

CANADA / JUDGMENT

R. v. Teixeira

2024 BCCA 257

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 257 R. v. Teixeira

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Teixeira,

2024 BCCA 257

Date: 20240705

Dockets: CA49727; CA49733

Docket: CA49727

Between:

Rex

Appellant

And

Brandon Nathan Teixeira

Respondent

- and -

Docket: CA49733

Between:

Attorney General of Canada

Appellant

And

Brandon Nathan Teixeira

Respondent

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File Sealed (In Part)

Before:

The Honourable Madam Justice Bennett

The Honourable Justice Griffin

The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated February 28, 2024 (R. v. Teixeira, 2024 BCSC 356, New Westminster Docket 82939-86).

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Place and Date of Hearing:

Vancouver, British Columbia

June 26-28, 2024

Place and Date of Judgment:

Vancouver, British Columbia

July 5, 2024

Written Reasons of the Court

Summary:

Information was inadvertently disclosed by the Crown to the respondent, and the respondent applied for proper disclosure of that information. When the trial judge ordered disclosure without conditions, the appellants filed an application objecting to disclosure on the basis that it encroached upon a specific public interest pursuant to s. 37 of the Canada Evidence Act, R.S.C., 1985, c. C-5 [CEA]. After the hearing of that application, which included an in camera proceeding ex parte the appellants, the judge ordered disclosure without conditions, finding that the Witness Protection Program Act S.C. 1996, c. 15 [WPPA] would still offer protections. The appellants appeal that order, asserting that the trial judge erred in the underlying procedure she followed, in the balancing exercise under s. 37 of the CEA, and in failing to impose conditions. Held: Appeal allowed, in part. The judge did not err in principle in going in camera ex parte with the respondent, nor did she err in the balancing exercise. However, the judge erred in failing to

impose conditions and concluding that the WPPA would provide sufficient protection. This Court exercises its jurisdiction to impose conditions on the disclosure.

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Reasons for Judgment of the Court:

- [1] There are a number of sealing orders and publications bans attached to this appeal. These reasons will not be published until after the conclusion of the trial in the British Columbia Supreme Court or as otherwise ordered by the trial judge.
- [2] The appellants, the Attorney General of Canada ("AGC") and the Attorney General of British Columbia (the "Crown"), appeal Justice Duncan's decision to order the disclosure of "Sensitive Information" without conditions, indexed at 2024 BCSC 356 (the "Reasons"). The appellants objected to such disclosure on the grounds of a specified public interest pursuant to s. 37(5) of the Canada Evidence Act, R.S.C., 1985, c. C-5 [CEA].
- [3] This is a pre-trial criminal appeal. On September 6, 2018, the respondent, Brandon Teixeira, was charged with the first-degree murder of Nicholas Khabra and the attempted murder of another individual. Pre-trial applications have been underway since August 2021 and a trial date is yet to be set.
- [4] In addition, the Crown has filed an application to adduce fresh evidence, in the form of two sealed affidavits. The purpose of the fresh evidence was to ensure that the record was accurate. Counsel conceded that the evidence was not properly fresh evidence, and we dismissed that application during the hearing.
- [5] The Crown also provided submissions on appeal regarding an alleged ethical dilemma raised by the respondent in one of the underlying applications. In our view, the ethical dilemma has no bearing on the resolution of the issues raised by the appellants on appeal. Accordingly, we decline to comment on this issue.

- [6] We would allow the appeal to the extent that we would add the following conditions as a term of disclosure:
- a) The defence shall not disclose the name or location of the protected unit to any person without further order of the trial court.
 - b) If, in the course of their inquiries of Other Inmate or Community Member, defence counsel are provided with the names of individuals who were or are housed in the same unit as Witness X and Other Inmate, the defence shall not disclose their names or any information that could identify them to any person, including the respondent, without further order of the trial court.

I. Background

- [7] The underlying pre-trial ruling relates to the disclosure of Sensitive Information that may be used by defence counsel to impugn the credibility of a Crown witness. The background facts relevant to the appeal are set out below.

Witness X

- [8] The Crown's key witness is Witness X. Witness X is a Vetrovec witness with a criminal history. His credibility is central to determining who shot and stabbed Mr. Khabra. He acted as a police agent in a number of scenarios. He entered into a limited immunity agreement concerning his involvement in the murder of Mr. Khabra. He has agreed to testify against the respondent and is expected to say that the respondent shot and then stabbed Mr. Khabra to satisfy a \$160,000 contract on the latter's life. He has admitted that he drove the respondent to the meeting with Mr. Khabra and provided the back-up firearm when the first one jammed. There is no forensic evidence to corroborate Witness X's version of events. Witness X received a favourable sentence for his guilty plea to conspiracy to commit that offence. He is being paid a significant amount of money for testifying, in addition to money he was paid in his role as a police agent.

Other Inmate

- [9] Other Inmate is a person whose time in custody overlapped with Witness X. The police and the Correctional Service of Canada ("CSC") regard Other Inmate as "an attention-seeking individual of dubious veracity": Reasons at para. 17. Other Inmate was released from custody some time ago. Other Inmate gave a media interview and described the locations where he had served time in custody (the "Media Interview"). CSC successfully took steps to edit the digital version of the Media Interview, although the re-released article and video remain publicly available. The Media Interview does not connect Witness X and Other Inmate.

- [10] Other Inmate told another individual, Person Y, that Witness X allegedly made statements about Witness X's involvement in the offence. Those statements contradicted statements that Witness X made to police. Person Y advised his handler of that conversation. Person Y was initially a Vetrovec witness in these proceedings but the Crown no longer intends to call him as a witness at trial.

May 3, 2019 Phone Call

- [11] On May 3, 2019, while in custody, Other Inmate invited Witness X to participate in a three-way phone call with a member of the community ("Community Member"), contrary to institutional rules (the "May 2019 Call").
- [12] Other Inmate called Community Member from custody and asked him to pretend he was an associate of a high-ranking member of an organized crime group. He requested that Community Member engage Witness X in some conversation about that crime group member. Witness X and Community Member proceeded to engage in conversation. The May 2019 Call was monitored and recorded.
- [13] Later that month, Other Inmate wrote a letter to his police handler, asserting that Witness X had organized an assault on him. He alleged that he knew things about Witness X that police did not know and asserted that Witness X was dishonest and had ongoing connections with organized crime.

The Inadvertent Disclosure

- [14] After CSC informed police about the recorded May 2019 Call, the call was disclosed in a heavily redacted version of Task Action Report 2032 ("Task 2032") in October 2020. Task 2032 was redisclosed in December 2021 after the Crown reviewed the privilege redaction. The names of Other Inmate and Community Member were redacted.
- [15] In February 2022, Crown counsel inadvertently lifted some redactions from a cumulative, vetted disclosure package, which was sent to defence counsel. As a result, Other Inmate's name was disclosed to defence counsel.
- [16] Defence counsel used Other Inmate's real name to find the Media Interview. Therefore, defence counsel's access to Other Inmate's name through the inadvertent disclosure revealed the location of Witness X on May 3, 2019.
- [17] On June 9, 2022, the Crown became aware of the inadvertent disclosure. The Crown immediately advised defence counsel and sought its return. Defence counsel returned the disclosure, then pursued disclosure of the following information in its unredacted form:
- a) the name of Other Inmate;
 - b) the name of Community Member; and
 - c) contact information for Community Member (together, the "Sensitive Information").

- [18] The Crown informed the court about the inadvertent disclosure on June 20, 2022. On June 28, 2022, the Crown and the AGC briefly went in camera to explain the situation. The judge made an order appointing an amicus on her own motion.
- [19] The police have not interviewed Other Inmate. This leaves it to the respondent to investigate Other Inmate's claims.

