affidavits of Kamal Dean, Jillian Schneider, Daniel Engel, Sharon Stewart Guthrie, Jocelyn Espejo-Clarke, Nimanthika

Kaneira, Maria Teresa Martins and Martha Lori Hendriks. For the reasons set earlier at paragraph 57 of these Reasons for Order, paragraph 8 of the Affidavit of Martha Lori Hendriks has been disregarded and is not part of the record.

[111] With the exception of Ms. Marquis and Ms. Hendriks, all of the other affiants who filed affidavits on behalf of the Ministers on this motion had access to Mr. Mahjoub's documents. They either accessed the breakout rooms and/or office 916 at the DOJ. I will now review the evidence of each of these affiants.

[112] Ms. Kamal Dean, a legal assistant with the Mahjoub team, was asked by another legal assistant, Ms. Irena Krakowska, on July 15, 2011, to accompany her to the Court to retrieve the Ministers' materials. Ms. Dean attests that she "did not read any of the documents that were in the courtroom or in the breakout rooms and was unaware that any of the documents belonged to counsel representing Mr. Mahjoub." Ms. Dean also attests that she had been advised by Ms. Krakowska and verily believes that "Irena did not read any of the documents in the courtroom or in the breakout rooms and that she was unaware that any of the documents belonged to counsel representing Mr. Mahjoub." Ms. Dean further attests that Ms. Krakowska advised her "she did not know that one of the breakout rooms was being used by counsel for Mr. Mahjoub." Ms. Dean helped Ms. Schneider organize the documents in office 916 on the mornings of July 25-27, 2011. Ms. Dean attests that she only looked at the title page and the back page of documents and did not notice any handwritten annotations.

[113] Ms. Jillian Schneider, a paralegal on the Mahjoub team, attests that she was asked to organize the materials once they arrived in office 916. She proceeded to do so on July 25-27, 2011.

She attests that on August 8, 2011, she sought the assistance of Mr. Engel to determine which documents needed to go back to Court for the resumption of the hearing. On the same day, in office 916, they "opened two or three boxes of the documents and flipped through the material." She states that it became clear that the contents of the boxes needed to be organized into categories before it could be decided what needed to be returned to Court. She states that she then proceeded on her own to organize the materials in categories of documents. When organizing the documents, she looked at the title of the document and occasionally at the back page. She attests that she "did not read or look at the content of the documents" and did not recall "having seen any handwritten notations on any of the documents." It is also noted that Ms. Schneider attests that in continuing to organize the documents in office 916, she never looked into the eight boxes after Ms. Stewart Guthrie labeled them for Public Counsel's review.

[114] Mr. Daniel Engel, counsel on the Ministers' litigation team, attests that he attended office 916 at the DOJ on August 8, 2011, to review the contents of the boxes of documents to determine what material needed to return to Court upon resumption of the hearing. He states that with Ms. Schneider, he opened two or three boxes and "flipped" through the material. He attests that he was in the office for approximately 10 minutes and has not returned to the office since. He attests that "[he] do[es] not recall having seen any of Public Counsel's materials while [he] flipped through the contents of the 2-3 boxes on August 8, 2011."

[115] Ms. Sharon Stewart Guthrie, DOJ counsel on the Mahjoub team, attended office 916 on August 22, 2011, in order to assist Ms. Schneider in identifying certain documents. Her affidavit evidence relating to her contact with the materials in office 916 can be summarized as follows:

1. She reviewed the labels on boxes that were put aside to go back to Court. She did not open these boxes.
2. She reviewed the labels on two or three boxes of exhibits in file folders. She opened the boxes and "quickly flipped through the file folders." She then closed the boxes and left them on the desk.
3. She opened three of the eight boxes containing miscellaneous documents that were stacked against the window. Inside the first, she noticed a file folder with French handwritten labels. She did not open the folder and closed the box and set it aside.
4. Upon opening the second box by the window, she noticed the first pages of publicly available reports, which she did not flip through. She closed the box and put it aside.
5. Upon opening the third box, she saw printed copies of jurisprudence that had been referred to in the proceeding by both parties. She did not flip through these. Deeper in this box she saw a copy of an email between two of the Ministers' litigation team members. She then saw a single page of handwriting she did not recognize with the name "Tyndale" written on the left of the page. She attests that "she did not read anything else on the page other then the name 'Tyndale'." She states that it is at this point she believed that the notes did not belong to her team. She closed the box and put it aside.
6. She was in office 916 for approximately 10 to 15 minutes.

[116] Ms. Nimanthika Kaneira, DOJ counsel on the Mahjoub team, attests that she was called to office 916 on September 1, 2011, by Ms. Espejo-Clarke who was in the office with Ms. Doyon and an assistant on Public Counsel's litigation team. She was asked if she knew how documents on the desk in office 916 appearing to belong to Public Counsel may have ended up there. Ms. Kaneira

speculated that this could be a repeat of what had occurred earlier in February when certain boxes belonging to the Ministers were moved to Mr. Mahjoub's breakout room. Ms. Kaneira saw stacks of documents on the desk most of which were blue covered and bound, such as motion records. She attests that she "did not review any of the documents and apart from remembering blue covers on some of the documents; [she] did not know anything about them."

[117] On August 30, 2011, Ms. Maria Teresa Martins, an administrative officer with the DOJ in Toronto, accompanied two movers to office 916 with boxes belonging to Ms. Amy Lambiris who was on maternity leave. She attests that the movers entered office 916 with Ms. Lambiris' boxes while she supervised from the doorway. They were in the office for a matter of minutes, just enough time to move the boxes into the office. She further attests that she "did not read any of the documents that were in office 916." She also attests that "she did not see the movers read any of the documents that were in office 916."

[118] Ms. Espejo-Clarke, DOJ counsel on the Mahjoub team, attests that she, along with Ms. Doyon, "briefly reviewed some of [the] materials and [she] noticed that there were also documents appearing to belong to the Ministers. After a brief review of some of the documents, [in the presence of Ms. Doyon, she] realized that [they] could not sort them and should not look at any other documents."

[119] Mr. Mahjoub argues that the Ministers have not rebutted the presumption that there is a real risk that his privileged materials in the possession of the Ministers will be used to his prejudice should the proceeding continue.

[120] Mr. Mahjoub points to certain gaps in the evidence adduced by the Ministers. He argues that no evidence was led to establish that the door to office 916 was locked from July 20 to September 1, 2011. Consequently, it is not known who would have had access to the materials stored in the office during this period of time. It is submitted this is further complicated by the fact the evidence fails to identify all of the members of the Ministers' litigation team.

[121] Mr. Mahjoub further argues that certain persons who were obviously members of the Ministers' litigation team did not provide affidavit evidence, namely Ms. Krakowska, Mr. Larouche and Mr. Tyndale. No explanation is offered as to why the evidence of these members of the Mahjoub team was not adduced. It is submitted that while the affidavits filed describe only a "cursory review" of some of the privileged documents, this is insufficient to rebut the legal presumption. Further, Mr. Mahjoub maintains that the assertions by Ms. Marquis that no member of the Mahjoub team reviewed opposing counsel's materials and that CSIS and CBSA did not have access to office 916 are hearsay, and consequently, an adverse inference should be drawn. Mr. Mahjoub maintains that if no adverse inference is drawn, the evidence should not be considered or be given little weight.

[122] In sum, Mr. Mahjoub argues that we do not know if some of the documents at issue were taken out of office 916; we do not know who had access to the office, including CSIS or CBSA; we do not know who the other members of the Ministers' litigation team are and what they saw in relation to the documents. Mr. Mahjoub contends that these questions remain unanswered on the record. In the result, it is submitted that there is a real risk his privileged materials in the possession of the Ministers will be used to his prejudice should the proceeding continue.

[123] For the reasons that follow, I am satisfied that the evidence adduced by the Ministers establishes that the members of the Mahjoub team who accessed Mr. Mahjoub's documents performed only a cursory and superficial review of the said documents. I find that no member of the Mahjoub team reviewed the documents belonging to Mr. Mahjoub. I also find that the gaps in the Ministers' evidence raised by Mr. Mahjoub are insufficient to warrant an adverse finding.

[124] In *Canada (Information Commissioner) v. Canada (Minister of Environment)* (1999), 179 F.T.R. 25 the Federal Court dealt with the issue of adverse inferences in similar circumstances at paragraph 47 of its reasons:

> I am not prepared to draw such an inference in these circumstances. Rule 81(1) of the *Federal Court Rules, 1998* expressly permits statements of information and belief as evidence on motion. Although Ms. MacCormick did not prepare the documents in questions, as a senior official of the Privy Council Office, she is well placed to give evidence that the Privy Council Office never intended to disclose the Schedule. Moreover, there is additional evidence which strengthens the respondent's contention that the Schedule was inadvertently produced. [My emphasis]

[125] The Federal Court of Appeal in reversing in part the trial court's decision did not disturb its above-noted finding (*Canada (Information Commissioner) v. Canada (Minister of Environment)* (1999), 187 D.L.R. (4th) 127 (FCA)).

