Federal Court  Cour fédérale

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

Date: 20220408

Docket: DES-5-20

Citation: 2022 FC 477

Ottawa, Ontario, April 8, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CAMERON JAY ORTIS

Respondent

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] This is the second Order and Reasons relating to an application by the Attorney General of Canada ("AGC") under section 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 ("*CEA*"), for an order confirming claims for the prohibition of disclosure of information arising in relation to a criminal proceeding against the respondent Cameron Jay Ortis. The general background to this application and the legal framework that applies to it (including the test in *Canada (Attorney General) v Ribic*, 2003 FCA 246) are set out in *Canada (Attorney General) v Ortis*, 2022 FC 142 ("*Ortis #1*").

[2] This Order and Reasons consists of the following parts:

- The main body of the Order and Reasons, which is unclassified, provides some additional background, including background relating to the charges in counts 1 to 4 of the indictment against Mr. Ortis. To the extent that this can be done in unclassified reasons, some explanation for the Court's determinations under section 38.06 of the *CEA* with respect to the information at issue in this phase is also provided.

- Annex A is a table setting out in summary form the Court's determinations under section 38.06 in relation to claims over information in the Crown disclosure documents at issue at this stage.

- Annex B provides further classified reasons explaining the Court's determinations under section 38.06 in relation to the documents listed in Annex A.

- Annex C provides further classified reasons explaining the Court's determinations under section 38.06 with respect to contested information in the Defence Summary relating to counts 1 to 4. (*Ortis #1* at paragraphs 19-23 explains what the Defence Summary is and why it came into existence.)

[3] In the particular circumstances of this case, the question of who should have access to which parts of this Order and Reasons and when is a complicated one. I will address it at the conclusion of these public reasons.

[4] As well, as discussed in *Ortis #1*, this Court plays an important role in ensuring that, to the extent possible under the law, the trial judge has the information required to adjudicate properly any application that may be brought under section 38.14 of the *CEA*. Unlike in *Ortis #1*, at this stage I am not authorizing any disclosure specifically for the trial judge. In my view, it would be premature to do so without first knowing whether Mr. Ortis intends to seek a remedy under section 38.14 with respect to counts 1 to 4. Thus, I will reserve on the question of whether additional disclosure to the trial judge concerning the redacted information relating to counts 1 to 4 is warranted.

II. BACKGROUND

A. *The Charges*

[5] The indictment against Mr. Ortis charges him with ten offences. At this stage I am only considering the counts in the indictment charging offences under subsection 14(1) of the *Security*

of Information Act, RSC 1985, c O-5 ("*SOIA*"). Mr. Ortis is also charged with the offences of fraudulent use of a computer service (contrary to subsection 342.1(1) of the *Criminal Code*, RSC 1985, c C-46) and breach of trust (contrary to section 122 of the *Criminal Code*). In part, the factual elements of the latter offences overlap with the *SOIA* offences so for purposes there is no need to consider the *Criminal Code* offences separately.

[6] Subsection 14(1) of the *SOIA* makes it an offence for a person permanently bound to secrecy to "intentionally and without authority" communicate or confirm special operational information. Subsection 14(2) of the *SOIA* provides that anyone who commits this offence is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

[7] The expressions "person permanently bound to secrecy" and "special operational information" are defined in subsection 8(1) of the *SOIA*. There does not appear to be any issue that Mr. Ortis is a person permanently bound to secrecy. "Special operational information" is defined as follows:

Definitions	**Définitions**
8 (1) The following definitions apply in this section and sections 9 to 15.	**8 (1)** Les définitions qui suivent s'appliquent au présent article et aux articles 9 à 15.
special operational information means information that the Government of Canada is taking measures to safeguard that reveals, or from which may be inferred,	***renseignements opérationnels spéciaux*** Les renseignements à l'égard desquels le gouvernement fédéral prend des mesures de protection et dont la communication révélerait ou

permettrait de découvrir, selon le cas :

(a) the identity of a person, agency, group, body or entity that was, is or is intended to be, has been approached to be, or has offered or agreed to be, a confidential source of information, intelligence or assistance to the Government of Canada;

a) l'identité d'une personne, d'un groupe, d'un organisme ou d'une entité qui est, a été ou est censé être une source confidentielle d'information ou d'assistance pour le gouvernement fédéral, ou à qui on a proposé ou qui a accepté ou proposé de le devenir;

(b) the nature or content of plans of the Government of Canada for military operations in respect of a potential, imminent or present armed conflict;

b) la nature ou la teneur des plans du gouvernement fédéral en vue des opérations militaires relatives à un conflit armé — actuel ou éventuel;

(c) the means that the Government of Canada used, uses or intends to use, or is capable of using, to covertly collect or obtain, or to decipher, assess, analyse, process, handle, report, communicate or otherwise deal with information or intelligence, including any vulnerabilities or limitations of those means;

c) les moyens que le gouvernement fédéral a mis, met ou entend ou pourrait mettre en oeuvre pour la collecte ou l'obtention secrètes, ou pour le déchiffrage, l'évaluation, l'analyse, le traitement, la communication ou toute autre utilisation d'information ou de renseignements, y compris, le cas échéant, les limites ou les failles de ces moyens;

(d) whether a place, person, agency, group, body or entity was, is or is intended to be the object of a covert investigation, or a covert collection of information or intelligence, by the Government of Canada;

d) le fait qu'il a mené, mène ou entend mener une enquête secrète ou des activités secrètes de collecte d'information ou de renseignements relativement à un lieu, une personne, un groupe, un organisme ou une entité;

