Federal Court of Appeal

Cour d'appel fédérale

Date: 20110711

Docket: A-431-10

Citation: 2011 FCA 223

CORAM: LÉTOURNEAU J.A.
DAWSON J.A.
STRATAS J.A.

BETWEEN:

CHANTHIRAKUMAR SELLATHURAI

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

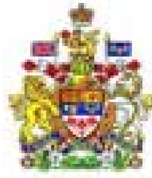
Heard at Toronto, Ontario, on June 9, 2011.

Judgment delivered at Ottawa, Ontario, on July 11, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In the course of processing Mr. Sellathurai's claim for ministerial relief under subsection 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), the Minister of Public Safety and Emergency Preparedness (Minister) inadvertently disclosed documents to Mr. Sellathurai's counsel that the Minister viewed to be subject to national security privilege. After asking that the documents be returned, the Minister sought and obtained an order from the Federal Court requiring Mr. Sellathurai's counsel to return the documents to the Minister. The central issue in this appeal is whether the Federal Court possessed the jurisdiction to make such an order. Other issues to be decided on this appeal include whether, in the absence of a certified

question, this Court has jurisdiction to hear the appeal and whether the Federal Court erred by failing to appoint an *amicus curiae* or by failing to consider whether the principles of procedural fairness required that some remedy be afforded to Mr. Sellathurai. A complete list of the issues to be decided appears at paragraph 13 below.

Background Facts

[2] To appreciate the issues before the Court it is necessary to understand the protracted facts that led to the making of the order under appeal. The facts may be summarized as follows:

1. In 1997, a report issued under section 27 of the *Immigration Act*, R.S.C. 1985, c. I-2 (former Act) alleged that Mr. Sellathurai was a member of the inadmissible class of persons described in clause 19(1)(*f*)(iii)(B) of the former Act. Specifically, the report alleged Mr. Sellathurai to be a person who there are reasonable grounds to believe is or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism. The organization referred to in the report was the Liberation Tigers of Tamil Eelam (LTTE).

2. Later, Mr. Sellathurai received a direction to report for an admissibility inquiry before the Immigration Division of the Immigration and Refugee Board (Immigration Division). The inquiry began on March 19, 1999.

3. The hearing before the Immigration Division into Mr. Sellathurai's alleged inadmissibility was split into two parts. The first part of the inquiry was completed on September 26, 2001. At that time a member of the Immigration Division

concluded that there were reasonable grounds to believe that Mr. Sellathurai was a member of the LTTE. Whether the LTTE was a terrorist organization was an issue left to be determined at the second stage of the inquiry.

4. On August 20, 2002, Mr. Sellathurai applied under subsection 34(2) of the Act for an exemption from a finding that he was inadmissible on security grounds as a result of being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism. Subsection 34(2) of the Act provides, among other things, that membership in a terrorist organization does not constitute inadmissibility where an affected person satisfies the Minister that his or her presence in Canada would not be detrimental to the national interest.

5. As a result of Mr. Sellathurai's application under subsection 34(2) of the Act, the Canada Border Services Agency (CBSA) prepared a brief for the Minister. The brief recommended that Mr. Sellathurai's request for ministerial relief be denied. In February 2006, Mr. Sellathurai was provided with a copy of the brief and given the opportunity to respond to it. Later, further submissions were invited from Mr. Sellathurai in 2007 and in 2008.

6. Prior to the events relevant to this appeal, no decision had been made with respect to Mr. Sellathurai's request for ministerial relief.

7. After the member of the Immigration Division determined that there were reasonable grounds to believe that Mr. Sellathurai was a member of the LTTE, the

inquiry was to continue before the Immigration Division. However, from September 26, 2001 until October 21, 2008 the admissibility hearing was adjourned from time to time in order to allow the Minister to make a decision on the request for ministerial relief.

8. On December 29, 2008, the Immigration Division refused Mr. Sellathurai's request for a further adjournment.

9. Mr. Sellathurai then filed in the Federal Court, in court file IMM-152-09, an application for leave and judicial review of the decision of the Immigration Division refusing a further adjournment. He also sought an order staying the admissibility hearing. The Federal Court granted the stay. Subsequently leave was granted by the Federal Court, and the hearing of the application for judicial review was scheduled for February 23, 2010.

10. On February 26, 2010, Justice Hughes of the Federal Court directed that the application for judicial review be adjourned *sine die*. Counsel were to provide updates to the Court as to the status of the request for ministerial relief.

11. On August 12, 2010, counsel for Mr. Sellathurai provided the following report to the Court:

> Re: Sellathurai v. MCI, Court File: IMM-152-09
>
> As your records will show I am the solicitor for the Applicant. This judicial review application is presently in abeyance while the parties try to resolve matters. Mr. Todd, counsel for the Minister has been

> advising Justice Hughes of the status of the case from time to time.
>
> I undertook to update the Court this time. Mr. Sellathurai has received a new package of materials from the CBSA and was asked to reply by August 15, 2010. I requested an extension to the end of August because I was away for some time and with other matters, it would not have been possible for me to meet this deadline. The extension was granted and it was our expectation that the case would go before the Minister for a decision shortly after submissions were filed.
>
> A new issue has just arisen. The CBSA has requested that its package of materials disclosed to me and Mr. Sellathurai be returned because there is apparently classified material that has been inadvertently disclosed. The CBSA has advised that Mr. Sellathurai will be given a month from receipt of the redacted materials to reply so that it would actually be later than the end of August when the reply would come due.
>
> We are in the process of addressing the CBSA request, as it is not apparent that any classified material has in fact been disclosed.
>
> The matter is moving along so I would suggest that either I or Mr. Todd report back to the Court by the end of September either to advise that the matter is now resolved or at least to update the Court on the status of its resolution.
>
> Please advise if there are problems with this.
>
> Thank you for your attention.
>
> [emphasis added]

12. On August 16, 2010, the CBSA wrote to Mr. Sellathurai's counsel advising that:

> This is in response to your letter dated August 12, 2010. A review of the file has revealed three

> documents which contain information that should not have been disclosed:
>
> 1- Canadian Security Intelligence Service (CSIS) letter dated January 26, 1995. This document is six pages long, has the CSIS letterhead, and is marked “Secret”. It is Appendix 9 in the package.
>
> 2- Canadian Security Intelligence Service (CSIS) letter dated November 9, 1995. This document is five pages long, has the CSIS letterhead, and is marked “Secret”. It is in Appendix 18 of the package.
>
> 3- Canadian Security Intelligence Service (CSIS) letter dated December 10, 2007. This document is two pages long, is marked “Secret”, and is signed by a CSIS employee. It is in Appendix 18 of the package.
>
> We request that you seal and return the above-noted documents, along with any copies that were made, to our attention at your earliest convenience. We assert that these documents carry national security privilege, and must be protected.
>
> We thank you for your cooperation in this matter.
>
> [emphasis added]

13. On August 19, 2010, counsel for Mr. Sellathurai responded:

> Thank you for your letter of August 16, 2010. I have specifically pulled the referenced reports and sealed them. I have the only copy as no others were made or given to anyone else. I would appreciate it if you would send the redacted version which you intend to rely on publicly so that we may determine if the matter can be settled amicably or if having the court review it would be more appropriate. We cannot

