Federal Court Cour fédérale

Date: 20240605

Docket: DES-1-19

Citation: 2024 FC 853

Ottawa, Ontario, June 5, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Respondent

ORDER AND REASONS

I. INTRODUCTION

[1] In 2014, British Columbia Civil Liberties Association (BCCLA) made a complaint to the Security Intelligence Review Committee (SIRC) under section 41 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*). (This and related provisions of the *CSIS Act* were repealed in 2019, when SIRC was succeeded by the National Security Intelligence Review Agency.)

[2] Relying in part on media reporting of information obtained through requests under the *Access to Information Act*, RSC 1985, c A-1, BCCLA alleged that the Canadian Security Intelligence Service (CSIS or "the Service") had engaged in "improper and unlawful actions by gathering information about Canadian citizens and groups engaged in peaceful and lawful expressive activities, and sharing it with other government bodies and private sector actors" (*Letter from Paul Champ to SIRC dated February 6, 2014* [*Complaint Letter*], p.1).

[3] More particularly, BCCLA alleged that CSIS had been investigating groups and individuals engaged in lawful protest against the Northern Gateway Pipeline Project and that it had shared the fruits of its investigations with the National Energy Board (NEB) and non-governmental members of the petroleum industry. It alleged that CSIS had targeted certain groups as potential security threats warranting investigation "simply because they advocate for protection of the environment" (*Complaint Letter*, p.1). Seven groups were identified in the complaint: Leadnow, ForestEthics Advocacy Association, the Council of Canadians, the Dogwood Initiative, EcoSociety, the Sierra Club of British Columbia, and Idle No More (*Complaint Letter*, p.2).

[4] BCCLA alleged that CSIS's activities in collecting and sharing information about these groups fell outside the scope of its lawful authority under the *CSIS Act*. It also alleged that these activities violated the rights to freedom of thought, belief, opinion, expression and association guaranteed by the *Canadian Charter of Rights and Freedoms.* In the latter regard, BCCLA highlighted its concern about the chilling effects that result from a security intelligence service

targeting groups and individuals that are engaging lawfully with issues of significant public interest and importance.

[5] SIRC's investigation of the complaint was conducted by the Honourable Yves Fortier, PC, CC, OQ, QC. The investigation included *in camera* hearings before Member Fortier at which BCCLA presented evidence and submissions in support of its complaint. It also included *ex parte* hearings at which four witnesses testified on behalf of CSIS and submissions were made in response to the complaint. CSIS compiled several volumes of Books of Documents that were filed with SIRC during the *ex parte* hearings.

[6] The parties agreed that the complaint gave rise to the following four questions:

a) Did the Service collect information about groups or individuals for their activities in relation to the Northern Gateway Pipeline Project?

b) If so, was it lawful?

c) Did the Service provide information relating to individuals or groups opposed to the Northern Gateway Pipeline Project to the National Energy Board or non-governmental members of the petroleum industry?

d) If so, was it lawful?

[7] For reasons set out in a 57-page Top Secret report dated May 30, 2017, Member Fortier dismissed the complaint, finding that BCCLA's allegations were not supported by the evidence.

[8] SIRC provided BCCLA with a redacted version of the report under covering letter dated August 30, 2017. Subsequently, in connection with the present application, the Attorney General of Canada (AGC) provided BCCLA with a less redacted version of the report, although many redactions still remain over information the disclosure of which would, the AGC alleges, be injurious to national security. (These redactions are indicated in what follows by [***].)

[9] In summary, Member Fortier concluded as follows:

- "Through the *ex parte* evidence and hearing, I heard that the Service has some information in their databases related to the named groups in this complaint, [***] which thereby constitutes collection. However, I have seen no evidence that the Service was collecting information or investigating [***] associated with the named groups as a result of their peaceful advocacy or dissent" (at para 137).

- "[***] the collection of information [***] conducted in an ancillary manner, in the context of other lawful investigations" (at para 138).

- "Through the evidence presented to me in the *ex parte* hearing, I am aware of the collection of information in accordance with section 12 [of the *CSIS Act*] and the provision of information as it pertains to certain individuals for whom the appropriate targeting authorities were in place" (at para 139).

- "The *ex parte* evidence has convinced me that [***] was done as ancillary information in respect of lawful targeting authorities against targets in place at the time, unrelated to groups or individuals engaged in legitimate protest and dissent" (at para 141).

- "The totality of the evidence which I have reviewed and analyzed demonstrates that there was no direct link between CSIS and the 'chilling effect' which the Complainant's witnesses mentioned in their testimonies. I agree with the Respondent's submissions that the Complainant failed to differentiate the actions of the NEB and of the RCMP [Royal Canadian Mounted Police] and those of CSIS" (at para 156).

- "I have found that the Service had information regarding the named groups in their operational database, and therefore this constitutes collection. However, I also find that the information regarding these groups was included in the Service's operational database when it was reporting on targets of the Service. In these circumstances, this collection falls squarely within the Service's mandate" (at para 160).

- "[…] I cannot find, on the basis of the evidence before me, that CSIS, in this case, expanded its mandate to include lawful advocacy, protest or dissent" (at para 163).

- "The evidence of the Respondent's witnesses, as well as the documentary evidence presented by the Service during both the *in camera* hearing and the *ex parte* hearing is persuasive. I am convinced by that evidence that CSIS did not investigate groups or individuals [***] and involved in lawful advocacy, protest or dissent. Accordingly, I find that the Service's collection of information related to the groups was lawful and within its mandate, and that the Service did not investigate activities involving lawful advocacy, protest or dissent" (at paras 174-75).

- "I find that there was no sharing of information by the Service about these groups or individuals opposed to the Northern Gateway Pipeline Project with the NEB, or other non-governmental members of the petroleum industry. Rather, the evidence presented to

me during the *ex parte* hearing has convinced me that CSIS did not disseminate information about the named groups or individuals, either with the NEB or with private members of the petroleum industry" (at para 176).

- "The evidence presented to me *ex parte* has persuaded me that CSIS does indeed provide advice to the NEB pursuant to section 12 and subsection 19(2) of the *CSIS Act*. However, the *ex parte* evidence does not reveal any reference to or mention of anyone [*sic*] of the groups or individuals named in the complaint" (at para 183).

- "There is clear evidence that the Service participated in meetings or round tables with NRCan [Natural Resources Canada], and the private sector, including the petroleum industry, at CSIS headquarters. However, the *ex parte* evidence presented to me is also clear. These briefings involved national security matters, and were definitely not concerned with [***] groups mentioned in this complaint" (at para 188).

- "Since I have found that the Service has not shared any information concerning the 'targeted groups' represented by BCCLA with the NEB or other non-governmental members of the petroleum industry, the question of lawfulness has become moot" (at para 195).

- "The evidence presented to me in the *ex parte* hearings has convinced me that any collection and dissemination of information by CSIS was done lawfully and in accordance with its mandate. I am persuaded that there was no targeting of [***]" (at para 196).

