Balancing National Security and the Public Interest

Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions

30 January 2024

Injurious to National Security

Information the Government of Canada will seek to protect from public disclosure

Information that may cause injury if released publicly includes information that may:

"(a) identify or tend to identify the Service's interest in individuals, groups or issues, including the existence or nonexistence of past or present files or investigations, the intensity of investigations or the degree or lack of success of investigations;

b) identify or tend to identify methods of operation and investigative techniques utilized by the Service;

c) identify or tend to identify relationships that the Service maintains with police, security and intelligence agencies and would disclose information exchanged in confidence with such agencies;

d) identify or tend to identify employees, internal procedures and administrative methodologies of the Service such as names and file numbers, and telecommunication systems used by the Service; and

e) identify or tend to identify individuals who accepted to cooperate with the Service or the information provided by persons which, if disclosed, could lead to the identification of the persons."

-*Huang v. Canada (Attorney General)*, 2017 FC 662, at para 23

Third Party Rule

- Concerns “the exchange of information among security intelligence services and other related agencies. Put simply, the receiving agency is neither to attribute the source of the information or disclose its contents without the permission of the originating agency” - *Ottawa Citizen Group Inc v Canada*, 2006 FC 1552, para 25

- “one type of information that the state has a legitimate interest in keeping confidential includes “[s]ecrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient.” – *Harkat (Re),* 2005, 262 (FTR) 52 (FC), para 89

- “the purpose of the third party rule is to protect and promote the exchange of sensitive information between Canada and foreign states or agencies, protecting both the source and content of the information exchanged to achieve that end, the only exception being that Canada is at liberty to release the information and/or acknowledge its source if the consent of the original provider is obtained.” - *Canada v Khawaja*, 2007 FC 490, para 145

The Mosaic Effect

"It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security." - *Henrie v Canada*, [1989] 2 FC 229 p 242-243

The Mosaic Effect cont.

"The mosaic effect may be one of those statements of the obvious that are difficult to prove or disprove. The problem arises in its application. How does the Court discern whether disclosure of a particular item of information will fill a gap in the knowledge of another person? … 'by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed.' "

- *Canada (AG) v. Almalki*, 2010 FC 1106 at para 118

National Security Privilege

Section 38 of the *Canada Evidence Act* (*CEA*)

CEA Section 38 Proceedings

Definitions

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 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 means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information.

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.

Step 1: Notice to the Attorney General of Canada (AGC)

”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.” (s 38.01 (1))

Alternatively

Any participant or official who believes sensitive/potential injurious information is about to be disclosed in a proceeding may notify the person preceding over the proceeding & the AGC . The person presiding over the proceeding shall ensure the information is not disclosed. (s 38.01 (2)-(4))

Unless

… “the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule” (s 38.01(6)(d))

Order in Counsel Amending CEA Schedule

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Order Amending the SCHEDULE TO THE CANADA EVIDENCE ACT in order to ensure that the Commissioner of the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions can exercise her duties.

Step 2: Disclosure Prohibited without AGC authorization

Subject to limited exceptions, one notice is given, no person in connection with a proceeding shall disclose (s 38.02):

(a) The information subject to the notice

(b) The fact that notice has been given

(c) The fact that an application for non-disclosure has been made

(d) The existence of a disclosure agreement

The AGC may, at any time and subject to any conditions, authorize disclosure of part or all of the information. (s 38.03)

Step 3: Application to the Federal Court for nondisclosure

- Applications are confidential (s 38.04(4))
- Applications may be heard *in camera* and *ex parte* by a designated judge (s 38.11 (1)-(2))
- The designated judge will often assign *amici curiae* to provide adversarial point of view *in camera* elements of the proceedings
- 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. (s 38.06(3.1))

Adjudicating s. 38 Claims: The "*Ribic*" Test

Question 1: Relevance

- Is the information in issue relevant to the proceeding in which it is sought to be used.
- Includes all information that is potentially useful in the underlying proceeding for the party from which it has been withheld.
- The test of relevance at this stage is "undoubtedly a low threshold" -*Canada (AG) v Ribic*, 2003 FCA 246, at para 17
- The burden rests on the party seeking disclosure. The other party is often assisted by *amici curiae* in making these arguments.
- "If the designated judge is not satisfied that the withheld information is relevant, this is sufficient to confirm the prohibition on disclosure. If, on the other hand, the designated judge is satisfied that the withheld information is relevant, it is necessary to proceed to the second step of the test." -*Canada (AG) v Ortis*, 2022 FC 142, at para 63

