Federal Court  Cour fédérale

Date: 20190510

Dockets: IMM-2977-17
IMM-2229-17
IMM-775-17

Citation: 2019 FC 637

Ottawa, Ontario, May 10, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

THE CANADIAN COUNCIL FOR REFUGEES,
AMNESTY INTERNATIONAL,
THE CANADIAN COUNCIL OF CHURCHES,
ABC, DE [BY HER LITIGATION GUARDIAN ABC],
FG [BY HER LITIGATION GUARDIAN ABC]

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP AND THE
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-2229-17

AND BETWEEN:

NEDIRA JEMAL MUSTEFA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-775-17

AND BETWEEN:

MOHAMMAD MAJD MAHER HOMSI
HALA MAHER HOMSI
KARAM MAHER HOMSI
REDA YASSIN AL NAHASS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] The Respondents have filed two Motions pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. By Motion dated April 4, 2019, they seek a 120-day extension of time to comply with the March 7, 2019 Order of this Court (Production Order). By Motion filed

on April 10, 2019, they seek permission to communicate on a restricted basis with their witness prior to the resumption of his cross-examination.

[2] This Order and Reasons pertains to both of these Motions.

Background Relevant to the Motions

[3] The Respondents' witness, Andre Baril, swore an Affidavit on behalf of the Respondents which is relied upon as evidence in the underlying judicial review applications. On December 6, 2018, he was served with a Direction to Attend (DTA) requiring that he attend for cross-examination on his Affidavit and requiring that he produce the documents as requested in the DTA. The cross-examination of Mr. Baril commenced on January 10, 2019, but was adjourned when the Respondents objected to producing documents requested in the DTA on various grounds, including: public interest immunity under section 37 of the *Canada Evidence* Act, RSC 1985, c C-5 [*CEA*]; international relations immunity under section 38 of the *CEA*; and Cabinet confidentiality under section 39 of the *CEA.*

[4] The Applicants filed a Motion compelling production of documents and, on March 7, 2019, the Production Order was issued requiring the Respondents to produce the relevant documents within 30 days of the Order.

[5] Following the issuance of the Production Order, the Respondents state that they have disclosed some documents but are not able to produce the balance of the documents within the requisite 30-day timeframe. The Respondents explain that, given the volume of the disclosure

ordered, they need additional time to review and analyze the information to determine if disclosure is subject to immunities under sections 38 and 39 of the *CEA*. They assert that the process to determine if and how such immunities should be invoked is complex, time-consuming, and not entirely within their control.

[6] In support of this first Motion, the Respondents rely upon the Affidavit of Laura Soskin, a paralegal with the Department of Justice, affirmed on April 4, 2019.

[7] The Respondents also seek direction regarding their future communications with Mr. Baril prior to the resumption of his cross-examination. They claim this is necessary because of the disclosure that was made following the cross-examination of Mr. Baril, as well as the further disclosure that is anticipated. They state that these documents, having not been previously disclosed, were never reviewed with Mr. Baril in advance of his cross-examination.

[8] In support of this second Motion, the Respondents rely upon the Affidavit of Leah MacLean, a legal assistant with the Department of Justice, sworn to on April 9, 2019.

[9] The Applicants object to the relief sought by the Respondents in both Motions. They have not filed evidence in response to these Motions but have provided informal written submissions.

Issues

[10] The issues addressed in these reasons are as follows:

(i) Extension of time to comply with the Production Order

(ii) Communication with the Respondents' witness.

Analysis

Extension of Time to Comply with the Production Order

[11] Rule 8 of the *Rules* gives the Court discretion to extend the time period for a party to comply with an Order. As required, the Respondents filed their Motion for an extension of time prior to the deadline to comply.

[12] The overriding consideration on a request for an extension of time is to ensure that justice is done between the parties (*Alberta v Canada*, 2018 FCA 83 [*Alberta*] at para 45).

[13] Although not determinative, the four relevant considerations when exercising discretion to extend time are outlined in *Canada (Attorney General) v Hennelly*, [1999] 167 FTR 158 (FCA) [*Hennelly*] at paragraph 3, and can be summarized as follows: (1) is there a continuing intention to pursue the application; (2) does the application have some merit; (3) does prejudice arise from the delay; and (4) is there is a reasonable explanation for the delay.

[14] The Respondents can easily satisfy the first two questions as there is a continued intention to pursue litigation of the judicial review applications and they have merit. Therefore, it is the third and fourth *Hennelly* questions that need to be considered.