- The Complainant and its witnesses are genuinely concerned about the chilling effect of the Service's activities. "However, I have seen in the context of the totality of the evidence which was provided to me during the ex parte hearings that these concerns were not justified. The conduct of the Service in the present case has been in conformity with its enabling legislation" (at para 204).

- "[. . .] the Complainant has failed to establish a 'causal effect' or 'direct link' between CSIS's conduct and the 'chilling effect' which it invokes. Having found no 'chilling effect', its allegations cannot form the basis of a *Charter* violation" (at para 205).

- This finding "also disposes of the Complainant's allegation that section 2 of the *Charter*, which guarantees the protection for freedom of expression, was breached by CSIS' conduct in its investigation of the activities of the Northern Gateway Pipeline project" (at para 206).

- "After having carefully reviewed the evidence submitted to me in the *ex parte* hearings […], I am satisfied that it does not support the Complainant's submission regarding a 'direct link' between CSIS' conduct and the 'chilling effect.' Therefore, upon review of the evidence before me in this case, I am convinced that there was no *Charter* breach" (at para 207).

[10] Member Fortier concluded his report as follows under the heading "Findings and Recommendations" (at paras 240-243):

> For these reasons, I find that the Complainant's allegations are not supported by the evidence, and the complaint is accordingly dismissed.

> While I found that the Service did collect some ancillary information [***] I find that any information reported on them was done incidentally, in respect of the lawful targeting authorities in place at the time, [***]. I also find that the Service did not investigate [***] recognized as being associated with lawful advocacy, protest or dissent.
>
> I find that the Service did not share information regarding these groups or individuals with the NEB or other non-governmental members of the petroleum industry.
>
> I recommend that the Service prioritize inclusive public discussions with the groups involved in the present complaint, where possible, having regard to the classified nature of certain topics.

[11] BCCLA has applied for judicial review of Member Fortier's decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (Court File No. T-1492-17). It alleges that Member Fortier erred in law in his interpretation of sections 12 and 19 of the *CSIS Act*, with respect to the chilling effects of CSIS's actions, and with respect to the threshold at which CSIS's actions engage the *Charter*. BCCLA also alleges that the non-disclosure of information and evidence in connection with the SIRC proceeding violated the principles of procedural fairness and natural justice.

[12] In conjunction with the application for judicial review, BCCLA requested under Rule 317 of the *Federal Courts Rules*, SOR/98-106 (*FCR*), that SIRC transmit all relevant material in its possession to the Court and to BCCLA. The documents eventually produced in response to this request included the Fortier Report, the classified Books of Documents filed with SIRC, transcripts of the proceedings before Member Fortier, and various procedural documents relating to SIRC's adjudication of the complaint.

[13] Pursuant to Rule 318(2) of the *FCR*, SIRC objected to disclosing parts of the Certified Tribunal Record (CTR). The grounds included that the CTR contained approximately 3,340 pages of unredacted classified information that it would be inappropriate to produce until the AGC had reviewed it for national security purposes. SIRC then gave notice to the AGC under section 38.01 of the *Canada Evidence Act*, RSC 1985, c C-5 (*CEA*), concerning the possible disclosure of sensitive or potentially injurious information in the CTR.

[14] Having identified information in the CTR the disclosure of which was objected to on national security grounds, the AGC brought the present application under *CEA* section 38.04 for an order confirming the claims for the prohibition of disclosure of that information. BCCLA is the respondent on this application.

[15] An unclassified version of the CTR redacted to protect the information that is the subject of this application has been disclosed to BCCLA. The AGC unsuccessfully sought a confidentiality order over this redacted CTR: see *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 FC 1094.

[16] As is now standard practice, the AGC filed a classified version of the documents containing *CEA* section 38 redactions in which the redacted information is visible.

[17] In view of the issues raised in this application, the large volume of material to be considered, and the fact that a significant part of the application would have to be heard *in camera* and *ex parte*, at an early stage, an *amicus curiae*, Mr. Ian Carter, was appointed to assist

the Court. Mr. Carter was also appointed *amicus* in connection with the underlying application for judicial review, albeit only on a watching brief at that time.

[18] The Court conducted both public and *in camera/ex parte* hearings on the AGC's application under *CEA* section 38. The focus of the *in camera/ex parte* hearings was the injury the AGC alleged would be caused by the disclosure of the information at issue.

[19] Mr. Carter withdrew from his *amicus* roles in June 2022 upon his appointment to the Ontario Superior Court of Justice. Fortunately, by then the AGC had presented its classified evidence in support of the non-disclosure claims, which was subject to cross-examination by Mr. Carter. As well, Mr. Carter had completed his work reviewing the redacted documents and formulating his positions concerning disclosure. The Court had the benefit of classified written and oral submissions from counsel for the AGC as well as Mr. Carter prior to his withdrawal.

II. SUMMARY OF THE COURT'S DETERMINATIONS

[20] The test under the *CEA* section 38 scheme for determining whether to confirm a prohibition of disclosure or, instead, to order some form of disclosure (e.g. by lifting redactions or summarizing redacted information) is stated in *Canada (Attorney General) v Ribic*, 2003 FCA 246. Briefly, I must determine whether the information in question is relevant to an issue in the underlying proceeding (in this case, BCCLA's application for judicial review of SIRC's decision dismissing its complaint); if the information is relevant, whether its disclosure would be injurious to international relations, national defence or national security; and, if

disclosure would be injurious, whether the public interest in disclosure outweighs the public interest in non-disclosure.

[21] As a result of the diligent work of the *amicus* and counsel for the AGC, the contested issues in this application were narrowed significantly. In summary, my determinations are as follows.

[22] First, as set out in the table attached as Annex A to these reasons, the *amicus* identified 363 documents as “non-contentious” – in other words, the *amicus* was satisfied that there was no basis to challenge the redactions over information in these documents. (Six additional documents were subsequently determined to be non-contentious.) Having considered the rationale for the *amicus*’s determinations regarding the documents listed in Annex A (and the additional documents) as well as the information in those documents, I am satisfied that the position of the *amicus* is well founded. Accordingly, pursuant to *CEA* subsection 38.06(3), I will confirm the prohibition of disclosure of the redacted information in the documents listed in Annex A and any other documents identified by the *amicus* as non-contentious.

[23] Second, the *amicus* identified 314 contentious documents. They are listed in the table attached as Annex B to these reasons. Even with respect to this set of documents, in the view of the *amicus*, not all of the redacted information was contentious. He took focused positions regarding the redacted information that, in his submission, should be disclosed either by way of lifts of redactions or by way of summaries that are linked to specific documents.

[24] Having considered the rationale offered by the *amicus* for distinguishing between the contentious and non-contentious information in these documents as well as the information the *amicus* identified as non-contentious, I am satisfied that the position of the *amicus* is well founded. Accordingly, pursuant to *CEA* subsection 38.06(3), I will confirm the prohibition of disclosure of the non-contentious redacted information in the documents listed in Annex B.

