Federal Court of Appeal | Cour d'appel fédérale

Date: 20240509

Dockets: A-17-23 (Lead)
A-280-23

Citation: 2024 FCA 92

CORAM: **LASKIN J.A.**
ROUSSEL J.A.
BIRINGER J.A.

BETWEEN:

SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY, NEW DAWN CONTRACTING COMPANY and SKY PRIME INVESTMENT COMPANY

Appellants

and

ATTORNEY GENERAL OF CANADA and SAAD KHALID S AL JABRI

Respondents

Heard at Ottawa, Ontario, on February 6, 2024.

Judgment delivered at Ottawa, Ontario, on May 9, 2024.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: LASKIN J.A.

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REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Overview

[1] These consolidated appeals concern two interlocutory decisions of a Designated Judge of the Federal Court issued in the context of proceedings under section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA). By an application brought pursuant to section 38.04, the Attorney General of Canada (AGC) is seeking to protect sensitive or potentially injurious information from disclosure in a proceeding commenced in the Ontario Superior Court of Justice (OSCJ).

[2] The underlying proceeding is an action commenced in January 2021 by the appellants, the Sakab Saudi Holding Company and other corporate plaintiffs (the Sakab Parties), against the respondent, Saad Khalid S Al Jabri (Al Jabri) and other related defendants. The Sakab Parties seek damages of now over $5 billion from Al Jabri and other defendants.

[3] It is alleged in the pleadings before the OSCJ that the Sakab Parties are a group of corporations created to pursue commercial and counterterrorism activities for the Kingdom of Saudi Arabia (KSA). Al Jabri is said to be a former high-ranking government official of the KSA who held the role of Special Advisor to the former Minister of the Interior. Al Jabri is also alleged to be a former Minister of State and member of the Council of Ministers. In 2015, he was relieved of his governmental duties, but continued to serve in an informal capacity until he relocated to Canada in 2017 (Appeal Book at 233, Second Fresh as Amended Statement of Claim, at paras. 32, 34-35, 43, 177; Appeal Book at 911, Statement of Defence, at paras. 13, 30).

[4] The Sakab Parties claim that Al Jabri orchestrated and executed an international fraudulent scheme by leveraging his position in the government of the KSA to "establish corporations intended ostensibly to perform anti-terrorism activities for the service of the KSA and its public interest", to "ensure funding of those corporations by the KSA's Ministry of the Interior" and to misappropriate funds from the Sakab Parties to himself and others (Appeal Book at 233, Second Fresh as Amended Statement of Claim, at paras. 26-27).

[5] Al Jabri denies having defrauded the Sakab Parties. He claims that the funds paid to him by the Sakab Parties were authorized by the former Minister of the Interior under his delegated authority from the King. They were meant to compensate Al Jabri for the performance of his official duties for the KSA government and the Minister of the Interior, and for his involvement in the security-related aspects of the activities undertaken by the Sakab Parties (Appeal Book at 911, Statement of Defence, at paras. 86, 172, 178; Appeal Book at 798, affidavit of Al Jabri in the OSCJ, at paras. 27, 47, 188).

[6] Al Jabri contends that some of the information that he will rely on to defend the fraud action cannot be disclosed because it is sensitive or potentially injurious information as defined in section 38 of the CEA. The information he seeks to disclose is contained in a document referred to as a proffer, over which he asserts litigation privilege, and 17 supporting documents. The proffer is described as an unsworn "solicitor's brief" or lawyer's "memo to file", setting out in detail all the information that Al Jabri views as relevant to defending the action and as potentially engaging section 38 of the CEA (Appeal Book at 1833, Al Jabri's brief for September

27, 2022, case conference, at para. 3; Appeal Book at 2330, transcript of case conference held on September 27, 2022, at 2335-2340).

[7] In 2022, following receipt of notices under section 38.01 of the CEA, the AGC brought an application in the Federal Court for an order confirming the non-disclosure of some of the information referred to in the notices and contained in the proffer and supporting documents. The Designated Judge named Al Jabri and the Sakab Parties as respondents in the application and appointed an *amicus curiae* to assist the Court in performing its statutory obligations under section 38 of the CEA.