[15] With respect to delay, the Respondents argue that no prejudice arises from granting an extension and they have explanations for the delay. They also point out that they offered the Applicants an alternative streamlined process of review and production of relevant information, but the Applicants refused to proceed in that manner. In any event, they submit that they will cooperate with the Applicants to reach an agreeable timeline for the next steps in the litigation. Conversely, the Respondents argue that they will suffer the risk of inadvertent or inappropriate disclosure if this Motion is not granted.

[16] The relevant provisions of the *CEA* for the immunities that the Respondents seek to invoke over production are outlined in Annex A.

[17] Section 38 of the *CEA* addresses the protection of information believed to be sensitive or potentially injurious such that it is "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security".

[18] As the disclosure of the documents potentially covered by section 38 has since been completed, the only remaining issue under this first Motion relates to potential immunity under section 39 of the *CEA* for the documents yet to be reviewed and disclosed.

[19] Section 39 of the *CEA* is part of the legislative framework relating to the constitutional tradition of Cabinet confidentiality, which ensures that those making government decisions are free to discuss issues and express views without fear of public scrutiny (*Babcock v Canada (Attorney General)*, 2002 SCC 57 at paras 18).

[20] In her Affidavit, Ms. Soskin outlines the steps that have been taken to produce the documents sought in the DTA. She notes, however, that the review process is complex and presents practical and technical challenges. She states that the review of these documents is digitally conducted by the small National Security Group (NSG) within the Department of Justice.

[21] With respect to the information and documents that may be covered by section 39 of the *CEA*, Ms. Soskin states as follows:

> [14] As regards the documents specified in para 1(a) of the Court's Order (at page 15 of the March 7, 2019 decision), as discussed in my affidavit filed for the Motion for Decisions, the determination of what information falls within the meaning of s 39 of the *CEA* and if so, whether competing public interests favour protection or disclosure, lies with the clerk of the Privy Council.
>
> [17] I have been advised that the Clerk of the Privy Council is required to make the determination whether the information in the documents constitutes a Cabinet confidence, and whether, in the particular circumstances, he should object to its disclosure. This requires a detailed analysis on a document-by-document basis, taking into account the context in which all of the documents were prepared, and involves balancing competing public interests as set out in the caselaw. The Clerk cannot delegate this responsibility.
>
> [20] I have been advised that the current Clerk of the Privy Council will step down on April 18, 2019 and his successor will take on his responsibilities on April 19, 2019. I have been further advised that given this transitional situation during the pre-writ period, Canada requires a reasonable amount of additional time to produce a formal determination under s 39.

[22] The Respondents maintain that it would not be in the interests of justice to rush or forgo any of these privileges in favour of meeting an April 8 deadline, especially because the over-

disclosure of such documents may cause prejudice that cannot later be undone because such documents will have been already produced and made public.

[23] In their letter dated April 15, 2019, regarding the section 39 documents, the Applicants state the following:

> If granted the extension sought, and the Respondents do in fact produce the certificates and/or the documents in August 2019, as they state, it will be nearly 11 months after the latest date on which the Cabinet Confidence issue surfaced. They cannot justify this extraordinary amount of time with reference to the complexity of the process for certifying cabinet confidences. Moreover, granting this request would require a further variation and delay in the hearing of this matter which had originally been set down for January 2019.

[24] The Applicants argue that the Respondents have had sufficient time to comply with the DTA. They point out that Mr. Baril acknowledged under cross-examination in January 2019 that the question of whether the documents sought are subject to Cabinet confidence has been before the Respondents since at least October of 2018 when his Affidavit was being drafted.

[25] The Applicants further argue that the Respondents were served with the DTA requiring production of the documents during the first week of December 2018. The Respondents did not resist production by serving a certificate or a motion at that time as required under the *CEA*, and the Respondents appeared at the cross-examination in January 2019 without either the requested documents or a certification claiming Cabinet confidence.

[26] However, it is clear that the documents and information sought by the Applicants are extensive and potentially sensitive. I am satisfied that the Respondents have been diligent in their

efforts to comply with the Order, and I acknowledge that they do not have control over certain aspects of the production process. I am of the view that any prejudice that may result is outweighed by the overlying consideration that granting this Motion will best ensure that justice is done between the parties (*Alberta* at para 45; see also *Attorney General (Canada) v Larkman*, 2012 FCA 204 at para 79).

