ONTARIO

SUPERIOR COURT OF JUSTICE

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DATE: April 8, 2010

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FROM: Justice Paul Perell

TOTAL PAGES (INCLUDING COVER PAGE): 24

RE: **Ahmad Abou-Elmaati et al and**
The Attorney General of Canada et al
Court File No.: 06-CV-308130 PD3

Note: Please contact Fleurette Lee at (416) 327-5230 if transmission not complete.

CITATION: Abou-Elmaati v. Attorney General, 2010 ONSC 2055
COURT FILE NO.: 06-CV-308130 PD3
DATE: April 8, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ahmad Abou-Elmaati, Badr Abou-Elmaati, Samira Al-Shallash and Rasha Abou-Elmaati

Plaintiffs

- and -

The Attorney General of Canada, John Doe and Jane Doe

Defendant

COUNSEL:

M. Philip Tunley and Andrea Gonsalves for the Plaintiffs
Robert MacKinnon and Zoe Oxaal for the Defendant

HEARING DATE: March 25, 2010

REASONS FOR DECISION

PERELL, J.

Introduction

[1] This is a preliminary objection to a discovery motion under rules 25.11, 30.03 (1), 30.04, 30.06, 37.02(1) and 37.08 (1) of the *Rules of Civil Procedure* and a competing constitutional challenge to strike down s.38 of the *Canada Evidence Act,* R.S.C. 2001, c.41. These matters raise important questions about the civil law jurisdiction of the Superior Court of Justice in an action against the Federal Government.

[2] The Defendant, Attorney General of Canada, submits that Ontario's Superior Court of Justice does not have jurisdiction to rule on the validity of the Federal Government's claim of Crown privilege on the grounds of national security, national defence, and international relations, and that the exclusive jurisdiction to rule on the privilege rests with the Federal Court under s.38 of the *Canada Evidence Act.*

[3] The Plaintiffs, Ahmad Abou-Elmaati, Badr Abou-Elmaati, Samira Al-Shallash, and Rasha Abou-Elmaati submit that the Superior Court always had and continues to

have jurisdiction to rule on the Federal Government's claim for national security privilege and that s.38 of the *Canada Evidence Act* is *ultra vires* to the extent that it interferes with the Superior Court's jurisdiction to rule on the validity of the Federal Government's claim of privilege on the grounds of national security, national defence, and international relations.

[4] For the reasons that follow, it is my conclusion that during the interlocutory stages of a civil proceeding, the Superior Court does not have jurisdiction to rule on the validity of a claim for Crown privilege on the grounds of national security, national defence, and international relations and that the jurisdiction rests exclusively with the Federal Court.

[5] In my opinion, during the interlocutory stages of a proceeding, there is nothing constitutionally or jurisdictionally wrong in the Federal Court having the comprehensive or exclusive jurisdiction to rule on the Federal Government's assertion of privilege on the grounds of national security, national defence, and international relations. I agree with the Attorney General's argument that as a matter of discovery in a civil proceeding, the Superior Court does not have this jurisdiction to judicially review a claim of federal Crown privilege on the grounds of national security, national defence, and international relations.

[6] While it is not relevant to the issues to be decided, I also agree that in the administration of justice, during the interlocutory stages of a civil proceeding, there is social utility in recognizing the resources available to and the expertise of the judges of the Federal Court in the sensitive area known as Crown privilege, but I also do not doubt that the masters and judges of this court have or could acquire similar expertise.

[7] However, in my opinion, in a civil proceeding where a party's substantive rights under the *Constitution Act,* including the *Charter of Rights and Freedoms* are being asserted by claim or by defence, the judge presiding at the trial or hearing does have the jurisdiction to rule on the Federal Government's claim of Crown privilege on the grounds of national security, national defence, and international relations. In my opinion, in the context of a constitutional enforcement claim, to the extent that s.38 of the *Canada Evidence Act* takes away the presiding judge's jurisdiction at a trial or at a hearing to rule on the claim of Crown privilege, it is *ultra vires*.

[8] I note here that in *R. v. F.A.* (S.C.J.) unreported - publication ban in effect under s.648 of the *Criminal Code* – an analogous decision was reached with respect to the Superior Court's criminal law jurisdiction. In *R. v. F.A.*, a judge of this court concluded that s.38 was of no force and effect to the extent that it deprived the Superior Court of its jurisdiction to apply the Constitution.

[9] It follows from the above conclusions that the Elmaati family's constitutional challenge is granted but that the Attorney General's preliminary objection is also granted, and, therefore, the Elmaati family's motion for an order requiring production under rules 25.11, 30.03 (1), 30.04, 30.06, 37.02(1) and 37.08(1) should be dismissed. I will have, however, some remarks about accommodating this court's intermittent procedural

jurisdiction during the interlocutory stages over production and discovery of the Federal Government with the Federal Court's jurisdiction under s.38 of the *Canada Evidence Act*.

Factual and Legal Background to the Motion and the Constitutional Challenge

[10] Mr. Ahmad Abou-Elmaati is a Canadian-Muslim. He and three other Canadian-Muslims, Mr. Maher Arar, Mr. Abdullah Almalki, and Mr. Muayyed Nureddin, were the victims of brutal torture and other deeply disturbing human rights' violations while in the custody of foreign governments. Each victim alleged that the Canadian Government put them in harm's way and was complicit and responsible for their horrific experience and for failing to come to their aid and rescue.

[11] In September 2006, Associate Chief Justice O'Connor released a report with respect to Mr. Arar. See *Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Ottawa: Public Works and Government Services Canada, 2006) (the "*O'Connor Report*"). Subsequently, the Canadian Government made a public apology and paid Mr. Arar's family $10.5 million.

[12] In 2006, Mr. Elmaati and members of his family commenced an action against the Canadian Government, and he claimed, among other things, compensatory damages for breaches of his rights under the *Charter*. Mr. Almalki and Mr. Nureddin and their families also commenced similar actions.

[13] I am case managing, the Elmaati and Nureddin actions in Toronto, and Regional Senior Judge Hackland is case managing the Almalki action in Ottawa.

[14] Paragraph 1 of Mr. Elmaati's statement of claim states:

> 1. The Plaintiff, Ahmad Abou-Elmaati ("Ahmad"), claims against all Defendants:
>
> (a) Compensatory damages for negligence, negligent investigation, defamation, complicity to arbitrary detention, torture, cruel, inhuman and degrading treatment, false imprisonment and assault and battery, and abuse of public office in the amount of $20,000,000.00;
>
> (b) Further and in the alternative, compensatory damages under s.24 (1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") for breaches of Ahmad's rights under sections 6, 7, 8, 9, 12, and 15 of the *Charter* in the amount of $20,000,000.00.