[25] Unsurprisingly, the Fortier Report (AGC0003) is one of the contentious documents. It is also fair to say that all of the redacted information in this document is contentious. The AGC's position concerning the Fortier Report has evolved significantly over the course of this application. In the end, the AGC has agreed to lift a number of the redactions originally applied to the report. For the reasons set out below, but with a few key exceptions, I have not been persuaded that any additional lifts of redactions in the Fortier Report are warranted.

[26] The AGC has also proposed summaries in relation to every redacted paragraph in the Fortier Report. The AGC agrees that, to at least some extent, the information covered by each redaction can be summarized in a way that is not injurious or, if there is some injury, it is outweighed by the public interest in disclosure of the summary. The *amicus* agreed with the AGC's proposed summaries (although in a few instances he urged the Court to authorize additional lifts instead). I agree that all the summaries proposed by the AGC are warranted. Since I am ordering lifts over certain paragraphs with respect to which the AGC had proposed summaries, those summaries are unnecessary.

[27] The AGC will be directed to prepare a version of the Fortier Report that has been redacted in accordance with this Order and Reasons and that incorporates the summaries authorized for disclosure. Specifically, this version should reflect: (1) the Court's determination that, with the exception of paragraphs 137, 138, 140 (in part), 141, 174 and 241, the AGC's position concerning redactions is accepted; (2) the Court's determination that lifts of redactions should be ordered with respect to paragraphs 137, 138, 140 (the last 8 words only), 141, 174 and 241; and (3) the Court's acceptance of the AGC's proposed summaries of paragraphs where redactions remain, subject only to a few minor revisions in the interests of clarity. Pursuant to *CEA* subsection 38.06(2), I will authorize disclosure of this version of the Fortier Report to BCCLA. Pursuant to *CEA* subsection 38.06(3), I will confirm the prohibition of disclosure of the remaining redacted information in the Fortier Report.

[28] With respect to the balance of the contentious information in the documents listed in Annex B, I am not persuaded that any additional lifts are warranted, nor (with the exception of six documents) do I agree with the *amicus* that summaries of redacted information should be linked to specific contentious documents.

[29] Briefly, I am not persuaded that the public interest in disclosure of the information, whether by lifts of redactions or summaries of redacted information linked to specific documents, outweighs the injury that would be caused by these forms of disclosure. Rather, I agree with the AGC that a single overarching summary covering a large sub-set of the contentious documents strikes the appropriate balance between the public interest in disclosure and the public interest in protecting the redacted information. I also agree with the AGC that

summaries can and should be linked to six specific documents (AGC0967, AGC0968, AGC0972, AGC0973, AGC0974 and AGC0976). Accordingly, pursuant to *CEA* subsection 38.06(2), I will authorize disclosure of the overarching summary and the six specific summaries set out in Annex C. All these summaries are in substance the same as the AGC has proposed, although I have revised them slightly in the interests of clarity. Pursuant to *CEA* subsection 38.06(3), I will confirm the prohibition of disclosure of the remaining redacted information in the balance of the documents listed in Annex B.

[30] Third, subsection 38.06(2) of the *CEA* provides that, where the designated judge concludes that disclosure of information would be injurious but the public interest in disclosure outweighs in importance the public interest in non-disclosure, before authorizing disclosure, the judge must consider "both the public interest in disclosure and the form and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure." Accordingly, when disclosure is authorized, it may be "subject to any conditions that the judge considers appropriate."

[31] In the present case, the disclosure to BCCLA I am authorizing will be subject to the condition that it be treated as confidential by the parties and by the Court. This is without prejudice to the right of BCCLA to request that the version of the Fortier Report disclosed pursuant to this order and any other information now being ordered disclosed be made part of the public record in the underlying judicial review application. Unless and until such an order is granted, Annex C and the version of the Fortier Report I am authorizing to be disclosed shall be treated as confidential by the parties and by the Court.

[32] In the hope of avoiding the need for a confidentiality order or any other restrictions with respect to the main body of this Order and Reasons, I have not included any of the contentious information in these reasons. Nevertheless, as set out below, it remains open to the AGC to seek such a measure once it has had the opportunity to review the decision.

[33] Finally, for reasons set out below, pursuant to *CEA* subsection 38.06(2), I am authorizing disclosure of all the redacted information in the Rule 317 documents to the judge who will hear the underlying application for judicial review. In the event that a new *amicus curiae* is appointed in connection with the application for judicial review, the issues of his or her role and access to the unredacted information can be addressed at that time.

[34] The steps to be followed in releasing this Order and Reasons to the parties as well as disclosing the additional information to BCCLA are addressed below.

III. <u>ANALYSIS</u>

[35] In *R v Ahmad*, 2011 SCC 6, the Supreme Court of Canada held that the purpose of the *CEA* section 38 scheme "is to balance the public interest in secrecy against the public interest in the effective administration of a fair system of justice" (at para 41). While it has not commented directly on the *Ribic* test, the Supreme Court has noted both the flexibility of the section 38 scheme and the "considerable discretion" it confers on designated judges: see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 77, and *Ahmad*, at para 44.

[36] In *Ribic*, which related to a criminal prosecution, the Federal Court of Appeal established a three step test for determining under *CEA* section 38.06 whether to confirm a prohibition of disclosure of sensitive or potentially injurious information or, alternatively, whether some form of disclosure should be ordered. Ever since, this test has been applied in section 38 applications relating to both criminal and civil proceedings: see, for example, *Canada (Attorney General) v Telbani*, 2014 FC 1050 at para 22 and the cases cited therein; see also *Canada (Attorney General) v Huang*, 2018 FCA 109 at para 13; and *Canada (Attorney General) v Hutton*, 2023 FCA 45 at para 31.

A. *Step One - Relevance*

[37] Under the *Ribic* test, I must first determine whether or not the information in issue is relevant to the underlying application for judicial review. In *Ribic* itself, where (as noted) the underlying proceeding was a criminal prosecution, the Court of Appeal held that relevance should be understood in accordance with the "usual and common sense" meaning of this term stated in *R v Stinchcombe*, [1991] 3 SCR 326 – namely, information, whether inculpatory or exculpatory, that may reasonably be useful to the defence (*Ribic*, at para 17). The proposition that information is relevant if it is potentially useful in the underlying proceeding for the party from whom it has been withheld is equally applicable to civil proceedings.

[38] At this stage, the burden is on BCCLA "to establish that the information is in all likelihood relevant evidence" (*Ribic*, at para 17). This is "undoubtedly a low threshold" (*ibid.*).

[39] The AGC accepts that the redacted information in the contentious documents is relevant in the sense required to satisfy the first step of the test. I will say more below about the potential usefulness of the withheld information in the underlying judicial review application.

B. *Step Two - Injury*

[40] At the second step, I must determine whether disclosure of the information would be injurious to international relations, national defence or national security. Only potential injury to national security is in issue here.

[41] At this stage, the burden rests on the AGC to establish that injury *would* result from disclosure. The AGC must demonstrate a probability of injury, not merely its possibility (*Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 at paras 47-49). While the Court should show deference to the AGC's determinations concerning potential injury, the AGC's position must "have a factual basis which has been established by evidence" (*Ribic*, at para 18). As Justice de Montigny (then a member of the Federal Court) held in *Telbani*, "it is not sufficient to speculate that a piece of information could be potentially injurious to national security; it must be established, through concrete and reliable evidence, that the injury is serious and not based on mere speculation" (at para 44). In short, there must be a reasonable basis for the injury claim (*Huang*, at para 13).