[27] It is therefore in the interests of justice that the Respondents be granted an extension to comply. However, I am not convinced that a 120-day extension is justifiable. As such, I am granting the Respondents an extension of 60 days from the date of this Order, however I am not otherwise adjusting the timelines for the underlying judicial review applications.

Communication with the Respondents' Witness

[28] The Respondents also seek permission of the Court to communicate with their witness, Mr. Baril, on a limited and circumscribed basis prior to the resumption of his cross-examination.

[29] The *Rules* do not address communications with a witness whose examination is already underway, or who is "under oath". Accordingly, it is appropriate to take direction from the Law Society of Ontario's *Rules of Professional Conduct*, which states as follows at rule 5.4-2:

> **5.4-2** Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:
>
> […]
>
> (b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the

> witness about the witness's evidence or any issue in the proceeding;
>
> (c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

[30] As noted by the rule, it is "subject to" the direction of the tribunal. Accordingly, discretion is to be exercised.

[31] The Respondents propose to limit their communication with Mr. Baril as follows:

(i) Not discuss any previous questions asked of the witness in cross-examination;

(ii) Not discuss any previous evidence given by the witness in cross-examination;

(iii) Not discuss any of the documents already entered into evidence in the cross-examination;

(iv) Not engage in any "coaching" of the witness as to how he ought to answer any questions that may be asked of him;

(v) Not discuss with the witness any ways in which he may rehabilitate answers already given;

(vi) Not discuss of potential areas of re-examination;

(vii) Focus only on the content of the subsequent disclosure and on how the protections of information therein might restrict what he can and cannot answer in cross-examination.

[32] Since the adjournment of Mr. Baril's cross-examination in January 2019, the Respondents have disclosed additional documentation, both voluntarily and pursuant to the

Production Order, with further production contemplated. According to the Affidavit of Ms. MacLean, these documents and those still to be produced have not been reviewed with Mr. Baril. Therefore, the Respondents argue that in the interest of fairness and efficiency they should be permitted to communicate with Mr. Baril on a limited basis prior to the resumption of his cross-examination. If not, the Respondents posit that, given Mr. Baril's divided cross-examination and the awaited disclosure of further documentation on which he may be questioned, the cross-examination process will be further delayed.

[33] The Applicants do not consent to this request.

[34] Considering the circumstances, the Respondents should be permitted to communicate with Mr. Baril in a circumscribed way prior to the resumption of his cross-examination.

[35] It is important to remember the context within which Mr. Baril is being cross-examined. On the resumption of this cross-examination he will be questioned on documents the majority of which he is not the author and over which he does not have control. Further, Mr. Baril is a representative and not a party with a personal stake in the outcome. To the extent he is giving evidence in a representative capacity and not in his personal capacity, fairness dictates that he should have the opportunity to review and be instructed upon documents disclosed as the process unfolds. This not only affords fairness to the witness but also efficiency in the litigation. This is unlike a situation where witness examination in the context of a hearing with a settled evidentiary record has commenced. Here, disclosure is ongoing and the evidentiary record is not settled.

Costs

[36] The Respondents have agreed to pay the costs of the Applicants Homsi in the amount of $229.00 to reimburse expenses arising from the cancelled cross-examination of Mr. Baril.

ORDER in IMM-2977-17, IMM-2229-17 and IMM-775-17

THIS COURT ORDERS that:

1. The Respondents' Motion for Extension of Time is granted as follows:

   (a) Within 60 days of the date of this Order, the Respondents shall produce the remaining documents and responses previously ordered by this Court in its March 7, 2019 Order.

2. The Respondents' Motion for Direction to seek leave for limited communication with their witness, Mr. Andre Baril, is granted on the following terms:

   (a) Not discuss any previous questions asked of the witness in cross-examination;
   (b) Not discuss any previous evidence given by the witness in cross-examination;
   (c) Not discuss any of the documents already entered into evidence in the cross-examination;
   (d) Not engage in any "coaching" of the witness as to how he ought to answer any questions that may be asked of him;
   (e) Not discuss with the witness any ways in which he may rehabilitate answers already given;
   (f) Not discuss of potential areas of re-examination;
   (g) Focus only on the content of the subsequent disclosure and on how the protections of information therein might restrict what he can and cannot answer in cross-examination.

