Date: 20080625

Docket: DES-1-08

Citation: 2008 FC 807

Ottawa, Ontario, June 25, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OMAR KHADR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC REASONS FOR ORDER AND ORDER

[1] On May 23, 2008 the Supreme Court of Canada directed the Minister of Justice and the Attorney General of Canada, the Minister of Foreign Affairs and International Trade, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police to produce to a "judge", as defined in section 38 of the *Canada Evidence Act* R.S.C. 1985, c. C-5, s. 38 (the "Act"), unredacted copies of all documents, records and other materials in their

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possession which might be relevant to charges which the applicant, Mr. Omar Khadr, currently faces at the United States military base at Guantánamo Bay, Cuba.

[2] A “judge” as defined in section 38 of the Act is the Chief Justice of the Federal Court or a judge of the Federal Court designated by the Chief Justice to conduct hearings under section 38.04 of the Act.

[3] The Supreme Court directed the judge to whom the materials were produced to consider any privilege or public interest immunity claim raised, including any claim under section 38 and following, and to make an order for disclosure in accordance with the Court’s reasons for judgment: *Canada (Minister of Justice et al.) v. Khadr*, 2008 SCC 28.

Procedural History

[4] The Supreme Court had before it an appeal from a judgment of the Federal Court of Appeal issued on May 10, 2007 and amended on June 19, 2007: *Khadr v. Canada (Minister of Justice)*, 2007 FCA 182*,* [2007] F.C.J. No. 672. In that decision, the Federal Court of Appeal found that Mr. Khadr was entitled, under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982 (U.K.)* 1982, c.11, to the disclosure of all materials relevant to the US proceedings that were in the possession of the respondents. The Supreme Court dismissed the government’s appeal from that finding but varied the order with respect to the scope of the disclosure to which Mr. Khadr was entitled.

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[5] In its reasons, the Court of Appeal invoked the right of an accused in Canada to the disclosure of all relevant and non-privileged information in the possession of the prosecution, whether inculpatory or exculpatory, as recognized by the decision of the Supreme Court in *R. v. Stinchcombe*, [1991] 3 S.C.R.326. This was made subject to a determination of any public interest immunity claims that might be raised by the Attorney General of Canada under the procedure set out in section 38 of the Act.

[6] The Court of Appeal's order would have encompassed any relevant materials obtained by Canada from the US authorities. The appellants challenged the order on the ground that Mr. Khadr's section 7 *Charter* rights did not extend to the production of information for the purpose of disclosure in a foreign criminal proceeding.

[7] The Supreme Court held that the *Charter* bound Canada to the extent that Canadian officials were involved in a foreign process that violated Canada's international law obligations. The United States Supreme Court had determined that detainees at Guantánamo were illegally denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the 1949 *Geneva Conventions.* In light of this holding by the foreign court with ultimate jurisdiction over the criminal proceedings, principles of sovereignty and judicial comity did not preclude a finding that section 7 of the *Charter* imposed a duty on Canada to provide disclosure of materials in its possession arising from its participation in the illegal process.

[8] The Federal Court of Appeal's judgment had been stayed pending the outcome of the appeal to the Supreme Court. On January 23, 2008, in the context of a motion to continue the stay, Chief

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Justice Beverley McLachlin directed that the section 38 proceedings continue, as stipulated by the Court of Appeal, subject to the proviso that no disclosure be made without further order of the Supreme Court.

[9] In a Notice of Application filed on January 24, 2008 the applicant sought the disclosure of information which the government had withheld in Federal Court actions T-536-04, T-686-04 and T-3-06. The applicant had requested production of this information through discovery procedures in the referenced actions and through the *Access to Information Act*, R.S., 1985, c. A-1. As a result, roughly 3000 pages containing extensive redactions had been released to the applicant's counsel. In these proceedings, the applicant sought to have disclosure of any of the redacted information that might be relevant to the charges against him at Guantánamo under the *Stinchcombe* standard.

[10] Immediate steps were taken to deal with the application pending further direction from the Supreme Court. On the applicant's motion, Chief Justice Allan Lutfy appointed Mr. Brian Gover, Barrister and Solicitor, to serve as *amicus curiae* to assist the court during hearings in which the Attorney General would present evidence and submissions in the absence of the applicant's counsel. The matter was then assigned to the undersigned, a designated judge within the meaning of the Act, for hearing and determination.

[11] Preliminary matters, including the filing of affidavit evidence and written representations, were completed by the end of March. Following a further canvass of the departments and agencies concerned, the Attorney General filed a collection of 182 documents containing the information at issue submitted as exhibits to *ex parte* affidavits by government witnesses.

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[12] These documents, for the most part, are internal government communications including memoranda, briefing notes and e-mail messages. Some contain background information on the applicant and his family and describe the efforts of Canadian officials to secure access to and collect information about his condition and status following his capture near Khost, Afghanistan in July 2002. Others deal with the planning, coordination and reporting by officials on visits to Guantánamo Bay. There is frequent repetition of the same information in the documents. Reports received by one department or agency were shared with the others and the content reproduced in subsequent materials.

[13] On March 25, 2008 the Court held a closed hearing to enable counsel for the applicant to make confidential submissions about the criminal proceedings before the US military commission and the potential significance of the undisclosed information to the defence. A series of *ex parte* hearings then followed to receive the government's evidence as to the injury that could result from disclosure of the information and to hear submissions from counsel for the Attorney General and the *amicus curiae*. The Court completed these hearings by April 17, 2008.