[42] If I am satisfied that there is a reasonable basis for the injury claim, I must proceed to the third step of the test (*Ribic*, at para 19). If, on the other hand, I am not satisfied that there is a

reasonable basis for concluding that the alleged injury would result from disclosure, disclosure of the information in question may be authorized: see *CEA* subsection 38.06(1).

[43] Generally speaking, in the public part of a *CEA* section 38 application, the injury alleged by the AGC and the evidence to support it must be framed in broad and generic terms; otherwise, the very purpose of the section 38 scheme would be defeated. Usually, detailed evidence and submissions concerning the nature of the injury to protected interests and how disclosure would result in that injury can only be presented *in camera* and *ex parte*, as provided for under *CEA* section 38.11. This is what happened here.

[44] The *amicus* accepted that the evidence led by the AGC in respect of the contentious information is sufficient to satisfy the second part of the test. Having considered the information in issue and the AGC's evidence of injury, I agree that the second step is met. It is therefore necessary to proceed to the third step of the test. I will address the question of injury further below, to the extent that this can be done in public reasons.

C. *Step Three - Balancing*

[45] At the third step of the test, I must determine whether the public interest in disclosure of the contentious information outweighs in importance the public interest in non-disclosure.

[46] On one side of the scale, there is a public interest in ensuring that justice is done in the underlying proceeding. The assessment of this interest involves, among other things, the issues at stake in that proceeding and the usefulness of the withheld information for BCCLA in

advancing its application for judicial review. At this stage, the information in issue "is not to be viewed in the narrow sense of whether it is relevant to an issue pleaded, but rather to its relative importance in proving the claim or in defending it" (*Ribic*, at para 22, quoting *Pereira E Hijos S.A. v Canada (Attorney General)*, 2002 FCA 470 at para 17).

[47] The open court principle also weighs on this side of the public interest balancing. Court files and proceedings are presumptively open to the public. The general rule is that justice should be carried out in the open and not in secret (*Sherman Estate v Donovan*, 2021 SCC 25 at paras 30 and 37-39).

[48] Weighing on the other side of the scale is the public interest in avoiding the injury that would be caused by disclosure of the contentious information, as determined at the second step of the test.

[49] This balancing of interests is reflected in the jurisprudence governing discretionary limitations on the open court principle. The jurisprudence recognizes that, while court openness is the rule, "it is not an absolute or overriding principle" (*R v TWW*, 2024 SCC 19 at para 69). Court openness can be balanced against other important interests, although it remains the case that "covertness in court proceedings must be exceptional" (*Sherman Estate*, at para 63). The presumption can be rebutted when court openness poses a serious risk to an important public interest, the order sought is necessary to prevent this serious risk to the identified interest, and, as a matter of proportionality, the benefits of the order outweigh its negative effects (*Sherman Estate*, at para 38).

[50] When balancing these competing public interests within the *CEA* section 38 scheme, which is itself a discretionary limit on court openness, I must also consider whether there are ways to limit the injury that would be caused by disclosure while still making information available for use in the underlying proceeding when this is warranted. Such measures include approving a summary of the redacted information and making a confidentiality order: see *CEA*, subsection 38.06(2); see also *Ribic*, at para 27; *Hutton*, at para 32; and *Canada (Attorney General) v Abdelrazik*, 2023 FC 1100 at para 68.

[51] The burden of demonstrating that the public interest balance is tipped in favour of disclosure rests on BCCLA. That said, in determining whether it has discharged this burden, the Court ought not to hold BCCLA to an unrealistic standard. Since it has not seen the information in issue, it must rely on general suppositions about what is being withheld and its potential usefulness (see *Canada (Attorney General) v Meng*, 2020 FC 844 at para 77). If held to a standard that is too stringent, it would be put in an impossible Catch-22: see, in an analogous context, *R v McNeil*, 2009 SCC 3 at para 33. Nevertheless, purely speculative possibilities regarding the potential usefulness of the information will not justify the disclosure of injurious information (*Ader v Canada (Attorney General)*, 2018 FCA 105 at para 30). It is also important to note in this connection that the *amicus* was well placed to make effective submissions on the potential value of the withheld information.

[52] One other general point is worth emphasizing. This balancing must not be done in a vacuum; the relevant factors must be “rooted in the reality of the file” and in the “issues of the

specific underlying proceeding" (*Canada (Attorney General) v Tursunbayev*, 2021 FC 719 at paras 88-89).

(1) The public interest in disclosure

[53] As stated above, at this stage of the test, I must consider, among other things, the interests and issues at stake in the underlying proceeding. *Ahmad* concerned how the CEA section 38 scheme can serve to reconcile "the potential conflict between two fundamental obligations of the state under our system of government: first, to protect society by preventing the disclosure of information that could pose a threat to international relations, national defence, or national security; and second, to prosecute individuals accused of offences against our laws" (at para 1). While the first of these obligations is engaged in the present case, obviously the second is not. Instead, a different countervailing public interest is implicated – namely, the public interest in a fair and effective process for judicial review of administrative decisions.

[54] The Supreme Court of Canada observed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, that judicial review of administrative decisions "concerns matters which are fundamental to our legal and constitutional order" (at para 4). Judicial review implicates the constitutional duty of courts to ensure that exercises of state power are subject to the rule of law (*Vavilov*, at para 82; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 10). It is "the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28).

[55] The public interest in effective judicial review, which is always significant, is particularly acute in the underlying application because higher interests are also at stake. The decision under review implicates matters of fundamental importance such as the lawful scope of the Service's investigative powers, effective oversight of the Service's activities, and the protections of the *Charter*.

[56] As also noted above, another consideration under the third step of the test is the relative importance of the withheld information for the party from whom it has been withheld in advancing its position in the underlying proceeding. In the context of a criminal proceeding, this is the importance of the information for making full answer and defence. In the context of an application for judicial review, this is the importance of the information for effective judicial review of the decision in question.

[57] Several factors have been identified in the jurisprudence as potentially bearing on the importance of withheld information in a given case. These include the admissibility of the information in the underlying proceeding; if the information would be admissible, its probative value; the materiality of the facts capable of being established by the information; and whether the same facts can be established by other information or evidence that does not engage section 38 concerns (*Ribic*, at para 22; *Abdelrazik*, at para 66).

[58] In the present case, since the contentious information is either included in the decision under review or is part of the record that was before the decision maker, none of these factors militates against the importance of the withheld information. On the contrary, they highlight the

importance of the information as part of the very subject matter of the application for judicial review. That being said, I agree with the AGC that the withheld information is not all of equal importance. While the information in the Fortier Report itself is indisputably important (the AGC does not suggest otherwise), it does not follow that every piece of classified information in the CSIS Books of Documents considered by SIRC is of the same importance as the information in the Fortier Report, or is even of much importance at all. The importance of this other information varies with the nature of the information.