[8] In the course of the section 38 proceedings, Al Jabri asserted that the entire proffer was subject to litigation privilege and would remain so vis-à-vis the Sakab Parties. As a result, in October 2022, the Sakab Parties brought a motion challenging, among other things, whether the proffer could properly be the subject of a section 38 application. They also argued that they would be particularly prejudiced in making submissions about the relevance of the redacted information in the section 38 proceeding if they were precluded from receiving a copy of the proffer, once redacted by the AGC and filed with the Federal Court. The motion was heard on December 6 and 7, 2022 and dismissed on January 10, 2023 (2023 FC 40 – *Sakab #1*).

[9] In her reasons, the Designated Judge acknowledged that the circumstances were unusual given that the proffer was not a document filed in the underlying proceeding, was not subject to a production order, and was cloaked in litigation privilege. However, she found that the “form or packaging” did not matter as the AGC was required to review the information regardless (*Sakab*

#1 at para. 177). She accepted Al Jabri's explanation that the proffer had been drafted to provide all the information that was likely to be otherwise disclosed in the course of the fraud action, in order to avoid a series of notices and applications. She held that, while the Court did not encourage the creation of new documents for a section 38 application, it would be more efficient to deal with as much information as possible in one application to avoid multiple section 38 applications and further delay the underlying litigation (*Sakab #1* at paras. 178-180).

[10] Noting that the AGC had not completed its review of the proffer, she found that many of the Sakab Parties' allegations were based on speculation. She found that there had not yet been any abuse of process and rejected the Sakab Parties' allegation that the section 38 process would be unfair unless they were provided a copy of the redacted proffer (*Sakab #1* at paras. 181-204). She observed that the determination of a section 38 application identifies the information that cannot be disclosed; it does not result in the Court ordering that certain information be disclosed or produced (*Sakab #1* at para. 208).

[11] While the first motion was still outstanding, the Sakab Parties brought a second motion seeking a declaration that the proffer was not subject to any form of privilege. They also sought an order directing the AGC and/or Al Jabri to produce a copy of the proffer to the Sakab Parties once redacted by the AGC for any sensitive or potentially injurious information. This second motion was heard on August 17, 2023, and dismissed on October 6, 2023 (2023 FC 1338 – *Sakab #2*).

[12] In denying the second motion, the Designated Judge found that the Sakab Parties were essentially seeking the same ultimate relief in both motions, namely the disclosure of the redacted proffer (*Sakab #2* at para. 81). She then reaffirmed that the proffer could be the subject of a section 38 application (*Sakab #2* at para. 92). She further found that the determination of whether the proffer is subject to litigation privilege was beyond the scope of her jurisdiction. In her view, any challenge of the assertion of litigation privilege should be pursued in the OSCJ (*Sakab #2* at para. 98). Finally, she held that the Court could not order production of the proffer to the Sakab Parties, regardless of whether the Court had jurisdiction to determine litigation privilege and of whether the proffer was protected by litigation privilege (*Sakab #2* at para. 99).

[13] In the meantime, the AGC completed his review of the proffer and supporting documents and informed the Court that he was prohibiting the disclosure of some of the information in the documents in order to prevent injury to national security. He also advised that he would provide the redacted proffer to Al Jabri's counsel and file the redacted document with the Designated Registry of the Court so that the section 38 application could proceed to the next steps. Al Jabri disclosed the redacted supporting documents to the Sakab Parties but refused disclosure of the redacted proffer, asserting litigation privilege.

[14] Before this Court, the Sakab Parties appeal both interlocutory orders of the Designated Judge. They submit that the overarching issue raised by these appeals is whether they are entitled to the production of a copy of the redacted proffer. They argue that the Designated Judge erred in concluding that a nominally privileged proffer, drafted by counsel, could be the subject of a section 38 application. They also claim that the Designated Judge erred in concluding that she

had no jurisdiction to adjudicate a privilege claim or to order production of the redacted proffer under section 38 of the CEA. Finally, they contend that the redacted proffer is not subject to litigation privilege and that they are entitled to the production of the redacted proffer.

