Date: 20070430

Docket: DES-2-06

Citation: 2007 FC 463

Ottawa, Ontario, April 30, 2007

PRESENT: CHIEF JUSTICE LUTFY

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MOHAMMAD MOMIN KHAWAJA

Respondent

APPLICATION UNDER SECTION 38.04 OF THE *CANADA EVIDENCE ACT*

REASONS FOR ORDER AND ORDER

[1] In a proceeding under section 38 of the *Canada Evidence Act*, R.S. 1985, c. C-5, the Attorney General of Canada has the right to make representations to a judge of the Federal Court in the absence of the party seeking the disclosure of secret information. In this case, where the party seeking access to the secret information is an accused facing serious criminal charges, does the right of the Attorney General of Canada to make these *ex parte* representations offend the principles of

fundamental justice, the right to a fair and public hearing and the open court principle enshrined in the *Canadian Charter of Rights and Freedoms*? These are my reasons for answering this question in the negative.

Procedural background

[2] Since November 1, 2006, the parties have been engaged in a proceeding under section 38 of the *Canada Evidence Act* (the main proceeding). The presiding judge in that proceeding is Justice Richard G. Mosley (the presiding judge).

[3] On March 15, 2007, the respondent, Mohammad Momin Khawaja, filed a motion and a notice of constitutional question asserting that subsection 38.11(2) of the Act infringes his rights under sections 2(b), 7 and 11(d) of the *Charter* and that these infringements are not justified under section 1 (the constitutional issue).

[4] The main proceeding is brought in the context of a terrorism-related criminal prosecution against the respondent in the Ontario Superior Court of Justice. When the constitutional issue was heard, the trial was tentatively scheduled to begin on May 7, 2007.

[5] By the time the motion was filed on March 15, 2007 and scheduled for hearing on March 30, 2007, Justice Mosley had presided over a number of *ex parte* sessions at the request of the Attorney General of Canada.

[6] During the hearing of March 30, 2007, the presiding judge made the following comments concerning the advisability that he determine the constitutional issue:

> Counsel for the Respondent notes that I have already heard *ex parte* evidence and representations from the Attorney General in these proceedings with respect to the merits of the application. Indeed, a considerable amount of the Court's time has been devoted already to hearing the testimony of *ex parte* affiants and in reviewing unredacted copies of the documents in question.
>
> Counsel suggests that the Court's consideration of the constitutional issue may be tainted by the evidence that has been heard thus far, *ex parte* and in camera.
>
> I am not convinced that I would be unable to decide the constitutional question fairly and impartially in the present circumstances. Nor do I want to suggest that in any other case in which a constitutional challenge is raised late in the proceedings, that the presiding judge should not determine the issue.
>
> Indeed in most cases it makes sense that the judge seized of the matter deal with any constitutional issues in the course of the proceedings, even where evidence may already have been heard *ex parte* on the merits.
>
> This situation arises in part because of the timing of the filing of the Respondent's Notice of constitutional question. Had it been brought earlier, the constitutional issue could have been determined prior to the scheduling of any evidentiary hearings. Such hearings may not, in any event, have proved necessary had the question been decided fully in the Respondent's favour.
>
> However, that is not the case that I must deal with.
>
> In this instance, there is a practical solution and that the issue is severable from the application, the factums have been served and filed by the parties and oral submissions could be heard next week by another judge who is available to hear the matter.

The presiding judge preferred that the constitutional issue be heard by another judge.

[7] As the case management judge, I undertook to hear the motion. Oral submissions began on April 4, 2007. Because of scheduling issues involving the Court and counsel, the hearing could not be completed until April 19, 2007 when the matter was taken under advisement.

[8] The parties are in substantial agreement as to the contents of the record for the purposes of this constitutional motion: (a) all of the materials exchanged between the applicant and the respondent, including the transcripts of the respondent's cross-examination of the applicant's affiants; (b) uncontroversial or uncontested facts concerning the various steps in the main proceeding and the respondent's criminal trial; (c) excerpts from legislative schemes and debates concerning the protection of sensitive information; and (d) judicial notice of broad social facts.