(e) the identity of any person who is, has been or is intended to be covertly engaged in an information- or intelligence-collection activity or program of the Government of Canada that is covert in nature;	**e)** l'identité de toute personne qui a mené, mène ou pourrait être appelée à mener secrètement des activités ou programmes de collecte d'information ou de renseignements du gouvernement fédéral;
(f) the means that the Government of Canada used, uses or intends to use, or is capable of using, to protect or exploit any information or intelligence referred to in any of paragraphs (a) to (e), including, but not limited to, encryption and cryptographic systems, and any vulnerabilities or limitations of those means; or	**f)** les moyens que le gouvernement fédéral a mis, met ou entend ou pourrait mettre en oeuvre pour la protection ou l'utilisation d'information ou de renseignements mentionnés à l'un des alinéas a) à e), notamment le chiffrement et les procédés de cryptographie, y compris, le cas échéant, les limites ou les failles de ces moyens;
(g) information or intelligence similar in nature to information or intelligence referred to in any of paragraphs (a) to (f) that is in relation to, or received from, a foreign entity or terrorist group.	**g)** des éléments d'information de la nature de ceux mentionnés à l'un des alinéas a) à f), reçus d'une entité étrangère ou d'un groupe terroriste ou le concernant.

[8] The Crown alleges that Mr. Ortis committed four offences under subsection 14(1) of the *SOIA*. Since Mr. Ortis is not disputing that he was a party to the communications in issue, the following synopsis of the allegations will simply presume that this is the case.

- First, that between February 1, 2015, and May 31, 2015, he communicated special operational information to Vincent Ramos, the Chief Executive Officer of Phantom Secure Communications. At the time, Ramos and his company were under

investigation by law enforcement agencies in Canada and elsewhere for providing a secure method of communication to transnational organized crime clients, including parties involved in money laundering.

- The Crown alleges that, after several preliminary attempts to engage with Ramos, on April 29, 2015, Mr. Ortis sent an email to Ramos's Hotmail account from variablewinds@tutanota.de. The email had several attachments, including excerpts from seven documents relating to US and Canadian law enforcement targeting of Phantom Secure. Two of the documents are from the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), two are from Tactical Internet Operational Support with the RCMP, and the rest are from the RCMP's National Intelligence Coordination Centre. Another attachment is a message from Mr. Ortis (effectively a covering letter) describing what he is sending and other information he has that would be of interest to Ramos.

- As well, in his preliminary communications with Ramos, Mr. Ortis referred to Kapil Judge (one of Ramos's employees) and hinted that someone he had met at Vancouver International Airport on March 8, 2015, was an undercover police officer. (This was in fact the case, something Mr. Ortis knew from reading an RCMP report dated March 6, 2015, describing plans for the operation.)

- About a week later, Ramos replied from a new Tutanota email address (something Mr. Ortis had suggested he set up because it would be a secure way for them to communicate). In the ensuing exchange over the next week or so, Mr. Ortis provided additional information relating to the investigation of Phantom Secure

and its clients (including "individuals like Polani [and] Khanani" in particular). In the end, Ramos did not pursue Mr. Ortis's offer of the "full documents" for $20,000 cash.

- There are no section 38 claims over any of the information Mr. Ortis shared with Ramos. Nor do there appear to be any section 38 claims over the original documents from which the excerpts were taken. The only original document that is classified is a Tactical Internet Operational Support report dated January 27, 2014, which concerned Jean-Francois Eap, another associate of Ramos's. While the document is classified as SECRET, there are no section 38 claims with respect to it.

- Second, that between March 19, 2015, and March 25, 2015, Mr. Ortis communicated special operational information to Salim Henareh. At the time, Henareh and his company Rosco Trading International Ltd. were under investigation by law enforcement and intelligence agencies in Canada and elsewhere for their involvement in money laundering activities in association with Altaf Khanani, the suspected head of a global money laundering business.

    - In particular, the Crown alleges that Mr. Ortis sent a package to Henareh by courier on or about March 23, 2015. When Henareh received the package, he turned it over to his lawyer, who eventually turned it over to investigators working on Project Ace (the police investigation into Mr. Ortis's activities).

    - The package included a covering letter addressed to Henareh dated March 19, 2015, explaining why the writer was contacting him. Specifically,

Mr. Ortis alerted Henareh to the fact that FINTRAC and the RCMP were investigating Rosco Trading "with the eventual goal of a full criminal investigation" against the company.

- Enclosed with the covering letter were a FINTRAC Disclosure Summary report dated July 2014 and a DVD. The DVD contained digital copies of the July 2014 Disclosure Summary, three PDF files of excerpts of tables of money transfers cited in the Disclosure Summary, and an Excel spreadsheet prepared by FINTRAC regarding Persepolis International Ltd., an alternative business name for Rosco Trading.

- The covering letter stated that the writer was an "independent contractor" whose "business line is the covert acquisition of intelligence and information gathered by Western governments and large private sector firms." The letter provided an email address (blindbat@mailbox.org) at which Henareh could contact the writer if he had "an interest in starting a conversation."

- The only section 38 claims regarding the information Mr. Ortis sent to Henareh are over some incidental information in the July 2014 FINTRAC Disclosure Summary.