II. Procedural History

- [20] The following summary sets out the relevant procedural history and rulings made after the inadvertent disclosure, including the rulings made prior to the underlying disclosure order at issue on appeal.

Common Law Public Interest Privilege Ruling: Teixeira 155

- [21] On July 25, 2022, defence counsel filed Application #58 to review the Crown's privilege claims about the May 2019 Call and related materials. Defence counsel sought to interview Other Inmate about other individuals who may also have been in custody at the same time to obtain information that could be used to attack Witness X's credibility. Defence counsel asserted they had no interest in obtaining the name or location of the institution where the May 2019 Call took place. The Crown resisted that application on the basis that the information sought was subject to common law public interest privilege.
- [22] The Crown acknowledged the Sensitive Information met the threshold for disclosure pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45 but contended that providing Other Inmate's name without restrictions could result in Other Inmate revealing the names of other individuals in custody with Other Inmate and Witness X and could place those persons in jeopardy.
- [23] Defence counsel submitted that the Sensitive Information was in the public domain as a result of the Media Interview. Further, defence counsel had discussed the Sensitive Information with the respondent, taken instructions, and retrieved the Media Interview before the Crown requested the return of the Sensitive Information.
- [24] The Crown tendered evidence to support the submission that the disclosure of Other Inmate's name could result in the release of bits and pieces of seemingly innocuous information that could form together as a mosaic and thereby could or would reveal protected information to a knowledgeable person. This "mosaic effect" would potentially endanger the lives or safety of others and undermine the ability of CSC to protect incarcerated witnesses.
- [25] In her reasons indexed at 2023 BCSC 155, the judge concluded that the Crown had established a legitimate public interest based on the potential for disclosure of the names of cooperating witnesses and the heightened risk that would pose to past, present or future cooperators.

Common Law Public Interest Privilege Remedies: Teixeira 768

- [26] Having found the Crown had established its public interest claim in Teixeira 155, the judge proceeded to consider whether, and to what extent, disclosure could be provided to the respondent.
- [27] Crown suggested that the name of Other Inmate could be disclosed to defence counsel but only if subject to certain conditions intended to protect the location where the May 2019 Call took place and any identifying information of other inmates.
- [28] In reasons indexed at 2023 BCSC 768, the judge found that disclosing Other Inmate's name was contrary to her finding that Other Inmate's identity was subject to public interest privilege. She held that the court did not have jurisdiction to impose conditions upon Crown disclosure in the context of defence counsel's application. She concluded that the Sensitive Information could not be disclosed. We note that the issue of whether the judge correctly concluded that she had no jurisdiction to impose conditions is not before us, and we do not decide that issue.

Reopening of Application: Teixeira 1475

- [29] On June 30, 2023, the respondent filed an abuse of process application, Application #85. The respondent sought to reopen the judge's rulings regarding public interest privilege on the basis of a proposed ethical dilemma: defence counsel and the respondent knew Other Inmate's real name as a result of the inadvertent disclosure, but counsel could not follow the respondent's instructions to act on that information. The respondent contended that maintaining the redactions prejudiced his ability to challenge Witness X's credibility and reliability by removing an avenue of investigation. He sought a stay of proceedings, or in the alternative, either an order that the Crown be prevented from calling Witness X, or an order that the disclosure about Other Inmate be made without any vetting for privilege.
- [30] The judge agreed to reopen Application #58.
- [31] In reasons indexed at 2023 BCSC 1475, the judge agreed with the Crown that much of the disclosure sought would be likely inadmissible at trial but found that there may be something of value to defence counsel in speaking with Other Inmate or Community Member. Noting, at para. 43, that "admissibility is not the touchstone of disclosure", the judge ordered disclosure, without conditions, on the basis that such disclosure was necessary to the defence of the respondent.
- [32] Application #85 remains suspended pending the outcome of the proceedings relating to disclosure of the Sensitive Information.

Section 37 CEA Application: Teixeira 356

[33] In August 2023, the AGC and the Crown filed certificates under s. 37(1) of the CEA, objecting to the disclosure of the Sensitive Information on the grounds of a specified public interest (Application #86).

[34] The AGC, on behalf of CSC, was granted standing on the s. 37 hearing.

1. In Camera Defence Hearing

[35] On November 16, 2023, defence counsel raised the prospect of an in camera and ex parte hearing:

CNSL R. THIRKELL: The final thing is back to application 86, and we find ourselves in the position that defence are contemplating requesting an ex parte in camera hearing with you to take advantage of a provision in the Canada Evidence Act that allows us to present evidence in other traditional forms on a matter that has taken on what we think is an outsized importance, but we need to talk about it amongst ourselves, we need to get instructions from Mr. Teixeira which we hope to do tonight . [a]nd if we can get an audience of 30 or 40 minutes tomorrow sometime, we would incrementally bring it out and hopefully in a way that doesn't cause problems. It's novel, new, first time I've done anything like this.

[36] Mr. Thirkell also stated that counsel wanted to proceed with the hearing before defence began their submissions at the s. 37 hearing.

[37] After the defence requested the in camera ex parte hearing, Crown counsel raised the issue of whether an amicus should be involved:

CNSL M. BARRENGER: On that point, Justice, this is the first I've heard of that. Is this something where the amicus ought to be involved?

THE COURT: I don't know.

CNSL M. BARRENGER: Well, I tend to think yes. The amicus has been here for every in camera ex parte type hearing that Mr. Katz has conducted and isn't what's good -

THE COURT: It's different -

CNSL M. BARRENGER: -- for the goose is good for the gander?

THE COURT: Well, no. I am the one who approves what sauce goes on the goose, and I'm going to accept the filing, and if I think I want Ms. Elden's assistance, I'll ask. This is a -- this is a different one, because it's a defence-initiated -- so I guess I could get amicus for the Crown.

CNSL M. BARRENGER: -- you know, I'm just thinking on my feet here. I could see a situation where perhaps the court would like the input of amicus. I don't know, because I have no idea about the information that is being proffered here or sought to be proffered or in what form or anything about it. I'm just hearing this now, and so it may be -- put it this way: I would at least like -- ask that the court have that in the back of your mind, if it -- as it were, as a potential option,

depending on the nature of the information that is brought forward by counsel for Mr. Teixeira. So maybe it would be required, and maybe it wouldn't be. I just don't know.

THE COURT: Well, I can tell you, Mr. Barrenger, I'm creeping up on ten years on this job, and my first reaction when someone wants to do something ex parte is to say, "Why do you want to do this ex parte?" So I am cognizant of having both sides of the story.

CNSL M. BARRENGER: Yes.

THE COURT: And I remain to see what interesting twist might come my way tomorrow and if I think I need amicus, I'll ask for amicus.

- [38] On November 17, 2023, defence counsel went in camera without the Crown and informed the judge that they were aware of the names of two inmates who were housed with Witness X, and the name of the place where the May 2019 Call occurred through sources independent of the Crown's inadvertent disclosure. An amicus was not present for these proceedings. Defence asserted that the details and sources of this knowledge were subject to litigation privilege. The hearing commenced at 12:12 p.m. and ended at 12:28 p.m.
- [39] The judge sealed defence counsel's written submissions pending further order of the court. Defence counsel intended to consult with the Crown to provide further information regarding the ex parte in camera hearing, but no communication occurred between November 17 and November 27, 2023.
- [40] The defence filed Application #88 (file stamped November 17, 2023) titled "Request for an in camera and ex parte hearing." Although relying on litigation privilege, the notice of application did not reveal the nature of the privilege asserted. Defence stated the purpose of the hearing was to:
- a) Inform the court about the reasons in support of the request for an in camera and ex parte hearing; and
 - b) Apprise the court of information the applicant intends to present to the court in relation to Application #86.
- [41] The notice of application was provided to the Crown after the first in camera ex parte hearing.
- [42] On November 20, 2023, Crown counsel requested a judicial summary of the in camera application. On November 27, 2023, defence counsel appeared in camera again to propose a judicial summary of the information they possessed. That summary was reduced to writing and disclosed to the AGC and the Crown. The judicial summary was marked as Exhibit W, and reads as follows:

Counsel and Mr. Teixeira have been aware of the name of the Institution prior to Crown's inadvertent disclosure in February of 2022. This information was available in the public domain.