[15] Mr. Elmaati's action and the actions of Mr. Almalki and Mr. Nureddin make allegations about the conduct of the Canadian Security and Intelligence Service ("CSIS"), the Royal Canadian Mounted Police ("RCMP") and the Department of Foreign Affairs and International Trade ("DFAIT"). A major allegation is that Canadian investigators made false statements to foreign agencies and identified Messrs. Elmaati, Almalki, and Nureddin as terrorists associated with Al Qaeda and Osama Bin Laden. It is alleged that those misrepresentations led to these Canadian citizens being forcibly rendered into the

custody of foreign countries where they were imprisoned and tortured. Mr. Elmaati was imprisoned in both Syria and Egypt for 26 months. Mr. Elmaati pleads that his rights under the *Charter* were violated and that Canada is liable for complicity in torture in breach of applicable international law instruments to which Canada is bound.

[16] The Attorney General has delivered a statement of defence that denies that the Federal Government breached the *Charter* or any duty alleged owed to the Plaintiffs.

[17] After the commencement of the Elmaati, Almalki, and Nureddin actions, the Canadian Government commissioned the Honourable Frank Iacobucci, Q.C. to conduct an internal inquiry.

[18] In October 2008, Commissioner Iacobucci released his inquiry report. See *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008) (the "*Iacobucci Report*"). As noted in his report, Commissioner Iacobucci's terms of reference prevented him from making reference to any information for which a national security, national defence, and international relations privilege was claimed by the Attorney General under s.38 of the *Canada Evidence Act*.

[19] The Attorney General submits, and for the purposes of this motion, I accept that the *O'Connor Report* and the *Iacobucci Report* raise no *res judicata* or issue estoppel and that they may not even be admissible evidence. Therefore, solely for the purpose of demonstrating the seriousness of Mr. Elmaati's claim against the Federal Government and to provide the context of the tension between that claim and the Attorney General's claim of privilege over evidence relevant to the prosecution of the claim, I note that in paragraph 53 of Chapter 11 (*Findings Regarding the Actions of Canadian Officials in Relation to Ahmad Abou-Elmaati*) of the *Iacobucci Report*, Commissioner Iacobucci stated: "Based on the evidence available to me, it is reasonable to infer that mistreatment of Mr. Elmaati in Syria resulted indirectly, in some part, from the failure of Canadian officials to inform DFAIT's Consular Affairs Bureau of Mr. Elmaati's detention." In paragraph 64, Commissioner Iacobucci states: "In my view, it is reasonable to infer that Mr. Elmaati's mistreatment by Syrian officials resulted indirectly, at least in part, from sending questions to be asked of Mr. Elmaati by Syrian officials." In a *Supplement* to his report, noted below, Commissioner Iacobucci added with respect to Chapter 11: "While the evidence (not all of which I am in a position to recount here) is not conclusive, it is in my view reasonable to infer on all of the evidence available to me, including that of Mr. Elmaati, that Mr. Elmaati suffered mistreatment of some form as a consequence of the Service's [CSIS] interaction with Egyptian authorities."

[20] In the winter or early spring of 2009, Mr. Elmaati and the Attorney General agreed to mediation, and on April 16, 2009, the parties signed "Minutes of Settlement and Agreement on Schedule," in which they agreed to conduct mediations in November and December 2009.

[21] In July 2009, in anticipation of the mediations, the Attorney General disclosed to Mr. Elmaati's lawyers approximately 500 documents, of which 290 documents were in

redacted form. Mr. Elmaati's lawyers had requested these documents based on references to them in the *Iacobucci Report*. The redactions were in black and in white. The black redactions were made pursuant to s.38 of the *Canada Evidence Act* on the grounds that the excluded information was potentially injurious to national security, national defence, and international relations. The white redactions indicate information irrelevant to the litigation and non-s.38 claims for Crown privilege including solicitor-client privilege and claims for privilege under sections 37 and 39 of the *Canada Evidence Act*.

[22] Inadvertently, the Attorney General disclosed one document without its redactions. It is a CSIS report to an RCMP inspector.

[23] On August 18, 2009, counsel for the Attorney General wrote Mr. Elmaati's lawyers and advised that the CSIS Report had been released inadvertently and that notice was being given pursuant to s.38 of the *Canada Evidence Act*. The letter demanded the return of the document. Under s.38, the effect of the notice is to prohibit disclosure of information unless disclosure is authorized by either the Attorney General or a designated judge of the Federal Court on an application made to the Federal Court. The application may be brought by the Attorney General or by the person seeking disclosure of the information. On the application, the designated judge has access to an unredacted version of the documents in issue. This was the first of two notices given under s.38 of the Act.

[24] Mr. Elmaati's lawyers replied by letter, and they disputed that the CSIS Report had been disclosed inadvertently and that it was subject to privilege. His lawyers asserted that the s.38 notice was void.

[25] Pausing here, the unredacted document was included in the Motion Record in a sealed envelope. An undertaking to restrict further disclosure was given by Mr. Elmaati's lawyers, and has been respected, pending my decision in the hearing before me. I have placed the sealed envelope in another sealed envelope in a secure place, and I have not opened the envelopes. Subject to any appeal of this decision, I will release the unsealed envelopes to the Attorney General. If there is an appeal, I will hold the envelopes pending a direction from the Appellate Court.

[26] In the autumn of 2009, for reasons not known to me, the mediations were cancelled, and the prosecution of the action resumed.

[27] On January 15, 2010, Mr. Elmaati brought a motion pursuant to rules 25.11, 30.03 (1), 30.04, 30.06, 37.02(1) and 37.08 (1) for an order requiring production of certain documents or categories of documents without redaction on account of national security, national defence, and or international relations. In the alternative, he sought an order that the Attorney General's statement of defence be struck out.

[28] For present purposes, rule 30.04, which authorizes the court to order documents to be produced and which authorizes the court to determine claims for privilege, is the most pertinent rule; it states:

> 30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not

> privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.
>
> (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. ....
>
> (5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.
>
> (6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

[29] Pursuant to s.27 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50, with some qualifications, the *Rules of Civil Procedure* apply to the Federal Government when a party to proceedings in Ontario. Section 27 states:

> 27. Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which the proceedings are taken apply in those proceedings.

[30] For the present purposes of determining whether the court may rule on Mr. Elmaati's motion, one important qualification to the applicability of the *Rules of Civil Procedure* to the Attorney General is provided by s.8 of the *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604, which provides that the Attorney General shall serve a list of documents subject to sections 37 to 39 of the *Canada Evidence Act*. Section 8 states:

> *File List of Documents*
>
> 8. (1) Subject to sections 37 to 39 of the *Canada Evidence Act*, where the Attorney General or an agency of the Crown would, if the Crown were a private person, be required under the provincial rules to file or serve a list or an affidavit of documents, the Deputy Attorney General shall, subject to the same conditions as apply between subject and subject, file or serve a list of the documents relating to the matter of which the Crown has knowledge within 60 days after the event that under the provincial rules gives rise to the obligation to file or serve the list or affidavit, or within such further time as may be allowed by the court.
>
> (2) Where, under provincial rules, a party would be entitled to obtain production for inspection of any document or a copy of any document as against or from the Crown, if the Crown were a private person, such production for inspection or copy may be had, subject to sections 37 to 39 of the *Canada Evidence Act*, under order of the court after consideration has

been given to any objection that would be available to the Crown if the Crown were a private person.