- Third, that between April 23, 2015, and May 4, 2015, Mr. Ortis communicated special operational information to Muhammad Ashraf. At the time, Ashraf and his company Finmark Financial were under investigation by law enforcement and intelligence agencies in Canada and elsewhere for their involvement in money laundering activities in association with the Khanani network.

- The Crown alleges that, after some preliminary contacts with Finmark Financial inquiring about how to reach Ashraf, on May 4, 2015, Mr. Ortis sent an email addressed to Ashraf from blindbat@mail.org. The email stated that it contained attachments "that are confidential and should be hand delivered to Mr. Ashraf."

- There were three attachments: an undated covering letter, an excerpt from an RCMP Investigation Report dated January 8, 2015, relating to Project Oryx (an RCMP investigation into money service businesses and money laundering), and an excerpt from a September 2014 Report regarding a meeting of the Criminal Intelligence Advisory Group (CIAG) (part of the Five Eyes Law Enforcement Group) regarding the Khanani money laundering network. Khanani is also mentioned in the RCMP Investigation Report, as are Ashraf and Rosco Trading.

- The covering letter stated that the writer "would like to get in touch with either Khanani or Polani. Both will see the value of the attached as well as other documents related to their operations." The letter also stated that the writer could be reached at either blindbat@mailbox.org or variablewinds@tutanota.de.

- The covering letter also included six excerpts from what Mr. Ortis represented to be reports relating to several individuals implicated in the Khanani money laundering network. The excerpts themselves are subject to section 38 claims. These are the only section 38 claims with respect to the information Mr. Ortis sent to Ashraf.

- Fourth, that on or about April 19, 2015, Mr. Ortis attempted to communicate special operational information to Farzam Mehdizadeh. At the time, Mehdizadeh and his

company Aria Exchange were under investigation as part of RCMP Project Oryx for their involvement in the Khanani money laundering network.

- The Crown alleges that on this date Mr. Ortis sent an email to Mehdizadeh's son Masih, who was then a student at the University of Toronto. The email (sent from blindbat@mailbox.org) stated that the writer was looking for a "trusted contact" who works for Mehdizadeh so that he could send Mehdizadeh some "docs that he needs to see." The writer noted that Mehdizadeh's "people don't seem to 'get' secure email methods (gpg, Tutanota, etc.)."

- Nothing came of this contact. However, a draft of the original email and drafts of two follow-up emails (which appear never to have been sent) were found on the Tails USB. (This device is described below.) The draft of the third email (which was premised on a secure means of communication with Mehdizadeh having been established) states: "Attached are documents related to Canadian and international intelligence and law enforcement activities that have recently started." It goes on to explain that the investigations target Mehdizadeh, the Polani brothers, Khanani and others. A section 38 claim was made over part of the third email but it has been resolved because the AGC has agreed to lift the redaction.

[9] Respectively, these allegations form the basis of counts 1 to 4 in the indictment against Mr. Ortis. (The Crown alleges that essentially the same conduct also constitutes the *Criminal Code* offences charged in counts 9 and 10.) All four of the individuals named in the indictment and their companies had connections to Canada at the time Mr. Ortis was in communication with

them (or attempting to communicate with them). During the time period covered by counts 1 to 4, Mr. Ortis was a civilian member of the RCMP and the Officer-in-Charge of the Operations Research section ("OR") dealing with national security. At no time in his communications with the targeted individuals did Mr. Ortis disclose his true personal or professional identity.

B. *The Position of the Defence*

[10] As already noted, Mr. Ortis does not dispute that he sent the communications in question to Ramos, Henareh or Ashraf or that he sent the message to Mehdizadeh's son. Nor do I understand him to dispute that he is a person permanently bound to secrecy. Rather, his defence in relation to counts 1 to 4 is that his actions were not unlawful because they occurred as part of an undercover operation that was within the scope of the authority of his position with the RCMP. According to Mr. Ortis, the information was not shared "without authority", as is required for an offence to be committed under subsection 14(1) of the *SOIA*, because, as Director of the OR, he had the authority to communicate the information that he did in the context of an online undercover operation. Mr. Ortis also maintains in the alternative that, if he was mistaken about this, he honestly believed it to be the case. Thus, even if the information he communicated could otherwise count as special operational information as defined in subsection 8(1) of the *SOIA*, he was (or at least honestly believed he was) authorized to communicate it as part of an undercover operation and, as a result, he did not commit an offence under subsection 14(1) of that Act by doing so. To the extent that the *Criminal Code* offences relate to the same conduct as counts 1 to 4, he defends himself against those charges on the same basis.

[11] Further details concerning this defence will be discussed below and in Annex C.

III. ANALYSIS

A. *The* Ribic *Test*

[12] I will not repeat my discussion of the *Ribic* test in *Ortis #1*.

[13] For present purposes, it suffices to note first that the documents in Crown disclosure are presumptively relevant under the first step of the test. As well, no issue is taken that the evidence Mr. Ortis wishes to present in his defence concerning his state of mind or explaining his actions meets this threshold test of relevance.

[14] Second, generally speaking there is no issue that disclosure of the information at issue here would be injurious to national security. As a result, generally speaking, the focus of the dispute has been whether the balancing process at the third step of the *Ribic* test favours disclosure or non-disclosure.

[15] Even then, several considerations relevant to this balancing process are not in dispute. Since the underlying proceeding is a criminal trial, Mr. Ortis's right to a fair trial is engaged and must be given careful consideration by this Court. The charges Mr. Ortis is facing are serious and he faces a potentially lengthy term of imprisonment should he be convicted of any of them. Although ultimate responsibility for ensuring that he has a fair trial rests with the trial judge, the importance of the information for his defence is a key consideration under the third step of the *Ribic* test.

