Federal Court of Appeal | Cour d'appel fédérale

Date: 20180601

Docket: A-214-17

Citation: 2018 FCA 109

CORAM: **GAUTHIER J.A.**
WEBB J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

QING (QUENTIN) HUANG

Respondent

Heard at Ottawa, Ontario, on March 6, 2018.

Judgment delivered at Ottawa, Ontario, on June 1, 2018.

Redactions completed on June 5, 2018.

PUBLIC REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

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PUBLIC REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal and cross-appeal from a decision (Public Reasons) of a designated judge of the Federal Court (the Designated Judge) seized with an application pursuant to paragraph 38.04(2)(*c*) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the CEA) to disclose the redacted content of a warrant issued by the Federal Court in 2013 (the Warrant) and the affidavit filed in support thereof (the Affidavit). The Designated Judge ordered the disclosure of some of the

information pursuant to subsection 38.06(2), and of other information not properly the subject of section 38 of the CEA.

[2] The Attorney General of Canada (the Attorney General or the appellant) contends that the Designated Judge erred in fact and law by ordering the disclosure of such information, erred in law by ordering disclosure of some information contrary to the requirements of natural justice and procedural fairness, and exceeded his jurisdiction with respect to the information that was not the subject of section 38 of the CEA.

[3] On cross-appeal, Qing (Quentin) Huang (Mr. Huang or the respondent) argues that the Designated Judge erred by refusing to order the disclosure of some redacted information, and in determining the role of the *amicus curiae* in this case.

[4] The hearing of this appeal took place in two phases. In a public hearing held on March 6, 2018, the Court heard the arguments of the appellant and respondent on cross-appeal, essentially revolving around the test for relevance applied by the Designated Judge in his assessment of the section 38 application, and his interpretation of the *amicus*' role. In an *in camera ex parte* hearing that took place on March 7 and 8, 2018, the Attorney General and the *amicus* dealt mostly with the arguments raised on appeal by the Attorney General.

[5] These public reasons deal with the cross-appeal. A set of private reasons, released concurrently with these public reasons, has been made available to the Attorney General and the

amicus only, and is kept at the designated proceedings facility in Ottawa, Ontario. The private reasons address the issues that were debated in the private hearing.

I. Background

[6] Mr. Huang was arrested and charged on November 30, 2013 with conspiracy to provide Canadian military secrets to the government of the People's Republic of China (PRC), contrary to the *Security of Information Act*, R.S.C. 1985, c. O-5. A key piece of evidence that led to Mr. Huang's arrest were telephone calls that he allegedly made to the PRC Embassy in Ottawa, incidentally intercepted by the Canadian Security Intelligence Service (CSIS) pursuant to the Warrant issued by the Federal Court on March 7, 2013 under section 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the CSIS Act). That Warrant, supported by an Affidavit from a CSIS officer, authorized the use of [redacted] Among other matters, it authorized the interception of telephone calls to and from a CSIS target at the PRC Embassy in Ottawa. The intercepted conversation between Mr. Huang and the PRC Embassy took place on May 22, 2013. Mr. Huang was not a target of the Warrant and had never been under investigation by CSIS.

[7] The transcripts and recordings of the intercepted calls allegedly made by Mr. Huang to the Embassy of the PRC were provided by CSIS to the Royal Canadian Mounted Police (the RCMP) under the authority of section 19 of the CSIS Act, which provides that such information may be disclosed to a peace officer if it may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province. These transcripts were disclosed to

Mr. Huang by the Public Prosecution Service of Canada (the PPSC), as part of its disclosure obligations pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97 (*Stinchcombe*). A heavily redacted version of the Warrant and the Affidavit were also disclosed to the respondent. The PPSC declined to provide the unredacted content of the two documents to the respondent 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. Nevertheless, no notice was given to the Attorney General pursuant to subsection 38.01(1), because counsel for the PPSC believed the respondent did not intend to challenge the admissibility of the intercepted communications and that there was no possibility of disclosure of the redacted information.

