Date: 20071031

Docket: DESA-1-07

Citation: 2007 FCA 342

CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

MOHAMMAD MOMIN KHAWAJA

Respondent

Heard at Ottawa, Ontario, on October 15 and 16, 2007.

Judgment delivered at Ottawa, Ontario, on October 31, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.

CONCURRING REASONS BY: PELLETIER J.A.

Date: 20071031

Docket: DESA-1-07

Citation: 2007 FCA 342

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

MOHAMMAD MOMIN KHAWAJA

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

ISSUES ON APPEAL AND CROSS-APPEAL

[1] The Attorney General of Canada (the appellant) appeals against a decision of Mosley J. of the Federal Court of Canada (judge). The decision was rendered on May 7, 2007 pursuant to an application made by the appellant under section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (Act).

[2] The appeal raises the following three issues:

a) the standard of review applicable to the errors alleged to have been committed by the judge;

b) whether the judge erred in summarizing sensitive or potentially injurious information contained in the documents in issue, despite finding, pursuant to section 38.06 of the Act, that the information should not be disclosed; and

c) whether the judge erred in failing to give the appellant an opportunity to make *ex parte* submissions regarding the proposed summary of sensitive or potentially injurious information before authorizing its disclosure.

[3] The respondent answered the appeal by a notice of cross-appeal. He also challenged in a related file (DESA-2-07) the constitutionality of subsection 38.11(2) of the Act. Under attack in that file is a decision of Chief Justice Lutfy of the Federal Court which dismissed the respondent's constitutional challenge.

[4] The notice of cross-appeal in file DESA-1-07 also raises the same constitutional issue. This issue will be addressed in file DESA-2-07. Here, I will review the respondent's complaints in respect of judge Mosley's decision and, if need be, the remedies sought.

[5] The respondent submits on his cross-appeal that the judge erred:

a) in placing too high a burden on him to demonstrate that the materials sought are relevant;

b) by reversing the burden of proof and placing the onus on him to produce evidence that the materials sought had been made public in whole or in part in the United Kingdom; and

c) by placing too high a burden on him to demonstrate how information that he has never seen would be useful to his defence.

[6] I should say at the beginning that the reasons for judgment will be succinct. The respondent is in custody. He is awaiting his trial in the Ontario Superior Court of Justice on seven criminal charges relating to a conspiracy to commit terrorist acts in the United Kingdom. At the request of counsel for the respondent, the hearing of this appeal has been adjourned once. In the interest of justice, which includes those of the respondent, all efforts have been made to proceed expeditiously to render a decision.

THE APPEAL

Whether the judge erred in summarizing sensitive or potentially injurious information contained in the documents in issue, despite finding that the information should not be disclosed, and the standard of review applicable

[7] The contention of the appellant in respect of this ground of appeal is that the judge, in applying section 38.06 of the Act, applied the wrong test for disclosure of the materials at issue.

According to the appellant's submission, section 38.06 authorizes the disclosure of the information at issue only if the judge has come to the conclusion that the information should be disclosed. The information can be disclosed if it is not injurious or if the balancing of the public interests mentioned in section 38.06 favours disclosure.

[8] Subsections 38.06(1) and (2) of the Act read:

> **38.06** (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.
>
> (2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

> **38.06** (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.
>
> (2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

[Emphasis added]

[9] At paragraph 186 of his reasons for judgment, the judge expressed his conclusion in the following terms:

> [186] However, I have also concluded that in the particular context of this application where the respondent faces serious criminal charges for which he could receive a lengthy sentence of imprisonment should he be convicted; <u>the public interest in disclosure outweighs the public interest in non-disclosure to the extent that it would be appropriate to provide a summary of the information as contemplated by subsection 38.06(2) of the Act</u>.
>
> [Emphasis added]

[10] It is obvious to me that the judge has concluded that public interest in disclosure of the information outweighs the public interest in non-disclosure. However, the judge was cognizant of his obligation to authorize disclosure in the form that is most likely to limit injury to “international relations or national defence or national security” resulting from disclosure: see subsection 38.06(2).