Counsel were able to corroborate this pre-existing information through various sources. They are:

- i) Other sources in the public domain and independent from Crown's inadvertent disclosure in February of 2022; and
- ii) Other Inmate's [Media Interview], as a result of Crown's inadvertent disclosure in February of 2022.

Counsel and Mr. Teixeira have also been aware of the names of two inmates who were housed with Witness X prior to Crown's inadvertent disclosure in February of 2022. Counsel have not set out to confirm the accuracy of this information.

[43] The judge informed counsel on two occasions that they could apply to unseal the materials. No one did.

2. Section 37 CEA Submissions and Reasons

[44] Both the Crown and the AGC took the position on the s. 37 application that the Sensitive Information should not be disclosed or, in the alternative, disclosed with conditions pursuant to s. 37(5). The judge reproduced the conditions proposed by the Crown at para. 65 of the Reasons:

Counsel must advise Other Inmate, prior to commencing any interview with him, that he is not to provide them with the name of the institution he was at, nor the names or personal identifying information of any inmates who were there other than Witness X;

Any inquiries or investigation by counsel cannot include any questions about the name or location of the institution [where] Other Inmate was housed with Witness X;

Any inquiries of investigation with Other Inmate or the Community Member by counsel cannot include any questions that would serve to identify additional inmates, besides Witness X, who were housed at the institution where Other Inmate and Witness X resided;

In the event that the Other Inmate provides unsolicited information in relation to the name of the institution or any personal or identifying information about additional inmates at that institution, such information cannot be used for any purpose and cannot be shared with the accused Respondent;

The stipulations above apply equally to any interviews with the Community Member.

[45] The AGC asserted that disclosure of the Sensitive Information would undermine the efforts of the CSC to provide for the safety and security of Witness X and other past, present, and future inmates at CSC facilities: Reasons at para. 57. Further, such disclosure would breach s. 11 of the Witness Protection Program Act, S.C. 1996, c. 15 [WPPA]: paras. 59-60. The AGC argued that when balancing disclosure of information that falls under the WPPA within a s. 37 CEA hearing, the threshold test is the prevention of a miscarriage of justice rather than full answer and defence: para. 61.

- [46] The Crown submitted that the court is required to protect the substantial public interest in the Sensitive Information and should only order disclosure subject to conditions. The Crown argued the conditions proposed would permit defence counsel to speak with Other Inmate without transgressing the WPPA: Reasons at para. 73. Further, the conditions would not interfere with the solicitor-client relationship or the ability of defence counsel to conduct investigations within the limits of law and ethics: paras. 75, 77.
- [47] The respondent asserted that the court lacked the jurisdiction to impose any conditions under s. 37(5) that negatively impacted his fair trial rights and solicitor-client relationship: Reasons at para. 87. The respondent cautioned against resorting to other provisions of the CEA for guidelines on imposing conditions, given their different wording from s. 37: para. 90. He argued that the WPPA is not at issue because the Sensitive Information includes three pieces of first party disclosure not within the scope of the WPPA: para. 91.
- [48] The judge affirmed that the burden of proof lies with the Crown, which has the onus of establishing, on a balance of probabilities, that privilege applies to the information it seeks to withhold: Reasons at para. 99.
- [49] The judge set out the general framework for a s. 37(5) analysis at para. 104 of the Reasons as follows:
- a) Define the specified public interest;
 - b) Consider whether disclosure of the information "would encroach upon" that specified public interest (this is the subsection (4.1) analysis);
 - i. If there is no encroachment on the specified public interest or no specified public interest at stake, an order may be made under subsection (4.1) for disclosure;
 - ii. If there is an encroachment then move to balancing the specified public interest and the public interest in disclosure;
 - c) Balance the specified public interest and the public interest in disclosure (this is the subsection (5) analysis). There are different factors to consider depending upon the privilege claimed:
 - i. Consider conditions that can be made as a part of the balancing stage and, if this will allow disclosure, disclosure may be ordered pursuant to (5) on the conditions that are necessary and;
 - ii. If no order should be made under either of subsections (4.1) or (5), then the Court must make an order prohibiting disclosure under subsection (6).
- [Emphasis in original.]

- [50] Contrary to the respondent's position that the public interest was only in the Sensitive Information, the judge found that the specified public interest at issue "was not simply the Sensitive Information, but the uses to which it may be put, which in turn may impact the safety of incarcerated witnesses and the operational integrity of the means and methods used to protect them": Reasons at paras. 105-106.
- [51] The judge found that the degree of encroachment on that public interest had decreased based on the defence counsel having already known the name and location of the place where the May 2019 Call took place, and the names of two other inmates through independent sources: Reasons at para. 108. However, a degree of encroachment still remained such that an order could not be made for disclosure under s. 37(4.1): para. 109.
- [52] The judge considered the following factors as applicable in the balancing exercise under s. 37(5) at para. 116:
- a) the nature of the privilege sought to be protected;
 - b) the seriousness of the charge;
 - c) the effect of non-disclosure on the public perception of the administration of justice;
 - d) prior publication of the evidence; and
 - e) the relevance of the evidence to an issue in the proceedings to the extent that it may possibly affect the outcome at trial.
- [53] In addressing these factors, the judge affirmed the important public interest privilege at stake: Reasons at para. 117. The judge emphasized the seriousness of the respondent's charges, and noted that conviction rests "almost entirely on whether or not the jury accepts Witness X's evidence that [the respondent] was the individual who shot and stabbed Mr. Khabra": para. 118.
- [54] The judge found that the effect of non-disclosure on the public perception of the administration of justice pulled towards disclosure as the jury must be in a position to fully assess Witness X's character and credibility and defence counsel must be able to investigate additional evidence tending to discredit Witness X: Reasons at para. 119.
- [55] In relation to prior publication of the evidence, the judge considered the fact that some of the Sensitive Information was either in the public domain, or was known by defence counsel and the respondent, prior to the inadvertent Crown disclosure: Reasons at para. 121.
- [56] The judge noted at para. 123 that if defence counsel interviewed Other Inmate or Community Member, the statutory restrictions on disclosure of information under s. 11 of the WPPA would apply:

Another theme on this application was concern over what Other Inmate or Community Member might say if interviewed by defence counsel, including whether they might reveal the [redacted] under the WPPA. As already discussed, defence counsel and Mr. Teixeira know the names of two individuals who served time with Witness X. Defence counsel are free to question those individuals without restriction, per Barros [R. v. Barros, 2011 SCC 51], except that they may not disclose information they learn to anyone, including their client, if it falls within s. 11(1) and (2) of the WPPA. I accept that defence counsel are, and will continue to be, mindful of the statutory prohibitions on disclosure pursuant to the WPPA. Those restrictions would apply, with equal force, to any interview with Other Inmate or Community Member.

[Emphasis added.]

- [57] While the judge acknowledged that "some aspects of defence counsel's proposed investigation involve tangential issues" she found that limiting the respondent's inquiries of Other Inmate may have an impact on counsel's ability to explore legitimate avenues of defence: Reasons at para. 124. The judge held that the "overarching consideration in the balancing exercise is how significant Witness X is to the Crown's case": Reasons at para. 125.
- [58] The judge declined to incorporate the AGC's higher threshold that disclosure "must be necessary to prevent a miscarriage of justice" pursuant to s. 11(5) of the WPPA into her analysis: para. 126. She noted that if defence counsel come into information that falls under s. 11(1) and (2) of the WPPA, they cannot disclose it without an order under s. 11(5): Reasons at para. 127.
- [59] In conclusion, the judge found the outcome of the trial might be affected by non-disclosure of the Sensitive Information. She further found that conditions would cut off a legitimate avenue of inquiry or investigation that would assist with full answer and defence: Reasons at para. 129. Therefore, she confirmed the order for disclosure without conditions.

