



Date: 20210427

Docket: DES-3-21

Citation: 2021 FC 347

Ottawa, Ontario, April 27, 2021

PRESENT: The Honourable Mr. Justice O'Reilly

**IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF
CANADA PURSUANT TO SECTION 38.04(1) OF THE *CANADA EVIDENCE ACT*,
RSC 1985, C C-5**

ORDER AND REASONS

I. Overview

[1] On June 16, 2020, I issued a decision in respect of an application for warrants under s 21 of the Canadian Security Intelligence Act, RSC 1985, c C-23 (see *In the matter of an application by XXXXX for warrants pursuant to sections 16 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 and in the matter of a foreign state, group of foreign states, corporation or person*, 2020 FC 697).

[2] Before issuing a public version of the decision, I ordered counsel for the Attorney General of Canada and the *amicus curiae*, Mr Gordon Cameron, to make suggestions to me about information in the decision that should be redacted. With one exception, counsel for the

AGC and Mr Cameron came to a common position on the necessary redactions. Counsel for the AGC suggested that one further piece of information should be redacted; Mr Cameron disagreed.

[3] Without receiving evidence or representations about the advisability of making the additional redaction requested by counsel for the AGC, I issued a public version of the decision with the contested piece of information redacted. This allowed counsel for the AGC to pursue a potential remedy under s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] to prevent disclosure of the information in question.

[4] As a preliminary issue, I invited submissions from counsel for the AGC and the *amicus* on the applicability of the CEA regime to the present novel circumstances – that is, the release of information in a public decision on an application for a warrant under s 21 of the *CSIS Act*.

[5] The AGC's position is that s 38 of the CEA applies to these circumstances. In particular, s 38.02(1.1) requires the Federal Court to give the AGC 10 days' notice of its intention to release sensitive or potentially injurious information. In turn, an official can then inform the AGC of the particulars of the potential disclosure under s 38.01. If the AGC determines that the information should not be disclosed, he or she may apply for a non-disclosure order under s 38.04. The Court will then hear evidence and arguments in support of the application and decide whether disclosure of the information would harm national security.

[6] The AGC also points out that the operation of s 38 is compatible with the less formal process that the Court usually follows and, indeed, followed here. That process permits counsel

for the AGC and an *amicus* to propose redactions to a Court decision without resorting to the formal procedure in s 38. If the informal process does not achieve a consensus on the extent of the necessary redactions, counsel for the AGC can then invoke s 38.

[7] The *amicus*, Mr Cameron, substantially agrees with the AGC's position. He points out that a potential issue could arise in a situation where the informal process described above results in the AGC seeking the redaction of information that the Court does not regard as sensitive or potentially injurious. The Court might choose to disclose the contested information before the AGC has had a chance to invoke s 38. Indeed, that could have happened in this case had I not granted the AGC an opportunity to pursue a remedy under s 38 even after the decision had been released.

[8] Mr Cameron makes a valid point. However, applications for warrants will frequently contain sensitive or potentially injurious information, which is disclosed to the Court in an *in camera ex parte* hearing. In practice, out of caution, the Court will be inclined to afford the AGC an opportunity through s 38 to persuade the Court that certain information in its decision should not be disclosed, even when it appears to the Court, at first blush, that disclosure would be appropriate. In the circumstances of this proceeding, it is unnecessary to explore this point further.

[9] Overall, I agree with the AGC's submissions. The scheme under the CEA provides an appropriate mechanism for seeking non-disclosure of sensitive information in a decision on a warrant application. The AGC may now bring its application under s 38.04.

ORDER IN DES-3-21

THIS COURT ORDERS that the AGC may seek an order under s 38 of the *Canada Evidence Act* for non-disclosure of sensitive information in a decision on a warrant application under s 21 of the *Canadian Security Intelligence Service Act*.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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BY THE ATTORNEY GENERAL OF
CANADA PURSUANT TO SECTION
38.04(1) OF THE CANADA EVIDENCE
ACT, RSC 1985, C C-5
APPLICATION CONSIDERED IN WRITING AT OTTAWA, ONTARIO
ORDER AND REASONS O'REILLY J.
DATED: APRIL 27, 2021

WRITTEN REPRESENTATIONS BY:

MARIA BARRETT-MORRIS

FOR THE APPLICANT

GORDON CAMERON

AMICUS CURIAE

SOLICITORS OF RECORD:

DEPARTMENT OF JUSTICE
CANADA

FOR THE APPLICANT