Federal Court Cour fédérale

Date: 20190830

Docket: DES-2-17
DES-4-19

Citation: 2019 FC 1122

Ottawa, Ontario, August 30, 2019

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

QING (QUENTIN) HUANG

Applicant

and

THE ATORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

THE ATORNEY GENERAL OF CANADA

Applicant

and

QING (QUENTIN) HUANG
AND THE DIRECTOR OF PUBLIC
PROSECUTIONS

Respondents

PUBLIC JUDGMENT AND REASONS

I. Introduction

[1] This Classified Judgment and these Reasons concern three related matters. In the first proceeding under Court file DES-2-17, the Applicant, Mr. Huang, sought disclosure of information that had been withheld from him on national security and international relations grounds for his defence in a criminal trial. The Attorney General of Canada [Attorney General] opposed that application and sought an Order from the Court confirming the non-disclosure of the same information.

[2] Mr. Huang's application was granted in part, and the judgment was appealed by the Attorney General and cross-appealed by the Applicant. With the exception of one issue that was returned to this Court for reconsideration, the Attorney General's appeal and the cross-appeal were dismissed. Leave to appeal to the Supreme Court of Canada was denied.

[3] In the second proceeding under Court file DES-4-19, the Attorney General has brought a fresh application to protect information that was previously ordered to be disclosed. DES-2-17 and DES-4-19 are both before this Court under section 38.04(2)(c) of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA].

[4] In addition, the Attorney General seeks to have this Court vary, under Rule 399(2)(a) of the *Federal Courts Rules*, SOR/98-106, its previous order issued on July 7, 2017 in DES-2-17, because of matters that arose subsequent to the making of the order.

[5] As the three matters are closely related, I have chosen to issue one decision. For the reasons that follow, I dismiss the motion to vary my prior decision in DES-2-17, address the reconsideration ordered by the Federal Court of Appeal in the same file and grant in part the application in DES-4-19.

II. **Background**

[6] Mr. Huang is before the Ontario Superior Court of Justice (ONSC) charged with four criminal offences under the *Security of Information Act*, RSC 1985, c O-5. The charges stem from the interception of telephone calls the Applicant allegedly made to the Embassy of the Peoples' Republic of China in Ottawa by the Canadian Security Intelligence Service (CSIS, or the Service) under the authority of a warrant issued by this Court. CSIS provided transcripts and recordings of the intercepts to the Royal Canadian Mounted Police (RCMP) pursuant to section 19 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*]. A subsequent RCMP investigation, including a brief undercover operation, resulted in the Applicant's arrest and prosecution.

[7] For the proceedings before the ONSC, the Public Prosecution Service of Canada (PPSC) disclosed evidence to Mr. Huang in accordance with its obligations under the standard set by *R v Stinchcombe*, [1991] 3 SCR 326 at 336–338, 130 NR 277 [*Stinchcombe*]. Those obligations are to disclose all information, inculpatory or exculpatory, except evidence that is clearly irrelevant, beyond the control of the Crown or privileged. As part of this disclosure, PPSC produced redacted copies of an affidavit sworn by a CSIS officer on March 4, 2013 (the 2013 Affidavit)

and a warrant issued by the Federal Court on March 7, 2013 (the 2013 Warrant). PPSC also produced the transcripts of the telephone calls provided to the RCMP.

[8] PPSC declined to provide unredacted copies of the 2013 Affidavit and the 2013 Warrant on the grounds that to do so would result in the disclosure of "sensitive information" or "potentially injurious information," as defined in CEA section 38. In withholding that information, PPSC did not give notice to the Attorney General under CEA subsection 38.01(1) as PPSC initially understood that the Applicant did not intend to challenge the intercepted communications' admissibility.

[9] In the Fall of 2016, after a change in Applicant's counsel, the Applicant advised PPSC that he was considering bringing an application to challenge the 2013 Warrant to exclude the intercepted communications in accordance with the principles and procedures laid out in *R v Garofoli*, [1990] 2 SCR 1421, 116 NR 241 [*Garofoli*].

[10] On a *Garofoli* application, the question is whether, based on the record before the authorizing court, the warrant could have been granted. Since electronic intercepts or "wiretaps" constitute a search or seizure, the issuance of the warrant must conform to the minimum constitutional requirements demanded by section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] Generally speaking, there are two ways to challenge an electronic interception authorization. On a facial challenge, the applicant contends that the record before the authorizing judge was insufficient to satisfy the statutory preconditions; on a sub-facial challenge, the applicant argues that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued: *World Bank Group v Wallace*, 2016 SCC 15 at paras 120–121. In either case, the challenges are predicated upon the disclosure of the affidavit and supporting materials placed before the issuing justice, with the redaction of sensitive information such as the identities of informants: *R v Bennett*, 2017 ONCA 780 at para 31. This is to enable the accused to make full answer and defence to the charges against him: *Garofoli*, above at 1443. The use of the disclosed information is limited to that purpose and can be made subject to conditions, including that the information be returned to the Crown: *R v Kim*, 2004 ABQB 157 at para 17.

[12] Informed of the change in the defence approach, PPSC then notified the Attorney General of the possible disclosure of the redacted information. The Attorney General prohibited disclosure of the redacted information, as authorized by the CEA. In the usual course of events, the Attorney General would then have applied to the Federal Court for an Order confirming the prohibition under CEA section 38.04(2)(a). However, that was pre-empted by Mr. Huang's application, filed on February 27, 2017, seeking disclosure of the redacted content of the 2013 Affidavit and the 2013 Warrant in what became Court file DES-2-17.