[14] The *amicus curiae,* Mr. Gover, had access to all of the classified material filed by the Attorney General and attended each of the *ex parte* hearings. He cross-examined the government witnesses and made submissions on the application of the section 38 considerations to the documents.

[15] At the Court's request, counsel for the Attorney General and the *amicus curiae* compiled a list of the information they considered potentially relevant to the applicant's defence. Counsel

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identified this information during oral submissions and filed a written list. While this was of assistance to the Court, I reviewed each document in the collection and made my own determination as to what would be relevant to the criminal proceedings. The proceedings were then suspended pending release of the Supreme Court's decision.

[16] Following the issuance of that judgment, a conference was convened with counsel for the parties and the *amicus curiae* on May 26, 2008 to obtain the benefit of their submissions as to the effect of the decision on this application. An *ex parte* hearing was then held on May 27th to receive further submissions from counsel for the Attorney General and the *amicus* with respect to certain specific documents about which the Court had some remaining questions.

[17] Further to a direction to provide assurances that all documents covered by the Supreme Court's order had been produced, counsel for the Attorney General made further inquiries of the concerned departments and agencies to determine whether there could be any additional documents in their possession that may have been overlooked in the assembly of the collection before the Court. As a result, the Court was informed by letter from counsel for the Attorney General dated May 30, 2008 that three documents had been located by the Department of Foreign Affairs and International Trade ("DFAIT") that could fall within the scope of the Supreme Court's decision. These were provided to the Court in unredacted form.

[18] Having read the three fresh documents, I am satisfied that the substantive information they contain was already before the Court in two documents. Two of the documents are versions in different format of documents 140 and 142 with similar content. The third is a page of handwritten

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notes similar to the content of document 142. While these documents should have been located during the earlier search for possibly relevant materials, I have no reason to believe this was anything other than an oversight. In any event, their production at this late stage does not add to or detract anything of substance from the work that had been undertaken thus far. For that reason, I did not consider it necessary to receive additional affidavit or oral evidence or to convene a further conference with counsel.

[19] Late in the week of May 26, 2008 the Court was informed that several media organizations would be seeking leave to intervene in these proceedings. Counsel for CTVGlobeMedia Publishing Inc., Toronto Star Newspapers Ltd. and the Canadian Broadcasting Corporation subsequently filed motion records which also addressed the merits of their proposed interventions.

[20] Counsel for the parties and the *amicus curiae* were invited to comment in writing on the intervention motions and a hearing was conducted on June 12th to receive oral submissions from the proposed interveners and the parties. In the interests of judicial economy, I heard argument on both the leave motions and the merits of the positions advanced on the issue of public release of the information and will address both questions in these reasons.

[21] Before turning to those matters, I think it useful to make a few comments about the scope of the Supreme Court's decision and this Court's jurisdiction.

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Scope and Effect of the Supreme Court's decision:

[22] In my view, this Court's jurisdiction to consider the matter flows entirely from the *Charter* remedy afforded the applicant and not from the statutory authority in the *Canada Evidence Act* under which Mr. Khadr formally sought disclosure in his application of January 24, 2008. That is because the application does not relate in any real sense to an underlying "proceeding" as contemplated by section 38.01 of the Act. As defined by the statute, a proceeding takes place before a court, person or body with jurisdiction to compel the production of information. I interpret that definition to be subject to the normal territorial limitations applicable to Canadian legislation. The proceeding in question is taking place before a court in a foreign jurisdiction which has no authority to compel the production of information in Canada.

[23] This Court was directed to conduct a section 38 review of the information to give effect to the *Charter* remedy arising from the involvement of Canadian officials in an illegal foreign process. The Supreme Court ruled that there must be disclosure of any information Canada gained from that involvement and information thus acquired that was subsequently shared with the US. The section 38 procedure is a convenient means to assess whether public interest considerations should limit the information to be disclosed but it is not the source of this Court's jurisdiction.

[24] I note that there are still civil actions pending in this Court against the federal government respecting the provision of consular services to Mr. Khadr and related issues. The applicant may be entitled to pursue a determination under section 38 regarding the withholding of information subject to discovery and production in one or more of those actions. That would require a determination

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which has not been the focus of these proceedings. It is clear that the scope of the review that the Court can undertake in this proceeding pertains to the US case and is limited to the parameters set out in the Supreme Court's judgment.

[25] At paragraph 34 of its reasons, the Supreme Court states that "Canada has an obligation under s.7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities." In paragraph 35, it is said that "the designated judge of the Federal Court who hears the application… may be expected to have a fuller picture of what was shared with the U.S. authorities <u>and what other material, if any, should be disclosed, bearing in mind the reasons of this Court</u> <u>and the principles enunciated in *Stinchcombe*</u>." [Emphasis added]

[26] At first impression, the underlined words would appear to leave open the possibility that the designated judge could apply a *Stinchcombe* relevance test to the redacted documents in the collection.

