Federal Court  Cour fédérale

Date: 20170707

Docket: DES-2-17

Citation: 2017 FC 662

Ottawa, Ontario, July 7, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

QING (QUENTIN) HUANG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT

I. INTRODUCTION

[1] This is an application pursuant to paragraph 38.04 (2) (c) of the *Canada Evidence Act*, RSC, 1985, c C-5 [CEA]. The Applicant seeks an order disclosing the redacted content of a warrant issued by the Federal Court in 2013 and the affidavit filed in support of the application for the warrant. The Respondent requests an order confirming the statutory prohibition against disclosure of the information at issue. In the alternative, if the Court decides that all or part of the information at issue ought to be disclosed in the public interest, the Respondent requests that the

Court impose conditions on its release limiting, as far as possible, any injury to national security, including through the use of a summary or statement of facts.

II. BACKGROUND

[2] The Applicant is before the Ontario Superior Court of Justice charged with four criminal offences under the *Security of Information Act*, RSC, c O-5. The allegations and potential evidence in the underlying criminal proceedings are summarized in a *certiorari* decision by the Ontario Superior Court of Justice: *R v Huang*, 2015 ONSC 7314. I have taken references to the facts and procedural history of this matter from that decision and from the application records of the parties.

[3] Mr. Huang was arrested and charged on November 30, 2013. A preliminary inquiry was conducted in the Ontario Court of Justice and Mr. Huang was committed for trial on May 15, 2015. His application for *certiorari* to quash the committal was dismissed on December 17, 2015. The original trial date, set to commence on November 14, 2016, was postponed due to a change of counsel and was rescheduled to begin in June 2017. That date was in turn vacated and, as of the date of writing, the trial is scheduled to begin on June 4, 2018.

[4] A constitutional challenge to the *Security of Information Act* was dismissed on June 2, 2017: *R v Huang*, 2017 ONSC 2589.

[5] A brief explanation may be helpful to understand why this application was brought by the Applicant long after the charges were laid and shortly before the initially rescheduled trial date.

[6] Prior to the preliminary inquiry, the Public Prosecution Service of Canada (PPSC) disclosed evidence to the Applicant in accordance with the Crown's obligations under the standard set by the Supreme Court of Canada in *R v Stinchcombe* [1991] 3 SCR 326 [*Stinchcombe*].

[7] As part of the disclosure process and in response to a request from counsel for the Applicant, the PPSC produced a copy of an affidavit sworn by an officer of the Canadian Security Intelligence Service (CSIS or the Service) on March 4, 2013 (the 2013 Affidavit) and a copy of a warrant issued by the Federal Court on March 7, 2013 (the 2013 Warrant). Both of these documents were disclosed in a redacted form.

[8] Execution of the 2013 Warrant resulted in the interception by CSIS of telephone calls allegedly made by Mr. Huang to the Embassy of the Peoples' Republic of China (PRC) in Ottawa. Transcripts and recordings of the intercepts were provided by CSIS to the Royal Canadian Mounted Police (RCMP) under the authority of section 19 of the *Canadian Security Intelligence Service Act,* RSC, 1985, c C-23 [*CSIS Act*]. Section 19 provides that CSIS may disclose information it obtains to a peace officer where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province.

[9] The section 19 advisory letter states that an individual identified as Mr. Huang "offered to provide Canadian military secrets to the PRC government". Subsequent investigation by the RCMP including an undercover operation resulted in the arrest of Mr. Huang. Transcripts of the

telephone calls provided to the RCMP formed part of the *Stinchcombe* disclosure to the Applicant as the PPSC wished to rely on the intercepts as evidence.

[10] The 2013 Affidavit and Warrant disclosed to the Applicant were, as described by counsel for the Applicant, heavily redacted. The PPSC declined to provide the unredacted content of the two documents to the Applicant and his counsel on the grounds that to do so would result in the disclosure of "sensitive information" or "potentially injurious information" as defined in section 38 of the CEA. Where a participant in a proceeding is required or expects to be required to disclose sensitive or potentially injurious information, notice must be given to the Attorney General of Canada pursuant to subsection 38.01 (1) of the CEA.