[126] In the instant case, Ms. Marquis, as Deputy Regional Director and Senior Counsel in the Toronto office of the DOJ and former counsel on the Ministers' litigation team in these proceedings, is well placed to give evidence on matters relating to the within proceedings. Given her position in the Department of Justice, she is well aware of the make up of the Ministers' litigation team in the

underlying proceedings and familiar with counsel and personnel representing the client departments, CSIS and CBSA.

[127] Moreover, there is direct evidence from other members of the Mahjoub team corroborating Ms. Marquis' evidence. All of the members of the Ministers' litigation team who did provide affidavit evidence had access to Mr. Mahjoub's documents either in the breakout rooms or in office 916 at the DOJ. Each of these affiants confirms that they did not review Mr. Mahjoub's documents. In the circumstances, I draw no adverse inference in respect to Ms. Marquis' evidence. I find her evidence persuasive and give it significant weight.

[128] Four members of the team who also had access to the documents did not provide affidavits, namely, Ms. Krakowska, Ms. Lewicki, Ms. Rondeau and Ms. Goodyear. It would have been preferable had affidavits been adduced for each of these individuals. However, I find their failure to do so is not fatal in the circumstances. Ms. Lewicki, Ms. Rondeau and Ms. Goodyear, legal assistants, were involved in transporting the boxes from Mr. Mahjoub's breakout room on July 20 and 21, 2011, to office 916. Two other legal assistants, Ms. Dean and Ms. Krakowska, boxed the materials. The evidence shows that the boxes remained closed during transportation. Consequently, I am satisfied that these three legal assistants did not review the materials and that no prejudice to Mr. Mahjoub would result from their involvement.

[129] Ms. Krakowska attended the courtroom and breakout rooms with Ms. Dean on July 15, 2011, for the purpose of packing and retrieving the boxes from the courthouse. Ms. Dean's evidence is that Ms. Krakowska informed her she did not read any of the materials in the courtroom or the

breakout rooms. Further, Ms. Marquis' evidence states that Ms. Krakowska, as one of the legal assistants who originally boxed the materials, did not review any of Mr. Mahjoub's documents.

[130] While it would have been preferable for Mr. Tyndale, Mr. Larouche and Ms. Krakowska to file affidavit evidence on this motion, I find that their failure to do so is not fatal to the Ministers on this motion since I accept the evidence of Ms. Marquis that no member of the "Mahjoub team" reviewed opposing Counsel's materials. In my view, since no member of the team reviewed Mr. Mahjoub's documents, it matters not that the identity of each member of the Ministers' litigation team is not revealed on the record.

[131] Mr. Mahjoub argues that since the Ministers did not establish who had access to his documents, they have failed to rebut the presumption. He maintains that evidence should have been led by all persons "with an interest in the proceeding" who had access to the unlocked office. Counsel for Mr. Mahjoub acknowledged that this would not mean that every DOJ lawyer in Canada would have to file evidence.

[132] I essentially agree with Public Counsel's suggestion of the proposed pool of interested individuals. In the circumstances, I find that the relevant pool of "persons with an interest in the proceeding" who would have had access to the unlocked office 916 prior to it being sealed on September 1, 2011, consists of those individuals who were members of the Mahjoub team and representatives of the departmental clients, namely counsel for CSIS and CBSA personnel. It is my view that the Ministers adduced the required evidence from those individuals.

[133] The Ministers' evidence concerning access to Mr. Mahjoub's materials by members of the Mahjoub team has been reviewed above. On the basis of that evidence, I have determined that no member of the Mahjoub team reviewed Mr. Mahjoub's materials. I also find, on the evidence, that counsel for CSIS and CBSA personnel did not enter office 916 at the DOJ in Toronto. It follows that they did not have access to Mr. Mahjoub's privileged materials. In the result, I find that no prejudice to Mr. Mahjoub's fair trial rights results from office 916 remaining unlocked prior to September 1, 2011.

[134] Mr. Mahjoub raises concerns relating to the photocopying of certain documents both within and outside the DOJ, as well as concerns relating to the separation process. These concerns relate to the risk of tampering with the documents and having more people accessing Mr. Mahjoub's privileged documents. Although it would have been preferable had no internal or outside copying of documents occurred, the evidence shows that the outside service used to copy a limited number of the larger documents was a bonded service that had been used by the DOJ on prior occasions. The evidence also establishes that the legal assistant responsible for internal copying of documents, Ms. Schneider, was tasked to ensure that sufficient copies of certain exhibits were made for the court proceeding as directed by counsel. Ms. Schneider is identified as a member of the Ministers' litigation team and her evidence is that she did not conduct a review of the documents. In the circumstances, I find that no prejudice to Mr. Mahjoub flows from the copying of his documents.

[135] Further, I find that the proceeding mandated by the October 4, 2011 Court Order, led by Prothonotary Aalto, was meticulously carried out and did not, in any way, further contribute to any prejudice the taking of the documents may have caused. To be clear, on the evidence, I find that no

prejudice to Mr. Mahjoub results from the separation process conducted by Prothonotary Aalto pursuant to the October 4, 2011 Court Order.

[136] On the basis of the evidence adduced, I find that the Ministers have rebutted the presumption of prejudice. A reasonably informed person would be satisfied, in the circumstances, that there is no real risk that Mr. Mahjoub's privileged materials which were in the possession of the Ministers will be used to his prejudice should the proceeding continue. The fairness of the trial is not in question.

(4) Does the conduct of the Ministers connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process? If so, what is the appropriate remedy?

[137] Having determined that the Ministers have rebutted the presumption of risk to Mr. Mahjoub's fair trial rights if the proceedings continue, I now turn to Mr. Mahjoub's abuse of process argument. He argues that since solicitor-client privilege is central to the administration of justice, and that the Ministers had possession of his privileged information, continuing the proceeding would bring the administration of justice into disrepute. Consequently, Mr. Mahjoub contends that the Court should grant a permanent stay of proceedings on the basis of an abuse of process that falls within the residual category.

[138] Mr. Mahjoub argues that since the underlying purpose for the residual category of abuse of process, the long term, forward-looking societal interest in maintaining confidence in the justice system, is the same as that addressed by subsection 24(2) of the *Charter*, the Court should adopt the

test used in subsection 24(2) cases. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the Supreme Court set out the applicable test in such cases at paragraph 71 of its decision:

> A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

[139] In my view, adopting the test as laid out in *Grant*, above, is unnecessary in this instance. In *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, the Supreme Court has recently provided guidance on how the courts are to deal with cases that fall within the residual category of an abuse of process. At paragraphs 41-42 of its decision the Court wrote:

> Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice. This essential balancing character of abuse of process under the residual category of cases was well captured by the words of L'Heureux-Dubé J. in *R. v. Conway*, [1989] 1 S.C.R. 1659. She stated the following:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.).It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis in original; p.1667.]

> The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

[141] At issue is whether the circumstances of the taking and co-mingling of the documents has undermined society's expectations of fairness in the administration of justice to the point that "the carrying forward of the prosecution will offend society's sense of justice" (*Tobiass*, above at para. 91).

[142] Mr. Mahjoub essentially argues that the Ministers' conduct in this instance is unfair and affects the integrity of the administration of justice so as to undermine the integrity of the judicial process. He points to the following events in support of his argument:

a. the Ministers seized his privileged materials;
b. the Ministers co-mingled his documents with theirs;
c. the Ministers failed to act on the July 15, 2011 email sent to their team indicating that all documents were in a single breakout room;
d. the Ministers did not seal the 8 boxes of miscellaneous documents once it was believed that some of the documents may belong to him;
e. the Ministers did not initially inform him about the photocopying of some of his documents;
f. the Ministers did not initially inform him about movers entering office 916 with boxes belonging to Amy Lambiris.

[143] The circumstances that led to the taking and co-mingling of Mr. Mahjoub's documents have been canvassed earlier in these reasons. Based on the evidentiary record, I have found that the conduct of the Ministers, although negligent, was unintentional and does not affect the fairness of the underlying proceeding.

[144] As the Supreme Court stated in *Nixon*, above, prejudice as it is understood under the residual category of cases concerns conduct that undermines society's expectations of fairness in the administration of justice. The privileges in play on this motion, in particular confidences shared between solicitor and client, are central to the administration of justice in an adversarial system. The public has an interest in maintaining the integrity of the solicitor-client relationship. The physical

possession of privileged documents by the opposing party is a serious matter that in some circumstances could have a devastating long-term impact on societal confidence in the administration of justice. Notwithstanding my determination that the Ministers' conduct did not impact on the fairness of the proceeding or prejudice Mr. Mahjoub, the appearance of fairness in the judicial process is of utmost importance. In my view, the circumstances here lead me to conclude the appearance of fairness has been compromised. Consequently, I find there to be an abuse of process in the residual category.

[145] I am of the view that a remedy is warranted to ensure that the Ministers' conduct does not undermine society's expectation in the administration of justice. In the circumstances, this is not the clearest of cases that would warrant a permanent stay of proceedings. Rather, a lesser remedy, to be discussed below, is available to ensure that any affront to the appearance of fairness will not be manifested, perpetuated or aggravated through the conduct of the proceedings or by their outcome.