[8] The respondent, however, changed counsel in the fall of 2016. His new counsel requested additional information from the PPSC regarding the Warrant and advised the PPSC that they were considering bringing an application before the Ontario Superior Court of Justice to seek the exclusion of the intercepted telephone communications pursuant to the principles laid out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 116 N.R. 241 (*Garofoli*). That application is "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*" (Public Reasons at para. 14), and that therefore the evidence obtained should be excluded pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). In support of such an application, Mr. Huang is seeking to show that the search authorized by the Warrant was more intrusive than was reasonably necessary to achieve its objectives (*R. v. Rogers Communications*, 2016 ONSC 70 at

paras. 40-41, 128 O.R. (3d) 692 (*Rogers Communications*); *R. v. Vu*, 2013 SCC 60 at paras. 21-22, [2013] 3 S.C.R. 657 (*Vu*)).

[9] The PPSC therefore informed the Attorney General of the possible disclosure of the redacted information in the Warrant and Affidavit on February 27, 2017. Mr. Huang brought an application for disclosure before the Federal Court on that same date. In his Notice of Application, the respondent claimed that 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. It is the Designated Judge's decision on this application that is before this Court in this appeal.

II. Impugned decision

[10] After having provided the background relevant to this case and summarized in broad detail the public affidavit in support of the appellant's position that the disclosure of the redacted information would be injurious to national security, the Designated Judge set out the CSIS Act warrant regime and the legislative scheme pursuant to which the Attorney General's decision to authorize disclosure is reviewed. There is no need to repeat here the Designated Judge's well-crafted summary of the legal context and principles governing this proceeding.

[11] Suffice it to emphasize that contrary to police investigations, which are focused on particular crimes committed by identifiable individuals, the mandate of CSIS is to prevent activities that would put the security of Canada at risk. In that context, CSIS' task is to collect information that may assist in that mission and report to and advise the Government of Canada

(see s. 12 of the CSIS Act). While the notion of "threats to the security of Canada" is broadly defined in section 2 of the CSIS Act, the requirements to obtain from the Federal Court a warrant to collect information and intelligence are strict. Section 21 of the CSIS Act provides that a judge may issue a warrant authorizing the interception of communications and the search and seizure of information only if he or she is satisfied that the facts affirmed in the affidavit in support of the application for a warrant justify the belief, on reasonable grounds, that: (1) a warrant is required to investigate a threat to the security of Canada; (2) the threat as defined by section 2 of the CSIS Act is present; and (3) other investigative measures have been tried and have either failed or are unlikely to succeed.

[12] There was a time when courts were precluded from second-guessing the assertion by the Crown of a public interest privilege, and could not inspect documents allegedly pertaining to international relations, national security or defence. That doctrine was firmly entrenched in common law (see *Duncan v. Cammell Laird & Co.*, [1942] A.C. 624, [1942] 1 All E.R. 587) and was enshrined in subsection 41(2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 (see *Landreville v. The Queen* (1976), 70 D.L.R. (3d) 122, [1977] 1 F.C. 419). Following the recommendation of the *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, Second Report - Vol. 1: Freedom and Security under the Law, Ottawa, August 1981, section 41 of the *Federal Court Act* was repealed and replaced by what are now sections 38 and 38.01 to 38.15 of the CEA. It is now for designated judges of the Federal Court to determine whether, and under what conditions, the information that the government seeks to protect ought to be disclosed.

[13] The Designated Judge aptly summarized the principles that have been developed over the years by the Federal Court and this Court in applying those provisions of the CEA. Of particular relevance is the test established by this Court in *Ribic v. Canada (Attorney General)*, 2003 F.C.T. 10, [2003] F.C.J. No. 1965 (Q.L.) (F.C.), aff'd 2003 FCA 246, [2003] F.C.J. No. 1964 (Q.L.) (*Ribic*), to determine whether the statutory prohibition on disclosure ought to be lifted. Again, the Designated Judge appropriately explained that test in paragraphs 44 to 52 of his Public Reasons, and I can do no better than to endorse his summary of the case law in that respect. For the purpose of this appeal, I need only reproduce his synopsis of the three part test when assessing the merits of the section 38 privilege claims:

> 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.