III. Issues on Appeal

- [60] We have organized the alleged errors raised by the appellants into three main categories in relation to the s. 37 CEA application: (1) procedural errors; (2) errors in the balancing of the specified public interest and the public interest in disclosure; and (3) errors in the failure to impose conditions on disclosure. The Crown and AGC raised different arguments in relation to these categories, as indicated below.
- a) The appellants submit that the trial judge erred in the procedure she followed in going in camera and ex parte with defence counsel and without an amicus present during the underlying proceedings.
 - b) The appellants contend that the trial judge erred in her application of the balancing exercise under s. 37(5) of the CEA by:
 - i. improperly assessing the public domain (Crown);

- ii. considering defence counsel's assertion that they had learned of some of the Sensitive Information through sources independent of the inadvertent disclosure (AGC); and
 - iii. applying an erroneous threshold for the balancing of the public interest where the disclosure of the information amounts to a breach of the prohibitions set out in s. 11 of the WPPA (AGC).
- c) The appellants argue that the trial judge erred in ordering the disclosure of the Sensitive Information without conditions, by:
- i. misapprehending the scope of the WPPA (Crown); and
 - ii. and misapprehending the scope of potential s. 37(5) conditions (Crown).

IV. Relevant Legislation

Canada Evidence Act

[61] Section 37 of the CEA provides as follows:

Objection to disclosure of information

37 (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

Objection made to superior court

- (2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

Objection not made to superior court

- (3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by
- (a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or
 - (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period

- (4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Disclosure order

(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.

Disclosure order

- (5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Prohibition order

- (6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

Evidence

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

When determination takes effect

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

Introduction into evidence

- (8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Relevant factors

- (9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

Witness Protection Program Act

[62] The relevant provisions of the WPPA provide as follows:

Disclosures prohibited

11 (1) Subject to sections 11.1 to 11.5, no person shall directly or indirectly disclose

- (a) any information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person;
- (b) any information about the means and methods by which protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person; or
- (c) the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to
 - (i) that person,
 - (ii) a member of that person's family, or
 - (iii) any protected person.

Means and methods of protection

- (2) For the purpose of paragraph (1)(b), information about the means and methods by which protected persons are protected includes information about
- (a) covert operational methods used to provide protection;
 - (b) covert administrative methods used to support the provision of protection;

- (c) any means used to record or exchange confidential information relating to protection or used to gain access to that information; and
- (d) the location of facilities used to provide protection.

Further disclosures prohibited

11.5 (1) Subject to this section, a person to whom information is disclosed under sections 11.2 to 11.4 is not authorized to disclose that information to anyone else.

Court -- confidentiality

- (4) Once a disclosure described in subsection 11(1) is made to a court, the court shall take any measures that it considers necessary to ensure that the information remains confidential.

Exception -- court

- (5) A court may make a disclosure described in subsection 11(1) for the purpose of preventing a miscarriage of justice, but in doing so it shall disclose only the information that it considers necessary for that purpose and shall disclose the information only to persons who require it for that purpose.

V. Positions of the Parties

Standard of Review

- [63] The parties dispute the appropriate standard of review for the errors raised by the appellants. The appellants submit the alleged procedural errors are subject to a standard of correctness. The respondent submits that arguments relating to trial fairness do not raise a standard of review but instead ask whether the process was ultimately fair: *Brar v. British Columbia (Securities Commission)*, 2023 BCCA 432 at paras. 25-26. Furthermore, the decision whether to appoint amicus is discretionary and it will therefore attract a deferential standard of review: *R. v. Basi*, 2009 SCC 52 at para. 58; *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, 1990 CanLII 10991 (B.C.C.A) at 199-200.
- [64] The standard of review for procedural fairness allegations outside of the administrative law context depends on the legal basis for the substance of the alleged error: *Katz v. Zentner*, 2022 BCCA 371 at para. 44.
- [65] As noted by the parties, the appropriate procedure to follow in s. 37 applications will depend on the circumstances of each case, and trial judges have a considerable amount of flexibility in overseeing the s. 37 hearing: *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 at para. 52, 2002 CanLII 34599; *Meuckon* at 199-200.

- [66] In this case, the legal basis for the substance of the alleged procedural error is a discretionary trial management decision. As highlighted by this Court in *British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10:
- [51] Trial judges have experience and wisdom in managing trials and in making discretionary interlocutory decisions after weighing various factors in the context of the circumstances of the case before them. Trial judges are fundamentally interested in managing cases in a practical manner so as to focus both legal resources and judicial resources. These are reasons why decisions of this nature are entitled to considerable deference by this Court.
- [52] A discretionary decision will not be overturned on appeal absent showing that the lower court misdirected itself on the applicable law (also described as an error in principle), or made a palpable error on the facts (including failing to consider relevant factors or misconceiving the evidence), or the decision is so clearly wrong that permitting the order to stand would work an injustice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp. 76-77, 1992 CanLII 110.

[Emphasis added.]

- [67] In relation to the s. 37(5) balancing exercise and ordering disclosure without conditions, the appellants submit that the power to order disclosure under s. 37 can only be exercised when certain legal conditions are met and accordingly, the standard of review concerns questions of law reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 36; *Canada (Attorney General) v. Ribic*, 2003 FCA 246 [Ribic] at para. 36; R.W. Hubbard & K. Doherty, eds, *Law of Privilege in Canada* (Toronto: Thomson Reuters, online) (loose-leaf updated 2024, release 3) at §3:17.
- [68] The respondent submits that the decision to order disclosure pursuant to s. 37(5) was a discretionary decision that is entitled to deference and may only be interfered with if there is an error in principle, a palpable and overriding factual error, or a failure to exercise discretion judicially: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48 [Carroll-Byrne] at para. 41.
- [69] In our view, the issues raised by the appellants relating to the s. 37 analysis go beyond the assignment of different weights to relevant factors under the balancing exercise and allege that the judge "put the wrong weights on the scales" in her interpretation and application of the s. 37 test: *Carroll-Byrne* at para. 41. Accordingly, the appellants raise legal errors reviewable on a standard of correctness.

Issue #1: Did the trial judge err in going in camera and ex parte with the defence?

1. Appellants

- [70] The appellants submit that the trial judge made a procedural error in permitting respondent's counsel to proceed in camera and ex parte without an amicus present and without hearing submissions from the Crown, which had a significant impact on the balancing of competing interests under s. 37(5). The Crown further argues that the judicial summary of the defence in camera proceeding was inadequate.
- [71] The Crown relies on Basi for the principles safeguarding the use of in camera ex parte proceedings at paras. 53-57:
- a) The accused and counsel should only be excluded from the proceedings when the claim of privilege cannot be otherwise protected, and only to the necessary extent;
 - b) A judge should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence;
 - c) Judges have broad discretion to craft appropriate procedures;
 - d) To assess a privilege claim, a judge may invite submissions on the scope of the privilege and request questions from the excluded party;
 - e) Fairness may require the court to provide the defence with a redacted or summarized version of the evidence presented ex parte;
 - f) The summary will permit the judge to receive additional submissions from defence counsel on whether the privilege applies; and
 - g) In difficult cases, the judges may appoint an amicus to assist the court.
- [72] Basi involved the question of whether defence could participate in Crown-initiated in camera ex parte proceedings, after the Crown claimed informer privilege over certain materials. The Crown refers to the audi alteram partem principle, which requires that courts provide an opportunity for both sides to be heard in proceedings that affect them, to submit that the Basi safeguards should apply when any party is excluded from in camera proceedings, including the Crown: A.(L.L.) v. B.(A.), [1995] 4 S.C.R. 536 at para. 27, 1995 CanLII 52; R. v. Gustavson, 2005 BCCA 32 at paras. 64-65.
- [73] The AGC argues that the procedural issues could have been cured through the presence of an amicus, or an opportunity for the Crown to provide a list of questions it wished to pose (see for example, Canada (Attorney General) v. Chad, 2018 FC 319 at para. 29; National Inquiry into Missing and Murdered Indigenous Women and Girls v. Canada (Attorney General), 2019 FC 741 [National Inquiry]).
- [74] The defence did not assert privilege or provide a specific legal justification prior to the in camera and ex parte hearing on November 17, 2023. The Crown notes that the judge did not ask Crown counsel to make submissions regarding the in camera ex parte hearing and contends that it should have been given an opportunity to address the lack of justification for this procedure.