[16] The parties also agree that the contentious documents and information in Crown disclosure would be admissible at trial for the limited purpose of demonstrating Mr. Ortis's state of mind and not for the truth of their contents. Nor is there any issue that, apart from section 38 concerns, Mr. Ortis could testify about his state of mind and his actions at the relevant time (as described in the Defence Summary).

[17] Finally, there is no dispute that Mr. Ortis bears the onus of demonstrating that the public interest in disclosure outweighs the public interest in non-disclosure.

[18] The remaining factors relevant to the public interest balancing in this case under the third step of the *Ribic* test are the nature and extent of the injury as it relates to the public interest in avoiding the injury that would be caused by disclosure, the importance of the information to Mr. Ortis's defence, and whether any harm to important public interests that would otherwise occur by disclosing information that Mr. Ortis requires for his defence can be reduced or even eliminated through summaries, word substitutions, and the like. It is on these points that the parties diverge. Of necessity, my discussion and resolution of the points in dispute must largely be confined to my classified reasons found in Annexes B and C.

[19] There are, however, some matters that can and should be addressed in these unclassified reasons.

B. *Summary of Determinations*

[20] First, in some instances the AGC has modified its original position and agreed to the disclosure of additional information through lifts of redactions. The AGC (sometimes with the concurrence of the *amici curiae*) also proposed summaries of redacted information or word substitutions for the Court's consideration. These were in all material respects accepted by the Court. This is reflected in the table in Annex A.

[21] Second, as also set out in the table in Annex A, with only one exception, I have not been persuaded that the public interest in the disclosure of the information at issue here that has been redacted from Crown disclosure documents outweighs the public interest in non-disclosure. This is because almost all of that information either has no value for Mr. Ortis's defence or, when it appears to have some value, its value is insufficient to outweigh the serious injury that would be caused by its disclosure.

[22] Third, in one specific instance, the Court is ordering additional disclosure beyond that agreed to by the AGC. This is because I am satisfied that the importance of the information to Mr. Ortis's defence outweighs any injury that would be caused by its disclosure. This additional disclosure is set out in the table in Annex A as well.

[23] Turning to the Defence Summary, in a few instances, the AGC has agreed to additional disclosure of information in that document that had initially been the subject of section 38 claims. In a few other instances, the Court is ordering additional disclosure beyond that agreed

to by the AGC because the importance of the information for Mr. Ortis's defence outweighs any injury that would be caused by its disclosure. These determinations are set out in the discussion in Annex C.

[24] On the other hand, as is also explained in Annex C, I am satisfied that disclosure of other information in the Defence Summary relating to counts 1 to 4 over which section 38 claims have been made would cause an injury that outweighs the importance of that information to Mr. Ortis's defence. Accordingly, the AGC's claims over that information are confirmed.

C. *The Usefulness of the Information to the Defence*

[25] As discussed in *Ortis #1*, an important consideration at the third step of the *Ribic* test is the usefulness of the contested information for Mr. Ortis in defending himself against the charges he is facing. Depending on the seriousness of the injury to national security that disclosure of the information would cause, the importance of the information to Mr. Ortis's defence could tip the public interest balance in favour of disclosure.

[26] Mr. Ortis submits that the redacted information will be useful to him because it will assist him in meeting the Crown's case, including by supporting the affirmative defence he intends to advance to counts 1 to 4. In summary, I am satisfied that for the most part disclosure of the information at issue here would be highly injurious to Canada's national security. Further, for the most part, I am not persuaded that the information would have much if any value for Mr. Ortis in defending himself against counts 1 to 4. The details of my analysis of his position must be confined to the classified reasons in Annexes B and C.

[27] There are, however, two broad arguments advanced by Mr. Ortis that can be addressed here. One is that he needs the redacted information in Crown disclosure to be able to show the jury that what he shared with the named individuals was "low value" intelligence. The other is that he needs the redacted information in Crown disclosure to be able to counter the potential prejudicial effect of the Crown introducing heavily redacted documents in evidence at his trial. As I will explain, I am not persuaded that either of these considerations warrants further disclosure to Mr. Ortis under the section 38 scheme.

(1) The "value" of the information that was shared

[28] Mr. Ortis argues that, in order to present his defence effectively, he needs to be able to show that, among other things, he attempted to minimize any injury to public interests that his undercover operation might cause by selecting only relatively innocuous information that would still be capable of piquing the interest of his targets. He maintains that this fact helps to show that he was acting in the course of a legitimate undercover operation. He also argues that the fact that he had access to more valuable information that he did not disclose helps to rebut any suggestion that he was motivated by financial gain or was acting otherwise than in accordance with the law.

[29] Mr. Ortis argues that to establish these facts, which he maintains are crucial to his defence, he needs to be able to show the jury specific examples of sensitive information that was in his possession at the relevant time that he did not share (or attempt to share) with any of the individuals named in counts 1 to 4. For example, he argues in relation to count 3 that he needs to be able to show the jury both the excerpts in his letter to Ashraf (which are entirely redacted) and

the original reports from which they were taken (which are also entirely redacted) in order to show that he selected only low grade intelligence to disclose. This, he argues, supports his defence that his sharing of the information was authorized because it was part of a legitimate undercover operation. He argues similarly with respect to the other individuals named in the indictment that he needs to be able to show that he had access to information about them that is more valuable than what he shared (or considered sharing, in the case of Mehdizadeh).