> continue with Mr. Sellathurai's submissions until this is settled because of the concern about not raising with him any of the relevant issues arising from the referenced reports. I am not sure if parts of these reports are to be sealed, how we will deal with the fact that he and others already have some knowledge of the concerns raised in the documents because we were already well underway in preparing reply submissions. Please note I am away next week. Thank you. Please advise. [emphasis added]

14. On September 2, 2010, Justice Hughes issued the following direction:

> THIS COURT HEREBY DIRECTS that:
>
> 1. [Counsel for Mr. Sellathurai] shall place the documents in question in a sealed envelope and file it with the Court number and style of cause clearly marked together with a caption to the effect that it is not to be opened until further Order or Direction of the Court. This shall be done on or before September 8, 2010;
>
> 2. The Department of Justice shall, on or before September 8, 2010 furnish to [counsel for Mr. Sellathurai] and file with the Court copies of said documents redacted so as to remove or obscure the contentious material;
>
> 3. On or about September 8, 2010, the Department of Justice shall file a Motion to be heard at a date to be fixed by the Office of the Chief Justice, to be heard by a designated Judge, if required as to the further manner in which said documents are to be dealt.

15. The three documents provided to Mr. Sellathurai's counsel were filed with the Court and redacted versions of the documents were provided to Mr. Sellathurai's counsel. The Minister filed a notice of motion in court file IMM-152-09. The motion was

brought in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 and was supported by two affidavits filed and served on counsel for Mr. Sellathurai as well as a confidential affidavit filed with the Court on an *ex parte* basis that was described as "justifying the national security privilege claim." The relief sought in the notice of motion was as follows:

> THIS MOTION IS FOR injunctive relief in the context of inadvertent disclosure of documents to which national security privilege is claimed. The Respondent seeks the assistance of this Honourable Court to resolve an issue involving inadvertent disclosure by a Federal tribunal (the Respondent Minister) of certain documents to which the Respondent claims are subject to national security privilege.
>
> The Respondent requests that a designated Judge of this Court sanction the direction of the Honourable Justice Hughes that the documents in question are to be sealed and filed with this Court by [counsel for Mr. Sellathurai] by September 8, 2010 by reviewing the redacted and unredacted versions of the documents. The Respondent requests an order upholding the Respondent's national security privilege claim.
>
> The Respondent seeks an order, as necessary or required, ensuring that the Applicant seal and return to the Respondent any other paper copy of the national security privilege documents in question and destroy any electronic copy of the documents that may exist in the control and possession of the Applicant and [his counsel]. The Respondent additionally seeks an order that the Applicant and [his counsel] destroy any notes relating to the national security privilege documents in question to ensure that no further violation of the national security privilege occurs.

> The Respondent requests such other relief as this Honourable Court sees fit. [emphasis added]

16. While the Minister's motion was initially brought in writing under Rule 369, an oral hearing was held on October 20, 2010. On November 3, 2010, a Judge of the Federal Court (Judge) issued an order and reasons in support of the order. The reasons are cited as 2010 FC 1082, 375 F.T.R. 181. The order provided:

> THE COURT ORDERS, DECLARES AND DIRECTS that:
>
> 1. the Order of Justice Hughes, dated September 2, 2010, is confirmed;
>
> 2. the national security claim of privilege over those portions of the Disputed Documents, as asserted by the Minister, is upheld;
>
> 3. to the extent that any of the following steps have not been taken, the Court orders that:
>
>   - the Applicant seal and return to the Minister, through his counsel, any paper copy of the unredacted Disputed Documents;
>
>   - the Applicant destroy any electronic copy of the unredacted Disputed Documents in the control or possession of the Applicant or his counsel; and
>
>   - the Applicant and his counsel destroy any notes in their possession or control relating to the redacted portions of the Disputed Documents.
>
> 4. The unredacted Disputed Documents, that currently are in a sealed envelope filed with the Court and that form part of this Court

File, are to be returned by the Registry to the Minister's counsel; and

5. no question of general importance is certified.

Mr. Sellathurai now appeals from this order.

The Decision of the Federal Court

[3] The Judge framed the issues before her as follows:

1. Does the Federal Court have jurisdiction to determine this motion and grant the relief sought by the Minister pursuant to section 87 of the Act?

2. Should the Minister's motion to recall the disputed documents succeed?

   (a) Are these documents the subject of national security privilege?

   (b) Did the Minister waive national security privilege on the disputed documents?

   (c) Is national security privilege an exception to the "open court principle"?

3. Should the Court designate a special advocate, pursuant to section 87.1 of the Act, to advance the interests of the Applicant?

[4] After reviewing the relevant facts, the Judge began consideration of the first issue: did the Federal Court have jurisdiction to determine the motion pursuant to section 87 of the Act? In her view, neither party disputed the Federal Court's jurisdiction to hear the motion, so the real issue was

whether it should be heard under section 87 of the Act or section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (Evidence Act).

[5] The Judge recognized the importance of preventing the disclosure of sensitive materials and also recognized the Crown's interest in recalling sensitive documents that were accidentally released. The question was how accidental disclosure of such documents should be dealt with in the circumstances of this case.

[6] The Judge disagreed with Mr. Sellathurai's submission that the Federal Court was required to deal with the issue under section 38 of the Evidence Act. Where another statute provided a legislative scheme for dealing with secret documents in the context of a particular type of proceedings, that scheme took precedence. The Act provided such a scheme in the present case. If section 38 of the Evidence Act remained applicable, section 87 of the Act would be redundant. Therefore, the Judge concluded that section 87 of the Act was applicable to this case, not section 38 of the Evidence Act.

[7] The Judge then moved to consideration of section 87 of the Act. She rejected Mr. Sellathurai's argument that the Minister's motion did not form part of existing judicial review proceedings as required by the language of the provision. She reasoned, at paragraph 27, as follows:

> [Mr. Sellathurai's] own action, in seeking a stay of the [Immigration Division's] hearing and an adjournment of the judicial review, has inextricably linked the Ministerial Relief Application and the judicial review of the [Immigration Division's] interlocutory decision. As a result, there is little question in my mind that documents disclosed in the context of the Ministerial Relief Application would have relevance to the judicial review application when, and if, it is heard. It follows that,

> although the Disputed Documents were disclosed pursuant to the Ministerial Relief Application, this disclosure forms part of the substance of the judicial review motion that currently stands adjourned *sine die*.

[8] She also reasoned that even if the disputed documents did not fall within the adjourned judicial review the result would be the same, because the documents had been disclosed pursuant to a matter within the Act, that is, the subsection 34(2) application for ministerial relief. From there, Rule 4 of the *Federal Court Rules* would "bridge the gap," and allow the Court to adopt, by analogy, the section 87 procedure. "In summary, I find that the Federal Court has jurisdiction to consider this motion either directly or by analogy pursuant to s. 87 of *IRPA*."

[9] The Judge then turned to consider the next issue: should the Court allow the Minister's motion for the return of the documents? After a review of the documents and the confidential affidavit, she concluded that the information contained in the original disclosure but redacted in the documents later provided pursuant to Justice Hughes' direction was subject to national security privilege. She also concluded that the disclosure did not constitute waiver of the privilege, since the disclosure had been accidental. The mistaken disclosure had not reduced the national interest in preventing dissemination of the information.