- [75] Finally, the Crown asserts that the judicial summary of the in camera ex parte proceeding was inadequate because it did not set out the nature of the privilege that warranted the proceeding and failed to address the valid questions raised by the Crown regarding the appointment of an amicus.
- [76] The AGC contends that the breach of procedural fairness impacted the judge's weighing exercise under s. 37(5), given the appellants were unable to properly refute the respondent's evidence and his argument that some of the information was in the public domain.

2. Respondent

- [77] The respondent submits that the decision as to whether to seek the aid of an amicus was a discretionary issue solely for the judge to decide, and is entitled to deference on appeal. The respondent also argues that the information provided in camera and ex parte was done pursuant to s. 37(6.1) of the CEA. He submits that there is no mechanism of appeal from the judge's decision to admit information received ex parte on an application made by the respondent for the receipt of certain defence evidence pursuant to s. 37(6.1).
- [78] The respondent does not take issue with the Crown's position on the audi alteram partem principle. Further, he assumes (without conceding) that the principles in Basi apply equally to the Crown. However, the respondent submits that the only question for this Court to answer on review is whether the process at issue was ultimately fair.
- [79] The respondent submits that the record does not support the AGC's position that the procedure followed in going in camera and ex parte did not offer the appellants the opportunity to know and respond to the defence's submissions. The record, according to the respondent, suggests that the appellants did not oppose the in camera ex parte hearing, did not apply to unseal the records, and were content to leave the decisions regarding the in camera ex parte hearing and the appointment of an amicus to the trial judge.
- [80] The respondent contends that the judge provided a full and accurate judicial summary, and clearly signalled to the appellants that the questions they wanted answered would trench on litigation privilege. He highlights the judge's comment regarding defence counsel's ethical responsibilities, where she notes "no further disclosure of how the information came into their possession is either necessary or desirable": at para. 36 of the Reasons.
- [81] Finally, the respondent takes the position that the evidence and submissions of the defence in the in camera ex parte hearing were not at the "core" of the judge's determination. Those submissions related to the defence's knowledge of certain information independent of the inadvertent disclosure. The overarching consideration in the s. 37(5) analysis was the significance of Witness X to the Crown's case, which in turn relates to the ability of the respondent to make full answer and defence.

3. Amicus Curiae

[82] We received helpful submissions from the amicus curiae. The amicus highlighted the importance of the open court principle. Counsel raised the question of when the press should be notified that the Court was going to hold an in camera hearing. The amicus pointed to the importance of proper formal notice of the application and of the audi alteram partem principle. Finally, counsel emphasizes the assistance that an amicus can provide in these situations and highlights some of the deficiencies that arose in the procedure the trial judge followed.

4. Analysis

[83] In our view, although not procedurally perfect, the judge did not err in principle by going in camera and ex parte. This was a fast-paced process. It would have been better had the defence filed a notice of application stating that the basis for the in camera hearing was litigation privilege prior to the hearing. However, considering the submissions of the parties, when the process as a whole is examined, including the judicial summary, in our view, the trial judge did not err in principle, there was no injustice, and we would not disturb the trial judge's discretionary decision.

[84] The judge reproduced Exhibit W, the judicial summary, at para. 34 of the Reasons. She summarized what transpired in relation to the in camera ex parte hearing with defence counsel, as follows:

[30] The submissions of the Attorney General of Canada and the Crown were completed on November 16, 2023 with defence submissions set to begin on November 28. On November 16, defence counsel advised that they wanted to appear before me, in camera and ex parte the Crown. While the Crown was concerned and opposed to this unusual request, I acceded to it.

[31] On November 17, defence counsel appeared before me, without Mr. Teixeira but with his consent to do so in his absence. I was assigned to civil and family chambers that day and could not predict with any certainty when a video link with Mr. Teixeira could be facilitated.

[32] During the in camera hearing, Mr. Mansoori-Dara and Mr. Thirkell, two of Mr. Teixeira's defence team, advised me that they were aware of some aspects of the Sensitive Information that the Crown and the Attorney General of Canada sought to withhold from them, through sources independent of the inadvertent disclosure of Other Inmate's name. They intended to inform the Crown about the state of their knowledge without revealing any details of the defence brief, over concerns of litigation privilege. Counsel acknowledged that this knowledge was one of the reasons why they refused to sign an undertaking in exchange for the disclosure in the summer of 2022.

[33] On November 27, defence counsel appeared before me, again in camera, to propose a summary of the information they possessed. The summary was reduced to writing, marked as Exhibit W on this application, and disclosed to the Attorney General of Canada and the Crown. An error as to the date was corrected by Memorandum on January 20, 2024.

- [85] We have reviewed the transcript of the in camera ex parte hearing. The judge's description of what occurred was accurate and complete in material respects. The judge was prepared to accept the advice of defence counsel, as members of the Bar, that they had learned information through their own sources without questioning them as to how they had learned the information and without requiring defence counsel to reveal their sources, given the assertion of litigation privilege. The judicial summary provided to the appellants was an accurate summary of what defence counsel had advised the judge about their knowledge. To put it another way, the judge had no more material information imparted to her in the in camera ex parte hearing than was contained in the judicial summary.
- [86] The Court is not required in every case to notify the press if there will be an in camera hearing. Here, there is a ban of publication in relation to all pre-trial matters, thus the press could not report on the events. The judge was aware she could appoint an amicus if needed. She had done so for earlier applications. This hearing, in hindsight, was brief and as noted, the substance of what occurred was disclosed in the judicial summary. Furthermore, the appellants were invited, twice, by the judge to apply to unseal the hearing transcript. They chose not to do so.
- [87] In addition, litigation privilege is fundamental to the proper functioning of our legal system: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 64. It ensures the efficacy of the adversarial process by maintaining a protected area to facilitate the investigation and preparation of a case: *Lizotte* at para. 63. In *Lizotte*, an insurance company asserted litigation privilege as a reason not to disclose the entirety of its claim file to the insurance syndicate inquiring into the conduct of the claims adjuster. The syndicate argued that litigation privilege was not absolute because there was a statutory obligation to produce "any document" to the syndicate. The Supreme Court of Canada ("SCC") disagreed and upheld the claim of litigation privilege.
- [88] The SCC analogized litigation privilege to solicitor-client privilege and informer privilege, as a class privilege subject to specific exceptions as opposed to a balancing exercise: *Lizotte* at paras. 40-41. The Court rejected the argument that the privilege could be lifted in part:
- [51] In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court's opinion, "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies" (para. 44). In that case, the fact that the third parties had duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.
- [52] This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk

that a syndic's inquiry will result in the disclosure of privileged documents, the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.

[Emphasis added.]