[13] After public and closed *ex parte* hearings, I issued public and private reasons: *Huang v Canada (Attorney General)*, 2017 FC 662. In my private reasons, I accepted most of the

Attorney General's claims for the protection of the redacted information as reasonable. However, some of the Attorney General's claims, in my view, overreached. On that basis, I ordered disclosure of some of the information from the 2013 Affidavit. I also ordered disclosure of some information in the form of summaries.

[14] The Attorney General appealed to the Federal Court of Appeal. The Applicant cross-appealed the judgment. After public and *ex parte* hearings, the Federal Court of Appeal granted the Attorney General's appeal in part and dismissed the Applicant's cross-appeal: *Canada (Attorney General) v Huang*, 2018 FCA 109 (*Huang, FCA 2018*).

[15] The Court of Appeal returned the matter to the Federal Court to reassess a claim of privilege under CEA section 38 [redacted] The Court of Appeal otherwise upheld the Federal Court's determinations with respect to the information to be disclosed and confirmed the summaries, except for one sentence. This is explained in the Court of Appeal's classified Private Reasons for Judgment.

[16] The Attorney General sought leave to appeal to the Supreme Court of Canada from the Federal Court of Appeal's judgment [redacted] The Supreme Court refused leave on March 14, 2019: 38264 (14 March 2019). The following day, a fresh written notice of the risk of disclosure was given to the Attorney General.

[17] On March 27, 2019, the Attorney General filed a classified motion before the Federal Court seeking to have the Court reconsider its original private judgment. The motion contends

that new matters have arisen since the Federal Court's judgment that warrant setting aside or varying the private judgment under Rule 399(2)(a). This and the reassessment ordered by the Court of Appeal are the matters being determined in docket DES-2-17.

[18] On March 29, 2019 the Attorney General filed a new CEA section 38 application relating to certain information that the Federal Court decision ordered to be disclosed. This is the matter being determined in docket DES-4-19.

[19] Mr. Huang was served with an amended Notice of Application under CEA section 38 on April 3, 2019. Counsel for Mr. Huang was informed of the classified motion by letter from counsel for the Attorney General on April 11, 2019.

[20] The Attorney General filed the classified affidavits of two public officials in support of the reassessment, the motion for reconsideration and the fresh section 38 application. Additional classified affidavits were filed to introduce documents. Following the disposition of some preliminary matters, reviewed below, the Court heard the *viva voce* evidence of the two affiants on May 27, 2019 and the oral submissions of counsel for the Attorney General and the *amicus curiae* on May 28, 2019. The *amicus curiae* and the Attorney General also submitted written representations.

[21] The Court also heard Mr. Huang's counsel's oral representations at an *in camera* and *ex parte* hearing on May 3, 2019. This hearing provided the Court an opportunity to receive information from Mr. Huang's counsel relating to the proceedings before the ONSC and

representations on both the motion to vary in DES-2-17 and the fresh CEA section 38 application in DES-4-19. Mr. Huang's counsel did not have access to the Federal Court's or the Federal Court of Appeal's private judgments or to the classified material filed on the present motion and application. Thus their representations, while helpful in informing the Court about matters relating to Mr. Huang's defence, were necessarily limited in scope and not informed by knowledge of the redacted information at issue in these proceedings.

[22] In filing the application in DES-4-19, the Attorney General proposed that the DPP should be named as a Respondent. The Attorney General informed the Court that this was because the DPP could be construed to be a person "directly affected by the order sought in the application." Such persons are required to be named as respondents by Rule 303(1)(a). This was the first CEA section 38 matter in which this has been done to my knowledge, although PPSC counsel have been invited and permitted to sit in on public case management conferences relating to other designated proceedings arising from prosecutions of which they have carriage.

[23] In this matter, PPSC counsel participated in a case management conference and submitted a Memorandum of Law pertaining to the *Garofoli* principles and procedure. PPSC counsel did not participate in any other manner and provided no oral or written representations regarding the motion and applications. However, one of the classified affidavits submitted on behalf of the Attorney General contains references to information the affiant received from PPSC counsel pertaining to the underlying criminal proceedings.

[24] There is some advantage in having PPSC counsel participate in the case management of a CEA section 38 matter relating to a criminal prosecution as they can assist the Court in understanding the issues before the criminal trial court and status of those proceedings. They may also play a role in providing information at the behest of this Court to the trial court. In this instance, I did not consider it necessary to invite submissions from the parties regarding the participation of the DPP, limited as it was. On another occasion, it may be necessary to determine whether the DPP, who exercises the prosecution function as a statutory delegate of the Attorney General, may properly be considered a "person directly affected" under Rule 303. This case should not be taken as authority for that proposition as it was neither argued nor decided.

III. **Preliminary matters**

A. *Amicus curiae*

[25] As a preliminary matter, it was necessary to determine whether to continue the appointment of the *amicus curiae* in both of these proceedings and, if so, to outline the scope of that role. The *amicus*, Mr. Anil Kapoor, was originally appointed to DES-2-17 by order of this Court dated March 22, 2017. His appointment was "to assist the Court in performing its statutory obligations under [CEA section 38]." As the proceedings continue to concern CEA section 38 and DES-2-17 remained to be completed following the Federal Court of Appeal's judgment, the Court was satisfied that the *amicus*' appointment was still valid. Mr. Kapoor had also served as *amicus* in the Court of Appeal proceedings and had been appointed to assist the Supreme Court of Canada should it have granted the leave application.