Adjudicating s 38 Claims: The "*Ribic*" Test

Question 2: Injury

- Whether the disclosure of the information would be injurious to international relations, national defence or national security.
- Burden rests on the AGC to establish that injury *would* result from disclosure. *Amici curiae* will often contest injury claims.
- AG's "submissions regarding his assessment of the injury to national security, …because of his access to special information and expertise, should be given considerable weight by the judge." -*Ribic*, at para 19
- Potential injury must "have a factual basis which has been established by evidence" -*Ribic*, at para 18
- This requires demonstrating a probability of injury, not merely its possibility. -*Canada (AG) v Canada (Arar Commission)*, 2007 FC 766 at para 49
- If there is a reasonable basis for the AGC's position, the designated judge should accept it and turn to the third step of the test. Otherwise they may authorize the disclosure of the information in question. -*Ortis*, at para 64

Adjudicating s 38 Claims: The "*Ribic*" Test

Question 3: Balancing

- Does the public interest in disclosure of the information outweigh the importance the public interest in non-disclosure.
- The designated judge must weigh and balance, among other things, the importance of avoiding the injury that would be caused by disclosure, the interests at stake in the underlying proceeding, and the importance of the withheld information to the party seeking disclosure. -*Ribic,* at para 22.
- Are there ways to limit the injury that would be caused by disclosure while still making the information available for use in the underlying proceeding (e.g. summaries)?
- Burden of proving balance favours disclosure rests with the party seeking disclosure. The other party is often assisted by *amici curiae* in making these arguments.
  - "that party ought not to be held to an unrealistic standard given that it is almost always the case that they have not seen the information in question. That being said, purely speculative possibilities regarding the potential usefulness of the information will not justify the disclosure of injurious information." -*Ortis,* at para 66

Step 4: Decision by the Federal Court

Option 1: **"**Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts." (s 38.06 (1))

Option 2: " If the judge concludes that the disclosure of the information or facts 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…authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information." (s 38.06 (2))

Option 3: "confirm the prohibition of disclosure." (s 38.06 (3))

The Attorney General's Certificate

"The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding… for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament." (s 38.13(1))

"If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate." (s 38.13(5))

The Flexibility of section 38

"Section 38 creates a scheme that is designed to operate flexibly. It permits conditional, partial and restricted disclosure in various sections. Section 38.06(1) affirmatively requires the Federal Court judge to consider the public interest in making disclosure along with what conditions are "most likely to limit any injury to international relations or national defence or national security" (s. 38.06(2)). In making this determination, the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding. One example of how this might work in practice can be found in *Canada (Attorney General) v. Khawaja…* where the Federal Court judge disclosed a summary of the material being withheld under s. 38 to counsel for the parties, and directed that it be made available to the trial judge and prosecutor if necessary to determine whether the fair trial rights of the accused had been infringed." - *R v Ahmad*, 2011 SCC 6 at para 44

Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar), 2007 FC 766

- Similar terms of reference regarding disclosure:
  - (iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the Canada Evidence Act;
- The Commissioner determined that he would apply *Ribic* test when making determinations about NSC, heard evidence on this point, including from an independent advisor (former CSIS director) and appointed 2 experienced amicus to challenge NSC claims in the *in camera* proceedings
- After the main evidentiary hearing concluded, Government counsel and the Commissioner held a series of discussions about what may be included in his report and how; they resolved the vast majority of the disputes
- Senior government officials were consulted, resulting in the government authorizing the disclosure of certain passages, notwithstanding the potential injury of such disclosure. The ministers were then briefed on the remaining protected passages, and the ministers decided not to authorize their disclosure, regardless of the fact that the Commissioner was of the opinion that their disclosure was in the public interest and was necessary to recite the facts surrounding the Arar affair fairly.
- Sep 2006, 2 final reports prepared for PCO (one classified, the other public).
- Dec 2006, AGC filed s. 38 applications to withhold approximately 1500 words from the public report; approx. 0,5%. The public report was initially released Sept 2006 with the impugned text redacted
- 2 days of public hearings, 4 days closed hearings, FC decision rendered July 2007. Agreed in part with AGC and in part with the Commission.
- Final report released Sep 2007.

Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar), 2007 FC 766

[98] I have identified some non-exhaustive factors which must be assessed and weighed against one another to determine whether the public interest lies in disclosure or in non-disclosure [in the context of a Commission of Inquiry]:

(a) The extent of the injury;

(b) The relevancy of the redacted information to the procedure in which it would be used or the objectives of the body wanting to disclose the information;

(c) Whether the redacted information is already known to the public, and if so, the manner by which the information made its way into the public domain;

(d) The importance of the open court principle;

(e) The importance of the redacted information in the context of the underlying proceeding;

(f) Whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc;

(g) Whether the redacted information relates to the recommendations of a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.

Report of the Events Relating to Maher Arar: Analysis and Conclusions

"As I look back at the Inquiry process, I am satisfied that it worked as well as could be expected, given the extent and nature of the NSC claims asserted by the Government. However, **the public hearing part of the Inquiry could have been more comprehensive than it turned out to be, if the Government had not, for over a year, asserted NSC claims over a good deal of information that eventually was made public**, either as a result of the Government's decision to reredact certain documents beginning in June 2005, or through this report.

Throughout the in camera hearings that ended in April 2005 and during the first month of the public hearings in May 2005, the Government continued to claim NSC over information that it has since recognized may be disclosed publicly. This "overclaiming" occurred despite the Government's assurance at the outset of the Inquiry that its initial NSC claims would reflect its "considered" position and would be directed at maximizing public disclosure. **The Government's initial NSC claims were not supposed to be an opening bargaining position….**

I raise this issue to highlight the fact that **overclaiming exacerbates the transparency and procedural fairness problems** that inevitably accompany any proceeding that can not be fully open because of NSC concerns. It also **promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming**." p. 301-302

Human Source Privilege

Section 18.1 of the *Canadian Security Intelligence Service Act* & Section 55 of the *Communications Security Establishment Act*

CSIS Act, s. 18.1- Human Source Privilege

Who is a human source?

"an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service." (s 2)

Purpose of Human Source Privilege?

"to ensure that the identity of human sources is kept confidential in order to protect their life and security and to encourage individuals to provide information to the Service." (s 18.1(1))

CSIS Act, s. 18.1- Human Source Privilege

"no person shall, in a proceeding before a court, person or body with jurisdiction to compel the production of information, disclose the identity of a human source or any information from which the identity of a human source could be inferred." (s 18.1(2))

Unless, "the human source and the Director [of CSIS] consent to the disclosure of that information." (s 18.1 (3))

CSIS Act, s. 18.1- Human Source Privilege

- Privilege subject to very limited review in non criminal proceedings.
- On application by a party to a proceeding or an *amicus curia* appointed in respect of a proceeding, a federal court judge may only review:
  1. Whether the individual meets the definition of a human source.
  2. Whether the identity of a human source could be inferred from the information in issue. (s 18.1 (4))

CSE Act, Section 55 – CSE Entity Privilege

Entity "means a person, group, trust, partnership or fund or an unincorporated association or organization and includes a state or a political subdivision or agency of a state." (s 2)

"It is prohibited, in a proceeding before a court, person or body with jurisdiction to compel the production of information, to disclose **the identity of a person or entity that has assisted or is assisting the Establishment on a confidential basis**, or any information from which the identity of such a person or entity could be inferred." (s 55 (1))

Unless,"the person or entity and the Chief [of CSE] consent to the disclosure." (s 55 (3))

CSE Act, Section 55 – CSE Entity Privilege

- Unlike s. 18.1 of the CSIS Act, claims of CSE Entity Privilege are reviewed under section 38 of the CEA. (s 55 (4))
- However, s 55 (5) of the CSE Act precludes the application of the Ribic Test. Instead, for a civil proceeding, a judge may only authorize disclosure after finding:
  1. The person or entity has not assisted/is not assisting CSE on a confidential basis.
  2. The identify of the person or entity could not be inferred from the disclosure of the information in issue.

The Rigidity of Human Source/Entity Privilege

- "Thus, when one considers the historical context and the legislative evolution of section 38 of the CEA and of section 18.1 of the CSIS Act, it is evident that the new provision deprives the respondents of the benefit of the more liberal version of the privilege set out in section 38 of the CEA pursuant to which the question of the identity of sources and information tending to identify them was dealt with up until now." -*Canada (Attorney General) v Almalki*, 2016 FCA 195, at para 60
- "section 18.1 was intended to be more restrictive than section 38 of the CEA. As the Attorney General has pointed out, our Court noted in Almalki that the enactment of section 18.1 of the CSIS Act had the effect of precluding the Federal Court from assessing CSIS human source information within the framework of section 38 of the CEA" – *s. 18.1 CSIS Act (Re)*, 2018 FCA 161, at para 37