[10] The Judge then considered the final issue: should the Court appoint a special advocate to advance Mr. Sellathurai's interests? The Judge applied the factors previously applied to applications for the appointment of a special advocate made in the course of an application under section 87 of the Act as articulated in *Kanyamibwa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 66, 360 F.T.R. 173 at paragraphs 43 to 56. While section 87.1 of the Act

would allow the Court to appoint a special advocate, the Judge decided against this, for several reasons:

- She had already concluded that disclosure of the documents would be injurious to national security;

- A judicial review of a denial of ministerial relief under subsection 34(2) differs from a judicial determination concerning the reasonableness of a security certificate and a judicial review of the detention of a person subject to a security certificate;

- The Minister had not yet determined whether to grant relief to Mr. Sellathurai, the information was minimal and it was uncertain whether the Minister would rely on the information he sought to protect; and

- Mr. Sellathurai was not facing imminent removal, and was not being detained.

[11] Finally, at paragraphs 54 to 56 the Judge gave brief consideration to whether she should certify a question. Mr. Sellathurai's counsel had made her submissions on this issue three days after the deadline set by the Judge, and concluded her submissions with "[s]o at this point there are no issues for which certification is being sought." The Judge found the Minister's submissions to be vague. In the end, the Judge decided not to certify a question, "[g]iven the unique circumstances that arise on this motion."

[12] As set out above, the Judge ordered that Mr. Sellathurai seal and return any paper copy of the unredacted documents, destroy any electronic copy in his control or possession (or the control

or possession of his counsel), and destroy any notes relating to the redacted portions of the documents. The copies of the documents in the Court's possession were to be returned to the Minister's counsel.

The Issues

[13] In my view, the issues to be decided on this appeal are:

1. Does this Court have jurisdiction to hear this appeal?
2. What is the standard of review to be applied to the remaining issues?
3. Did the Judge err by concluding that the Federal Court had jurisdiction to consider the motion either directly or by analogy under section 87 of the Act?
4. If the Federal Court erred by applying section 87 of the Act, what was the proper procedure to follow?
5. Did the Federal Court err in concluding that the inadvertently disclosed documents could be returned to the Minister?
6. Did the Federal Court err in law by applying the jurisprudence relevant to the appointment of a special advocate under sections 87 and 87.1 of the Act, or by failing to consider whether it was procedurally fair to limit Mr. Sellathurai to responding to the redacted version of the documents when making submissions to the Court and the Minister?

Consideration of the Issues

1. Does this Court have jurisdiction to hear this appeal?

[14] The respondent submits that the Judge correctly determined that the Federal Court possessed jurisdiction under the Act to order the return of the inadvertently disclosed documents. It follows, the respondent says, that because the Judge did not certify a question this appeal should be quashed on the ground this Court lacks jurisdiction to hear the appeal. In the alternative, the respondent says that if this Court finds that the Judge possessed the jurisdiction to protect the disclosed documents in the manner she did, in the absence of the certified question this Court lacks jurisdiction to consider "any ancillary issues raised by the Appellant regarding how the Applications Judge exercised her jurisdiction" (paragraph 31, respondent's factum).

[15] It is uncontroversial that, as a matter of general principle, the Act prohibits appeals from interlocutory decisions of the Federal Court (paragraph 72(2)(*e*) of the Act). The Act also prohibits appeals from final decisions of the Federal Court, unless in rendering judgment a judge of the Federal Court certifies that a serious question of general importance is involved and states that question (paragraph 74(*d*) of the Act). That said, the jurisprudence of this Court is well-settled that these preclusive clauses are not to be interpreted literally. This Court can hear an appeal where it is alleged that the Federal Court judge committed a jurisdictional error: *Horne v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 337, 414 N.R. 97 at paragraph 4, citing *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27, [2005] 3 F.C.R. 255 at paragraph 17 and *Narvey v. Canada (Minister of Citizenship and Immigration)*, (1999) 235 N.R. 305 (F.C.A.).

[16] In my view, this appeal does raise a jurisdictional question. There is real uncertainty about whether the Federal Court had jurisdiction to deal with the inadvertent disclosure of documents in the course of events leading to a decision under subsection 34(2) of the Act. Central to this appeal is whether the Act, the Evidence Act or neither gave jurisdiction to the Federal Court to deal with the Minister's inadvertent disclosure. Until it is decided whether the Federal Court possessed the jurisdiction to deal with this matter, its jurisdiction has not been established and this appeal should proceed.

2. What is the standard of review to be applied to the remaining issues?

[17] This is not an appeal from an application for judicial review. Therefore, the standard of review is that set out in *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235. Questions of law must be determined on a correctness standard. Questions of fact or mixed fact and law are reviewed on the standard of palpable and overriding error.

[18] Issues 3, 4 and 6, listed at paragraph 13 above, raise questions of law and so the Judge's decision on these issues is reviewable on the standard of correctness. Issue 5 required the Judge to make findings of mixed fact and law. Ultimately, however, the Judge granted injunctive relief by ordering that the three documents be returned to the Minister. Injunctive relief is discretionary. A discretionary order made by a Judge will not be interfered with on appeal unless:

> […] the appellate court clearly determines that the lower court judge has given insufficient weight to relevant factors or proceeded on a wrong principle of law: *Elders Grain Co. v. Ralph Misener (The)*, [2005] F.C.J. No. 612, 2005 FCA 139 at paragraph 13. This Court may also overturn a discretionary decision of a lower court

> where it is satisfied that the judge has seriously misapprehended the facts, or where an obvious injustice would otherwise result: *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, [2005] F.C.J. No. 215, 2005 FCA 50, 38 C.P.R. (4th) 1 at paragraph 9.

See: *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, 370 N.R. 336, at paragraph 15.

3. Did the Judge err by concluding that the Federal Court had jurisdiction to consider the motion either directly or by analogy under section 87 of the Act?

[19] As explained above, the Judge concluded that section 38 of the Evidence Act did not apply. Instead, because she viewed the disclosure to form part of the substance of the adjourned judicial review of the decision of the Immigration Division not to adjourn the admissibility hearing, she viewed section 87 of the Act to be applicable. Alternatively, if the disclosure did not fall within the adjourned application for judicial review, the Judge decided that the documents had been disclosed pursuant to a matter within the Act and Rule 4 of the *Federal Courts Rules* would "bridge the gap" and allow the Court to adopt, by analogy, the section 87 procedure.

[20] For the reasons that follow, I am of the view that the Judge was correct to reject the application of section 38 of the Evidence Act and to find that the Federal Court had jurisdiction. However, I respectfully disagree that the source of the Court's jurisdiction was section 87 of the Act. In my view, as explained below, the Court's jurisdiction was founded upon section 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the Federal Court's plenary jurisdiction over disclosure in immigration matters.

[21] Turning first to the potential application of section 38 of the Evidence Act, section 38 is set out in the appendix to these reasons. Generally, it provides a mechanism for the protection of information where in a proceeding a person is required to disclose, or expects to disclose or cause to be disclosed, sensitive or potentially injurious information (subsection 38.01(1)) or believes that such information is about to be disclosed (subsections 38.01(2) and (4)) or may be disclosed (subsection 38.01(3)). In such circumstances, where proper notification has been given to the Attorney General of Canada, the Attorney General may apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

[22] However, just as section 39 of the Evidence Act has no application after the disclosure of sensitive information (*Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at paragraph 26), in my view, section 38 has no application as a mechanism to retrieve information already disclosed. Nothing in the language of section 38 speaks to its application after disclosure has been made. It is confined by its language to the future disclosure of sensitive or potentially injurious information.