[59] A key indicator of the importance of information that has been withheld is its materiality in light of the live issues in the underlying proceeding. In the context of an application for judicial review, materiality must be assessed in light of the grounds for review being advanced and the information otherwise available to an applicant. What must be determined is whether non-disclosure of the information could materially affect the outcome of the judicial review by depriving an applicant of an important argument (*Telbani*, at para 91). In assessing the withheld information, the importance of a given piece of information cannot be determined in isolation. When, as is the case here, a substantial amount of information is already available to BCCLA and, further, some additional disclosure is being authorized, the Court should consider the marginal value that would be added by authorizing the disclosure of yet more information when determining whether that disclosure is warranted despite the injury this would cause.

[60] I begin by observing that, for present purposes, it is difficult to know what to make of BCCLA's allegation that SIRC's non-disclosure of information violated the principles of procedural fairness and natural justice. As currently framed, this ground of review is premised

on the non-disclosed information not constituting "any kind of risk to national security." However, at this stage, we are only concerned with information that has met the second step of the *Ribic* test – that is, information the disclosure of which *would* be injurious to national security. Thus, the information now at issue would appear to have no importance for this ground for review.

[61] The withheld information also appears to have only modest value for the grounds on which BCCLA is challenging the substance of the decision, at least as those grounds are stated in the Notice of Application. This is because, for the most part, the grounds largely relate to matters of statutory interpretation and other legal questions such as the threshold at which CSIS investigations engage *Charter* protections for anyone affected by those investigations. In the originating notice, BCCLA has not expressly challenged the reasonableness of any of Member Fortier's factual determinations, including that the Service did not investigate activities involving lawful advocacy, protest or dissent; that, while the Service did collect information relating to the groups in question, this was only in connection with reporting on lawful targets of the Service; that the Service did not share information about any of the complainant groups with the NEB or other non-governmental members of the petroleum industry; and that there was no causal connection between Service investigations and any chill on free expression felt by the complainant groups or individuals.

[62] Be that as it may, in fairness to BCCLA, its Notice of Application was drafted in 2017. At the time, BCCLA only had the redacted version of the Fortier Report disclosed by SIRC. It did not have the benefit of the less redacted version of the report eventually disclosed by the

AGC in the course of this application, let alone the version that I am authorizing to be disclosed. Nor did it have the benefit of *Vavilov* or other important recent jurisprudence concerning judicial review on a reasonableness standard.

[63] Viewing the proposed grounds for review in the context of subsequent developments, and with the benefit of BCCLA's very helpful submissions on the present application, I would understand the application for judicial review to include a challenge to the reasonableness of Member Fortier's overall conclusion that any collection or retention of information regarding the groups in question was authorized by section 12 of the *CSIS Act* and therefore "falls squarely within the Service's mandate" (Fortier Report at para 160). I would also understand it to include a challenge to the reasonableness of Member Fortier's conclusions that the actions of the Service did not have a chilling effect on the expressive activities of the groups in question and that they therefore did not engage any *Charter* protections. Finally, Member Fortier found that the Service did not share information about the named groups. Whether or not this was a reasonable determination, BCCLA also raises broader issues concerning the reasonableness of Member Fortier's understanding of the scope of the Service's authority to share information under section 19 of the *CSIS Act.*

[64] With the grounds for review so understood, the importance of the contentious redacted information for advancing the application for judicial review becomes apparent. A reviewing court performing a reasonableness analysis must consider both the outcome and the reasoning process that led the decision maker to that outcome (*Vavilov*, at para 87). As the Supreme Court of Canada emphasized in *Vavilov* and again in *Mason v Canada (Citizenship and Immigration)*,

2023 SCC 21, courts conducting judicial review of an administrative decision on a reasonableness standard must adopt a "reasons first" approach (*Mason*, at paras 58-63). As the AGC acknowledges, the Fortier Report is central to this approach. Redactions to the report itself risk hampering this fundamental methodology of meaningful and effective judicial review.

[65] Moreover, to the extent that BCCLA is challenging the reasonableness of Member Fortier's overall decision, it bears the burden of demonstrating that the decision is unreasonable. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). To set aside a decision on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). Again, the Fortier Report is central to this determination. As well, "The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov*, at para 126). The underlying record provides essential context for understanding and assessing Member Fortier's findings. To varying degrees, the documentary and *viva voce* evidence he considered is important for assessing the reasonableness of the decision in light of the evidence before SIRC.

[66] In sum, I am satisfied that the Fortier Report itself is of the utmost importance for the underlying application for judicial review. On the other hand, while the classified information in the CSIS records and testimony considered by Member Fortier is all relevant, its importance

varies depending on the nature of the information and its materiality to the issues raised in the underlying application.

(2) The public interest in non-disclosure

[67] In these unclassified reasons, it must suffice to say only that the AGC's evidence concerning injury related to, among other things, the consequences of revealing the Service's investigative interests (or lack of interest) in particular subjects as well as the consequences of revealing the nature, scope and intensity of any investigations it may have undertaken. In other words, the contentious information engages the "never confirm or deny" principle (or what the Federal Court of Appeal refers to in *Hutton* (at para 37) as the Investigation Principle). The AGC contends that disclosing information in breach of this principle would be injurious to national security.

[68] As a matter of logic and common sense, disclosure of information in breach of this principle can be expected to risk injury to national security. Indeed, this has long been recognized in the jurisprudence: see, for example, *Henrie v Canada (Security Intelligence Review Committee)*, 1988 CanLII 5686 (FC), [1989] 2 FC 229 at paras 29-30 (aff'd 1992 CanLII 8549 (FCA)); see also *Telbani*, at para 50, and *Abdelrazik*, at para 157. Nevertheless, the contentious information the AGC seeks to protect by invoking this principle does not benefit from a class protection; weighing the public interest in respecting the Investigation Principle against the public interest in disclosure is a case-by-case exercise of discretion (*Hutton*, at para 45).

[69] As stated above, I concluded under the second part of the test that disclosure of the contentious information in this case would be injurious to national security. I so concluded because, among other things, I was persuaded by the evidence and submissions presented *in camera* and *ex parte* that disclosing contentious information in breach of the Investigation Principle would impair the ability of CSIS to operate effectively. A security intelligence agency like CSIS cannot operate effectively if present or past subjects of its investigations know they are or were of interest to the Service. Such information would allow the subjects to take steps to evade or frustrate the Service's investigative efforts. It would also reveal the state of the Service's knowledge of them at a given time, which in turn could reveal the nature and intensity of its investigations as well as potential gaps in its capabilities. National security would also be comprised if groups or individuals knew they were *not* of interest to CSIS (either at all or at a given time) since this would suggest to those engaged in threat-related activities that their activities had gone undetected, revealing gaps in the Service's interests and capabilities. Consequently, I am satisfied that there is a public interest in maintaining the secrecy of the contentious information.