[9] It is acknowledged that the respondent has filed no affidavit evidence in the main proceeding. Neither party filed new affidavit evidence concerning the constitutional issue.

[10] The respondent does not take issue with the applicant's following submission:

> … the material which has been made the subject of a notice of the Attorney General and placed before the Federal Court in the s. 38 proceeding comprises less than 2% of the total volume of material disclosed to the respondent/accused in the Superior Court of Justice criminal proceeding.[7]

[7] Approximately 1,700 out of 98,822 pages.

The sensitive information in issue in the main proceeding is included among some twenty-three volumes of documents.

[11] The respondent did not seek leave to make *ex parte* submissions in the main proceeding.

[12] Neither party requested the Court to appoint an *amicus curiae* at any stage of the main proceeding.

[13] A general description of the procedures followed in a typical section 38 proceeding since the amendments enacted in the *Anti-terrorism Act*, S.C. 2001, c. 41 is set out in *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128 at paragraphs 28 to 38. In these reasons, sections 38 and following of the *Canada Evidence Act* will sometimes be referred to collectively as "section 38".

The legislative provisions

[14] The constitutional issue raises three provisions of the *Charter*:

2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
…	…
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	*b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
…	…
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
…	…
d) to be presumed innocent until proven guilty according to law in a fair and public	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la

hearing by an independent and impartial tribunal	loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable
…	…

[15] Subsection 38.11(2) reads as follows:

38.11 (2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(*d*), and shall give 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, the opportunity to make representations *ex parte*.	**38.11** (2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au 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* — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)*d*).

Analysis

i) The sufficiency of the factual foundation

[16] In response to a request from the Court, the parties filed submissions concerning the sufficiency of the factual foundation for the determination of the constitutional issue.

[17] The parties acknowledge that disclosure in the criminal proceeding has been ongoing for some two years, including those documents redacted for reasons relating to national security and international relations (referred to collectively as "national security" in this decision). When the

Attorney General of Canada launched the section 38 proceeding on November 1, 2006, the trial was scheduled to commence on January 2, 2007. When the respondent raised the constitutional issue on March 15, 2007, the trial had been tentatively rescheduled for May 7, 2007.

[18] As mentioned earlier, the respondent did not seek to make any *ex parte* submissions in the main proceeding as he was entitled to do pursuant to subsection 38.11(2). As I noted in *Toronto Star*, above, information from the accused, provided to the Court secretly and in the absence of the Attorney General of Canada, can be of assistance to the presiding judge in the section 38 proceeding (at paragraph 37):

> … In the Court's experience to date, when *ex parte* representations are made by a party other than the Attorney General of Canada, only that party is present before the presiding judge. This may occur where the underlying proceeding is a criminal prosecution. Specifically, the accused may wish to make representations to the section 38 judge concerning the importance of disclosing the secret information to assist in defending the criminal charge. In such circumstances, the accused will prefer to make these submissions without disclosing to any other party the substance or detail of the defence in the criminal proceeding.

[19] In this case, the respondent has received voluminous documentation through the *Stinchcombe* disclosure process. Many of the pages have been only partially redacted. This unredacted information can form the basis of the *ex parte* representations I had in mind in paragraph 37 of *Toronto Star*.

[20] The respondent argued that the record available to him disclosed insufficient evidence concerning three factual issues.

[21] First, the respondent was told during cross-examination that an attempt was made to obtain waivers from foreign agencies or governments with respect to the redactions based on the third party rule. This rule prohibits the agency receiving national security information from attributing the source of the information or disclosing its contents without the permission of the originating agency. It is true that the deponent himself did not make the inquiries to obtain the waivers.