[11] In this instance, notice was not given to the Attorney General of Canada until late in February 2017. It appears from the record that counsel for the PPSC understood that the Applicant did not intend to challenge the admissibility of the intercepted communications and believed that there was no possibility of disclosure of the redacted information: Letter of Bradley Reitz, PPSC, to Frank Addario, February 28, 2017; Exhibit "L" to the Affidavit of Fiona Clarke.

[12] As noted above, there was a change of counsel for the Applicant in the Fall of 2016. Mr. Huang's new counsel requested additional information from the PPSC regarding the CSIS warrant and advised the PPSC that they were considering bringing an application for exclusion of the evidence pertaining to the intercepted communications in accordance with the principles and procedures laid out by the Supreme Court of Canada in *R v Garofoli*, [1990] 2 SCR 1421

[*Garofoli*] (QL). Hearing dates for a *Garofoli* application were scheduled for the Spring of 2017 but vacated. A potential *Garofoli* application is now scheduled for April 16-19, 2018.

[13] In considering a *Garofoli* application, a Superior Court will look to whether the search is no more intrusive than is reasonably necessary to achieve the objective: *R v Rogers Communications,* 2016 ONSC 70, [2016] OJ No 151 at paras 40-41, citing *R v Vu,* 2013 SCC 60, [2013] 3 SCR 657 at paras 21-22.

[14] In this context, the *Garofoli* application would be for an order that the 2013 Warrant was invalid, the interceptions were not authorized by law and infringed section 8 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, being Schedule B to the *Canada Act, 1982,* 1982, c 11 (UK) [RSC, 1985, Appendix II, No 44] [the *Charter*], and the evidence of the communications must be excluded under subsection 24(2) of the *Charter.*

[15] For the purposes of the *Garofoli* application, the warrant and supporting affidavit as a whole are relevant but portions may be excised where certain information has been obtained by unconstitutional means and the parts are not dependent upon each other: *R v Grant,* [1993] 3 SCR 223, [1993] SCJ No 98 at paras 47-50; *R v Wiley,* [1993] 3 SCR 263, [1993] SCJ No 96 at paras 17-27; *R v Plant,* [1993] 3 SCR 281, [1993] SCJ No 97 at para 26. The issue was also considered in the context of a *CSIS Act* warrant in *R v Jaser,* 2014 ONSC 6052, [2014] OJ No 6424.

[16] Notice of the possible disclosure of the redacted information was provided by the prosecutor to the Attorney General of Canada on February 27, 2017.

[17] On the same date, Mr. Huang brought this application for:

1) A determination that the disclosure of the unredacted warrant and affidavit would not be injurious to international relations, national defence or national security;

2) An order that the unredacted warrant and affidavit be provided to the Applicant/Defendant and his counsel;

3) An order that the Court appoint Anil Kapoor as a special advocate to review any material to which the Applicant is not entitled, and to represent the Applicant's interests in any proceedings which the Applicant is not, for national security reasons, entitled to attend;

4) An order granting such further or other relief as counsel may seek and which this Honourable Court deems just.

[18] In his Notice of Application, the Applicant claims that the 2013 Warrant and Affidavit are so heavily redacted that he cannot test the sufficiency of the warrant or make full answer and defence to the charges against him. In particular, he states, he cannot investigate or challenge the lawfulness of the interception of private communications that form the basis for his criminal charges without the redacted information that is being withheld from him.

[19] Following receipt of notice from the prosecutor, the Attorney General of Canada, through her delegate, made her decision with regard to the 2013 Affidavit and Warrant and decided to prohibit disclosure of information contained therein.

[20] In a Supplementary Notice of Application filed on March 22, 2017, the Applicant sought an order for further disclosure of information relating to the interception of telephone calls at the

PRC Embassy in Ottawa during the timeframe of the warrant. The information in question, assuming that it exists, is in the possession of a third party, CSIS.

[21] In a case management teleconference on April 5, 2017, counsel for the Applicant was advised that the Court considered that the Supplementary Notice of Application was premature as there was no court order requiring the production of the requested information for the purposes of the underlying criminal prosecution and no notice had been provided to the Attorney General in respect of that information to initiate proceedings under section 38 of the CEA. As a result, the Court considered that the subject-matter of the Supplementary Notice to be outside the scope of this application as it currently stands. An application for production of the information requested in the Supplementary Notice of Application pursuant to *R. v. O'Connor* [1995] 4 S.C.R. 411 has now been set down to be heard in the Superior Court of Justice on August 31, 2017.