[26] I issued an Order on April 15, 2019, appointing Mr. Anil Kapoor as *amicus* for the purpose of the new section 38 application in DES-4-19. At the Parties' request, and for the sake of clarity, I invited them to make submissions on the appointment's terms and conditions.

[27] The Applicant sought to have the *amicus*'s role in these proceedings expanded so that the *amicus* would represent the Applicant's interests. In essence, the Applicant asked this Court to designate the *amicus* as his *in camera*, *ex parte* counsel. This was required, the Applicant argued, because he was being excluded from part of his criminal trial by way of these *ex parte* proceedings.

[28] The Attorney General opposed the Applicant's request. According to the Respondent, the *amicus* is, and must remain, a friend and aide of the Court. This would not be possible, the Respondent submitted, if the *amicus* had obligations to both the Court and the Applicant.

[29] I heard the Parties in regards to these submissions on May 7, 2019. At the conclusion of the hearing, I asked the Parties to submit draft wording they wanted included in an Order clarifying the *amicus*'s appointment terms. I received submissions from both Parties. Despite originally indicating that he would not make submissions on the terms of his appointment, the *amicus* contacted the Court after reviewing these submissions to express concerns with one of the proposed terms of appointment, which would have prohibited any communication with counsel for the Applicant, even on matters unrelated to these proceedings. I agreed that was unnecessarily restrictive.

[30] After considering all submissions, and after deliberating on the matter, I issued a further Order on May 24, 2019 outlining the *amicus*'s terms of appointment for the *ex parte*, *in camera* hearing on May 27 and 28, 2019. In this Order, I provided the *amicus* broad authority to represent the interests of justice and make arguments on the Applicant's behalf. I did not, however, grant the Order in the words specifically requested by the Applicant.

[31] The *amicus* proceeded per the terms of his appointment. I would note, as the Court of Appeal did at paragraph 37 of its public reasons, that despite the Applicant's concerns regarding the wording of the *amicus*'s terms, there is no doubt that *amicus* served the interests of justice in the proceedings before this Court. The *amicus* fulfilled his role in a way that ensured the Applicant's interests were properly and thoroughly considered in his absence and that of his counsel.

B. *Jurisdiction*

[32] As a further preliminary matter, this Court must also determine whether it has the jurisdiction to reconsider matters that the Federal Court of Appeal has upheld. At first impression, that is not obvious.

[33] As noted above, in its June 1, 2018 judgment, the Court of Appeal upheld the Federal Court's determinations with respect to the information to be disclosed, with the exception of one sentence of a summary related to the reconsideration direction. The Court of Appeal granted the appeal for the limited purpose of returning the file to the Designated Judge to assess pursuant to section 38 of the *CEA* and on the basis of further submissions and new evidence, whether

[redacted] could be disclosed to Mr. Huang. In addition to that assessment, the Attorney General now asks this Court to reconsider provisions of its order that were upheld by the Court of Appeal.

[34] The Attorney General's position is that Rule 399(2)(a) provides the Court with the authority to vary its July 7, 2017 judgment, notwithstanding the subsequent decision of the Federal Court of Appeal upholding most of that order's terms. At first impression, the *amicus* was of the view that the Federal Court was *functus officio* on matters that had subsequently been decided by the Federal Court of Appeal. Instead, the Attorney General's motion for reconsideration would best be brought before the Federal Court of Appeal.

[35] The Attorney General drew the Court's attention to the Federal Court of Appeal's decision in *AstraZeneca Canada Inc v Apotex*, 2016 FCA 194 [*AstraZeneca*]. In that case, which arose from a patent infringement action, the trial judge, relying on *Grenier v Canada*, 2008 FCA 63 [*Grenier*], dismissed a motion to vary a judgment on the ground that when a judgment had been affirmed by the Court of Appeal, it was for that Court to vary the judgment: *Apotex Inc v AstraZeneca Canada Inc*, 2015 FC 799 at para 16.

[36] On appeal, the Court of Appeal concluded that where a judgment has been upheld, any subsequent proceeding to vary the judgment under Rule 399 on newly discovered information should be brought before the original decision maker: *AstraZeneca*, at paras 17–20. *Grenier,* the Court of Appeal clarified, stands for the proposition that a trial court cannot correct a judgment it has rendered if it has been the subject of a judgment by the Court of Appeal. In *Grenier,* the

Court was not required to consider the proper forum in which to bring a motion under Rule 399 and did not decide that issue.

[37] This interpretation is consistent, the Court of Appeal noted at paragraph 21, with the position taken by the Ontario Courts in applying Rule 59.06(2) of the *Rules of Civil Procedure,* RRO 1990, Reg 194: *Mehedi v 2057161 Ontario Inc (Job Success)*, 2014 ONCA 604; *Aristocrat v Aristocrat* (2004), 73 OR (3d) 275, 190 OAC 327 (CA).

[38] The question under Rule 399 is not whether the judgment ought to be set aside or varied because of an error in the judgment itself but because of matters discovered after the judgment was made. In such circumstances, any subsequent proceeding to set aside the judgment is properly brought in the trial court: *AstraZeneca* at para 22, citing *Royal Trust Company v EM Jones* (1961), [1962] SCR 132, 31 DLR (2d) 292.

[39] In the result, I accept that, as the original decision maker, I am better positioned to determine whether or not to vary my decision and have the authority to do so under Rule 399.

[40] I will now proceed to consider the motion to vary my judgment in DES-2-17, the reassessment and the fresh application under CEA section 38 in DES-4-19.