[23] As to the potential application of section 87 of the Act, the section provides that:

87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary	87. Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de

modifications.	nommer un avocat spécial et de fournir un résumé.

[24] The ordinary meaning of this text is that section 87 applies only during an application for judicial review when the Minister may apply for leave not to disclose information that, but for the granting of leave, would be producible (generally as part of the certified tribunal record). Thus, on its plain language, section 87 applies to prevent disclosure. It is not intended to apply as a mechanism to retrieve information after disclosure has been made.

[25] Moreover, with respect to the requirement that there be a pending application for judicial review, it is common ground that no application for judicial review had been brought with respect to the pending application for ministerial relief made under subsection 34(2) of the Act. The Judge found, however, that by obtaining a stay of the admissibility hearing and an adjournment of the application for judicial review of the Immigration Division's decision not to adjourn the admissibility hearing, Mr. Sellathurai had "inextricably linked" the subsection 34(2) application and the application for judicial review. Thus, in her view, section 87 of the Act became applicable.

[26] I again respectfully disagree. As explained above, section 87 applies to the anticipated disclosure of information relevant to a pending application for judicial review. The language of the French version of section 87 is express that the application for the non-disclosure of information or other evidence may be made "dans le cadre d'un contrôle judiciaire".

[27] In the present case, what was relevant to the pending application for judicial review was information or evidence about the propriety of the refusal of the Immigration Division to grant a further adjournment. The information at issue which was inadvertently disclosed is information relevant to whether Mr. Sellathurai was inadmissible. Therefore, it is not clear that the information at issue is relevant to the pending application for judicial review. More to the point, there is no evidence that the information inadvertently disclosed in the ministerial relief application formed part of the record before the Immigration Division so as to be producible in the judicial review of the decision refusing an adjournment.

[28] Section 87 applies only to protect information that is producible in a pending application for judicial review. The linkage to a future, perhaps related, judicial review is insufficient to make section 87 applicable to documents or information not otherwise producible in the pending application for judicial review.

[29] Before leaving section 87, brief mention should be made of Rule 4 of the *Federal Courts Rules*, known as the gap rule. Rule 4 states:

4. On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.	4. En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l’espèce.

[30] Rule 4 exists to ensure that there are no gaps of a procedural nature. Thus, in cases such as *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310, [2007] 4 F.C.R. 300 Rule 4 has been applied in order to fill a lacuna in the Rules for dealing with sensitive information. However, in those cases there was no doubt that the proceedings were properly commenced in the Federal Court and that it possessed jurisdiction (see *Mohammed* at paragraphs 18 to 20). What was missing was a procedural mechanism for the protection of sensitive information within the proceeding. Where, however, as in this case the jurisdiction of the Federal Court is in doubt, Rule 4 cannot be relied upon to confer substantive jurisdiction on the Federal Court.

[31] Having considered section 38 of the Evidence Act and section 87 of the Act, I now turn to section 44 of the *Federal Courts Act*. The section states:

44. In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just. [emphasis added]	44. Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables. [Non souligné dans l'original.]

[32] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 the Supreme Court considered the ambit of this provision. The majority of the Court observed that by virtue of sections 3, 18 and 18.1 of what is now the *Federal Courts Act*, the Federal Court was made "a court of review and of appeal which stands at the apex of all the administrative decision-

makers on whom power has been granted by individual Acts of Parliament." At paragraph 36, Justice Bastarache wrote for the majority:

> 36 As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction. [emphasis added]

[33] The majority of the Court concluded that when the then *Federal Court Act* and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 were read together, it was intended that section 44 of the *Federal Courts Act* conferred jurisdiction on the Federal Court to grant an interlocutory injunction enjoining a party to proceedings before the Human Rights Tribunal from making available messages likely to expose persons to hatred or contempt on the basis of any prohibited ground of discrimination.

[34] In the present case, in addition to sections 3, 18 and 18.1 of the *Federal Courts Act*, subsection 72(1) of the Act confers a broad supervisory jurisdiction upon the Federal Court with respect to matters arising under the Act. In the words of subsection 72(1):

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

[35] The disclosure of information to an applicant for ministerial relief that is required by the principles of procedural fairness, and the control over such disclosure, are clearly related to the jurisdiction of the Federal Court to supervise the exercise of ministerial discretion to grant or withhold relief under subsection 34(2) of the Act. It follows, as in *Liberty Net*, that the Federal Court has plenary jurisdiction over the disclosure process.

[36] In *Liberty Net* the majority went on to note the requirement that there be “valid federal law which nourishes the statutory grant of jurisdiction” and that the “dispute over which jurisdiction is sought must rely principally and essentially on federal law” (paragraph 43).

[37] In the present case, this requirement is met in the body of law relating to national security privilege and public interest immunity, as evidenced in section 38 of the Evidence Act, those provisions of the Act relating to the protection of information where disclosure would be injurious to national security or the safety of any person and the *Security of Information Act*, R.S.C. 1985, c. O-5.

[38] To conclude, I find that the Federal Court had plenary jurisdiction to hear and adjudicate upon the Minister’s motion for injunctive relief. The source of the jurisdiction was section 44 of the *Federal Courts Act* and the Federal Court’s plenary jurisdiction over disclosure in immigration matters. Because the Federal Court’s power to order the return of the documents derived from section 44 of the *Federal Courts Act*, the preclusive provisions of paragraphs 72(2)(*e*) and 74(*d*) of the Act do not apply. There was, therefore, no requirement that a question be certified in order for

this appeal to be properly brought and so this Court may consider the issues raised by the appellant in this case.

4. <u>If the Federal Court erred by applying section 87 of the Act, what was the proper procedure to follow</u>?

[39] Because the Federal Court's jurisdiction was not based directly or indirectly upon section 87 of the Act, it possessed jurisdiction whether or not any related application for judicial review happened to be pending before the Federal Court. Irrespective of whether related proceedings were already in existence, in my view the proper procedure to be followed was that followed by the applicant in *Liberty Net*. What is now known as a notice of application should have been filed seeking injunctive relief, and the application should have been supported by appropriate affidavit evidence.

[40] In the present case, the Minister moved by way of notice of motion filed within the pending application for judicial review of the decision of the Immigration Division. In my view, this was not fatal to the present application. The notice of motion fully disclosed the grounds relied upon by the Minister and referred to section 44 of the *Federal Courts Act*. The motion was supported by appropriate affidavit evidence. The failure to comply with the *Federal Courts Rules* does not render a proceeding, or a step in the proceeding, void (Rule 56).

5. Did the Federal Court err in concluding that the inadvertently disclosed documents could be returned to the Minister?

[41] The Minister's motion sought injunctive relief, primarily the return of the three documents released to Mr. Sellathurai that were said to contain information that was subject to national security privilege. Ancillary relief was sought in the form of an order that any copies of the three documents, and any notes related to the content of the privileged information, be destroyed. Mr. Sellathurai's counsel has advised that no copies were made and there is no suggestion that any notes were made about the content of the documents. Accordingly, on this appeal the challenge is made only to the Judge's order that the documents be returned to the Minister. Mr. Sellathurai argues that there is no statutory provision which would allow the Court to order the recall of documents previously disclosed.

