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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE June 28, 2024 28 juin 2024 Samantha Chojnacki	D É P O S É
Court File No.		
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FEDERAL COURT OF APPEAL

B E T W E E N:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the appellants. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 28, 2024

Issued by: _____
(Registry Officer)

Address of
local office: _____

TO: Shalene Curtis-Micallef
Deputy Attorney General of Canada

Per: Nathalie Benoit
Department of Justice
284 Wellington Street
EMB 2021
Ottawa, ON K1A 0H8
T: 613-952-5034
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Solicitors for the Respondent

AND TO: Federal Court of Appeal
90 Sparks Street, 1st Floor
Ottawa, ON K1A 0H9

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of the Honourable Justice Norris of the Federal Court, dated June 5, 2024, bearing Court File DES-1-19, disclosed to and received by the Appellant on June 20, 2024.

In 2014, the Appellant British Columbia Civil Liberties Association (“BCCLA”) initiated a complaint to the Security Intelligence Review Committee (“SIRC”) under s. 41 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (“*CSIS Act*”), alleging that the Canadian Security Intelligence Service (“CSIS”) officials had improperly and unlawfully collected information about Canadian citizens and groups protesting the Northern Gateway Pipeline Project, and shared that information with government bodies and private sector actors. It was further alleged that these activities fell outside the scope of authority of the *CSIS Act* and violated the rights to freedom of expression and association, as guaranteed by s. 2 of the *Canadian Charter of Rights and Freedoms*.

During the course of its investigation, SIRC held *in camera* hearings in Vancouver, British Columbia in August 2015. The Appellant BCCLA participated in these hearings and called witnesses who testified before the SIRC. SIRC later heard evidence from CSIS witnesses in *ex parte* hearings. SIRC rendered a decision dated May 30, 2017, dismissing the Appellant’s complaint.

The Appellant BCCLA commenced a judicial review application in the Federal Court in 2017 challenging the SIRC decision (Court File T-1492-17). As part of that application, the Appellant requested a copy of the Certified Tribunal Record pursuant to Rule 317 of the *Federal Courts Rules*. The Respondent produced the record to the Appellant, but many of the documents were redacted. This led the Respondent to commence an application under s. 38 of the *Canada Evidence Act*, RSC 1985, c C-5, (Court File DES-1-19) seeking an order from a designated judge confirming the prohibition on disclosure of the confidential information to the Appellant on the ground it would be injurious to national security.

The Respondent Attorney General of Canada sought other orders from the designated judge in the s. 38 application. This included an order authorizing disclosure of the unredacted Certified Tribunal Record to the judge seized with the underlying judicial review, to the exclusion of the Appellant.

The Appellant BCCLA opposed such a procedure as contrary to fundamental principles of natural justice. The BCCLA argued that the right to be informed of the case made by another party is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. It was argued that *ex parte* evidence and arguments depart from deeply rooted common law principles of fair trial and may only be abrogated by Parliament with explicit statutory language.

In the judgment rendered June 5, 2024, the designated judge Justice Norris ruled that some information could be disclosed to the Appellant under s. 38.06(2) of the *Canada Evidence Act*. Significantly, the designated judge also held that the unredacted Certified Tribunal Record could be disclosed to the judge seized with the underlying judicial review, even though it would continue to be withheld from the BCCLA, a party to that proceeding.

The designated judge also implicitly upheld the prohibition on the disclosure of information related to hospitality meetings between CSIS and oil companies and other actors in the petroleum industry. The Appellant had sought the disclosure of the names of those companies and private sector actors. It appears from the judgment that Justice Norris denied the disclosure of that information on the basis of the “never confirm or deny” principle, or otherwise referred to by the Federal Court of Appeal as the “Investigation Principle” in *Canada (Attorney General) v Hutton*, 2023 FCA 45.

The Appellant appeals against Justice Norris’ decision and order that confidential information can be disclosed to the judge in the underlying proceeding while still

being withheld from a party in the context of this case. Secret evidence is inimical to our democratic system of constitutional government and the rule of law, and is contrary to fundamental principles of natural justice. Such departures from the common law requires express statutory authorization.

The Appellant also appeals against Justice Norris' decision to uphold the prohibition on the disclosure of the names of petroleum industry companies that participated in briefings and hospitality events with CSIS. All CSIS activities do not amount to investigations and it was an error to withhold this information on the basis of the "Investigation Principle".

THE APPELLANT ASKS that:

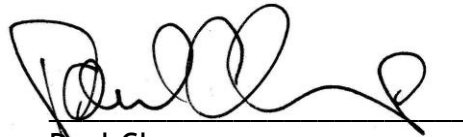
1. The appeal be allowed and the Order of Justice Norris, dated June 5, 2024, authorizing the disclosure of the unredacted Certified Tribunal Record to the judge seized with the judicial review, be set aside; and
2. Such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Federal Court judge erred in law by finding that confidential information can be disclosed to a judge hearing the merits of an underlying proceeding;
2. As a matter of fundamental natural justice, a party to a legal proceeding has a right to know the case to meet, and that means knowing about all the evidence that is before the judge hearing the matters. Departures from this deeply rooted common law principle of trial fairness must be expressly authorized by statute. The *Canada Evidence Act* does not permit disclosure of confidential information to a judge in an underlying proceeding, to the exclusion of a party,

except for very limited purposes;

3. The Federal Court judge rendered an error of law or mixed fact and law by finding that the disclosure of names of petroleum industry companies that participated in hospitality events with CSIS would be injurious to national security and/or can be withheld on the basis of the “Investigation Principle”;
4. Sections 38.02, 38.04, 38.06, 38.09, 38.11, 38.14 of the *Canada Evidence Act*, RSC 1985, c C-5;
5. Sections 18(1), 18.1(1), and 27 of the *Federal Courts Act*; and
6. Such further and other grounds as counsel may advise and this Honourable Court may permit.



Paul Champ



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