

File No **A-17-23****FEDERAL COURT OF APPEAL**

<b>FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE</b>	
F I L E D	20-JAN-2023 Kyla Chisholm
<b>TORONTO, ON</b>	-1-

B E T W E E N:

SAKAB SAUDI HOLDING COMPANY, ALPHA STAR  
 AVIATION SERVICES COMPANY, ENMA AL ARED REAL  
 ESTATE INVESTMENT AND DEVELOPMENT COMPANY,  
 KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY  
 CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL  
 MANUFACTURING COMPANY, SAUDI TECHNOLOGY  
 & SECURITY COMPREHENSIVE CONTROL COMPANY,  
 TECHNOLOGY CONTROL COMPANY, NEW DAWN  
 CONTRACTING COMPANY and SKY PRIME INVESTMENT  
 COMPANY

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

SAAD KHALID S AL JABRI

Respondent

**NOTICE OF APPEAL**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by  
 the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the  
 Judicial Administrator. Unless the Court directs otherwise, the place of hearing will  
 be as requested by the appellant.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the [Federal Courts Rules](#) and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the [Federal Courts Rules](#) instead of serving and filing a notice of appearance.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 20, 2023

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## APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Justice Kane of the Federal Court of Canada dated January 10, 2023 (Federal Court File No. DES-5-22) (the "Decision"), whereby the Court dismissed the Appellants' motion for certain jurisdictional and procedural relief (the "Jurisdiction Motion").

THE APPELLANT ASKS for an Order:

- (a) allowing the Appeal and setting-aside the Decision;
- (b) directing Saad Aljabri to provide to the Attorney General of Canada for review the material subject to the Second Canada Evidence Act Notice (as defined below), being the material Saad Aljabri represented he would file on the Stay Motion (defined below) last scheduled to be heard on November 28 to December 1, 2022;
- (c) in the alternative, directing Saad Aljabri to withdraw the Solicitors' Brief (defined below) and to provide the Attorney General with a document that contains only the factual information the Attorney General needs to review to make a determination as to whether the information is sensitive or potentially injurious;
- (d) directing that Saad Aljabri and/or the Attorney General provide the Appellants with a copy of the materials provided to the Attorney General for review (after redaction for the purportedly sensitive or potentially injurious information);
- (e) in the alternative, dismissing and/or staying the Application solely as it relates to the material provided to the Attorney General of Canada and/or Federal Court of Canada with reference to the Second Canada Evidence Act Notice and/or Third Canada Evidence Act Notice;
- (f) granting the costs of the Appeal and the costs of the Jurisdiction Motion below; and

- (g) granting further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

***Overview***

2. This Appeal concerns an unprecedented process endorsed by the Federal Court in connection with an Application under s. 38 of the *Canada Evidence Act*.
3. The respondent Saad Aljabri is a defendant in a multi-billion dollar fraud action brought by the Appellants in the Ontario Superior Court of Justice. In connection with that action, various notices have been filed under s. 38.01(3) of the *Canada Evidence Act*. Instead of providing the information required under the *Canada Evidence Act* in response to the s. 38 notices, Saad Aljabri has purported to provide to the Attorney General of Canada an allegedly privileged "solicitors' brief" setting out the sensitive or potentially injurious information purportedly relevant to his defence, along with his lawyer's notes and commentary. The "solicitors' brief" is now the subject of a s. 38 Application in the Federal Court.
4. The Appellants brought a motion alleging that the solicitors' brief was improper and, among other things, beyond the jurisdiction of the statutory regime under the *Canada Evidence Act* (the "Jurisdiction Motion"). The Federal Court dismissed the Jurisdiction Motion, from which the Appellants now appeal.
5. The Application below is being conducted in a manner contrary to the *Canada Evidence Act*. There is no statutory authority to authorize and/or prohibit disclosure of information contained in an unsworn, and nominally privileged, memorandum or brief drafted by the participants' solicitor. To allow the Application to proceed with reference to a solicitors' brief would also be contrary to basic notions of procedural fairness, and significantly prejudice the Appellants' interests in the Application.
6. The Appellants seek that the Decision be set aside.

***Background***

7. The underlying action in the Ontario Superior Court of Justice concerns a \$3.5 billion dollar fraud claim brought by the Plaintiffs against Saad Aljabri, his family members and other co-conspirators (the "Fraud Action").