[11] Balancing the public interest in a fair trial, which includes the right to full answer and defence, and the public interest in protecting injurious information from disclosure, he was of the view that disclosure of a descriptive summary of the documents containing the information at issue would protect the right to a fair trial and result in minimal impairment of international relations, national defence or national security. That summary is contained in Schedule A.

[12] That being said, a review of Schedule A shows, with respect to some documents, a discrepancy between the judge’s conclusion on release and what is effectively released in the summary. As contended by the appellant, while the judge has clearly concluded that the impugned information should not be released, the descriptive summary of the documents does contain some

information whose release would be injurious or potentially injurious to the interests protected by section 38 of the Act.

[13] The judge was dealing with a substantial number of documents. He showed a very good knowledge of the working of section 38 of the Act and of the jurisprudence applicable to it. It is reasonable to infer that the errors are not errors of law resulting from a misconception of the law, but errors of fact reviewable on the palpable and overriding error standard.

[14] We reviewed the alleged error at an *ex parte* hearing. We are satisfied that they should be corrected. Therefore, a new Schedule A will be substituted for the one prepared by the judge.

Whether the judge erred in failing to give the appellant an opportunity to make *ex parte* submissions regarding the proposed summary of sensitive or potentially injurious information before authorizing its disclosure

[15] The appellant claims that the judge should have given him the opportunity to make submissions, as I understand it, on whether the summary that the judge ordered released contained sensitive or potentially injurious information before, of course, releasing it. The rationale for this submission, the appellant says, is that a designated judge cannot "issue a decision which in itself discloses information that the designated judge has ruled should not be disclosed": see appellant's memorandum of fact and law, at paragraph 27. This process would further minimize the risk of inadvertently releasing that kind of information.

[16] Section 38 of the Act empowers the judge to release injurious information after having heard the submissions of the parties, including *ex parte* submissions on the part of the appellant. This was done in the present instance in respect of the information the release of which was objected to by the appellant.

[17] Nothing in the Act imposes upon the judge a duty to hear the appellant again when, in the exercise of the powers conferred by section 38.06, he has decided that the information should be released in whole or in part or in an abridged form. The Act does not expressly or impliedly give the appellant a second kick at the can, so to speak, still less the right to review, or to sit on appeal of, a decision that the judge has already made. Nor does it empower the appellant, who has already been heard, to review, screen or veto the content of the summary that the judge has already decided should be released in the public interest.

[18] As this appeal shows, the appellant is not, however, without remedy should he disagree with the decision of a judge to release information pursuant to section 38.06, after having balanced the competing public interests. In appropriate cases, a motion to reconsider pursuant to Rule 397 of the *Federal Courts Rules* may also be an adequate remedy. I do not think that public confidence in this embattled process and in the administration of justice would be enhanced if the appellant's proposal were to be implemented.

Conclusion on the appeal

[19] For these reasons, I would allow the appeal but only to the extent of substituting a new Schedule A for the one prepared by the judge. The new Schedule A would be subject to the same terms and conditions as the original.

THE CROSS-APPEAL BY THE RESPONDENT

Whether the judge erred in placing too high a burden on the respondent to demonstrate that the materials sought are relevant

[20] According to the respondent, the judge correctly stated the law from *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and *Ribic v. Canada (Attorney General)*, 2003 FCA 246 as regards the test for relevance, but failed to properly apply it. The basis for the respondent's contention is that the judge should have accepted that all the material referred to in the section 38 application, for which Crown prosecutor David McKercher gave notice to the appellant, was information relevant to the trial of the respondent since the prosecution was under the duty to disclose all relevant information pursuant to *Stinchcombe*, *supra*. In other words, the judge should have accepted the assessment made by the Crown prosecutor.

[21] Furthermore, the respondent says, the appellant conceded that the voluminous information was relevant. Consequently, the judge should not have taken upon himself to rule that some of the information provided was not relevant.

