Federal Court  Cour fédérale

Date: 20180223

Docket: T-848-17

Citation: 2018 FC 207

Ottawa, Ontario, February 23, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JATINDER SINGH HANJRA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application, by the Minister of Citizenship and Immigration [the Minister], pursuant to s 37 of the *Canada Evidence Act*, RSC 1985, c C-5 [the CEA], seeking determination of an objection to disclosure of certain information based on a claim of informer privilege. The application arises in the context of a sponsorship appeal before the Immigration Appeal Division of the Immigration and Refugee Board [IAD].

[2] For the reasons explained in greater detail below, I have found that the information that the Minister seeks to protect is subject to informer privilege and that its disclosure is prohibited.

II. Background

[3] The Respondent, Jatinder Singh Hanjra, sponsored his wife, Amandeep Virk, to come to Canada from India, but his application was refused because the visa officer [the Officer] was not satisfied that the marriage was genuine or that it was not entered into primarily for the purpose of acquiring permanent residency. Mr. Hanjra appealed and, in the context of that appeal, the Minister provided an appeal record in which a portion of the Officer's notes, as maintained in the Global Case Management System [GCMS] of Citizenship and Immigration Canada [CIC], had been redacted. The IAD wrote to the parties, asking Mr. Hanjra if he objected to the redaction and explaining that, if he did object, the IAD would require the Minister to provide an unredacted copy of the record to the IAD only and to make an application to the IAD only, explaining the basis for the redaction.

[4] Mr. Hanjra advised the IAD through his counsel that he did object to the redaction. He took the position that, as a result of the redaction, the appeal record was incomplete and the IAD should exclude the appeal record provided by the Minister. The Minister advanced the position that the redacted portion could not be disclosed to the IAD because it was protected by informer privilege, as it captured information which had been provided through a telephone tip line administered by the Canada Border Services Agency [CBSA], called the Border Watch Toll-Free Line [the Border Watch Line]. The Minister also submitted that the information was irrelevant

because it was not relied on by the Officer and would not be relied on by the Minister in the appeal.

[5] The IAD then issued an interlocutory decision, dated May 15, 2017, ordering the Minister to provide it with the redacted material so that it could assess whether the information was irrelevant or protected by informer privilege [the IAD Decision]. On May 30, 2017, the Minister filed an application for judicial review of the IAD Decision, which the Court is adjudicating in Court file IMM-2398 [the Judicial Review Application]. In the Judicial Review Application, the Minister argues that the IAD erred in finding that that the Minister's assessment of irrelevance did not dispose of the issue whether to allow the redactions; in finding that it is entitled to access information over which informer privilege is claimed (described by the Minister as finding that the IAD is within the "circle of privilege"); and in finding that it was required to review the redacted information in order to confirm that it was covered by privilege.

[6] The Minister also provided the IAD with a Certificate dated June 2, 2017, objecting to the disclosure of the redacted material pursuant to s 37 of the CEA. It is the merits of that objection which the Minister asks the Court to determine in the present application.

III. Evidence Before the Court

[7] While the Respondent, Mr. Hanjra, was served with the Notice of Application in this matter, he has not filed a Notice of Appearance or a Respondent's Record. Mr. Hanjra was provided with a copy of the Order setting the date for the hearing of the application, but he

informed the Registry Officer by telephone on the day of the hearing that he would not be attending. The Court therefore proceeded with the hearing in Mr. Hanjra's absence, as contemplated by Rule 38 of the *Federal Courts Rules*.

[8] The Minister argued this application and the Judicial Review Application concurrently, relying on the affidavit evidence contained in the Application Records filed by the Minister in the two proceedings. Counsel for the Minister also advised the Court that he had brought to the hearing a copy of a Confidential Affidavit of Laura Soskin, a paralegal with the Department of Justice, dated February 2, 2018, which attached an unredacted copy of the GCMS notes, including the portion over which informer privilege was claimed [the Confidential Affidavit]. The Minister's counsel advised the Court that he was prepared to provide it with a copy of the Confidential Affidavit, with the benefit of an Order protecting the affidavit's confidentiality. The Court accordingly received the Confidential Affidavit, which has been accepted for filing on a confidential basis under an Order dated February 9, 2018. The Minister did not rely on the Confidential Affidavit in argument. Later in these Reasons, I will explain the extent to which the Confidential Affidavit has been taken into account in deciding this application.