[27] However, the scope of the disclosure obligation recognized by the Supreme Court is summed up in paragraph 37:

> In reaching its conclusions on disclosure, the Federal Court of Appeal held that the *Stinchcombe* disclosure regime should apply, and consequently held that the scope of disclosure extended to all materials in the Crown's possession which might be relevant to the charges against the appellant, subject to ss.38 ff. of the *Canada Evidence Act*. **Our holding is not based on applying *Stinchcombe* directly to these facts. Rather, as described above, the section 7 duty of disclosure to Mr. Khadr is triggered on the facts of this case by Canadian officials giving US authorities access to interviews conducted at Guantanamo Bay with Mr. Khadr. As a**

> **result the disclosure order we make is different in scope than the order of the Federal Court of Appeal. The appellants must disclose (i) all records in any form of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him. This disclosure is subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act*.** [Emphasis added]

[28] At paragraph 40, the Court reiterates that the "… designated judge will review the material and receive submissions from the parties and decide which documents fall within the categories set out in para. 37 above." I take from the Supreme Court's reasons read as a whole that this Court may still be guided by the principles set out in *Stinchcombe* but only to the extent that the material in question is linked to Canada's direct involvement in the US proceedings through the interviews conducted at Guantánamo and through sharing the results with the US.

[29] Accordingly, the field of inquiry conducted by this Court has been considerably narrowed. Information in the collection which may have been considered relevant to the criminal charges under *Stinchcombe* was provided by U.S. agencies to Canada for intelligence sharing and law enforcement purposes unrelated to the visits by Canadian officials to Guantánamo.

[30] I will note here that the rights to discovery under US federal and military rules are, in general, not as extensive as those which apply in Canada under the *Stinchcombe* principles: see *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Dancy*, 38 M.J. 1, 4 (CMA, 1993). Under the US rules, the applicant is entitled to any exculpatory or mitigating evidence and his own recorded statements which are within the control of the government but not to the disclosure of

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other relevant inculpatory information which the prosecution does not intend to use. This includes inculpatory information that may be inconsistent with the prosecution's theory. As a result, the applicant may not receive from the US authorities in the course of his trial before the US military commission disclosure of information which could be of assistance to him and which is in the possession of Canadian agencies. But that is beyond the scope of this Court's jurisdiction.

The Intervention Motions:

[31] Rule 109 of the *Federal Courts Rules* permits the Court to grant leave to a non-party to intervene in a proceeding. In this instance, the moving parties seek leave solely for the purpose of making argument about the public release of the information to be disclosed to Mr. Khadr and his counsel as a result of the Supreme Court's order and this Court's section 38 determination. The applicant and the *amicus curiae* support the proposed intervention. The Attorney General is opposed.

[32] Under Rule 109 (2) (b), a prospective intervener must demonstrate that their participation will assist in the determination of a factual or legal issue related to the proceeding. Factors for the Court to consider when deciding whether to exercise its discretion to grant leave are set out in *CUPE v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220, 95 A.C.W.S. (3d) 249 (C.A.). They are:

(1) Is the proposed intervener directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

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(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the case on its merits without the proposed intervener?

[33] The Attorney General's position is that the moving parties have failed to demonstrate how their involvement at this late stage will materially assist the Court in determining a factual or legal issue related to the proceeding. They do not propose to add any evidence to a factual issue in dispute. Their involvement is to reiterate a legal argument already advanced by the applicant that any material ordered disclosed should be disclosed publicly without conditions. In that respect, they have no greater interest in these proceedings than any other member of the public. The Court has heard all of the evidence related to the matter together with the submissions of the parties and the *amicus curiae*. The moving parties' point of view is not essentially different from that of the applicant and is essentially "jurisprudential", in the Attorney General's view.

[34] The proposed interveners counter that there is a strong public interest in Mr. Khadr's case and the moving parties play an important role by representing the Canadian public. There is a justiciable issue in the balancing of the public interest in the disclosure of the information and the public interest in non-disclosure. The non-disclosure of information by the state is a matter of public concern which is heightened in this instance as the actions of state officials have been called into

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question by the finding that they participated in a breach of Canada's international human rights obligations.

[35] In *Abdullah Khadr v. Canada (Attorney General)*, 2008 FC 549, [2008] F.C.J. No. 770, a decision respecting the disclosure of sensitive information to the applicant's brother for the purposes of an extradition proceeding, I made the following comments at paragraphs 44 and 45 regarding the public interest in obtaining information, the role of the press and the open court principle:

> Freedom of expression including freedom of the press and the public's right to receive information are core values protected by subsection 2 (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11. The scope of the protection afforded freedom of the press must be interpreted "in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee": *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, [1991] S.C.J. No.87 at paragraph 61.
>
> Inextricably linked to those values is the principle of the openness of court proceedings (see *Vancouver Sun, (Re)* 2004 SCC 43, [2004] S.C.J. No.41 and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] S.C.J. No.41). Freedom of the press and the open court principle are not, however, absolute. They must yield on occasion when there are other important interests to be protected such as informant privilege (see *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] S.C.J. No. 43) or to protect the right of an individual to a fair hearing (see *Re Charkaoui*, 2008 FC 61).

And at paragraphs 47 and 48:

> It is clear now that any court procedures that limit freedom of expression and freedom of the press in relation to legal proceedings, including those imposed by statute, are subject to the test set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R.835, [1994] S.C.J. No.104 and *R. v. Mentuck* 2001 SCC 76, [2001] 3 S.C.R. 442; see also *Toronto Star Newspapers Limited v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paragraph 7. This was affirmed in the section 38 CEA context by

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> Chief Justice Allen Lutfy in *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2006 FC 1552, [2006] F.C.J. No. 1969.
>
> The *Dagenais/Mentuck* test requires that public access to court proceedings be barred only when the appropriate court in the exercise of its discretion concludes that disclosure would subvert the ends of justice or unduly impair its proper administration. This test is meant to be applied in a flexible and contextual manner […].