[31] Having reviewed the inadvertently disclosed unredacted CSIS Report and the other redacted documents, Mr. Elmaati's lawyers believe that the Attorney General is systematically over-claiming the privilege provided by s.38 of the *Canada Evidence Act.* They believe that the Attorney General is wrongfully withholding production of documents that prove that the Canadian Government violated Mr. Elmaati's rights under the *Charter*.

[32] On January 18, 2009, the Attorney General gave notice pursuant to s.38.01 (1) of the *Canada Evidence Act* that 289 of 446 documents of which full disclosure was sought by the Plaintiffs "contained sensitive or potentially injurious information the disclosure of which could harm international relations and/or national security." This notice was the second of the two notices given pursuant to s.38 of the Act.

[33] After giving its two notices, the Attorney General applied to the Federal Court under s.38 of the *Canada Evidence Act* for an order pursuant to s.38.06 (3) confirming the prohibition on disclosure, including any disclosure of the unredacted CSIS Report. The Attorney General also moved for an order for directions with respect to safeguarding the inadvertently disclosed unredacted CSIS Report. The Plaintiffs have been named as respondents in the s.38 application before the Federal Court.

[34] On February 4, 10, 18, and March 4 and 11, 2010, the parties attended before Chief Justice Lufty of the Federal Court for case conferences with respect to the Attorney General's application under s.38 of the *Canada Evidence Act.* Chief Justice Lufty assigned the s.38 application to Justice Mosley of the Federal Court as the designated judge under the Act.

[35] By letters dated February 18, 2010, Justice Hackland and I were given notice pursuant to s.38.04(5)(c) of the *Canada Evidence Act* that the Federal Court was seized of an application under s.38 of the Act with respect to the disclosure of information about which notices had been given by the Attorney General. The letter advised that: "you may, if you wish, provide the Federal Court judge who will adjudicate the application with a report concerning any matter relating to the civil actions ... that you may consider may be of assistance to the Federal Court judge." The letter set a 10-day period for providing the report.

[36] On February 23, 2010, Commissioner Iacobucci released a supplementary report (the *Supplement*) in which he provided further information about his mandate and findings. This information had not been released earlier "because of government concerns that disclosure of the information in the manner then proposed would be injurious to national defence, national security or international relations." Mr. Elmaati states that the information contained in the *Supplement* confirms his concerns that the Attorney General is over-claiming privilege on grounds of national security, national defence, and international relations.

[37] In a case conference before me, the Attorney General took the position that this court did not have the jurisdiction to rule on Mr. Elmaati's motion under the *Rules of Civil Procedure*. I directed that this preliminary objection about jurisdiction should be determined by a motion confined to the issue of jurisdiction. The Attorney General brought that motion.

[38] On March 12, 2010, Mr. Elmaati responded by giving notice of a constitutional question challenging the constitutionality of s.38 of the *Canada Evidence Act*. The Provincial and the Federal government were served. The Ontario Government did not attend on the hearing of the motion.

[39] In his Notice of Constitutional Question, Mr. Elmaati alleges that the Attorney General "has systematically redacted productions, purportedly on account of national security, national defence and/or international relations, but actually for the improper purpose of concealing information relevant to the claims against [the Attorney General] herein in tort, under international law, and for breach of the Plaintiffs' *Charter* rights."

[40] In his Notice of Constitutional Question, Mr. Elmaati challenges the constitutional validity of s.38 of the *Canada Evidence Act* and submits:

> Section 38, to the extent it removes the Superior Court's jurisdiction, in a civil action of which it is properly seized, including an action against the Crown in Right of Canada as represented by the Attorney General of Canada, to review and order production of documents relevant to the action, and to make orders it considers appropriate and just in the circumstances to ensure that the parties receive a fair trial and do justice between the parties, trenches on the Court's core jurisdiction. .... Where, as here, the matters before the Court include a claim that the Federal Government has breached an individual's rights and freedoms on the *Charter*, the Court's jurisdiction and powers are broadest and are fully protected under the *Constitution*. As a court of competent jurisdiction charged with applying the *Constitution*, the Superior Court can only ensure a fair trial and do justice between the parties if it can ensure that the Government is not concealing evidence of its own *Charter* breaches.

Preliminary Points about the Interpretation and Constitutionality of s.38 of the Canada Evidence Act

[41] Before considering the major arguments, it is convenient to address several points raised by Mr. Elmaati and the Attorney General about the *Rules of Civil Procedure* and about the interpretation and constitutionality of s.38 of the *Canada Evidence Act*.

[42] As for the *Rules*, it is not necessary to discuss or interpret the provisions of the *Rules of Civil Procedure* that the Plaintiffs rely on. I agree with the Attorney General's argument that in a civil proceeding, but for the provisions of the federal *Crown Liability and Proceedings Act*, set out above, there is no right of discovery against the federal Crown and no jurisdiction to rule upon a matter of Crown privilege during the

interlocutory stages of a civil proceeding. While the *Crown Liability and Proceedings Act* makes discovery against the Crown available, it provides no jurisdiction to the Superior Court to rule on a matter of Crown privilege under s.38 of the *Canada Evidence Act*. In other words, what authority there is under the *Rules of Civil Procedure* to have discovery of the federal Crown is made available by the federal *Crown Liability and Proceedings Act*, which in turn is subject to s.38 of the *Canada Evidence Act*. During the discovery stages of an action, s.38 confers jurisdiction exclusively on the Federal Court to rule on Crown privilege on the grounds of national security, national defence, and international relations.

[43] Turning to s.38 of the *Canada Evidence Act*, Mr. Elmaati argues that as a matter of interpretation, s.38 of the *Canada Evidence Act* does not apply to the already disclosed unredacted copy of the CSIS Report that was inadvertently disclosed to his lawyers and that the Federal Court does not have jurisdiction with respect to this particular document.

[44] I disagree with this submission. The inadvertent disclosure of a document is not a waiver that would oust jurisdiction under s.38 of the *Canada Evidence Act*: *Canada (Attorney General) v. Khawaja*, 2007 F.C. 490 at paras. 104-111; *Khadr v. Canada (Attorney General)*, 2008 FC 549 at paras. 40-42; *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, [2008] 3 F.C.R. 248 at para. 57.

