Court File No. A-224-24

FEDERAL COURT OF APPEAL

B E T W E E N :

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPELLANT'S MEMORANDUM OF FACT AND LAW

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TABLE OF CONTENTS

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PART I – FACTS

A. Overview

1. The Appellant British Columbia Civil Liberties Association ("BCCLA") commenced an application for judicial review in the Federal Court in October 2017 to challenge a decision by the Security Intelligence Review Committee ("SIRC" or "the Committee"), dismissing a complaint brought by BCCLA under section 41 of the *Canadian Security Intelligence Service Act*. In the SIRC complaint, the BCCLA alleged that the Canadian Security Intelligence Service had been improperly collecting information about environmentalists and others who were opposed to a pipeline project and sharing it with government and private sector actors.

2. In the application for judicial review of the SIRC decision, the Attorney General of Canada opposed disclosure of certain information in the Certified Tribunal Record on the grounds of national security and, pursuant to section 38.04 of the *Canada Evidence Act* ("*CEA*"), commenced an application in February 2019 for an order confirming the prohibition of disclosure. A designated judge of the Federal Court

rendered a judgment on the section 38 application on June 5, 2024, finding that some previously redacted information could be disclosed to the Appellant, while the redactions in most of the documents were upheld.

3. As part of the section 38 application, the Court asked the parties to address whether any part of the underlying judicial review could be held *in camera* and *ex parte*. The Appellant opposed such a procedure as contrary to fundamental principles of natural justice. It was argued that secret hearings are inimical to our democratic system of constitutional government and the rule of law and that common law principles of fair trial may only be abrogated by Parliament with explicit statutory language. Notwithstanding these arguments, the Federal Court ruled that the confidential information could be disclosed to the judge in the underlying application.

B. Background

4. The Appellant initiated a complaint under section 41 of the *CSIS Act* in February 2014, alleging that the Canadian Security Intelligence Service ("CSIS" or "the Service") had engaged in improper and unlawful actions by collecting information about Canadian citizens and groups engaging in peaceful and lawful expressive activities, and by sharing that information with other bodies and private sector actors. Specifically, the BCCLA alleged that documents obtained under the *Access to Information Act* showed that CSIS had collected intelligence and information about organizations opposed to the Northern Gateway Project, a proposal to build an oil pipeline in Western Canada, and that the Service had shared this information with the National Energy Board ("NEB") and with petroleum industry representatives in conferences held at CSIS headquarters.[1]

[1] Notice of Application for Judicial Review, dated October 2, 2017, bearing Court File T-1492-17, p. 3 [Appeal Book ("AB"), Tab 5, p. 162]; and Section 38 Judgment, paras 2-4 [AB, Tab 2, p. 9-10]

5. The Appellant's position was that gathering intelligence about citizens opposed to the Northern Gateway Project was contrary to section 12 of the *CSIS Act*, which prohibits the Service from collecting information about Canadians unless there are reasonable grounds to suspect they constitute a threat to the security of Canada. BCCLA further contended that section 19 of the *CSIS Act* did not authorize sharing such information with the NEB or private sector actors. The *CSIS Act* strictly prohibits the Service from sharing information with anyone other than enumerated branches of the Canadian government and, in certain circumstances, law enforcement officials.[2]

6. Finally, BCCLA complained that the Service's activities created a chilling effect, as it appeared to criminalize participation in the NEB's hearings, which are ostensibly a forum for public expression and engagement regarding projects of significant public interest. BCCLA alleged these activities violated sections 2(b), 2(c), 2(d), and 8 of the *Canadian Charter of Rights and Freedoms*.[3]

7. During the course of its investigation, SIRC held *in camera* hearings in which BCCLA participated and called a series of witnesses from a number of well-known environmental and public interest organizations, all of whom had engaged in advocacy around the Northern Gateway Project and had discovered through media stories that CSIS may have spied on them and their members.[4]

8. SIRC dismissed the Appellant's complaint by way of a report dated May 30, 2017. The Committee's report includes discussions of the evidence and analysis of sections 12 and 19 of the *CSIS Act*.[5] The Appellant was unfamiliar with much of that evidence.