[30] For the following reasons, I am not persuaded that any further disclosure on this basis is warranted.

[31] First, Mr. Ortis's argument rests on the premise that the information in his possession at the relevant time that he did not share is more "valuable" than what he did share. Thus, on his own theory, the injury that would be caused by disclosure of this other more "valuable" information is serious or, at least, more serious than what was caused by his disclosures to the targets. Indeed, it is fair to say that disclosure of the information Mr. Ortis seeks to be able to use to support this argument would be highly injurious to national security. As a result, the information would have to be very important for his defence to warrant disclosure.

[32] Second, even if at the relevant time Mr. Ortis had access to other information that could in some sense be said to be more "valuable" than what he shared, this is irrelevant to whether information he did share was in fact special operational information.

[33] Third, with respect to count 3 in particular, which alleges that Mr. Ortis provided highly classified information (among other information) to Ashraf, the actual information is redacted under section 38. The Crown states in this proceeding that it "does not rely" on the excerpted information in the letter to Ashraf: see Evidence Narrative at para 37. What I take this to mean is that the Crown only intends to prove that the information Mr. Ortis shared is classified and it does not rely on the information itself to establish this. In my view, having access to the excerpts themselves could not assist Mr. Ortis in any way to rebut the fact that the information is classified.

[34] Fourth, the information at issue is incapable of establishing a fact crucial to Mr. Ortis's defence with respect to the question of whether he shared special operational information without authority. While the information at issue meets the test of relevance at the first step of the *Ribic* test, it falls well short of what is required to warrant disclosure at the third step given the significant injury this would cause: see *Ribic* at para 22.

[35] A key premise of Mr. Ortis's defence is that he had the authority to use information he judged to be of low value in the undercover operation. According to Mr. Ortis, even if *prima facie* the original information was very sensitive, he could use the information he did because he had sanitized it sufficiently or it had been classified incorrectly in the first place. He was "managing risk" by determining what information could safely be communicated to his targets and what information could not.

[36] I am prepared to assume for the sake of argument that, in describing his undercover operation, Mr. Ortis could testify about his own beliefs about the relative value of the information he shared compared to other information he had access to at the relevant time. The question in the present proceeding is whether he should be able to point to specific examples to demonstrate by way of comparison that his characterization of the value of the information he shared is accurate. In my view, Mr. Ortis has not established that this is warranted.

[37] The evidence before me, which I accept, is that the classification of information is the prerogative of the "owner" of the information. Parties with whom information is shared under the third-party rule are expected to handle it in accordance with how the owner has classified it. To the extent that any of the information shared with the persons named in the indictment was subject to restrictions on its use in its original form, there is simply no basis for the assertion that Mr. Ortis himself had the authority to effectively reclassify it and use it as he did. As a result, I am not persuaded that, as a matter of law, there will be a live issue at trial concerning *how* Mr. Ortis exercised his ostensible authority to share special operational information as opposed to *whether* he had this authority at all. The redacted information is incapable of assisting the jury in answering the latter question. Reframing the defence as one of mistake of fact (about the scope of his authority) does not change the analysis.

[38] Furthermore, in any event, I am not persuaded that there will be any issue at trial that Mr. Ortis had access to highly classified information regarding the individuals named in the indictment and others. Indeed, it appears that the Crown intends to lead evidence to this very effect, as demonstrated by the following paragraphs in the Crown's Evidence Narrative:

> 5) As part of his duties, Ortis had access to RCMP Information Technology (IT) Systems and Data in a manner authorized for performance of his duties, and to classified information, including Top Secret and GAMMA classified Signals Intelligence, subject to the Canadian [*sic*] Security Establishment's SIGINT Security Standards and GAMMA Handling Standards.
>
> [. . .]
>
> 8) Since 2013, the RCMP had worked with Five Eyes (Canada, US, UK, Australia and New Zealand) Law Enforcement agencies to address Canadian companies providing encrypted communications devices to Transnational Organized Crime clients. In July 2013, the RCMP National Intelligence Coordination Centre (NICC) initiated Project Saturation; an intelligence assessment of these Canadian companies including Phantom Secure Communications (Phantom Secure). Vincent Ramos (Ramos) was the Phantom Secure Chief Executive Officer (CEO). Kapil Judge was the Phantom Secure Technical Manager. Jean-Francois Eap was a known associate of Ramos. Project Saturation petered out in 2016 however the RCMP continued to provide technical assistance to the FBI.
>
> [. . .]
>
> 27) From at least 2014, the RCMP along with multiple Five Eyes law enforcement and intelligence agencies was investigating money laundering activities conducted by various entities associated with Altaf Khanani. Altaf Khanani was a Dubai-based money service business owner and the head of an international money laundering network. Ashraf Polani and Safwan Polani also ran a global money laundering business and had been close partners of Altaf Khanani. Salim Henareh and his companies Persepolis International and Rosco Trading, Muhammad Ashraf and his company Finmark Financial, and Farzam Mehdizadeh and his company Aria Exchange were subjects of the investigation. The RCMP's investigation was called Project Oryx.

[39] As well, it should also be noted that, with respect to counts 1 and 2 and, in part, count 3, Mr. Ortis will not be impeded meaningfully, or at all, by any section 38 claims in presenting to the jury the original reports from which he took excerpts and inviting the jury to compare what he shared with what he held back.