[146] As found by the Supreme Court in *Nixon,* above, an essential balancing exercise is required where an abuse of process is found in the residual category of cases. This balancing exercise involves weighing the interests that would be served in granting a stay of proceedings against society's interest in having a final decision on the merits. In balancing these interests, I have considered the following factors, namely: the particulars of the case and the nature of the proceedings, Mr. Mahjoub's circumstances, the seriousness of the Ministers' conduct and its impact on the integrity of the administration of justice, and society's interest in the adjudication of the case on its merits. For the most part, these factors have been canvassed earlier in these reasons. There is an important societal interest in having such cases decided on the merits, both for the named individual who seeks to have his or her name cleared and for the Ministers who are obligated to

protect Canada's national security (*O'Connor*, above at para. 81, *Al Yamani v. Canada*, 2003 FCA 482, 246 F.T.R. 320; *Harkat (Re)*, 2010 FC 1243, 95 Imm.L.R. (3d) 1, rev'd on other grounds 2012 FCA 122).

[147] Upon considering the record in this instance, I find that the affront to fair play and decency caused by the Ministers' taking and co-mingling of Mr. Mahjoub's privileged documents is not disproportionate to the societal interest of having the underlying proceeding continue and be ultimately decided on the merits.

[148] In the circumstances, in order to dispel any lingering perception that counsel for the Ministers may have reviewed privileged materials belonging to Mr. Mahjoub and ensure that public confidence in the system of justice is maintained, I will consider permanently removing from the file certain members of the Mahjoub team. In doing so, I am guided by the six non-exhaustive factors to be considered in determining whether solicitors should be removed suggested by the Supreme Court in *Celanese*, above, and set out at paragraph 81 above. I will briefly review each of these factors.

[149] As to the first factor, I have reviewed in significant detail the Ministers' taking and co-mingling of Mr. Mahjoub's documents earlier in these reasons. Suffice it to say that the documents came into the Ministers' possession as a result of an unintentional and negligent mistake by members of the Mahjoub team.

[150] As to the second factor, upon recognizing that they were in possession of some of Mr. Mahjoub's documents, the Ministers set aside eight boxes of miscellaneous documents believed

to contain some of Mr. Mahjoub's materials. The Ministers labeled these boxes "To be reviewed by Public counsel." However, office 916 was not sealed at this point. As the Ministers subsequently discovered on September 1, 2011, documents belonging to Mr. Mahjoub, other than those in the eight boxes, were also found in office 916.

[151] As to the third factor, my findings on the extent of the review of the privileged material are canvassed earlier in these reasons. While I have determined that the members of the Mahjoub team did not conduct a review of the materials, certain members of the team nevertheless had access to and handled the materials. Ms. Schneider, tasked with organizing the materials, spent over a week sorting documents. Other members of the Mahjoub team, including Ms. Stewart Guthrie, Mr. Engel, Ms. Dean and Ms. Espejo-Clarke, also handled, looked at and/or flipped through materials that belonged to Mr. Mahjoub, which likely included privileged documents.

[152] With respect to the fourth factor, I am satisfied, based on the report of Prothonotary Aalto, that prejudicial privileged materials belonging to Mr. Mahjoub were in the possession of the Ministers.

[153] As to the fifth factor, there remained only four witnesses to be called by Mr. Mahjoub when the taking of the documents occurred. Since lead counsel would remain on the file, there is less concern should certain counsel on the Mahjoub team be removed permanently at this late stage of the proceedings.

[154] As to the sixth factor, I have already determined that the ethical walls put in place and precautionary measures taken by the Ministers were appropriate and effective from the time they were implemented. No such measures were in place from July 20, 2011, until September 1, 2011.

[155] Upon considering the above factors, in the interest of ensuring public confidence in the administration of justice, I will order that the following members of the Mahjoub team who accessed Mr. Mahjoub's documents be removed permanently from the file and be barred from having access to any of the materials or information relating to the file. Further, they will be ordered not to discuss any information relating to the file with anyone or communicate such information to anyone:

1. Ms. Stewart Guthrie;
2. Ms. Krakowska;
3. Ms. Rondeau;
4. Ms. Goodyear;
5. Ms. Lewicki**;**
6. Ms. Schneider;
7. Ms. Kaneira;
8. Ms. Martins;
9. Mr. Engel;
10. Ms. Dean; and
11. Ms. Espejo-Clarke.

[156] In my view, permanently removing these members of the Mahjoub team constitutes a lesser remedy that is reasonably capable of removing the prejudice found to arise by reason of the abuse of process in the residual category. A person reasonably informed of the totality of the circumstances would be satisfied that the proceedings could continue without a loss of confidence in the integrity of the administration of justice.

SECTION 8 *CHARTER* VIOLATION

[157] In the circumstances, I am satisfied that the taking by the Ministers of Mr. Mahjoub's documents constitutes a "seizure" under section 8 of the *Charter*.

[158] The impact of the seizure of Mr. Mahjoub's documents by the Ministers has been canvassed in the above reasons. In the result, I have determined that the permanent stay of proceedings sought by Mr. Mahjoub is not appropriate in the circumstances. As discussed above a lesser remedy was available and will be provided. Nonetheless, I am of the view that it will be appropriate for the Court to consider the violation of Mr. Mahjoub's section 8 *Charter* rights and the significant delay caused thereby as factors in Mr. Mahjoub's underlying motion for abuse of process.

ORDER

THIS COURT ORDERS that:

1. Mr. Mahjoub's motion is granted in part.

2. The following members of the Ministers' litigation team are permanently removed from the file, barred from working on the proceedings or having access to any of the materials or information relating to the file, and ordered not to discuss any information relating to the file with anyone or communicate such information to anyone:

    1. Ms. Stewart Guthrie;
    2. Ms. Krakowska;
    3. Ms. Rondeau;
    4. Ms. Goodyear;
    5. Ms. Lewicki;
    6. Ms. Schneider;
    7. Ms. Kaneira;
    8. Ms. Martins;
    9. Mr. Engel;
    10. Ms. Dean; and
    11. Ms. Espejo-Clarke.

3. All other relief sought on the motion is denied.

"Edmond P. Blanchard"
Judge

Schedule A

Date: 20111004

Docket: DES-7-08

Toronto, Ontario, October 4, 2011

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

IN THE MATTER OF A CERTIFICATE SIGNED PURSUANT TO SUBSECTION 77(1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT* (IRPA);

AND IN THE MATTER OF THE REFERRAL OF A CERTIFICATE TO THE FEDERAL COURT OF CANADA PURSUANT TO SUBSECTION 77(1) OF THE IRPA;

AND IN THE MATTER OF MOHAMED ZEKI MAHJOUB.

ORDER

UPON a motion filed on behalf of Mr. Mahjoub on September 16, 2011, seeking the following relief:

a. a permanent stay of proceedings pursuant to sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms* and section 50 of the *Federal Courts Act*;

b. an order for his release without conditions;

c. an order reserving the right of the parties to present further submissions for the retrieval, sealing or destruction of the co-mingled material;

d. in the alternative, such further and other remedy as this Honourable Court considers appropriate and just in the circumstances including the removal of Department of Justice (DOJ) counsel and legal staff on record and Canadian Border Services Agency (CBSA)/Canadian Security Intelligence Service (CSIS) staff;

UPON reading the motion records of the parties and hearing the parties' oral submissions in Toronto on October 3, 2011;

UPON the Court taking the matter under reserve at the conclusion of the hearing;

UPON the Court hearing the parties on the process for the separation of the documents at issue;

UPON being satisfied that in order to determine the proper remedy, if any, that may be appropriate in the circumstances, it is first necessary to have the documents separated and returned to the respective parties for the purpose of affording them an opportunity to make submissions on the nature and extent of the alleged prejudice;

UPON noting that the parties take the position that it is preferable that any examination of the documents not be conducted by the hearing judge for fear that this may taint him;

AND UPON being satisfied that the separation of the documents should be conducted by a Prothonotary of the Court who will establish, in consultation with the parties, a process for the separation of the co-mingled documents in a manner that will limit prejudice to the parties.

THIS COURT ORDERS that

1. The parties are to attend before Prothonotary Aalto at 9:30 am, on Wednesday October 5, 2011, at the Federal Court in Toronto, Ontario, for the purpose of developing a protocol for the separation of the co-mingled documents. The protocol shall be established by Prothonotary Aalto, in consultation with the parties. It shall permit the separation of the documents in a manner that will limit prejudice to the parties.

2. Each party is to designate a person or persons, not a Solicitor of record, who is able to identify the documents belonging to that party for the purpose of dividing the co-mingled documents in the presence and under the supervision of the Prothonotary pursuant to the protocol to be established for that purpose.

3. The person or persons so designated by each party shall thereafter be excluded from the respective litigation teams and shall be prohibited from communicating with anyone about the nature or content of the materials reviewed for the above stated purpose and shall sign an undertaking to that effect with the Court.