[14] Acknowledging that the Court must be sensitive to the value that the redacted information could have to the respondent's right to make full answer and defence, the Designated Judge nevertheless found that the redacted information unrelated to the interception of Mr. Huang's telephone calls would not be relevant to challenge the authorization of the Warrant. In his view, the redacted information would not be relevant to either of the grounds identified by the Supreme Court in *World Bank Group v. Wallace*, 2016 SCC 15 at paragraph 120, [2016] 1 S.C.R. 207 (*Wallace*) to challenge an authorization, that is: "first, that the record before the authorizing judge was insufficient to make out the statutory preconditions; second,

that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued".

[15] The Designated Judge also found that the Attorney General had satisfied her burden of establishing that disclosure of much of the redacted information would cause injury to Canada's national security and international relations. In coming to that conclusion, the Designated Judge noted and accepted what has come to be known as the mosaic theory, according to which discrete pieces of information that appear to be innocuous when considered separately may well be harmful to Canada's security interests when put together. The Designated Judge also acknowledged that information provided by foreign agencies may well limit the disclosure of information to affected individuals.

[16] In his conclusion, the Designated Judge explained that he read the underlying text of each disputed redaction subject to a CEA section 38 privilege claim, and made a determination on whether the information could be disclosed applying the *Ribic* test in a chart attached as a schedule to a private judgment issued concurrently with his Public Reasons. He found that much of the information sought by the respondent "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" (at para. 80). He also considered whether to exercise his discretion pursuant to subsection 38.06(2) of the CEA to authorize the disclosure in whole or in part of relevant information.

III. Issues

[17] As previously mentioned, these public reasons deal only with the respondent's cross-appeal. In his cross-appeal, Mr. Huang essentially raises two issues:

A. What is the correct threshold for relevance within the *Ribic* test in an application for disclosure pursuant to section 38 of the CEA?

B. Did the Designated Judge err in determining the role of the *amicus* in the present proceeding?

IV. Analysis

A. *What is the correct threshold for relevance within the Ribic test in an application for disclosure pursuant to section 38 of the CEA?*

[18] The respondent submits that the Designated Judge made two errors in assessing the relevance of the redacted information, first by wrongly requiring him to prove a "reasonable likelihood" of relevance, and second by failing to consider the possibility of a "manner of search" argument on his challenge to the admissibility of the intercepted telephone calls. In my view, neither of these arguments is warranted when the Designated Judge's Public Reasons are read contextually.

[19] It is not entirely clear from the record whether CSIS shared with the RCMP the unredacted Warrant and Affidavit on the basis of which the calls by Mr. Huang to the PRC Embassy were intercepted, or only the redacted version that was disclosed by the Crown as part of its *Stinchcombe* obligations. If it is the latter, the *O'Connor* rule pursuant to which an accused must show a "reasonable likelihood" that the records will be of probative value to obtain third

party production in the *Garofoli* context would probably apply (see *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 (*O'Connor*); *Wallace*). This would be the case because it is generally accepted that, where CSIS and the RCMP investigations are separate, CSIS is a third party for disclosure purposes (see *R. v. Ahmad,* [2009] O.J. No. 6153, 89 W.C.B. (2d) 238 (Ont. Sup. Ct.), rev'd but not on this point 2011 SCC 6, [2011] 1 S.C.R. 110; *R. v. Nuttall,* 2015 BCSC 1125 at paras. 45-46, [2015] B.C.J. No. 1394; *R. v. Jaser*, 2014 ONSC 6052 at para. 11, [2014] O.J. No. 6424; *R. v. Alizadeh,* 2013 ONSC 5417 at para. 14, [2013] O.J. No. 6394, reconsidered but not on this point 2013 ONSC 7540, [2013] O.J. No. 6395).