[15] For the reasons set out below, I find that the Designated Judge did not err in concluding that the proffer could be the subject of an application under section 38 of the CEA. I also find it unnecessary to decide whether the Designated Judge erred in concluding that she did not have the jurisdiction to adjudicate the privilege claim or to order production of the proffer given her conclusions on the issues of fairness and abuse of process.

[16] By order of this Court dated November 9, 2023, the two appeals were consolidated. A copy of these reasons shall be filed in both appeals.

II. Analysis

[17] The standards of review in appeals from discretionary interlocutory orders are those set out in *Housen v. Nikolaisen*, 2002 SCC 33 (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79). The Court may intervene if the Designated Judge made an error of law, or a palpable and overriding error of fact or mixed fact and law, unless there is an extricable error of law in which case the standard of correctness applies.

A. *The Proffer and Section 38 Proceedings*

[18] The Sakab Parties submit that the Designated Judge erred in law in finding that the proffer could be the subject of proceedings under section 38 of the CEA. They argue that Al Jabri's "submission of the [p]roffer is contrary to the scheme of the [CEA], which governs information that a party intends to or may disclose in the underlying proceeding and which specifically exempts information provided to a party's solicitor" (Appellants' Memorandum of Fact and Law at para. 74). They contend that subsection 38.01(6) of the CEA stipulates that the section 38 regime does not apply to information disclosed to a party's lawyer if relevant to a proceeding. A section 38 notice could not be provided, and an application could not be brought, in connection with a "solicitor's brief" asserted to be privileged. Put differently, they claim that the section 38 scheme "does not apply to information provided only to a person's solicitor in preparation for litigation because the purpose of the regime is to regulate the disclosure of sensitive or potentially injurious information in a 'proceeding' – not a lawyer's office" (Appellants' Memorandum of Fact and Law at para. 77).

[19] In my view, the Sakab Parties' arguments are not consistent with the overall scheme and purpose of section 38 of the CEA, of which I will provide a brief overview.

[20] Section 38 of the CEA sets out a mandatory statutory process governing the use and protection of sensitive or potentially injurious information in connection with, or in the course of a proceeding before a court, person, or body with jurisdiction to compel the production of information. It defines "sensitive information" as "information relating to international relations

or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard". It also defines "potentially injurious information" as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."

[21] When, in connection with a proceeding, a participant is required to disclose, or expects to disclose or cause the disclosure of sensitive or potentially injurious information, they must give notice to the AGC in writing as soon as possible of the possibility of the disclosure, and of the nature, date and place of the proceeding (subsection 38.01(1)). The broad notice requirements extend to all participants to a proceeding (subsection 38.01(2)) and to non-participating officials (subsections 38.01(3)-(4)). The immediate effect of the notice is to prohibit disclosure of the sensitive or potentially injurious information, including the fact that notice was provided (section 38.02).

[22] Upon review of the information, the AGC may authorize the disclosure of all or part of the information (section 38.03). Where the AGC does not authorize the disclosure of the information or enter into an agreement to permit disclosure of some of the facts or information subject to conditions (section 38.031), the AGC may bring an application to the Federal Court for an order confirming the prohibition on disclosure (subsection 38.04(1)).

[23] The Court must then determine, pursuant to section 38.06, whether to confirm the prohibition on disclosure or to authorize disclosure of all or part of the information and under

what conditions (subsections 38.06(1)-(3)). In doing so, the Court applies a three-part test established by this Court in *Canada (Attorney General) v. Ribic*, 2003 FCA 246 and restated in *Canada (Attorney General) v. Khawaja*, 2007 FCA 388 at paragraph 8, leave to appeal dismissed, 32397 (3 April 2008).

[24] On the first part of the test, the party seeking disclosure of the information (usually the respondent) must establish that the redacted information is relevant (*Ribic* at para. 17). On the second part of the test, the onus shifts to the AGC to demonstrate that the disclosure of the information would be injurious to international relations, national defence or national security (*Ribic* at para. 18). If both relevance and injury are established, the party seeking disclosure of the information then bears the burden of demonstrating that the public interest in disclosure outweighs the public interest in the non-disclosure (*Ribic* at para. 21).

[25] Where the Court concludes that the public interest favours disclosure, the Court may authorize, by order, disclosure in the form and under the conditions that are most likely to limit any injury resulting from disclosure (subsection 38.06(2)).

