

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20110613**

**Docket: A-428-10**

**Citation: 2011 FCA 199**

**CORAM: BLAIS C.J.  
LÉTOURNEAU J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**ABDULLAH ALMALKI, KHUZAIMAH KALIFAH,  
ADBULRAHMAN ALMALKI, by his Litigation Guardian  
Khuzaimah Kalifah, SAJEDA ALMALKI, by her Litigation Guardian  
Khuzaimah Kalifah, MUAZ ALMALKI, by his Litigation Guardian  
Khuzaimah Kalifah, ZAKARIYY A ALMALKI, by his Litigation Guardian  
Khuzaimah Kalifah, NADIM ALMALKI, FATIMA ALMALKI,  
AHMAD ABOU-ELMAATI, BADR ABOUELMAATI,  
SAMIRA AL-SHALLASH, RASHAABOU-ELMAATI,  
MUAYYED NUREDDIN, ABDUL JABBAR NUREDDIN,  
FADILA SIDDIQU, MOFAK NUREDDIN, AYDIN NUREDDIN,  
YASHAR NUREDDIN, AHMED NUREDDIN,  
SARAB NUREDDIN, BYDA NUREDDIN**

**Respondents**

Heard at Ottawa, Ontario, on May 31, 2011.

Judgment delivered at Ottawa, Ontario, on June 13, 2011.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

BLAIS C.J.  
TRUDEL J.A.

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SARAB NUREDDIN, BYDA NUREDDIN**

**Respondents**

**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**The issues on appeal**

[1] The Attorney General of Canada (appellant) appeals against a decision of a designated judge of the Federal Court (judge) rendered in relation to the public disclosure of sensitive and potentially

injurious information as defined in section 38 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (Act).

[2] The appellant challenges part of the judge's decision which ordered the disclosure of a number of documents. He seeks with respect to some of these documents an order confirming prohibition of disclosure pursuant to subsection 38.06(3) of the Act. As for the others, the demand is for changes to the disclosure order so as to limit any injury to international relations or national defence or national security as authorized by subsection 38.06(2).

[3] The appellant's challenge raises the following issues:

- a) the standard of review;
- b) whether the judge erred in failing to apply the common-law informer privilege rule (informer privilege) to Canadian Security Intelligence Service (CSIS) human sources; and
- c) whether the judge erred in his treatment of the so-called Third Party Rule when he ordered disclosure of certain information received from foreign partners.

### The relevant legislative provisions

[4] For a better understanding of the process, I reproduce the relevant legislative provisions:

**38.** The following definitions apply in this section and in sections 38.01 to 38.15.

“judge” « juge »  
 “judge” means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.

“participant” participant »  
 “participant” means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

“potentially injurious information”  
 « renseignements potentiellement préjudiciables »  
 “potentially injurious information” means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

“proceeding” « instance »  
 “proceeding” means a proceeding before a court, person or body with jurisdiction to compel the production of information.

“prosecutor” « poursuivant »  
 “prosecutor” means an agent of the Attorney General of Canada or of the Attorney General of a province, the

**38.** Les définitions qui suivent s’appliquent au présent article et aux articles 38.01 à 38.15.

« instance » “proceeding”  
 « instance » Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements.

« juge » “judge”  
 « juge » Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l'article 38.04.

« participant » “participant”  
 « participant » Personne qui, dans le cadre d’une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements.

« poursuivant » “prosecutor”  
 « poursuivant » Représentant du procureur général du Canada ou du procureur général d’une province, particulier qui agit à titre de poursuivant dans le cadre d’une instance ou le directeur des poursuites militaires, au sens de la Loi sur la défense nationale.

« renseignements potentiellement préjudiciables » “potentially injurious

Director of Military Prosecutions under the National Defence Act or an individual who acts as a prosecutor in a proceeding.

“sensitive information”

« renseignements sensibles »

“sensitive information” means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

information”

« renseignements potentiellement préjudiciables » Les renseignements qui, s’ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

« renseignements sensibles »

“sensitive information”

« renseignements sensibles » Les renseignements, en provenance du Canada ou de l’étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l’égard desquels celui-ci prend des mesures de protection.

Notice to Attorney General of Canada

Avis au procureur général du Canada

**38.01** (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

**38.01** (1) Tout participant qui, dans le cadre d’une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu’il s’agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d’aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l’avis la nature, la date et le lieu de l’instance.