[45] I also do not agree with Mr. Elmaati's argument that *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, discussed further below, is authority that supports the proposition that an inadvertent disclosure of a privileged document may amount to a waiver of the privilege. *Babcock* concerns the waiver of cabinet privilege (confidences of the Queen's Privy Council), which privilege is treated differently than other Crown privileges that are more vulnerable to judicial review. *Babcock* is a case about s.39 of the *Canada Evidence Act* that is not analogous to the situation in the case at bar. The issue of inadvertent disclosure did not arise in *Babcock* because the Court found that the Crown had deliberately disclosed certain documents: See *Babcock v. Canada (Attorney General)*, *supra* at para. 26.

[46] Further, Mr. Elmaati argues that as a matter of interpretation, s.38 of the *Canada Evidence Act* does not interfere with the Superior Court's jurisdiction to rule on Crown privilege because as a cannon of statutory interpretation, clearer more explicit language would be required to oust the court's jurisdiction: *Orden Estate v. Grail*, [1998] 3 S.C.R. 437 at paras. 44-46. He, therefore, submits that as a matter of interpretation, s.38 does not confer exclusive jurisdiction on the Federal Court, leaving the Superior Court to exercise the jurisdiction it already has. However, as already noted above, I agree with the Attorney-General's argument that the Superior Court does not have jurisdiction to review Crown privilege on the grounds of national security, national defence, and international relations in civil proceedings during the interlocutory stages of discovery of documents and examinations for discovery. Further, it is my opinion that apart from s.38.14, mentioned below, no oversight jurisdiction is conferred on the Superior Court by s.38 of the *Canada Evidence Act*. .

[47] Thus, it becomes somewhat of a *non sequitur* for Mr. Elmaati to argue as a matter of interpretation that s.38 of the *Canada Evidence Act* does not interfere with a non-existent procedural jurisdiction that Mr. Elmaati seeks to invoke during the interlocutory stages of his action. Accordingly, I do not propose to spend any time interpreting s.38 of the *Canada Evidence Act*. As a matter of interpretation, all I need say is that s.38 clearly and comprehensively provides a regime solely for the Federal Court to review Crown privilege on the grounds of national security, national defence, and international relations. See *R. v. F.A.* (S.C.J.) unreported - publication ban in effect under s.648 of the *Criminal Code* at paras. 66-69.

[48] In my opinion, despite Mr. Elmaati's arguments to the contrary, with one qualification, as a matter of interpretation, the only jurisdiction to review claims of Crown privilege that is conferred by s.38 of the *Canada Evidence Act* is a jurisdiction that is comprehensively conferred on the Federal Court. The qualification is found in s.38.14 (1), which applies in the context of criminal proceedings and which is designed to protect the right to a fair trial. Section 38.14 (1) states:

> 38.14 (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.
>
> (2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:
>
> > (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
> >
> > (b) an order effecting a stay of the proceedings; and
> >
> > (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

[49] The effect of s.38.14 of the *Canada Evidence Act* is that although a judge in a criminal proceeding cannot review the Attorney General's assertion of privilege, the judge is empowered to protect the fairness of the trial by dismissing counts, ordering a stay, or making findings against a party. For civil proceedings, there is no similar qualification in s.38 to the Federal Court's comprehensive jurisdiction.

[50] Thus, for the purposes of the matters now before the court, it is my opinion that as a matter of interpretation, in a civil proceeding, s.38 of the *Canada Evidence Act* does not confer any jurisdiction on the Superior Court and only confers jurisdiction on the Federal Court. For the purposes of the matters now before the court, I assume that judges of the Superior Court are bound by the prohibitions on disclosure set out in s.38 of the Act.

[51] Further, for present purposes, I do not think it is necessary to describe in any detail the complicated scheme that governs the Federal Court's jurisdiction and the due process rights that it contains or the test that the Federal Court employs to determine whether it should confirm, vary, or overrule the Attorney General's claim of privilege by authorizing disclosure or some or all of the information.

[52] Nor do I think it necessary to set out and discuss the public policy arguments set out in the competing factums about the advantages and disadvantages of the s.38 scheme in terms of the administration of justice and the protection of national security, national defence, and international relations, and it is not necessary to discuss how the s.38 scheme would compare to how a superior court would or should address claims of Crown privilege.

[53] Further still, for the purposes of this motion, I do not think that it is necessary to discuss several cases that have upheld the constitutionality of s.38 of the *Canada Evidence Act* from constitutional challenges that are not engaged in the pertinent arguments or issues of the immediate case. For example, in *Canada (Attorney General) v. Khawaja*, 2007 FCA 388, aff'g 2007 FC 463, the Federal Court of Appeal held that the *ex parte* procedure contained in s.38.11(2) of the *Canada Evidence Act* did not breach s.7 or paragraph 11(d) of the *Charter*. The case at bar is not about the constitutionality of the *ex parte* procedure contained in s.38.11 (2).

[54] Further still, for the purposes of this motion, I do not think that it is necessary to discuss the constitutionality of s.38 of the *Canada Evidence Act* as a matter of the distribution of powers (sections 91 and 92 of the *Constitution*) or as a matter of the Federal Government conferring jurisdiction on the Federal Court, which is a s.101 superior court under the Constitution, as opposed to the Federal Government conferring jurisdiction on a s.96 superior court, such as Ontario's Superior Court of Justice.

[55] In this regard, I do not regard *Commission des droits de la personne v. Attorney General of Canada*, [1982] 1 S.C.R. 215, which upheld the constitutionality of s. 41 (2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, which was a predecessor legislation to s.38 of the *Canada Evidence Act*, as helpful in deciding the issues in the case at bar. (This precursor to s.38 came into force on August 1, 1972, S.C. 1970-71-72, c.1, s.41.)

[56] *Commission des droits de la personne* was a case in the era before the *Charter* came into force, and the constitutional challenge it raised concerned Parliament creating an absolute Crown privilege not to produce documents on the grounds of national security. The challenge was a distribution of powers challenge on the grounds that Parliament's legislation encroached on the provinces' jurisdiction under s.92 (14) (administration of justice) of the *Constitution Act, 1867,* then the *British North America Act, 1867*, (U.K.) 30 & 31 Vict. c. 3.

[57] In *Commission des droits de la personne,* significantly, Justice Chouinard at p.228 p. 228 of his judgment differentiated "exceeding the federal field of jurisdiction" and "concealing such a trenching from the courts, without the latter being able to intervene."