- [89] The Court emphasized that any uncertainty with respect to litigation privilege could have a chilling effect on parties preparing for litigation: para. 53.
- [90] In light of the above principles, it was proper for the trial judge to approach the respondent's in camera ex parte submissions with caution.
- [91] Finally, we reject the respondent's suggestion that this Court has no jurisdiction to scrutinize the procedure which led to the disclosure order. While the information that was provided by the respondent may have been pursuant to s. 37(6.1), it ultimately factored into the analysis for disclosure under s. 37(5), from which the Crown has a right of appeal.

Issue #2: Did the trial judge err in the s. 37(5) balancing exercise?

1. Appellants

- [92] The appellants submit that the judge erred when balancing the specific public interest and the public interest in disclosure pursuant to s. 37(5). Specifically, she erred in concluding that because some information was in the public domain, and already known by defence counsel, the encroachment on the safety of incarcerated witnesses and the operational integrity of the means and methods used to protect them was minimal. The AGC submits that defence counsel's previous knowledge was an irrelevant factor, and also argues that the trial judge applied the wrong threshold for the balancing exercise.
- [93] Before addressing the alleged errors in the balancing exercise, the Crown highlights that the balancing of interests requires the court to assess the "relative relevance" of the Sensitive Information: *R. v. Western Taylor*, 2010 ONSC 5448 at para. 51; *Khan v. Canada (T.D.)*, [1996] 2 F.C. 316 at para. 37, 1996 CanLII 4032. The Crown emphasizes on appeal that the true relevance of the Sensitive Information remains minimal, given that the Crown disclosed a "body of material" in relation to Witness X, and that the Sensitive Information has a limited probative value and potential admissibility issues.
- [94] In addressing the public domain issue, the appellants emphasize that the encroachment on privilege was not minimal given the lack of information in the public domain specifically linking Witness X to Other Inmate and the safety concerns to past, current, and future cooperators flowing from the mosaic effect. It was only the inadvertent disclosure itself that enabled the defence to make this connection.

- [95] The AGC further asserts that notwithstanding the brief time before the Media Interview was edited and re-released, there is no evidence at all about any other place in the public domain where the Sensitive Information was available.
- [96] Finally, the AGC submits that the judge imposed an erroneous threshold for the balancing of the public interest where the disclosure of the information amounts to a breach of the prohibitions set out in s. 11 of the WPPA. That section limits the court to making such a disclosure only for the purpose of preventing a miscarriage of justice pursuant to s. 11.5(5) as opposed to the threshold of whether disclosure prevents full answer and defence.
- [97] The AGC submits that the judge's findings and the specified public interest directly engage the WPPA. The disclosure sought by the respondent and his intended uses of it jeopardizes the interests protected by the WPPA. The AGC refers to the WPP Affidavit filed on the s. 37 CEA application which it says supports a finding that disclosure of the Sensitive Information without any restrictions upon its use would cause significant harm to past, present and future protected inmates of CSC facilities, amounting to breaches of s. 11 of the WPPA.
- [98] In applying the "miscarriage of justice" standard, as set out in *R. v. Khan*, 2001 SCC 86, the AGC submits that disclosure is not warranted on the facts of this case. The AGC sets out the factors from *Khan*, arguing that: the Sensitive Information does not relate to any central issue in the case against the respondent; the gravity of non-disclosure is limited; there is no need to consider the impacts that non-disclosure could have on a jury at this preliminary stage; and the non-disclosure does not render the trial unfair because the respondent has already received a large body of disclosure in relation to Witness X.

2. Respondent

- [99] The respondent submits that the judge did not err in the balancing exercise pursuant to s. 37(5) of the CEA.
- [100] Central to the respondent's position on the s. 37(5) analysis, is that expanding the information subject to s. 37 into both the Sensitive Information and its future use by the respondent has significant implications for the balancing exercise. While the respondent does not argue that the trial judge erred in finding the "future use" of the information was protected pursuant to s. 37, he submits that this Court will have to resolve the question of whether the "disclosure of information before a court" encompasses future use. The respondent favours a narrower interpretation of the "information" encompassed by s. 37 than the one applied by the judge in the Reasons. He relies on *R. c. Dube*, 2010 QCCA 1377 for the proposition that "information" refers to the "content, i.e. the elements of knowledge concerning a person or an event": para. 21.

- [101] In relation to the arguments raised by the Crown about the relevance of the Sensitive Information, the respondent notes that the Crown does not suggest that the judge erred in her assessment of the relative relevance of the Sensitive Information. As such, the respondent urges this Court to accept the judge's findings regarding the relevance of the Sensitive Information and not to engage in a de novo analysis on this issue.
- [102] With respect to the "public domain" issue, the respondent submits that the judge did not err in concluding that because some of the Sensitive Information was already in the public domain, the encroachment on the privilege would be minimal. He asserts that this is a factual finding, and the appellants have not raised a palpable and overriding error in relation to the degree of encroachment.
- [103] The respondent argues that the judge did not err in considering defence counsel's knowledge of certain information independent of the inadvertent disclosure in the s. 37(5) analysis. He asserts that the law required that the judge consider whether information was in the public domain, because such information cannot be protected from disclosure, citing authorities which consider s. 38 and s. 39 of the CEA: *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 at para. 54; *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 26.
- [104] In addition, the respondent notes that certain information, including the identity of Other Inmate and the location of the institution where he was in custody are still in the public domain through the re-released Media Interview and digital video. Accordingly, this was not an irrelevant consideration.
- [105] Finally, the respondent submits that it would be incorrect to import the WPPA "miscarriage of justice" threshold to s. 37(5), and in the alternative, if that threshold is applied correctly, disclosure would still be ordered.
- [106] First, it is not clear that the Sensitive Information is captured by s. 11 of the WPPA—it is the future uses of that information which may potentially yield information captured by the WPPA.
- [107] Second, there is no legal precedent for importing a statutory prohibition into the disclosure analysis pursuant to s. 37. For example, in *R. c. Minisini*, 2008 QCCA 2188, the Québec Court of Appeal did not import the threshold from the WPPA. The respondent submits that as much as these two statutes intersect, the legislation must be interpreted and applied in a manner that will avoid unfair criminal trials.
- [108] In the alternative, the respondent argues that the miscarriage of justice test would be met. The respondent submits that the test in *Khan* was developed to guide appellate courts in a retrospective analysis, where courts have the benefit of the entire trial record, and is not appropriate in this context. Nonetheless, he asserts that the judge made findings that resolve the *Khan* factors in his favour at paras. 118-120 of her Reasons.

[109] The respondent submits that a more appropriate test on the "miscarriage of justice" threshold is found in *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 36, 1998 CanLII 805 and applied in cases where the Crown breaches its disclosure obligation. He contends that the application of this test would also lead to a conclusion that non-disclosure would cause a miscarriage of justice.

3. Analysis

[110] The Crown's submissions regarding the relevance of the Sensitive Information have no merit. The trial judge made a factual finding with respect to relevance of the Sensitive Information that no party alleges to be an error on appeal. No issue is taken with the fact that the Crown's case turns on the credibility of Witness X and that the Sensitive Information is highly relevant to the pre-trial investigations by defence counsel.

[111] We do not find it necessary to decide the AGC's argument regarding the proper threshold for disclosure under s. 37(5). Even if the test was miscarriage of justice, this case factually meets that test. Whether the test includes a miscarriage of justice threshold would have no effect on the outcome of this appeal.

[112] In our view, the judge correctly interpreted "information" under s. 37(5) as including future uses of the Sensitive Information by defence in this case. While this conclusion broadly interprets the word "information" in the context of s. 37 of the CEA, it was appropriate to give a broad meaning because of the arguments made by the appellants regarding the deleterious impact of the mosaic effect on the safety of incarcerated witnesses.