IV. Issues

[9] The Minister submits that the following are the issues to be decided by the Court in this application:

A. Is the information the Minister seeks to protect relevant to the IAD appeal?

B. Is the information the Minister seeks to protect protected by informer privilege?

C. Is the IAD in the circle of privilege?

[10] I will explain below the nature of an application under s 37 of the CEA, in terms of the process to be followed by the Court and what the Court is required to decide. Based thereon, my conclusion is that I am required to decide the first two issues raised by the Minister (relevance and privilege). The third issue (whether the IAD is within the circle of privilege) is not within the scope of this application but is addressed in my decision in the Judicial Review Application.

V. Analysis

A. *The Nature of an Application under Section 37 of the Canada Evidence Act*

[11] Section 37 of the CEA provides as follows:

Objection to disclosure of information	**Opposition à divulgation**
37 (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of	**37 (1)** Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public

a specified public interest.

déterminées, ces renseignements ne devraient pas être divulgués.

Obligation of court, person or body

Mesure intérimaire

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

(1.1) En cas d'opposition, le tribunal, l'organisme ou la personne veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Objection made to superior court

Opposition devant une cour supérieure

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

(2) Si l'opposition est portée devant une cour supérieure, celle-ci peut décider la question.

Objection not made to superior court

Opposition devant une autre instance

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by

(3) Si l'opposition est portée devant un tribunal, un organisme ou une personne qui ne constituent pas une cour supérieure, la question peut être décidée, sur demande, par:

(a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or

a) la Cour fédérale, dans les cas où l'organisme ou la personne investis du pouvoir de contraindre à la production de renseignements sous le régime d'une loi fédérale ne constituent pas un tribunal régi par le droit d'une province;

(b) the trial division or trial court of the

b) la division ou le tribunal de première

superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

instance de la cour supérieure de la province dans le ressort de laquelle le tribunal, l'organisme ou la personne ont compétence, dans les autres cas.

Limitation period

(4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Délai

(4) Le délai dans lequel la demande visée au paragraphe (3) peut être faite est de dix jours suivant l'opposition, mais le tribunal saisi peut modifier ce délai s'il l'estime indiqué dans les circonstances.

Disclosure order

(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.

Ordonnance de divulgation

(4.1) Le tribunal saisi peut rendre une ordonnance autorisant la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1), sauf s'il conclut que leur divulgation est préjudiciable au regard des raisons d'intérêt public déterminées.

Disclosure order

(5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in

Divulgation modifiée

(5) Si le tribunal saisi conclut que la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1) est préjudiciable au regard des raisons d'intérêt public déterminées, mais que les raisons d'intérêt public qui justifient la divulgation

importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

l'emportent sur les raisons d'intérêt public déterminées, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice au regard des raisons d'intérêt public déterminées, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

Prohibition order

(6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

Ordonnance d'interdiction

(6) Dans les cas où le tribunal n'autorise pas la divulgation au titre des paragraphes (4.1) ou (5), il rend une ordonnance interdisant la divulgation.

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

Preuve

(6.1) Le tribunal peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

When determination takes effect

(7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time

Prise d'effet de la décision

(7) L'ordonnance de divulgation prend effet après l'expiration du délai prévu ou accordé pour en appeler ou, en cas d'appel, après sa confirmation et l'épuisement

provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

des recours en appel.

Introduction into evidence

(8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Admissibilité en preuve

(8) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (5), mais qui ne pourrait peut-être pas le faire à cause des règles d'admissibilité applicables devant le tribunal, l'organisme ou la personne ayant le pouvoir de contraindre à la production de renseignements, peut demander au tribunal saisi au titre des paragraphes (2) ou (3) de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, pourvu que telle forme ou telles conditions soient conformes à l'ordonnance rendue au titre du paragraphe (5).

Relevant factors

(9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

Facteurs pertinents

(9) Pour l'application du paragraphe (8), le tribunal saisi au titre des paragraphes (2) ou (3) prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve devant le tribunal, l'organisme ou la personne.