[22] By Order dated March 22, 2017, a schedule was fixed for the filing of materials by the parties and Mr. Anil Kapoor was appointed as *amicus curiae* to assist this Court in carrying out its obligations under section 38 of the CEA. On the same date, the Applicant's Application Record was filed. Included in that Record were copies of the Indictment, the CSIS advisory letter to the RCMP, the redacted affidavit and warrant, and correspondence between the parties. The Respondent's Public Record was filed on April 4, 2007 and included additional information notably, the public affidavit of Karen X, a CSIS intelligence officer. The Court directed that Karen's affidavit could be accepted for filing without disclosure of her last name.

III. EVIDENCE

[23] In her affidavit, Karen describes the duties and functions of CSIS, the definition of "threats to the security of Canada" in section 2 of the *CSIS Act*, the nature of CSIS investigations, disclosures to other foreign and domestic agencies permitted under section 19 of the *CSIS Act* and the categories of information sought to be protected. Those categories are described in broad terms as information that would:

> a) identify or tend to identify the Service's interest in individuals, groups or issues, including the existence or nonexistence of past or present files or investigations, the intensity of investigations or the degree or lack of success of investigations;
>
> b) identify or tend to identify methods of operation and investigative techniques utilized by the Service;
>
> c) identify or tend to identify relationships that the Service maintains with police, security and intelligence agencies and would disclose information exchanged in confidence with such agencies;
>
> d) identify or tend to identify employees, internal procedures and administrative methodologies of the Service such as names and file numbers, and telecommunication systems used by the Service; and
>
> e) identify or tend to identify individuals who accepted to cooperate with the Service or the information provided by persons which, if disclosed, could lead to the identification of the persons.

[24] In the remainder of her affidavit, Karen elaborates on the reasons why disclosure of information falling within these categories would be injurious to national security. Karen has no personal knowledge of the investigation leading to the issuance of the warrant, had not read the information under the redactions and was not aware of the specific reasons why the Attorney General of Canada seeks to prevent disclosure of the information.

[25] *Ex parte* and classified affidavits, with attached exhibits were filed by the Respondent on April 24, 2017. Copies of these materials were provided to the *amicus* for his review prior to a private hearing. The materials included unredacted versions of the two documents at issue in these proceedings highlighted in different colors corresponding to the five categories described in Karen's affidavit. Much of the information is subject to several different claims for protection and is highlighted accordingly. [redacted]

[26] Private hearings were conducted on May 2 and May 3, 2017. On those dates, witnesses representing the Canadian Security Intelligence Service (CSIS) and Global Affairs Canada (GAC) were examined and cross-examined by counsel for the Attorney General of Canada and the *amicus* and questioned by the Court. Additional exhibits were admitted as evidence.

[27] On May 16, 2017, the Court heard the oral submissions of the *amicus* and counsel representing the Attorney General of Canada. At the outset of the hearing on that date, I was provided with a chart listing all of the privilege claims in the documents and charts indicating the redactions disputed by the *amicus*. The Respondent submitted further written argument on May 31, 2017, and counsel for the Respondent and the *amicus* provided additional oral submissions on June 22, 2017.

[28] In a case management teleconference on April 5, 2017 prior to the private hearings, counsel for the Applicant was reminded of the provisions of subsection 38.11 (2) of the CEA, which permit the Court to allow any person an opportunity to make *ex parte* representations in

private. In addition, counsel was advised that a public hearing could also be scheduled, on request, for oral representations to be received. No request was received for either an *ex parte* hearing to receive representations on behalf of the Applicant or a public hearing.

IV. ISSUE

[29] The sole issue in these proceedings is whether the decision to prohibit disclosure of the information subject to CEA section 38 claims by the Respondent, the Attorney General of Canada, should be upheld by the Court.