[22] Second, the respondent was also advised during cross-examination that a person was assigned to determine whether any of the redacted information was in fact made public as a result of related criminal proceedings in the United Kingdom. The person responsible for this task was not the affiant. There is also, of course, a duty of utmost good faith on counsel for the Attorney General of Canada to make full disclosure in any *ex parte* proceeding: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at paragraphs 27 and 47; *Charkaoui (Re)*, 2004 FCA 421 at paragraphs 153 and 154.

[23] Finally, the respondent was advised that the affiant from the Canada Border Services Agency was familiar with the process by which different kinds of privileges are attached to specific redacted information. Again, this particular affiant could not address the linkage between the specific privilege being asserted and the information redacted in the main proceeding. The affiant from the Canadian Security Intelligence Service set out six categories for asserting national security privilege in her affidavit. The respondent's cross-examination of this affiant was limited.

[24] In each instance, however, it was open to the respondent to pursue further these factual issues, including the one concerning the linkage between the specific privilege and the information, through counsel for the Attorney General of Canada and, if unsuccessful, to seek relief from the Court. No such relief was sought.

[25] Against this background, I questioned whether there is an appropriate factual foundation upon which to test the constitutionality of the section 38 provisions.

[26] *Charter* decisions should not and must not be made in a factual vacuum: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at paragraph 9; *Reference re Same-Sex Marriage*, 2004 SCC 79.

[27] This principle was somewhat qualified in *R. v. Mills*, [1999] S.C.J. No. 68 (at paragraphs 36 and 37):

> The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. …
>
> …The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. …

[28] Despite some misgivings that the factual underpinnings have not been fully explored in this case, I am satisfied, as acknowledged by both parties, that there are sufficient legislative facts to

assess the purpose or general effects of the impugned provision in the context of this *Charter* challenge.

ii) Sections 7 and 11(d)

[29] The main proceeding arises as the result of serious criminal charges where the respondent, if convicted, faces the possibility of a substantial penitentiary sentence. In this context, the applicant conceded, properly in my view, that the respondent's liberty interests as protected under section 7 are engaged.

[30] Also, the parties generally acknowledge, and I agree, that the principles of fundamental justice at issue include the respondent's right to a fair trial, his right to disclosure and his right to make full answer and defence, as these rights relate to the underlying criminal proceeding.

[31] In this case, the respondent's right to fundamental justice, including the right to make full answer and defence, overlaps with his right to a fair and public hearing in accordance with section 11(d). As a potential loss of life, liberty or security of the person is at issue, it is appropriate to consider both sections of the *Charter* together since a finding that one provision has been infringed will necessarily entail a finding that the other has been infringed as well: *R. v. Rose*, [1998] 3 S.C.R. 262 at paragraph 96. In this case, the parties have presented their submissions concerning sections 7 and 11(d) interchangeably. In these reasons, I will be referring principally to section 7.

[32] In considering the relevant section 7 issues, I have been guided by the recent judgment of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

[33] Section 7 of the *Charter* does not require a particular type of process, but a fair process having regard to the nature of the proceedings and interests at stake: *Charkaoui* at paragraph 20. The main question is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is "fundamentally unfair" to the affected person: *Charkaoui* at paragraph 22.

[34] Societal concerns form part of the relevant context for determining the scope of the applicable principles of fundamental justice: *Charkaoui* at paragraph 58. In the national security context, in particular, although the protection of due process may not be as complete as in a case where national security does not operate, due process is nonetheless the bottom line: *Charkaoui* at paragraph 27. Section 7 does not, however, permit a free-standing inquiry into whether a legislative measure "strikes the right balance" between individual and societal interests as this would risk collapsing the section 1 analysis into section 7: *Charkaoui* at paragraph 21.

[35] The right to know the case to be met is not absolute. Canadian statutes sometimes provide for *ex parte* or *in camera* hearings, in which judges must decide important issues after hearing from only one side: *Charkaoui* at paragraph 57. In order to satisfy section 7, either the person must be

given the necessary information or a substantial substitute for that information must be found: *Charkaoui* at paragraph 61.

