

Federal Court



Cour fédérale

Date: 20240925

Docket: T-1580-09

Ottawa, Ontario, September 25, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ABOUSFIAN ABDELRAZIK

Plaintiff

and

**HIS MAJESTY THE KING IN RIGHT OF
CANADA AND LAWRENCE CANNON**

Defendants

ORDER

UPON Notice of Motion filed by the Defendant Crown, His Majesty the King [Defendant], dated July 2, 2024, for an Order:

1. That four (4) former or current Canadian Security Intelligence Service [CSIS] employees who will testify at trial and whose identities are protected from public disclosure by this Court's Order pursuant to s. 38.06(3) of the *Canada Evidence Act* RSC 1985, c C-5 [CEA] (2023 FC 1100, per St-Louis J.), shall be designated as witnesses whose identities must be protected [Protected Witnesses];

2. That the Protected Witnesses shall:
 - a. Enter the Court building via an alternate entrance, at a time and place to be arranged with Court security. Their names shall not be recorded in unclassified security records;
 - b. Be permitted to enter and leave the trial courtroom via an alternate entrance than the public, to be arranged with Court security;
 - c. Be permitted to swear an oath or affirm their testimony in a room other than the trial courtroom, and in the presence of only the judicial officer administering the oath. Their names shall not be recorded in unclassified Court records; and
 - d. Testify in person, with appropriate steps taken to protect their physical appearance and shall only be identified using a pseudonym;
3. That measures shall be taken to protect the physical and auditory appearance of the Protected Witnesses, which may include a screen, appearance by videoconference such that each witness' face is obscured, voice modulation software, or other such measures which this Court deems appropriate to ensure the complete anonymity of the Protected Witnesses;
4. That the Protected Witnesses shall provide their real name in writing, either directly or via counsel for the Defendants, to the Judge and required Court staff only, prior to beginning their testimony; however, their names shall not be recorded in unclassified Court records;

5. That in the event that a Protected Witness' identity is inadvertently revealed prior to, during or after his/her testimony, the identifying information shall forthwith be redacted or removed from any transcript, recording, or other document in which it appears;
6. That a notice shall issue and be read out to the courtroom prior to the testimony of each Protected Witness, directing that no person, including counsel, parties, witnesses, Court staff and members of the public and media, shall publish or otherwise disclose, during or after the conclusion of the trial, any information which may identify the witness, including, but not limited to, information pertaining to the witness' name, appearance, voice, or other identifying characteristic;
7. That, on agreement between the Parties or on motion, the Court may designate any additional witnesses as Protected Witnesses;
8. That the Plaintiff shall pay the Defendant Crown's costs on this motion; and
9. Such further and other relief as counsel may advise and this Honourable Court may permit.

AND UPON considering the written and oral submissions of the parties;

AND UPON considering Justice Martine St-Louis' judgment in *Canada (Attorney General) v Abdelrazik*, 2023 FC 1100 [Section 38 Judgment], responding to the Attorney

General of Canada's application under subsection 38.04(1) of the CEA for an order with respect to disclosure of information;

AND UPON considering that the Plaintiff is in general agreement with the Defendant's proposed measures but also noting that to the extent the Protected Witnesses be permitted to testify out of the view of the Plaintiff and his counsel and that voice modulation software be employed during their testimony, the Plaintiff takes issue with the breadth of the measures sought;

AND UPON noting that the strong presumption in favour of open courts is subject to limits in exceptional circumstances (*Canadian Broadcasting Corp v Named Person*, 2024 SCC 21 [*Named Person*] at para 32; *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*] at para 3), and that exceptional circumstances include those where a prior judicial order prohibits the public disclosure of information;

AND UPON considering paragraph 112 of the Section 38 Judgment where the Court summarizes CSIS' position, stating it "seeks to protect from disclosure information that would tend to identify its employees, information that includes their name, position title, work, location, including liaisons posts abroad that are not publicly acknowledged by CSIS, telephone numbers and e-mail addresses," and that Justice St-Louis accepted at paragraph 117 of the Section 38 Judgment that the "disclosure of the CSIS employee's identity [...] would be injurious to national security or international relations.";

AND UPON accepting that, divulging a Protected Witnesses' physical appearance – and, in some circumstances, auditory appearance – would identify a Protected Witness;

AND UPON concluding that divulging a Protected Witness' appearance, would be contrary to the Section 38 Judgment;

AND UPON concluding that circumstances may well demonstrate that divulging a Protected Witness' auditory appearance would also disclose the identity of that witness contrary to the Section 38 Judgment;

AND UPON noting that the Defendant submits, and I agree, that the Section 38 Judgment makes no provision for exceptions, that would allow the identity of the Protected Witnesses to be disclosed to the Plaintiff or his counsel;

AND UPON concluding that the motion must therefore be granted;

THIS COURT ORDERS that:

1. The four (4) former or current Canadian Security Intelligence Service employees who will testify at trial and whose identities are protected from public disclosure pursuant to the judgment in *Canada (Attorney General) v Abdelrazik*, 2023 FC 1100, are designated as witnesses whose identities must be protected [Protected Witnesses].
2. The Protected Witnesses shall:
 - a. Enter the Court building via an alternate entrance, at a time and place to be arranged with Court security. Their names shall not be recorded in unclassified security records;
 - b. Be permitted to enter and leave the trial courtroom via an alternate entrance than the public, to be arranged with Court security;

- c. Be permitted to swear an oath or affirm their testimony in a room other than the trial courtroom, and in the presence of only the judicial officer administering the oath. Their names shall not be recorded in unclassified court records; and
 - d. Testify in person, with appropriate steps taken to protect their physical appearance and shall only be identified using a pseudonym.
3. Measures the Court deems appropriate to ensure the identities of the Protected Witnesses shall be taken, which may include a screen, appearance by videoconference such that each witness' face is obscured, the use of voice modulation software where the Court determines that the witness' auditory appearance would disclose the Protected Witnesses' identity, or other such measures necessary to protect the identity of the witnesses.
4. The Protected Witnesses shall provide their real name in writing, either directly or via counsel for the Defendants, to the Judge and required Court staff only, prior to beginning their testimony; however, their names shall not be recorded in unclassified Court records.
5. In the event that a Protected Witness' identity is inadvertently revealed prior to, during or after his/her testimony, the identifying information shall forthwith be redacted or removed from any transcript, recording, or other document in which it appears.
6. A notice shall issue and be read out to the courtroom prior to the testimony of each Protected Witness, directing that no person, including counsel, parties, witnesses,

Court staff and members of the public and media, shall publish or otherwise disclose, during or after the conclusion of the trial, any information which may identify the witness, including, but not limited to, information pertaining to the witness' name, appearance, voice, or other identifying characteristic.

7. On agreement between the Parties or on motion, the Court may designate any additional witnesses as Protected Witnesses.
8. There shall be no costs on the motion.

“Patrick Gleeson”

Judge