8. The Superior Court of Justice has already determined, on more than one occasion, that the Plaintiffs have established a strong *prima facie* case of fraud against Saad Aljabri. A Mareva order has been issued freezing Saad Aljabri's worldwide assets, among other interim relief, which order was confirmed when challenged.

9. In June 2021, Saad Aljabri's counsel (at the time Stockwoods LLP) provided notice under s. 38.01(1) of the *Canada Evidence Act* that Saad Aljabri intended to disclose sensitive or potentially injurious information in a sworn affidavit, contained in a motion record, to be filed on a Stay Motion brought by Saad Aljabri in the Fraud Action (the "First Canada Evidence Act Notice").

10. In accordance with the required procedure under s. 38 of the *Canada Evidence Act*, Saad Aljabri's counsel provided the Attorney General of Canada with a copy of Saad Aljabri's sworn affidavit, which included a "Confidential Appendix" and attached several Exhibits (all redacted) detailing the purportedly sensitive material (the "First Saad Submission").

11. The Attorney General of Canada has now redacted the Confidential Appendix for what it views as sensitive or potentially injurious information (the Attorney General's review of the Exhibits is still ongoing). A redacted copy of the Confidential Appendix has now been released to all parties.

12. In June 2022, Saad Aljabri claimed he was taking steps to file additional material, including a supplementary affidavit, on the same Stay Motion, as part of a new or amended motion record (in addition to the June 2021 Stay Motion record, referred to above). The material that Saad Aljabri intended to file covered the same subject matter as that covered by the First Canada Evidence Act Notice, and was described by Saad Aljabri's counsel to contain potentially injurious or sensitive information.

13. In contrast to his approach with the First Canada Evidence Act Notice, Saad Aljabri's new counsel (Adair Goldblatt Bieber LLP) took the position that the *Canada Evidence Act* did not apply to the supplementary affidavit and motion material that Saad Aljabri actually intended to disclose in the Fraud Action. Counsel took this position notwithstanding that Saad Aljabri had himself invoked the *Canada Evidence Act* process on the *same* motion nearly a year earlier.

14. As a result, an individual at the Canadian Security Intelligence Service was forced to deliver notice a notice under s. 38.01(3) of the *Canada Evidence Act* that they expected Saad Aljabri to disclose sensitive or potentially injurious information in his motion materials to be filed on the Stay Motion (the "Second Canada Evidence Act Notice").

15. In light of Saad Aljabri's new position that the *Canada Evidence Act* did not apply, the Attorney General of Canada was forced to bring an injunction application to enjoin Saad Aljabri from filing his motion materials on the Stay Motion, including any supplementary affidavit, to prevent him from disclosing sensitive or potentially injurious information in a public court filing. The Attorney General and Saad Aljabri subsequently entered into a consent order, which enjoins Saad Aljabri from serving or filing a notice of motion or any supporting evidence on the Stay Motion that implicates potentially injurious or sensitive information (the "Consent Order").

16. After a significant delay, Saad Aljabri delivered an unsworn solicitors' brief to the Attorney General of Canada (the "Solicitors' Brief"). Saad Aljabri took the position that the Solicitors' Brief is litigation privileged, and will remain litigation privileged after the Attorney General has redacted the document for any sensitive or potentially injurious information, and presumably even after the Federal Court has adjudicated the appropriateness of those redactions.

17. The Appellants have also brought a motion in the Federal Court challenging the assertion of privilege in the Solicitors' Brief, which remains pending (the "Privilege Motion"). As described below, the Privilege Motion was necessitated by events occurring after the Jurisdiction Motion was delivered, including the additional

information provided by Saad Aljabri about the nature of the information contained in the Solicitors' Brief.

18. If the Privilege Motion is granted, it is possible that a significant portion of this Appeal will be rendered moot. Similarly, if the Privilege Motion is dismissed, a subsequent Appeal would raise interrelated issues those raised on this Appeal. As a result, the Appellants will suggest that any procedural deadlines related to the hearing of this Appeal be suspended until the Privilege Motion is heard and determined.

### **The Jurisdiction Motion**

19. In response to Saad Aljabri's submission of the Solicitors' Brief, the Appellants brought the Jurisdiction Motion challenging the form of Saad Aljabri's proffer and seeking ancillary orders to ensure fairness in the hearing of the Application. The Appellants' position was that Saad Aljabri's submission of the Solicitors' Brief was improper for at least three core reasons.

20. *First*, the Attorney General only has the authority to bring, and the Federal Court only has the authority to entertain, an application from the Attorney General's review of the material subject to notice under the *Canada Evidence Act*.

21. At the time the Solicitors' Brief was provided to the Attorney General of Canada (nominally in response to the Second Canada Evidence Act Notice), **no** notice had been provided with respect to that document. To the contrary, the Second Canada Evidence Act Notice specifically covers the notice of motion, supplementary affidavit and other materials Saad Aljabri claims he intended to file on the Stay Motion. No other material is at issue in these proceedings.

22. After the Appellants served and briefed the Jurisdiction Motion, Saad Aljabri purported to deliver a further notice under s. 38.01(1) of the *Canada Evidence Act* (the "Third Canada Evidence Act Notice"), covering the **same** Solicitors' Brief that he had purported to deliver in response to the Second Canada Evidence Act Notice. In the circumstances, this was an acknowledgment that the Solicitors' Brief is not in fact responsive to the Second Canada Evidence Act Notice.



23. *Second*, the *Canada Evidence Act* regime is only intended to apply to information that it is expected will be disclosed in a proceeding. As a result, the Solicitors' Brief could not be the subject of a notice under the *Canada Evidence Act*. There is no statutory authority to authorize and/or prohibit disclosure of information contained in an unsworn, and nominally privileged, memo drafted by the participants' solicitor – which, by definition, will not be disclosed in a "proceeding." In fact, information intended to be provided solely to one's lawyer – such as in a solicitors' brief – *cannot* be the subject of a s. 38.01 notice or a s. 38.04 application.

24. Instead, the *Canada Evidence Act* confers upon the Attorney General and the Federal Court the statutory authority to authorize and/or prohibit disclosure of information the participant actually intends or will be required to disclose in a proceeding. This is exactly how Saad Aljabri approached his submission to the Attorney General of Canada in connection with the First Canada Evidence Act Notice.

25. *Third*, Saad Aljabri's approach would create innumerable practical challenges, and judicial inefficiencies, inconsistent with the objective of the *Canada Evidence Act*, the governing case law, and basic notions of procedural fairness. Among other things, on Saad Aljabri's approach, the Appellants would be the only parties precluded from seeing the unredacted information that the Attorney General of Canada authorizes for disclosure. It would also position Saad Aljabri to make *ex parte* submissions on the relevance of the underlying information, in a manner not necessary to protect against the disclosure of sensitive or potentially injurious information. The result would be to prejudice significantly the Appellants' participation in the Application, contrary to basic notions of procedural fairness.

### **The Hearing of the Jurisdiction Motion**

26. In the course of the hearing of the Jurisdiction Motion, Saad Aljabri provided additional information about the nature of the Solicitors' Brief, and clarified his position in respect of the procedure he believes should be followed in the Application:

- (a) The Solicitors' Brief is a memo drafted by Saad Aljabri's counsel after the Second Canada Evidence Act Notice was given;
- (b) The Solicitors' Brief was drafted for the purpose of conveying the purportedly sensitive or potentially injurious factual information in Saad Aljabri's possession to the Attorney General;
- (c) The Solicitors' Brief contains all of the purportedly sensitive or potentially injurious information known to Saad Aljabri that he asserts may be relevant to his defence. Saad Aljabri has also confirmed that all of this factual information is relevant to his Stay Motion. As a result, all of the information in the Solicitors' Brief would also have been included in the Stay Motion materials Saad Aljabri was poised to file in the Fraud Action, and which Saad Aljabri was required to provide to the Attorney General under the Second Canada Evidence Act Notice;
- (d) In drafting the Solicitors' Brief, Saad Aljabri's counsel included not only the factual information that is purportedly sensitive or potentially injurious, but also described Saad Aljabri's litigation strategy in the Fraud Action and provided submissions on the relevance of the purportedly sensitive or potentially injurious information to the Fraud Action. In effect, counsel included Saad Aljabri's submissions on the *Ribic* test (which are to be made to the Federal Court in the context of a public hearing) in the Solicitors' Brief, which Saad Aljabri now attempts to shield from disclosure to the Appellants.
- (e) Saad Aljabri asserts that the Solicitors' Brief *as a whole* (including the factual information included therein) is litigation privileged and therefore shielded from disclosure. However, Saad Aljabri accepts that the underlying factual information (which the Attorney General will review and the Court will adjudicate under s. 38 of the *Canada Evidence Act*) is *not* privileged and that the vast majority of the factual information will be disclosed in the underlying Fraud Action.

- (f) Saad Aljabri's counsel has provided inconsistent descriptions of the solicitors' brief and the extent to which the factual information therein is interwoven with the (unnecessary) description of his litigation strategy and the relevance of the underlying information to the Fraud Action. In some instances, Saad Aljabri's counsel has suggested that the Solicitors' Brief is structured so as to make the factual information easily severable from Saad Aljabri's legal submissions. But in other instances, Saad Aljabri's counsel suggested that the factual information and legal submissions are inextricably linked and not severable.
- (g) Saad Aljabri takes the position that the Solicitors' Brief is privileged notwithstanding that it was created for the sole purpose of being provided (and now has been provided) to the Attorney General (a party adverse in interest to Saad Aljabri in these Federal Court proceedings).
- (h) Saad Aljabri accepts that both a redacted and unredacted copy of the Solicitors' Brief will be provided to *amicus* and filed with the Court (once redacted by the Attorney General for potentially injurious or sensitive information). Saad Aljabri also accepts that he will make submissions to the Court based on the information contained in the redacted Solicitors' Brief. However, Saad Aljabri takes the position that the Solicitors' Brief will remain privileged vis-à-vis the Appellants, such that the Appellants are the only parties to the Federal Court proceedings that should be deprived of a copy of the redacted Solicitors' Brief.

27. In the context of the Jurisdiction Motion, the Appellants' position was that if there is any legitimate concern about the Sakab Respondents receiving a copy of the solicitors' brief (after redaction by the Attorney General for any purportedly sensitive or potentially injurious information) because it unnecessarily includes details of Saad Aljabri's litigation strategy, the appropriate remedy was for the Federal Court to order that:

- (a) Saad Aljabri (i) provide a copy of the Stay Motion materials (being the material actually subject to the Second Canada Evidence Act Notice) to the Attorney General for review; and/or (ii) withdraw the solicitors' brief and provide the Attorney General with a document that contains only the factual information the Attorney General needs to review to make a determination as to whether the information is sensitive or potentially injurious; and
- (b) Saad Aljabri and/or the Attorney General provide the Appellants with a copy of the materials provided to the Attorney General (after redaction for the purportedly sensitive or potentially injurious information), as is done in the ordinary course in proceedings under s. 38 of the *Canada Evidence Act*.

28. Saad Aljabri opposed the pragmatic relief set out above. As described below, Justice Kane declined to direct that relief.

29. In light of the new information provided by Saad Aljabri, and Saad Aljabri's opposition to the pragmatic relief identified above, the Appellants served the Privilege Motion while the Jurisdiction Motion remained under reserve.

### **The Decision**

30. On January 10, 2023, Justice Kane of the Federal Court of Canada released the Decision dismissing the Appellants' Jurisdiction Motion.

31. In the Decision, Justice Kane concluded, without addressing the Appellants' submissions regarding the jurisdiction conferred by the *Canada Evidence Act*, that the Solicitors' Brief was an appropriate form of proffer to the Attorney General of Canada, and could be the subject of the within Application to the Federal Court of Canada.

32. Justice Kane also concluded that the process taken by Saad Aljabri and the Attorney General of Canada was not "necessarily unfair", despite acknowledging the

circumstances were "unusual" and that that the Court would "not encourage the creation of new documents for a section 38 application."

33. Justice Kane similarly declined to direct any of the proposals suggested by the Appellants or *amicus* to ensure a fair hearing, while simultaneously suggesting that it may be expedient for Saad Aljabri to adopt *voluntarily* some of those same proposals.