4. The separated documents are to be returned to the respective parties.

5. The parties may make further argument on the nature and extent of any alleged prejudice before the designated judge. To that end Mr. Mahjoub may prepare a description of any of the returned documents relied upon to demonstrate that prejudice, which description shall not disclose any substantive information that would be subject to solicitor-client or litigation privilege.

6. Prothonotary Aalto shall review and approve any description prepared by Mr. Mahjoub against the document prior to the description being filed with the Court.

7. Upon the separation of documents, Prothonotary Aalto shall file a report on the protocol followed to separate the documents. He may, in the exercise of his discretion, also report on any other matter relating to the within order.

8. In the event of a dispute arising with respect to the interpretation of the within order, the parties are free to return to the Court for direction.

"Edmond P. Blanchard"

Judge

Schedule B

Docket: DES-7-08

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (IRPA);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the IRPA;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

REPORT TO JUSTICE BLANCHARD REGARDING THE SEPARATION OF DOCUMENTS

I. INTRODUCTION

1. Background

During the summer of 2011, documents stored in the breakout rooms at the Federal Court used by public counsel for Mr. Mahjoub and by the Ministers were moved by Department of Justice (DOJ) personnel to an office located at the offices of the DOJ at 130 King Street W., Toronto. The documents were then placed in an unused office on the 9th floor of the DOJ offices, being Room 916.

After one of the counsel from DOJ observed that it appeared that documents from both DOJ counsel and Mr. Mahjoub's public counsel were in Room 916, the room was sealed. Public counsel

for Mr. Mahjoub were invited to review the documents and concluded that, in fact, documents belonging to Mr. Mahjoub and his public counsel were in Room 916.[1]

Public counsel for Mr. Mahjoub then brought a motion for a permanent stay of these proceedings based on various grounds including, *inter alia*, "the co-mingling of confidential material from Mr. Mahjoub's file by DOJ staff members and/or legal counsel with material from the DOJ's file". The motion was opposed by counsel for the Ministers. After hearing submissions on the stay motion on October 3, 2011, the Designated Judge, the Honourable Mr. Justice Edmond Blanchard, made an order dated October 4, 2011 (October 4 Order).[2]

2. October 4 Order

The preamble to the October 4 Order notes as follows:

> **UPON** being satisfied that in order to determine the proper remedy, if any, that may be appropriate in the circumstances, it is first necessary to have the documents separated and returned to the respective parties for the purpose of affording them an opportunity to make submissions on the nature and extent of the alleged prejudice; **…**

The October 4 Order then sets out a mechanism for the separation of the documents. In essence, both Minister's counsel and Mr. Mahjoub's public counsel were to appoint designates[3] who were not part of the respective litigation teams working on this matter to assist in the separation of the documents[4] under the supervision and direction of a Prothonotary of the Federal Court. The

[1] The circumstances giving rise to these circumstances is set out in the various motion records of the parties filed on the stay motion and are not repeated here.
[2] October 4 Order, Appendix, Vol. 1, Tab 1.
[3] The individuals appointed were subsequently referred to as "Delegates".
[4] Throughout this Report, "Documents" refers to the documents located in Room 916 which were subsequently moved to the Federal Court.

October 4 Order also provided that a protocol for the separation of the Documents was to be developed with the input of counsel and the Delegates.

3. Report

In accordance with paragraph 7 of the October 4 Order, the purpose of this Report is to provide a summary of the process engaged in by the Delegates under the direction of the Court to separate the Documents. All of the details of the process and Protocol developed for the separation of the Documents are not described in this Report other than in a general way.[5] Throughout the entirety of the proceeding there were many issues which arose, almost on a daily basis: logistical,[6] procedural,[7] and, substantive.[8] This Report does not deal with all of those issues unless the issue had a significant impact on the separation process. For complete details of the process and Protocol resort should be had to the Appendix to this Report.[9]

II. INITIAL PROCEEDINGS

1. Case Conferences

[5] The transcripts of case conferences and meetings with the Delegates contain all of the details of the process. The transcripts are attached to this Report as Appendix, Vol. III and Vol. IV.

[6] For example, logistical issues included such matters as ensuring that the security of the DOJ offices was not compromised; working out the availability of the Delegates, the Court and Court staff; procedures for unlocking and locking Room 5043 at the Federal Court; arranging for the use of a photocopier; etc.

[7] For example, procedural issues included determining who could be present while Mr. Mahjoub's public counsel reviewed documents; determining what information including exhibits regarding the process was to be shared with the Minister's counsel and Mr. Mahjoub's public counsel; approving protocols for review of documents by Ministers' counsel and Mr. Mahjoub's public counsel, etc.

[8] For example, substantive issues included how solicitor-client materials were to be dealt with; how in camera documents should be treated etc.

[9] In addition to the transcripts which provide all of the details of the process, a number of the significant exhibits are also contained in the Appendix, Vol. I to this Report.

A number of case conferences were held with counsel to obtain input on a process by which the Documents could be separated and to develop an initial plan including the naming of the Delegates.[10] When appointed the Delegates also participated in these conferences. As a result of these conferences, a general approach to the separation of the Documents was developed which formed the basis of the ultimate protocol established for the separation of the Documents. Of particular importance at the outset was the appointment of Delegates and the decision to move all of the Documents from Room 916 at the offices of the DOJ to a boardroom at the Court House.

2. Delegates

The Delegates appointed by the parties are as follows:

a. Ministers:

Rhonda Marquis (Senior Counsel)

Teresa Ramnarine (Associate Counsel)

Laura Wilson (Law Clerk)

b. Mr. Mahjoub:[11]

Nadia Liva (Senior Counsel)

Jared Will (Associate Counsel)

Amber Ingram Branton (Law Clerk)

[10] An initial case conference was held with counsel for the Ministers and Mr. Mahjoub's public counsel on October 5, 2011. Additional case conferences as the process moved forward were held on October 12 and 19, 2011; November 1, 10, 15, and 22, 2011; December 13, 2011; and January 10, 11,13, 17, 18, and 31, 2012.

[11] Initially, Mr. Mahjoub proposed Patricia E. DeGuire as the Senior Counsel Delegate who advised she was available to be appointed but who was not, in fact, appointed. On November 3, 2011, Nadia Liva was appointed as the Senior Counsel Delegate. Ms. DeGuire, at Mr. Mahjoub's request, participated in one case conference.

3. Undertakings

In order to underline the importance of the distinction between counsel of record and Delegates and the fact that Delegates were not actively involved in this matter nor would become involved in the matter as counsel a form of undertaking was drafted which was required to be signed by all Delegates prior to commencing the separation process. All of the undertakings were marked as exhibits in this proceeding.[12] Additional undertakings were prepared for both counsel to the Ministers and for Mr. Mahjoub's public counsel when they were given access to the separated documents.

4. Initial Inspection and Identification of Documents

The first step in the process of separating the Documents was to move all of the documents from Room 916 at the offices of the DOJ to the Federal Court. Of paramount importance in moving the Documents was ensuring the continuity of the move so that no party could allege that there was any opportunity for documents to go missing or to allow for any tampering with the Documents. To that end the Delegates worked with the Court to formulate a procedure for the move of the Documents.

The procedure followed is detailed in the transcript of proceedings taken Monday, November 7, 2011.[13] Essentially, the Court and the Delegates[14] met at the offices of the DOJ. A preliminary meeting was held at which time the undertakings of the Delegates were identified and

[12] "Proceeding" or "Protocol" or "process" as used in this Report refers only to the Court mandated process of separating the Documents.
[13] The transcripts of proceedings involving the separation of the Documents with the Delegates are found in the Appendix, Vols. III and IV and form part of this Report.
[14] The Ministers' three Delegates were present while only Ms. Liva on behalf of Mr. Mahjoub was present.

marked as Exhibits and a brief discussion was had regarding the goals of the overall process and the steps to be taken to ensure the continuity of the move.

The Delegates and the Court then assembled in the hallway outside Room 916 and the Court unsealed the room. A videographer[15] was retained to take both still photos and videos of the opening of Room 916 and the contents of Room 916. After an initial assessment of the contents and the layout of the room, the four walls of the room were colour-coded and the boxes on each wall were colour-coded the same colour. Each step of the process was videographed and at various times still photos were taken of the boxes and the loose documents located on the desk or windowsill.[16] All loose documents were placed in numbered sealable property bags.[17] The property bags were then placed in boxes. Once all loose documents were tagged, bagged, sealed and boxed and all other boxes were numbered and colour-coded, all boxes were sealed and the Delegates initialed each seal.

During the course of the identification, colour-coding and numbering of the boxes a schematic diagram was drawn by the Delegates. This schematic diagram ensured that a roadmap

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[15] The videographer was Rick Leswick. He also signed an undertaking in respect of his involvement in the process, which undertaking was made Exhibit 5.

[16] Several photographs of Room 916 and the Documents in Room 916 are attached to this Report in Appendix, Vol. I, Tab 4. The photographs show how Room 916 was sealed and the general layout of the boxes in Room 916. There is also a photograph of an Amy Lambiris box and a sample box at the end of the process.