[20] Be that as it may, I do not think the Judge applied a "reasonable likelihood" of relevance standard developed in the context of third party disclosure, as alleged by the respondent. When read as a whole, the Public Reasons clearly demonstrate that the Judge applied the proper legal test to establish relevance at the first stage of his *Ribic* analysis.

[21] Early on in his Public Reasons, he identified the standard according to which the Crown fulfilled its disclosure obligation as that established by the Supreme Court in *Stinchcombe* (Public Reasons at para. 6). Indeed, counsel for the PPSC conceded as much when making that disclosure. It is therefore to be assumed, for the purposes of this appeal, that the contents of the Warrant and of the Affidavit are first party disclosure.

[22] The Judge also referred to a Supplementary Notice of Application filed by the respondent on March 22, 2017, whereby he sought an order for further disclosure of information relating to the interception of the telephone calls at the PRC Embassy in Ottawa during the timeframe of the

Warrant (Public Reasons at paras. 20-21). The Judge found that the subject matter of this further application was outside the scope of the application that was before him. He nevertheless noted that the information in question, if it exists, was in the possession of a third party (CSIS), and that an application for the production of that information was set down to be heard in the Ontario Superior Court of Justice pursuant to *O'Connor*. This is clear evidence that the Judge was well aware of the distinction between the two standards for relevance, depending upon whether the documents sought by an accused are in the hands of the Crown or of a third party.

[23] In his analysis, the Designated Judge summarized the applicable law and, in particular, the test developed in *Ribic* for the purposes of section 38 of the CEA. He emphasized more than once that the relevance threshold is not exacting, especially in a case like this one where 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" (Public Reasons at para. 53). He added, at paragraph 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.

[24] This language tracks closely the wording used by this Court in *Ribic*. Writing for the Court, Justice Létourneau wrote at paragraph 17 of *Ribic*:

> The first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the *Stinchcombe* rule, that is to say in the case at bar information, whether inculpatory or exculpatory, that <u>may reasonably be useful</u> to the defence: *R. v. Chaplin*, [1995] 1 S.C.R. 727, at page 740. This is undoubtedly a low threshold. This step remains a necessary one because, if the information is not relevant, there is no need to go further and engage scarce judicial resources. This

> step will generally involve an inspection or examination of the information for that purpose. The onus is on the party seeking disclosure to establish that the information is in all likelihood relevant evidence.
>
> (emphasis added)

[25] Reading the Public Reasons of the Designated Judge in context, I have no doubt that he applied the *Stinchcombe* test of disclosure. This is made even clearer at paragraph 59 of his Public Reasons, where he reiterated in concluding his analysis on this matter that the information pertaining to [redacted] would not be reasonably useful to the defence in the underlying criminal proceeding, "in the *Stinchcombe* sense of relevance". There was clearly no confusion in his mind as to the proper test to be applied. It may have been unfortunate for the Designated Judge to comment on what will happen at the *Garofoli* stage, and to question whether the respondent will be able to show "a reasonable likelihood that the records sought will be of probative value to the issues on a *Garofoli* application" (at para. 54 of his Public Reasons). This is clearly the test Mr. Huang will have to meet before the Ontario Superior Court of Justice to obtain third party production in the *Garofoli* context. It is clear to me, however, that the Designated Judge did not confuse the two tests and properly applied the *Stinchcombe* test in his assessment of relevance for the purpose of his section 38 CEA analysis.

[26] Counsel for the respondent further submits that the Designated Judge erred in assuming that his challenge to the constitutionality of the search rests only on two possible bases, namely that the record before the authorizing judge was insufficient to make out the statutory preconditions, and that the affiant failed to make full, frank and fair disclosure of information which he knew or ought to have known would be relevant to the judge issuing the Warrant. The

respondent argues that the Designated Judge failed to consider that his challenge would also pertain to the manner by which the intercepts were carried out.

[27] To be sure, the Designated Judge did refer at paragraph 60 of his Public Reasons to the facial and sub-facial validity arguments and mentioned that, in *Wallace*, the Supreme Court discussed these two grounds for challenging an authorization. I do not think, however, that one can infer from that statement that the Designated Judge was oblivious to the possibility of a manner of search challenge.