After differentiating the constitutionality of s.41 (2) from "the applicability of the legislative enactment," he stated at p.229 of his judgment that "this is not a case, if any exist, where its applicability can be questioned." In contrast, the case at bar is a case where the issue is about the constitutionality of the applicability of s.38 of the *Canada Evidence Act* on the court's jurisdiction, not whether the Federal government has intruded upon the province's jurisdiction under s.92 (14) of the *Constitution Act, 1867.*

[58] Still on the issue of constitutionality of s.38, and keeping in mind that the Federal Court is a superior court, save for what the cases have to say about the provincial superior courts having a constitutional and a core jurisdiction, I do not regard the case law about constitutional constraints on conferring jurisdiction on an inferior court or administrative tribunal as being relevant to deciding whether s.38 of the *Canada Evidence Act* is *infra vires* or *ultra vires*; see: *Reference re Residential Tenancies Act 1979 (Ontario),* [1981] 1 S.C.R. 714; *McEvoy v. New Brunswick (Attorney General)*, [1983] 1 S.C.R. 704; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.

[59] In any event, in para. 55 of his factum, Mr. Elmaati concedes that under s.91 of the *Constitution Act, 1867*, Parliament is competent to make legislation relating to the protection of information that may be injurious to national security, national defence or international relations and may confer that jurisdiction on the Federal Court, a court under s.101 of the *Constitution Act, 1867.*

[60] For the purposes of the matters before me, I accept that the conferral of jurisdiction on the Federal Court is constitutionally valid. The problem in the case at bar is not about what jurisdiction the Federal Court has. The problem here is about the jurisdiction the Superior Court allegedly does not have.

Analysis-Introduction

[61] Given the above conclusions on the preliminary interpretative and jurisdictional points, the crucial question now before the court may be stated as follows:

> Is s.38 of the *Canada Evidence Act* unconstitutional because in a civil proceeding, it vests the jurisdiction to rule on claims by the Federal Government of Crown privilege on the grounds of national security, national defence, and international relations comprehensively or exclusively in the Federal Court and in that sense displaces or removes the Superior Court of Justice's jurisdiction to judicially review the claim of Crown privilege?

[62] The Attorney General's answer is no, and it is perhaps to oversimplify, but as I understand it, the Attorney General's main argument is that s.38 is *infra vires* because in a civil proceeding, the Superior Court never had and does not now have any jurisdiction to rule on the Federal Government's claim for privilege on the grounds of national security, national defence, and international relations, and, therefore, the Attorney General submits that s.38 of the *Canada Evidence Act* does not divest or remove any Superior Court's jurisdiction and cannot be unconstitutional on that account. It should be

noted that the Attorney General's argument focuses on the evidentiary and procedural aspects of the jurisdiction associated with s.38.

[63] Mr. Elmaati's answer is yes, and it is also perhaps to oversimplify, but as I understand it, Mr. Elmaati's main argument is that in a civil proceeding, s.38 removes the Superior Court's jurisdiction to enforce the *Canadian Charter of Rights and Freedoms* and its "core jurisdiction" to conduct a fair trial. He then argues that to the extent s.38 removes a core jurisdiction of the Superior Court it is *ultra vires*. It should be noted that Mr. Elmaati's argument focuses on the effect of s.38 on the Superior Court's ability to conduct a fair trial and on its substantive jurisdiction, particularly its jurisdiction as a constitutional court.

[64] This description of the competing arguments reveals that the case at bar very much is a matter of the characterization of the jurisdiction that Mr. Elmaati requests the Superior Court to exercise; namely, a jurisdiction to judicially review the Federal Government's claim for Crown privilege on the grounds of national security, national defence or international relations. As my discussion of the authorities will reveal, for Mr. Elmaati's argument to succeed, he must demonstrate that this jurisdiction is an intrinsic or inextricable jurisdiction or it is a "core jurisdiction" that cannot be removed without an amendment of the *Constitution Act*.

[65] To determine who is correct in their characterization of classification of the effect of s.38 of the *Canada Evidence Act,* it is necessary to examine the case law about: (a) the role of the Superior Court as a constitutional court; (b) the so called "core jurisdiction" of s.96 courts under the *Constitution Act 1867*, of which Ontario's Superior Court of Justice is one such court; and (c) the jurisdiction of the Superior Court to judicially review claims of federal Crown privilege on the grounds of national security, national defence, and international relations.

The Jurisdiction of Ontario's Superior Court of Justice as a Constitutional Court

[66] In Ontario, under the *Courts of Justice Act,* R.S.O. 1990, c. C.43, s.11, the Superior Court of Justice is a superior court of record with all the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario.

[67] Under s.129 of the *Constitution Act, 1867*, the predecessor of the Superior Court of Justice was continued as a superior court of general jurisdiction in Ontario. Section 96 of the *Constitution Act, 1867* provides that the Federal Government is responsible for appointing the judges of the superior courts of the provinces, and s.94 (14) of the *Constitution Act, 1867* confers on the provinces the jurisdiction to administer justice in the provinces.

[68] Historically and procedurally, the superior courts of Canada exercised jurisdiction in actions against the provincial or federal governments in two ways: (1) by petition of right; and (2) by an action for a declaration without a petition of right, epitomized by the

English case of *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.). See *Attorney General Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at p.323.

[69] A proceeding by petition of right was an aspect of the sovereign's immunity from a lawsuit, about which I will have more to say below, and the sovereign's consent (practically speaking, the government's consent) was required before the Crown could be sued.

[70] A proceeding for a declaration without a petition of right, however, did not require any consent from the government, and the action for a declaration was the means by which courts ruled on the constitutionality of legislation. As noted by Justice Bora Laskin in *Vide Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 at p.162, this form of action is very significant in a federal system precisely because it is the means to challenge the constitutionality of legislation. In *Thorson*, Justice Laskin also stated at pp. 151-52, that in Canada, the question of the constitutionality of legislation has always been a justiciable question.

[71] In *Attorney General Canada v. Law Society of British Columbia, supra*, which involved the question of the authority of the Director of Investigation and Research under the *Combines Investigation Act* to conduct an inquiry about the Law Society of British Columbia's regulation of the advertising of legal services, an issue arose about the jurisdiction of the Supreme Court of British Columbia to rule on the constitutionality of the Act or whether the Federal Court had exclusive jurisdiction. Justice Estey declined to decide this issue as a matter of interpreting the *Federal Court Act,* and he decided the issue based on the constitutional law principle that Parliament lacks the constitutional authority to provide that a superior court does not have the jurisdiction to declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. Justice Estey stated at p.328:

> In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.

[72] In *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, citing *Attorney General Canada v. Law Society of British Columbia, supra*, Justice Sopinka stated:

> The jurisdiction of the provincial superior courts to issue declaratory judgments on the constitutional validity of provincial and federal legislation (whether as to *vires* or consistency with the *Charter)* is fundamental to Canada's federal system. .... This plenary jurisdiction is necessary both to enable the provincial superior courts to discriminate between valid and invalid federal laws so as to refuse to apply the invalid ones ... and to ensure that the subject always has access to a remedy for violation of his or her *Charter* rights and freedoms.