[17] The property bags were obtained through the auspices David Steeves, Head of Security of the Court in Toronto from the Toronto Metropolitan Police Department. Each bag is numbered with a peelable number strip and when document(s) were placed in a property bag the bag was sealed. The numbered strips were retained as part of the exhibits in the proceeding. Bags could not be opened unless they were cut open. This further ensured continuity of the process during the move and separation.

existed to permit an accurate recreation of the location of all of the Documents in Room 916 in relation to each other.[18]

5. Lambiris Documents

During the initial inspection and review of the boxes in Room 916 it was determined that there were 15 additional boxes which appeared to belong to Amy Lambiris. These boxes were sealed. Ms. Lambiris is a lawyer with the DOJ who was not involved in the Mahjoub file and who was on maternity leave. Upon her return from maternity leave, Ms. Lambiris was to become the occupant of Room 916. The Court determined that these boxes need not be moved but would remain in Room 916. In addition, Room 916 would remain sealed pursuant to Court Order until a protocol for dealing with those boxes was finalized.

Subsequently, the Court and the Delegates attended at Room 916 to review, in the presence of Ms. Lambiris, the contents of those boxes. Ms. Lambiris confirmed that she and her assistant had packed the boxes for storage. They were moved at some point to Room 916. The inspection of those boxes determined that the contents of the boxes belonged to Ms. Lambiris and were entirely unrelated to this matter.[19]

6. Move of the Documents to the Federal Court

[18] The schematic diagram outlined in colour the location of the furniture in Room 916, the location of boxes and was colour-coded to track the same colour-coding of the walls and boxes. The original schematic diagram was marked as Exhibit 8 in the proceeding and is found in the Appendix, Vol. I, Tab 3.

[19] The inspection took place on November 25, 2011 in the presence of Ms. Lambiris. Ms. Lambiris also signed an undertaking and provided an affidavit describing the packing of those boxes. Both the undertaking and affidavit were marked as exhibits in this proceeding.

A moving company was retained to move the boxes from the DOJ offices to the Federal Court. The Delegates and the Court accompanied the Documents from Room 916 to the service elevator, from the service elevator to the parking area where the boxes were placed in the moving van. All of these steps were also videographed. A seal was placed on the back door of the van and initialed by the Delegates. A representative of the Court[20] accompanied the truck from the parking lot at the DOJ offices to the Federal Court to ensure absolute continuity of control of the Documents.

Upon arriving at the Federal Court the seal on the back door of the van was broken by the Delegates. The Documents were then taken, in the presence of the Court and the Delegates, to Room 5043. With the aid of the schematic diagram[21] the Documents were placed in Room 5043 in the same relative positions in which they were found in Room 916. That is, each of the four walls of Room 5043 were colour-coded the same colours as the colours used in Room 916. Further, the configuration of the desk in Room 916 was re-created in Room 5043. All of the Documents were placed in the same relative positions in Room 5043 as they were in Room 916. There is no doubt that because of the steps taken by the Delegates and the Court there was absolute continuity of control of the Documents in the move from the offices of the DOJ to the Federal Court. In all, there were 60 boxes of Documents moved to the Federal Court.

7. Security

a. Sealing of Room 5043

[20] The designated registrar in this process - Bernadette Moraga.
[21] Exhibit 8 found in the Appendix, Vol. I, Tab 3.

Room 5043 was sealed pursuant to Court Order and a sign to that effect was posted on the door. No one had access to Room 5043 except with the authorization of the Court. Further, no cleaning staff or unauthorized persons were allowed entry to the room. The lock to the room was also changed. Three keys were made for the lock: one was held in a sealed envelope by the Head of Security for the Federal Court in Toronto; the second was held by the Court; the third key was kept by the Registrar of the Court.

b. Log book

To maintain a record of those persons who entered Room 5043 an Entry Control Register was kept. All persons entering or leaving Room 5043 were required to sign in and sign out.[22]

c. Presence of Delegates

At the outset of the separation process it was directed that any Delegate could be present in Room 5043 so long as the Prothonotary of the Court was present. In the absence of the Prothonotary, a Delegate could only be in the room if there was at least one Delegate from the other party present. This rule changed only at the end of the Secondary Review when both Mr. Mahjoub's public counsel and Ministers' counsel were allowed access to the room to review certain of the Documents. In those circumstances, only the Delegate(s) for that party were present with counsel.

[22] In all, the Delegates spent approximately 25 days or significant parts thereof in the period November 2011 - January 2012 separating the Documents.

III. SEPARATION OF DOCUMENTS

1. General Approaches

There were a number of general principles which informed the process for the separation of the Documents. While they are detailed in the Protocol as it evolved and the many discussions on the record regarding issues as they arose, in general terms they are as follows:

a. Mr. Mahjoub's public counsel took the position throughout that although they objected to the entirety of the process, they were participating only on the basis that the entire process was without prejudice to Mr. Mahjoub's rights. At various times throughout the process the Court confirmed on the record that the process was without prejudice to Mr. Mahjoub's rights;

b. The process was developed to ensure absolute integrity with respect to the continuity of the Documents;

c. An underlying premise of the separation of the Documents was to insulate the Designated Judge from any exposure to the content of solicitor-client privileged material or solicitor work product or litigation privileged documents. Similarly, counsel acting for the parties were to be insulated from reviewing solicitor-client privileged material or solicitor work product or litigation privileged material of the other party;

d. The separation was to be completed by the Delegates without the involvement of either Ministers' counsel or public counsel for Mr. Mahjoub until an appropriate time was reached when access to separated Documents could be made available to counsel;

e. The Court approached the process of separating the Documents with a view to ensuring that the rights of any party involved in the proceeding not be prejudiced. The Delegates represented the interests of the their respective parties in keeping with the mandate of the October 4 Order;

f. The development of the Protocol for the separation of the Documents (as described in detail below) was created with input and consultation with counsel for the respective parties. It was understood that the process be flexible and would evolve as issues arose regarding categorization and identification of documents;

g. The Delegates were authorized to share certain information with their respective parties and to seek input from time to time on aspects of the Protocol to be followed;[23]

h. When the seals on the boxes were broken and the boxes were opened the contents were reviewed, without reading, by Mr. Mahjoub's Delegates or the Court to provide an indication as to whether the box contained any documents belonging to

[23] A summary of information to be shared with counsel was prepared and given to counsel. It is found in the Appendix, Vol. I, Tab 6.

Mr. Mahjoub. If it was the view of Mr. Mahjoub's Delegates or the Court that a box contained such documents, those boxes were eventually reviewed during the course of the process by the Court and Mr. Mahjoub's Delegates;

i. Documents which were identified as belonging to either the Ministers or Mr. Mahjoub, after being catalogued on the Charts, were moved to a new box identified as one of the five categories described below;

j. Blue boxes 1 – 8 were initially reviewed only by Mr. Mahjoub's Delegates and the Court;[24] and,

k. In carrying out their mandate, the Delegates followed the Protocol to ensure it would not result in revealing information to counsel on either side the content of documents that might be considered to be solicitor-client privileged, solicitor work product or otherwise litigation privileged materials.

2. Primary Review

During the initial case conferences in which both Delegates and ministers' counsel and Mr. Mahjoub's public counsel were involved, there was a general consensus on an approach to separation of the Documents. However, as those discussions took place essentially in a vacuum as

[24] These boxes were a point of discussion at case conferences involving Mr. Mahjoub's public counsel who specifically requested that the Court and/or Mr. Mahjoub's Delegates review these boxes.

the scope of what was contained in the boxes of Documents was unknown, the actual implementation of the Protocol could only take place as the process of separation was underway.

a. Chart

i. General Description of Chart

A number of decisions were made respecting the tracking of documents. It was determined that a chart was required.[25] The Chart contains seven columns: Box or Bag Number; the Document Number;[26] a column for verification and confirmation of each document by the Delegates or the Court;[27] a column for Document Description/Category; a column for Issue/Identification; a column for Resolution (FN#); and a column identifying the New Location.[28]

ii. Document Description/Category

This column provides generic information regarding each document. It was intended that once the separation of the Documents was complete the Charts would be released to Ministers' counsel and to public counsel for Mr. Mahjoub to assist them in determining what documents they wished to refer to in making further submissions on the

[25] The Delegates developed a system of charts which aided in tracking where documents were placed once they were identified as belonging to one of the categories of documents. Although this was a time intensive process, ultimately it was seen as useful tool to assist in the separation and would assist counsel once they began reviewing their respective documents. While a computerized document tracking system may very well have sped up the process and made cross-checking and locating of documents faster and easier for all concerned, there was no time to develop such a computerized program and, in any event, Mr. Mahjoub's public counsel raised concerns about an electronic database where copies of potentially sensitive information would be available.

[26] It became apparent as the contents of each box were reviewed that the individual documents in each box needed to be marked with a separate identification number. Thus, boxes were identified by colour and number i.e. "blue box 1" or "beige property bag box 2". Individual documents from each box were bundled where appropriate i.e. multiple copies of the same case, and given an identifier such as "red box 1-1".

[27] As each document in a box was numbered the document was confirmed by a Delegate as being accurately described on the chart and then verified either by the Court or by the other sides' Delegates. Documents identified as Mr. Mahjoub's were confirmed by one of Mr. Mahjoub's Delegates and verified by the Court.