[26] As noted above, the obligation to give notice arises when there is a <u>possibility</u> that sensitive or potentially injurious information will or may be disclosed in connection with a proceeding. While section 38 defines when notice must be provided, it does not prescribe the form in which the information must exist. Although the sensitive or potentially injurious information will usually be contained in a document, the obligation to give notice can also apply to oral testimony as well as audio and video recordings (*Ribic* at paras. 4-7; *Lopes v. Canada*

(Attorney General), 2006 FC 347 at paras. 17, 23, upheld on appeal in *Lopez v. Canada (Attorney General)*, 2007 FCA 109). There is also no requirement that the information pre-exist in the format sought to be used in the section 38 process. As the Designated Judge properly noted, the AGC is required to review the information regardless of the format in which it is provided (*Sakab #1* at para. 177). The scope of section 38 extends to all information that is anticipated to be disclosed over the course of the underlying proceeding.

[27] The Designated Judge accepted that Al Jabri had prepared the proffer to provide the AGC all the information that was likely to be otherwise disclosed in the underlying civil action, in order to prevent a series of section 38 notices and applications as the litigation unfolded and to avoid the uncertainty about what information could be disclosed. She found that multiple section 38 applications as the litigation progressed could be more detrimental than resolving the section 38 claims at the outset. She added that, while the Court did not encourage the creation of new documents for a section 38 application, the circumstances in this case warranted such an approach (*Sakab #1* at paras. 178-180; *Sakab #2* at paras. 89, 92).

[28] The Designated Judge's finding that it would be more efficient to deal with as much information as possible in one application to avoid further delays in the underlying action was an appropriate exercise of discretion regarding the section 38 process, in the circumstances.

[29] In fact, in 2021, Al Jabri had provided to the AGC a first notice under section 38.01 which referred to sensitive information in a confidential appendix to an affidavit filed by Al Jabri on a stay motion in the OSCJ. Believing that Al Jabri might disclose sensitive or potentially

injurious information in a supplementary affidavit and motion materials to be filed on a renewed stay motion in the OSCJ, an official from the Canadian Security Intelligence Service gave notice under subsection 38.01(3) of the CEA to the AGC in 2022 (the second notice). Instead of providing the AGC with a copy of his affidavit and stay materials, Al Jabri and his counsel prepared the proffer with the supporting documents and submitted them to the AGC for review. The justification for this approach was to ensure that all the information relevant to Al Jabri's defence, and potentially engaging section 38 of the CEA, would be provided for review by the AGC. Al Jabri then delivered a third notice to the AGC, which referred to the proffer and 17 supporting documents. As Al Jabri's counsel explained during a case management conference, the purpose behind the proffer was to know, once it was redacted, what information could be adduced in the underlying litigation (Appeal Book at 2330, transcript of case conference held on September 27, 2022, at 2335-2340). The first and second notices are not at issue in this appeal.

[30] Given the number of notices already provided to the AGC and the nature of the operations in which the Sakab Parties and Al Jabri are alleged to have engaged in (counterterrorism), it was reasonably foreseeable that further section 38 notices would be required as the proceedings in the OSCJ evolved. I am satisfied that the Designated Judge properly exercised her discretion in finding that the circumstances warranted this approach.

[31] The Designated Judge's finding is also consistent with the jurisprudence of the Supreme Court of Canada, this Court and the Federal Court.

[32] In *Canada (Attorney General) v. Nuttall*, 2016 FC 850, the Federal Court cautioned against a "continuing cycle of disclosure orders", especially in light of the delay inherent in the bifurcated section 38 process (*Nuttall* at paras. 78-79).