3. The Respondents shall pay costs in the amount of $229.00 to the Applicants Homsi forthwith.

"Ann Marie McDonald"
Judge

Annex A

Definitions

38 The following definitions apply in this section and in sections 38.01 to 38.15.

judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.

participant means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

potentially injurious information means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information.

prosecutor means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the National Defence Act or an individual who acts as a prosecutor in a proceeding.

sensitive information means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

Notice to Attorney General of Canada

- **38.01 (1)** Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

- **During a proceeding**

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

- **Notice of disclosure from official**

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

- **During a proceeding**

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

- **Military proceedings**

(5) In the case of a proceeding under Part III of the National Defence Act, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

- **Exception**

(6) This section does not apply when

  - **(a)** the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;
  - **(b)** the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;
  - **(c)** disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or
  - **(d)** the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

- **Exception**

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

- **Schedule**

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

Disclosure prohibited

- **38.02 (1)** Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding
    - **(a)** information about which notice is given under any of subsections 38.01(1) to (4);
    - **(b)** the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);
    - **(c)** the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3)in connection with the application is instituted; or
    - **(d)** the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).
- **Entities**

  (1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.
- **Exceptions**

  (2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if
    - **(a)** the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or
    - **(b)** a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

Authorization by Attorney General of Canada

- **38.03 (1)** The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).
- **Military proceedings**

(2) In the case of a proceeding under Part III of the National Defence Act, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

- **Notice**

  (3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

Disclosure agreement

- **38.031 (1)** The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.
- **No application to Federal Court**

  (2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

Application to Federal Court — Attorney General of Canada

- **38.04 (1)** The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).
- **Application to Federal Court — general**

  (2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

  - **(a)** the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

- **(b)** a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and
- **(c)** a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

- **Notice to Attorney General of Canada**

  (3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

- **Court records**

  (4) Subject to paragraph (5)(a.1), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to section 38.12, take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

- **Procedure**

  (5) As soon as the Federal Court is seized of an application under this section, the judge

  - **(a)** shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, with respect to making the application public;
  - **(**a.1) shall, if he or she decides that the application should be made public, make an order to that effect;
  - **(**a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;
  - **(b)** shall decide whether it is necessary to hold any hearing of the matter;
  - **(c)** if he or she decides that a hearing should be held, shall
    - **(i)** determine who should be given notice of the hearing,
    - **(ii)** order the Attorney General of Canada to notify those persons, and
    - **(iii)** determine the content and form of the notice; and

- **(d)** if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

- **Disclosure agreement**

  (6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

  - **(a)** the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and
  - **(b)** if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

- **Termination of Court consideration, hearing, review or appeal**

  (7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

Disclosure order

- **38.06 (1)** Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

- **Disclosure — conditions**

  (2) If the judge concludes that the disclosure of the information or facts 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 or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

- **Order confirming prohibition**

  (3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

- **When determination takes effect**

  (3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

- **Evidence**

  (3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

- **Introduction into evidence**

  (4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

- **Relevant factors**

  (5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

Automatic review

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

Appeal to Federal Court of Appeal

- **38.09 (1)** An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.
- **Limitation period for appeal**

  (2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

[…]

Objection relating to a confidence of the Queen's Privy Council

- **39 (1)** Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.
- **Definition**

  (2) For the purpose of subsection (1), **a confidence of the Queen's Privy Council for Canada** includes, without restricting the generality thereof, information contained in

  - **(a)** a memorandum the purpose of which is to present proposals or recommendations to Council;
  - **(b)** a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
  - **(c)** an agendum of Council or a record recording deliberations or decisions of Council;
  - **(d)** a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
  - **(e)** a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

- **(f)** draft legislation.

- **Definition of Council**

  (3) For the purposes of subsection (2), **Council** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

- **Exception**

  (4) Subsection (1) does not apply in respect of

  - **(a)** a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or
  - **(b)** a discussion paper described in paragraph (2)(b)
    - **(i)** if the decisions to which the discussion paper relates have been made public, or
    - **(ii)** where the decisions have not been made public, if four years have passed since the decisions were made.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2977-17
	THE CANADIAN COUNCIL FOR REFUGEES ET AL v MIRC ET AL
	IMM-2229-17
	NEDIRA JEMAL MUSTEFA v MIRC ET AL
	IMM-775-17
	MOHAMMAD MAJD MAHER HOMSI ET AL v MIRC ET AL

MOTIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO,
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCDONALD J.
DATED:	MAY 10, 2019

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