IV. **Motion to Vary**

[41] Rule 399(2)(a) of the *Federal Courts Rules* reads as follows:

Setting aside or variance	Annulation
399 (2) On motion, the Court may set aside or vary an order	**399 (2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order…	**a)** des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue…

[42] The Attorney General contends that paragraphs 2 and 3 of the Court's Private Judgment of July 7, 2017 are ambiguous. Paragraph 2 authorizes the disclosure of information set out in an attached Schedule "A" to the Applicant, Mr. Huang, his counsel and the ONSC. Paragraph 3 requires the Attorney General of Canada to provide fresh copies of the 2013 Affidavit to the Applicant's counsel and the DPP, with the redactions lifted over the information ordered to be disclosed. Applicant's Counsel and the DPP were authorized to share the revised copies of the 2013 Affidavit with the ONSC at their discretion. Mr. Huang is not mentioned specifically in paragraph 3.

[43] The Attorney General submits that one interpretation of the Private Judgment is that they are not required to disclose the information to Mr. Huang, but only to his counsel and the DPP. Another interpretation, the Attorney General submits, is that the requirement to disclose includes disclosure to Mr. Huang. It is that which the Attorney General seeks to prevent on this motion.

[44] The Attorney General contends that new matters that have arisen subsequent to the Private Judgment would allow the Court to vary or set aside those paragraphs in order to make it

clear that the information contained in Schedule “A” and the fresh copies of the 2013 Affidavit would not be provided to Mr. Huang. Disclosure to his counsel would be conditional on their agreement not to share the information with Mr. Huang.

[45] As the author, I can confidently assert that there is nothing in the 58 paragraphs of reasons that accompany the Private Judgment, or the 83 paragraphs of Public Reasons also issued in 2017, to support the proposition that it was the Court’s intent to limit the disclosure ordered to Mr. Huang’s counsel and to bar Mr. Huang from receiving it. Furthermore, in my view, there is no indication in the Federal Court of Appeal’s Public or Private Reasons that this was raised as a consideration before that Court. As I read those reasons, the Attorney General sought on the appeal to prevent disclosure to both Mr. Huang and his counsel, as well as to any other member of the public.

[46] Notwithstanding the grounds of cross-appeal raised by the Applicant, this Court proceeded on the assumption in 2017, as it does now, that the PPSC was bound by the principles established by the Supreme Court of Canada in *Stinchcombe*, above, which required disclosure to the accused of any relevant evidence in the Crown’s possession. As indicated at paragraphs 53–60 of my Public Reasons, I took into account the potential relevance of the content of the 2013 Affidavit and Warrant to the criminal proceedings. I concluded that much of the redacted information in the two documents would not be relevant to Mr. Huang’s defence. With regard to that information, the application for disclosure failed on the first branch of the *Ribic* test: *Canada (Attorney General) v Ribic*, 2003 FCA 246. However, I concluded, some of the information would be relevant to Mr. Huang’s challenge to the validity of the 2013 Warrant.

[47] I then proceeded to consider whether disclosure of information I found to be relevant would be injurious to the three protected national interests – international relations, national defence and national security – under the second branch of *Ribic*. If I considered the information to be non-injurious, I ordered that it be disclosed. If injurious, I considered whether it should be protected on the ground that the public interest in preventing the injury would outweigh the public interest in disclosure, including Mr. Huang's *Stinchcombe* disclosure rights, as required by the third stage of *Ribic*. The result of this analysis was set out in my Private Judgment including the attached Schedule "A".

[48] The specific relief sought by the Attorney General on this motion is to: (a) set aside or vary paragraphs 2, 3 and 9 of the Private Judgment and (b) set aside or vary the Court's determinations set out in Schedule "A" to the Private Judgment

[49] To grant a motion to set aside or vary an order under Rule 399(2)(a) by reason of a matter that arose or was discovered subsequent to the making of the order, three conditions must be fulfilled: (1) the new information must be a "matter" within the Rule's meaning; (2) the "matter" must not have been discoverable before the making of the Order; and (3) the "matter" must have a determining influence on the decision: *Ayangma v Canada*, 2003 FCA 382 at para 3.

[50] The word "matter" has broad import: *Procter & Gamble Pharmaceuticals Canada Inc v Canada (Minister of Health)*, 2003 FC 911 at para 16. It includes "an element of the relief sought as opposed to an argument raised before the Court": *Haque v Canada (Minister of Citizenship*

and Immigration) (2000), 188 FTR 154 at para 5, 98 ACWS (3d) 1081 (FC). The "matter" must be relevant to the facts giving rise to the original order: *Procter & Gamble*, above, at para 16. Jurisprudence, whether existing prior to or after the decision at issue, does not constitute a new matter: *Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 237 at paras 12–17.

[51] The authority to reconsider is an exceptional power: *Saywack v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 189, 27 DLR (4th) 617 (FCA); *Watson v Canada (Royal Canadian Mounted Police)*, 2002 FCT 610 (FC). Rule 399 cannot be used as a vehicle for revisiting judgments every time a change in the facts occurs: *Zeneca Pharma Inc v Canada (Minister of National Health & Welfare)* (2000), 196 DLR (4th) 299, 10 CPR (4th) 146 (FCA). The policy of the law strongly favours finality of court orders to ensure the judicial process' integrity: *Nu-Pharm Inc v Canada (Attorney General)* (1999), [2000] 1 FC 463, 179 DLR (4th) 531 (CA).

[52] The Attorney General submits that there are two new matters that have arisen since the issuance of the July 2017 Private Judgment that relate to the facts considered at that time. One is [redacted] The second new matter is the order issued by Mr. Justice Dambrot of the ONSC on March 16, 2018 sealing the court files and excluding the public from the hearing of the *Garofoli* motion filed by Mr. Huang to exclude the intercept evidence at trial: *R v Huang*, 2018 ONSC 888.