(3) Striking the right balance

[70] In view of the foregoing, there is a genuine balancing to be done at this stage: on the one hand, generally speaking, there is a strong public interest weighing against disclosure of the contentious information; on the other hand, there is also a public interest weighing in favour of some form of disclosure, although the strength of that interest depends on the information in question.

[71] It is important at this point to underscore that there is substantial agreement between the AGC and the *amicus* that summaries of a great deal of redacted information are warranted. Of course, agreements between the AGC and the *amicus* regarding summaries are not binding on the Court, nor should the Court simply rubber stamp any agreements they have arrived at. Nevertheless, in the circumstances of this case, I am satisfied that the common positions of the AGC and the *amicus* are entitled to significant weight (*Telbani*, at para 36; *Meng*, at para 71).

[72] The crux of the dispute is whether the value of the redacted information that remains in issue for the underlying application for judicial review outweighs the injury that would be caused by its disclosure. This comes down to two main points of disagreement. One is whether additional lifts of redactions in the Fortier Report and in the documents CSIS submitted to SIRC over and above what the AGC has agreed to are warranted. The other is whether summaries of redacted information should be linked to specific documents in the Books of Documents or, instead, should take the form of a global summary.

[73] In relation to the Fortier Report, apart from some key exceptions, I have not been persuaded that any additional lifts beyond those the AGC has agreed to are warranted. I reiterate that the AGC ultimately agreed to make several lifts compared to the version of the report that was first disclosed to BCCLA in connection with the present application, and even more compared to the version originally released by SIRC. As I understand the AGC’s final position regarding information in the Fortier Report (as reflected in the less redacted version of the report the AGC disclosed in September 2022), it accepted that disclosure of some information that had been redacted in earlier versions of the report was warranted because the importance of the

information for the underlying judicial review application outweighed the injury, if any, its disclosure may cause. Consequently, only relatively few parts of the Fortier Report remain in dispute in this regard.

[74] In my view, the AGC has taken a principled and generally well-founded position regarding what should and should not be disclosed in the Fortier Report. For the most part, I agree that additional lifts of redactions over information in the report are not warranted, mainly because they would trench unduly on the Investigation Principle; in other words, the injury that would result from disclosure is not outweighed by the value of the information in the underlying judicial review application. However, I am not persuaded that the AGC's claims with respect to paragraphs 137, 138, 140 (in part), 141, 174 and 241 of the report are justified.

[75] Reading these paragraphs in context and in light of other information in the Fortier Report, the disclosure of which the AGC does not object to (especially the other information in paragraphs 137, 141 and 174 along with that in paragraphs 90, 120, 143, 144, 153 and 160), I am not persuaded that disclosure of the contentious information in paragraphs 137, 138, 140 (in part), 141, 174 and 241 would cause additional injury beyond any that may have arisen from what has already been disclosed. In short, while the information in these paragraphs engages the Investigation Principle, I am not persuaded that this principle weighs heavily against disclosure in these particular respects. As I have said, the AGC's position concerning what *should* be disclosed in the Fortier Report is sound. I am simply extending the logic of that position to what I consider to be substantially the same information elsewhere in the report.

[76] Moreover, I find that the redacted information in these paragraphs is central to BCCLA's judicial review application. The information in paragraphs 137, 138, 140, and 141 is a key part of Member Fortier's discussion of the first of the four questions arising from the complaint – namely, "Did the Service collect information about groups or individuals for their activities in relation to the Northern Gateway Pipeline Project?" Paragraphs 174 and 241 simply reiterate the findings stated in the earlier paragraphs. Member Fortier's answer to this first question was largely determinative of BCCLA's complaint. The contentious information in these paragraphs, along with other information disclosed in the report, is critical to the ability of BCCLA to argue that Member Fortier erred in his understanding of the Service's authority to collect and retain certain information, including his interpretation of section 12 of the *CSIS Act*.

[77] As a result, with respect to paragraphs 137, 138, 140 (the last eight words only), 141, 174 and 241, I am satisfied that the public interest in disclosure outweighs the public interest in non-disclosure. Accordingly, pursuant to *CEA* subsection 38.06(2), I am ordering that the redacted information in these paragraphs (or, in the case of paragraph 140, the last eight words of that paragraph) be disclosed.

[78] As noted, the AGC has agreed to summaries of redacted information in the Fortier Report. In my view, the AGC's summaries go as far as the *CEA* section 38 scheme permits in informing BCCLA about information in this document that must continue to be withheld. While the AGC proposed summaries for paragraphs 137, 138 140, 141, 174 and 241, they have been obviated by the lifts I am ordering. (A summary linked to paragraph 160 is obviated by lifts the AGC agreed to make.) Otherwise, pursuant to *CEA* subsection 38.06(2), I

am ordering disclosure of the AGC's summaries of redacted information in the Fortier Report, subject only to some minor editing of the summaries for paragraphs 140 and 145 for the sake of clarity. (The wording of the revised summaries for these paragraphs will be provided to the AGC in a confidential *ex parte* Direction issued concurrently with this Order and Reasons.)

[79] Pursuant to *CEA* subsection 38.06(3), I am confirming the prohibition of disclosure of the balance of the information in the Fortier Report.

[80] In relation to the contentious classified documents in the Books of Documents, I agree with the AGC that ordering further lifts or linking summaries to specific documents (apart from six documents) would cause injury to protected interests and that this injury is not outweighed by the contribution doing so would make to the ability of the BCCLA to advance the underlying application for judicial review. Put another way, I am not persuaded that BCCLA would be in a materially better position to pursue its application for judicial review if the summaries proposed by the *amicus* were disclosed than it would be if only the overarching summary proposed by the AGC were disclosed. Consequently, given the injury that would result, the public interest in disclosure in the form sought by the *amicus* does not outweigh the public interest in non-disclosure. In my view, the global summary proposed by the AGC goes as far as the section 38 scheme permits in informing the BCCLA about the contested redacted information in the Books of Documents. I have edited the proposed summary slightly in the interests of clarity.

[81] As noted above, the AGC does agree that six summaries can be linked to specific documents. I, too, agree that disclosure in this form is warranted, subject only to minor editing in the interests of clarity.

[82] Accordingly, pursuant to *CEA* subsection 38.06(2), I am authorizing disclosure of the overarching summary and the six specific summaries set out in Annex C.

D. *Should a confidentiality condition be imposed?*

[83] As has already been discussed, *CEA* subsection 38.06(2) directs the Court to consider whether to subject disclosure of information to conditions in order to limit any injury to international relations, national defence, or national security resulting from disclosure. The AGC requests, and BCCLA does not oppose, a condition that any information whose disclosure is authorized pursuant to *CEA* subsection 38.06(2) be treated as confidential by the parties and the Court. Quite appropriately, BCCLA reserves the right to challenge the need for confidentiality once it has had a chance to review the disclosure being authorized.

[84] Accordingly, the disclosure I am authorizing will be subject to the condition that it is to be treated as confidential by the parties and by the Court. This is without prejudice to the right of BCCLA to request with respect to the version of the Fortier Report now being disclosed or the information in Annex C that it be part of the public record in the underlying application for judicial review. Any such request should be brought before me under the present file number. Unless and until such an order is granted, the disclosure now being authorized shall be treated as confidential by the parties and by the Court.