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[2] Notice of Application, Court File T-1492-17, p. 3-4 [AB, Tab 5, p. 162-163] and Section 38 Judgment, para 4 [AB, Tab 2, p. 9-10]; and *Canadian Security Intelligence Service Act*, RSC 1985, c.C-23, ss. 12, 19
[3] Section 38 Judgment, para 4 [AB, Tab 2, p. 9-10]
[4] Section 38 Judgment, para 5 [AB, Tab 2, p. 10]
[5] SIRC Report dated May 30, 2017 [AB, Tab 4, p. 103]; and Section 38 Judgment, para 7 [AB, Tab 2, p. 10]

9. The Appellant challenged the Committee's final decision by way of an application for judicial review under section 18.1 of the *Federal Courts Act*. The BCCLA contends that the SIRC decision includes errors of law and challenges the SIRC findings with respect to any chilling effect created by CSIS activities and the appropriate test for *Charter* infringement.[6]

10. The Attorney General raised concerns about disclosing the full Certified Trial Record on this matter. Notices pursuant to section 38.01 of the *CEA* were issued prohibiting disclosure of certain information deemed sensitive and the Attorney General subsequently commenced an application under section 38.04 of the *CEA* to confirm the prohibition on disclosure.[7]

11. In the course of the section 38 proceeding, the Designated Judge directed the parties to make submissions on whether the Court could in the underlying application for judicial review sit *ex parte* and review the confidential information.[8]

C. Section 38 Decision

12. In the section 38 judgment rendered June 5, 2024, Justice Norris ruled that some information could be disclosed to the Appellant under section 38.06(2) of the *Canada Evidence Act*. However, Justice Norris also held that the unredacted Certified Tribunal Record could be disclosed in its entirety to the judge seized with the underlying judicial review and made part of the record in the underlying application, even though it would continue to be withheld from the BCCLA, a party to that proceeding.[9]

13. The Respondent had argued that the application must be heard and decided on the complete record that had been before the SIRC, while the Appellant argued the

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[6] Notice of Application, Court File T-1492-17, p. 4 [AB, Tab 5, p. 163]; and Section 38 Judgment, para 11 [AB, Tab 2, p. 15]
[7] Section 38 Notice of Application, Court File DES-1-19 [AB, Tab 6, p. 168]; and Section 38 Judgment, paras 13-14 [AB, Tab 2, p. 16]
[8] Section 38 Judgment, paras 33 [AB, Tab 2, p. 22]
[9] Section 38 Judgment, paras 91-102 [AB, Tab 2, p. 43-47]

Court lacked jurisdiction to authorize disclosure of the classified records to the applications judge, and doing so would be contrary to the requirements of natural justice and procedural fairness and an unwarranted limit on the open court principle.[10]

14. Justice Norris held that an applications judge should be given the option to consider the classified Certified Trial Record, and found that subsection 38.06(2) of the *CEA* confers jurisdiction to authorize such disclosure. In reaching this conclusion, Justice Norris interpreted the Supreme Court of Canada's ratio in *Ahmed* as being applicable beyond the criminal prosecution context. Accordingly, Justice Norris authorized disclosure of the classified CTR to the judge seized with the underlying application for judicial review.[11]

15. While the Court was deliberating, Parliament introduced Bill C-70, the *Countering Foreign Interference Act*. This new legislation completed third reading on June 19, 2024, and Part 3, which included amendments to section 38 of the *Canada Evidence Act* to introduce a Secure Administrative Review Proceeding (SARP), came into force on August 19, 2024. This procedure now authorizes disclosure of classified documents to a judge only in an application for judicial review, and designates a special counsel to represent the interests of an excluded party.[12] However, under the transitional provisions, the underlying judicial review application is to be governed by the law before Bill C-70 came into force. [13]

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[10] Section 38 Judgment, paras 93-94, 96 [AB, Tab 2, p. 43-45]
[11] Section 38 Judgment, paras 95, 98-102 [AB, Tab 2, p. 44-47]
[12] *An Act respecting countering foreign interference*, Bill C-70, 44th Parl., 1st Sess, Part 3
[13] *An Act respecting countering foreign interference*, Bill C-70, 44th Parl., 1st Sess, Part 3, section 108

PART II – ISSUES

16. The Appellant BCCLA submits that the following issue is raised on this appeal:

(a) Did the Designated Judge err in law by finding that the Court has jurisdiction to authorize disclosure and use of information in the underlying judicial review application to the exclusion of the BCCLA?

PART III - ARGUMENTS

A. No Jurisdiction to Order an *Ex Parte* Hearing Based on Withheld Information

17. The Designated Judge asked the parties to address whether part of the hearing in the underlying application could be held *ex parte* and based on information that was withheld from the BCCLA. The Court directed the parties' attention to the procedure contemplated by Justice de Montigny, as he then was, in *Canada (Attorney General) v Telbani*, 2014 FC 1050. The Appellant argued that the Court has no jurisdiction to direct such a procedure in the absence of consent.

18. Natural justice is a fundamental principle of the justice system, and it encompasses the right to know the case to be met and the opportunity to hear and respond to any evidence or submissions put forward by the opposing party. While the Courts have recognized that there are some rare exceptions to the principle of open justice where competing public interests may justify information or material being withheld from the public, infringements on the rights to natural justice are more grave and can only be abridged by statute.[14]

19. The UK Supreme Court addressed these issues in *Al Rawi and Others v The Security Service and Others*, [2011] UKSC 34. In *Al Rawi*, the UK courts were asked to order a closed material proceeding for a civil trial for damages. The UK Security Service wanted to file pleadings, submit evidence and make arguments in the absence of the plaintiff. The England Court of Appeal rejected this motion, holding:

> In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum

[14] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at para. 22

> requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.

20. The matter went on appeal to the UK Supreme Court, and the Lords and Lady of the Court engaged in a sweeping review of the principles of natural justice and the limits on the inherent power of the Courts to introduce procedural innovations in the interests of justice. The UK Supreme Court resoundingly dismissed the appeal, with no member of the bench holding that a court could approve such a radical development in the common law absent statutory authority. [15]

21. In the opinion of Lord Dyson, who was followed by Lord Hope and Lord Kerr, there was a difference between open justice and natural justice, as the former does not fundamentally violate the rights of one of the parties:

> It is one thing to say that the open justice principle may be abrogated if justice cannot otherwise be achieved. As Lord Bingham of Cornhill said in *R v Davis* [2008] UKHL 36, [2008] AC 1128 at para 28, the rights of a litigating party are the same whether a trial is conducted in camera or in open court and whether or not the course of the proceedings may be reported in the media. It is quite a different matter to say that the court may sanction a departure from the natural justice principle (including the right to be present at and participate in the whole or part of a trial).[16]

22. Lord Dyson viewed the basic principles of natural justice as integral to the common law right to fair trial. The most fundamental strands to natural justice are the right to know the case against a person and the evidence upon which it is based, and the opportunity to respond to any evidence or submissions made by the other side.[17]

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[15] *Al Rawi & Ors v The Security Service & Ors*, [2011] UKSC 34 ("*Al Rawi*") at para. 27 (Lord Dyson)
[16] *Al Rawi & Ors v The Security Service & Ors*, [2011] UKSC 34
[17] *Al Rawi* at paras 11 and 21(Lord Dyson)

23. Lord Dyson observed that procedural common law innovations over the years were commendable and referred to courts inventing remedies such as Mareva injunctions and Anton Piller orders. As noted by the Court, even the remedy of discovery, now entrenched in the rules, was developed by courts to aid in the administration of justice. But such innovations have limits, and there is a line where a procedural change becomes one of substantive justice. For the court to order an *ex parte* hearing would be a big step for the law in view of the fundamental principles at stake. This, the Lords held, was "a matter for Parliament and not the courts."[18]

24. Lord Mance, Lady Hale and Lord Clarke in *Al Rawi* did hold that a Court could permit a closed material proceeding *where the parties consented to the procedure*. Lord Dyson and others commented that this was an open question and was not fully argued. Lord Brown held that even with consent it could not be allowed.[19]

25. Turning to the Federal Court judgment in *Telbani*, it is first worth noting that no court has adopted that procedure since. Justice de Montigny emphasized that s. 38.06(2) of the *CEA* provides some flexibility and permits the designated judge to authorize disclosure "subject to any conditions that the judge considers appropriate".[20] The Court held that this broad language could authorize the designated judge to order disclosure of the protected material to the judge in the underlying proceeding, and for that judge to rely on the secret evidence on the merits of the case. The Court suggested that the judge in the underlying proceeding could decide to appoint an *amicus curiae* or special advocate to assist in potential *in camera, ex parte* hearings.[21]

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[18] *Al Rawi* at paras 20-22, 44, and 47-48, para. 44 for quote (Lord Dyson); paras 71 and 74 (Lord Hope); para. 86 (Lord Brown); para. 152 (Lord Clarke); and para. 192 (Lord Phillips).
[19] *Al Rawi* at para. 46 (Lord Dyson); para. 84 (Lord Brown); para. 98 (Lord Kerr); paras 120-121 (Lord Mance, with whom Lade Hale agrees at para. 100); paras 161 and 188 (Lord Clarke); and para. 192 (Lord Phillips).
[20] *Telbani* at para. 106
[21] *Telbani* at paras 113-114 and 116

26. The Court in *Telbani* also observed that the Supreme Court of Canada in *R v Ahmad* held that the designated judge had the power under the *CEA* to order disclosure to a trial judge alone in a criminal matter. But the Supreme Court of Canada in *Ahmad* proposed that such disclosure would only be "for the sole purpose of determining the impact of non-disclosure on the fairness of the trial".[22] With respect, the form of disclosure proposed by Justice Norris in this matter is for a very different purpose. There is no suggestion in *Ahmad* that a trial judge would be permitted to rely on such disclosed information on the merits of the criminal matter.

27. The essence of the reasons for the Court's ruling in *Telbani* is found at paragraphs 113 and 114, where Justice de Montigny expressed concern that the application for judicial review be decided based on all the information that was before the original decision-maker. The Court suggested that it is in the interests of the individual before the court for all information to be placed before the applications judge, even if some of that evidence is presented and considered *ex parte*. This would be beneficial, the Court ruled, because:

> this ensures that the application for judicial review will be heard on its merits and will not be dismissed or allowed for lack of information. It would also 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. [23]

28. The BCCLA submits that this reasoning does not attach sufficient weight to our system of adversarial justice, not to mention to values of natural justice. Lord Kerr in *Al Rawi* provides a direct answer to the Court's reasoning in *Telbani*. Lord Kerr observed that this proposition is "deceptively attractive – for what, the appellants imply, could be fairer than an independent arbiter having access to all of the evidence germane to the dispute between the parties?" Lord Kerr explains the difficulty with this reasoning:

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[22] *Telbani* at paras 108-109; and *R v Ahmad*, 2011 SCC 6 at para. 45
[23] *Telbani* at paras 113-114, quote at 114

> The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.[24]

29. The Appellant BCCLA submits that the same reasoning applies here. As a matter of principle, the right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. Any innovations in this area depart from deeply rooted common law, if not constitutional, principles of fair trial and may only be abrogated by Parliament with explicit statutory language.

30. The Federal Court of Appeal considered the challenges of judicial review on a limited record in *Moumdjian v Canada (SIRC)* and acknowledged that it was an "extraordinary situation" for the court to review the work of a tribunal where the full record was unavailable. However, that was all that was authorized by Parliament.[25]

31. On a final point, the Respondent submits that the language of s. 38.06(2) is not explicit enough to provide the Court with sweeping jurisdiction to order disclosure to judge on the merits of the underlying proceeding for any purpose, with a direction that the other court can simply fashion its own procedure. While the Supreme Court in *Ahmad* recognized that s. 38.06(2) was flexible, this would be turning general

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[24] *Al Rawi* at para. 93

[25] ***M****oumdjian v. Canada (Security Intelligence Review Committee),* [1999] F.C.J. No. 1160 (FCA) at para 52, where the Court favourably quotes *Al Yamani v. Canada (Solicitor General),* [1996] 1 F.C. 174 (T.D.)

language into a significant change to the common law. Subsection 38.14 deals with the very specific context of ensuring a fair criminal trial, and there is nothing in section 38 that would suggest its purpose was to confer the unfettered power on the courts to dramatically abrogate a bedrock principle of common law in any and all legal contexts.

32. Notably, in exceptional matters, Parliament has enacted statutory provisions that permit parties to be heard *ex parte* by the presiding judge. These provisions are explicit and set out a procedure. Given that Parliament has legislated in this area before,[26] the Appellant submits that it cannot be assumed that Parliament intended to grant authority to a designated judge in a s. 38 proceeding to suggest or fashion some form of *ex parte* procedure for a case on its merits.[27]

33. Most significantly, Parliament has very recently passed legislation authorizing "Secure Administrative Review Proceedings". According to the Attorney General's position, Bill C-70 was superfluous because Designated Judges could already fashion a similar remedy under s. 38.06(2) of the *CEA*. Parliament cannot be assumed to have acted unnecessarily.

34. For all of the foregoing reasons, the Respondent submits that this Court has no jurisdiction to make such an order.

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[26] See, e.g., *Access to Information Act*, RSC 1985, c A-1, s. 47; *Privacy Act*, RSC 1985, c P-21, s. 46; *Canada Evidence Act*, RSC 1985, c C-5, s. 38.11; and *Immigration and Refugee Protection Act*, SC 2001, c 27, s. 83

[27] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at para. 22

PART IV – ORDER SOUGHT

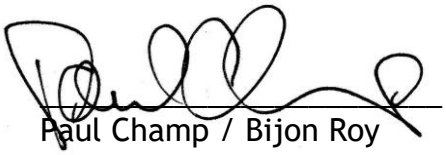
35. The Appellant respectfully requests the following relief:

(a) 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

(b) such further and other relief as counsel may request and this Honourable Court may deem justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 28th day of October, 2024.



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PART V – LIST OF AUTHORITIES

Statutes

Access to Information Act, RSC 1985, c A-1, s. 47

Privacy Act, RSC 1985, c P-21, s. 46

Canada Evidence Act, RSC 1985, c C-5, section 38

Immigration and Refugee Protection Act, SC 2001, c 27, s. 83

Caselaw

Al Rawi & Ors v The Security Service & Ors, [2011] UKSC 34 (13 July 2011)

Canada (Attorney General) v Telbani, 2014 FC 1050

***M**oumdjian v. Canada (Security Intelligence Review Committee)*, [1999] F.C.J. No. 1160 (FCA)

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52, [2001] 2 SCR 781

R v Ahmad, 2011 SCC 6