[53] In paragraphs 19 and 20 of my Private Judgment and Reasons, I addressed [redacted] I concluded at paragraph 20 that:

> [redacted]

[54] Disclosure [redacted] was argued before the Federal Court of Appeal. The Court of Appeal dealt with this question at paragraphs 53 to 55 of its Private Reasons for Judgment issued on June 1, 2018. The Court agreed with the conclusion that I had reached [redacted]

[55] The evidence and submissions tendered by the Attorney General on the motion to vary do not convince me that [redacted] is a "new matter" that would have had a determining effect on the decision that I made in 2017.

[56] At the initial hearing in DES-2-17, [redacted] by a witness representing Global Affairs Canada (GAC). That witness, [redacted] affirmed in his affidavit that [redacted]

[REDACTED] was referring to the release of additional information beyond that pertaining to the fact of the interception of telephone communications at the PRC Embassy that had already been disclosed, [REDACTED]

[57] [REDACTED]

[58] On this motion, the Attorney General tendered the affidavit evidence and testimony of [REDACTED]

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[65] Chief in CSIS'S Counter-Intelligence Division, provided a classified affidavit and testified, as he had before me in 2017. He also provided affidavit evidence and was cross-examined for the purposes of the appeal to the Federal Court of Appeal.

[66] As described in the evidence before me in 2017, so as to constitute a new matter within the meaning of Rule 399(2)(a). Nor am I convinced that it would have had a determining effect on my decision in 2017.

[67] This Court is being asked to alter its prior decision and to exercise its jurisdiction to protect information from disclosure I find that

argument difficult to accept as justification for the Court to change a judgment on a motion to vary.

[68] Mr. Justice Dambrot's order was not discoverable at the time I issued the Private Judgment as it had not occurred, and I accept that it would have been relevant to the facts considered at that time had I known of it. The question is whether it would have had a determining influence on my decision.

[69] The application before Mr. Justice Dambrot was brought by the PPSC and was unopposed by Mr. Huang. Notice of the application was given to the media, in accordance with the ONSC's protocol relating to the open court principle; no one appeared or expressed any objection.

[70] Section 486 of the *Criminal Code*, RSC 1985, c C-46 requires that any proceedings against an accused be held in open court. But the presiding judge or justice may, on application of the prosecutor or a witness, or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings if the judge or justice is of the opinion that such an order is, among other things, "necessary to prevent injury to international relations or national defence or national security."

[71] In support of the motion, Justice Dambrot had before him [redacted] affidavit from the proceedings before this court and the assistance of the same *amicus.* Having regard to the significant facts that the accused was not opposed to the order, that the media had expressed no

interest in the matter and could not, in any event, publish information about either the disclosure motion or the exclusion motion until after the jury empanelled to hear the case had retired to consider its verdict, Justice Dambrot issued an order:

> 1. Excluding the public from the hearing of Mr. Huang's application for disclosure;
>
> 2. Excluding the public from the hearing of Mr. Huang's application to exclude evidence, and
>
> 3. Permanently sealing the court files in relation to the applications subject to the order being set aside by the judge hearing the application to exclude evidence, the trial judge or any other judge at the conclusion of the proceedings on the indictment.

[72] Justice Dambrot stated that it was understood by the Parties that Mr. Huang's trial would be held in public and it was on that basis that Mr. Huang did not oppose the making of the order. Justice Dambrot ordered that answers be provided to questions relating to the 2013 Warrant's execution. The questions asked were:

[73] A communication from one of the PPSC counsel with carriage of the prosecution, introduced by the affidavit of a paralegal in this proceeding, indicates that in the event that the Attorney General's application is successful, the PPSC would bring a motion in the ONSC seeking to vary Justice Dambrot's March 16, 2018 Order as follows:

- that a new version of the 2013 affidavit would be disclosed by the DPP to Mr. Huang's defence counsel, upon counsel's undertaking not to share any of the information contained in the 2013 affidavit with his client, and
- the manner in which this would be achieved would be left with the Superior Court judge seized of the matter to decide.

[74] As noted above, my Private Judgment and Reasons authorized the disclosure of information in the 2013 Affidavit to Mr. Huang and the PPSC. I specified that a fresh version of the affidavit with certain redactions lifted should be provided to counsel with the intent that it could be shared with the ONSC. I was aware at the time that Mr. Huang's application to exclude the evidence obtained under the 2013 Warrant was pending before the ONSC.

[75] Had I known that an application would be made to the ONSC for an order to exclude the public from the hearing to exclude evidence and to seal the documents submitted to the Court, I would have taken that into consideration. It is not clear to me, however, that it would have been determinative of the issues before me in the way that the Attorney General proposes. It would have lent support to my conclusion that the version of the 2013 Affidavit with redactions lifted over the information ordered disclosed could be shared with the accused, the PPSC and the trial judge. And as stated in paragraph 2 of my Private Judgment, I authorized disclosure of information <u>to the accused</u> (emphasis added) and his counsel. This reflected my view of the Crown's disclosure obligations and the ethical responsibilities of counsel to their clients.

[76] For these reasons, I am not satisfied that the Attorney General has made out a case for variance of my 2017 judgment under Rule 399(2)(a).