[85] For greater certainty, this confidentiality order does not apply to the main body of this Order and Reasons. This is without prejudice to the right of the AGC to request restrictions on the dissemination of these reasons (whether by way of redactions, a confidentiality order or some other measure) once it has had the opportunity to review them pursuant to the process described below.

E. *Should disclosure of a less redacted version of the Fortier Report to counsel for BCCLA be authorized?*

[86] The foregoing discussion is based on the premise that any disclosure authorized by the Court would be to BCCLA, a party to the underlying proceeding. In other words, representatives of BCCLA responsible for the underlying litigation as well as counsel representing BCCLA in that litigation would have access to the information for the purpose of advancing the underlying judicial review application.

[87] In the course of the present application, the AGC indicated its potential openness to a more limited form of disclosure – namely, disclosure on a "For Counsel's Eyes Only" basis of a less redacted version of the Fortier Report than has currently been disclosed or which the Court may order disclosed to BCCLA. Under this proposal, the Court would authorize disclosure of a less redacted but still classified version of the report on the condition that counsel for BCCLA provide the AGC with an express undertaking of confidentiality with respect to the additional information disclosed in that document and, further, that the document would be handled in accordance with its security classification. This would mean that, while counsel would have access to this additional information, their client, BCCLA, would not.

[88] *CEA* subsection 38.06(2) gives the Court the jurisdiction to authorize disclosure to counsel for a party on the condition that counsel not share the information with their client: see *Ahmad*, at para 49; see also *Tursunbayev*, at paras 107-113. In fact, the AGC itself also has the authority to disclose information on this basis, without the need for the Court's intervention (this is what happened in the Air India prosecution, for example, as discussed in *Charkaoui*, at para 78, and *Ahmad*, at para 49). The Supreme Court of Canada has observed that caution should be exercised when considering such a measure because of the difficulties receiving disclosure on this basis can pose for the solicitor/client relationship (*Ahmad*, at para 49; see also *R v Basi*, 2009 SCC 52 at paras 45-46). Nevertheless, there is no doubt that disclosure on this basis can be authorized in appropriate cases, either by the Court or by the AGC itself.

[89] When this possibility was first suggested, the AGC of course did not know whether or to what extent the Court would authorize additional disclosure to BCCLA. Consequently, it was not in a position to know whether any redactions it might have been willing to lift on this basis would be confirmed by the Court or not. Moreover, as a result, at this stage, no one can tell whether counsel for BCCLA would find it necessary or appropriate to receive additional disclosure on this basis or not.

[90] Since this option is entirely hypothetical at the moment, no Order in this regard will be made at this time. The Court will remain seized in the event that the parties wish to pursue it in the future.

F. *Should disclosure of the redacted information to the application judge be authorized?*

[91] Among the relief sought by the AGC is an order under *CEA* subsection 38.06(2) authorizing disclosure to the judge seized with the underlying judicial review application of the information otherwise prohibited from disclosure. In other words, the AGC seeks an order authorizing the judge seized with the judicial review application to have access to the classified information in the CTR. The effect of such an order would be to make the classified CTR (along with the unclassified redacted CTR) part of the record in the underlying application. BCCLA opposes this request.

[92] Since I am currently the judge seized with the underlying judicial review application, this might appear to be a mere formality. After all, I have already had access to the classified CTR in connection with the present application. Nevertheless, even if it is a formality, it is an important one. It brings to the fore the question of whether the underlying judicial review application should be adjudicated on the basis of the entire record that was before Member Fortier (including all the classified information) or only on the basis of the unclassified CTR that has been disclosed to BCCLA (together with the additional disclosure now being authorized).

[93] Drawing on *Telbani* (specifically the discussion in paragraphs 103 to 114 of that decision), the AGC suggests that the underlying application may be one in which it is appropriate to proceed partly *in camera* and *ex parte* so that the judge is able to consider the grounds for review in light of the complete record that was before Member Fortier, including all the classified information. The AGC submits that, as discussed in *Telbani*, doing so would ensure

"that the application for judicial review will be heard on its merits and will not be dismissed or allowed for lack of information" (*Telbani*, at para 114). Indeed, it would be "damaging for the administration of justice and the rule of law for a decision to be deemed reasonable or unreasonable solely on the fact that a judge did not have all the information that the decision-maker had" (*ibid.*). The AGC also acknowledges that, should the Court decide to proceed in this fashion, it may be appropriate for an *amicus curiae* to be appointed in the underlying proceeding.

[94] BCCLA opposes any part of the judicial review application being heard *in camera* and *ex parte* on several grounds, including that the Court lacks the jurisdiction to proceed in this fashion and, in any event, doing so would be an unwarranted limitation on the open court principle and contrary to the requirements of natural justice and procedural fairness.

[95] In my view, it is neither necessary nor appropriate to resolve this important issue now. Strictly speaking, this is an issue to be resolved in the underlying judicial review application, not in the present application. While the two are closely connected and involve the very same parties, they are separate and distinct proceedings. I see the issue before me now as simply whether the judge hearing the underlying judicial review application should have the option of considering the classified CTR. Creating this option by authorizing disclosure under *CEA* subsection 38.06(2) does not entail that it must or will be exercised. Whether it should be exercised, and under what circumstances (for example, by conducting part of the application *in camera* and *ex parte* with the assistance of an *amicus*), should be determined later, in the context of the judicial review itself.

[96] BCCLA submits that even this narrower question cannot be answered in the AGC's favour because the *CEA* section 38 scheme does not grant the Court jurisdiction to authorize disclosure of the classified record to the judge seized with the underlying judicial review application and, even if it does, that jurisdiction should not be exercised in this case.

[97] I am unable to agree with BCCLA.

[98] In *Ahmad*, the Supreme Court of Canada expressly took a practical approach to the *CEA* section 38 scheme (see the heading immediately above paragraph 27 of the judgment). The Court repeatedly stressed the flexibility of the scheme for meeting the ends of justice. As the Court stated:

> The broad discretion conferred by s. 38 must be interpreted in accordance with the purpose of the legislation, which is to balance the public interest in secrecy against the public interest the effective administration of a fair system of justice. This purpose requires that trial judges have the information required to discharge their duties under the *CEA* and the *Charter* in an informed and judicial manner.
>
> (*Ahmad*, at para 41; see also para 44)

[99] The Court held in *Ahmad* that *CEA* subsection 38.06(2) permits the disclosure of information directly to the judge presiding over the criminal trial from which a section 38 application arose. Like Justice de Montigny in *Telbani*, I would not read *Ahmad* as establishing that the only judge to whom disclosure could be authorized under *CEA* subsection 38.06(2) is a criminal trial judge. The Supreme Court said no such thing. The wording of paragraph 41, quoted above, and the discussion elsewhere in *Ahmad*, reflect the specific question before the Court, which was whether the section 38 scheme prevented a criminal trial judge from obtaining

all the information necessary for the just adjudication of an application for a remedy under *CEA* section 38.14 or under section 24 of the *Charter*. In concluding that the scheme was sufficiently flexible to permit this to occur when the interests of justice require it, the Court reasoned that, in designing the section 38 scheme, Parliament must have expected and intended that it would be used to provide trial judges “with a sufficient basis of relevant information on which to exercise their remedial powers judicially and to avoid, where possible (and appropriate), the collapse of the prosecution” (*Ahmad*, at para 33).