[36] The media bring a valuable perspective to the Court's consideration of the application of section 2(b) of the *Charter*, the open court principle and the *Dagenais/Mentuck* test. In *Abdullah Khadr,* the press was already in possession of a significant piece of information that the Attorney General wished to protect through a non-disclosure order. Accordingly, I directed that the press organization concerned, one of the moving parties in this case, be given notice of the application and an opportunity to file a record and be heard on the issue. In the result, the application to prohibit publication was denied. Here, on the other hand, I am being urged to extend the scope of any disclosure ordered for Mr. Khadr's benefit to the public through the media.

[37] I emphasize that the media organizations are not in possession of the information which the Attorney General wishes to protect but seek to have the Court order the public release of any materials disclosed to Mr. Khadr. This is also not a case in which the Attorney General has invoked section 38 in order to prevent the disclosure of information which the public through the media could otherwise obtain from another source as in the *Ottawa Citizen* case cited above.

[38] While Mr. Khadr supports public release of the information, his interests are not identical with those of the media organizations. As his counsel candidly acknowledged at the hearing, Mr.

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Khadr seeks to advance his defence by any means available including political measures. The media's interest is not to help Mr. Khadr or to hinder him in those efforts but to give the public as much information as possible. They argue that public access to the information should not be dependent upon the possibility that the defence will release only such disclosed information as will assist him. Their participation is, they submit, the most reasonable and efficient way to advance the public's interest in the information.

[39] One of the concerns that I raised at the hearing is that these motions were brought at a very late stage in the proceedings. It was open to the media outlets to seek leave to intervene following the Federal Court of Appeal's decision in May of 2007. That opportunity may have been short-lived as the order was stayed pending the appeal. However, it was again open to them to bring a motion following the Supreme Court's order of January 23, 2008 which directed this Court to proceed with the review of the information at issue.

[40] No steps were taken until the Supreme Court's judgment was released on May 23, 2008 and only then, it seems, when the media organizations were informed by defence counsel that there were video tapes in existence of the interviews conducted by Canadian officials at Guantánamo. As counsel for the Attorney General pointed out during the hearing, this fact was disclosed in a public affidavit filed in this proceeding on March 7, 2008.

[41] It is submitted by the proposed interveners that the disclosure issue had not crystallized until the Supreme Court rendered its decision. Until then, the work done by the parties and the Court was contingent upon the outcome of the appeal and the media could not have assumed that disclosure

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would be ordered. Nonetheless, the late arrival of the motions served to delay these proceedings as it was necessary to postpone release of this decision while they were considered.

[42] Not all of the *CUPE* factors must be present or weigh in favour of intervention before the Court may grant leave. I have no doubt that this case could have been heard and decided on its merits without the proposed interveners. However, as the Court has read the materials filed by the moving parties and heard their submissions on the merits, there would seem to be no practical purpose to be achieved at this stage to deny the motions. The moving parties have achieved their primary objective which was to be heard on the question of public release of any disclosure resulting from this process.

[43] There is no longer any dispute that the *Dagenais/Mentuck* test applies in the context of a designated judge's discretionary order regarding disclosure or non-disclosure and that the open court principle is a significant factor to be considered in balancing the competing interests. But, as the Attorney General submits, these principles do not mandate an all or nothing result. If the designated judge finds that disclosure is injurious to international relations, national defence or national security he or she may authorize disclosure subject to any conditions that the judge considers appropriate. Those conditions may include restrictions, for example, on publication of the disclosed information for a specified period of time: see *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

[44] I would note further that the Supreme Court has ruled that exhibits remain the property of the party which filed them while the Courts have merely a custodial role to supervise their use:

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Vickery v. Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671. At paragraph 20 of the Court's reasons it was stated:

> An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access… The rule, however, reflects the fact that exhibits are not the property of the court. [Abridged]

[45] The exhibits under review were initially produced to the applicant under compulsion of either a Court order or the *Access to Information Act*. They were produced to the Court under the Chief Justice of Canada's Order of January 23, 2008 for a limited purpose. While it is not necessary to decide the question at this time, it is not clear from the jurisprudence that the open court principle requires that exhibits filed as attachments to *ex parte* affidavits for review in a closed session thereby become accessible to the public. Nor is it at all clear that an order for disclosure to an applicant under section 38.06 of the Act on the basis that the public interest in disclosure outweighs the public interest in non-disclosure necessarily implies disclosure to the public at large under the open court principle.

[46] As a matter of general practice, an implied undertaking attaches to information produced by one party to another in civil proceedings that the information will not be used for other purposes: see for example *Merck & Co. v. Apotex Inc.,* [1996] 2 F.C. 223. The situation in criminal matters is not as clear: *Jackson v. D.A*., 2005 ABQB 702, but see *D.P. v. Wagg*, 71 O.R. (3d) 229. In *Wagg,* the Ontario Court of Appeal expressed the opinion that there should be an implied undertaking in criminal matters for disclosed information not filed as evidence. But that was in the context of

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criminal proceedings taking place in Canada. I note that applicant's counsel offered to provide an express undertaking in this case in a letter reproduced at paragraph 10 of the Court of Appeal decision, but the offer was not taken up by the respondent's counsel. In the result, there would appear to be no restriction on the applicant's use of any information disclosed to him through these proceedings unless the Court imposes conditions under the authority provided by section 38.06.