[28] The Chart is colour-coded. The entries for the Primary Review are in black. The Secondary Review is in blue and the Final Review is in red. The verifications or certifications are either in blue or black pen.

stay motion. Thus, in order to ensure that no information was recorded which would provide solicitor/client information or solicitor work product, generic descriptions of documents were used. Such descriptors include "transcripts", "surveillance reports", "cases", "cerlox bound document" and "binder" etc.

iii. Issue/Identification

This column also provides generic information regarding each document. The intent of this column was to provide information regarding the identification issue i.e. whether a document had any notations such as handwriting/underlining/highlighting/language etc.[29]

iv. Resolution (FN#) and New Location

These columns record the basis on which a document was moved from its original box to a new box. Throughout the process as documents were identified as belonging to one of the categories of documents discussed below a notation was made in the Resolution (FN#)[30] column as to who identified the document or why it was identified as belonging to a particular category. The new location of the document was noted in the last column.

b. Toolkit

[29] For example, if a document contained original Arabic handwriting or if handwritten notes were in French those documents would be separated to the appropriate category of boxes.

[30] Fn# refers to an annotation of a document maintained on a separate chart created for Mahjoub documents only. These annotations were developed to protect solicitor-client privilege as no references were made on the Charts regarding the contents of documents. They are confidential, are sealed and will not be released to the parties. The Court also made notes solely for the use of the Court as an aide-memoire and are confidential.

As part of the process it became necessary to use various aids to assist in identifying ownership of documents. As a result a "toolkit" was created. Included in the Toolkit[31] were samples of handwriting from many of the lawyers, students and support staff who had worked on the Mahjoub matter; notes from counsel regarding their practices in marking documents; and, notes from counsel regarding the types of office supplies that would ordinarily be used etc.

c. Categories of Documents

At the outset of the primary review five[32] main categories of documents came to be established. As each box was opened and the documents reviewed the Delegates made an initial determination as to which of the five categories a document belonged. Once the determination was made the document was then placed in a new box and the new location noted on the Chart. The five categories of the Documents are:

i. Neutral Documents[33]

ii. Mahjoub Documents

iii. Ministers' documents

iv. Contentious Documents[34]

a. Documents not identifed

b. In camera materials[35]

[31] The Toolkit is marked as Exhibit 18 and was assembled as a confidential document as it contains solicitor-client information. The Toolkit does not form part of this Report nor will it be released to counsel for the parties.
[32] Although there were five categories during the Primary Review, the five were ultimately conflated to four. The solicitor-client intercept motion materials, upon subsequent review, were divided up between Neutral, Mahjoub and Ministers' boxes.
[33] Neutral Documents were documents that were essentially public documents – that is, motion records, affidavits, briefs of authorities etc. - that had no indicia of ownership such as original initials, handwriting etc.
[34] Contentious Documents were documents that during the Primary Review could not be identified from either the handwriting, stickies, notations or other markings. These documents are more fully described in the Protocol Rules in Part IV of this Report.

c. Blue boxes 4 - 8[36]

v. Solicitor/client intercept motion documents[37]

IV. THE PROTOCOL RULES

In order to separate the Documents certain rules evolved during the course of examining the individual documents in the boxes. These rules dealt with how documents would be separated based on the contents of the documents. The rules evolved during the many days of separating the Documents, were based on the experience of the Delegates and the Court in reviewing the Documents, and, were developed with input from counsel.[38] They are as follows:

Rule No. 1:

A Document which is an original or contains copied initials; is otherwise unmarked; and, is a public document is a neutral document[39] and will be placed in a Neutral box.

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[35] During the primary review two documents were identified as being possible national security documents. These documents were initially labeled as "national security" documents and referred to as such during case conferences. During the secondary review it was determined that "national security" documents was not an accurate description of the documents and the category name for these documents was changed to "in camera" documents which better describes the nature of the documents. In the end result only one of the two documents was determined to contain "in camera" information. Counsel for the Ministers identified the in camera materials and those materials were immediately sealed under Order of the Court with the direction that they be turned over to whichever of Ministers' counsel or representative had the appropriate national security clearance.

[36] These boxes were specifically identified as being documents that would be reviewed by the Court. Ultimately, the contents of these boxes were separated in accordance with the Protocol Rules and the documents identified as Mr. Mahjoub's were placed in the Mahjoub Boxes although there were circumstances where if the entire contents of a box were Mahjoub documents they were left in that box and not moved.

[37] These were documents which related to a motion heard by the Court in late 2010 and early 2011 which dealt with the production of solicitor/client documents from the Ministers. The motion documents were only reviewed by Mr. Mahjoub's Delegates and the Court. Ultimately, they were separated into three categories: Neutral, Mahjoub and Ministers.

[38] They are summarized in the transcript of December 22, 2011.

[39] Transcript, Dec. 13, 2011, pages 30 – 32.

Rule No. 2:

Public documents that are an original or a photocopy, with highlighting, tabs, stickies, underlining and markings remain in the Contentious boxes unless they can otherwise be identified.[40]

Rule No. 3:

Annotated exhibits are all placed in the Contentious boxes, subject to the Secondary Review.[41]

Rule No. 4:

Correspondence between counsel, that is, the Ministers' counsel and Mr. Mahjoub's public counsel, are neutral documents provided that such correspondence is not a draft and the correspondence is signed, either in the original, or by way of a typewritten signature.[42]

Rule No. 5:

Documents from the public domain that are unidentifiable remain in the Contentious boxes for Mr. Mahjoub's counsel to review, first. Such public-domain documents include items such as factual materials and reference materials, meaning copies of articles, copies of newspaper reports and the like.[43]

Rule No. 6:

[40] Transcript, Dec. 13, 2011, page 37.
[41] Transcript, Dec. 13, 2011, page 34.
[42] Transcript, Dec. 13, 2011, pages 39 - 40.
[43] Transcript, Dec. 13, 2011, pages 40 – 41.

Unmarked case law is placed in the neutral boxes.[44] There was an agreement by counsel for the Ministers that cases found in what was otherwise a Mahjoub box should remain in the Mahjoub box. Such material was not required to be moved to the Neutral boxes.[45]

Rule No. 7:

Transcripts of proceedings in relation to Mr. Mahjoub are to be placed in the neutral boxes, unless they are otherwise marked in some fashion and the markings are unidentified.[46] If they are marked up and are unidentifiable, they are to be placed in the Contentious boxes.[47]

Rule No. 8:

Transcripts from other proceedings, that is, other than proceedings involving Mr. Mahjoub that cannot be identified remain in the Contentious boxes for Mr. Mahjoub's public counsel to review first.[48]

Rule No. 9:

If there is handwriting that shows up repeatedly on documents that the Delegates cannot identify based on samples received from participants in the proceedings, copies of sanitized versions[49] will be provided to counsel for identification. Until identification is confirmed the documents remain in the Contentious boxes.[50]

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[44] Transcript, Dec. 13, 2011, pages 48 - 49.
[45] The Minister's Delegates agreed to this on December 20, 2011.
[46] Transcript, pages 50 - 51.
[47] Transcript, Dec. 13, 2011, page 51.
[48] Transcript, Dec. 13, 2011, pages 50 - 51.
[49] Sanitized versions refers to documents which were redacted except for a few neutral words or phrases and then photocopied and sent to counsel for identification.

Rule No. 10:

As the boxes are reviewed and materials are moved to the Contentious boxes, the Delegates will keep track of how many Contentious boxes are one quarter, half, or full, following the Secondary Review.[51]

Rule No. 11:

With respect to titles on public documents which are highlighted, Mr. Mahjoub's public counsel conceded that such documents have no privilege attached to them and they were catalogued as neutral and placed in the Neutral boxes.[52]

V. RESULTS OF PRIMARY REVIEW

The Primary Review required a review of each document in the 60 boxes. In total, over the course of the proceeding, approximately 1450 documents were individually identified and catalogued on the Charts. During the Primary Review a significant number of documents were separated on the basis of the Protocol Rules as they were at the time. The separated Documents comprised the following:

- Neutral Documents - 25 boxes
- Ministers' Documents – 4 boxes
- Mahjoub Documents – 6 boxes
- Contentious Documents - over 40 boxes [53]

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[50] Transcript, Dec. 13, 2011, pages 54 – 56.
[51] Transcript, Dec. 13, 2011, pages 59 - 63.
[52] Transcript, Dec. 22, 2011, page 10.

VII. SECONDARY REVIEW

Following the Primary Review of the Documents the Delegates and the Court engaged in a Secondary Review of all of the documents remaining in the Contentious category. As well, Mr. Mahjoub's Delegates together with the Court reviewed a number of boxes identified as belonging to Mr. Mahjoub. During this review the Delegates and the Court used the Toolkit and the Protocol Rules to assist in identifying ownership of documents. In addition, as it became apparent that there was handwriting on the Documents other than the samples already obtained the parties were requested to provide samples of handwriting from additional members of each team and to provide more information about how files were organized and maintained. All of this additional information was added to the Toolkit.