During a proceeding

Au cours d’une instance

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with

(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d’être divulgués par lui ou par une autre personne au cours d’une instance est

the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

#### Notice of disclosure from official

#### Avis par un fonctionnaire

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(3) Le fonctionnaire — à l'exclusion d'un participant — qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

#### During a proceeding

#### Au cours d'une instance

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

## Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

## Exception

(6) This section does not apply when

(a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;

(b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

## Instances militaires

(5) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, les avis prévus à l'un des paragraphes (1) à (4) sont donnés à la fois au procureur général du Canada et au ministre de la Défense nationale.

## Exception

(6) Le présent article ne s'applique pas :

a) à la communication de renseignements par une personne à son avocat dans le cadre d'une instance, si ceux-ci concernent l'instance;

b) aux renseignements communiqués dans le cadre de l'exercice des attributions du procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

c) aux renseignements dont la divulgation est autorisée par l'institution fédérale qui les a produits ou pour laquelle ils ont été produits ou, dans le cas où ils n'ont pas été produits par ou pour une institution fédérale, par la première institution fédérale à les avoir reçus;

d) aux renseignements divulgués auprès de toute entité mentionnée à l'annexe et, le cas échéant, à une application figurant en regard d'une telle entité.

## Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

## Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

## Disclosure prohibited

**38.02** (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the

## Exception

(7) Les paragraphes (1) et (2) ne s'appliquent pas au participant si une institution gouvernementale visée à l'alinéa (6)c) l'informe qu'il n'est pas nécessaire, afin d'éviter la divulgation des renseignements visés à cet alinéa, de donner un avis au procureur général du Canada au titre du paragraphe (1) ou de soulever la question devant la personne présidant une instance au titre du paragraphe (2).

## Annexe

(8) Le gouverneur en conseil peut, par décret, ajouter, modifier ou supprimer la mention, à l'annexe, d'une entité ou d'une application figurant en regard d'une telle entité.

## Interdiction de divulgation

**38.02** (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3)



application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

#### Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

#### Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further

relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6).

#### Entités

(1.1) Dans le cas où une entité mentionnée à l'annexe rend, dans le cadre d'une application qui y est mentionnée en regard de celle-ci, une décision ou une ordonnance qui entraînerait la divulgation de renseignements sensibles ou de renseignements potentiellement préjudiciables, elle ne peut les divulguer ou les faire divulguer avant que le procureur général du Canada ait été avisé de ce fait et qu'il se soit écoulé un délai de dix jours postérieur à l'avis.

#### Exceptions

(2) La divulgation des renseignements ou des faits visés au paragraphe (1) n'est pas interdite :

a) si le procureur général du Canada l'autorise par écrit au titre de l'article 38.03 ou par un accord conclu en application de l'article 38.031 ou du paragraphe 38.04(6);

b) si le juge l'autorise au titre de l'un des paragraphes 38.06(1) ou (2) et que le délai prévu ou accordé pour en appeler a expiré ou, en cas d'appel ou de renvoi pour examen, sa décision est confirmée et les recours en appel sont épuisés.

appeal is available.

#### Previous Version

Authorization by Attorney General of Canada

**38.03** (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

#### Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

#### Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

#### Disclosure agreement

**38.031** (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts

#### Version précédente

Autorisation de divulgation par le procureur général du Canada

**38.03** (1) Le procureur général du Canada peut, à tout moment, autoriser la divulgation de tout ou partie des renseignements ou des faits dont la divulgation est interdite par le paragraphe 38.02(1) et assortir son autorisation des conditions qu'il estime indiquées.

#### Instances militaires

(2) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, le procureur général du Canada ne peut autoriser la divulgation qu'avec l'assentiment du ministre de la Défense nationale.

#### Notification

(3) Dans les dix jours suivant la réception du premier avis donné au titre de l'un des paragraphes 38.01(1) à (4) relativement à des renseignements donnés, le procureur général du Canada notifie par écrit sa décision relative à la divulgation de ces renseignements à toutes les personnes qui ont donné un tel avis.