The Section 38 Framework:

[47] The procedure to be followed on a section 38 application was developed by the Federal Court and the Federal Court of Appeal in *Canada (Attorney General) v. Ribic*, 2003 FCT 10, [2003] F.C.J. No. 1965, aff'd 2003 FCA 246, [2003] F.C.J. No. 1964 (*Ribic)*; see also *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2007] F.C.J. No. 622 (*Khawaja I*); rev'd in part but not on the test in *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, [2007] F.C.J. No. 1473.

[48] As outlined by the Supreme Court at paragraph 41 of its reasons, the task of the designated judge in this case is to consider whether disclosure of the records which are found to fall within the scope of the limitation set out in paragraph 37 would be injurious to international relations, national defence or national security and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. This is normally done in three steps, the first of which is a determination of the relevance of the information to the underlying proceedings.

[49] In this instance, relevance is to be determined according to whether the information falls within the scope of the two arms of the section 7 disclosure right recognized by the Supreme Court:

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(i) whether the information constitutes a record, in any form, of the interviews conducted by Canadian officials with the applicant at Guantánamo or (ii) whether it consists of a record given to the US authorities as a direct consequence of Canadian officials having interviewed the applicant there while he was subject to an illegal detention regime.

[50] Where the designated judge in a section 38 proceeding finds that the information is relevant to the underlying case, the next step is a determination of whether disclosure would result in injury to the protected national interests.

[51] The burden is on the party opposing release of the information to establish a factual basis for the assertion of probable injury on a reasonableness standard. The Attorney General's assessment that injury would result must be given considerable weight because of his access to special information and expertise. Moreover the Attorney General assumes a protective role vis-à-vis the security and safety of the public. If his assessment of the injury is reasonable, the court should accept it: *Ribic,* at paragraph 19 of the FCA decision.

[52] Where the Court finds that no injury would result to the protected interests, the information must be disclosed. Absent such a finding, the third stage of the test is to determine whether the public interest in non-disclosure is outweighed by the public interest in disclosure. Section 38.06 of the Act permits a designated judge to authorize release of information notwithstanding the judge's conclusion that injury would occur. The designated judge must assess those factors which he or she deems necessary to find the balance between the competing public interests and must consider whether the disclosure should be subject to terms and conditions.

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[53] The jurisprudence provides guidance as to factors which may be significant in the balancing process: see *Khan v. Canada (T.D.)*, [1996] 2 F.C. 316, [1996] F.C.J. No. 190 at paragraph 26; *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, [2002] F.C.J. No. 1658; *Arar*, above, at paragraph 93.

[54] I have concluded that the most compelling factors in this case are the nature of the public interests sought to be protected by confidentiality and those favouring openness and the other higher interests at stake; notably the applicant's human rights and right to make full answer and defence.

[55] The importance of protecting national security and the need for confidentiality in such matters has been repeatedly recognized by the Supreme Court of Canada: *Chirarelli v. Canada (M.E.I.),* [1992] 1 S.C.R. 711; *Ruby v. Canada (Solicitor General),* [2002] 4 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. In these decisions, the Supreme Court has also recognized that such considerations can limit the disclosure of information to affected individuals.

[56] Another factor which may serve to reduce disclosure is the fact that Canada is a net importer of information essential to our security, defence and international relations. Much of it is provided by foreign agencies in confidence that it will not be disclosed without the permission of the provider or the source. The public has a very high level interest in maintaining that confidence: *Singh v. Canada (Minister of Citizenship and Immigration)* 186 F.T.R. 1 (T.D.) at paragraphs 32-34.

[57] On the other hand, the public also has a high interest in ensuring that rights guaranteed by the *Charter* are not frustrated by the withholding of documents which must be produced if justice is

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to be done to the person affected. In the present case, the Supreme Court of Canada has determined that the *Charter* is engaged as the applicant was detained under conditions that violated the international law obligations of both the United States and Canada. That factor weighs heavily in favour of disclosure even if an injury to Canada's national interests would result.

[58] A great deal of information has already been made available to the public about the applicant's situation through media attention to his case. A book was recently published which describes the applicant's background, the circumstances of his capture, treatment while in detention and contacts with Canadian officials. Some of the information published in open sources corresponds to information which the government seeks to withhold in these proceedings. Information which is in the public domain already should, generally, not be protected under section 38.

[59] My colleague, Justice Simon Noël, discussed this principle in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar - O'Connor Commission)*, 2007 FC 766, [2007] F.C.J. No. 1081 at paragraphs 54 – 57. Nonetheless, as he stated at paragraph 56, "[t]here are many circumstances which would justify protecting information available in the public domain, for instance: where only a limited part of the information was disclosed to the public; information is not widely known or accessible; the authenticity of information is neither confirmed nor denied; and where the information was inadvertently disclosed." This, of course, presumes that further disclosure will result in injury to one of the protected national interests.

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Applying the section 38 framework to the information at issue:

[60] The documents containing the information at issue are held by Canadian Security Intelligence Service ("CSIS), the Royal Canadian Mounted Police ("RCMP"), the Department of Foreign Affairs and International Trade ("DFAIT") and the Department of National Defence\Canadian Forces ("DND\CF").