[33] In *Ribic*, this Court expressed concern over an approach that would lead to disclosure in multiple stages:

> [51] The two witnesses asserted that they are incapable of separating sensitive from non-sensitive information ... If they were to testify in the criminal trial, the trial would have to be suspended every time a question would be put to the witnesses in order to determine whether the question would lead to the disclosure of sensitive information and, if so, whether that sensitive information should be revealed. For this last determination, it involves coming back to the Federal Court. …

[34] In *R v. Ahmad*, 2011 SCC 6, the Supreme Court of Canada noted that "[s]ection 38 of the CEA places an obligation on all participants to a legal proceeding, as well as non-participating officials, to notify the Attorney General of the possibility that sensitive or potentially injurious information will be disclosed" (*Ahmad* at para. 17, my emphasis). It further held that the scheme under section 38 of the CEA was "designed to operate flexibly" (*Ahmad* at para. 44). In discussing the issue of potential delays caused by the bifurcation of proceedings, the Supreme Court stated as follows:

> An important step the parties can take is attempting to identify potential national security issues during pre-trial proceedings. This would allow the disclosure arguments to take place at an early date. Section 38 encourages early-stage disclosure proceedings … Due diligence in this respect will work to minimize the risk of mistrials. Disclosure by the Crown in a series of stages over a period of time, each new stage of disclosure triggering additional s. 38 proceedings, will heighten the risk of resort by the trial judge to s. 38 remedies.
> (*Ahmad* at para. 77)

[35] While *Ahmad* involved the disclosure of information in the context of a criminal prosecution, I see no reason why the same reasoning would not apply in the context of civil proceedings, as the Federal Court held in *Canada (Attorney General) v. Telbani*, 2014 FC 1050 at paragraph 110.

[36] The Sakab Parties submit "this Court has declined to review information under s. 38 that is not yet at an imminent risk of disclosure." To support their preferred approach, they rely on *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2004 FC 1052 (Appellant's Memorandum of Fact and Law at para. 79, footnote 81).

[37] In my view, their reliance on this decision is misguided.

[38] *Ottawa Citizen* is a decision of the Federal Court. In that case, the applicants had filed an application before a judge of the Ontario Court of Justice to terminate or vary a sealing order she had previously made in respect of seven search warrants. Counsel for the AGC was notified that the documents in issue contained sensitive or potentially injurious information as defined in section 38 of the CEA. The applicants initiated a section 38 application in the Federal Court and sought an order authorizing the disclosure of the information in issue. The Designated Judge adjourned the section 38 proceeding as a matter of judicial economy, pending the determination of the motion to vary the sealing order in the Ontario Court of Justice. The Designated Judge found that, if the judge of the Ontario Court of Justice refused to vary her sealing order, it was likely that there would be no reason to continue the section 38 application. He also noted that, if she agreed to further vary her sealing order and the AGC no longer objected to making the

information public, then again, the proceeding would likely not be necessary (at paras. 20-21, 25).

[39] In my view, *Ottawa Citizen* does not stand for the proposition that section 38 proceedings are limited to information at imminent risk of disclosure. On the contrary, it confirms the flexibility designated judges enjoy in determining section 38 applications.

[40] Like the Designated Judge, I agree that the creation of new documents for a section 38 application should not be encouraged. However, the situation is not unprecedented. In Canada (Attorney General) v. Ortis, 2022 FC 142, Mr. Ortis was a civilian employee of the Royal Canadian Mounted Police who, in connection with his employment, had access to classified information from a variety of sources, including international partners (Ortis at paras. 2-3). He was charged with a number of offences under the *Security of Information Act*, R.S.C. 1985, c. O-5 and the *Criminal Code*, R.S.C. 1985, c. C-46. Crown disclosure provided to Mr. Ortis was redacted and the AGC applied under section 38.04 for an order confirming the claims for the prohibition of disclosure.

[41] Since Mr. Ortis had been privy to the classified documents, he was able to recall some of their redacted content. It was recognized that Mr. Ortis needed to be able to discuss the classified information with his defence counsel in order to prepare for trial. Arrangements were made for Mr. Ortis to consult with and instruct his counsel in a secure fashion. To assist the Court, Mr. Ortis' counsel, who was security cleared, provided a summary of the evidence that Mr. Ortis wished to provide at his trial in his own defence. This information was not sworn or affirmed.

The AGC reviewed the information and redacted portions of the defence summary on section 38 grounds. The summary of Mr. Ortis' anticipated evidence was made available to the AGC and the amici curiae, but was withheld from counsel with the Public Prosecution Service of Canada (PPSC), who had carriage of the prosecution on behalf of the Crown. Mr. Ortis eventually agreed to share with the PPSC parts of the defence summary that related to specific counts, but did so in part to facilitate the Crown's consideration of whether those charges should be stayed on the grounds that he could not have a fair trial (Ortis at paras. 17-24).