#### Accord de divulgation

**38.031** (1) Le procureur général du Canada et la personne ayant donné l'avis prévu aux paragraphes 38.01(1) ou (2) qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais veut

referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

#### No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

#### Application to Federal Court — Attorney General of Canada

**38.04** (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

#### Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or,

divulguer ou faire divulguer les renseignements qui ont fait l'objet de l'avis ou les faits visés aux alinéas 38.02(1)*b* à *d*), peuvent, avant que cette personne présente une demande à la Cour fédérale au titre de l'alinéa 38.04(2)*c*), conclure un accord prévoyant la divulgation d'une partie des renseignements ou des faits ou leur divulgation assortie de conditions.

#### Exclusion de la demande à la Cour fédérale

(2) Si un accord est conclu, la personne ne peut présenter de demande à la Cour fédérale au titre de l'alinéa 38.04(2)*c*) relativement aux renseignements ayant fait l'objet de l'avis qu'elle a donné au procureur général du Canada au titre des paragraphes 38.01(1) ou (2).

#### Demande à la Cour fédérale : procureur général du Canada

**38.04** (1) Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la divulgation de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).

#### Demande à la Cour fédérale : dispositions générales

(2) Si, en ce qui concerne des renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4), le procureur général du Canada n'a pas notifié sa décision à l'auteur de l'avis en

other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any

conformité avec le paragraphe 38.03(3) ou, sauf par un accord conclu au titre de l'article 38.031, il a autorisé la divulgation d'une partie des renseignements ou a assorti de conditions son autorisation de divulgation :

a) il est tenu de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements si la personne qui l'a avisé au titre des paragraphes 38.01(1) ou (2) est un témoin;

b) la personne — à l'exclusion d'un témoin — qui a l'obligation de divulguer des renseignements dans le cadre d'une instance est tenue de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements;

c) la personne qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais qui veut en divulguer ou en faire divulguer, peut demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements.

Notification du procureur général

(3) La personne qui présente une demande à la Cour fédérale au titre des alinéas (2)b) ou c) en notifie le procureur général du Canada.

Dossier du tribunal

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du

measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

#### Procedure

#### Procédure

(5) As soon as the Federal Court is seized of an application under this section, the judge

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge :

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

a) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;

(b) shall decide whether it is necessary to hold any hearing of the matter;

b) décide s'il est nécessaire de tenir une audience;

(c) if he or she decides that a hearing should be held, shall  
(i) determine who should be given notice of the hearing,  
(ii) order the Attorney General of Canada to notify those persons, and  
(iii) determine the content and form of the notice; and

c) s'il estime qu'une audience est nécessaire :  
(i) spécifie les personnes qui devraient en être avisées,  
(ii) ordonne au procureur général du Canada de les aviser,  
(iii) détermine le contenu et les modalités de l'avis;

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations.

Disclosure agreement

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

Accord de divulgation

(6) Après la saisine de la Cour fédérale d'une demande présentée au titre de l'alinéa (2)c) ou l'institution d'un appel ou le renvoi pour examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3) relativement à cette demande, et avant qu'il soit disposé de l'appel ou de l'examen :

a) le procureur général du Canada peut conclure avec l'auteur de la demande un accord prévoyant la divulgation d'une partie des renseignements ou des faits visés aux alinéas 38.02(1)b) à d) ou leur divulgation assortie de conditions;

b) si un accord est conclu, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen.

Fin de l'examen judiciaire

(7) Sous réserve du paragraphe (6), si le procureur général du Canada autorise la divulgation de tout ou partie des renseignements ou supprime les conditions dont la divulgation est assortie après la saisine de la Cour fédérale aux termes du présent article et, en cas d'appel ou d'examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3), avant qu'il en soit disposé, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen à l'égard de tels des renseignements dont la divulgation est autorisée ou n'est plus assortie de

## Report relating to proceedings

**38.05** If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

## Disclosure order

**38.06** (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

## Disclosure order

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge 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 injury to international relations or national defence or national security resulting from disclosure, authorize the

conditions.

## Rapport sur l'instance

**38.05** Si la personne qui préside ou est désignée pour présider l'instance à laquelle est liée l'affaire ou, à défaut de désignation, la personne qui est habilitée à effectuer la désignation reçoit l'avis visé à l'alinéa 38.04(5)c), elle peut, dans les dix jours, fournir au juge un rapport sur toute question relative à l'instance qu'elle estime utile à celui-ci.