The Secondary Review resulted in the Contentious Documents being significantly winnowed down. By approximately January 10, 2012 the Secondary Review was substantially complete and only 294 Documents from the total of approximately 1450 Documents remained unidentified and remained as Contentious Documents.

VIII. FINAL REVIEW

The Final Review of the Documents centered primarily on the disposition of the remaining Contentious Documents. It was also during this review that Mr. Mahjoub's public counsel and

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[53] Not all boxes were full. Many contained only one or just several documents. As well, the contentious boxes comprised Blue Boxes 4 – 8 (which had not been fully reviewed), the in camera boxes (2) and the solicitor-client intercept boxes.

Ministers' counsel were given access to Room 5043 to review the Contentious Documents and assist in the identification of the remaining Contentious Documents.[54] Mr. Mahjoub's public counsel were invited to review the remaining Contentious Documents first. As a result of their review the number of Contentious Documents was reduced. Ministers' counsel were then afforded an opportunity to review the Contentious Documents. As well, for a number of Contentious Documents, sanitized copies were forwarded to counsel for the parties to assist in the identification of Documents.[55] Following completion of the review by counsel and the responses to the sanitized documents the final separation resulted in the following:

- Neutral Documents – 32 boxes
- Ministers' Documents - 12 boxes[56]
- Mahjoub Documents – 14 boxes
- Contentious Documents – 3 boxes

The October 4 Order requires that any descriptions of Documents put before the Court on the continuation of the stay motion by Mr. Mahjoub's public counsel first be approved by the Court to ensure no solicitor-client information is inadvertently referred to. Paragraphs 5 and 6 of the October 4 Order provide as follows:

> 5. The parties may make further argument on the nature and extent of any alleged prejudice before the designated judge. To that end Mr. Mahjoub may prepare a description of any of the returned documents relied upon to demonstrate that prejudice, which description shall not disclose any substantive information that would be subject to solicitor-client or litigation privilege.

[54] All representatives from either party who examined Documents in Room 5043 were required to execute an undertaking and to sign in and out on Entry Control Register. The form of undertaking was drafted by Ministers' counsel and reviewed by and ultimately approved by Mr. Mahjoub's public counsel. All of the undertakings became exhibits in the proceeding.

[55] A list of the e-mails has been provided to counsel.

> 6. Prothonotary Aalto shall review and approve any description prepared by Mr. Mahjoub against the document prior to the description being filed with the Court.

Thus, in order to maintain the continuity of the Documents it was determined by the Court, after input from counsel and the Delegates, that all of the Documents remain in Room 5043 and not be released to any party.

While consideration was given to photocopying all of the Documents at the Court and returning the original Documents to their respective owners as separated, this was determined to be unworkable for several reasons. First, photocopying would require an enormous amount of time and resources. Second, photocopying might result in copies of sensitive documents remaining on the imaging components of photocopiers. Third, many documents would have had to be taken apart to be photocopied. Fourth, colour photocopying would be necessary for some documents to show highlighting and such. Fifth, the mere photocopying of the documents expanded the group of people that would be exposed to solicitor-client privileged information and documents.

Further, consideration was also given to taking the Documents to a third party printing company but that had the potential of interfering in the continuity of the Documents and created logistical issues as to how the Documents would be transported, who could accompany them and who would stay to ensure the continuity. Thus, this idea was abandoned.

In the end, it was determined that no Documents would leave Room 5043 and Mr. Mahjoub's public counsel worked at a work station set up for them to review, initially the

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[56] The Court issued an Order dated February 9, 2011 releasing the contents of Ministers' Box 12 to a representative of

Contentious Documents, and, subsequently Mr. Mahjoub's documents and the Neutral Documents. No one else was present for this latter review other than Mr. Mahjoub's Delegates who assisted in locating documents and providing factual information regarding the Charts and locations of documents. Court staff were not present for this review but were available as needed and were also available to unlock and lock Room 5043.

IX. REMAINING DOCUMENTS

After all reasonable avenues of identification were pursued by the Delegates to identify all of the remaining Contentious Documents there remained only 66 documents in three boxes which were not identified by either party as belonging to them.[57] These documents remain unidentified and the Court cannot determine on the basis of either the information in the Toolkit or from counsel to the parties as to their provenance. The documents include, for example, items such as orange and green file folders containing publications, will-says and excerpts of transcripts; many volumes of documents including summaries of surveillance reports, expert reports, affidavits, transcripts and exhibits; a binder of Ministers' documentary exhibits; and, various loose documents. Because they are either highlighted, have some handwriting on them or have stickies placed on various pages, by virtue of the Protocol Rules and for absolute consistency they must remain in the Contentious category.

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the Ministers with the appropriate level of national security clearance to attend at the Court to retrieve the contents.

[57] The 66 documents are listed on a chart and are found in the Appendix, Vol. I, Tab 7. The chart gives the location of where each of the documents came from.

They will remain in the Contentious Boxes until further submissions are received from counsel concerning their disposition.

X. CONCLUSIONS

There are a number of general conclusions that can be summarized from the process related to the separation of the Documents. It is not the purpose of this Report, however, to offer conclusions on the implications, legal results or remedies that result from any documents having been commingled.

These general conclusions are as follows:

1. The process was labour intensive and took longer than perhaps what was expected at the outset of the process. This, in part, was because of the need to ensure the integrity and the continuity of control of the Documents and the overriding concern that counsel for the parties and the Designated Judge be insulated from any solicitor-client material, solicitor work product or litigation privileged materials.

2. No one knew or anticipated the many issues that would arise during the course of the separation of the Documents. At the outset neither the Court nor the Delegates knew the number of documents, how they were organized or the scope of the commingling. Only during the actual separation process did it become apparent that

the job of separating the Documents would not be a simple process. As noted, the Protocol Rules evolved over time to respond to particular issues as they arose.

3. While to some it may seem that the separation of documents between two parties should be a simple exercise – that one looks at a document and makes a decision as to which party it should go – such is not the case. For example, neither the Delegates nor the Court are handwriting experts and even though handwriting samples were obtained and formed a large part of the Toolkit, identifying specific handwriting turned out to be more difficult than anticipated. There were many individuals who worked on the Mahjoub file both at the DOJ and at the offices of Mr. Mahjhoub's public counsel. Although it can be said that toward the end of the process, both the Court and the Delegates came to recognize certain of the handwriting.

4. It is for the parties to argue the significance and the extent of the commingling of the Documents. However, it should be said that there were boxes which contained more than one category of Documents including boxes that contained both Ministers' Documents and Mahjoub Documents.

5. No party waived solicitor-client privilege. In light of this, both the Court and the Delegates were vigilant in ensuring the confidentiality of any information that could be perceived to be solicitor-client privileged, solicitor work product or litigation privileged material.

6. The types of documents that were found to belong to Mr. Mahjoub included, in addition to motion records, case law, published articles, handwritten notations on motion records and other documents, documents such as summaries of transcripts; handwritten and typed notes of counsel for Mr. Mahjoub; cross-examination notes of witnesses prepared by Mr. Mahjoub's public counsel; notes of Mr. Mahjoub; correspondence between counsel for Mr. Mahjoub; solicitor work product; solicitor-client privileged material; and litigation privileged material. This is a non-exhaustive list.

7. Similarly, the types of documents that were found to belong to the Ministers included motion records; case law; published articles; notes of counsel; correspondence; handwritten notes including both typed and handwritten notes of examinations of witnesses; summaries and documents that are solicitor-client privileged, solicitor work product and litigation privileged materials. This is also a non-exhaustive list.

8. All efforts were made to ensure that the Ministers' Delegates did not review any documents of Mr. Mahjoub that could be categorized as solicitor work product, solicitor-client privileged material or litigation privileged material.

9. The role of the Delegates in the process was to ensure the separation of the Documents was carried out in such a way as to maintain the integrity of the process

and insulate the parties from exposure to solicitor-client information of solicitor work product of the other side.

10. During the Final Review of the Documents, the Delegates assisted the parties in understanding the facts of the logistics of the process, i.e. the colour-coding; information on the charts; locations of boxes; locations of documents etc. On the specific Order of the Court, the Delegates were directed not to provide information to the parties as to why a particular document was placed in a particular category. It is for the parties, not the Delegates nor is it the purpose of this Report, to draw conclusions regarding the relevance of any of the Documents.

11. The Delegates each signed undertakings, over and above their professional obligations, not to divulge solicitor-client information which they might be exposed to in the course of this process. As noted, this concern to ensure no party or the Designated Judge was tainted by being exposed to such information, was one which drove much of the process.

12. At the end of the process there was only one document identified as belonging to the In Camera Sub-Document category. It was identified by the Court and was not reviewed by the Delegates. The document will be removed from Room 5043 and given by the Court to a representative of the Ministers who has the relevant security clearance. An Order to this effect has been issued by the Court.

13. Continuity of control was an important part of the process to ensure all documents in Room 916 were moved to the Court and once at the Court that no documents were removed from Room 5043 or were in any way tampered with. The Court and the Delegates took every reasonable step to ensure the continuity and the integrity of the Documents. Further, at the end of each review, all boxes were sealed. There is absolute continuity and integrity of the Documents as found in Room 916 and as they were moved to Room 5043. As of the date of this Report none of the Documents have been removed from Room 5043.