V. Reconsideration of DES-2-17 and the Fresh Application in DES-4-19

[77] The Attorney General seeks to protect the following passages in the 2013 Affidavit:

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[78] These phrases or sentences are highlighted in a see through version of the 2013 Affidavit provided by the Attorney General. A different version of the 2013 Affidavit was also provided that shows, highlighted , the information which was ordered disclosed and was also the subject of the appeal to the Federal Court of Appeal.

[79] The Attorney General's present application goes beyond the scope of the direction in *Huang, FCA 2018*, asking me to reconsider my decision regarding disclosure

were the subject of CEA section 38 claims in the 2017 proceedings

[80] The Court declined to uphold the CEA section 38 claims as explained at paragraphs 19 and 20 of the Private Reasons and in Schedule “A” to the Judgment. I concluded that no injury would result from their disclosure. That conclusion was upheld by the Court of Appeal. At the hearing of the present proceeding, counsel for the Attorney General conceded that, given the no injury finding, there was less of a case for redacting on the motion to vary.

[81] However, counsel for the Attorney General also argued that disclosure would render futile the Court of Appeal’s decision with respect to Alternatively, it was argued, the Attorney General should be permitted to

[82] There is a considerable difference between There is nothing in the

of the 2013 Affidavit that is inconsistent with the Court of Appeal's direction. And it is difficult to see how it could support

[83] Having considered the matter with the benefit of the additional evidence and submissions, I accept that For that reason, I am prepared to accept that there may be a valid basis for and that they should be included in the spirit if not the letter of the Court of Appeal's reassessment direction.

[84] With respect to other information ordered disclosed, I concluded in 2017 that if there was injury, it would be minimal and, on balance, the public interest in disclosure outweighed that of non-disclosure. Those conclusions were also upheld by the Court of Appeal.

[85] With regard to that information, the Attorney General seeks to have me vary my order to limit disclosure to counsel for Mr. Huang and not to Mr. Huang.

[86] The Court of Appeal also confirmed the summaries set out in Schedule "A" except for the last sentence That sentence reads as follows:

[87] The Federal Court of Appeal directed me to assess, on the basis of further submissions, whether should be protected under CEA section 38.

[88] My Private Judgment required the Attorney General to disclose that My reasons for this were set out in paragraphs 28–59 of the Private Judgment. No argument was made before me that I should protect Rather, the Attorney General contended that I disagreed with that interpretation and ordered that be disclosed to Mr. Huang.

[89] The Federal Court of Appeal stated the following, at paragraph 32 of its Private Reasons, regarding whether the Attorney General could assert a claim under CEA section 38 to protect the documents at issue:

[90] The Federal Court of Appeal accepted that the Federal Court had the jurisdiction to make an Order requiring disclosure The assessment of whether disclosure "is better left to the Designated Judge after a full debate has taken place and a full evidentiary record has been put before him": *Huang, FCA 2018* at para 36.

[91] In the particular circumstances of the case, it was "in the best interests of justice to return the file to the Designated Judge so as to ensure that a decision is made with full confidence that every aspect of the question has been canvassed": *Huang, FCA 2018* at para 37.

[92] The Attorney General now contends that disclosure would cause injury to both national security and international relations This alters the balance, the Attorney General argues, from that which was before me in 2017. should not be disclosed at all, including to counsel for Mr. Huang for the purpose of the *Garofoli* application. Among other reasons provided, the Attorney General argued that

[93] This is an attempt by the Attorney General of Canada to withhold disclosure from a person accused of serious criminal offences in a prosecution undertaken by the DPP, a statutory delegate of the Attorney General. I am instructed by the Federal Court of Appeal to consider whether this is the hopefully rare case in which it may be necessary to apply CEA section 38 to protect such information on the ground that disclosure would injure national security, national defence or international relations. The evidence of that is as described above – the classified affidavits and testimony of The Attorney General argues that, in those circumstances, the balance of public interests now weighs in favour of non-disclosure.

[94] In response to the concern that withholding the information will deny Mr. Huang the right to make full answer and defence to the charges against him, the Attorney General's answer is that it remains open to the trial judge to craft a remedy for Mr. Huang under CEA section 38.14. That is correct so long as it is possible for the trial judge to ascertain how the accused has been denied a fair trial. In this instance, the position taken by the Attorney General would not permit Mr. Huang to argue that he has been denied the right to effectively challenge the 2013

Warrant under which the principal evidence against him was obtained because he is unable to question whether the information provided to the authorizing judge was accurate, as contemplated under *Garofoli.* This is not to suggest that he would be successful in such an argument but that it would be foreclosed from the outset.

[95] It is trite to observe that the right to disclosure is not absolute but in this instance, if I accept the Attorney General's position, Mr. Huang and his counsel would receive no information about most of the content of the 2013 Affidavit

[96] The *amicus* took the position at the outset of his argument that both the information that is the subject of the motion to vary and the information that is the subject of the new CEA section 38 application can be released either because it is not injurious or, if injurious, because balancing favours production. He then advised that the Court could impose terms and conditions on the release and use of the information solely for the purpose of the *Garofoli* application.

[97] I found in my 2017 Private and Public Reasons that the bulk of this information is not relevant to the merits of the trial proper, as it did not involve Mr. Huang. He was not a target of the warrant. The collection of his telephone calls was incidental to the authorized interception of the PRC Embassy telephone And it was entirely

fortuitous that the Service stumbled across the evidence passed on to the RCMP. But for the fact of the manner in which it was obtained, the information in the 2013 Affidavit would have no bearing on the trial.