## Ordonnance de divulgation

**38.06** (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

## Divulgation modifiée

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, 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 porté aux relations internationales ou à

disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

#### Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

#### Evidence

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

#### Introduction into evidence

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

#### Relevant factors

la défense ou à la sécurité nationales, 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.

#### Confirmation de l'interdiction

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une ordonnance confirmant l'interdiction de divulgation.

#### Preuve

(3.1) Le juge 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.

#### Admissibilité en preuve

(4) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (2), mais qui ne pourra peut-être pas le faire à cause des règles d'admissibilité applicables à l'instance, peut demander à un juge 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, dans la mesure où telle forme ou telles conditions sont conformes à l'ordonnance rendue au titre du paragraphe (2).

#### Facteurs pertinents



(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Notice of order

**38.07** The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

Automatic review

**38.08** If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

Appeal to Federal Court of Appeal

**38.09** (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation period for appeal

(2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

(5) Pour l'application du paragraphe (4), le juge prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve au cours de l'instance.

Avis de la décision

**38.07** Le juge peut ordonner au procureur général du Canada d'aviser de l'ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) toute personne qui, de l'avis du juge, devrait être avisée.

Examen automatique

**38.08** Si le juge conclut qu'une partie à l'instance dont les intérêts sont lésés par une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) n'a pas eu la possibilité de présenter ses observations au titre de l'alinéa 38.04(5)d), il renvoie l'ordonnance à la Cour d'appel fédérale pour examen.

Appel à la Cour d'appel fédérale

**38.09** (1) Il peut être interjeté appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) devant la Cour d'appel fédérale.

Délai

(2) Le délai dans lequel l'appel peut être interjeté est de dix jours suivant la date de l'ordonnance frappée d'appel, mais la Cour d'appel fédérale peut le proroger si elle l'estime indiqué en l'espèce.

**Analysis of the judge's decision and the submissions of the parties**

a) The standard of review

[5] The issue of the standard of review of a designated judge's decision determining applications for disclosure under section 38 of the Act was addressed in *Ribic v. Canada (Attorney General)*, 2003 FCA 246, leave to appeal to the SCC denied on October 22, 2003.

[6] At paragraph 36 of the reasons for judgment in that case, our Court concluded that decisions relating to the definition of the scope of the power to order disclosure are reviewable on a standard of correctness. Decisions of this nature involve the interpretation and construction of the legislative provisions granting the power and delimiting its conditions of exercise. So a misconception or misconstruction of these provisions involves a question of law which normally would be easily extricable from the facts.

[7] The application to the facts of a properly interpreted and construed power to disclose, however, calls for a different standard of review as it involves a mixed question of fact and law. The resulting decision is, according to the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, subject to the more deferential standard of "palpable and overriding error". This is also the standard of review applicable to questions of fact.

[8] A palpable and overriding error exists when, in rendering his decision, the judge “took irrelevant factors into account, omitted to consider those that ought to have been considered, or weighed the relevant factors in an unreasonable manner”: see *Canada v. Furukawa*, [2001] 1 CTC 39, at paragraph 35 (FCA).

[9] It is on the basis of these standards of review that the judge’s decision will be assessed in the present instance.

b) Whether the judge erred in failing to apply the informer privilege to CSIS human sources

[10] Counsel for the appellant argues that the informer privilege should have been applied by the judge and that it was an error for him to apply the *Ribic* test and engage in a balancing exercise of the public interests at stake. The contention is that the issue of the privilege should be decided first. This brings into play the interrelation between a privilege and the *Ribic* test.

[11] The *Ribic* test was developed in the *Ribic* case cited above. It is a three-prong test. The judge must first determine whether the information sought to be disclosed is relevant or not to the proceedings in which it is intended to be used. The applicant for disclosure bears the burden of establishing that the information is in all likelihood relevant evidence.

[12] If the information meets the relevancy test, the judge must then determine whether disclosure of that information would be injurious to international relations, national defence or

national security. It belongs to the Crown to prove the potential injury if disclosure of the information were to be ordered.

[13] Finally, if satisfied that disclosure of the sensitive information would result in injury, the judge must move to the last step and determine whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The burden of proving that the public interest scale is tipped in favour of disclosure rests with the party seeking it.

[14] I shall begin with the question of the extension of the informer privilege to CSIS human sources. Then I will address the interrelation between a privilege and the *Ribic* test.