[22] At paragraphs 115 and 116 of his reasons for judgment, the judge explained the process that he followed and gave his reasons for excluding from disclosure some of the evidence. He wrote:

> [115] In the present case, I began with the assumption that the information at issue had been demonstrated to meet the relevancy threshold as defined by the Supreme Court in *Stinchcombe*. However, it has become clear to me as I read the information which the applicant seeks to protect that some of it has no bearing upon the case against the respondent. The prosecutor's concession must be interpreted in my view as a general statement about the documents as a whole and not applicable to each item of information the documents contain.
>
> [116] Many of the investigators on Project Awaken had broader duties to perform and their notes reflect the fact that they had to deal with other matters including on-going investigations unrelated to the case against the respondent. I would include in the irrelevant category analytical reports of a general nature some of which were prepared years before the events that gave rise to the charges against the respondent and are not specific to the context of those charges. In these cases I concluded that there was no need to consider the second or third stages of the *Ribic* approach with respect to that information.

[Emphasis added]

[23] With respect, I believe the respondent's submission is misguided. Whether disclosure is envisaged in the context of a criminal proceeding or in the context of a section 38 application under the Act, it belongs to the judge to determine whether the evidence is relevant or not and, therefore, ought to be disclosed or not. Of course, the judge will hear the submissions of the parties, but the decision on relevancy is his, not that of any party to the proceedings or other proceedings. I agree with counsel for the appellant that it would have been an error for the judge to "have concluded that the prosecutor's determination of "*Stinchcombe* relevance" relieved him of the obligation to carry out an independent assessment": see appellant's memorandum of fact and law, at paragraph 23.

[24] In *Stinchcombe*, *supra*, where disclosure was sought by an accused in a criminal trial, Sopinka J., at page 340 described in these words the function of the judge as regards relevancy:

> The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.
>
> 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.

[25] Words to the same effect can be found in *Ribic*, *supra*, where disclosure under section 38 of the Act was considered. At paragraph 17 of the reasons for judgment, this Court wrote:

> The first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual common sense of the *Stinchcombe* rule […] This step remains a necessary one because, if the information is not relevant, there is no need to go further and engage scarce judicial resources.

This ground of appeal cannot succeed.

Whether the judge erred by reversing the burden of proof and placing the onus on the respondent to produce evidence that materials sought had been made public in whole or in part in the United Kingdom

[26] The respondent contends that the judge put the burden of proving an absence of injury on him in order to have released to him information used or released in the Crevice trial in England. It is not disputed that, at the second stage of the mandated analysis of an application for disclosure under section 38 of the Act, the burden is on the appellant to establish that disclosure would be injurious: see *Ribic*, *supra*, at paragraph 20.

[27] In support of his contention, the respondent cites the following passage found at paragraph 162 of the judge's reasons for judgment:

> [162] I would also note that it was open to the respondent to provide evidence or submissions to the Court as to what had been publicly disclosed abroad had he been in possession of that information. That was not done, as counsel said during oral argument, due to a lack of resources. The Attorney General does not, of course, suffer from the same financial constraints. Nonetheless, I am satisfied that the Attorney General did not seek to protect evidence that was introduced and made public in the UK proceedings. Evidence from that case that is material to the charges against him has been disclosed to the respondent.

[Emphasis added]

[28] Even when the passage is read in isolation, it is hard to see how it can be said that, as a result of the statement that it contains, the burden was put on the respondent to show an absence of injury to national security, national defence or international relations. The judge was merely saying that the respondent was not precluded from providing evidence or making submissions as to what had been disclosed abroad if he, in fact, knew what information had already been released in the United

Kingdom. Then the documents at issue in the section 38 application could be reviewed to see whether they contain the information released abroad.

[29] The respondent argues that he was “asked to produce evidence of what had been made public in the U.K.” and “to produce evidence to show that two cards match [when] he is not allowed to see one of the cards”: see respondent’s memorandum of fact and law, at paragraph 38. His argument shows a misunderstanding of what the judge said and did.

[30] Indeed, when the impugned statement is re-placed in the whole context of the extensive reasons for judgment, there cannot be any doubt that the judge properly put on the appellant, not on the respondent, the burden of proving the alleged injury to national security or international relations. He reiterated the appellant’s duty to ensure that the information presented to the Court is complete as well as the duty to act diligently to ensure that the information over which a claim of public interest immunity is asserted under section 38 of the Act is not already publicly available: see paragraphs 47 to 50, and 158 to 160 of the reasons for judgment as well as paragraph 43 where it is stated that “the [appellant’s] witnesses were pressed as to what knowledge they had as to the UK proceedings and the evidence publicly disclosed therein”.