V. LIMITATION

[30] [redacted]

VI. ANALYSIS

A. *The legal context and principles*

[31] At the outset I will provide some information on *CSIS Act* warrants for the benefit of anyone reading this decision who may not be familiar with that process. The warrant regime in the *CSIS Act* stems from the recommendations of the *McDonald Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police (1977-1981)* (the McDonald Commission) which, among other things, called for the creation of a civilian intelligence service and for the issuance of security warrants by the judiciary rather than by Ministers as had previously been the case. The Commission recommended that this function be performed by a small group of judges within the Federal Court. This recommendation was adopted by Parliament in the enactment of the *CSIS Act* in 1984.

[32] The *CSIS Act* warrant regime was not designed to gather evidence to investigate offences but rather to collect information and intelligence for the purpose of advising the Government of Canada on the existence of threats to the security of Canada. This is in support of the Service's core mandate which is set out in section 12 of the *CSIS Act*. The term "threats to the security of Canada" is defined in section 2 of the *CSIS Act.* These provisions read as follows:

Threats to the security of Canada means	***Menaces envers la sécurité du Canada*** Constituent des menaces envers la sécurité du Canada les activités suivantes :
(a) Espionage or sabotage that is against Canada or is detrimental to the interests of Canada or	**a)** l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses

activities directed toward or in support of such espionage or sabotage,

intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;

(b) Foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;

(c) Activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

c) Les activités qui touchent les Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;

(d) Activities directed toward undermining by cover unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionality established system of government in Canada,

d) Les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence

but does not include lawful

La présente définition ne vise

advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).	toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d).
Collection, analysis and retention	**Informations et renseignements**
12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and in relation thereto, shall report to and advise the Government of Canada.	**12 (1)** Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.

[33] As will be apparent from this legislative text, the focus of CSIS threat-related investigations under the combined effect of these provisions is on activities which put the security of Canada at risk and not particular crimes committed by specific individuals.

[34] There is a separate provision for the collection of information or intelligence in relation to the defence of Canada and the conduct of the international affairs of Canada under section 16 of the *CSIS Act* which is not relevant to these proceedings.

[35] The requirements for the Court to issue a warrant with respect to the collection of information and intelligence under section 12 are set out in section 21 of the *CSIS Act.* When the

Court is satisfied that the facts relied upon in the affidavit submitted in support of the application for a warrant justify the belief, on reasonable grounds, (1) that a warrant is required to investigate a threat to the security of Canada, (2) that the threat as defined by s 2 of the Act is present, and (3) that other investigative measures have been tried and have either failed or are unlikely to succeed, the Court may issue a warrant that authorizes communications to be intercepted or information to be searched for and seized.

[36] An extensive process is undertaken prior to the submission of a warrant application to the Federal Court. It involves the affiant, normally an experienced intelligence officer, an analyst, and a lawyer from the Department of Justice legal unit at the Service assembling the evidence required. In addition, there are several layers of approval of the application within the Service and a review of the facts and grounds relied upon by Department of Justice counsel other than those who directly advise the Service in such matters.

[37] The constitutional validity of the *CSIS Act* warrant regime with respect to section 8 of the *Charter* was confirmed by the Federal Court of Appeal in *Atwal v Canada* [1988] 1 FC 107, [1987] FCJ No 714 (FCA) (QL) [*Atwal*]. In comparing the *CSIS Act* warrant regime with the authorization of interceptions under Part VI of the *Criminal Code*, RSC, 1985, c C-46, the Federal Court of Appeal recognized that "it will be generally less practically possible to be specific, in advance, in authorizations to intercept private communications under the [CSIS] Act than under the Criminal Code": *Atwal*, above, at 16. This was, the Court noted, because "[t]he Code contemplates interception as an investigative tool after or during the event while the [CSIS]

Act is directed primarily to gathering information in an attempt to anticipate future occurrences": *Atwal*, above, at 16.

[38] The legislative regime under section 38 of the CEA was also a product of the McDonald Commission recommendations. In accepting those recommendations, Parliament allocated to judges of the Federal Court, on application, the responsibility to consider potentially injurious or sensitive information in respect of which national security is claimed and to determine whether, and under what conditions, it ought to be disclosed. Where the information is withheld, judges presiding at criminal trials cannot order that it be disclosed to the accused.

[39] The constitutionality of this regime was upheld by the Supreme Court of Canada in *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110 [*Ahmad*]. In arriving at that conclusion, the Supreme Court noted, at paragraph 44, that section 38 creates a scheme that is designed to operate flexibly. It permits conditional, partial and restricted disclosure and preserves the authority of the trial judge to issue whatever orders the court considers necessary to protect the fair trial rights of the accused, short of disclosure of the information, including entering a stay of proceedings.

[40] The Supreme Court pointed to the example in *Canada (Attorney General) v Khawaja*, 2007 FC 490, [2007] FCJ No 622, where this Court disclosed a summary of the material being withheld under section 38 of the CEA to counsel for the parties, and directed that it be made available to the trial judge and prosecutor if necessary to determine whether the fair trial rights of the accused had been infringed.

[41] The test to apply in a proceeding under CEA section 38 was developed by the Federal Court and the Federal Court of Appeal in *Ribic v Canada (Attorney General)*, 2003 FCT 10, [2003] FCJ No 1965 (FC), affirmed 2003 FCA 246, [2003] FCJ No 1964 (FCA) [*Ribic FCA*].

[42] A section 38 application is not a judicial review of the Attorney General's decision not to authorize disclosure. Instead, the designated judge must make a determination as to whether the statutory ban on releasing the information sought to be protected, as outlined in subsection 38.02(1), ought to be confirmed or not. In coming to that decision, the judge must assess the information in three steps.

[43] First, the judge must decide whether the information sought to be protected is relevant to the underlying proceeding. Where the judge finds that the information is relevant, the next step is to determine whether disclosure would be injurious to international relations, national defence or national security, as outlined in section 38.06 of the CEA. Where the Attorney General can show a reasonable basis for her assessment that the disclosure of the information at issue would cause injury to the national interests, the judge must then determine whether the public interest in disclosure is outweighed by the public interest in non-disclosure.

[44] The relevance threshold, as determined by the Federal Court of Appeal in *Ribic*, at paragraph 17, is a low one. In the criminal context, this is normally determined through application of the *Stinchcombe* test for disclosure. If the information at issue may not be reasonably useful to the defence, it is not relevant and there is no need to go any further in assessing it.

[45] Second, the judge must consider whether the information sought to be protected is injurious. In assessing whether injury to the protected national interests would be caused by disclosure, the judge must give considerable weight to the Attorney General's submissions given the access that officeholder has to special information and expertise about national security and international relations. However, a mere assertion of injury is not sufficient to reach a conclusion that injury would in fact be caused by the disclosure. The Attorney General bears the onus of establishing a factual basis to the allegations of probable injury on a reasonableness standard: *Canada (Attorney General) v Khawaja*, 2007 FCA 388, [2007] FCJ No 1635 at paras 40-42.

[46] Where the Attorney General can show a reasonable basis for her assessment that the disclosure of the information at issue would cause injury to international relations, national defence or national security, the judge must then proceed to the third and final step of the test. At this point, the judge must determine whether the public interest in disclosure outweighs the public interest in non-disclosure.

[47] Where the judge decides that all or part of the information ought to be disclosed, the Court may exercise discretion to disclose the information in a manner or subject to conditions that are most likely to limit any injury, pursuant to subsection 38.06 (2) of the CEA. This may include the use of a summary or written admission of the facts. This is analogous to the use of judicial summaries approved by the Supreme Court in *Garofoli,* above, at paragraph 79, to allow sufficient disclosure to the accused while protecting privileged information.

[48] The party seeking disclosure of the information bears the burden of proving that the public interest scale is tipped in its favour: *Ribic FCA*, above, at para 21. That is, of course, difficult when that party – in this case the Applicant, Mr. Huang – cannot see the information and gauge for himself, with the assistance of his counsel, how useful it might be to his defence. It is worth noting that the legislation makes no provision for a special advocate to be appointed as a surrogate counsel in CEA s 38 proceedings. The Court has developed the practise of appointing *amicus curiae* but they can play only a limited role in assisting the Court to examine the claims to protect the information.

[49] The public interest in maintaining the confidentiality of information relating to national security, defence and international relations has long been recognized: *Carey v Ontario* [1986] 2 SCR 637 at para 49 and 59 (QL); *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at paras 48-49 (QL).

[50] The factors to be considered in determining whether the public interest is best served by disclosure or non-disclosure will vary from case to case. The judge must assess those factors which he or she deems necessary to find the balance between the competing public interests: *Khadr v Canada (Attorney General)*, 2008 FC 549, [2008] FCJ No 770 at paras 36 -39.

[51] Such factors include the nature of the public interest sought to be protected by confidentiality, whether the evidence in question will probably establish a fact crucial to the defendants, the seriousness of the charge or issues involved, the admissibility of the documentation and its usefulness, whether the party has established that there is no other reasonable way of

obtaining the information and whether the disclosures sought amount to general discovery or a fishing expedition: *Ribic FCA*, above, at para 22.

[52] The public interest in disclosure referenced in section 38.06 of the CEA covers more than the fair trial rights of the individual concerned. It encompasses other interests such as the open court principle, freedom of the press and the right of the public to receive information. See for example, *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* 2007 FC 766, [2007] FCJ No 1081.

(1) Application of the principles to this case

(a) *Relevance*

[53] In the particular context of this case, the Court must be particularly conscious of the value, if any, of the redacted information to the Applicant's right to make full answer and defence to the charges against him. As stated by the Supreme Court of Canada in *Ahmad*, above, at paragraph 7, "[i]n criminal cases, the court's vigilance to ensure fairness is all the more essential". The Supreme Court also noted the following, however, at paragraph 30:

> Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which nondisclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure.

[54] As framed in the Application Record, Mr. Huang seeks the redacted information to make an assessment of whether or not to challenge the admissibility of the intercept evidence against

him in a *Garofoli* application. The PPSC has conceded that the redacted information is at least presumptively relevant for that purpose. However, at this stage, it is not clear that the Applicant will be able to show a reasonable likelihood that the records sought will be of probative value to the issues on a *Garofoli* application: *World Bank Group v Wallace*, 2016 SCC 15, [2016] 1 SCR 207 at para 132 [*Wallace*].

[55] The Attorney General argues that not all of the redacted information is relevant since much of the content of the 2013 Affidavit and Warrant pertains to target [redacted] not related to the intercepts that form the basis for the charges against the Applicant. She contends that the redacted information is not in the possession of the Crown for *Stinchcombe* disclosure purposes and that much of the 2013 Affidavit and Warrant is severable from that which is relevant to the underlying prosecution.

[56] I would also note that it is clear from the unredacted text of the 2013 Affidavit disclosed to the Applicant that the application was for intrusive powers [redacted]

Much of the content of the 2013 Affidavit has no bearing on the interceptions at issue in the underlying proceedings and is not relevant for the purposes of this application under CEA section 38.

[57] The 2013 Affidavit and Warrant are not the typical kind of warrant and information to obtain (ITO) that would be seen in a criminal case. Criminal warrants are of limited duration and are directed to the investigation of specific individuals, locations and crimes. The 2013 Affidavit

and Warrant covered a broad range of threat related activities believed to be occurring in Canada on an on-going basis.

[58] [redacted]

[59] I am satisfied that information in the 2013 Affidavit and Warrant pertaining to [redacted] would not be reasonably useful to the defence in the underlying criminal proceeding, in the *Stinchcombe* sense of relevance. While I understand that the affidavit as a whole would normally be considered on a *Garofoli* application, subject to excisions, it is not clear that redacted information unrelated to the interception of Mr. Huang's telephone calls would be relevant to a challenge to the authorization in the 2013 Warrant.

[60] In *Wallace*, above, at paragraphs 120-122, the Supreme Court discussed the two grounds for challenging an authorization: (1) either the record before the authorizing judge was insufficient to make out the statutory preconditions or, (2) the record did not accurately reflect what the affiant knew or ought to have known, and if it had, the authorization would not have issued. It seems to me that much of the redacted information in the 2013 Affidavit and Warrant is not relevant to either ground. The 2013 Affidavit thoroughly addresses each of the statutory preconditions to issuance of a warrant and there is nothing before me to suggest that the content

of the affidavit is not accurate. While the determination of the admissibility of the evidence is not for this court to make, there is nothing in the redacted content of the documents that would, in my view, provide a basis for concluding that the warrant should not have issued.