[61] The injury claims advanced by the Attorney General include concerns about the disclosure of information respecting other investigations, subjects and persons of interest; investigative methods and operational techniques employed by the agencies; sensitive internal administrative information such as file and telephone numbers; information that would identify agents and human sources and references to secure data banks and communication systems. Of particular concern to the Attorney General in the context of this case are confidential reports provided by US agencies. Disclosure of information falling into these categories would, it is contended, cause injury to Canada's national security, national defence and international relations.

[62] Where the Attorney General relies upon what is commonly referred to as the "third party rule" in section 38 proceedings to seek continued protection for information obtained in confidence from a foreign agency, the Court will normally require that evidence be led to demonstrate that efforts have been made to obtain consent to the disclosure of the information from the foreign source. If the efforts are successful, that would obviate the need for the Court to consider the matter further in the interests of judicial economy.

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[63] In this case, evidence was received in the closed hearings that the government contacted the responsible US agencies requesting consent to release of information in these proceedings. Responses were received to some of these requests. As a result, a modest amount of additional information has been disclosed to the applicant's counsel. Responses on certain documents remain outstanding.

[64] It is also the practice in these cases to inquire into the scope of the information already in the possession of the applicant or that which could be readily obtained by the applicant from other sources. Where information has been provided to the government of Canada in confidence that it would not be disclosed and that information could be obtained directly from the source through other means which would not result in a breach of the third party rule by Canada, it would seem to be axiomatic that the party seeking disclosure must explain whether such efforts have been made.

[65] In the present case, the members of Mr. Khadr's defence team are constrained by a Protective Order issued on October 9, 2007 by the then presiding judge in the military commission proceedings. This order restricts the members of the defence team from disclosing any classified information and any information described as "law enforcement sensitive" ("LES") or "For Official Use Only" ("FOUO") provided to them by the prosecution, including investigative reports and witness statements, without prior approval from the Military Judge. Classified material may only be released to someone with the requisite clearance and a "need to know".

[66] As "Foreign Attorney Consultants" before the Military Commission, the applicant's Canadian counsel have access to the LES/FOUO material but not to the classified information

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produced to the detailed military defence counsel. On March 17, 2008, they wrote to the military prosecutor seeking permission to disclose the content of the LES/FOUO material to this Court in an *in camera* session but that had not been resolved as of the date of writing. The presiding judge had earlier ruled that he lacks jurisdiction to approve the release of such information for the purpose of Canadian court proceedings as such authority rests with the US Defence Department.

[67] In the result, this Court was not in a position to identify, with some exceptions, what has or has not been disclosed to the defence in the military proceedings. It is clear from the public record that a great deal of material has already been turned over to the defence by the prosecution. What cannot be determined by the Court is whether there are materials in the possession of the Canadian authorities that would fill in any gaps in what the prosecution has produced to assist the applicant in making full answer and defence.

[68] It must be stressed that much of the redacted information in the documents produced to the Court does not relate to the applicant and would not assist him in defending himself against the criminal charges at Guantánamo. A considerable amount of this information refers to investigations concerning other persons unrelated to the applicant. This information would be irrelevant under the *Stinchcombe* standard. Redacted documents may contain only brief passages referring to the applicant. As a result, of the entire collection of 182 documents, less than thirty appeared to contain potentially relevant information that could be of assistance to the applicant.

[69] The Supreme Court’s decision required a re-examination of the documents to determine whether the information they contain might fall within the scope of the direction to disclose defined

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by the nature of Canada's role in the Guantánamo interviews whether or not they contained *Stinchcombe* relevant material. Some documents initially considered relevant were excluded from consideration as falling outside the scope of the Supreme Court's decision. Others which would not have otherwise been considered *Stinchcombe* relevant were found to fall within the parameters established by the Supreme Court.

[70] In the result, the Court focused on the content of some 26 records. Again I would stress that the content of these materials does not deal exclusively with the applicant and the records contain sensitive information pertaining to other subjects, persons and events that would not be of assistance for his defence and will not be disclosed.

[71] In these reasons, I propose to refer to only a few of these records but they will all be addressed in a private order to be issued to the applicant and to the Attorney General describing what is to be disclosed and what is to remain protected. It is necessary for the Court to speak obliquely and reservedly about the information as any disclosure in these pages would require that public release of this decision, including to the applicant, be withheld until the expiry of the appeal period in section 38.09 (2) of the Act.

[72] As is now well known, in February 2003 three CSIS officials and one officer of the DFAIT Foreign Intelligence Division were authorized by the US Department of Defence to visit Guantánamo Bay. They interviewed Mr. Khadr over four days; February 13-16, 2003. CSIS and DFAIT officials subsequently returned to Guantánamo to interview the applicant in September 2003. A DFAIT official went again in March 2004. The purpose of these visits was primarily to

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collect intelligence information. The interview notes and reports prepared by the Canadian officials were shared with the RCMP. US agencies were subsequently provided with edited versions of those reports.