[42] For the above reasons, I am satisfied that the Federal Court possessed jurisdiction to grant injunctive relief mandating the return of the three documents. The question then becomes whether the Judge erred in the exercise of her discretion by ordering the return of the three documents.

[43] Based on my review of the motion records, Mr. Sellathurai did not seriously dispute in the Federal Court the Minister's claim that a portion of the information contained in the three documents was information that was subject to national security privilege. Nor did he seriously dispute that the information had been disclosed inadvertently.

[44] In this Court Mr. Sellathurai's counsel candidly acknowledged that at least some of the content of the three documents is information that is subject to national security privilege. I have

read the documents and agree with that characterization. Further, based upon the content of the documents I accept without reservation the evidence of the Minister that the disclosure was inadvertent.

[45] The Judge concluded on the evidence before her that the claim to national security privilege over portions of the three documents was not waived by their inadvertent disclosure. That conclusion was not challenged on appeal.

[46] All of these factors support the grant of injunctive relief. However, the consequence of ordering the return of the documents was to leave Mr. Sellathurai's counsel with redacted versions of the relevant documents. This limited his counsel to making submissions to the Court and to the Minister based upon the redacted documents. I consider below whether the Judge erred by limiting Mr. Sellathurai to responding to the redacted reports prepared by the Canadian Security Intelligence Service by ordering the return of the documents and approving the redacted versions provided in their place. I also consider whether the Judge erred by relying upon the jurisprudence relevant to sections 87 and 87.1 of the Act when she declined to appoint a special advocate or an *amicus*.

6. Did the Federal Court err in law by applying the jurisprudence relevant to the appointment of a special advocate under sections 87 and 87.1 of the Act, or by failing to consider whether it was procedurally fair to limit Mr. Sellathurai to responding to the redacted version of the documents when making submissions to the Court and the Minister?

[47] Mr. Sellathurai argued before the Federal Court that:

1. The Minister's claim to national security privilege was overbroad. He asserted that some of the information the Minister sought to redact had been previously disclosed in the course of immigration proceedings.
2. Redacting the information was unfair in that the redacted documents left a distorted impression of the case against Mr. Sellathurai. His counsel could only make submissions to the Minister based on the redacted documents.
3. Even if national security privilege was established, the law does not require in every case that inadvertently disclosed documents be returned. Reliance was placed upon the decision of the Federal Court in *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80. There, in the context of an application under section 38 of the Evidence Act, the Court wrote at paragraph 118:

> 118 However, I see no practical purpose would be achieved at this time by requiring counsel for the applicant to destroy or return their copies of the unredacted inadvertent disclosures. These documents have remained in their possession for over a year without any apparent resulting harm to the protected national interests. I think it sufficient that the information not be further disclosed. There is some information in the list of inadvertent disclosures which counsel for the applicant indicated could be of assistance to his client. Those details are included in the summary which is to be provided to counsel and may be used in the extradition proceedings. [emphasis added]

4. In view of the overbroad claim to national security privilege it was essential that a special advocate or an *amicus curiae* be appointed to respond to evidence and submissions made *in camera* and *ex parte*.

[48] As indicated in her reasons, the Judge was satisfied that she could review the three documents and determine both the claim to national security privilege and the propriety of the redactions to the documents without the benefit of a special advocate or *amicus*. Indeed, her ability to do so and her conclusion that "disclosure of the unredacted disputed documents would be injurious to national security" was one of the grounds she relied upon in order to conclude that fairness did not require the appointment of a special advocate (or *amicus*) to advance Mr. Sellathurai's interests.

[49] Once satisfied information contained in the three documents was subject to national security privilege, the Judge ordered the return of the documents. The Judge did not consider in her reasons Mr. Sellathurai's submission that even if a claim to national security privilege was established, the Court had discretion to permit some use of the information previously disclosed to his counsel. The Judge, therefore, did not consider whether fairness required that Mr. Sellathurai's counsel be permitted to make some limited use of the previously disclosed information in any fashion, for example by making closed, confidential submissions to the Court or the Minister. The Judge rejected Mr. Sellathurai's request for the appointment of an *amicus curiae* or special advocate, applying the factors relevant to an analysis under sections 87 and 87.1 of the Act.

[50] The three main issues of fairness that arise on the facts of this appeal are as follows:

1. The manner in which the Judge considered the appointment of a special advocate or *amicus curiae*;

2. The use, if any, that Mr. Sellathurai or his counsel might make of the information which was inadvertently disclosed to them; and
3. The scope of the redactions made in the three relevant documents.

[51] Turning first to the issue of a special advocate or *amicus curiae*, because section 87 of the Act did not apply to the circumstances before the Court, there was no basis at law for the appointment of a special advocate. This role was created by Parliament, and the circumstances when a special advocate may be appointed are limited to those provided for in the Act. It was, however, open to the Judge to appoint an *amicus curiae* if persuaded that such appointment was necessary to assist the Court to arrive at a full and fair determination of the fairness issues (*Khadr v. Canada (Attorney General)*, 2008 FC 46, [2008] 3 F.C.R. 306 at paragraph 19, citing *Liberty Net* at page 641).

[52] As noted above, the Judge rejected the request for the appointment of an *amicus curiae* by applying the factors applicable to the appointment of a special advocate. Specifically, the Judge considered that she had already found that disclosure of the documents would be injurious to national security; the nature of the ministerial relief application was distinguishable from security certificates and detention review proceedings; Mr. Sellathurai was neither detained nor facing imminent removal; and the Minister had not yet made his decision so it was uncertain whether he would rely upon the redacted information.

[53] In the unique circumstances before the Court it was, in my view, an error of law for the Judge to dismiss the request for the appointment of an *amicus* on this basis. As explained below, by doing so the Judge failed to consider that in this case the information subject to national security privilege had already been disclosed to Mr. Sellathurai. This fact distinguished the jurisprudence relied upon by the Judge.

[54] The order recalling the documents originally provided by the Minister and the substitution of redacted documents, prevented counsel for Mr. Sellathurai from making submissions to the Court or to the Minister on the unredacted information, both because of the practical reality of the absence of the unredacted documents and because of the constraint that information protected by national security privileges not be disclosed. Further, having seen the privileged information, Mr. Sellathurai's counsel's ability to respond to the redacted documents was constrained. She could no longer speculate about the content of the redactions and then address responsive submissions to the imputed content of the redactions.

[55] In these circumstances, the appointment of an *amicus*, perhaps authorized by the Court to have discussions with counsel for Mr. Sellathurai before having access to the privileged information, would allow submissions directed to Mr. Sellathurai's concerns to be made to the Court based upon the confidential record. This was a relevant factor the Judge should have considered, and which was not addressed in the jurisprudence the Judge relied upon to reject the appointment of an *amicus*.

[56] Turning to the remaining issues of fairness, because the Judge did not address the use, if any, Mr. Sellathurai and his counsel could make of the privileged information on this appeal, the Court's task is not to determine the merits of this issue. Rather, if the Court finds that there is an air of reality to Mr. Sellathurai's fairness concerns, the matter should be remitted to the Federal Court for consideration.