[42] The Designated Judge in *Ortis* noted that the defence summary "was in effect an advance vetting of Mr. Ortis's anticipated trial evidence for objections to disclosure under the section 38 scheme" (*Ortis* at para. 7). He further observed at paragraph 39:

> While this complicated the work of the AGC and the Court somewhat, proceeding in this fashion ultimately enhanced the efficiency and consistency of the Court's determinations under subsection 38.06(2) of the CEA. Dealing at this stage with objections to the disclosure of certain information Mr. Ortis wishes to provide at trial should also go a long way in minimizing any disruption to the trial because of section 38 concerns.

[43] As in *Ortis*, the Designated Judge here accepted that Al Jabri was seeking to vet in advance his potential defence to the fraud action. Furthermore, similarly to Mr. Ortis, who relied on his right to silence vis-à-vis the Crown, Al Jabri is placing restrictions on who may access his anticipated defence by invoking litigation privilege.

[44] The Sakab Parties' reliance on paragraph 38.01(6)(*a*) of the CEA is equally misplaced. While section 38.01 of the CEA imposes notice requirements regarding the disclosure of sensitive or potentially injurious information, subsection 38.01(6) sets out certain exceptions.

One such exception is when a person discloses the information to their solicitor in connection with a proceeding if the information is relevant to that proceeding (para. 38.01(6)(*a*)). In such a situation, the person is not required to give notice to the AGC.

[45] However, this exception does not preclude the requirement to give notice under section 38.01 of the CEA where there is a possibility that the sensitive or potentially injurious information will or may be disclosed in a proceeding. In this case, as previously noted, the Designated Judge accepted that Al Jabri had prepared the proffer to provide all the information that was likely to be disclosed in the course of the underlying civil proceeding to the AGC for review. He was thus required to give notice to the AGC and the section 38 process was triggered.

[46] As I stated above, the Designated Judge's conclusion that the proffer was appropriate in the circumstances of this section 38 application is a proper exercise of discretion, which warrants this Court's deference on appeal.

[47] The Sakab Parties have failed to convince me that the Designated Judge either erred in law or committed a palpable and overriding error in concluding that the proffer could be the subject of proceedings under section 38 of the CEA.

B. *No Unfairness or Abuse of Process*

[48] As noted above, the Sakab Parties submit that the Designated Judge erred in finding that she did not have jurisdiction to decide the litigation privilege claim or to order the production of the redacted proffer.

[49] Even if I were to assume that the Designated Judge erred in interpreting the scope of her jurisdiction, I do not find that such error would be determinative of the outcome of the appeal in light of her conclusions on the issues of fairness and abuse of process, such that the production of the redacted proffer to the Sakab Parties was not warranted.

[50] Before the Designated Judge, the Sakab Parties submitted that the section 38 process would be unfair and constitute an abuse of process unless the redacted proffer was provided to them. They argued that in an effort to exclude the Sakab Parties from the process, Al Jabri deliberately created the proffer and asserted litigation privilege over it to prevent them from receiving the redacted proffer. They maintained that but for the cloak of litigation privilege, they would receive the redacted proffer and could glean information that would guide them in their relevancy submissions under the *Ribic* test. They claimed that without the redacted proffer, they would be left in the dark and could not meaningfully participate in the section 38 proceedings, such that the Court would be unable to determine relevance and conduct the necessary balancing at the third stage of the *Ribic* test. They asserted that the Court has a broad responsibility to ensure fairness in national security matters due to the closed nature of the proceedings and that this obligation includes ensuring that the section 38 process is fair.

[51] The Designated Judge found that there had not yet been any abuse of process that would engage the Court's inherent power to control its own process. She also held that she was confident she could fairly determine the section 38 application *(Sakab #1* at para. 168; *Sakab #2* at para. 107).