[40] Finally, the underlying premise of this part of Mr. Ortis's argument for disclosure – that the "value" of the information he shared matters – opens up collateral issues that could distract the jury. This is a pertinent consideration in assessing the legal viability of Mr. Ortis's theory of the relevance and probative value of the information at issue. Part of his argument is that the fact that (as he asserts to be the case) he used only low value information is consistent with his actions being part of a legitimate undercover operation. Mr. Ortis can certainly testify that this was his belief at the time. However, allowing the jury to see redacted information he did not share – information which, it bears repeating, would be highly injurious to disclose – would only distract them with the collateral issue of whether it was in some sense more valuable than what he did share.

[41] In summary, disclosure of the information at issue here would be highly injurious. Contrary to this part of Mr. Ortis's argument for disclosure, in my view, the public interest in disclosure of the redacted information is negligible because the information will have no utility in establishing a fact crucial to his defence. Accordingly, no further disclosure of information on this basis is warranted.

(2) The risk of prejudice flowing from the redacted reports

[42] Most of the information at issue at this stage is found in documents that were stored on a USB device that was found at Mr. Ortis's home. Installed on the device was an encrypted Tails Operating System. ("Tails" is the acronym for "The Amnesic Incognito Live System".) Copies of documents that were shared with individuals named in the indictment as well as copies of many highly classified documents were found in various subfolders in a folder on the Tails USB

named "The Project". Among the latter documents are some 65 signals intelligence (or SIGINT) documents. (A list of these documents is found in DOCID9011.) There is no dispute that these are highly sensitive documents or that disclosure of their contents would be highly injurious to Canada's national security.

[43] All of these documents are heavily redacted on the basis of claims under section 38. For the most part, the only things disclosed are the security markings on each document (uniformly TOP SECRET/SI), the names of the countries to which release of the information is authorized (uniformly, the Five Eyes countries), the date of the document, and print stamps indicating that Mr. Ortis had printed the document from the CTSN and when. Many of the documents also bear the following caveat, which is disclosed: "No portion of this report may be used in affidavits, court proceedings or for any other legal or judicial purposes without prior approval of CSEC." (CSEC is a former acronym for the Communications Security Establishment.) In a handful of instances, the name of the originating agency (the RCMP, the Australian Signals Directorate or the United States National Security Agency) is disclosed. Otherwise the list in DOCID9011 simply identifies the Originator/Owner of the documents as "International Partner".

[44] The Crown has stated in this proceeding that it "does not rely on any of these documents to prove that Ortis communicated special operational information contrary to *SOIA* s.14" (Evidence Narrative at para 25). On the other hand, the Crown has not expressly disavowed any intention to present these documents (in their redacted form, obviously) as part of its case in chief against Mr. Ortis. On the contrary, it appears that it is the Crown's intention to put the heavily redacted SIGINT documents into evidence "to show that Ortis's pattern of collection,

saving and attempting to anonymize documents was ongoing in 2015" (*Memorandum of Fact and Law of the Public Prosecution Service of Canada* at para 37). This reflects the Crown's theory of the relevance of these documents to counts 5 to 8 in the indictment (i.e. the preparatory offences allegedly committed in September 2019) as opposed to counts 1 to 4. Indeed, in the same paragraph of the memorandum, the Crown acknowledges that none of the redacted information in the SIGINT documents "is relevant to proof of Counts 1-4." That this is the Crown's position was also confirmed in oral submissions on this application: see *Transcript of Proceedings on September 20, 2021*, page 49, lines 14-27. The concern for present purposes, however, is that introducing this evidence at trial will create a risk of prejudice for Mr. Ortis in relation to counts 1 to 4, especially considering that the reports were being collected at a time proximate to when those offences were allegedly being committed.

[45] For his part, Mr. Ortis argues in the present proceeding that, even apart from how the contents of these documents would support his affirmative defence (a contention I have rejected), he needs to be able to show the jury material parts of unredacted versions of these documents to forestall prejudicial speculation about what is under all the redactions. In particular, he submits that there is a risk that the jury will misuse the redacted documents by speculating that they support counts 1 to 4 because they have something to do with Ramos, Henareh, Ashraf or Mehdizadeh or because they suggest he was engaged in a similar course of conduct with other potential targets. It is only by showing the jury the actual contents of the reports, he argues, that he can counter such prejudicial speculation about why he had these highly classified documents at his home on a USB device in early 2015.

[46] If the Crown does not put these redacted documents into evidence, then the risk of prejudice Mr. Ortis relies on here would not materialize. On the other hand, if the Crown does seek to put this evidence before the jury, there may be some basis for Mr. Ortis's concerns. In my view, however, the appropriate place to raise these concerns is not before this Court but, rather, before the trial judge. It would then be for the trial judge to weigh the probative value of the redacted reports (which nevertheless disclose that they are all highly classified and that they were printed by Mr. Ortis) against their potential prejudicial effects. Should the trial judge be persuaded that the prejudicial effect of the redacted reports outweighs their probative value, it would be open to him to exclude them from evidence. This solution would fully protect Mr. Ortis from the risk of misuse of the reports. It would also avoid entirely the injury that would be caused by disclosing any material part of the reports in order to forestall speculation by the jury about what is under the redactions, why Mr. Ortis collected the reports when he did, and why he kept them at his home. Thus, any such risk at this stage is entirely speculative.