[73] In *Babcock v. Canada*, already mentioned above and discussed further below, [2002] 3 S.C.R. 3 at para. 57, Chief Justice McLachlin stated with my emphasis added:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

[74] For the superior courts to play their role, they must have the powers that are essential to the administration of justice and for the maintenance of the rule of law: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1981] 2 S.C.R. 214.

[75] I do not see how the court's fundamental jurisdiction to be the constitutional arbiter could be ousted, even by amending the constitution. In my opinion, s.38 of the *Canada Evidence Act* to the extent that it infers with the Superior Court's role as a constitutional court is *ultra vires*.

[76] In the case at bar, Mr. Elmaati ultimately will ask this court to rule on whether his constitutional rights were violated, and he is asking for a remedy under s.24 of the *Charter*. A remedy under s.24 (1) is available where there is some government action beyond the enactment of an unconstitutional statute that infringes a person's *Charter* rights: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003]3 S.C.R. 3 at para. 43; *Schacter v. Canada*, [1992] 2 S.C.R. 679 at pp.719-20.

[77] The recent Supreme Court of Canada decision in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, where the Supreme Court declared that Mr. Khadr's *Charter* rights were violated when CSIS and DFAIT officials participated in the detainment, interrogation, and improper treatment of Mr. Khadr under what was at the time an illegal regime of the American government, establishes a precedent that demonstrates that Mr. Elmaati has at least pleaded a viable claim that his *Charter* rights were violated.

[78] In *Khadr*, the Supreme Court stated at para. 36, with my emphasis added:

> [T]he courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist, and if so, whether its exercise infringes the *Charter* ... or other constitutional norms.

[79] In a civil proceeding, s.38 of the *Canada Evidence Act* could interfere with the Superior Court's role as a constitutional court charged with enforcing the *Constitution Act*, including the *Charter*. As a general principle, all facts must be available to the court to do justice between the parties, absent an overriding public interest: *Smallwood v. Sparling*, [1982] 2 S.C.R. 686.

[80] The possible interference with the court's ability to do justice is not a matter of speculation. In the case at bar, it is known that Commissioner Iacobucci, whose Internal Inquiry investigated the circumstances of Mr Elmaati's case, has significant information that could be withheld from the Superior Court. In the circumstances of this case, it seems

obvious that a trial judge's ability to administer justice both in substance and in appearance and to carry out his or her constitutional role would be impaired if he or she could not rule upon whether this information was privileged from being admitted into evidence in Mr. Elmaati's action.

[81] The trial judge of this case should be in a position to both protect the public interest and still do justice for Mr. Elmaati and the Federal Government. In this last regard, it should be noted that it is conceivable that the information being withheld is exculpatory of government misconduct.

[82] Commissioner Iacobucci was able to deliver a report to the Federal Government without causing harm to national security, and in my opinion, a Superior Court judge at a trial similarly should and would be able to rule on the claim for Crown privilege, rule on the merits of Mr. Elmaati's claim, and have regard to what information may be published in his or her reasons for judgment. Commissioner Iacobucci was able to carry out his mandate, and the Superior Court should be able to carry out its constitutional obligations.

[83] In my opinion, once a civil claim of a *Charter* infringement or an infringement of another constitutional norm leaves the interlocutory and largely procedural stages of a proceeding and enters the substantive stage of a trial or hearing, s.38 of the *Canada Evidence Act* would interfere with the Superior Court's duty to determine whether the constitutional rights of the claimant have been violated and its duty to provide a remedy under s.24 (1) of the *Charter*. To the extent that it interferes, s.38 is *ultra vires* and must be read down.

[84] In *R. v. F.A.* (S.C.J.) unreported - publication ban in effect under s.648 of the *Criminal Code*, in the context of criminal proceedings, a judge of this court had a similar opinion, and I agree with his analysis and would apply it by analogy to the context of civil proceedings. I appreciate the judge regarded s. 38 as interfering with an accused person's *Charter* rights to a fair trial and to various rights associated with s.7 of the *Charter* that may not be engaged in the case at bar. I appreciate that in a civil case, the Crown does not have the disclosure obligations associated with a criminal case. However, the point remains that s.38 potentially interferes with Mr. Elmaati's rights to the determination of a *Charter* claim and to obtain a remedy for a violation of his *Charter* rights.

[85] These conclusions provide sufficient reasons for granting Mr. Elmaati's constitutional challenge to s.38 of the *Canada Evidence Act*, but these conclusions do not explain why I am dismissing his motion for disclosure under the *Rules of Civil Procedure*. Therefore, it is necessary to continue the analysis of the Superior Court's jurisdiction.

The Core Jurisdiction of the Superior Court

[86] Emanating from the unwritten principles of the constitution and the judicature sections of the *Constitution Act, 1867*, there is a line of authority that establishes the constitutional law principle that without an amendment to the constitution, Legislatures

and Parliament may not remove certain core powers of a superior court, even if those powers could be validly conferred on other adjudicative bodies: *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1981] 2 S.C.R. 214; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714.

[87] A leading case about the core jurisdiction of a superior court is *MacMillan Bloedel Ltd. v. Simpson, supra*. In this case, a youth was convicted for *ex facie* contempt of court for contravening an injunction that prohibited environmental activists from interfering with logging operations in the Clayoquot Sound area of Vancouver Island. The youth appealed his conviction on the grounds that the British Columbia Supreme Court had no jurisdiction to try him, because when a young offender is involved, s.47 (2) of the *Young Offenders Act* extends exclusive jurisdiction over *ex facie* contempt of court to the youth court. The appeal was unsuccessful. The majority of the Supreme Court of Canada read down s.47 (2) of the *Young Offenders Act* to not interfere with the British Columbia Supreme Court's jurisdiction. The Supreme Court of Canada concluded that it was unconstitutional for Parliament or any legislature to remove any part of the core jurisdiction of a superior court without a constitutional amendment.

[88] Thus, the superior courts across Canada have a "core" jurisdiction, which is integral to their function and functioning. The core jurisdiction includes, at a minimum, "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and the preservation of its foundational role within our legal system:" *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 196 at para. 56.

[89] For the reasons already expressed above in discussing the Superior Court's role as a constitutional court, I would include the court's civil law jurisdiction as a constitutional court and to provide remedies for *Charter* violations within its core jurisdiction. Thus, just as s.47 (2) of the *Young Offenders Act* was read down to accommodate the court's core jurisdiction, I conclude that s.38 of the *Canada Evidence Act* should be read down.

[90] However, relying on *Babcock v. Canada*, [2002] 3 S.C.R. 3, mentioned above, the Attorney General argues that s.38 is *infra vires*. In *Babcock*, the Supreme Court of Canada upheld the constitutional validity of s.39 (cabinet privilege) of the *Canada Evidence Act*, a statutory sibling to s.38 of the Act. In the case at bar, the Attorney General relies on *Babcock* to support the constitutional validity of s.38 in its entirety.