[12] In *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 [*Wang*], the Court was required to address under s 37 of the CEA a public interest privilege claim by the Minister of Public Safety and Emergency Preparedness, who asserted that the disclosure of certain documents would compromise an ongoing investigation by the CBSA. At paragraphs 32 to 38, Justice Mactavish explained the Court's mandate when presented with a s 37 application as follows:

> [32] Before turning to consider the merits of the applicants' application, it is important to identify the legal principles that govern the assessment of objections under section 37 of the *Canada Evidence Act*.
>
> [33] Section 37 of the *Canada Evidence Act* permits a Minister of the Crown to object to the disclosure of information by certifying orally or in writing that the information should not be disclosed on the grounds of a specified public interest such as prejudice to an ongoing investigation: subsection 37(1).
>
> [34] Pursuant to subsection 37(4.1) of the Act, a Court may order the disclosure of the information in question unless the Court determines that such disclosure would encroach upon a specified public interest. If disclosure of the information in question would not encroach on a specified public interest, then the Court may order disclosure: *Goguen v. Gibson*, [1983] 1 F.C. 872.
>
> [….]
>
> [36] If the Court is satisfied that disclosure of the evidence in question would indeed encroach on a specified public interest, it must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure: subsection 37(5), *R. v. Richards* (1997) 34 O.R. (3d) 244 at 248-249, 100 O.A.C. 215 (C.A.). If it is determined that the public interest in disclosure outweighs the public interest in protecting an ongoing investigation, then the Court may order the disclosure of all, part, or summaries of the information in question and may impose any conditions on that disclosure that the Court considers appropriate.
>
> [….]

> [38] If the Court does not order disclosure pursuant to subsection 37(4.1) or subsection 37(5), then the Court shall prohibit disclosure of the information in question, pursuant to subsection 37(6).

[13] The Minister submits that, in the case of informer privilege, there is no place for the weighing process contemplated by s 37(5), as discussed in paragraph 36 of *Wang*, because informer privilege is a class privilege that is subject only to the "innocence at stake" exception applicable in matters of criminal law. I agree with the Minister's position on this point (see *R. v Leipert*, [1997] 1 SCR 281 [*Leipert*]). In a case involving informer privilege outside of the criminal context, with no scope for application of the "innocence at stake" exception, the Court must prohibit disclosure of the disputed information or documentation if the privilege is established.

[14] In deciding a s 37 application, the Court must first determine whether the information that is the subject of the privilege claim is relevant to the issues before the decision-maker in the proceeding giving rise to the claim (see *Wang* at para 47; *Harris v Canada*, 2001 FCA 74). I also note the explanation by the Federal Court of Appeal in *Jose Pereira E Hijos S.A. v Canada (Attorney General)*, 2002 FCA 470 [*Hijos*] at paragraph 9, that it is unnecessary for the Court to examine the material over which the privilege claim is asserted unless an "apparent case for disclosure" has been made out. That guidance was provided in the context of a claim for a category of public interest privilege in which the weighing of the public interest in protecting the privileged information against the public interest in disclosure was applicable, such that the "apparent case for disclosure" was a result of that balancing exercise. However, I consider this guidance to be equally applicable to the present case, as it is consistent with other authorities to

the effect that courts will decline to review privileged documents to ensure a claim of privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue (in the context of solicitor-client privilege, see *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, at para 68; *Privacy Commissioner of Canada v Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*] at para 17).

[15] The decision of the Supreme Court of Canada in *Leipert*, a case which dealt specifically with informer privilege and the potential application of the "innocence at stake" exception, is to the same effect. At paragraph 33 of *Leipert*, the Supreme Court explained that, when an accused seeks disclosure of privileged information on the basis of this exception, the accused must first show some basis to invoke the exception, following which the Court may then review the information to determine whether it is in fact necessary to prove the accused's innocence. The inference is again that inspection of the document over which privilege is claimed is unnecessary in the absence of a basis to question the claim.

[16] Finally, I note the Minister's position that the Court owes no deference to the IAD Decision in adjudicating the application under s 37 of the CEA. The Minister relies on the decision in *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 [*Arar*]. That case did not consider s 37 but involved an application to determine whether certain information could be disclosed under the somewhat comparable process prescribed by s 38.04 of the CEA in the case of information potentially injurious to international relations, national defence, or national security.

At paragraphs 30-32 of *Arar*, this Court held that no deference should be afforded to the findings of the Commission of Inquiry whose report gave rise to the application. I agree that the Minister's position on this point is supported by *Arar*. It is also consistent with Justice Mactavish's analysis at paragraphs 47 to 50 of *Wang*.

B. *Is the information the Minister seeks to protect relevant to the IAD appeal?*

[17] The Minister argued before the IAD and now before the Court that the redacted portion of the GCMS notes was irrelevant because it was not relied on by the Officer and would not be relied on by the Minister in the appeal. In advancing this position, the Minister emphasizes that the appeal to the IAD is a hearing *de novo* of the substantive issue of the *bona fides* of Mr. Hanjra's marriage and is therefore not restricted to the information available to the Officer.