(b) *Injury*

[61] The 2013 Affidavit begins with a description of the background of the affiant including his employment history and qualifications. While the name of the affiant could be obscured by a pseudonym or initials, disclosure of his work history would cause harm to Canada's national security as it would reveal details of CSIS's internal organization and management structures. Any information that would identify the affiant or from which his identity could be inferred would also present a risk of harm to him and his family and preclude his employment as a covert operative. For that reason, I was satisfied that the text in the first three pages of the affidavit had been properly redacted.

[62] The next part of the 2013 Affidavit describes the nature of the threats to the security of Canada for which intrusive investigative powers are requested. Much of this information appears in clear. The affidavit then describes the individual target [redacted] and the specific powers requested. It also explains the efforts which have been made to conduct investigations and why they have not or would not be successful without the intrusive powers. Most of this part of the affidavit is redacted. As indicated above, I consider that much of this content is not relevant to the underlying criminal proceedings.

[63] A significant factor in assessing the nature and extent of any injury that may result from disclosure of the redacted information is that the Service knew that the fact of the intercepts at the PRC Embassy would likely be made public once the decision was made to share that information with the RCMP for the purposes of a criminal investigation. This was done in full awareness that revelation of that fact would likely cause injury to Canada's national interests. The Attorney General now seeks to minimize the degree of injury that may result from further disclosures.

[64] I accept that, overall, the Attorney General has satisfied her burden to establish that disclosure of much of the redacted information would cause injury to Canada's national security and international relations.

[65] In considering the evidence on the question of injury I have taken into account what is often referred to as the Mosaic Theory. This theory contends that individual pieces of information which appear to be innocuous on their face, may, when assembled with other pieces of information, present a picture that would be harmful to Canada's security interests. While I have expressed skepticism about this theory in previous decisions, I accept that it is a factor to consider when dealing with [redacted] a sophisticated nation state. This is particularly true in the modern era when extraordinarily powerful computer systems can be employed in assessing the assembled bits of information.

[66] While the primary basis for the Attorney General's claims to protect the information at issue in this application is national security this case also raises delicate issues pertaining to Canada's international relations.

[67] There is no question that confidentiality is fundamental to the collection and sharing of information between states. International conventions require that diplomatic communications and missions be protected. However, it is essential that nations receive sensitive information about the activities and intentions of other countries. The collection of intelligence has long been part of international diplomacy. It would not come as a surprise to anyone familiar with the history of foreign relations and with public disclosures in recent years that this often involves covert methods. These methods are well known and are featured in many publications in the public domain. However, the specific nature and manner of how such collection methods are employed remains highly sensitive and protected information within each country.

[68] For that reason, I have generally accepted the evidence presented that disclosure of certain of the redacted content of the 2013 Affidavit and Warrant would cause injury to Canada's international relations. This is despite the fact, as was readily conceded in the closed proceedings, that in choosing to disclose the intercepts to the RCMP for criminal investigation, the Government of Canada, through CSIS, was prepared to accept some risk of injury in order to prosecute Mr. Huang. The fact that the intercepts in question were of calls to the PRC Embassy has been publicly disclosed both in the criminal prosecution and in a press report on this proceeding. That is a factor that I have taken into consideration in determining whether further injury would result from additional disclosures.

[69] Where information is provided by foreign agencies, it is often subject to express or implied caveats as to its use and broader distribution. Respect for these caveats is known as the "third party rule". In general, this means that the information would not be used by the receiving state for any purpose other than the limited one for which it was provided, usually intelligence, without the consent of the originating agency.

[70] The significant and legitimate interests of the state in maintaining foreign confidences have been recognized by the Supreme Court of Canada: *Ruby v Canada (Solicitor General),* 2002 SCC 75, [2002] 4 SCR 3 at paras 43 and 46. The Supreme Court has also recognized that Canada is a net importer of security information, that this information is essential to the security and defence of Canada, and that such considerations can limit the disclosure of information to affected individuals: *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350, at paras 48 and 59.