[100] While articulated in *Ahmad* with reference to criminal prosecutions, this rationale applies with equal force outside the criminal context as well. Whether the underlying proceeding is criminal or civil, it is generally not in the interests of justice for decisions to be made on an incomplete record. Parliament must be taken to have intended that, in both criminal and civil cases, the presiding judge would have access to the information and evidence necessary to discharge their duties “in an informed and judicial manner,” even if it is necessary on public interest grounds to withhold relevant information or evidence from the public and even from a party: see *Telbani*, at paras 113-114. The fundamental principle that judicial review of a decision should be conducted in light of the record before the decision maker, which has assumed even greater importance post-*Vavilov*, only reinforces this conclusion. Thus, I agree with and adopt Justice de Montigny’s conclusion in *Telbani* that *CEA* subsection 38.06(2) provides the jurisdiction to authorize disclosure of the classified CTR or any part thereof to the judge seized with the judicial review application from which the *CEA* section 38 application arose.

[101] *Telbani* is the only other decision besides the present one to address this jurisdictional question in the non-criminal context. However, orders like the one the AGC seeks here have been made in several non-criminal cases in addition to *Telbani*: see *Canada (Attorney General) v Chad*, 2018 FC 556 at para 71 (albeit under *CEA* section 37); *Canada (Attorney General) v Life Prediction Technologies Inc et al*, DES-1-20; and *Canada (Attorney General) v Llewellyn*, 2024 FC 143 at para 128. In other cases, it appears to have simply been presumed that, in the normal course, the designated judge hearing the underlying matter would be able to consider the classified CTR: see, for example, *Canada (Attorney Genera) v Turp*, 2016 FC 795 at para 21; and *Tursunbayev*, at para 109. The conclusion that *CEA* subsection 38.06(2) confers the jurisdiction to authorize disclosure of classified information to the judge seized with the underlying matter is thus consistent with the Court's practice to date.

[102] For these reasons, I find that *CEA* subsection 38.06(2) confers jurisdiction to make the order the AGC seeks. I am also satisfied that it would not be in the interests of justice to preclude the judge seized with the underlying judicial review application from considering the entire record that was before Member Fortier. Thus, I will authorize disclosure of the classified CTR to the judge seized with the underlying application. To repeat, in authorizing this disclosure, I am merely making the classified information available to that judge. Whether it is necessary or appropriate for the judge to actually make use of the classified CTR in adjudicating the judicial review application, or to conduct part of that proceeding *in camera* and *ex parte*, are questions for another day.

G. *The procedure for releasing this Order and Reasons*

[103] This Order and Reasons, including the annexes, will be released first only to the AGC. This will provide the AGC with an opportunity to review the body of the Order and Reasons for any national security concerns. As well, pursuant to *CEA* subsection 38.06(3.01), the Court's disclosure order does not take effect until the time provided or granted to appeal the order has expired (or until any appeal has been disposed of). Once the AGC's position in both of these respects has been ascertained, the question of whether any restrictions on the release of this Order and Reasons (together with the annexes) to BCCLA as well as the timing of disclosure of the new version of the Fortier Report will be addressed.

[104] Concurrently with the release of this Order and Reasons to the AGC, a public Direction will be issued to the parties setting out the next steps in this matter.

IV. CONCLUSION

[105] For these reasons, the AGC's application is allowed in part. The Court's Order is set out below.

ORDER IN DES-1-19

THIS COURT ORDERS that:

1. The application is allowed in part.
2. Pursuant to subsection 38.06(3) of the *Canada Evidence Act*, the prohibition of disclosure of the redacted information in the documents listed in the table found in Annex A is confirmed.
3. The Attorney General of Canada (AGC) is directed to prepare a revised redacted version of AGC0003 that accords with this Order and Reasons.
4. More particularly:
   a. The redactions over paragraphs 137, 138, 140 (the last eight words only), 141, 174 and 241 shall be lifted.
   b. Apart from the exceptions set out immediately below, the summaries added by the AGC in the version of AGC0003 submitted to the Court *ex parte* in May 2022 shall be retained.
   c. The summaries with respect to paragraphs 137, 138, 141, 160, 174 and 241 shall be removed.
   d. A confidential *ex parte* Direction issued concurrently with this Order and Reasons will provide the approved wording for the summaries for paragraphs 140 and 145.
5. Pursuant to subsection 38.06(2) of the *Canada Evidence Act*, disclosure of the revised redacted version of AGC0003 is authorized.
6. The AGC shall file the revised redacted version of AGC0003 on an *ex parte* basis within seven (7) days of the date of this Order and Reasons. If additional time is required, the AGC may submit an informal request.

7. Pursuant to subsection 38.06(2), disclosure of the overarching summary and six specific summaries set out in Annex C is authorized.
8. Pursuant to subsection 38.06(3) of the *Canada Evidence Act*, the prohibition of disclosure of the remaining redacted information in the documents listed in the table found in Annex B is confirmed.
9. Pursuant to subsection 38.06(3) of the *Canada Evidence Act*, the prohibition of disclosure of redacted information in any documents in the Certified Tribunal Record not listed in either Annex A or Annex B is confirmed.
10. The information being disclosed pursuant to this Order and Reasons (i.e. Annex C and the revised redacted version of AGC0003) shall be treated as confidential by the parties and by the Court.
11. The foregoing term is without prejudice to the right of BCCLA, if so advised, to seek relief from the confidentiality condition with respect to information being disclosed pursuant to this Order and Reasons.
12. For greater certainty, the confidentiality condition does not apply to the main body of this Order and Reasons or to Annexes A or B, which have previously been disclosed on the public record.
13. The foregoing term is without prejudice to the right of the AGC, if so advised, to seek a confidentiality order or other restrictions on the dissemination of the main body of this Order and Reasons.
14. Pursuant to subsection 38.06(2) of the *Canada Evidence Act*, disclosure of the complete, unredacted Certified Tribunal Record to the judge seized with the underlying judicial review application (Court File Number T-1492-17) is authorized.
15. This Order and Reasons (including the annexes) shall be released first to the AGC on an *ex parte* basis. Once the AGC's position with respect to any appeal and with

respect to the release of this Order and Reasons (including the annexes) to BCCLA has been communicated to the Court, the process for releasing this Order and Reasons (together with the annexes) to BCCLA as well as the timing of disclosure of the revised redacted version of AGC0003 will be addressed. The AGC shall communicate its position to the Court (if necessary, on an *ex parte* basis) within fourteen (14) days of the date of this Order and Reasons. If more time is required, an informal request may be submitted.

16. Concurrently with the issuance of this Order and Reasons, a public Direction will be issued to the parties describing the next steps in this matter.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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