[57] For the following reasons, I believe there was an air of reality to the concerns raised by Mr. Sellathurai. Therefore it was, in my respectful view, an error for the Judge to fail to consider Mr. Sellathurai's submission that, in the circumstances, fairness required that his counsel be permitted to make some limited use of the information inadvertently disclosed by the Minister. Restricting counsel to making submissions upon the redacted record limited the ability of Mr. Sellathurai's counsel to argue before the Judge that the redactions proposed by the Minister were overbroad, and that some of the redacted information had been disclosed in previous proceedings. Once Justice Hughes ordered that three documents be delivered to the Court, how was Mr. Sellathurai to establish that the national security claim to privilege was overbroad? Aside from the difficulty posed by taking the three documents from his counsel's possession, in order to show information now redacted had previously been disclosed, he and his counsel would have been required to disclose the substance of the redacted information. As well, limiting counsel to the redacted information further hampered Mr. Sellathurai's ability to make future submissions to the Minister on the full record.

[58] In theses circumstances, the Judge was required to consider Mr. Sellathurai's submissions that his counsel be permitted to make some use of the confidential information. Until these submissions were dealt with it was premature for the Judge to order the return of the documents.

[59] For these reasons, I have concluded that the Judge erred by failing to consider the particular circumstances in this case when deciding on Mr. Sellathurai's request for the appointment of an *amicus* and by failing to consider what, if any, use Mr. Sellathurai could make of the information that had been disclosed to him.

[60] I wish to stress, however, that nothing in these reasons should be taken to mean that fairness requires that an *amicus* be appointed, or that the redactions be reduced, or that Mr. Sellathurai's counsel be permitted to make some limited use of the information subject to national security privilege. I am simply of the view that the Judge was required at law to consider the issues of fairness raised by Mr. Sellathurai.

Conclusion

[61] I have come to the same conclusion as the Judge on the power of the Federal Court to issue the order, but for different reasons.

[62] However I have come to the conclusion that the appellant's requests that an *amicus curiae* be appointed and that an appropriate remedy be devised in view of the fact that the information has been disclosed to him, should be considered.

[63] For these reasons, I would allow the appeal to the limited extent of remitting the matter to Justice Snider, or another designated judge of the Federal Court (as may be determined by the Chief Justice of the Federal Court), for the purpose of considering whether in the circumstances an *amicus curiae* should be appointed to assist the Court and what, if any, remedy is required by application of the principles of procedural fairness as a result of the inadvertent disclosure to Mr. Sellathurai of three documents that contained privileged information.

[64] In all other respects, I would dismiss the appeal.

Postscript

[65] By letter dated May 13, 2011 counsel for the Minister wrote requesting "the return of this secret material following the rendering of a judgment in the aforementioned appeal file in accordance with the registry's usual procedure in such matters."

[66] This is a request that the confidential affidavit filed with the Federal Court on an *ex parte* basis to support the claim of national security privilege be returned.

[67] The affidavit in question is one similar to that which is filed in support of an application under section 87 of the Act. I know of no practice whereby such affidavits are returned to the Minister, and such a practice would not be consistent with sections 3 and 4 of the *Federal Courts Act* which continue this Court and the Federal Court as superior courts of record. The affidavit shall not be returned. It forms part of the confidential record of the Federal Court.

"Eleanor R. Dawson"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
David Stratas J.A."

APPENDIX

Section 38 of the *Canada Evidence Act* reads as follows:

38. The following definitions apply in this section and in sections 38.01 to 38.15.

“judge”
« juge »

“judge” means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.

“participant”
« participant »

“participant” means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

“potentially injurious information”
« renseignements potentiellement préjudiciables »

“potentially injurious information” means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

“proceeding”
« instance »

“proceeding” means a proceeding before a court, person or body with jurisdiction to compel the production of information.

38. Les définitions qui suivent s’appliquent au présent article et aux articles 38.01 à 38.15.

« instance »
“proceeding”

« instance » Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements.

« juge »
“judge”

« juge » Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l'article 38.04.

« participant »
“participant”

« participant » Personne qui, dans le cadre d’une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements.

« poursuivant »
“prosecutor”

« poursuivant » Représentant du procureur général du Canada ou du procureur général d’une province, particulier qui agit à titre de poursuivant dans le cadre d’une

instance ou le directeur des poursuites militaires, au sens de la *Loi sur la défense nationale*.

"prosecutor"
« poursuivant »

"prosecutor" means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding.

« renseignements potentiellement préjudiciables »
"potentially injurious information"

« renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

"sensitive information"
« renseignements sensibles »

"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

« renseignements sensibles »
"sensitive information"

« renseignements sensibles » Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection.

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

Avis au procureur général du Canada

38.01 (1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Au cours d'une instance

(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

Avis par un fonctionnaire

(3) Le fonctionnaire — à l'exclusion d'un participant — qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon

Au cours d'une instance

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur

as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Instances militaires

(5) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, les avis prévus à l'un des paragraphes (1) à (4) sont donnés à la fois au procureur général du Canada et au ministre de la Défense nationale.

Exception

(6) This section does not apply when

(a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;
(b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

Exception

(6) Le présent article ne s'applique pas :
a) à la communication de renseignements par une personne à son avocat dans le cadre d'une instance, si ceux-ci concernent l'instance;
b) aux renseignements communiqués dans le cadre de l'exercice des attributions du procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

c) aux renseignements dont la divulgation est autorisée par l'institution fédérale qui les a produits ou pour laquelle ils ont été produits ou, dans le cas où ils n'ont pas été produits par ou pour une institution fédérale, par la première institution fédérale à les avoir reçus;

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

d) aux renseignements divulgués auprès de toute entité mentionnée à l'annexe et, le cas échéant, à une application figurant en regard d'une telle entité.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Exception

(7) Les paragraphes (1) et (2) ne s'appliquent pas au participant si une institution gouvernementale visée à l'alinéa (6)c) l'informe qu'il n'est pas nécessaire, afin d'éviter la divulgation des renseignements visés à cet alinéa, de donner un avis au procureur général du Canada au titre du paragraphe (1) ou de soulever la question devant la personne présidant une instance au titre du paragraphe (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

Annexe

(8) Le gouverneur en conseil peut, par décret, ajouter, modifier ou supprimer la mention, à l'annexe, d'une entité ou d'une application figurant en regard d'une telle entité.

Disclosure prohibited

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding
(a) information about which notice is given under any of subsections 38.01(1) to (4);
(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);
(c) the fact that an application is made to the Federal Court under

Interdiction de divulgation

38.02 (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :
a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);
b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);
c) le fait qu'une demande a été présentée à la Cour fédérale au titre de

section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if
(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or
(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further

l’article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;
d) le fait qu’un accord a été conclu au titre de l’article 38.031 ou du paragraphe 38.04(6).

Entités

(1.1) Dans le cas où une entité mentionnée à l’annexe rend, dans le cadre d’une application qui y est mentionnée en regard de celle-ci, une décision ou une ordonnance qui entraînerait la divulgation de renseignements sensibles ou de renseignements potentiellement préjudiciables, elle ne peut les divulguer ou les faire divulguer avant que le procureur général du Canada ait été avisé de ce fait et qu’il se soit écoulé un délai de dix jours postérieur à l’avis.