[113] This interpretation is not speculative because defence counsel has indicated that they intend to probe issues with Other Inmate that may well reveal the names and identities of incarcerated witnesses. The purpose of the legislation, in part, is to protect individuals from harm. Interpreting the section narrowly in this case, would provide little, if any, protection given the need for defence counsel to investigate the circumstances surrounding Witness X. In our view, the future use is not "future use in a vacuum" or future use in every case. The Court has the details of what counsel intends to do--it intends to ask Other Inmate about other potential witnesses in relation to things Witness X may have said or done. This is a specific "future use" and in our view, it falls within the scope of s. 37(5).

[114] In relation to the public domain submissions, the trial judge weighed the public availability of some aspects of the Sensitive Information as one factor in the balancing exercise, although it was not her sole consideration. She found that the encroachment on the public interest was attenuated by information the respondent provided in camera and ex parte that suggested he knew about the Sensitive Information from sources apart from the disputed disclosure. She concludes at paras. 108-109:

The assessment of encroachment has changed somewhat since the Crown objected to disclosure during the common law public interest privilege proceedings. The change relates to the information that defence counsel and Mr. Teixeira have come to know from sources apart from the disputed disclosure.

Overall, given the alternate sources the defence has concerning aspects of the Sensitive Information, including the names of two people who were on the unit, and the fact that Other Inmate went public with his complaints about the location where he served time with Witness X, the encroachment on the privilege is minimal.

[115] During the balancing exercise, she states (at para. 121):

I must also consider that some of the Sensitive Information was either in the public domain, or was known by defence counsel and Mr. Teixeira, prior to the inadvertent Crown disclosure. I accept that defence counsel and Mr. Teixeira were aware of the unit where Witness X served time with Other Inmate before the inadvertent Crown disclosure and that this information was available in the public domain. I also accept that defence counsel and Mr. Teixeira were already aware of the names of two other people on that unit who served time with Witness X, and they knew this information from sources independent of the inadvertent Crown disclosure. Defence counsel was also able to corroborate some information using the [Media Interview], before the Crown realized that there had been inadvertent disclosure of Other Inmate's name.

[116] The trial judge made a finding that some of the Sensitive Information was in the public domain, and properly considered the prior publication of the Sensitive Information as a factor in the balancing exercise pursuant to s. 37(5): see, for example, National Inquiry at para. 102. She considered this, amongst multiple other factors, in her s. 37(5) analysis. To the extent that the appellants disagree with the weight she placed on the Sensitive Information being in the public domain, it is not the role of an appellate court to second-guess that factual conclusion: Housen at para. 23.

[117] In our view, the trial judge did not err in her consideration, as a factor, of the information being in the public domain, nor did she err in assessing what was in the public domain. Accordingly, we do not accede to the submissions of the appellants that the trial judge erred in the balancing exercise under s. 37(5).

Issue #3: Did the trial judge err in failing to impose conditions?

1. Appellants

[118] The Crown's primary argument is that the judge erred in law in ordering disclosure without conditions. The Crown notes that the trial judge did not grapple with a key question of whether any conditions could be imposed at law, but infers that she concluded she could not impose conditions that might interfere with defence counsel's ability to make inquiries and further, that the WPPA would provide sufficient protection. Therefore, she misapprehended the scope of the WPPA and the scope of potential s. 37(5) conditions, which led to her failure to impose conditions attenuating the encroachment on the specific

public interest. The Crown submits that the conditions it proposes on appeal constitute a reasonable limit on the solicitor-client relationship but permit the respondent to investigate in furtherance of his right to make full answer and defence. Those conditions proposed in the Crown factum, which are significantly reduced from what was sought at the s. 37 hearing, include:

- a) The defence shall not disclose the name or location of the protected unit to any person; and
- b) If, in the course of their inquiries, the defence is provided with the names of individuals housed in the same unit as Witness X and Other Inmate, the defence shall not disclose their names or any information that could identify them to any person, including the respondent, without further order of the court.

[119] The Crown contends that the WPPA does not provide sufficient protection. This is in response to the judge's conclusion, at Reasons para. 123, that the existing statutory safeguards under the WPPA offered protection to cooperating witnesses, which weighed into her determination that conditions were not required.

[120] The Crown recognizes that the Sensitive Information does not fall within the scope of the WPPA, and states that the WPPA only applies to certain people and there is no way for the defence to know whether any individual identified by Other Inmate might fall into the category of "protected person". Only the change in identity, and the current location of a protected person is protected under s. 11(1)(a), and former location may fall under s. 11(1)(b) if the location was one of the means and methods used to provide protection. The Crown also notes that it is foreseeable that a person may not know if a third party is a protected person.

[121] Due to the narrow scope of the WPPA, the Crown asserts that safety concerns for incarcerated witnesses who may have been housed with Other Inmate and Witness X remain, regardless of statutory protections, due to the mosaic effect.

[122] Furthermore, even though some aspects of the Sensitive Information are in the public domain, the Crown submits that the risk of harm from further disclosure of information can be attenuated by disclosure with conditions. Just because some information may be publicly available, does not preclude the risk of further harm by additional dissemination: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 81. The Crown submits conditions were required given the high safety risk that disclosure poses to inmate cooperators.

[123] Next, the Crown argues that there is a principled basis for imposing conditions under s. 37(5). There is a wide body of s. 38 CEA (national security) jurisprudence that also requires a judge to consider "the form of and conditions to disclosure that are most likely to limit any injury" and the two sections must be interpreted consistently as a "single unit": *Dominion Investments (Nassau) Ltd. v. Canada*, 2005 FC 1397 at para. 39; *Hubbard & Doherty* at §3:1.

- [124] The s. 38 jurisprudence indicates that judges have a wide and flexible discretion to choose conditions for disclosure that limit injury to the specified public interest as much as possible. They are not limited to an all or nothing approach: *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9 at para. 77; *R. v. Ahmad*, 2011 SCC 6 at para. 44; *Ribic* at para. 37; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at paras. 109, 119-120, appeal allowed in part on other grounds, 2023 SCC 17.
- [125] The Crown argues that conditions do not interfere with the solicitor-client relationship. The Crown asserts that the comments in *Basi* regarding how a court order that prevents defence counsel from sharing information with their client may strain the relationship, were made in the unique context of informer privilege: *Basi* at paras. 24, 45-46. Further, the Crown asserts that *Basi* should not be read as an absolute prohibition on such conditions, relying on *Ahmad* at para. 30. There may be a principled basis for imposing a condition that restricts communication between counsel and client, either on court-ordered express undertakings or undertakings with client consent: *Named Person v. Vancouver Sun*, 2007 SCC 43 [*Named Person*] at paras. 138-141 (per Lebel J. dissenting in part); *R. v. Guess*, 2000 BCCA 547. In addition, the Crown refers to "Guess undertakings" (access to wiretap on an undertaking not to disclose to the accused) as an example of a court ordered solution to deal with disclosure issues.
- [126] Finally, similar conditions are imposed in civil and administrative proceedings, and in the s. 38.06(2) CEA context. The Crown cites *M. (A.) v. Ryan* (1994), 98 B.C.L.R. (2d) 1, 1994 CanLII 6417 (B.C.C.A) aff'd [1997] 1 S.C.R. 157, 1997 CanLII 403 as an example where conditions were imposed on the disclosure of psychiatric records, and *British Columbia v. British Columbia Government and Service Employees' Union*, 2005 BCCA 14, where this Court confirmed that conditions that limit the solicitor-client relationship may be appropriate in some circumstances.
- [127] Orders restricting the flow of information from counsel to client have been imposed in the s. 38.06(2) CEA context, including in *Ribic* (where third-party counsel was appointed to examine certain witnesses); *Huang v. Canada (Attorney General)*, 2019 FC 1122; and *Canada (Attorney General) v. Tursunbayev*, 2021 FC 719.
- [128] The Crown submits as an alternative to their proposed conditions that a third party could be appointed to interview Other Inmate. Respondent's counsel could draft questions and a transcript from the interview redacted to protect the identities of any additional protected inmates, if necessary.
- [129] The AGC agrees that if this Court concludes that disclosure of the Sensitive Information is required under s. 37(5), then it must be subject to conditions.