[36] National security considerations can limit the extent of disclosure of information to the affected individual. Where the national security context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found: *Charkaoui* at paragraph 23. Substitute measures can include subsequent disclosure, judicial review and rights of appeal: *Charkaoui* at paragraphs 57-59 and *Ruby* at paragraph 40.

[37] An analysis of national security considerations is inherently engaged in section 38 proceedings. The sensitive information in issue arguably necessitates *ex parte* review. However, section 38 provides a number of substantial substitutes to accommodate the competing interests of fundamental justice. These protections are set out below.

[38] Subsection 38.03 authorizes the Attorney General of Canada to disclose all or part of the information at any time. This may occur during the section 38 proceeding, including the *ex parte* process: see *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2006 FC 1562 at paragraph 49.

[39] Parliament has provided a substitute for the redacted information by authorizing the judge to consider the conditions of disclosure most likely to limit injury to national security: subsection 38.06(2). The same provision states that the judge may authorize the disclosure "… of all the

information, a part of summary of the information, or a written admission of facts relating to the information." This flexibility was not written into the version of section 38 which existed prior to the amendments enacted by the *Anti-terrorism Act*.

[40] Sections 38.09 and 38.1 provide respectively an appeal as of right to the Federal Court of Appeal and on leave to the Supreme Court of Canada.

[41] An additional procedural safeguard to protect the right of the accused to a fair trial is set out in section 38.14. After the section 38 process has been completed, with or without the issuance of a certificate by the Attorney General of Canada pursuant to section 38.13, the judge presiding over the criminal proceeding has a range of options, including an order effecting a stay of the criminal charges.

[42] Section 38 provides for other procedural protections.

[43] Subsection 38.11(2), the impugned provision, itself affords the party seeking disclosure of the secret information the right to request the opportunity to make representations in the absence of any other party, including the Attorney General of Canada: above at paragraphs 18-19. This is another innovation enacted by the 2001 amendments to the *Anti-terrorism Act*.

[44] The one difference between the right of the Attorney General of Canada and the right of the respondent to make *ex parte* representations is that the latter is with leave of the Court. There has been no reported case, and no case to my knowledge, where such a request has been refused.

[45] Also, there is no principle of fundamental justice that the Crown and the defence must enjoy precisely the same privileges and procedures: *Mills* at paragraph 111. The Supreme Court of Canada has accepted the right of government to make *ex parte* submissions in national security matters, subject to the control of the reviewing court and the applicable principles of fundamental justice: *Charkaoui* at paragraph 57 and *Ruby* at paragraph 49.

[46] Section 38 also confers a considerable discretion in deciding whether information in issue should be disclosed. The three-part test set out in the Federal Court of Appeal decision in *Ribic* is itself a form of procedural protection insofar as it establishes a balanced and nuanced approach to assessing disclosure: *Ribic* at paragraphs 17-27.

[47] Finally, as acknowledged by the applicant, the presiding judge in a section 38 proceeding has the discretion to appoint a security-cleared *amicus curiae*.

[48] In considering the Federal Court's jurisdiction to appoint an *amicus curiae* in the context of a ministerial certificate case, Justice Eleanor Dawson noted in *Harkat (Re)*, 2004 FC 1717 at paragraph 20: "… a power may be conferred by implication to the extent that the existence and

exercise of such a power is necessary for the Court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision."

[49] Section 38 affords the flexibility to accommodate factual situations which will differ from case to case. A variant of the *amicus curiae* model, although not identical to the traditional conception of that office, was used in *Ribic*: at paragraphs 6 and 44-45.

[50] In this proceeding, the Attorney General of Canada has acknowledged the Federal Court's jurisdiction to appoint an *amicus curiae* for the *ex parte* sessions of a section 38 application. In written submissions, the Attorney General of Canada characterized the *amicus curiae* as a legal expert to address legal issues relating to national security. During the hearing, counsel for the applicant acknowledged that the *amicus curiae* could be provided access to the secret information to read, hear, challenge and respond to the *ex parte* representations made on behalf of the government.