[28] The respondent is correct that a search (in this case, the interception of telephone calls) may be unreasonable and contrary to section 8 of the Charter if it is not carried out in a reasonable manner, either because the issuing justice failed to limit the breadth of the authorization, or because the persons carrying out the search failed to adhere to minimization principles in executing the warrants (*R. v. Cornell*, 2010 SCC 31 at para. 16, [2010] 2 S.C.R. 142; *R. v. Collins*, [1987] 1 S.C.R. 265, at 278, 38 D.L.R. (4th) 508). In my view, the Designated Judge was well aware of that possibility and alluded to it at paragraph 13 of his Public Reasons; he cited the same case law relied upon by the respondent for the proposition that a Superior Court judge seized of a *Garofoli* application is entitled to look into the way a search was conducted to determine whether it was no more intrusive than is reasonably necessary to achieve its objective (see *Rogers Communications* at paras. 40-41; *Vu* at paras. 21-22). Moreover, the Designated Judge had to deal with a further notice of application wherein the respondent sought production of information regarding the manner or means of execution of the Warrant; the Designated Judge refused to entertain that further notice of application because it was premature

(there was no court order requiring the production of that information at the time), but he was clearly alert to the fact that the respondent was considering the possibility of challenging the Warrant on that basis.

[29] As a result, I do not think it can seriously be argued that the Designated Judge erred in failing to appreciate the manner of search argument.

[30] Furthermore, the Designated Judge made no error of law when he concluded that the redacted information in the Warrant and the Affidavit pertaining to the interception of Mr. Huang's telephone calls would not be reasonably useful or relevant to his defence in the underlying criminal proceeding. First of all, it is obvious that nothing in the Warrant or the Affidavit could be of use to the respondent in his endeavour to demonstrate that the means used to intercept the telephone calls runs afoul of the duty to minimize the impact of these intercepts on the privacy interests of potential targets. As noted by counsel for the Attorney General, the Warrant and the Affidavit necessarily pre-date the interceptions themselves; none of the information contained in these documents can be of relevance with respect to how the communications were actually intercepted.

[31] I agree with the respondent that he is entitled to argue, as part of his "manner of search" argument, that the search was not carried out in a reasonable manner because the Warrant failed to limit the breadth of the authorization. I would not go as far as to say, however, that he is entitled to question the sufficiency of the minimization measures in relation to every type of search and seizure authorized by the Warrant. The Warrant is severable, and its potential

deficiencies with respect to [redacted] The focus of the enquiry, therefore, is on the interception of telephone calls to and from the PRC Embassy.

[32] The Warrant contains a number of clauses, dealing with the conditions associated with the retention of intercepted communications and the use to which they can be put. These clauses have been disclosed to the respondent, and he is certainly entitled to rely on them in trying to convince the *Garofoli* judge that they are insufficient to guard against unreasonable intrusions on privacy rights pursuant to section 8 of the Charter. In addition, the Warrant contains other clauses, which, although they have not been disclosed to the respondent since their disclosure would be injurious to national security, impose minimization conditions that limit the breadth of the authorization.

[33] As noted by the Designated Judge, on a *Garofoli* application, the respondent would also undoubtedly be entitled to rely on the Affidavit in support of the Warrant to show that the minimization measures are insufficient or inadequately tailored to meet the requirements of the right to privacy. However, as the Designated Judge hastened to add, a CSIS warrant is substantially different from a criminal warrant. The statutory requirements established under section 21 of the CSIS Act are different from those set out in the *Criminal Code*, R.S.C., 1985, c. C-46, for the obvious reason that they are directed at different purposes. While the first type of warrants cover a broad range of threat-related activities and are meant to prevent the commission of illegal activities, the second type are more narrowly focused and are directed to the investigation of specific individuals involved in the perpetration of ongoing crimes or crimes that

have already taken place. For that reason, the information found in an affidavit supporting a CSIS warrant is much broader in scope, and significant portions of it may not be relevant in the context of a particular criminal investigation. To that extent, the respondent's reliance on *R. v. Thompson*, [1990] 2 S.C.R. 1111, 73 D.L.R. (4th) 596 is of limited assistance.