[73] Questions have arisen in these proceedings as to whether the visits had a law enforcement aspect, about which there is some dispute between the Attorney General and Mr. Khadr's counsel. The former Deputy Director of Operations for CSIS was cross-examined on the point in the course of earlier proceedings. From what I have seen, it appears clear that the interviews were not conducted for the purpose of assisting the US authorities with their case against Mr. Khadr or for building a case against him in Canada. I note that no law enforcement personnel were authorized to attend at that time. The information collected during the interviews was provided to the RCMP for intelligence purposes. However, it is equally clear that the US authorities were interested in having Canada consider whether Khadr could be prosecuted here and provided details about the evidence against him to Canadian officials for that purpose. Nonetheless, the interviews by Canadian officials were conducted for intelligence collection and not evidence gathering.

[74] The interviews were monitored by US officials on each occasion the Canadian officials visited Guantánamo. An audio and video record was made of the February 2003 interviews. It is not clear in which format they were originally recorded but they are described as videotapes. CSIS was subsequently provided with copies of the February videotapes. Copies were filed with the Court as exhibits in DVD format. The evidence before me was that Canadian officials do not have copies of any recordings that may have been made of the September 2003 or March 2004 interviews.

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[75] Counsel for the applicant has indicated that the defence team has been provided with copies of the February videotapes in DVD format subject to restrictions on access to them and their use. They are classified as "secret/no foreign". I understand this to mean that the videos can only be shared with someone who has the necessary security clearance and not with foreign counsel. In the result, Mr. Khadr's military defence counsel, Lt. Cmdr. Kuebler, may view the videos but not his Canadian counsel. If presented in open court during the military commission proceedings, only American nationals with the necessary security clearance could, apparently, remain in the room.

[76] As described by counsel, the DVDs in the possession of the defence have very poor sound quality and all have audio portions that cannot be understood. I was informed that the audio on the DVD from February 14, 2003 cannot be understood at all. They do not appear to have been edited.

[77] I have viewed the DVDs filed with the Court. The sound and visual quality is poor but the content which may be ascertained is consistent with the written reports which summarize these interviews and they do not appear to have been edited. I accept that this is the condition in which the videotapes were obtained by CSIS. The videotapes fall within both branches of the Supreme Court's Order and must be disclosed subject to consideration of the interests protected under section 38.

[78] Counsel for the applicant submits that the videotapes will assist the defence as they illustrate that the applicant suffered abuse following his capture and that from unclassified summaries and open source information it appears that he cried, asked Canadian officials for help, told them that he had been tortured and showed them the scars left by his injuries. I will refrain from commenting on what the tapes reveal. However, I am satisfied that any content that may tend to support the

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applicant's allegations is relevant and should be disclosed to the applicant and his counsel for the purpose of his defence to the criminal charges.

[79] The audio content of these tapes includes specific references to sensitive information that falls squarely within several of the injury claims advanced by the Attorney General. This information would not, in my view, assist the applicant in making full answer and defence as it relates to persons, places and events not material to the charges against him. It is information that would harm protected national interests and the public interest in disclosure does not outweigh the public interest in non-disclosure in my estimation.

[80] The videos also disclose images of the faces of Canadian and American agents that could lead to their identification and compromise their ability to perform their duties. It was submitted in argument by one of the moving parties that the identity of the Canadian officials who visited Guantánamo is already a matter of public record. That appears to be correct with respect to the DFAIT official, but I am not satisfied that the full identities of the CSIS agents have been publicly disclosed and neither has that of an American official who was in the room during the interviews. In any event, there is no reason in my view for the faces of the officials or agents to be disclosed.

[81] I am satisfied that disclosure of the sensitive audio content and the facial images would cause injury to Canada's national interests and that there is no public interest in the disclosure of this information that outweighs the interest in non-disclosure. I have been advised that the DVDs could be edited to remove the audio containing the sensitive information and the identities of the

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officials/agents could be obscured. With those measures taken, any potential injury that might result from release of the tapes to Mr. Khadr's defence team would be mitigated.

[82] Accordingly, I will order the disclosure of these tapes to the applicant's defence team for use in the military commission proceedings subject to the proviso that they be edited to eliminate any irrelevant and sensitive audio content and that the faces of the Canadian and American officials present be obscured in the video images.

[83] Document 167 consists of 186 pages of interview notes and witness statements which were completely redacted in the version produced to the applicant. The entire content of this document would be relevant under the *Stinchcombe* principles. However, only 5 of the 186 pages can be said to fall within the Supreme Court's Order as constituting a record of the Canadian interviews or of information obtained from those interviews that was shared with the US authorities.

[84] The five pages in question are reports prepared by US agents describing the February 2003 Canadian visit. They include references to the statements made by the applicant discussed above that could be relevant to his defence and they may also assist in understanding the audio on the video-tapes. Subject to minor editing to remove the names of the individuals who observed the proceedings and prepared the notes, these pages will also be ordered disclosed.

[85] The report of the March, 2004 visit to Guantánamo prepared by the DFAIT official who went on that occasion is included in the collection as document 168. The version served on the applicant is almost entirely unredacted. The respondent seeks to protect a paragraph on page 2 of the report as it contains information provided in confidence by a member of the US military regarding

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steps taken by the Guantánamo authorities to prepare the applicant for the Canadian visit. There is also a side comment by the DFAIT official that the Attorney General wishes to protect as potentially harmful to Canada-US relations.

[86] As indicated in a recently published report of the Office of the Inspector General of the U.S. Department of Justice, during the period in question detainees at Guantánamo were subjected to a number of harsh interrogation techniques that would not have been permissible under American law for law enforcement purposes and have since been prohibited for use by the military.