[51] The respondent's concern was that the appointment of an *amicus curiae* with such functions was not explicitly written into the section 38 legislation.

[52] The Security Intelligence Review Committee (Review Committee) was enacted by the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23. Pursuant to section 36 of this Act, the Review Committee may engage "staff as it requires". Neither the Act nor the Rules of Procedure adopted by the Review Committee make any specific mention of the role of counsel acting on behalf of the Review Committee. In my view, the Court's ability to appoint *amicus*

curiae, as may be necessary, adequately answers the respondent's concern that the equivalent of section 36 is not specifically provided for in section 38 of the *Canada Evidence Act*.

[53] A more complete description of the role of counsel appointed by the Security Intelligence Review Committee is available in two useful articles: Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990) 3 C.J.A.L.P. 173; and Ian Leigh, "Secret proceedings in Canada" (1996) 34 Osgoode Hall LJ 113, especially at paragraphs 82-83. See also *Charkaoui* at paragraphs 71-76.

[54] In his reply argument during the hearing, counsel for the respondent expressed a preference for "a Canadian special counsel model as described by *Charkaoui*" over an *amicus curiae*. In assessing this submission, it is important to characterize carefully the role of counsel for the Review Committee.

[55] The Review Committee appointed counsel to assist its members during hearings. The nomenclature "independent counsel" or "special counsel" may be confusing.

[56] In carrying out its investigative hearings, the Review Committee would, of course, be concerned to enhance natural justice and procedural fairness. One of the functions of Review Committee counsel in contributing to this goal would be to cross-examine government witnesses during the *ex parte* sessions, keeping in mind the interests of the complainant absent from the

hearing. To suggest that counsel was "independent" or "special" risks obscuring the fact that, at all times, counsel is acting on behalf of the Review Committee.

[57] In my view, the Court's ability, on its own initiative or in response to a request from a party to the proceeding, to appoint an *amicus curiae* on a case-by-case basis as may be deemed necessary attenuates the respondent's concerns with the *ex parte* process. This safeguard, if and when it need be used in the discretion of the presiding judge, further assures adherence to the principles of fundamental justice in the national security context.

[58] In *Charkaoui*, the Supreme Court of Canada found the impugned provisions of the *Immigration and Refugee Protection Act* unconstitutional on the principal basis that the scheme attempted to meet the dictates of fundamental justice essentially through one mechanism which the Court deemed insufficient: *Charkaoui* at paragraph 65. The Supreme Court also noted that the *Canada Evidence Act* strikes a better and more sensitive balance between the protection of sensitive information and the procedural rights of individuals: *Charkaoui* at paragraph 77. In my view, the substantial substitutes and procedural protections in section 38 establish a process that is not "fundamentally unfair": *Charkaoui* at paragraph 22.

[59] In summary, section 38, including subsection 38.11(2), achieves a nuanced approach that respects the interest of the state to maintain the secrecy of sensitive information while affording mechanisms which respect the rights of the accused, including the right to full answer and defence, the right to disclosure and the right to a fair trial in the underlying criminal proceeding. I find that

subsection 38.11(2) accords with section 7 and 11(d) of the *Charter*. No section 1 analysis is therefore required.

iii) Section 2(b)

[60] The parties' written and oral submissions concerning section 2(b) of the *Charter* were limited.

[61] The Attorney General of Canada readily acknowledges that the *ex parte* process in subsection 38.11(2) infringes the freedom of the media and the open court principle enshrined in section 2(b).

[62] In *Ruby*, the Supreme Court affirmed the validity of the statutory requirement that government submissions concerning secret information can be received *ex parte*.

[63] The respondent has not successfully distinguished *Ruby* from this case. Accordingly, I find that the infringement of the open court principle caused by subsection 38.11(2) is saved under section 1 for the reasons enunciated in *Ruby*: at paragraph 60 and, in the context of section 7, at paragraphs 46-49.

ORDER

THIS COURT ORDERS that the respondent's motion, filed on March 15, 2007, is dismissed.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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