[91] In *Babcock*, a group of Crown lawyers in Vancouver who were being paid less than their colleagues in Toronto sued the Federal Government in a salary dispute, and in the civil proceedings, they sought the production of documents relating to the order-in-council establishing the higher salaries for Toronto lawyers. The Clerk of the Privy Council delivered a certificate under s.39 of the *Canada Evidence Act* blocking the

disclosure of the documents. The plaintiffs responded by challenging the constitutional validity of s.39, and they argued that s.39 interfered with the court's ability to control its own process and its ability to have crucially relevant evidence. The Supreme Court dismissed the challenge. Chief Justice McLachlin concluded that s.39 did not interfere with any core jurisdiction of a superior court.

[92] I am, of course, bound by the authority of *Babcock*, and because of its authority, I have concluded that during the interlocutory stages of a civil proceeding, the Superior Court does not have the jurisdiction to rule on the validity of a claim for Crown privilege on the grounds of national security, national defence, and international relations and that the jurisdiction rests exclusively with the Federal Court. During the interlocutory stages, the Superior Court is in the main exercising its procedural jurisdiction and during the interlocutory stages of an action, I do not regard s.38 as interfering with any core jurisdiction.

[93] I also do not regard s.38 as interfering with the independence of the judiciary and *ultra vires* on that account. The fact that legislation limits the compellability of relevant information does not necessarily interfere in appearance or in fact with the court's adjudicative role or any of the essential conditions of judicial independence. As Justice Major noted in *British Columbia v. Imperial Tobacco of Canada Ltd.*, [2005] 2 S.C.R. 473 at para. 55, "judicial independence can abide unconventional rules of civil procedure and evidence."

[94] Practically speaking, I do not see any interference with the Superior Court's core jurisdiction arising during the interlocutory stages of the proceeding. In the next section of these reasons, I will describe the Superior Court's jurisdiction over discovery from the Crown during the interlocutory stages of a civil proceeding, but for immediate purposes, I simply observe that for the interlocutory phase, there would appear to be very little difference between a master of this court deciding the Attorney General's claim for privilege (which is what will occur with other claims for privilege not covered by the *Canada Evidence Act*) and the Federal Court deciding the claims for privilege.

[95] Using the Elmaati and Nureddin actions as examples, from the perspective of a judge case managing a civil action, I see no practical difference during the interlocutory stage of a proceeding in delegating the problems of national security privilege to a master of this court or in utilizing the expertise and the facilities of the Federal Court in this regard. In either event, the action will be readied for trial and then set down for a determination on the merits. In the case at bar, there is no reason to interfere with the process already underway to review the Attorney General's claim for privilege under s.38 of the *Canada Evidence Act*.

[96] However, for the reasons expressed earlier, the situation and the dynamics of the court's jurisdiction in the civil proceedings changes when the proceeding moves to a trial or a hearing where the court is exercising its substantive jurisdiction to enforce the Constitution, including the *Charter of Rights and Freedoms*. Even if the court's jurisdiction is characterized as a matter of evidence, civil procedure, and trial fairness, once the proceeding reaches a trial or a hearing on the merits, the court is duty bound to

enforce the constitution including the *Charter*, and, in my opinion, for the reasons already expressed, by conferring exclusive jurisdiction on the Federal Court to review the claim for Crown privilege of documents that are inextricably linked to the facts of Mr. Elmaati's case, Parliament through s.38 of the *Canada Evidence Act*, is interfering with the Superior Court's ability to do its job, and, practically speaking, the diversion to the Federal Court under s.38 would disrupt a trial. To be clear, this does not mean that the Superior Court judge must order the disclosure or the publication of the documents. It simply means that at the trial stage, the Superior Court must have the jurisdiction to rule on the claim for Crown privilege on the grounds of national security, national defence, and international relations.

The Superior Courts Jurisdiction over Discovery from the Crown

[97] I turn now to the Superior Court's common law, equitable and statutorily conferred jurisdiction in the context of an action against the Crown to order the discovery of documents or, more generally, to the Superior Court's jurisdiction in the course of a civil proceeding to order the disclosure of documents in the possession of the Federal Crown.

[98] The petition of right procedure, mentioned above, existed because at the time of confederation no court had any jurisdiction regarding actions against the sovereign: *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. This immunity to action is why in *Babcock v. Canada*, [2002] 3 S.C.R. 3 at para. 60, Chief Justice McLachlin noted that in Canada, superior courts had operated pre-Confederation without the power to compel Cabinet confidences. Crown immunity at common law endured until the 1950s, when Canadian governments began adopting Crown liability legislation: *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51 at para. 43. The Crown liability statutes confer rights that did not exist at common law and designate the court in which those rights may be exercised: *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 at p.75.

[99] Numerous authorities support the proposition that at common law, the Crown is immune from civil liability and from discovery of documents: *Quebec (Attorney General) v. Canada (Attorney General)* sub nom. *Keable v. Canada (Attorney General)*, [1979] 1 S.C.R. 218 at pp.245-246; *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 16 C.P.C. (3d) 64 (N.S.S.C.); *Crombie v The King* (1922), 52 O.L.R. 72 (C.A.) at p.77. In *Keable*, *supra*, Justice Pigeon referred to the old case of *Tomline v. The Queen* (1879), 4 Ex. D. 252 for authority that the Crown does not owe discovery to the subject.

[100] Litigants in provincial courts acquired a right of discovery against the Federal Government with the enactment of s.8 of the *Crown Liability and Proceedings Act (Provincial Court) Regulations*. As noted earlier, these regulations now provide that the right to discovery is subject to sections 37 to 39 of the *Canada Evidence Act*. These sections of the *Canada Evidence Act* were proclaimed in force in July 1982; see S.C. 1980-81-82-83, c.111. The current version of s.38 was enacted as part of the *Anti-Terrorism Act*, S.C. 2001, c.41, which came into force on December 24, 2001.

[101] Thus, as a matter of the civil procedure law of discovery, apart from the jurisdiction provided by statute, the Superior Court does not have jurisdiction to compel production from the Crown in a civil proceeding. Thus, the Attorney General has a strong argument that s.38 of the *Canada Evidence Act* cannot be taken as ousting the Superior Court's jurisdiction during the discovery process to rule on the production of documents by the Federal Government or to judicially review claims for privilege on the grounds of national security, national defence, and international relations. In the context of the discovery process, there is no common law jurisdiction to be ousted.