[87] Canada's international human rights obligations include the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, ("UNCAT"), to which the US is also a signatory. The application of this Convention to specific types of interrogation practices employed by military forces against detainees was discussed by the Supreme Court of Israel in *Public Committee against Torture in Israel v. Israel* 38 I.L.M. 1471 (1999). The practice of using these techniques to lessen resistance to interrogation was found to constitute cruel and inhuman treatment within the meaning of the Convention.

[88] The practice described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview.

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[89] Canada cannot now object to the disclosure of this information. The information is relevant to the applicant’s complaints of mistreatment while in detention. While it may cause some harm to Canada-US relations, that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantánamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.

Conclusion:

[90] This case began as a review of all of the materials in the possession of the named government departments and agencies that may be relevant to the criminal charges faced by the applicant at Guantánamo Bay and which might assist him in making full answer and defence to those charges as contemplated by the *Stinchcombe* principles applicable to a criminal prosecution in Canada. As a result of the decision rendered by the Supreme Court of Canada on May 23, 2008 concerning the *Charter*’s reach with respect to foreign criminal proceedings, the scope of the review undertaken has been considerably narrowed. As discussed above, it remains open to the parties to seek consent to the disclosure of any information falling outside the scope of the Supreme Court’s order from the originating sources.

[91] I conclude that the Court’s jurisdiction in this matter is limited to that authorized by the Supreme Court’s Order and does not flow directly from the statutory scheme under sections 38 and following of the *Canada Evidence Act*. As directed by the Supreme Court, I have applied the referenced provisions of the Act to determine whether disclosure of the redacted information within

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the records held by the government and produced to the applicant would be injurious to international relations, national defence or national security and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure

[92] The object of the Supreme Court's order was to provide a *Charter* remedy to the applicant for the breach of Canada's international human rights obligations. The remedy was to provide disclosure to him of information that was obtained by Canada and shared with the US authorities for the purpose of his defence to the criminal charges. The Supreme Court's reasons and order do not refer to any broader disclosure or public release of that information. I must interpret and apply the direction given to this Court in light of the open court principle and the *Dagenais/Mentuck* test. Yet my primary concern must be with disclosure to Mr. Khadr for his defence.

[93] In considering the balancing of the public interests in disclosure and non-disclosure of information that would cause injury to Canada's interests, the Court may be inclined to authorize the release of less rather than more if the result is to reveal the information to the world. The interests of the public in access to the information withheld by the government and the interests of the media to publish that information must be taken into account but do not override Mr. Khadr's right to a meaningful *Charter* remedy. Nor is the information the property of the Court to dispose of as it sees fit. Any disclosure order made must fit within the scope of the *Charter* remedy ordered and the section 38 procedure and principles.

[94] The applicant submits that, in the event that the Court were to find that injury to the protected interests had been established, such injury can be entirely prevented by the imposition of

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appropriate conditions. The applicant suggests that these could include disclosure of a summary of the relevant information publicly and unconditionally or, in the alternative, disclosure of all relevant information to the applicant's military defence counsel, authorized to receive classified documents, to be dealt with in accordance with the rules and procedures established by US law with respect to the handling of such information.

[95] The Attorney General's position is that the Court should decline to order the disclosure of information which would cause injury to Canada's national interests. If any of the redacted information is to be disclosed, the respondent requests that the Court exercise its discretion under subsection 38.06 (2) of the Act so as to disclose the information in a form and under conditions that are most likely to limit the injury. I am satisfied that the imposition of such conditions is within the scope of the Supreme Court's direction. Should the balancing of interests favour disclosure to Mr. Khadr and his counsel but not to the general public and the media, that can also be addressed by conditions.

[96] In the result, I will issue a private order that will specify the information to be disclosed to Mr. Khadr with such terms and conditions as are deemed necessary. Subject to those conditions, Mr. Khadr and his counsel will be free to use the information as they see fit for the purposes of his defence, including release to the media for publication. I will not issue an order, as requested by the moving parties, for the general public disclosure of any of the information that is disclosed to Mr. Khadr.

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[97] Mr. Khadr has received orders for his costs in the Federal Court of Appeal and the Supreme Court. In the particular circumstances of this case, and after considering the factors set out in Rule 400 (3) of the *Federal Courts Rules*, and considering in particular the difficulty of representing someone detained in a foreign jurisdiction under military control, I will exercise my discretion to award costs at a level higher than the normal scale.

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ORDER

THIS COURT ORDERS that:

1. The moving parties are granted leave to intervene for the limited purpose of making submissions on public disclosure of the information to be disclosed to the applicant;
2. A private order will be issued to the applicant and the respondent specifying the information to be disclosed to the applicant and his counsel subject to any terms and conditions that the Court deems necessary in accordance with section 38.06 of the *Canada Evidence Act* ;
3. Subject to any specific condition restricting disclosure of the information which may be set out in the private order, the applicant and his counsel may release the information to other members of the public including the media;
4. The applicant shall have his costs to be assessed at the high end of Column IV of Tariff B for two counsel from the beginning of these proceedings on January 24, 2008.

"Richard G. Mosley"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-1-08
STYLE OF CAUSE:	OMAR KHADR AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	***IN CAMERA/EX PARTE*** March 25, 2008, April 2, 3 and 7, 2008 April 17, 2008 May 27, 2008 ***PUBLIC*** June 12, 2008
REASONS FOR ORDER:	MOSLEY J.
DATED:	June 25, 2008

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