[47] In addition, the argument that further disclosure is required to counter the potential prejudicial impact of the redacted reports conflates my role with the trial judge's. It is the trial judge's role, not mine, to assess the potential prejudicial impact of the Crown adducing in evidence the reports in their redacted form, whether this can be guarded against by other measures (e.g. limiting instructions to the jury), and whether the ultimate balancing of probative value and prejudicial effect favours the admission or exclusion of that evidence.

[48] Importantly for present purposes, the trial judge is able to do this on the basis of the reports in exactly the form in which they would be put before the jury – i.e. fully redacted but for

the security markings and print stamps. There is no need for him (or the parties, for that matter) to consider the underlying information to assess the probative value and potential prejudicial effect of the redacted reports should the Crown to seek to tender them in evidence at the trial.

D. *The release of this Order and Reasons*

[49] As mentioned above, in the particular circumstances of this case, the question of who should have access to which parts of this Order and Reasons and when is a complicated one. So that all interests that are implicated are protected to the extent that is required, the release of these Order and Reasons will occur in the following steps.

[50] First, the Order and Reasons (including all the annexes) will be released to the AGC and the *amici* so that the AGC may determine whether an appeal will be taken from any of the disclosure orders. No disclosure order can take effect until, at the earliest, the time for bringing an appeal has expired – i.e. within 10 days: see *CEA*, subsections 38.06(3.01) and 38.09(2). If the decision is made not to appeal any of the disclosure orders, it would be very helpful if this could be communicated to the Court as soon as possible. If the decision is made to appeal, this may require redactions to the Order and Reasons before it is distributed further in order to ensure that the appeal is not rendered nugatory.

[51] The second step is for the AGC and the *amici* to consider whether any redactions to the main body of the Order and Reasons or the annexes are required before they can be released to Mr. Carter, counsel for Mr. Ortis. Apart from the question of an appeal, I do not expect there to be any issue with the main body or Annex A. Given its contents, the review of Annex C for this

purpose should also be relatively straightforward. On the other hand, I do not expect any useful purpose would be served by attempting to redact injurious information from Annex B to facilitate its disclosure to anyone beyond the AGC and the *amici* (at least, not at this stage).

[52] Once the Court has had the benefit of input from the AGC and the *amici* and applied any redactions that may be required, I will authorize release of the main body of the Order and Reasons and Annexes A and C to Mr. Carter and his client.

[53] The third step is to determine, in light of any concerns Mr. Carter might raise about the premature disclosure of his client's defence to counts 1 to 4, whether any redactions are required to the main body of the Order and Reasons or to Annexes A or C before they can be released to counsel for the PPSC. Should Mr. Carter have such concerns, he should raise them with the Court as soon as possible. It would also be helpful if he could indicate at the same time whether Mr. Ortis intends to seek a remedy under section 38.14 of the *CEA* in relation to counts 1 to 4. As I understand things, the two are related: if Mr. Ortis intends to seek a remedy under section 38.14, this would require disclosure of his defence to those counts so there would be no need to redact any parts of the Order and Reasons to prevent this from happening; on the other hand, if he does not seek such a remedy at this time, there would be no reason to disclose his defence to the Crown. In the latter case, I agree that it would be appropriate to protect Mr. Ortis's right to control the timing of the disclosure of his defence by redacting any parts of the Order and Reasons that reveal it before they are provided to the Crown.

[54] The final step will be releasing the main body of the Order and Reasons as well as Annexes A and C to counsel for the PPSC, subject to any redactions applied at the first two steps described above and, if requested, subject to any redactions to prevent the premature disclosure of Mr. Ortis's defence to the Crown.

IV. CONCLUSION

[55] For these reasons, together with the classified reasons in Annexes B and C, the Court has made the determinations under subsection 38.06(2) or (3) of the *CEA*, as the case may be, set out in Annexes A and C.

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

ORDER IN DES-5-20

THIS COURT ORDERS that

1. The claims of the Attorney General of Canada for the prohibition of disclosure under section 38 of the *Canada Evidence Act* with respect to information in the documents listed in Annex A are confirmed, subject to the exceptions noted in Annex A.
2. The claims of the Attorney General of Canada for the prohibition of disclosure under section 38 of the *Canada Evidence Act* with respect to information in the Defence Summary relating to counts 1 to 4 in the indictment are confirmed, subject to the exceptions noted in Annex C.
3. This Order and Reasons shall be released to the parties in accordance with the procedure set out in paragraphs 49-54, above.
4. This Order and Reasons shall not be published in any document, or broadcast or transmitted in any way before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.
5. For greater certainty, the foregoing term does not apply to the filing of this Order and Reasons or any part thereof at the Ontario Superior Court of Justice.
6. Subject to further Order of the Court, the Registry shall not make this Order and Reasons available to any member of the public before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.