[18] As previously noted, the Court has been provided with a copy of the unredacted GCMS notes through the Confidential Affidavit. However, guided by the jurisprudence canvassed earlier in these reasons, I have considered the Minister's relevance argument without taking into account the content of the portion of the notes over which privilege is claimed.

[19] I am unable to agree with the Minister's relevance argument. In *Nguesso v Canada (Minister of Citizenship and Immigration)*, 2015 FC 102 [*Nguesso*] at para 89, this Court expressed that any document that was before a decision-maker when it made its decision is presumed relevant when that decision is under review. The Court further explained in paragraph 93 of *Nguesso* that relevance in a judicial review is not restricted to documents that actually

influenced the administrative tribunal's decision but extends to all materials that were before the decision-maker.

[20] My conclusion on this issue is not altered by the fact that the process before the IAD is a *de novo* appeal, rather than a judicial review. The significance of this process is that both parties can introduce additional evidence to supplement the record that was before the Officer. However, this does not alter the presumption that the record that was before the Officer is relevant. The redacted passage that was the subject of the IAD's decision is an excerpt from the Officer's own notes, to which such a presumption must surely apply. As explained at paragraph 17 of *Hijos*, relevance is not to be viewed in the narrow sense of whether it is relevant to an issue pleaded, but rather to its relative importance in proving the claim or in defending it. As observed in the IAD Decision, when a spousal sponsorship application is refused because of concerns about the genuineness of the marriage and the purpose for which it was entered into, the visa officer's notes are always included in the record for any appeal of such a refusal, as these notes play a central role in the adjudication of the appeal because they reveal the officer's underlying reasoning.

[21] Having rejected the Minister's position that the redacted material is not relevant, I must proceed to consider whether it is protected by informer privilege.

C. *Is the information the Minister seeks to protect protected by informer privilege?*

[22] Beginning with the nature of informer privilege, the Supreme Court of Canada provided the following summary in its recent decision in *R. v Durham Regional Crime Stoppers Inc.*, 2017 SCC 45 [*Durham*] at para 11:

> [11] Informer privilege is a common law rule that prohibits the disclosure of an informer's identity in public or in court. As a class privilege, informer privilege is not determined on a case-by-case basis. It exists where a police officer, in the course of an investigation, guarantees confidentiality to a prospective informer in exchange for information: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 36; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 105. The privilege acts as "a complete and total bar" on any disclosure of the informer's identity, subject only to the innocence at stake exception: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 30. All information which might tend to identify the informer is protected by the privilege: *ibid*. The privilege belongs both to the Crown and to the informer and neither can waive it without the consent of the other: *ibid.*, at para. 25.

[23] While I have previously noted that this application under s 37 of the CEA is not a judicial review of the IAD decision, and I am required to make up my own mind as to whether the redacted portion of the GCMS notes meet the test for informer privilege, I do wish to address the IAD's articulation of that test. The IAD stated that the privilege is triggered where the communicator of information requests confidentiality and there is a corresponding promise of confidentiality (either express or implied) by the recipient of the information. Applying this analysis to the Minister's claim of privilege for the information received through the Border Watch Line, the IAD concluded that the legal test for informer privilege is likely met when a tip is made to the Border Watch Line and the informer expects the tip to be treated confidentially.

As a result of this conclusion, the IAD found that it could not assess the claim of privilege without reviewing the substance of the tip to evaluate whether the informer had an expectation of confidentiality.

[24] In my view, the jurisprudence applicable to informer privilege does not support the IAD's understanding of the test as requiring demonstration of two separate elements, i.e. an expectation of confidentiality on the part of the informer and a promise of confidentiality by the recipient. The IAD relied on paragraph 18 of *R. v Named Person B*, 2013 SCC 9 [*Named Person*], in which the Supreme Court provided the following explanation of the circumstances in which the privilege arises:

> [18] In *R. v. Barros*, [2011] 3 S.C.R. 368, this Court held that "not everybody who provides information to the police thereby becomes a confidential informant" (para. 31). The Court was clear, however, that "the promise [of protection and confidentiality] need not be express [and] may be implicit in the circumstances" (para. 31, citing *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him or her? An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality.