14. As part of the process, both videos and still photographs were taken of Room 916 at the DOJ offices and the move of the documents to the Federal Court. The video contains confidential footage of parts of the offices of the DOJ. Therefore, as part of this process the Court has ordered that the entire video is not part of the public record although parts will be made available to counsel. At the end of the process, the same videographer who photographed the move from Room 916 to the Federal Court took photographs of the outside of the all of the empty boxes.

15. During the course of the separation no Documents were allowed to be removed from Room 5043 until the entire process was complete including the review by public counsel for Mr. Mahjoub. As of the date of this Report, public counsel for Mr. Mahjoub are reviewing all of the Documents in the Mahjoub Boxes and Neutral Boxes in Room 5043. Descriptions of documents to be used on the continuation of the stay motion will be prepared by public counsel for Mr. Mahjoub. As the

integrity of the Documents has been maintained in Room 5043, the Court can review the descriptions with the benefit of the originals.

16. Ministers' counsel, as of the date of this Report, have not yet reviewed documents other than the Contentious Documents and the In Camera Documents in the context of assisting the Delegates in determining ownership of various Contentious Documents.

17. Three boxes containing 66 Contentious Documents remain unidentified as to ownership. These Documents include items such as bound volumes of transcripts, affidavits, expert reports, documentary evidence, file folders and the like. Further submissions will be received from counsel as to the disposition of these documents.

18. Although the Delegates have taken the actual separation process as far as they can, the Delegates must continue to be available to assist counsel for the respective parties in locating documents or providing factual information regarding the Charts.

19. Similarly, the Case Management Judge will remain seized of further matters relating to the Documents that may be raised by the parties in preparation for the continuation of the stay motion apart from the requirement in the October 4 Order for the Court to review the descriptions of documents referred to on the stay motion.

20. It is anticipated that once the stay motion is completed, that Documents will be returned to the parties. Further submissions from counsel are also required regarding the disposition of not only the remaining Contentious Documents but all of the Neutral Boxes.

21. At the end of the process certain materials were released to counsel to assist them in their review of the Documents. Counsel were only given access to their respective client's boxes, the Neutral boxes and the Contentious boxes.[58] The materials released to counsel were as follows:

    a. Charts (colour copies);
    b. Exhibit 8 (the coloured schematic diagram);
    c. Index to the Charts;
    d. Property Bag Document List;
    e. List of Contentious Documents in the 3 remaining boxes;
    f. List of e-mails seeking identification of documents from counsel;
    g. Copies of the still photographs of Room 916 and of the boxes in Room 5043 at the end of the process, and,
    h. Redacted copy of the Entry Log Register.

On a final note, there are two groups of individuals who deserve recognition for their contributions to this process. First, it must be said that the Delegates appointed by each party are deserving of enormous credit for the manner in which they conducted the separation of the Documents. While representing the interests of their respective party, they were each professional,

hard-working and civil throughout. Indeed, they brought many concrete ideas forward to achieve the separation of the Documents. The Court is greatly indebted to them for their courtesy, inventiveness and thoroughness throughout the entirety of this process. Second, the dedicated Court staff who worked well beyond regular hours and on weekends and worked with the Delegates and counsel for the parties to ensure this matter could be finished in as timely a manner as possible.[59]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Case Management Judge Kevin R. Aalto

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[58] Mr. Mahjoub and his counsel were given access first to the remaining contentious boxes.

[59] In particular, the work of the following should be recognized: Bernadette Moraga (the designated registrar for this matter) Kirk Wiederhold (who assisted with the technical issues regarding the videos and pictures), Garnet Morgan and Alejandra Gutierrez (who made arrangements as required for the space and equipment) David Steeves (head of security, who assisted with security issues) and my judicial assistant, Sandra Perez (who did the organization of this Report).

IN THE MATTER OF A CERTIFICATE SIGNED PURSUANT TO SECTION 77(1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT* (IRPA);

AND IN THE MATTER OF THE REFERRAL OF A CERTIFICATE TO THE FEDERAL COURT PURSUANT TO SECTION 77(1) OF THE IRPA;

AND IN THE MATTER OF MOHAMED ZEKI MAHJOUB

APPENDIX VOLUMES I - IV	
VOLUME I	
1.	Order of Justice Blanchard, dated October 4, 2010
2.	Orders of Case Management Judge Aalto dated November 3, 9, 2011 and January 27, 2012.
3.	Diagram of DOJ office (Exhibit 8)
4.	Photographs showing sealed Room 916 and general layout of the boxes
	a. Sealed Door to Room 916
	b. Door opened
	c. a) Room 916 before color coding
	b) Room 916 after colour coding
	c) Room 916 after colour coding
	d. a) Documents on Desk
	b) Documents on Desk
	c) Documents on Desk after colour coding
	e. a) Documents on East Wall before colour coding
	b) Documents on East Wall before colour coding
	f. a) Boxes on North Wall
	b) Boxes on North Wall

	c) Boxes on North Wall after colour coding g. a) Boxes on West Wall before colour coding b) Boxes on West Wall before colour coding h. a) Boxes on South Wall before colour coding b) Boxes on South Wall before colour coding c) Boxes on South Wall after colour coding i. Any Lambiris Box j. Sealed Box as Moved to Federal Court k. a) Empty Box at end of process b) Empty Box at end of process c) Empty Box at end of process
5.	Exhibit List
6.	Summary of Information to be provided to Solicitors of record dated December 7, 2011
7.	List of 66 Unidentified Contentious Documents
VOLUME II	
8.	Index of Charts
9.	Charts of Contents of Boxes
VOLUME III	
10.	<u>Transcripts November 1, 2011 to December 6, 2011</u> (A). Transcript November 1, 2011 (B). Transcript November 10, 2011 (C). Transcript November 15, 2011 (D). Transcript November 22, 2011 (E). Transcript November 29, 2011

(F). Transcript November 30, 2011

(G). Transcript December 1, 2011

(H). Transcript December 2, 2011

(I). Transcript December 5, 2011

(J). Transcript December 6, 2011

VOLUME IV

11. Transcripts December 12, 2011 to January 17, 2012

(A). Transcript December 12, 2011

(B). Transcript December 13, 2011

(C). Transcript December 15, 2011

(D). Transcript December 16, 2011

(E). Transcript December 20, 2011

(F). Two Transcripts December 21, 2011

(G). Transcript December 22, 2011

(H). Transcript January 3, 2012

(I). Transcript January 10, 2012

(J). Transcript January 11, 2012

(K). Transcript January 13, 2012

(L). Transcript January 17, 2012

Schedule C:

MZM Box 4

Box Colour& #	Folder Colour & Doc #	Ex #	Type	Marking	Page	Where	Description	Reference/ comments	Prejudice code
Blue 5	8		Notes (details below) of counsel L. Joncas Dec 14/10 Sept 9/10				Solicitor-client and litigation privileged doc re expert witness, merits of the case, solicitor-client intercepts and challenge of warrants motion [redacted]		**Code 4 SC 1,2,4,5,6**
Blue 5	8	n/a	Notes LJ	Foolscap yellow long paper; 2 pgs			Litigation privileged doc re expert witness [redacted]		Code 2
				11 pgs total (no	1		Litigation privileged doc re abuse of process motion and challenge of warrants motion		Code 3 1,2,4,5,6

				numbers)			French notes re: [redacted]		
					2		Litigation privileged doc re disclosure, evidence and detention [redacted]		Code 4 1,2,4,5,6
					3		Litigation privileged doc re danger [redacted]		Code 3 1,2,4,5,6
					5		Litigation privileged doc re evidence [redacted]		Code 4 1,2,4,5,6
					6		Litigation privileged doc re analysis of the evidence [redacted]		Code 3 1,2,4,5,6
					7		Litigation privileged doc re testimony [redacted]		Code 4 1,2,4,5,6
					8		Litigation privileged document re evidence and solicitor-client intercepts [redacted] notes between YH and JD [redacted]		Code 5 1,2,4,5,6
					9		Litigation privileged doc re expert witness [redacted]		Code 3 1,2,4,5,6

					11		Litigation privileged doc re expert witness [redacted]		Code 2 1,2,4,5,6

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SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and The Minister of Public Safety v. Mohamed Zeki Mahjoub
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING :	April 23-24, 2012
REASONS FOR ORDER:	BLANCHARD J.
DATED:	May 31, 2012

APPEARANCES:

Mr. Donald MacIntosh Mr. Ian Hicks Mr. Kevin Doyle	FOR THE APPLICANTS
Mr. Paul Slansky Ms. Johanne Doyon	FOR THE RESPONDENT
Mr. Anil Kapoor	SPECIAL ADVOCATES

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANTS
Doyon & Associés Inc. Montréal, Quebec Paul Slansky Toronto, Ontario	FOR THE RESPONDENT
Mr. Anil Kapoor Toronto, Ontario	SPECIAL ADVOCATES