Exceptions

(2) La divulgation des renseignements ou des faits visés au paragraphe (1) n’est pas interdite :
a) si le procureur général du Canada l’autorise par écrit au titre de l’article 38.03 ou par un accord conclu en application de l’article 38.031 ou du paragraphe 38.04(6);
b) si le juge l’autorise au titre de l’un des paragraphes 38.06(1) ou (2) et que le délai prévu ou accordé pour en appeler a expiré ou, en cas d’appel ou de renvoi pour examen, sa décision est confirmée et les recours en appel sont épuisés.

appeal is available.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to

Autorisation de divulgation par le procureur général du Canada

38.03 (1) Le procureur général du Canada peut, à tout moment, autoriser la divulgation de tout ou partie des renseignements ou des faits dont la divulgation est interdite par le paragraphe 38.02(1) et assortir son autorisation des conditions qu'il estime indiquées.

Instances militaires

(2) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, le procureur général du Canada ne peut autoriser la divulgation qu'avec l'assentiment du ministre de la Défense nationale.

Notification

(3) Dans les dix jours suivant la réception du premier avis donné au titre de l'un des paragraphes 38.01(1) à (4) relativement à des renseignements donnés, le procureur général du Canada notifie par écrit sa décision relative à la divulgation de ces renseignements à toutes les personnes qui ont donné un tel avis.

Accord de divulgation

38.031 (1) Le procureur général du Canada et la personne ayant donné l'avis prévu aux paragraphes 38.01(1) ou (2) qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais veut divulguer ou faire divulguer les

(d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.	renseignements qui ont fait l'objet de l'avis ou les faits visés aux alinéas 38.02(1) b) à d), peuvent, avant que cette personne présente une demande à la Cour fédérale au titre de l'alinéa 38.04(2)c), conclure un accord prévoyant la divulgation d'une partie des renseignements ou des faits ou leur divulgation assortie de conditions.
No application to Federal Court	Exclusion de la demande à la Cour fédérale
(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).	(2) Si un accord est conclu, la personne ne peut présenter de demande à la Cour fédérale au titre de l'alinéa 38.04(2) c) relativement aux renseignements ayant fait l'objet de l'avis qu'elle a donné au procureur général du Canada au titre des paragraphes 38.01(1) ou (2).
Application to Federal Court — Attorney General of Canada	Demande à la Cour fédérale : procureur général du Canada
38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).	38.04 (1) Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la divulgation de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).
Application to Federal Court — general	Demande à la Cour fédérale : dispositions générales
(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the	(2) Si, en ce qui concerne des renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4), le procureur général du Canada n'a pas notifié sa décision à l'auteur de l'avis en conformité avec le paragraphe 38.03(3) ou, sauf par un accord conclu au titre de

disclosure of only part of the information or disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;
(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

l'article 38.031, il a autorisé la divulgation d'une partie des renseignements ou a assorti de conditions son autorisation de divulgation :
a) il est tenu de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements si la personne qui l'a avisé au titre des paragraphes 38.01(1) ou (2) est un témoin;
b) la personne — à l'exclusion d'un témoin — qui a l'obligation de divulguer des renseignements dans le cadre d'une instance est tenue de demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements;
c) la personne qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais qui veut en divulguer ou en faire divulguer, peut demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements.

Notification du procureur général

(3) La personne qui présente une demande à la Cour fédérale au titre des alinéas (2)b) ou c) en notifie le procureur général du Canada.

Dossier du tribunal

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

Procedure

(5) As soon as the Federal Court is seized of an application under this section, the judge
(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;
(b) shall decide whether it is necessary to hold any hearing of the matter;
(c) if he or she decides that a hearing should be held, shall
(i) determine who should be given notice of the hearing,
(ii) order the Attorney General of Canada to notify those persons, and
(iii) determine the content and form of the notice; and
(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

Procédure

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge :
a) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;
b) décide s'il est nécessaire de tenir une audience;
c) s'il estime qu'une audience est nécessaire :
(i) spécifie les personnes qui devraient en être avisées,
(ii) ordonne au procureur général du Canada de les aviser,
(iii) détermine le contenu et les modalités de l'avis;
d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations.

Disclosure agreement

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and

Accord de divulgation

(6) Après la saisine de la Cour fédérale d'une demande présentée au titre de l'alinéa (2)c) ou l'institution d'un appel ou le renvoi pour examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3) relativement à cette demande, et avant qu'il soit disposé de l'appel ou de l'examen :
a) le procureur général du Canada peut

the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and	conclure avec l'auteur de la demande un accord prévoyant la divulgation d'une partie des renseignements ou des faits visés aux alinéas 38.02(1)b) à d) ou leur divulgation assortie de conditions;
(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.	b) si un accord est conclu, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen.
Termination of Court consideration, hearing, review or appeal	Fin de l'examen judiciaire
(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.	(7) Sous réserve du paragraphe (6), si le procureur général du Canada autorise la divulgation de tout ou partie des renseignements ou supprime les conditions dont la divulgation est assortie après la saisine de la Cour fédérale aux termes du présent article et, en cas d'appel ou d'examen d'une ordonnance du juge rendue en vertu de l'un des paragraphes 38.06(1) à (3), avant qu'il en soit disposé, le tribunal n'est plus saisi de la demande et il est mis fin à l'audience, à l'appel ou à l'examen à l'égard de tels des renseignements dont la divulgation est autorisée ou n'est plus assortie de conditions.
Report relating to proceedings	Rapport sur l'instance
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	38.05 Si la personne qui préside ou est désignée pour présider l'instance à laquelle est liée l'affaire ou, à défaut de désignation, la personne qui est habilitée à effectuer la désignation reçoit l'avis visé à l'alinéa 38.04(5)c), elle peut, dans les dix jours, fournir au juge un rapport sur toute question

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.

relative à l'instance qu'elle estime utile à celui-ci.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

Ordonnance de divulgation

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

Disclosure order

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Divulgation modifiée

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the

Confirmation de l'interdiction

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une

prohibition of disclosure.

ordonnance confirmant l'interdiction de divulgation.

Evidence

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

Preuve

(3.1) Le juge peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Admissibilité en prevue

(4) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (2), mais qui ne pourra peut-être pas le faire à cause des règles d'admissibilité applicables à l'instance, peut demander à un juge de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, dans la mesure où telle forme ou telles conditions sont conformes à l'ordonnance rendue au titre du paragraphe (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Facteurs pertinents

(5) Pour l'application du paragraphe (4), le juge prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve au cours de l'instance.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of

Avis de la decision

38.07 Le juge peut ordonner au procureur général du Canada d'aviser de l'ordonnance rendue en application

subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

de l'un des paragraphes 38.06(1) à (3) toute personne qui, de l'avis du juge, devrait être avisée.

Automatic review

Examen automatique

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

38.08 Si le juge conclut qu'une partie à l'instance dont les intérêts sont lésés par une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) n'a pas eu la possibilité de présenter ses observations au titre de l'alinéa 38.04(5)d), il renvoie l'ordonnance à la Cour d'appel fédérale pour examen.

Appeal to Federal Court of Appeal

Appel à la Cour d'appel fédérale

38.09 (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

38.09 (1) Il peut être interjeté appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) devant la Cour d'appel fédérale.