[102] At common law, in actions between private litigants, if production or disclosure was sought of Crown documents or communications, the Crown, and for that matter members of the public, had a privilege to refuse to disclose documents and information on the grounds that the information was a matter of national security, national defence, and international relations: *Balfour v. Foreign and Commonwealth Office*, [1994] 2 All E.R. 588 (C.A.); *Beaton v Skeene* (1860), All E.R. Rep 882 (Exch); *Duncan v. Cammel Laird and Company*, [1942] A.C. 624 (H.L.); *Conway v. Rimmer*, [1968] 1 All E.R. 874 (H.L.); *Choundry v. Attorney-General*, [1999] 3 NZLR. 399 (C.A.).

[103] Common law courts also did have and did exercise a jurisdiction to review claims of Crown privilege on the grounds that the information was a cabinet confidence. See *Carey v. Ontario*, [1986] 2 S.C.R. 637

[104] Thus, outside of the procedural rules for discovery, common law courts did have and did exercise a jurisdiction to review claims of Crown privilege, and there has been a debate in the case law about the extent to which the common law permitted a court to review the genuineness and the substance of the government's decision to assert Crown privilege. For present purposes, I need not explore the whether and the how of the common law's approach to Crown privilege, because assuming it exists, then for assertions of Crown privilege by the Federal Government, the common law's privilege has been displaced by s.38 of the *Canada Evidence Act*, which places the judicial review jurisdiction exclusively within the domain of the Federal Court. Thus, the question remains whether this ouster of jurisdiction is constitutionally permitted.

[105] In his factum, Mr. Elmaati identifies the Superior Court's inherent jurisdiction to control its own process as being the core jurisdiction that is in issue in the case at bar, and he submits that the power to review claims of Crown privilege are within the court's core jurisdiction that the Legislature or Parliament cannot divest without amending the Constitution. As suggested above, I, however, do not see the court's jurisdiction, such as it is, to review claims of Crown privilege as being within the court's core jurisdiction during the interlocutory stages of a civil proceeding. In any event, in a civil proceeding, it is not necessarily a violation of the core jurisdiction of the Superior Court to alter the court's inherent jurisdiction to control its own proceedings.

[106] There are numerous authorities that hold that the Superior Court's inherent jurisdiction to control its own process is subject to statutory incursions. See: *Toronto-Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.); *Forrest v. Lacroix Estate* (2000), 48 O.R. (3d) 619 (C.A.); *Peel (Regional Municipality) v. Great*

Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 161 (C.A.); *Société Sepic S.A. v. Aga Stone Ltd.* (1995), 21 O.R. (3d) 542 (C.A.). These authorities support the Attorney General's argument that there is no constitutional violation in interfering with the Superior Court's jurisdiction, whatever it is, over Crown privilege during the interlocutory stages of a proceeding.

[107] In *Glover v. Glover (No. 1)* (1980), 29 O.R. (2d) 392 (C.A.), aff'd. [1981] 2 S.C.R. 561, the Court of Appeal held that the court did not have jurisdiction to require Revenue Canada to reveal confidential information that would assist the court in locating children and in implementing a custody order. The Court of Appeal noted that the court's general and inherent jurisdiction described in *80 Wellesley Street East Limited v. Fundy Bay Builders Limited*, [1972] 2 O.R. 280 (C.A.) was available except where a statute provided specifically to the contrary. The Court of Appeal held that there was a specific statutory limitation imposed by the *Income Tax Act* that precluded resort to the court's general or inherent jurisdiction.

[108] In *S.L. v. N.B*, [2005] O.J. No. 1411 (C.A.), the Ontario Court of Appeal held that the disclosure provisions of the *Youth Criminal Justice Act* exclusively governed access to a young offender's records and these provisions did not offend the constitutional principles underlying s.96 of the *Constitution Act 1867*. In this case, the plaintiffs sued four defendants for damages for an assault. The plaintiffs applied for an order to require the Attorney General, who was not a party to the civil action, to produce documents in his possession from criminal proceedings arising from the assault. The documents, however, were subject to the federal *Youth Criminal Justice Act* and were not producible under that Act. The Ontario Court of Appeal ruled that neither the *Rules of Civil Procedure* nor the Superior Court's inherent jurisdiction would assist the plaintiffs in obtaining the documents because the disclosure provisions of the *Youth Criminal Justice Act* were a comprehensive scheme designed to carefully control access to a young offender's records. The court ruled that the limits on disclosure did not strike at the core of the superior court's judicial functions.

[109] Relying on the above authorities, I, therefore, conclude that during the interlocutory stages of a proceeding, it is within the constitutional authority of the Federal Government to oust any jurisdiction that the Superior Court may have to review the Federal Government's claims of Crown privilege. In other words, there is no reason to read down s.38 of the *Canada Evidence Act* during the interlocutory stages of a civil proceeding. However, for the reasons already expressed, I do not think these authorities go so far as to justify any interference by s.38 with the Superior Court exercising its constitutional role during the trial stage of an action.

[110] Thus, during the interlocutory stages of a civil proceeding, claims of Crown privilege on the grounds of national security, national defence, and international relations may be reviewed exclusively by the Federal Court under s.38 of the *Canada Evidence Act*. It would, nevertheless, be desirable that a procedure be developed where the parties to the action brought a motion to made submissions so that the Superior Court could take up the invitation found in s.38.05 of the *Canada Evidence Act* to make a report to the Federal Court. Section 38.05 states:

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

[111] In the case at bar, I did not make any report under s.38.05. Albeit late, if either party wishes me to make a report, then this may be the matter of a motion before me.

Conclusion

[112] For the above reasons, I, therefore, conclude that the Attorney General's preliminary jurisdictional objection to this court making an order under the *Rules of Civil Procedure* is sound, and that Mr. Elmaati's motion should be dismissed. However, I also grant the Plaintiffs' constitutional challenge and I declare that where a claim is made to enforce the *Constitution Act,* including the *Charter* in a civil proceeding, s.38 of the *Canada Evidence Act* does not preclude a judge of the Superior Court of Justice at the trial of an action or the hearing of an application from judicially reviewing a claim of Crown privilege on the grounds of national security, national defence, and international relations.

[113] My opinion is that this is not a case where there should be an order as to costs or alternatively costs should be in the cause. If, however, the parties disagree and cannot agree about the matter of costs, then they may both make submissions in writing within 20 days of the release of these Reasons for Decision.

[114] Order accordingly.

Perell, J.

Released: April 8, 2010

CITATION: Abou-Elmaati v. Attorney General, 2010 ONSC 2055
COURT FILE NO.: 06-CV-308130 PD3
DATE: April *, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ahmad Abou-Elmaati, Badr Abou-Elmaati, Samira Al-Shallash and Rasha Abou-Elmaati

Plaintiffs

- and -

The Attorney General of Canada, John Doe and Jane Doe

Defendant

REASONS FOR DECISION

Perell, J.

Released: April 8, 2010