[98] But, as both counsel for Mr. Huang and the *amicus* argued, the information in the 2013 Affidavit is relevant to the *Charter* section 8 challenge to the 2013 Warrant that Mr. Huang is entitled to bring in an effort to exclude the primary evidence against him. It is relevant to the sub-facial challenge to the warrant that the *amicus*, an experienced criminal defence attorney, considers to be Mr. Huang's best and perhaps only chance at having the evidence excluded.

[99] In light of the ONSC's decision to order that the exclusion hearing be closed and the materials filed in support of it be sealed, the *amicus* recommends that this Court adopt a similar procedure and order disclosure to the PPSC subject to conditions.

[100] The PPSC is bound by the Crown's constitutional obligation to produce relevant information in its possession for disclosure to the accused in a criminal prosecution. Such disclosure is subject, in Ontario and other provinces, to an implied undertaking that the only basis on which it may be used would be in the context of providing full answer and defence to the criminal proceeding: *R v Mossaddad*, 2017 ONSC 5520. It is not open to Mr. Huang or his counsel to use it for any other purpose.

[101] Under the *amicus*' proposed approach, it would be for the ONSC to determine whether conditions could be imposed on disclosure to Mr. Huang and his counsel. It would not be open to

the ONSC to order disclosure of the information [redacted] because such applications must be brought to the Federal Court. This Court cannot delegate that responsibility to the trial court. But, the ONSC could determine that Mr. Huang's fair trial rights had been breached and provide him with a remedy in the trial proper.

[102] Should the ONSC decline to limit production for the purposes of the *Charter* application [redacted] it would be up to the ONSC to determine whether there was enough information before the trial court to decide the *Charter* section 8 application and whether the rights of the accused to adequate disclosure had been infringed.

[103] If the ONSC agreed to limit production as requested by the PPSC, the *Charter* application could proceed and the disclosed information could be returned to the Attorney General upon a decision on the exclusion motion being rendered. As noted, the information would not be relevant to the merits of the charges against Mr. Huang – only to his challenge as to how the intercepts of the telephone calls were obtained through the 2013 Warrant.

[104] The *amicus'* proposal would appear to satisfy the Federal Court of Appeal's direction that this Court reconsider the question of disclosure [redacted] It would also minimize the risk of the injury that concerns the Attorney General, [redacted]

as the information would only be considered in a closed court and subject to a non-publication order.

[105] The negative aspect of this approach from the Attorney General's perspective is that, as the *amicus* submits, it is unlikely that Mr. Huang's counsel would or could agree to a condition that he not disclose the information to his client. Defence counsel have ethical obligations that require them to take instructions from their clients on matters pertaining to their defence.

[106] The criminal trial courts can, and have, imposed restrictions on clients' access to and possession of disclosed information: see for example *R v Blencowe* (1997), 35 OR (3d) 536, 118 CCC (3d) 529 (Sup Ct). However, to my knowledge the cases have not imposed an absolute restriction on the accused receiving portions of his or her disclosure for review. Rather, reasonable limitations have been placed on the accused's direct physical possession of "sensitive" information: *R v Carter*, 2018 ONSC 1272 at para 46.

[107]

[108]

[109]

[110]

[111] The evidence of risk of injury put forward by the Attorney General is speculative, although the risk cannot be ruled out entirely. the risk is

always present when confronted with a [redacted]

[redacted] In our constitutional framework, however, it may be a risk that has to be accepted if Mr. Huang's fair trial rights are to be respected.

[112] I recognize that most of the content of the 2013 Affidavit has nothing to do with the charges against Mr. Huang. [redacted] the information submitted to the Court or [redacted] the PRC Embassy. His connection to the 2013 Affidavit and Warrant was pure happenstance. Nonetheless, the impact of the position put forward by the Attorney General on Mr. Huang is very real. He would be left in the dark with respect to the true nature of much of the 2013 Affidavit and deprived of an opportunity to make a sub-facial challenge to the admissibility of the intercept evidence against him. [redacted]

VI. **Conclusions**

[113] As indicated above, I am not persuaded that the Attorney General has made out a case under Rule 399(2)(a) for the Court to vary the terms of the Private Judgment issued in 2017. The disclosure orders made at that time will stand subject to the following discussion regarding the fresh CEA section 38 application.

[114] I accept that the environment has changed [redacted] But I see the change more as a matter of scale rather than of

kind.

[115] Where I previously found no injury would result from disclosure, I accept that determination may need to change In particular, I am now satisfied that release of the 2013 Affidavit would cause injury and that the public interest favours non-disclosure of that specific information.

[116] Similarly, I am now persuaded that public disclosure would cause injury Such information has been consistently protected. But that leaves us with the question of whether disclosure would be injurious. And on that, I remain skeptical. Even if I were to agree with that contention, the test at the third stage of *Ribic* is whether the public interest in non-disclosure outweighs that of disclosure to Mr. Huang in order that he may make full answer and defence to the charges against him. That is a right guaranteed to him under our constitution

and that should only be displaced in the balance by evidence supporting a finding that it is outweighed by a greater public interest.

[117] The public interest in protecting Canada's national interests is very strong. There is also a compelling public interest in protecting Mr. Huang's fair trial rights. The potential negative effects of disclosure advanced by the Attorney General's evidence are speculative. It is beyond conjecture that the administration of criminal justice in Mr. Huang's case will be dependent in part on the outcome of the exclusion motion before the ONSC. On all of the evidence, in the circumstances of this case I am not satisfied that the public interest in non-disclosure outweighs that of assuring Mr. Huang a fair trial.