[15] It is fair to say that the informer privilege bears specific characteristics in more than one way. It is a common law, not a statutory privilege. Contrary to the Crown privilege, it is absolute in the sense that it cannot be balanced against other interests: see *R. v. Leipert*, [1997] 1 S.C.R. 281, at pages 291 and 292. Its application “does not depend on the judge’s discretion, as it is a legal rule of public order by which the judge is bound”: *ibidem*, citing *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at page 90. It suffers only the innocence at stake exception, that is to say, where disclosure of the informer’s identity is necessary to demonstrate the innocence of the accused: *ibidem*, at page 295.

[16] The informer privilege falls into the category of class privilege (for example, solicitor and client privilege) as opposed to a case-by-case privilege. The law recognizes very few class privileges: *R. v. National Post*, [2010] 1 S.C.R. 477, at page 509.

[17] In the *National Post* case, at pages 508-509, Binnie J. described in the following terms the nature, importance and consequences of making a privilege a class privilege:

In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case. Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice.

[Emphasis added]

[18] The informer privilege as a class privilege protects the relationship between the informer and a peace officer. It is part of a peace officer's toolbox that the courts judged necessary to enforce criminal law. In the *Bisaillon* case, previously cited, Beetz J. writes at page 105:

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.

The common law did not give a peace officer this right simply because it would be useful to him, but because it concluded empirically that the right was necessary.

This power of giving an assurance of secrecy is part of the range of means with which a peace officer is equipped by the criminal law, such as the power of making an arrest without a warrant and the power of search and seizure under ss. 450 and

443 et seq. of the Criminal Code; it partakes of the nature of these methods and, like them, it is closely associated with the status of a peace officer.

[Emphasis added]

[19] In the *National Post* case, Binnie J. reviewed some of the difficulties associated with the granting of a class privilege to journalists: the immense variety and degrees of professionalism (or lack of it) of persons who gather and publish news said to be based on secret sources, the extent of the respective rights and immunities of the journalist and the source to whom confidentiality has been promised, the absence of workable criteria for the creation or loss of the claimed immunity: *National Post, ibidem*, at paragraphs 43 to 45.

[20] All these considerations raised by Binnie J. apply in the present instance to the application of the informer privilege to CSIS human sources. CSIS employees are not peace officers and belong within the service to different categories of employees. Who will, or perhaps it is better asked, who should have the authority to grant immunity? To whom should it be granted? Anyone who seeks it? In other words, who should be part of the class?

[21] Another difficulty stems from the conditions under which the immunity should be granted. What are they? Who should fix them? In addition, as Binnie J. asked in the *National Post* case, what are the respective rights and immunities of the CSIS employee and the source to whom confidentiality has been promised?

[22] When should the immunity be granted? For any information as long as the source asks for immunity? In the present instance, the judge found as a fact that CSIS' approach was overbroad as it tended "to treat virtually everyone who provides information as a confidential source whether there is any real expectation of confidentiality on the part of the source, a risk of harm to the source or likelihood that they would not be forthcoming without such assurances": see reasons for judgment, at paragraph 169.

[23] How should the protection be given? Expressly, implicitly, orally or in writing? The form chosen may be important when it comes to ascertaining the scope of the rights and obligations of the parties as well as the scope of the immunity. It is public knowledge in criminal law that the informal granting of immunity to informers has given rise to bitterness and litigation in court. In the United States and in the province of Quebec for example, the granting of immunity in many cases has been formalized, the parties entering into a written binding contract describing their respective rights and obligations.

[24] Finally, this excerpt from Binnie J.'s decision found at paragraph 46 is apposite here, especially in the context of section 38 of the Act:

[46] Fourthly, while the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

[Emphasis added]

[25] As a matter of fact, section 38 of the Act puts in place a balancing system whereby, as we have seen, potentially injurious information may be released by court order if the public interest in disclosure outweighs in importance the public interest in non-disclosure. To put it differently, Parliament has devised in respect of information relating to international relations, national security and national defence a system where confidentiality is not absolute contrary to what the informer privilege is by being a class privilege.