2. Respondent

- [130] The respondent submits that the judge correctly refused to impose conditions. He submits that the Crown's arguments are fundamentally flawed in two key ways. First, he argues that the Crown's submission that the judge did not grapple with the key question of whether any conditions could be imposed at law is an adequacy of reasons complaint, and the reasons more than adequately explain the trial judge's approach. Second, conditions could not properly be imposed because the judge made a conclusion that conditions would interfere with the respondent's right to make full answer and defence: Reasons at para. 129. The respondent submits that this conclusion is not tainted by any palpable and overriding error, and is entitled to deference as a discretionary finding. Further, the conditions proposed by the Crown on appeal were considered fully in the court below and refused.
- [131] Because the respondent addresses what he deems the "fundamental flaw" in the Crown's submissions, he only summarily deals with the Crown's further arguments regarding conditions.
- [132] He submits that the Crown overstates the weight that the judge put on the operation of the WPPA in her Reasons and argues that the protections provided by the WPPA were invoked as an "afterthought" following her conclusion that conditions would interfere with his ability to make full answer and defence. He agrees with the Crown that the Sensitive Information does not fall within the scope of the WPPA, and notes this position is at odds with the arguments of the AGC.
- [133] In addition, the respondent submits that limits on counsel's right to disclose all relevant information to the client should not be imposed solely by means of a court order: Named Person at para. 141 (per LeBel J. dissenting in part). He contends that there are fundamental distinctions between Guess undertakings, and the disclosure conditions the Crown has proposed on appeal.
- [134] Finally, although similar conditions are imposed in civil and administrative proceedings, and in the s. 38.06(2) CEA context, the respondent contends that this caselaw is of no assistance in the criminal law context because the latter engages constitutional dimensions: *R. v. Haevischer*, 2023 SCC 11 at para. 57. He further notes that there are distinctions between ss. 37 and 38 of the CEA, which militate against the availability of conditions under s. 37.
- [135] The respondent argues that the Crown's alternative approach, suggesting the appointment of third party counsel to interview Other Inmate, is completely unworkable. He submits that beyond the resource and time issues associated with such an approach, the third party interviewer would have to be situated in the exact same position as defence counsel, which means infringing on the respondent's solicitor-client relationship and litigation privilege.

[136] In response to the AGC's arguments, the respondent notes that the AGC does not offer an analysis of potential conditions. Further, he highlights the trial judge's conclusion that the encroachment on the public interest in this case "is minimal", and accordingly, there is no need for conditions.

[137] The respondent's primary response to both appellants on conditions is that the judge clearly found that conditions would interfere with the respondent's right to full answer and defence and that the appellants have not identified a palpable and overriding error or error in principle that would refute this conclusion.

3. Amicus Curiae

[138] The amicus provided helpful submissions on whether a third party, in particular, the amicus, should be appointed to interview Other Inmate. Counsel pointed out the difficulties in making such an order, including the fact that amicus is not familiar with the defence brief, and it would take a significant amount of time to become sufficiently familiar; that the respondent may not want unknown counsel involved in his brief; and that although possible, it is not an efficient way of proceeding. Counsel pointed to the vast differences between this case and Ribic, the case relied on by the Crown.

4. Analysis

[139] First, we disagree with the respondent that the Crown's arguments with regard to conditions on disclosure are fatally flawed. We do not accede to the respondent's submission that the Crown's submissions on this issue are primarily related to adequacy of reasons. The Crown does not directly raise adequacy of reasons in their factum and provides ample submissions for why the trial judge should have imposed conditions on disclosure.

[140] Furthermore, the errors alleged by the Crown relate to the trial judge's interpretation and application of s. 37(5), and are subject to a correctness standard, not palpable and overriding error as the respondent suggests. The Crown takes issue with the trial judge's misapprehension of potential s. 37(5) conditions and the scope of the WPPA, not the trial judge's finding that conditions would limit the respondent's right to full answer and defence.

[141] In addition, we agree with the Crown that there may be a principled way to impose conditions on disclosure pursuant to s. 37(5), that this is contemplated in the language of the CEA, and that further analogies can be drawn to the conditions imposed pursuant to s. 38 of the CEA.

[142] Although the reasoning in Basi acknowledges the strain that an undertaking to keep information from a client may put on the solicitor-client relationship (at para. 46), we do not see it as an absolute prohibition on conditions to disclosure, particularly given the different procedural background and types of privilege at issue in this case.

[143] Further, the respondent contends that if defence counsel came into possession of information that engages the application of the WPPA, they would be required to keep that information confidential, including from their client, until they obtained a further order from the court. We therefore consider this approach manageable in limited circumstances.

[144] In our view, the judge erred when she concluded that the provisions of the WPPA would provide sufficient protection at para. 123, set out again for convenience:

Another theme on this application was concern over what Other Inmate or Community Member might say if interviewed by defence counsel, including whether they might reveal the [redacted] under the WPPA. As already discussed, defence counsel and Mr. Teixeira know the names of two individuals who served time with Witness X. Defence counsel are free to question those individuals without restriction, per Barros, except that they may not disclose information they learn to anyone, including their client, if it falls within s. 11(1) and (2) of the WPPA. I accept that defence counsel are, and will continue to be, mindful of the statutory prohibitions on disclosure pursuant to the WPPA. Those restrictions would apply, with equal force, to any interview with Other Inmate or Community Member.

[Emphasis added.]

[145] There are two flaws with the judge's conclusion: first, the defence may not know that a name if uncovered falls within the WPPA and may not realize it applies; and second, the WPPA does not necessarily apply to cooperating witnesses who do not fall within the WPPA but are still in need of protection. In our view, this is an error in law.

[146] In our view, the judge's conclusion that the WPPA would provide sufficient protection in the face of the disclosure order was not an afterthought. It was a basis to release the information believing that sufficient protections were in place. With respect, she erred in that regard.

[147] Given the need for protections, as found by the trial judge, it is necessary to impose conditions on the scope of the disclosure of the Sensitive Information.

[148] The parties argued the question on whether, if this Court finds an error, we should refer it back to the trial judge or impose conditions. This Court is in as good a position as the trial court to take the small step of imposing conditions on the basis that any question in relation to our order will be resolved by the trial judge. She will have complete discretion in terms of how the order should be enforced. Justice Duncan has been enmeshed in this case for several years, and it is not our intention to bind her discretion in any way.

[149] In our view, the conditions now sought by the Crown are sufficiently flexible to protect the respondent's right to make full answer and defence and pursue the line of questioning he seeks and provide protection, under the supervision of the trial judge, to persons whose names may be revealed during the course of the defence investigations.

[150] The following conditions should be imposed and should attach to the s. 37(5) disclosure order. We understand that defence counsel does not seek to use the information regarding the location where the call occurred. However, circumstances may change, defence counsel may change, and there is no harm in imposing that condition requested by the appellants. The conditions are as follows:

- a) The defence shall not disclose the name or location of the protected unit to any person without further order of the trial court.
- b) If, in the course of their inquiries of Other Inmate or Community Member, defence counsel are provided with the names of individuals who were or are housed in the same unit as Witness X and Other Inmate, the defence shall not disclose their names or any information that could identify them to any person, including the respondent, without further order of the trial court.

[151] Thus, the appeal is allowed to the extent of adding the two conditions to the disclosure order.

"The Honourable Madam Justice Bennett"

"The Honourable Justice Griffin"

"The Honourable Justice Winteringham"

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