[31] No doubt was cast on the judge’s overall conclusion that the appellant showed due diligence with respect to the material publicly released in the United Kingdom.

Whether the judge placed too high a burden on the respondent to demonstrate how information that he has never seen would be useful to his defence

[32] The respondent's submission that the judge put on him the burden of demonstrating how information that he has never seen would be useful to his defence is also founded on a misunderstanding of the events which unfolded.

[33] The judge sought the assistance of the respondent as to the kind of information that would be useful to his defence so that he could review the material accordingly. He never asked the respondent to tell him which information that the respondent had not seen would be useful to his defence.

[34] Indeed, by way of evidence, or submissions made *ex parte* pursuant to subsection 38.11(2), the respondent could have informed the judge of, or at least given him some indications as to, the kind of information that would assist him in presenting a full answer and defence or would be of a particular and useful interest to him.

[35] As counsel for the appellant properly pointed out, at the third stage of the analysis of a section 38 application, the burden is on the person seeking disclosure to prove that the public interest in disclosure outweighs in importance the public interest in non-disclosure: see *Ribic*, *supra*, at paragraph 21. Obviously, the right to full answer and defence when facing serious criminal charges is a highly relevant consideration in balancing the competing public interests. However, in

order to make a meaningful review of the information sought to be disclosed, the judge must be either informed of the intended defence or given worthwhile information in this respect.

[36] It is true as this Court said in *Ribic*, *supra*, at paragraph 29, that, barring exceptions, an accused is under no obligation to reveal or disclose his defence to the prosecution. However, section 38 of the Act does create a legislative exception by requiring that competing public interests, one of which includes the right to full answer and defence, be balanced. However, the section offers "an accused an appropriate forum for adjudication of the debated issue as well as for subsequent reviews": *ibidem*, at paragraph 30. In this respect, this Court went on to say in the same paragraph:

> …It is of fundamental importance to note that disclosure of the sensitive information that the appellant wants to rely upon is not made to the prosecution, but, under the seal of absolute confidentiality, to the Attorney General and a designated judicial forum where the matter will be decided in private. It is therefore not a disclosure which violates an accused's right to silence and the presumption of innocence in criminal proceedings. In addition, as the appellant requests in the present instance, this Court has the authority to issue an order that none of the information disclosed in the context of the section 38 process be released to the prosecution without the consent of the defence. In my view, sufficient and adequate guarantees are offered by the system which protect an accused's right not to disclose to the prosecution his defence.

[37] The judge recognized at paragraph 168 of his reasons for judgment that the seriousness of the charges against the respondent was a factor that favours him in the balancing of public interests. However, he also noted as a fact that he received little assistance from the respondent in performing his task. At paragraphs 178 and 179 of his reasons, he wrote:

> [178] As was noted by the Court in *Canada v. Singh*, 2002 FCT 460 at para. 9 [*Singh*] it is not enough for the respondent to simply assert a public interest in having a fair and equitable

> trial. The assessment required by section 38 of the Act requires that each party present his point of view and support it, if necessary, with appropriate evidence.
>
> [179] In the present case the respondent has not provided the Court with much assistance in performing its task. It has been difficult in particular to assess what information, if any would "probably establish a fact crucial to the defence" as the respondent has not shared any information with the court as to what his defence or defences might be, apart from what was noted above. This is a factor to consider at the balancing stage of the test, particularly in light of the significance of releasing information which has passed the second stage of the test.
>
> [Emphasis added]

[38] The respondent acknowledged at the hearing that he made a tactical choice to not participate in a process whose constitutional validity he was challenging. His choice entailed consequences that he should be left to live with. In my respectful view, the respondent's argument cannot succeed.

Conclusion on the cross-appeal

[39] For these reasons, I would dismiss the cross-appeal.

CONCLUSION ON THE APPEAL AND THE CROSS-APPEAL

[40] I would dismiss the cross-appeal. I would allow the appeal but only to the extent of substituting a new Schedule A for the one prepared by the judge. I would make the new Schedule A subject to the same terms and conditions as the original.