[52] In making these determinations, the Designated Judge rejected the argument that the Sakab Parties were excluded from the section 38 process (*Sakab #1* at paras. 168, 182). She considered that they could make public submissions and could request to make additional public or *ex parte* submissions pursuant to subsection 38.11(2) of the CEA. She also found that the Sakab Parties had sufficient information to make submissions about why the information was not relevant or essential to Al Jabri's defence. In particular, she noted the extensive record from which the Sakab Parties could discern Al Jabri's position in the underlying litigation and the nature of the information likely subject to the section 38 application (*Sakab #1* at paras. 183-184).

[53] Likewise, she found that the Court would have a sufficient grasp of the underlying litigation and key issues to determine the relevance of the information in the proffer, given the volume of documents submitted by the Sakab Parties, including their submissions. She further added that, to the extent that the Sakab Parties did not know or could not anticipate what information may be in the proffer, there was also the option of sharing some of the redacted information with the presiding judge in the OSCJ in a summary way or under strict conditions, without disclosure to the Sakab Parties (*Sakab #1* at paras. 187-188).

[54] In addition, the Designated Judge found that if the Sakab Parties did not receive the redacted proffer, they would be in a position similar to a respondent in a section 38 application who receives a heavily redacted document, yet still makes general submissions about the relevance or irrelevance of that information. Recognizing that this may be a challenge for such respondents, she stated that it was one inherent in the section 38 process (*Sakab #1* at para. 190).

In responding to the argument that any document filed should be shared with all parties, she noted that the provision or exchange of information would occur in the context of the underlying litigation (*Sakab #1* at para. 191).

[55] The Designated Judge did not accept the argument that litigation privilege could not attach to the proffer because the proffer had been provided to the AGC. She held that the AGC was not in a typically adversarial role, and was only fulfilling his role to review the information for the purposes of determining whether the sensitive and potentially injurious information could be disclosed (*Sakab #1* at para. 192).

[56] The Designated Judge further rejected the argument that the creation of the proffer was unfair because it contains "secret submissions" about the relevance of the information, thus giving Al Jabri an advantage by providing *ex parte* submissions to the Court in advance of any public hearing. She found that Al Jabri's description of the proffer did not equate to secret submissions but added that, given the Sakab Parties' allegation, the Court would be alert to this concern (*Sakab #1* at para. 193). She also found that there was no need in this case for "secret submissions." She would hear in a public hearing submissions from Al Jabri on the relevance of the information he seeks to have disclosed, and would similarly hear submissions from the Sakab Parties on the irrelevance of the information. In both cases, they could request to make additional public and/or *ex parte* submissions (*Sakab #1* at para. 195).

[57] The Designated Judge acknowledged that the circumstances of this application differed from those in some section 38 applications where the redacted documents are provided to one or

more respondents before submissions are made to the Court, but found that the different circumstances did not amount to unfairness (*Sakab #1* at para. 196). In her view, the alleged unfairness could be addressed by the role of the *amicus curiae*, the AGC's duty of candour and the Court's responsibilities in designated proceedings to carefully scrutinize the documents and consider all submissions (*Sakab #1* at para. 197). She added that she was alive to the Court's duty to ensure fairness, and that if the Court had concerns that the position of the Sakab Parties had not been well articulated, she could invite them to make additional public submissions, including through responses to tailored questions from the Court formulated to protect sensitive or potentially injurious information (*Sakab #1* at paras. 198, 204). The Designated Judge was satisfied that she could fairly determine the section 38 application (*Sakab #2* at para. 107).

[58] To some degree, the Sakab Parties reiterate the same arguments before this Court. In essence, they are concerned that there is a real risk that the Designated Judge will approach the *Ribic* framework without a full and proper appreciation of the issues raised in the underlying civil proceeding.

[59] Contrary to the submission of the Sakab Parties, the Designated Judge's reasons clearly demonstrate that she understood that they were seeking disclosure of the redacted proffer for the purposes of the section 38 proceedings, not the underlying proceeding.

[60] I acknowledge that the process followed in the section 38 proceedings is unusual and may not be ideal to the Sakab Parties. However, as this Court noted in *Ribic*, "'unusual' is not necessarily synonymous with 'unfair'" (*Ribic* at para. 42).