[71] In general, I accepted that injury had been established with respect to the disclosure of CSIS' investigative interests. The Applicant, Mr. Huang, was not a target of the 2013 Affidavit and Warrant. He came within the scope of the 2013 Warrant because he allegedly placed telephone calls to the PRC Embassy, a location covered by the warrant. Disclosure of the [redacted] described in the 2013 Affidavit and Warrant would cause certain injury to Canada's national security and the public interest in protecting that information exceeds any interest in its disclosure.

[72] The fact that certain techniques or methods have been employed against a particular target or location may be suspected but is not publicly known. Release of information concerning this would therefore compromise CSIS's operational capabilities. Disclosure of information about the nature and extent of CSIS knowledge of the structure of foreign intelligence services would also compromise Canada's national security. In the absence of evidence to the contrary, the Court must show deference to the Attorney General's position that injury would result from disclosure of such information.

[73] In the present context, the [redacted] telephone line [redacted] directly relevant to the case against Mr. Huang [redacted] has been publicly identified. [redacted]

[74] Section 18 of the *CSIS Act* prohibits the disclosure of the identity of Service employees who were, are or will be engaged in covert activities. While this provision remains subject to section 38 of the *CEA*, its enactment indicates that Parliament regards the protection of such information as being of particular importance. The Court must be cognizant of the potential personal risks faced by CSIS employees who do this work and the risk of injury to the public interest if their identities were revealed. For that reason, I have confirmed the protection of such information wherever it appears in the documents.

[75] Similarly, I see no reason to order the disclosure of information pertaining to [redacted] in the course of their investigations. In the context of this case, this information would be of no value to the Applicant and disclosure would deter others from assisting the Service.

[76] Information regarding internal administrative procedures or information such as file names and categories, telephone numbers or Internet addresses is routinely protected under s 38 as either being of minimal relevance or likely to cause injury. The only value of disclosure of such information would be to assist those who could use it to discern how the Service manages its investigations and internal operations.

VII. CONCLUSION

[77] In order to arrive at a decision with respect to each specific claim of public interest privilege with respect to the information at issue, I have relied on charts prepared by counsel for the Attorney General in consultation with the *amicus*. The charts narrowed the scope of the claims at issue to those that remained in dispute following the private hearings. To be clear, I read the underlying text of each redaction subject to a CEA s 38 privilege claim in a see-through version and made a determination on whether the information could be disclosed applying the *Ribic* test.

[78] A chart indicating my decisions with respect to each disputed s 38 claim is attached as a Schedule to a Private Judgment which will be issued concurrently with these Reasons setting out the detailed determinations that I have made under section 38.06 of the CEA. The Attorney

General has ten days from the issuance of that Judgment within which to appeal to the Federal Court of Appeal under section 38.09 of the CEA. If no appeal is brought, the Judgment will then take effect subject only to the personal issuance of a certificate by the Attorney General of Canada under section 38.13 of the CEA to prohibit disclosure of the information.

[79] As noted above under the heading “Limitation”, in the Private Judgment and Schedule I [redacted]

[80] With regard to much of the information at issue in these proceedings, I am satisfied that it is either not relevant or that the risk of injury has been established by the Attorney General and that the public interest in non-disclosure outweighs that of disclosure. The prohibition on disclosure is confirmed with respect to such information in the Private Judgment and Schedule.

[81] In some instances, the Attorney General’s burden to establish that injury would result from the disclosure of relevant information has not been met. I will order disclosure of that information in the Private Judgment and Schedule.

[82] Where I am satisfied that injury has been established I have considered whether the Applicant has met the burden of demonstrating that the public interest in disclosure outweighs that of non-disclosure. Where I am satisfied that the burden has been met I have considered whether to exercise my discretion pursuant to subsection 38.06 (2) of the CEA to authorize disclosure of the relevant information in whole or in part, in the form of a summary or written

admission of facts or subject to conditions so as to limit any injury to the protected national interests.

[83] The Application Record, which was initially filed in the Public Registry of the Court, the Respondent's Record and the evidence and submissions received in the closed proceedings will be kept in the Designated Proceedings Registry of the Federal Court.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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