"John Norris"
Judge

ANNEX A – TABLE OF DOCUMENTS[1]
SUMMARY OF COURT'S DETERMINATIONS UNDER *CEA* SECTION 38.06

AGC No.	Determination re AGC's claims	Comments
0250	Disclosure of the following summary of information agreed to by the AGC is ordered : "Information in the document pertains to CSE and RCMP collaboration on foreign intelligence efforts to address transnational organized crime priorities, particularly with respect to money laundering and international narcotics networks. The injurious information includes techniques, capabilities and entities of interest to the foreign intelligence activities." Otherwise claim is confirmed.	
0257	Disclosure of the following summary of information agreed to by the AGC is ordered : "Information in the document pertains to CSE and RCMP collaboration on foreign intelligence efforts to address transnational organized crime priorities, particularly with respect to money laundering and international narcotics networks. The injurious information includes names of CSE employees as well as techniques, capabilities and	

[1] As much as possible, this chart omits duplicate and near-duplicate documents. It is understood between the AGC and the *amici curiae* that the Court's determinations will be applied to documents that are duplicates or near-duplicates of those listed here. As well, with this understanding in mind, this table is meant to be an exhaustive list of the Court's determinations with respect to the contentious documents under Phase 2. If it turns out to be the case that a contentious Phase 2 document has been overlooked at this stage, it will be addressed in a subsequent Order and Reasons.

	entities of interest to the foreign intelligence activities." Otherwise claim is confirmed.	
0304	Confirmed	
0309	Disclosure of the following summary agreed to by the AGC is ordered: "Operations Research organizational structure diagram on Farzam Mehdizadeh "	Final determination with respect remaining section 38 claims deferred pending clarification of scope of claims over the document under section 37 of the *CEA*.
0310	Confirmed	
0311	Confirmed	
0312	Confirmed	
0314	Confirmed	
0315	Confirmed	
0316	Confirmed	
0317	Confirmed	AGC agrees to lift redaction over "Walter Mendonca "
0318	Confirmed	
0319	Confirmed	
0320	Confirmed	
0321	Confirmed	
0322	Confirmed	
0323	Confirmed	
0324	Confirmed	
0325	Confirmed	
0326	Confirmed	
0327	Confirmed	
0328	Confirmed	
0329	Confirmed	
0330	Confirmed	
0331	Confirmed	
0332	Confirmed	
0333	Confirmed	
0334	Confirmed	
0335	Confirmed	
0336	Confirmed	
0337	Confirmed	
0338	Confirmed	
0339	Confirmed	
0340	Confirmed	
0341	Confirmed	
0342	Confirmed	
0343	Confirmed	

0344	Confirmed	
0345	Confirmed	
0346	Confirmed	
0612	Confirmed	
0613	Confirmed	
0614	Confirmed	
0615	Confirmed	
0616	Confirmed	
0617	Confirmed	
0618	Confirmed	
0619	Confirmed	
0620	Confirmed	
0636	Confirmed	
0641	Confirmed	
0652	Confirmed	
0653	Disclosure of the following summary of information substantially agreed to by the AGC is ordered : "Information in the document pertains to CSE and RCMP collaboration on foreign intelligence efforts to address transnational organized crime priorities, particularly with respect to money laundering and international narcotics networks. The injurious information includes techniques, capabilities and entities of interest to the foreign intelligence activities. This document summarizes intelligence capabilities and gaps against organized crime's use of a specific technology. " Otherwise the claims are confirmed.	
0685	Confirmed	
0686	Confirmed	
0687	Confirmed	
0787	Confirmed	
0871	Disclosure of the following summary of information	AGC also agrees to specific lifts.

	agreed to by the AGC is ordered: "Information in the document pertains to CSE and RCMP collaboration on foreign intelligence efforts to address transnational organized crime priorities, particularly with respect to money laundering and international narcotics networks. The injurious information includes names of CSE employees, as well as techniques, capabilities and entities of interest to the foreign intelligence activities." Otherwise claims confirmed.	
0991	Disclosure of the following summary of information agreed to by the AGC is ordered: "Information in the document pertains to CSE and RCMP collaboration on foreign intelligence efforts to address transnational organized crime priorities, particularly with respect to money laundering and international narcotics networks. The injurious information includes techniques, capabilities and entities of interest to the foreign intelligence activities." Otherwise claim is confirmed.	
1004	Confirmed	
1042	Confirmed	
1043	Confirmed	
1047	Confirmed with word substitution agreed to by the AGC : "name of CSE employee"	
1340		Determinations deferred

1341		Determinations deferred
1345		Determinations deferred
1348		Determinations deferred
1414	Confirmed	
1415	Confirmed	

Further disclosure:
The Court also authorizes the release of the following summary of information: “When he was in communication with Muhammad Ashraf, Cameron Jay Ortis had the necessary information to attempt to contact Altaf Khanani directly.”

~~SUBJECT TO A PUBLICATION BAN~~

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-20
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v CAMERON JAY ORTIS ET AL
PUBLIC HEARING DATES:	September 20, 21, 2021
Ex parte in camera HEARING DATES:	October 4, 5, 6, 21, 2021 November 2, 3, 2021 December 1, 2, 3, 13, 2021 January 20, 21, 2022
ORDER AND REASONS:	NORRIS J.
DATED:	April 8, 2022

APPEARANCES:

Andre Seguin Elizabeth Richards Nicole Jedlinski Jacques-Michel Cyr Derek Rasmussen	FOR THE APPLICANT
Ian Carter	FOR THE RESPONDENT, CAMERON JAY ORTIS
John MacFarlane Judy Kliewer	FOR THE RESPONDENT, DIRECTOR OF PUBLIC PROSECUTIONS
Christine Mainville Howard Krongold	*AMICI CURIAE*

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Bayne, Sellar, Ertel, Carter	FOR THE RESPONDENT, CAMERON JAY ORTIS

Ottawa, Ontario

Public Prosecution Service of Canada Ottawa, Ontario	FOR THE RESPONDENT, DIRECTOR OF PUBLIC PROSECUTIONS
Christine Mainville Toronto, Ontario	*AMICUs CURIAE*
Howard Krongold Ottawa, Ontario	*AMICUS CURIAE*