[61] As the Supreme Court and this Court have often stated, the notion of fairness depends entirely on the circumstances and the context (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 743-744; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at paras. 39-40; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 57; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 56; *Ribic* at paras. 42, 45; *Khawaja* at paras. 29-30, 120).

[62] Not only does the Designated Judge have a general power to control the Court's process, subsection 38.04(5) of the CEA provides them with discretion over various aspects of the section 38 process. For example, the Designated Judge decides whether it is necessary to hold a hearing (para. 38.04(5)(*b*)) and, if the judge "considers it appropriate in the circumstances, may give any person the opportunity to make representations" (para. 38.04(5)(*d*)).

[63] In the circumstances of this application, I find that the section 38 process is sufficiently flexible to allow the Designated Judge to make a fair determination of the nature of the information at issue. The Sakab Parties have had the opportunity to make representations on the relevancy prong of the *Ribic* test. To do so, they have had access to a comprehensive record in the underlying proceeding from which they could discern Al Jabri's defence. Furthermore, the Sakab Parties would have received written submissions from Al Jabri on the redacted information's relevance to the underlying proceeding.

[64] Moreover, by the time the second prong of the *Ribic* test will be completed, they will likely have examined Al Jabri for discovery and have elicited some of the facts they allege are

contained in the proffer. If they acquire information they feel should be shared with the Designated Judge, they can request a further public hearing or request an *ex parte* hearing to advance their position in the absence of the other parties. The *amicus curiae* will also have access to the proffer and can assist the Designated Judge in reaching a fair decision.

[65] In addition, I accept the Designated Judge's conclusion that, given the extensive record filed and submissions received from the Sakab Parties and Al Jabri, she should have a sufficient grasp of the key issues in the underlying litigation to determine the relevance and public interest prongs of the *Ribic* test. One must keep in mind that designated judges regularly determine section 38 applications where one of the parties does not have all the information. If the Designated Judge finds that she requires more context to assist in her determination, she may order the production of additional information (*Nuttall* at paras. 77-78). In the event the Sakab Parties are unsatisfied with the Designated Judge's findings on relevance in the context of the section 38 application, they are not precluded from making arguments about the relevance of the evidence to the trier of fact in the civil proceedings.

[66] I also find that the Designated Judge's decision preserves litigation fairness in the underlying proceeding. If the redacted proffer were provided to the Sakab Parties in the course of the section 38 proceedings, they would in effect be obtaining early disclosure of information to which they may not yet be entitled in the underlying proceeding. Litigation privilege is intended to ensure a zone of privacy in which the parties may consider and prepare their cases without a requirement of premature disclosure or without adversarial interference (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 27, 34, 41). The Designated Judge accepted that the

proffer was created for the purpose of the underlying fraud litigation in the OSCJ (*Sakab #2* at para. 92).

[67] The Designated Judge's findings regarding the Sakab Parties' allegations of abuse of process and unfairness and her conclusion that they need not have a copy of the redacted proffer for the purpose of the section 38 process constitute an appropriate exercise of her discretion in managing fairness to all parties in the process. The Sakab Parties have not demonstrated that the Designated Judge erred in law or committed a palpable and overriding error in exercising her discretion.

III. Conclusion

[68] For the reasons set out above, I am of the view that the Designated Judge did not err in law or make a palpable and overriding error in concluding that the proffer could be the subject of proceedings under section 38 of the CEA and in rejecting the allegations of abuse of process and unfairness. Accordingly, I would dismiss the appeal without costs, as none were sought by the respondents.

"Sylvie E. Roussel"
J.A.

"I agree.
John B. Laskin J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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CONCURRED IN BY:	LASKIN J.A. BIRINGER J.A.
DATED:	MAY 9, 2024

APPEARANCES:

Munaf Mohamed KC Jonathan Bell Douglas Fenton	FOR THE APPELLANTS
André Séguin Christine Arcari	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Sean Pierce Anil Kapoor	FOR THE RESPONDENT SAAD KHALID S AL JABRI

SOLICITORS OF RECORD:

Bennett Jones LLP Toronto, Ontario	FOR THE APPELLANTS
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Adair Goldblatt Bieber LLP and Kapoor Barristers Toronto, Ontario	FOR THE RESPONDENT SAAD KHALID S AL JABRI