[34] Bearing these considerations in mind, I find that the Designated Judge did not err in his analysis of the relevance test to be applied at the first stage of the *Ribic* analysis. He correctly assessed the relevance threshold to be low, yet properly concluded that redacted information unrelated to Mr. Huang's intercepted calls would not be relevant to a challenge of the Warrant. If anything, the limited redacted information related to the interception of telephone calls to and from the Embassy could have been more useful to the appellant than to the respondent. Still, the appellant renounced that potential benefit for national security reasons.

B. *Did the Designated Judge err in determining the role of the amicus in the present proceeding?*

[35] Counsel for the respondent takes exception with a comment made by the Designated Judge to the effect that *amicus curiae* can "play only a limited role in assisting the Court to examine the claims to protect the information" (Public Reasons at para. 48). According to counsel, the role of an *amicus* in a section 38 CEA proceeding, where the liberty interest of the person seeking disclosure is at stake, should be more akin to the role played by a defence counsel or a special advocate.

[36] This submission is without merit, both as a matter of principle and as applied to the particular facts of this case. As the Designated Judge pointed out, section 38 of the CEA does not explicitly provide for the possibility to appoint an *amicus*. It is as a matter of judicial discretion that the Federal Court and this Court have developed the practice to appoint an *amicus*, and it is for the court appointing an *amicus* to determine precisely the role and attributions it intends to confer on the *amicus*. As I stated in *Canada (Attorney General) v. Telbani*, 2014 FC 1050 at paragraphs 28 and 30, 251 A.C.W.S. (3d) 457:

> There is no doubt, however, that the *amicus* is not the accused's lawyer (in a criminal proceeding) or respondent (in a civil proceeding). The role of an *amicus* is not any more analogous to that of a special advocate appointed under section 83 of the IRPA [*Immigration and Refugee Protection Act*, S.C. 2011, c. 27] in the context of a security certificate. The role of the *amicus* is to assist the court and ensure the proper administration of justice, and the sole [TRANSLATION] "client" of the *amicus* is the court or the judge that appointed him or her. …
>
> …
>
> In short, playing a role that may sometimes be opposite to that of the Attorney General does not make the *amicus* a defence counsel or counsel for the civil party. The objective of the *amicus* and the state of mind in which he or she acts is not to assume the role of an advocate for the accused or the respondent, but to provide the Court with insight that it would not otherwise obtain and to assist it in making a decision that is in the best interests of justice. The fact that these interests may converge in certain circumstances does not change anything and merely represents, in a manner of speaking, a marginal benefit resulting from the appointment of *amicus*. He or she must therefore act at all times with transparency, without ever attempting to take counsel for the Attorney General by surprise. …

[37] In his Order dated April 12, 2017, the Designated Judge directed Mr. Kapoor, in his role as *amicus*, to "assist the Court in performing its statutory obligations under section 38 of the CEA". As such, his role was to ensure that the respondent would obtain disclosure of as much sensitive information as possible, without unduly compromising national security, national defence or international relations. Having carefully reviewed the record and the transcript of the

secret proceedings before the Designated Judge, I can assure the respondent that the *amicus* fulfilled his role admirably, professionally and with an acute understanding of his function. Mr. Kapoor was equally helpful to this Court in this appeal, and there is no doubt in my mind that the interests of justice were well served by his active participation throughout these proceedings.

V. Conclusion

[38] For all of the foregoing reasons, I would dismiss the cross-appeal. For the reasons expressed in the private reasons, I would allow the appeal in part and remit the matter back to the Designated Judge for reconsideration in accordance with the private reasons.

"Yves de Montigny"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-214-17
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. QING (QUENTIN) HUANG
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 6, 2018
PUBLIC REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. WEBB J.A.
DATED:	JUNE 1, 2018

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