[25] It is correct to derive from this passage that not everybody who provides information to the police, who were the recipients of the information at issue in that case, thereby becomes a confidential informant. However, the Supreme Court's explanation focuses upon whether or not

the police had made a promise of protection and confidentiality. In noting that the promise need not be explicit, the Court proceeded to explain circumstances in which that the privilege may result from an implicit promise. This is to be assessed objectively and may be based on the conduct of the police or evidence from which it can be inferred that the potential informer reasonably believed he or she was the recipient of informer status. While the above passage speaks of reasonable expectations of confidentiality, I read that reference as related to the objective nature of the analysis. I do not read it as mandating a conjunctive analysis, in which a court or other decision-maker assessing a privilege claim must consider whether there was both a promise of confidentiality and an expectation of confidentiality. I particularly do not regard it necessary to consider the informer's expectations as a separate element of the test when there has been an explicit promise of confidentiality on the part of the police or whatever other law enforcement authority received the information from the informer.

[26] Turning to other authorities, I note that *Iser v Canada (Attorney General)*, 2017 BCCA 393 [*Iser*], does state at paragraph 27 that there are two preconditions to the existence of informer privilege. However, the Court explained that these conditions are, first, that the informer provided information to an investigating authority and, second, that the informer provided the information under an express or implied guarantee of protection and confidentiality. I also note that, in *Iser*, the British Colombia Court of Appeal relied on *R. v Barros*, 2011 SCC 51 [*Barros*] at para 31, in which the Supreme Court stated:

> 31 Of course, not everybody who provides information to the police thereby becomes a confidential informant. In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police. As noted in *Basi*, at para. 36:

> The privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain.

Bisaillon, however, added that the promise need not be express. It may be implicit in the circumstances:

> The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed. [Emphasis added; p. 105.]

[27] *Barros* refers to confidentiality being explicitly sought by the informer and confirmed by the police. However, it describes that as a "clear case", which I do not interpret to prescribe a requirement that there be both an explicit request for confidentiality and explicit promise of same, as this would be not be consistent with the jurisprudence which clearly contemplates that an implicit promise of confidentiality is sufficient to support the application of informer privilege.

[28] The evidence provided by the Minister in this application includes an affidavit sworn by the CBSA officer who manages the Border Watch Line, which describes the purpose of that service and the manner in which it is publicly advertised, as well as the fact that the information in the redacted portion of the GCMS notes had been received through the Border Watch Line. I have reached the same conclusion as was expressed by the IAD in its decision, that both the Minister's website and the CBSA website provide an explicit promise of confidentiality to

informers using the Border Watch Line. Based on this evidence of an explicit promise of confidentiality, I find that informer privilege applies to the redacted portion of the GCMS notes.

[29] I also note that I am able to arrive at this determination without taking into account the content of the portion of the notes over which privilege is claimed. I appreciate that it is theoretically possible that the redacted information would demonstrate in some way that the informer who called the Border Watch Line in this particular instance did not require his or her information or identity to be treated confidentially. However, such a possibility is purely speculative, without any foundation in evidence or argument. In my view, the principle that courts will decline to review privileged documents to ensure a claim of privilege is properly asserted, unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue, applies to the present case.

[30] Having said that, this case is also comparable to the s 37 application considered by Justice Heneghan in *Harris v Canada*, 2001 FCT 498, in which, as explained at paragraph 36, there was no issue concerning inspection of the documents as they had been voluntarily submitted to the Court. The Minister has provided the Court with a copy of the unredacted GCMS notes and, if I were to take into account the content of the portion of the notes over which privilege is claimed, it would remain my decision that that this portion of the document is subject to informer privilege.

VI. Conclusion

[31] Having found that the redacted portion of the GCMS notes is subject to informer privilege, my Judgment will prohibit disclosure of that information.

[32] The Minister's Notice of Application also requests an order that the appeal before the IAD be continued in accordance with the Court's decision. I am not convinced that s 37 of the CEA affords the Court jurisdiction to provide this particular direction. However, my Judgment in the Judicial Review Application allows that application and remits the matter to the IAD for the continuation of the appeal in accordance with the Court's Reasons in that proceeding.

[33] The Minister did not claim costs on this application, and none are awarded.

JUDGMENT IN T-848-17

THIS COURT'S JUDGMENT is that disclosure of "the redacted information", as defined in the Certificate of Jasmine Hayes dated June 2, 2017 made pursuant to section 37 of the *Canada Evidence Act*, is prohibited. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-848-17
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION V JATINDER SINGH HANJRA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 5, 2018
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 23, 2018

APPEARANCES:

Gregory George Amy King	FOR THE APPLICANT
No appearance	FOR THE RESPONDENT (On his own behalf)

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT