Federal Court  Cour fédérale

~~**SUBJECT TO A PUBLICATION BAN**~~

Date: 2022020<u>9</u>

Docket: DES-5-20

Citation: 2022 FC 142

Ottawa, Ontario, February <u>9</u>, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CAMERON JAY ORTIS

Respondent

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

<u>AMENDED</u> ORDER AND REASONS

I. OVERVIEW

[1] Cameron Jay Ortis is charged with a number of offences under the *Security of Information Act*, RSC 1985, c O-5 ("*SOIA*"), and the *Criminal Code*, RSC 1985, c C-46. His trial before a judge and jury in the Ontario Superior Court of Justice is scheduled to begin in September 2022. The Public Prosecution Service of Canada ("PPSC"), under the direction of the Director of Public Prosecutions ("DPP"), has carriage of this prosecution on behalf of the Crown.

[2] Mr. Ortis was arrested in September 2019. The charges against him relate to his alleged conduct between January 1, 2014, and September 12, 2019, when he was a civilian employee of the Royal Canadian Mounted Police ("RCMP"). During the material time, he was the Officer-in-Charge of Operations Research relating to the RCMP's national security mandate and, beginning in April 2016, the Director General of the RCMP's National Intelligence Coordination Center.

[3] It is undisputed that, in connection with his employment with the RCMP, Mr. Ortis legitimately had access to classified information from a variety of sources including international partners. Indeed, he had access to classified information of the utmost sensitivity.

[4] In very broad strokes, the Crown alleges that Mr. Ortis printed copies of documents containing classified information from the Canadian Top Secret Network ("CTSN"), a highly restricted database to which he had access at his workplace. Mr. Ortis then scanned the documents and stored them on his own electronic devices. The Crown alleges that Mr. Ortis disclosed special operational information (as defined in the *SOIA*) to unauthorized persons or

attempted to do so (counts 1 to 4 in the indictment). The Crown further alleges with respect to other classified information that Mr. Ortis prepared to communicate it unlawfully to a foreign entity (counts 5 to 8). Mr. Ortis is also charged with the *Criminal Code* offences of unauthorized use of a computer and breach of trust (counts 9 and 10). Those charges generally relate to the same conduct alleged in connection with counts 1 to 8.

[5] Crown disclosure provided to Mr. Ortis has been redacted to protect certain information the release of which, it is alleged, would be injurious to international relations, national defence or national security. The Attorney General of Canada ("AGC") has applied under section 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 ("*CEA*"), for an order confirming the claims for the prohibition of disclosure of the redacted information. For ease of expression, I will refer to this application generically as a section 38 application and sections 38.01 to 38.17 of the *CEA* collectively as the section 38 scheme.

[6] Mr. Ortis and the DPP/PPSC are respondents on the section 38 application. As well, in view of the complexity of the issues raised in this application and the volume of material to be considered, at a very early stage, two *amici curiae* – Mr. Howard Krongold and Ms. Christine Mainville – were appointed to assist the Court.

[7] In addition to the claims over Crown disclosure, the AGC has also made section 38 claims over certain information contained in a summary of the evidence Mr. Ortis wishes to present at his trial in defence to the charges. As will be explained below, through his counsel, Mr. Ortis provided this summary to assist the Court in applying the test for determining whether

the AGC's claims over information in Crown disclosure should be confirmed. The summary was also used to carry out what was in effect an advance vetting of Mr. Ortis's anticipated trial evidence for objections to disclosure under the section 38 scheme.

[8] I will be adjudicating the section 38 claims advanced by the AGC with respect to Crown disclosure and Mr. Ortis's anticipated evidence concurrently. As well, with the agreement of the parties, I will be dealing with the redacted information in three phases. The present reasons relate only to the first phase. In this phase, I am only considering certain discrete information relating to counts 5 to 8 in the indictment. The second phase will concern information relating primarily to counts 1 to 4. The third phase will concern the balance of the information relating to counts 5 to 8. Given the overlap between counts 9 and 10 and the other counts, there is no need to consider them separately.

[9] The test for determining whether to confirm a prohibition on disclosure under the section 38 scheme or, instead, to order some form of disclosure (e.g. by lifting redactions or summarizing redacted information) is set out 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, Mr. Ortis's criminal trial; if it 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.

[10] For the reasons set out below and in a classified annex, I have concluded that none of the information at issue in the first phase of this application can be disclosed because the public interest in non-disclosure outweighs the public interest in disclosure. As a result, none of this information will be available to Mr. Ortis to defend against counts 5 to 8 in the indictment (or counts 9 and 10 to the extent that they relate to the same alleged conduct as counts 5 to 8). As I will explain, I have reached this conclusion despite the immense importance I attribute to this information for Mr. Ortis's ability to make full answer and defence to the charges in counts 5 to 8 of the indictment.

II. BACKGROUND

[11] In support of the allegations set out in counts 5 to 8, the Crown intends to lead evidence at trial that a significant number of highly classified documents that Mr. Ortis had printed from the CTSN were found on electronic devices seized from his home.

[12] When a document is printed from the CTSN, the name of the person printing the document as well as the date and time the document was printed are printed on the document. Also printed on the document is a "stamp" with a URL uniquely linking the document to the terminal on the CTSN from which it was printed.

[13] The Crown intends to lead evidence that Mr. Ortis had organized and processed electronic copies of documents he had printed from the CTSN in certain ways that, according to the Crown, suggest he intended to disclose them to unauthorized parties. Among other things, the Crown intends to lead evidence that Mr. Ortis had taken steps to remove identifying

information or marks from a number of the classified documents on his personal devices. The Crown alleges that this, along with and in the context of other conduct, constitutes preparation for the commission of an offence under section 16 of the *SOIA*. If proved, such conduct is an offence under paragraphs 22(1)(b) and (e) of the *SOIA*. (The elements of the relevant offences are discussed in greater detail below.) The Crown's theory is that Mr. Ortis's handling of the documents is the *actus reus* of the offence and, together with his other conduct, is circumstantial evidence of his intention to disclose the classified documents to a foreign entity. There is no direct evidence that he had such an intention.

[14] I do not understand Mr. Ortis to dispute that he obtained and possessed the documents or information in question found on his personal devices. A central issue at trial – if not *the* central issue – will be what he intended to do with them.

[15] As matters currently stand, the contents of the documents to which counts 5 to 8 relate have been redacted entirely as a result of section 38 claims by the AGC. All that is revealed in the versions of the documents in the Crown disclosure brief are the security markings on the documents and, in a few instances, the identity of the agency that produced the document. This is the form in which the Crown intends to file the pertinent documents at trial. The Crown does not intend to rely on the actual contents of any of the documents to prove counts 5 to 8 (or, to the extent that they relate to the same conduct, counts 9 and 10).

[16] The link between the charges and Mr. Ortis's past employment gives rise to four unusual features of this application.

[17] First, since he once was privy to the classified documents on his personal devices, at one time Mr. Ortis knew what their redacted contents are. While it has been some time since he last had access to the original unredacted documents, Mr. Ortis believes he recalls the classified contents of at least some of them to at least some extent. Without at this stage confirming or denying the accuracy of any of Mr. Ortis's recollections, it is nevertheless fair to say that he is in a very different position regarding at least some of the information that has been redacted from Crown disclosure than is typically the case for an accused person who is a respondent in a section 38 proceeding.

[18] Second, given that the charges relate to classified information to which Mr. Ortis once was privy, it was recognized that he needed to be able to discuss classified information with his defence counsel, Mr. Ian Carter, in order to prepare for trial. Consequently, arrangements were made for Mr. Ortis to consult with and instruct Mr. Carter in a secure fashion. Mr. Carter holds a Top Secret security clearance and is a person permanently bound to secrecy under the *SOIA*.

[19] Mr. Carter acts for Mr. Ortis not only in relation to the criminal charges but also in the present application. As a result of the instructions he was able to obtain from Mr. Ortis, and given the nature of the information his client was able to share with him, Mr. Carter requested and was granted the opportunity to provide classified submissions relating to the application of the *Ribic* test to information redacted from Crown disclosure. These submissions were originally provided *ex parte* the AGC in order to protect Mr. Ortis's right to silence *vis-à-vis* the Crown and, relatedly, his general right not to disclose his defence prior to trial.

[20] Third, to assist the Court in the application of the *Ribic* test, Mr. Carter provided a summary of the evidence that Mr. Ortis has instructed him he wishes to give at his trial in his own defence. This information was originally included in Mr. Carter's written submissions. Later, a separate document extracting the synopsis of Mr. Ortis's anticipated evidence was created. I will refer to this latter document as the Defence Summary. In both its original and extracted form, the summary of Mr. Ortis's anticipated evidence was initially made available to the AGC, the *amici curiae* and the Court but it was withheld entirely from the PPSC. It was provided to the AGC and the *amici curiae* under an Order designed to preserve the confidentiality of its contents from the Crown.

[21] The Defence Summary is not sworn or solemnly affirmed. However, Mr. Carter has confirmed that it is a synopsis of the evidence Mr. Ortis wishes to provide at his trial and, further, that Mr. Ortis has instructed him unequivocally that he wishes to testify in his own defence. No objection was raised to the form in which the defence position has been put before this Court. I have no hesitation in relying on the Defence Summary for the purpose of applying the *Ribic* test to the information at issue in this proceeding.

[22] Fourth, with Mr. Carter's agreement on behalf of Mr. Ortis, and governed by the terms of the Order under which it was provided to the AGC, the Defence Summary was reviewed by representatives of interested agencies to determine whether any of its contents gave rise to section 38 concerns. As noted, this served as an advance vetting of Mr. Ortis's trial testimony. Following this review, the AGC put forward a number of section 38 claims with respect to information Mr. Ortis wishes to present at trial by applying redactions to the Defence Summary.

Obviously, the point of these claims is not to keep information from Mr. Ortis – he, of course, already knows exactly what the redacted information is. Rather, the claims mark the information to which the AGC objects on section 38 grounds to Mr. Ortis providing in his testimony at his trial, which will be a public proceeding. If any of the claims over his anticipated evidence are confirmed, Mr. Ortis will be legally precluded from relying on the underlying information when defending himself on the criminal charges. The same is true of information that has been withheld from Crown disclosure.

[23] Following the review of the Defence Summary, the AGC provided Mr. Ortis with a redacted version of the document that identifies the information with respect to which section 38 objections were being made. However, the rationale for the claims has not been disclosed to Mr. Ortis or to Mr. Carter. Nevertheless, to repeat the obvious, Mr. Ortis knows what information the AGC objects to having disclosed at his trial. In this respect as well, he is in a very different position from the typical accused person who is a respondent on a section 38 application.

[24] As this application progressed, Mr. Carter eventually agreed on behalf of Mr. Ortis to share with the PPSC the parts of the Defence Summary that relate to counts 5 to 8. As I understand it, this was done at least in part to facilitate the Crown's consideration of whether, pursuant to *R v Ahmad*, 2011 SCC 6 at para 46, it should stay those charges because Mr. Ortis could not have a fair trial (on them) without the information that is being protected. Although at that point the Court had not made a determination on whether the prohibition on disclosure should be confirmed, the PPSC was willing to consider the question on the assumption that this

would turn out to be the case. Counsel for the PPSC ultimately informed Mr. Ortis and the Court that they had not been persuaded that a stay was warranted and explained why this was so in terms of the third step of the *Ribic* test. To be clear, this Court has no role to play with respect to this exercise of Crown discretion. Nevertheless, I welcomed the PPSC's assessment of the significance of the evidence at issue and I have given it careful consideration when applying the *Ribic* test.

[25] There is one additional piece of background information that I should mention before explaining how these reasons have been structured.

[26] Subsection 38.14(1) of the *CEA* provides that the trial judge in a criminal proceeding "may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial," as long as that order is consistent with the terms of any order made under the section 38 scheme confirming a prohibition on the disclosure of information. In short, section 38.14 of the *CEA* authorizes the trial judge to remedy any trial unfairness that results from the non-disclosure of information under the section 38 scheme. Such remedial orders can include an order dismissing counts in an indictment, an order permitting the trial to proceed only in respect of a lesser included offence, an order staying the proceedings, and an order "finding against any party on any issue relating to information the disclosure of which is prohibited": see *CEA*, subsection 38.14(2).

[27] Mr. Carter has advised the Court and the other parties that he has been instructed to bring an application under section 38.14 of the *CEA* before the trial judge, the Honourable Justice

Robert Maranger, seeking such remedies as may be necessary to protect Mr. Ortis's right to a fair trial in the event that any of the AGC's claims are confirmed. Mr. Carter has also advised that, anticipating that at least some of the AGC's claims would be confirmed, the parties have set dates for this application to facilitate its timely adjudication so that the trial may proceed as scheduled in September. Given the nature of the information that would have to be discussed in connection with that application regardless of what I may determine at this stage, arrangements have been made for the Federal Court's designated proceedings facility to be used for the hearing of the section 38.14 application. All necessary supports will also be provided to Justice Maranger while he is working there.

[28] As the Supreme Court of Canada explained in *Ahmad*, the public interest will only be served "if the trial judge in the criminal proceeding is able to exercise his or her discretion with an adequate understanding of the nature of the withheld information. In other words," the Court continued, "the drastic nature of the potential remedies specified in s. 38.14 leads us to the conclusion that Parliament expected trial judges to be provided 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). One way for the trial judge to be furnished with such information is through a disclosure order under subsection 38.06(2) of the *CEA*. As *Ahmad* explains, "the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purpose of the criminal proceeding" (at para 44). Such a step may be required when the trial judge would not otherwise have access to sufficient information to assess the

impact of non-disclosure on the accused's fair trial interests: see *Ader v Canada (Attorney General)*, 2018 FCA 105 at para 38. I am satisfied that this is the case here, at least with respect to the information at issue at this stage.

[29] My suggestion (which was accepted by the parties and the *amici*) that the section 38 application be adjudicated in phases was motivated, at least in part, by the belief that this would assist in the timely adjudication of any application(s) that may be brought under section 38.14 of the *CEA* – particularly an application in relation to counts 5 to 8 of the indictment. With this in mind, I have crafted this Order and Reasons in a way that seeks to ensure that the trial judge has the information he requires to discharge his responsibilities under section 38.14 while also ensuring that this information continues to be protected from wider disclosure.

[30] Finally, it bears noting that whether it will be necessary to adjudicate the third phase of this proceeding (described in paragraph 8, above) depends on any rulings that may be made by the trial judge under section 38.14 of the *CEA* with respect to counts 5 to 8 in light of the present Order and Reasons.

III. THE STRUCTURE OF THESE REASONS

[31] As I have already stated, the present Order and Reasons relate only to the first phase of the section 38 application. The information at issue is highly classified. Some of this information is included in the Defence Summary; other information is in Crown disclosure. My conclusion that the AGC's claims over this information should be confirmed affects the extent to which these reasons can be made public or even made available to Mr. Ortis and his counsel. On

the other hand, I am satisfied the information at issue as well as my analysis of it under the third step of the *Ribic* test should be available to the trial judge for his assistance in relation to any application that may be brought under section 38.14 of the *CEA*.

[32] Accordingly, these reasons and order consist of three parts.

[33] First, the main body of the reasons provides the general background to this application (including the charges faced by Mr. Ortis), discusses the *Ribic* test, and explains to a limited extent the application of that test to the information at issue at this stage. Standing alone, this part of the reasons is unclassified, although it is subject to the terms set out below restricting publication and public access to it.

[34] Second, Annex A sets out more detailed reasons relating to the application of the *Ribic* test to the information at issue in phase one. Annex A is classified. I do not expect that any useful purpose would be served by attempting to redact surgically the potentially injurious information in Annex A so that it could be included with the public reasons in redacted form. Annex A is to be included in the version of these reasons that is provided to the AGC and the *amici*. It shall not be included in the version provided to Mr. Carter or to the PPSC.

[35] Third, Annex B is a classified discussion of the information at this stage that is intended to assist the trial judge with respect to any application that may be brought under section 38.14 of the *CEA* as a result of my order confirming the AGC's claims over that information. This discussion is intended to assist the trial judge in assessing the impact of the non-disclosure order

on Mr. Otis's right to a fair trial. Accordingly, pursuant to subsection 38.06(2) of the *CEA*, I am authorizing and directing the designated proceedings registry to make Annex B available to the trial judge for his use in connection with any application that may be brought under section 38.14 of the *CEA*. Annex B shall also be included in the version of these reasons provided to the AGC and the *amici*. It shall not be included in the version provided to Mr. Carter or to the PPSC.

[36] Finally, the AGC has filed with the Court a version of the Defence Summary with see-through redactions indicating the section 38 claims over that document but not the rationale for any of the claims. On behalf of Mr. Ortis, Mr. Carter does not object to the trial judge seeing this document; on the contrary, he maintains that it is necessary for the trial judge to see the information at issue in order to assess the impact of an order confirming the AGC's claims on the fairness of Mr. Ortis's trial. While only a few of the redactions in the Defence Summary are directly in issue at this stage, I agree that the document as a whole will assist the trial judge in any hearing under section 38.14 of the *CEA*. Thus, again pursuant to subsection 38.06(2) of the *CEA*, I am authorizing and directing the designated proceedings registry to make a copy of this document available to the trial judge, to counsel for the PPSC and to counsel for Mr. Ortis for their use in connection with any application under section 38.14 of the *CEA*. For greater certainty, this is the version of the Defence Summary that has also been redacted at Mr. Carter's request to remove certain information that he (on behalf of Mr. Ortis) has not yet shared with the PPSC. I understand that none of this redacted information relates to counts 5 to 8 in the indictment.

IV. THE PROCEDURE FOLLOWED IN THIS APPLICATION

[37] As I have already explained, the AGC has applied to this Court for an order confirming the prohibition on disclosure of certain information that has been redacted from Crown disclosure provided to Mr. Ortis as well as information contained in the Defence Summary. Among other things, the section 38 scheme provides that the hearing of this application may proceed in public, in private, or by a combination of the two: see *CEA*, subsection 38.11(1). Any private hearing takes place in the Federal Court's secure facility and only authorized persons are permitted to attend.

[38] The section 38 scheme provides that parties who are permitted to make representations on the application may do so *ex parte*; indeed, if so requested, the Court must give the AGC the opportunity to make *ex parte* representations: see *CEA*, subsection 38.11(2). Any *ex parte* representations (whether by the AGC or another party) must be made in private: see *CEA*, subsection 38.11(3).

[39] The AGC's additional claims over the Defence Summary were incorporated into the original application under section 38.04 of the *CEA* and are being dealt with at the same time as the claims over Crown disclosure. While this complicated the work of the AGC and the Court somewhat, proceeding in this fashion ultimately enhanced the efficiency and consistency of the Court's determinations under subsection 38.06(2) of the *CEA*. Dealing at this stage with objections to the disclosure of certain information Mr. Ortis wishes to provide at trial should also go a long way in minimizing any disruption to the trial because of section 38 concerns.

[40] The AGC commenced this application on July 21, 2020. After a number of preliminary matters were dealt with, the substance of the application proceeded as follows:

- First, a public hearing was held on September 20 and 21, 2021. In that hearing, the PPSC presented submissions on the *Ribic* test. These submissions focused on the charges against Mr. Ortis and the evidence the Crown intends to lead at trial. The PPSC filed a Memorandum of Fact and Law as well as a compendium of the evidence the Crown intends to rely on at trial. This presentation of the Crown's theory of its case provided a very helpful context for the Court's ultimate assessment of the relevance and the significance of the redacted information. Counsel for Mr. Ortis was present for this part of the hearing but did not make any submissions. Counsel for the AGC and the *amici curiae* were also present but did not make any submissions, either.

- Second, there was a private hearing at which counsel for Mr. Ortis made submissions on the application of the *Ribic* test to redacted information in the Crown disclosure brief. Counsel for Mr. Ortis also filed extensive written submissions. Counsel for the PPSC were not present for this part of the hearing. Counsel for the AGC and the *amici curiae* were present but, again, did not make submissions.

- Third, there was a series of private hearings at which the AGC led evidence from representatives of various government agencies, departments and offices to support the contention that the disclosure of the redacted information in the Crown disclosure brief and the Defence Summary would be injurious to international relations, national defence or national security. Specifically, witnesses provided evidence on behalf of the Communications Security Establishment, the Canadian Security Intelligence Service, the

RCMP, the Department of National Defence, Global Affairs Canada, the Canada Border Services Agency, and the Privy Council Office. The witnesses were cross-examined by the *amici*. Counsel for Mr. Ortis was not present at these hearings, nor was counsel for the PPSC.

- Fourth, both the AGC and the *amici* provided classified written submissions on the application of the *Ribic* test to the information at issue in the first phase of this application.

- Fifth, a private hearing was held at which counsel for the PPSC explained its position regarding the specific information at issue in the first phase of this application. Counsel for the PPSC also provided brief unclassified written submissions. Counsel for Mr. Ortis was present for most of this hearing but was excused near the end so that counsel for the PPSC could address certain information in Crown disclosure to which he is not privy because of section 38 redactions. Before he was excused, counsel for Mr. Ortis provided responding submissions on why, in his view, the information that has been redacted from the Defence Summary is crucial to Mr. Ortis's right to make full answer and defence and why, to the extent that he understands what it may be, redacted information in the Crown disclosure brief provides necessary and essential corroboration for Mr. Ortis's defence to counts 5 to 8. (By this point, Mr. Carter had already shared parts of the Defence Summary with counsel for the PPSC.) Counsel for the AGC and an *amicus* were present throughout this hearing.

- Finally, while this process is still ongoing, it is anticipated that counsel for the AGC and the *amici* will provide comprehensive written submissions on the application of the *Ribic*

test to the information at issue in the second phase of this application (relating primarily to counts 1 to 4) and then to the information at issue in the third phase (if necessary in light of any order that may be made by the trial judge under section 38.14 of the *CEA*). The Court will also hear oral submissions from counsel for the AGC and the *amici* in both of these respects, if necessary.

[41] I would add one final note regarding the procedure followed in this application. All parties and the Court are acutely aware of Mr. Ortis's right to a trial within a reasonable time as guaranteed by subsection 11(b) of the *Canadian Charter of Rights and Freedoms*. Every effort has been made to secure the timely adjudication of the section 38 claims so that, if at all possible, these proceedings will not disrupt the schedule of the trial proceedings.

V. *THE SECURITY OF INFORMATION ACT* CHARGES

[42] Since the elements of the offences with which Mr. Ortis is charged establish the framework within which the relevance and potential importance of the information at issue is to be assessed, it may be helpful to set this out first before turning to the *Ribic* test itself.

[43] Section 16 of the *SOIA* provides as follows:

Communications with Foreign Entities or Terrorist Groups	**Communication à des entités étrangères ou groupes terroristes**
Communicating safeguarded information	**Communication de renseignements protégés**

16 (1) Every person commits an offence who, without lawful authority, communicates to a foreign entity or to a terrorist group information that the Government of Canada or of a province is taking measures to safeguard if

16 (1) Commet une infraction quiconque, sans autorisation légitime, communique à une entité étrangère ou à un groupe terroriste des renseignements à l'égard desquels le gouvernement fédéral ou un gouvernement provincial prend des mesures de protection si, à la fois :

(a) the person believes, or is reckless as to whether, the information is information that the Government of Canada or of a province is taking measures to safeguard; and

a) il croit que les renseignements font l'objet de telles mesures ou ne se soucie pas de savoir si tel est le cas;

(b) the person intends, by communicating the information, to increase the capacity of a foreign entity or a terrorist group to harm Canadian interests or is reckless as to whether the communication of the information is likely to increase the capacity of a foreign entity or a terrorist group to harm Canadian interests.

b) soit il les communique dans l'intention d'accroître la capacité d'une entité étrangère ou d'un groupe terroriste de porter atteinte aux intérêts canadiens, soit il ne se soucie pas de savoir si la communication aura vraisemblablement cet effet.

Communicating safeguarded information

(2) Every person commits an offence who, intentionally and without lawful authority, communicates to a foreign entity or to a terrorist group information that the Government of Canada or of a province is taking measures to safeguard if

Communication de renseignements protégés

(2) Commet une infraction quiconque, intentionnellement et sans autorisation légitime, communique à une entité étrangère ou à un groupe terroriste des renseignements à l'égard desquels le gouvernement fédéral ou un gouvernement provincial

	prend des mesures de protection si, à la fois :
(a) the person believes, or is reckless as to whether, the information is information that the Government of Canada or of a province is taking measures to safeguard; and	**a)** il croit que les renseignements font l'objet de telles mesures ou ne se soucie pas de savoir si tel est le cas;
(b) harm to Canadian interests results.	**b)** la communication porte atteinte aux intérêts canadiens.
Punishment	**Peine**
(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.	(3) Quiconque commet l'infraction prévue aux paragraphes (1) ou (2) est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.

[44] In the present case, the Crown alleges that, among other things, Mr. Ortis engaged in conduct that constitutes preparatory acts in relation to the commission of an offence under section 16. If proven, this is an offence under section 22 of the *SOIA*. In relevant part, section 22 provides as follows:

Preparatory acts	**Accomplissement d'actes préparatoires**
22(1) Every person commits an offence who, for the purpose of committing an offence under subsection 16(1) or (2) [. . .] does anything that is specifically directed towards or specifically done in	**22 (1)** Commet une infraction quiconque accomplit un acte en vue ou en préparation de la perpétration d'une infraction prévue à l'un des paragraphes 16(1) ou (2), 17(1), 19(1) ou 20(1), notamment :

preparation of the commission of an offence, including	
[. . .]	[. . .]
(b) obtaining, retaining or gaining access to any information;	**b)** obtient ou retient des renseignements ou en obtient l'accès;
[. . .]	[. . .]
(e) possessing any device, apparatus or software useful for concealing the content of information or for surreptitiously communicating, obtaining or retaining information.	**e)** possède un instrument, du matériel ou un logiciel utile pour la dissimulation de la teneur de renseignements ou la communication, l'obtention ou la détention secrètes de renseignements.
Punishment	**Peine**
(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years	**(2)** Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de deux ans.

[45] As set out above, section 16 of the *SOIA* makes it an offence to, without lawful authority, communicate safeguarded information to a foreign entity or a terrorist group. The Crown has not, in connection with counts 5 to 8, specified in the indictment whether it alleges the intended recipient of safeguarded information was a foreign entity, a terrorist group, or both. However, in response to a question from the Court about the scope of the case Mr. Ortis must meet, counsel for the PPSC pointed out that there are no references to any terrorist group in the Crown disclosure pertaining to counts 5 to 8. What I take from this is that, despite counts 5 to 8 incorporating section 16 of the *SOIA* without limitation, the Crown only alleges that Mr. Ortis

committed preparatory acts for the communication of safeguarded information to a foreign entity.

[46] "Foreign entity" is defined in subsection 2(1) of the *SOIA* as follows:

foreign entity means	***entité étrangère***
(a) a foreign power,	**a)** Puissance étrangère;
(b) a group or association of foreign powers, or of one or more foreign powers and one or more terrorist groups, or	**b)** groupe ou association formé de puissances étrangères ou d'une combinaison d'une ou de plusieurs puissances étrangères et d'un ou de plusieurs groupes terroristes;
(c) a person acting at the direction of, for the benefit of or in association with a foreign power or a group or association referred to in paragraph (b);	**c)** personne agissant sur l'ordre d'une puissance étrangère, ou d'un groupe ou d'une association visé à l'alinéa b), en collaboration avec lui ou pour son profit.

[47] "Foreign power", an element of the definition of "foreign entity" is defined in subsection 2(1) of the *SOIA* as follows:

foreign power means	***puissance étrangère***
(a) the government of a foreign state,	**a)** Gouvernement d'un État étranger;
(b) an entity exercising or purporting to exercise the functions of a government in relation to a territory outside Canada regardless of whether Canada recognizes the territory as a state or the	**b)** entité faisant ou prétendant faire fonction de gouvernement pour un territoire étranger, que le Canada reconnaisse ou non le territoire comme État ou l'autorité de l'entité sur celui-ci;

authority of that entity over the territory, or	
(c) a political faction or party operating within a foreign state whose stated purpose is to assume the role of government of a foreign state;	**c)** faction ou parti politique exerçant son activité à l'étranger et dont le but avoué est d'assumer le gouvernement d'un État étranger.

[48] The indictment does not particularize the foreign entity to which it is alleged Mr. Ortis was preparing to communicate safeguarded information. The Crown takes the position that, consequently, it is not necessary for it to prove that Mr. Ortis was preparing to communicate safeguarded information to any foreign entity in particular; he can be found guilty of counts 5 to 8 as long as the jury is satisfied beyond a reasonable doubt that the intended recipient was *a* foreign entity. Be that as it may, the Crown also alleges that evidence including "to do" lists kept by Mr. Ortis, his handwritten notes, and business cards for officials of a foreign entity that Mr. Ortis collected establish that he was preparing to clandestinely share classified documents with a foreign entity. As I understand this evidence, it all points largely if not entirely to one particular foreign entity. I will consider the implications of this in the public reasons below as well as in the classified reasons.

[49] Further, the indictment does not particularize whether the Crown is alleging that Mr. Ortis was preparing to commit an offence under subsection 16(1) or subsection 16(2) of the *SOIA*. However, based on the Evidence Narrative filed by the PPSC in connection with this application, it appears that the Crown's focus is Mr. Ortis's alleged preparation for the commission of an offence under subsection 16(2). As set out above, in the present case, the essential elements of this offence are:

- the person intentionally and without lawful authority communicates to a foreign entity information that the Government of Canada is taking measures to safeguard;

- the person believes or is reckless as to whether the information is information the Government of Canada is taking measures to safeguard; and

- harm to Canadian interests results.

[50] The *actus reus* of an offence under subsection 22(1) of the *SOIA* is exceptionally broad – anything that someone does. The critical constraint on this broad *actus reus* is the *mens rea* that must accompany the person's acts: *c.f. R v Legare*, 2009 SCC 56 at para 35. Here, the required *mens rea* is that the acts have been done "for the purpose of" committing one of the listed offences. In the present case, the Crown must establish that Mr. Ortis's acts were for the purpose of committing an offence under section 16 of the *SOIA*. As subsection 22(1) also states, to constitute preparatory acts under that provision, Mr. Ortis's acts must have been "specifically directed towards or specifically done in preparation of the commission of the offence."

[51] Section 22 of the *SOIA* creates an incipient or inchoate offence, that is, "a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime" (*Legare* at para 25, referring to subsection 172.1(1)(c) of the *Criminal Code*, which has a similar structure). It criminalizes conduct that precedes the commission of the offences to which it refers.

[52] There can be no doubt that, in the case of such an offence, the intention of the accused must be determined subjectively. The accused must be shown to have engaged in the prohibited conduct with the specific intent of preparing to commit one of the listed offences. To adapt the Court's holding in *Legare*, "[t]his view is commanded not only by the plain meaning of [subsection 22(1)] but also by precedent regarding other 'for the purpose' offences in the *Criminal Code*, and policy considerations governing preparatory offences of this kind" (at para 33). In *Legare*, the Court adopted the following observation by Professor Andrew Ashworth, which applies equally here: "inchoate crimes are an extension of the criminal sanction, and the more remote an offence becomes from the actual infliction of harm, the higher the degree of fault necessary to justify criminalization" (*Legare* at para 33, quoting Andrew Ashworth, *Principles of Criminal Law* (6th ed. 2009), at p. 456).

[53] Like other inchoate offences, the justification for criminalizing the conduct described in subsection 22(1) of the *SOIA* is found in the required *mens rea*. It is the intention to commit one or more of the listed offences "that makes the accused's otherwise lawful conduct sufficiently harmful and potentially dangerous to warrant the imposition of criminal sanction" (*R v Alicandro*, 2009 ONCA 133 at para 21, also referring to section 172.1 of the *Criminal Code*).

[54] As I have already stated, it appears that a central issue, if not the central issue, will be what Mr. Ortis intended to do with the safeguarded information relating to counts 5 to 8. Evidence relating to this will have a direct bearing on whether the Crown is able to prove these offences beyond a reasonable doubt.

[55] While the Crown does not need to prove the commission of the underlying offence – in this case, communicating safeguarded information to a foreign entity – evidence tending to show the presence or absence of an element of that offence could also be relevant to whether the Crown has established the required elements of an offence under subsection 22(1) of the *SOIA*. For example, as a matter of logic and common sense, evidence raising a reasonable doubt about whether Mr. Ortis intended to communicate safeguarded information to a foreign entity could also raise a reasonable doubt about whether he did something for the purpose of committing that offence. Put another way, evidence tending to show that Mr. Ortis did not intend to communicate safeguarded information to a foreign entity could also tend to show that he was not preparing to commit that offence. As a matter of logic and common sense, no one could be said to be preparing to do something they had no intention of doing.

[56] I will return to the *mens rea* issue in the classified reasons.

VI. THE *RIBIC* TEST GENERALLY

[57] *Ahmad* addressed "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" (*Ahmad* at para 1). The decision goes on to state that, in section 38 of the *CEA*, "Parliament has recognized that on occasion it may become necessary to choose between these objectives, but has laid out an elaborate framework to attempt, where possible, to reconcile them" (*ibid.*). Thus, the purpose of the 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).

[58] In *Ribic*, the Federal Court of Appeal established a three step test for determining under section 38.06 of the *CEA* whether to confirm a prohibition on disclosure of sensitive or potentially injurious information or, alternatively, whether some form of disclosure should be ordered. This test has been applied consistently ever since 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 1, and *Canada (Attorney General) v Meng*, 2020 FC 844 at para 39. While it has not commented directly on the *Ribic* test, the Supreme Court of Canada 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.

[59] The designated judge hearing a section 38 application must first determine whether or not the information in issue is relevant to the proceeding in which it is sought to be used. The Court held in *Ribic* (where the underlying proceeding was a criminal prosecution) that relevance should be determined under the "usual and common sense" meaning given to it 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). This broad conception of relevant information as information that is potentially useful in the underlying proceeding for the party from which it has been withheld applies equally to civil as well as criminal proceedings. I will return to the question of what it means for information to reasonably be useful to the defence in a criminal prosecution below.

[60] The onus is on the party seeking disclosure "to establish that the information is in all likelihood relevant evidence" (*Ribic* at para 17). That being said, the designated judge cannot insist on a demonstration of the precise manner in which the information could be used in the underlying proceeding. The imposition of such a stringent burden would put the party seeking disclosure in an impossible Catch-22 position: see, in an analogous context, *R v McNeil*, 2009 SCC 3 at para 33; see also *Dersch v Canada (Attorney General)*, [1990] 2 SCR 1505 at 1513-14; *R v Garofoli*, [1990] 2 SCR 1421 at pp. 1463-64; *Carey v Ontario*, [1986] 2 SCR 637 at 678; *R v Durette*, [1994] 1 SCR 469 at 499; *R v O'Connor*, [1995] 4 SCR 411 at 438 (per Lamer CJ and Sopinka J, dissenting in the result but speaking for the majority on this point); and *R v Mills*, [1999] 3 SCR 668 at 717. Even though it is not entirely the case here, it is not uncommon – and understandable – that the party seeking disclosure will need to make assumptions about the nature of the information that has been withheld and will have to cast its submissions broadly in

terms of the potential usefulness of certain types of information, as opposed to the usefulness of the specific information that has been withheld – information which that party has not seen: see, for example, *Meng* at para 77.

[61] In any event, the Federal Court of Appeal has confirmed that the test of relevance at this stage is "undoubtedly a low threshold" (*Ribic* at para 17).

[62] The designated judge is well-positioned to assess the relevance of the redacted information. *Ribic* held that this step "will generally involve an inspection or examination of the information" for the purpose of determining whether it is relevant or not (at para 17). It is standard practice for the AGC to file classified versions of the documents or information at issue in which the redacted information is visible to the designated judge from the outset.

[63] If the designated judge is not satisfied that the withheld information is relevant, this is sufficient to confirm the prohibition on disclosure. If, on the other hand, the designated judge is satisfied that the withheld information is relevant, it is necessary to proceed to the second step of the test.

[64] At the second step, the designated judge must determine whether disclosure of the information would be injurious to international relations, national defence or national security. At this stage, the burden rests on the AGC to establish that injury *would* result from disclosure. This requires demonstrating a probability of injury, not merely its possibility (*Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials)*, 2007 FC 766

at para 49). The AGC's position with respect to potential injury must "have a factual basis which has been established by evidence" (*Ribic* at para 18). If there is a reasonable basis for the AGC's position, the designated judge should accept it and turn to the third step of the test: see *Ribic* at para 19; see also *Huang* at para 13. If, on the other hand, the designated judge is not satisfied that there is a reasonable basis for concluding that the alleged injury would result from disclosure, he or she may authorize the disclosure of the information in question: see *CEA*, subsection 38.06(1).

[65] At the third step of the test, the designated judge must determine whether the public interest in disclosure of the information outweighs in importance the public interest in non-disclosure. On the one hand, there is a public interest in ensuring that justice is done in the underlying proceeding, whether this is a matter of making full answer and defence to a criminal charge or having meaningful access to a legal remedy in a civil proceeding. On the other hand, there is also a public interest in avoiding the injury that would be caused by the disclosure of information, as determined at the second step of the test. The designated judge must weigh and balance, among other things, the importance of avoiding the injury that would be caused by disclosure, the interests at stake in the underlying proceeding, and the importance of the withheld information to the party seeking disclosure (*Ribic* at para 22). The designated judge must also consider whether there are ways to limit the injury that would be caused by disclosure while still making the information available for use in the underlying proceeding – for example, by approving a summary of the information: see *CEA*, subsection 38.06(2).

[66] The burden of demonstrating that the public interest balance is tipped in favour of disclosure rests with the party seeking disclosure. As at the first step, that party ought not to be held to an unrealistic standard given that it is almost always the case that they have not seen the information in question. That being said, purely speculative possibilities regarding the potential usefulness of the information will not justify the disclosure of injurious information: see *Ader* at para 30.

[67] If the designated judge does not authorize disclosure in any form, he or she shall confirm the prohibition of disclosure: see *CEA*, subsection 38.06(3).

VII. THE *RIBIC* TEST AND CRIMINAL PROSECUTIONS

[68] Given that the Crown must apply the *Stinchcombe* test of relevance when providing disclosure to the accused in a criminal prosecution, it will be the rare case where redacted information in the Crown disclosure brief does not pass the first step of the *Ribic* test, which applies the very same test. Nevertheless, it is important to be clear about what it means for information to reasonably be useful to the defence because this idea is also foundational to the third step of the *Ribic* test. After examining the concept of relevance in the criminal disclosure context and as it plays out in the third step of the *Ribic* test, I will consider one possible formulation of the test for determining under *CEA* subsection 38.06(2) whether the public interest in disclosure outweighs the public interest in non-disclosure – namely, whether innocence is at stake.

A. *Relevance and the right to Crown disclosure*

[69] The accused's right to Crown disclosure is integral to the right to make full answer and defence to a criminal charge, "which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*" (*R v Carosella*, [1997] 1 SCR 80 at 106). Non-disclosure of relevant information by the Crown "can seriously erode the right to make full answer and defence and carries with it the very real threat of convicting an innocent person" (*Mills* at para 70).

[70] *Stinchcombe* confirmed that the Crown has a legal duty to disclose all relevant information in its possession or control to a criminal accused, so long as the material is not privileged: see *Stinchcombe* at 338-40. It also confirmed that Crown disclosure decisions are reviewable by the trial judge. This review in relation to questions of relevance or privilege is described as follows:

> The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege.
>
> (*Stinchcombe* at 340)

[71] In *R v Egger*, [1993] 2 SCR 451, the Court reiterated the principles articulated in *Stinchcombe*, stating that "the Crown has a duty to disclose to the accused all information reasonably capable of affecting the accused's ability to make full answer and defence" (at 466).

The Crown's general disclosure obligation "is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the nondisclosure of which is required by the rules of privilege, or to delay the disclosure of information out of the necessity to protect witnesses or complete an investigation" (*ibid.*).

[72] *Egger* also set out a more precise test for determining the relevance of information in the Crown's possession:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe, supra,* at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
>
> (*Egger* at 467)

[73] In the hands of the defence, information can be used to meet the case for the Crown by raising a reasonable doubt about elements of the offence charged or by supporting an affirmative defence. It can do this by, among other things, providing a basis for the cross-examination of Crown witnesses, pointing to investigative avenues the defence can explore in preparing for trial, permitting the defence to make informed decisions about evidence to call at trial, and by corroborating evidence supportive of the defence position at trial. It can also be used to support applications for legal remedies such as the exclusion of evidence. Having a meaningful opportunity to challenge the admissibility of evidence, including having access to the information required to bring such an application, is an essential element of the right to make full answer and defence: see *Dersch* at 1513-14. So, too, is having a meaningful opportunity to seek

other legal remedies that may be appropriate and just in the circumstances such as a stay of proceedings. This list is not exhaustive. Precisely how information will be useful to the defence in a given case will depend on the issues at trial and the nature of the information in question.

B. *Relevance and the third step of the* Ribic *test*

[74] The threshold requirement for disclosure in the context of a criminal trial is set quite low: see *R v Dixon*, [1998] 1 SCR 244 at para 21. As a result, the scope of the Crown's disclosure obligation is very broad. It "includes material which may have only marginal value to the ultimate issues at trial" (*Dixon* at para 23). This is echoed in the low threshold applied at the first step of the *Ribic* test: see *Ribic* at para 17.

[75] However, the third step of the *Ribic* test "requires the application of a more stringent test than the usual relevancy rule" that grounds the Crown's duty to disclose (*Ribic* at para 22). At this stage, the determination "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" (*ibid.*). Put in criminal law terms, this requires an assessment of the importance of the information for meeting the case for the Crown, advancing a defence, or otherwise in making a decision which may affect the conduct of the defence such as whether to seek the exclusion of evidence or some other legal remedy – in short, the value or usefulness of the information for making full answer and defence to the charge.

[76] This qualitative assessment is guided by factors such as the importance for the defence of the facts established by the information; the admissibility of the information in the underlying

proceeding; if the information would be admissible, its probative value; and whether the facts may be established by information from some other source that does not engage section 38 concerns. See *Ribic* at para 22; see also *Ader* at paras 18-26 and 28-29, and *Canada (Attorney General) v Ader*, 2017 FC 838 at para 68. (I note parenthetically that while the admissibility of the information at trial has been considered a relevant factor at the third step of the *Ribic* test, it is the trial judge and not the designated judge who is responsible for determining this. As well, in this connection, subsection 38.06(4) of the *CEA* provides that exceptions may be made to the usual rules of admissibility to permit the introduction of evidence disclosed under subsection 38.06(2).)

[77] In my view, how the designated judge should assess the importance of the information for the accused depends on how the accused could use it.

[78] If the information relates to an element of the offence, the designated judge should consider the potential value of the information for raising a reasonable doubt about that element. A reasonable doubt is a doubt that is based on reason and common sense, a doubt that is logically connected to the evidence or absence of evidence: see *R v Lifchus*, [1997] 3 SCR 320 at para 36. Importantly, the trier of fact need not believe the evidence supporting the defence position for it to warrant an acquittal; as long as the evidence leaves the trier of fact with a reasonable doubt, the accused must be acquitted: see *R v W(D)*, [1991] 1 SCR 742 at 757-58.

[79] If the information relates to an affirmative defence that is legally available to the accused, the designated judge should consider the potential value of the information in supporting that

defence: see, for example, *Ader* at para 28. Similarly, if the information relates to a possible application for a legal remedy such as the exclusion of evidence or a stay of proceedings, the judge should consider the potential value of the information in relation to the issues that will be engaged in that application. Since the designated judge may not have access to all the necessary information, he or she should be slow to pronounce on the ultimate viability of a given affirmative defence or application for a remedy at trial. That being said, if, on the whole of the information available to the designated judge (which includes the redacted information), it appears that the potential value of the information in question is merely speculative, this will likely be insufficient to overcome even the smallest injury to international relations, national defence or national security.

[80] Importantly, while the accused certainly has a strong private interest in obtaining disclosure of information that will assist in defending against a criminal charge, the factors mentioned above are among those that determine the weight of the *public* interest in disclosure. This is because protecting the right to make full answer and defence and avoiding wrongful convictions is fundamentally a matter of public interest as well.

[81] Weighing on the other side of the scale is another public interest – avoiding the injury that would be caused to international relations, national defence or national security by the disclosure of the information in question. This, too, is a qualitative assessment. Some injuries to protected interests will be relatively minor, others will be exceptionally grave, and yet others will fall somewhere in between. The determinative question at the third step is whether, having balanced the competing interests at stake, the public interest in disclosure outweighs in

importance the public interest in non-disclosure. While it is the judge presiding over the criminal trial who has ultimate responsibility for the fairness of that proceeding, the designated judge hearing a section 38 application must also give this careful consideration in the balancing exercise. As the Federal Court of Appeal stated in *Ribic*, the designated judge "has been tasked with the difficult duty of balancing the competing public interests which, in this case, involve the protection of sensitive information and the protection of an accused's constitutional rights to a full answer and defence and to a fair trial" (at para 13).

C. *The innocence at stake test*

[82] A significant point of contention in this case – particularly as between counsel for the PPSC and counsel for Mr. Ortis – is the role, if any, of the concept of innocence at stake in the third step of the *Ribic* test.

[83] As I understand their primary position, counsel for the PPSC submits that relevant information should not be ordered disclosed in connection with a criminal proceeding if to do so would be injurious to international relations, national defence or national security unless innocence is at stake – unless, in other words, the information is necessary to establish the accused's innocence.

[84] On the other hand, counsel for Mr. Ortis cautions against importing a concept developed in the context of class privileges into the case-by-case weighing exercise inherent in the third step of the *Ribic* test. He submits that innocence at stake should not be a necessary condition for the disclosure of information. Rather, the third step is fundamentally a balancing exercise and

the public interest in disclosure can outweigh the public interest in non-disclosure even if it has not been shown that innocence is at stake in the strict sense that would constitute an exception to a class privilege.

[85] I begin by observing that previous attempts to incorporate the innocence at stake test into the test for disclosure under *CEA* subsection 38.06(2) have not met with much success. In *Ribic v Canada (Attorney General)*, 2003 FCT 10 (CanLII) ("*Ribic FC*"), the AGC had submitted that "the test to be applied in weighing the competing interests is the 'innocence at stake test' where the applicant must prove on a balance of probabilities that the protected information demonstrates a fact crucial to the defence in the criminal proceeding" (at para 21). The designated judge, Justice Blanchard, rejected this approach, holding as follows:

> Subsection 38.06(2) of the Act does not specify the test or the factors to be considered in weighing the competing interests nor does the Act contemplate an obvious imbalance between the public interest in national security and the public interest in the administration of justice. I am of the view that the Court may consider different factors in balancing the competing public interests. The breadth of the factors may well vary from case to case.
>
> (*Ribic FC* at para 22)

[86] On appeal, the AGC renewed the argument that the stringent innocence at stake test should be applied. Writing for the Court, Létourneau JA concluded that, while he would be "inclined to apply that test at least in respect of matters affecting national security or national defence," it was not necessary in that case to determine whether the innocence at stake test should apply (*Ribic* at para 27).

[87] More recently, however, in *Ader* the Federal Court of Appeal cited with approval the paragraph in *Ribic FC* in which Justice Blanchard declined to adopt the innocence at stake test. The Court expressly confirmed that the factors to be considered at the third stage of the *Ribic* test "will vary with the circumstances" (*Ader* at para 25). The Court also noted that the disclosure requirements in civil and criminal matters are different and care should be taken not to confuse the two by incorporating the more stringent civil threshold into criminal cases: see *Ader* at para 26.

[88] Of course, in a given case, innocence being at stake can be a relevant factor – indeed, a highly relevant factor – at the third stage of the *Ribic* test. However, I agree with counsel for Mr. Ortis that care must be taken when importing a concept developed in the context of class privileges into the sort of case-by-case determination that is inherent in the third part of the *Ribic* test. I also agree that it should not be set as a threshold that must be met in every case in which the disclosure of injurious information is sought.

[89] Innocence being at stake stands as an exception to class privileges that the Supreme Court of Canada has described as near-absolute – namely, informer privilege and solicitor client privilege: see *R v Barros*, 2011 SCC 51 at para 1 and *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras 53-54. Solicitor client privilege "should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction" (*R v McClure*, 2001 SCC 14 at para 47). The same principle applies when informer privilege is engaged: see *R v Leipert*, [1997] 1 SCR 281 at para 20. The test for establishing this unique exception is a stringent one: *McClure* para 5. It is

"intended to be a rare exception and used as a last resort" (*R v Brown*, 2002 SCC 32 at para 3). On the other hand, there is no basis for the suggestion that the protection of *all* information whose disclosure would in any way be injurious to international relations, national defence or national security is near-absolute in the way informer privilege or solicitor client privilege is. On the contrary, the third step of the *Ribic* test involves the very balancing exercise that is decidedly not part of the adjudication of claims that information is protected by solicitor client privilege or informer privilege: see *McClure* at para 35 and *Leipert* at paras 12-14; see also *Canada (Attorney General) v Khawaja*, 2007 FC 490 at paras 76-84.

[90] The innocence at stake exception exists to guard against the risk of a wrongful conviction: see *Brown* at paras 2-3 and *R v Durham Regional Crime Stoppers Inc*, 2017 SCC 45 at para 14. In our system of law, "the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount" (*R v Scott*, [1990] 3 SCR 979 at 995-96). If information is capable of raising a reasonable doubt about the accused's guilt, this will be a compelling indication of the importance of the information not only for that accused person but also for the proper administration of justice. But this is not all that is required to establish the innocence at stake exception to a class privilege. The information must also be *necessary* for the accused to raise a reasonable doubt in the sense that it "is not available from any other source and that [the accused] is unable to raise a reasonable doubt as to his guilt in any other way" (*Brown* at para 4). It is this additional requirement in particular that I am not persuaded should be incorporated as a threshold an accused person must meet to overcome a claim under the section 38 scheme as opposed to a relevant consideration that may arise in a given case. To impose this as a requirement in all cases would convert a case-by-case

determination into what would effectively be a new class privilege. Moreover, the procedure for determining whether the accused can raise a reasonable doubt in any other way suggested in relation to class privileges – evaluating how things look for the accused once the Crown has closed its case and, if necessary, again after the defence has called all the evidence that is available to it without piercing the privilege – is obviously unworkable in the section 38 context: see *Brown* at paras 52-55 for a discussion of the timing of an "innocence at stake" application to pierce solicitor client privilege.

[91] As well, it must not be forgotten that injurious information can assist an accused in other ways besides going directly to "core issues" relating to the guilt of the accused. As discussed above, injurious information could, for example, support an argument for the exclusion of evidence as having been obtained in breach of the *Charter* or an argument for some other legal remedy that does not go directly to the merits of the charge or the innocence of the accused but that is still an integral part of the right to make full answer and defence. In short, innocence at stake should not be considered a necessary condition for the disclosure of injurious information under subsection 38.06(2) of the *CEA*.

[92] In any event, in my view, even if redacted information does put innocence at stake, this may not be sufficient to warrant its disclosure if to do so would be injurious to international relations, national defence or national security. It all depends on the seriousness of the injury disclosure would cause. In a given case, the injury to international relations, national defence or national security could be so profound that this would justify withholding information from an accused even in circumstances where innocence is at stake. The same is true of information that

in some other way goes to the heart of the accused's ability to make full answer and defence, even if that information does not meet the strict innocence at stake test.

[93] This is a troubling prospect. Confirming a prohibition on disclosure of information that is necessary to demonstrate the innocence of the accused or, more broadly, that is necessary for the accused to make full answer and defence raises a serious risk of a miscarriage of justice in the underlying criminal proceeding. However, as *Ahmad* holds, where the conflict between the need to prevent injurious information from being disclosed and the right to a fair trial is irreconcilable, "an unfair trial cannot be tolerated. Under the rule of law, the right of an accused person to make full answer and defence may not be compromised" (*Ahmad* at para 2).

[94] The ultimate safeguard against such a miscarriage of justice rests not with this Court but, rather, in the remedial powers of the trial judge under section 38.14 of the *CEA* as well as subsection 24(1) of the *Charter*: see *Ahmad* at paras 32 and 65; see also *Ader* at para 35. Nevertheless, this Court has an important responsibility to weigh the right to a fair trial in determining whether the public interest in disclosure outweighs the public interest in non-disclosure. Where the balancing process results in the non-disclosure of information, this Court also has an important responsibility to ensure that the trial judge has sufficient information to determine what remedy, if any, is necessary to ensure that the trial is fundamentally fair: see *Ahmad* at para 45; see also *Ader* at paras 33-39.

VIII. THE *RIBIC* TEST APPLIED

[95] Given the nature of the information at issue at this stage, these public reasons must be largely conclusory. A more detailed explanation for why I have concluded that none of this information can be disclosed is set out in Annex A, which is classified.

[96] First, there is no issue that the information at issue at this stage meets the test of relevance for purposes of the first step of the *Ribic* test.

[97] Second, for the reasons set out in Annex A, I am satisfied that exceptionally grave injury would be caused to Canada's national security by the disclosure of the information at issue at this stage.

[98] Third, also for the reasons set out in the classified annex, I am satisfied that the public interest in non-disclosure outweighs the public interest in disclosure of the information at issue at this stage. I reach this conclusion despite the fact that I judge the information to be of immense importance to Mr. Ortis's ability to make full answer and defence to counts 5 to 8. More particularly, this evidence is highly probative of Mr. Ortis's *mens rea* and is capable of raising a reasonable doubt about his guilt on these counts. While it is not for me to say definitively that Mr. Ortis has no *other* way to raise a reasonable doubt on these counts, I am satisfied that he has no way to raise a reasonable doubt with information that is as directly probative of his *mens rea* as the information at issue here. Despite this, the injury to national security that would be caused

by disclosure of this information is so grave that the public interest in non-disclosure outweighs the public interest in disclosure.

IX. CONCLUSION

[99] For these reasons, I confirm the Attorney General of Canada's claims with respect to the information at issue in this phase of the section 38 proceeding. The specific information at issue is described in Annex A.

[100] Finally, for the reasons set out in *Attorney General of Canada v Ortis*, 2021 FC 737, these reasons shall not be published in any document, or broadcast or transmitted in any way before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded. For the same reasons, subject to further Order of the Court, the Registry shall not make this Order and Reasons available to any member of the public before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.

ORDER IN DES-5-20

THIS COURT ORDERS that

1. The claims of the Attorney General of Canada for the prohibition of disclosure under section 38 of the *Canada Evidence Act* with respect to the information described in Annex A to this Order and Reasons are confirmed.
2. A copy of Annex A shall be made available to counsel for the Attorney General of Canada and the *amici curiae.*
3. A copy of Annex A shall not be made available to Mr. Ortis or his counsel or to counsel for the Public Prosecution Service of Canada.
4. Pursuant to *CEA*, subsection 38.06(2), the designated proceedings registry is authorized and directed to make a copy of Annex B to this Order and Reasons available to the Honourable Justice Maranger.
5. Annex B shall also be made available to counsel for the Attorney General of Canada and the *amici curiae*.
6. Annex B shall not be made available to Mr. Ortis or his counsel or to counsel for the Public Prosecution Service of Canada
7. Pursuant to *CEA*, subsection 38.06(2), the designated proceedings registry is authorized and directed to make available to the Honourable Justice Maranger, to counsel for Mr. Ortis, and to counsel for the Public Prosecution Service of Canada, a copy of the Defence Summary, described more particularly in paragraph 36 of this Order and Reasons.

8. These reasons shall not be published in any document, or broadcast or transmitted in any way before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.
9. For greater certainty, the foregoing term does not apply to the filing of these reasons or any part thereof at the Ontario Superior Court of Justice.
10. Subject to further Order of the Court, the Registry shall not make this Order and Reasons available to any member of the public before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.

"John Norris"
Judge

~~SUBJECT TO A PUBLICATION BAN~~

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-20
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v CAMERON JAY ORTIS ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
PUBLIC HEARING DATES:	SEPTEMBER 20, 21, 2021
***EX PARTE IN CAMERA* HEARING DATES:**	OCTOBER 4, 5, 6, 21, 2021 NOVEMBER 2, 3, 2021 DECEMBER 1, 2, 3, 13, 2021 JANUARY 20, 21, 2022
ORDER AND REASONS:	NORRIS J.
DATED:	FEBRUARY 8, 2022
AMENDED:	FEBRUARY 9, 2022

APPEARANCES:

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John MacFarlane Judy Kliewer	FOR THE RESPONDENT, DIRECTOR OF PUBLIC PROSECUTIONS
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