[41] In closing, I wish to say that the judge dutifully and rigorously applied himself to perform a tedious, painstaking and thankless, but necessary task. He is to be commended for the very thorough and professional review and assessment that he made of the information sought to be disclosed.

"Gilles Létourneau"
J.A.

"I agree
John Richard C.J."

<u>PELLETIER J.A. (Concurring)</u>

[42] I have read the careful reasons of my colleague Létourneau J.A. While I agree with his disposition of the case, I come to my conclusion by a different route.

[43] The appellant says that Mosley J. committed an error in the preparation of Schedule A. The error is that in the course of preparing the Schedule, he included in the description of the documents whose content was not to be disclosed, information which divulged or pointed to the very information whose disclosure he opposed. So, for example, if he had decided that a document should not be disclosed because it revealed the existence or identity of a source, his description of that document contained information which pointed to, or could point to, the identity or the existence of that source.

[44] Like my colleague, I do not believe that Mosley J. was mistaken as to what the law required him to do. Unlike my colleague, I do not believe that the error which is alleged is one that gives rise to issues of standard of review. It appears to me that the basis of the appellant's appeal is that Mosley J. included information in the document descriptions in issue which, by the terms of the document itself, he did not intend to include. I regard this as a matter for a motion for reconsideration and not the proper subject of an appeal.

[45] Rule 397 of the *Federal Courts Rules* provides as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(*a*) the order does not accord with any reasons given for it; or	*a*) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(*b*) a matter that should have been dealt with has been overlooked or accidentally omitted.	*b*) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

[46] It is clear that Schedule A is intended to be, and is, part of the order issued by Mosley J. It is also clear that the Crown's position is that in certain cases, one part of the order (the description of the document) does not accord with the reasons given for it. In such a case, the natural presumption is that Mosley J. did not intend to convey that information.

[47] In my view, the appropriate course for the appellant to have followed was an application for reconsideration before Mosley J. I say this for four reasons.

[48] *Prima facie*, the problem identified by the appellant is specifically dealt with by Rule 397.

[49] Secondly, I believe it is inappropriate for the appellant to ask this Court to assume that the judge did not mean to do what he did. That proposition should be put to the judge who knows

exactly what he intended to do. If he agrees that the disclosure is inadvertent, he can correct the matter and the issue is resolved. If he does not agree, then the appellant is free to come to this Court to say that the judge did not properly exercise his discretion. In such a case, it is for the appellant to show that the exercise of discretion is reviewable. By asking us to assume inadvertence, the appellant asks us to interfere with a discretionary decision without having to show that the discretion was wrongly exercised.

[50] Thirdly, the appellant's second ground of appeal would not arise if the appellant proceeded by way of motion for reconsideration. I agree with my colleague that the appellant overreaches when it suggests that it ought to be able to vet the decision of the application judge before it is released. That said, there is nothing untoward about an application for reconsideration based on the ground of inadvertent disclosure of protected information.

[51] Finally, as a purely practical matter, such questions can be resolved far more expeditiously and inexpensively by means of a motion for reconsideration than by a full-blown appeal.

[52] For all of those reasons, I believe that the appellant has not proceeded as it ought to have. That said, I would nonetheless grant the Crown the relief it seeks. The respondent is in custody. To remit the matter to the application judge would delay this matter even further. The respondent is not responsible for the appellant's choice of procedure and ought not to be penalized by it. Having reviewed the descriptions to which the appellant objects, I am satisfied that the probability of

inadvertence is sufficiently high that granting the Crown the relief it seeks will not be unfair to the respondent nor to the applications judge.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	DESA-1-07
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. MOHAMMAD MOMIN KHAWAJA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 15 and 16, 2007
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	RICHARD C.J.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	October 31, 2007

APPEARANCES:

Ms. Linda Wall Mr. Normand Vaillancourt	FOR THE APPELLANT
Mr. Lawrence Greenspon Mr. Eric Granger	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Greenspon, Brown & Associates Ottawa, Ontario	FOR THE RESPONDENT