[26] In my respectful view, to accede to the Crown's demand that the informer privilege be extended to CSIS human sources would run counter to section 38 of the Act and the express will of Parliament. Section 18 of the *Canadian Security Intelligence Service Act*, R.S., 1985, c. C-23 has been brought to our attention as evidence of Parliament's intent to protect the identity of human sources. In *Harkat (Re)*, 2009 FC 204, [2009] 4 F.C.R. 370 (presently on appeal to this Court), Noël J. of the Federal Court, at paragraph 30 of his reasons for judgment, used section 18 as a basis to assert that "Parliament itself has spoken on the importance of protecting human sources and covert operatives".

[27] I reproduce sections 18 and 19:

Offence to disclose identity

**18.** (1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this

Infraction

**18.** (1) Sous réserve du paragraphe (2), nul ne peut communiquer des informations qu'il a acquises ou auxquelles il avait accès dans l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ou



Act or the participation by that person in the administration or enforcement of this Act and from which the identity of

(a) any other person who is or was a confidential source of information or assistance to the Service, or

(b) any person who is or was an employee engaged in covert operational activities of the Service

can be inferred.

#### Exceptions

(2) A person may disclose information referred to in subsection (1) for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(a) to (d).

#### Offence

(3) Every one who contravenes subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary

lors de sa participation à l'exécution ou au contrôle d'application de cette loi et qui permettraient de découvrir l'identité :

a) d'une autre personne qui fournit ou a fourni au Service des informations ou une aide à titre confidentiel;

b) d'une personne qui est ou était un employé occupé à des activités opérationnelles cachées du Service.

#### Exceptions

(2) La communication visée au paragraphe (1) peut se faire dans l'exercice de fonctions conférées en vertu de la présente loi ou de toute autre loi fédérale ou pour l'exécution ou le contrôle d'application de la présente loi, si une autre règle de droit l'exige ou dans les circonstances visées aux alinéas 19(2)a) à d).

#### Infraction

(3) Quiconque contrevient au paragraphe (1) est coupable :

a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable par procédure sommaire.

conviction.

Authorized disclosure of  
information

**19.** (1) Information obtained in the performance of the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.

*Idem*

(2) The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,

(a) where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken;

(b) where the information relates to the conduct of the international affairs of Canada,

Autorisation de communication

**19.** (1) Les informations qu'acquiert le Service dans l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ne peuvent être communiquées qu'en conformité avec le présent article.

*Idem*

(2) Le Service peut, en vue de l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ou pour l'exécution ou le contrôle d'application de celle-ci, ou en conformité avec les exigences d'une autre règle de droit, communiquer les informations visées au paragraphe (1). Il peut aussi les communiquer aux autorités ou personnes suivantes :

a) lorsqu'elles peuvent servir dans le cadre d'une enquête ou de poursuites relatives à une infraction présumée à une loi fédérale ou provinciale, aux agents de la paix compétents pour mener l'enquête, au procureur général du Canada et au procureur général de la province où des poursuites peuvent être intentées à l'égard de cette infraction;

b) lorsqu'elles concernent la conduite des affaires

to the Minister of Foreign Affairs or a person designated by the Minister of Foreign Affairs for the purpose;

(c) where the information is relevant to the defence of Canada, to the Minister of National Defence or a person designated by the Minister of National Defence for the purpose; or

(d) where, in the opinion of the Minister, disclosure of the information to any minister of the Crown or person in the federal public administration is essential in the public interest and that interest clearly outweighs any invasion of privacy that could result from the disclosure, to that minister or person.

Report to Review Committee

(3) The Director shall, as soon as practicable after a disclosure referred to in paragraph (2)(d) is made, submit a report to the Review Committee with respect to the disclosure.

internationales du Canada, au ministre des Affaires étrangères ou à la personne qu'il désigne à cette fin;

c) lorsqu'elles concernent la défense du Canada, au ministre de la Défense nationale ou à la personne qu'il désigne à cette fin;

d) lorsque, selon le ministre, leur communication à un ministre ou à une personne appartenant à l'administration publique fédérale est essentielle pour des raisons d'intérêt public et que celles-ci justifient nettement une éventuelle violation de la vie privée, à ce ministre ou à cette personne.

Rapport au comité de surveillance

(3) Dans les plus brefs délais possible après la communication visée à l'alinéa (2)d), le directeur en fait rapport au comité de surveillance.