[118] Under CEA section 38.06(2), when the judge concludes that disclosure of the information would be injurious but that the public interest in disclosure outweighs in importance the public interest in non-disclosure and, having considered the form of and conditions of disclosure that are most likely to limit any injury to international relations or to national security or national defence, the judge may authorize disclosure subject to any conditions that the judge considers appropriate of all or part of the information or facts, a summary or a written admission of facts relating to the information.

[119] I do not accept speculative concerns that could become known through some weakness in the closed proceedings and

sealing procedures of the ONSC, including the integrity of the presiding judge, court personnel and Crown counsel.

[120] When pressed on this in cross-examination by the *amicus,* was unable to come up with any concrete grounds for his concerns. When asked whether he thought that the ONSC judge responded:

> …I can't answer. I am assured that the judge has integrity, but I can only speculate.

[121] Much evidence was based on speculation drawn from his knowledge

[122]

[123] In the result, I am satisfied that an order along the lines of what the *amicus* has proposed would minimize any injury from disclosure of the sensitive information for the purposes of the closed proceedings ordered by Justice Dambrot. In my view, this Court can be confident that the

order made by Justice Dambrot under section 486 of the *Criminal Code* to exclude the public from the hearing and seal the record and the expressed intention of the PPSC to seek further restrictions would be effective to protect the information from disclosure.

[124] Accordingly, I will order disclosure to the PPSC and the ONSC [redacted] The PPSC has an obligation to make disclosure to an accused of the relevant information in its possession under the *Stinchcombe* principles. The PPSC can seek an order from the ONSC limiting disclosure to the accused's counsel on the condition that he not further disclose the information to the accused. Should Mr. Huang's counsel decline to accept the information on that condition, it will be for the ONSC to determine what effect, if any, that would have on the adequacy of the disclosure provided by the PPSC and the effect on Mr. Huang's fair trial rights.

JUDGMENT in DES-2-17 and DES-4-19

THIS COURT'S JUDGMENT is that:

1. The motion to vary the Court's 2017 Private Judgment in DES-2-17 is dismissed;

2. The application to confirm the Attorney General of Canada's prohibition of the disclosure of information in the 2013 Affidavit under CEA section 38.04 in DES-4-19 is granted in part;

3. Those portions of the Court's 2017 Private Judgment and the attached Schedule "A" that are not addressed in the subsequent paragraphs of this Judgment remain in full force and effect;

4. For greater certainty, the summaries set out in Schedule "A" to the 2017 Private Judgment are to be disclosed to Mr. Huang and his counsel, Mr. Addario, with the exception of the sentence [redacted]

5. [redacted] of the 2013 Affidavit shall be protected from disclosure;

6. [redacted] shall be protected from disclosure;

7. ████████ shall be protected from disclosure.

8. For greater certainty, ████████ of the version of the 2013 Affidavit received at the hearing on May 27, 2019 shall be protected from disclosure;

9. The Attorney General of Canada shall disclose to counsel for the Director of Public Prosecutions (i.e., Public Prosecution Service of Canada) with carriage of the prosecution against Mr. Huang that ████████

10. Counsel for the Director of Public Prosecutions may disclose the information referenced in paragraph 9 above to the Superior Court of Ontario Justice hearing Mr. Huang's application for the exclusion of the evidence obtained by the 2013 Warrant under the terms of the order pursuant to section 486 of the *Criminal Code* issued by Mr. Justice Dambrot on March 19, 2018;

11. Counsel for the Director of Public Prosecutions may disclose to the Superior Court of Ontario Justice that this Court has found that none of the information in the paragraphs ████████ relates to Mr. Huang or in any way associates him with any ████████ addressed in the 2013 Affidavit other than the PRC Embassy's telephones.

12. Counsel for the Director of Public Prosecutions may disclose the information in paragraphs 9 and 11 above to counsel for Mr. Huang upon obtaining an undertaking from counsel for Mr. Huang that he will not disclose the information to Mr. Huang;

13. If counsel for Mr. Huang declines to provide the undertaking referenced in paragraph 12, counsel for the Director of Public Prosecutions shall inform the Superior Court of Ontario Justice presiding over the exclusion hearing that they are unable to provide disclosure of the information referenced in paragraphs 9 and 11 above to Mr. Huang or his counsel by reason of this order;

14. The information referenced in paragraphs 9 and 11 above shall be used solely for the purpose of the exclusion hearing in the Ontario Superior Court of Justice and for no other purpose;

15. Upon completion of the exclusion hearing in the Ontario Superior Court of Justice and the issuance of the Court's decision, and subject to any appeal periods that may apply, any copies of the 2013 Affidavit indicating [redacted] [redacted] shall be returned to the Attorney General of Canada;

16. The *amicus curiae* may have access to review this judgment at the Federal Court's secure facility;

17. This judgment shall take effect ten (10) days after it has been issued to the Attorney General of Canada, subject to an appeal being brought to the Federal Court of Appeal under section 38.09 of the CEA within that time period or the issuance of a certificate personally by the Attorney General of Canada under section 38.13 of the CEA;

18. The Attorney General of Canada shall provide notice of the issuance of this Judgment to the Applicant, to the Public Prosecution Service of Canada and to the Ontario Superior Court of Justice after the expiry of the appeal period referred to in paragraph 17.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-2-17 DES-4-19
STYLE OF CAUSE:	QING (QUENTIN) HUANG V THE ATTORNEY GENERAL OF CANADA THE ATTORNEY GENERAL OF CANADA V QING (QUENTIN) HUANG AND THE DIRECTOR OF PUBLIC PROSECUTIONS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 3, 27 AND 28, 2017
PUBLIC JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	AUGUST 30, 2019

APPEARANCES:

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