34. In effect, Justice Kane concluded that the Appellants' Jurisdiction Motion was premature, as the Attorney General of Canada had yet to complete its redaction to the Solicitors' Brief, notwithstanding the exact same issues will inevitably arise when the Attorney General of Canada completes its review and notwithstanding the intention to proceed with the Application on the basis of the Solicitors' Brief, irrespective of the redactions made by the Attorney General of Canada. In this regard, Justice Kane placed significant importance on a desire to advance the Application expeditiously.

### **Grounds of Appeal**

35. In dismissing the Jurisdiction Motion, Justice Kane erred in fact and in law by, among other things:

- (a) Failing to consider and/or address the Appellants' submission that there is no statutory authority under the *Canada Evidence Act* for the Attorney General and Federal Court to consider and review the Solicitors' Brief;
- (b) Failing to engage in any statutory interpretation of the relevant provisions of the *Canada Evidence Act*;
- (c) Misapprehending and/or improperly construing the nature and scope of the statutory authority created by s. 38 of the *Canada Evidence Act*;
- (d) Incorrectly accepting that the Application under s. 38 of the *Canada Evidence Act* could proceed with reference to a Solicitors' Brief (nominally subject to a claim of privilege) that Saad Aljabri does not intend to file or disclose in the Fraud Action;

- (e) Incorrectly concluding that the Court's jurisdiction flowed from the application filed by the Attorney General of Canada, rather than from the *Canada Evidence Act*;
- (f) Failing to give effect to basic principles of procedural fairness in the hearing of the Application;
- (g) Failing to identify that the Stay Motion materials properly subject to the Second Canada Evidence Act Notice would contain the same "waterfront" of information as is represented to be contained in the Solicitors' Brief, such that there is no "efficiency" advantage in proceeding with an Application in reference to the Solicitors' Brief;
- (h) Incorrectly characterizing the Solicitors' Brief as having been drafted by Saad Aljabri's counsel for the purpose of preparing for the Fraud Action, when the uncontradicted evidence and statements from Saad Aljabri's counsel establish that the Solicitors' Brief was prepared for the express purpose of conveying information to the Attorney General within the s. 38 *Canada Evidence Act* process;
- (i) Allowing Saad Aljabri to, in effect, make *ex parte* submissions on the relevance of the non-privileged factual information contained in the Solicitors' Brief, in a manner not necessary to protect any sensitive or potentially injurious information from disclosure and therefore also in a manner contrary to the provisions and purpose of s. 38 of the *Canada Evidence Act*;
- (j) Incorrectly concluding that the Appellants were positioned to make submissions on the relevance of the information contained in the Solicitors' Brief because Saad Aljabri had served and filed other documents in the Fraud Action (which do *not* describe the information contained in the Solicitors' Brief);

- (k) Failing to give effect to the decisions of the Federal Court and Federal Court of Appeal which direct that access to unredacted information in a document subject to a s. 38 *Canada Evidence Act* claim is necessary to inform submissions on the relevance of information that the Attorney General seeks to redact on the basis that it is sensitive or potentially injurious information;
- (l) Acknowledging that the "circumstances are unusual" and that the Court would "not encourage the creation of new documents for a section 38 application", while failing to take any steps to ensure the fairness of such a novel approach in accordance with, among other things, basic principles of procedural fairness;
- (m) Incorrectly concluding that Saad Aljabri is not subject to any obligation to produce the Solicitors' Brief in the Application, unless he were to "provide it voluntarily to Sakab";
- (n) Misapprehending the role of the Attorney General of Canada in the Application and under s. 38 of the *Canada Evidence Act*, including by incorrectly concluding that the Attorney General of Canada is not in a "typically adversarial position";
- (o) Incorrectly concluding that there is no unfairness to the Appellants in the proposed manner of proceeding;
- (p) Incorrectly concluding that the Court does not have jurisdiction to direct any of the alternative remedies suggested by the Appellants, which would, among other things, ameliorate the prejudice to their interests and allow the Application to proceed on a fair and efficient basis; and
- (q) Incorrectly concluding that the Jurisdiction Motion is premature by placing significant reliance on the fact that (a) the Attorney General of Canada has not completed its review of the Solicitors' Brief; and (b) the Solicitors' Brief has not been filed with the Court in dismissing the

Jurisdiction Motion, when both conditions will inevitably be satisfied and, at that time, the same issues raised by Jurisdiction Motion to will continue to exist.

January 20, 2023

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