[28] Section 18 creates an offence to disclose the information therein mentioned unless authorized to do so by subsection 18(2) and section 19. It does not create an absolute prohibition against disclosure as the informer class privilege does. Indeed, subsection 18(2) allows a person to disclose the information "as required by any other law". This is compatible with section 38 of the

Act which allows for disclosure pursuant to an order issued by a designated judge in the exercise of the discretion conferred by that section.

[29] In the *National Post* case, at paragraph 42, when referring to the informer privilege and its absolutism, Binnie J. wrote:

It is likely that in future such “class” privileges will be created, if at all, only by legislative action.

[30] I can see the wisdom in this warning. The creation of a new privilege entails legal, political, social and economic impacts. I have been involved in law reform long enough to know that policies of the kind, precisely because of their serious diverse impacts, require extensive consultations and public debate. They need to be enacted by persons accountable to the people who will have to live with such policies. Not only is this Court ill-equipped to assess the appropriateness of extending to CSIS human sources the informer privilege, I think it would be usurping Parliament’s function if it were to do so and defeat Parliament’s intent expressed in section 38 of the Act that there be a balancing of the interests regarding the information, including that relating to the identity of the source.

[31] This now brings me to the interrelation between a privilege regarding the source and the *Ribic* test, and the procedure to be followed when confronted with a claim of privilege.

[32] Upon reflection, the procedure has to remain flexible because the manner of proceeding may be dictated by the nature of the information, the importance of the source, the extent of the prejudice to the source and national defence, national security and international relations, to name some of the factors that may influence the approach a judge should be taking.

[33] Depending on the circumstances, it may be preferable to look at the protection of the identity of the source first. For example, release of the information sought may not be prejudicial, but release of the source's name would be. In the same vein, public interest in disclosure of the information itself may outweigh in importance public interest in non-disclosure, except for the identity of the source. On the other hand, there is no point in engaging in a long debate as to the need to protect the source if the information itself is not relevant and will not be released. The designated judge who proceeds to the balancing required by section 38 is in the best position to determine the process to be followed so as to foster the better exercise of his or her discretion in the most efficient manner.

[34] In conclusion, for these reasons, I believe that the judge made no error when he did not apply the informer privilege rule to CSIS human sources.

b) Whether the judge erred in his treatment of the Third Party Rule when he ordered disclosure of certain information received from foreign partners

[35] This issue arises in relation to a small number of documents. The Court sat *in camera* to deal with the confidential information and heard the submissions of counsel for the appellant as well as

those of the *amicus curiae* appointed to assist us. The documents were examined as well as the appellant's proposals to prevent or minimize injury.

[36] It is not always clear why the judge ordered disclosure because in a number of them he did not provide reasons. In fairness to him, he was confronted with a Herculean task and, by any standard, he did an excellent job. We, therefore, proceeded to apply the third prong of the *Ribic* test to the documents at issue.

[37] We are satisfied that the judge in his application of the *Ribic* test either discounted the evidence of injury or did not give it the weight that it deserved. It could also be that at the same time he gave undue weight to the respondent's claim of prejudice. This led him in the balancing test to give undue weight to the public interest in disclosure of the information. In turn, this is reflected in some of the summaries of the information where injury is not minimized as mandated by the Act. In so doing, he committed palpable and overriding errors.

### **Conclusion**

[38] For these reasons, I would allow the appeal, set aside the judge's Disclosure Order and Annex "A" relating to the impugned documents and issue a confidential Order implementing the

changes necessary to these documents to prevent and minimize injury to international relations,  
national security and national defence.

“Gilles Létourneau”

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J.A.

“I agree  
Pierre Blais C.J.”

“I agree  
Johanne Trudel J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA v.  
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**DATE OF HEARING:** May 31, 2011

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**CONCURRED IN BY:** BLAIS C.J.  
TRUDEL J.A.

**DATED:** June 13, 2011

**APPEARANCES:**

Linda J. Wall  
Catherine A. Lawrence  
Philip Tunley  
Frederick Schumann  
François Dadour

FOR THE APPELLANT

FOR THE RESPONDENTS

APPEARING AS AMICUS CURIAE

**SOLICITORS OF RECORD:**

Myles J. Kirvan  
Attorney General of Canada  
Stockwoods LLP Barristers  
Toronto, Ontario  
Les Avocats Poupart, Dadour, Touma & Associés  
Montréal, Quebec

FOR THE APPELLANT

FOR THE RESPONDENTS

APPEARING AS AMICUS CURIAE