Limitation period for appeal

Délai

(2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

(2) Le délai dans lequel l'appel peut être interjeté est de dix jours suivant la date de l'ordonnance frappée d'appel, mais la Cour d'appel fédérale peut le proroger si elle l'estime indiqué en l'espèce.

Limitation periods for appeals to Supreme Court of Canada

Délai de demande d'autorisation d'en appeler à la Cour suprême du Canada

38.1 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 10 days after the day on which the judgment appealed from is made or within any further time that the

38.1 Malgré toute autre loi fédérale :

a) le délai de demande d'autorisation d'en appeler à la Cour suprême du Canada est de dix jours suivant le jugement frappé d'appel, mais ce tribunal peut proroger le délai s'il l'estime indiqué en l'espèce;

Supreme Court of Canada considers appropriate in the circumstances; and
(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

b) dans les cas où l'autorisation est accordée, l'appel est interjeté conformément au paragraphe 60(1) de la *Loi sur la Cour suprême*, mais le délai qui s'applique est celui qu'a fixé la Cour suprême du Canada.

<u>Special rules</u>

38.11 (1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private and, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, shall be heard in the National Capital Region, as described in the schedule to the *National Capital Act*.

<u>Règles spéciales</u>

38.11 (1) Les audiences prévues au paragraphe 38.04(5) et l'audition de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) sont tenues à huis clos et, à la demande soit du procureur général du Canada, soit du ministre de la Défense nationale dans le cas des instances engagées sous le régime de la partie III de la *Loi sur la défense nationale*, elles ont lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

<u>Ex parte representations</u>

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, the opportunity to make representations ex parte.

<u>Présentation d'arguments en l'absence d'autres parties</u>

(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)d).

Protective order

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of the information to which the hearing, appeal or review relates.

Court records

(2) The court records relating to the hearing, appeal or review are confidential. The judge or the court may order that the records be sealed and kept in a location to which the public has no access.

Certificate of Attorney General of Canada

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Ordonnance de confidentialité

38.12 (1) Le juge saisi d’une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l’appel ou de l’examen d’une ordonnance rendue en application de l’un des paragraphes 38.06(1) à (3) peut rendre toute ordonnance qu’il estime indiquée en l’espèce en vue de protéger la confidentialité des renseignements sur lesquels porte l’audience, l’appel ou l’examen.

Dossier

(2) Le dossier ayant trait à l’audience, à l’appel ou à l’examen est confidentiel. Le juge ou le tribunal saisi peut ordonner qu’il soit placé sous scellé et gardé dans un lieu interdit au public.

Certificat du procureur général du Canada

38.13 (1) Le procureur général du Canada peut délivrer personnellement un certificat interdisant la divulgation de renseignements dans le cadre d’une instance dans le but de protéger soit des renseignements obtenus à titre confidentiel d’une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l’information* — ou qui concernent une telle entité, soit la défense ou la sécurité nationales. La délivrance ne peut être effectuée qu’après la prise, au titre de la présente loi ou de toute autre loi fédérale, d’une ordonnance ou d’une décision qui entraînerait la divulgation des renseignements devant faire l’objet du certificat.

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence.

Instances militaries

(2) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, le procureur général du Canada ne peut délivrer de certificat qu'avec l'assentiment du ministre de la Défense nationale donné personnellement par celui-ci.

Service of certificate

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on
(a) the 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;
(b) every party to the proceeding;
(c) every person who gives notice under section 38.01 in connection with the proceeding;
(d) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;
(e) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;
(f) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

Signification

(3) Le procureur général du Canada fait signifier une copie du certificat :
a) à la personne qui préside ou est désignée pour présider l'instance à laquelle sont liés les renseignements ou, à défaut de désignation, à la personne qui est habilitée à effectuer la désignation;
b) à toute partie à l'instance;
c) à toute personne qui donne l'avis prévu à l'article 38.01 dans le cadre de l'instance;
d) à toute personne qui, dans le cadre de l'instance, a l'obligation de divulguer ou pourrait divulguer ou faire divulguer les renseignements à l'égard desquels le procureur général du Canada a été avisé en application de l'article 38.01;
e) à toute partie aux procédures engagées en application du paragraphe 38.04(5) ou à l'appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) en ce qui concerne les renseignements;
f) au juge qui tient une audience en application du paragraphe 38.04(5) et à tout tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) en ce qui

(g) any other person who, in the opinion of the Attorney General of Canada, should be served.

concerne les renseignements;
g) à toute autre personne à laquelle, de l'avis du procureur général du Canada, une copie du certificat devrait être signifiée.

Filing of certificate

(4) The Attorney General of Canada shall cause a copy of the certificate to be filed
(a) with the person responsible for the records of the proceeding to which the information relates; and
(b) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

Dépôt du certificate

(4) Le procureur général du Canada fait déposer une copie du certificat :

a) auprès de la personne responsable des dossiers relatifs à l'instance;

b) au greffe de la Cour fédérale et à celui de tout tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3).

Effect of certificate

(5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate.

Effet du certificate

(5) Une fois délivré, le certificat a pour effet, malgré toute autre disposition de la présente loi, d'interdire, selon ses termes, la divulgation des renseignements.

Statutory Instruments Act does not apply

(6) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Exclusion

(6) La *Loi sur les textes réglementaires* ne s'applique pas aux certificats délivrés au titre du paragraphe (1).

Publication

(7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Publication

(7) Dès que le certificat est délivré, le procureur général du Canada le fait publier dans la *Gazette du Canada*.

Restriction

(8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

Restriction

(8) Le certificat ou toute question qui en découle n'est susceptible de révision, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que sous le régime de l'article 38.131.

Expiration

(9) The certificate expires 15 years after the day on which it is issued and may be reissued.

Durée de validité

(9) Le certificat expire à la fin d'une période de quinze ans à compter de la date de sa délivrance et peut être délivré de nouveau.

Application for review of certificate

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

Demande de révision du certificate

38.131 (1) Toute partie à l'instance visée à l'article 38.13 peut demander à la Cour d'appel fédérale de rendre une ordonnance modifiant ou annulant un certificat délivré au titre de cet article pour les motifs mentionnés aux paragraphes (8) ou (9), selon le cas.

Notice to Attorney General of Canada

(2) The applicant shall give notice of the application to the Attorney General of Canada.

Notification du procureur général du Canada

(2) Le demandeur en avise le procureur général du Canada.

Military proceedings

(3) In the case of proceedings under Part III of the *National Defence Act*, notice under subsection (2) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Instance militaire

(3) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, l'avis prévu au paragraphe (2) est donné à la fois au procureur général du Canada et au ministre de la Défense nationale.

Single judge

(4) Notwithstanding section 16 of the *Federal Court Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Juge seul

(4) Par dérogation à l'article 16 de la *Loi sur la Cour fédérale*, la Cour d'appel fédérale est constituée d'un seul juge de ce tribunal pour l'étude de la demande.

Admissible information

(5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence.

Renseignements pertinents

(5) Pour l'étude de la demande, le juge peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut se fonder sur cet élément pour rendre sa décision au titre de l'un des paragraphes (8) à (10).

Special rules and protective order

(6) Sections 38.11 and 38.12 apply, with any necessary modifications, to an application made under subsection (1).

Règles spéciales et ordonnance de confidentialité

(6) Les articles 38.11 et 38.12 s'appliquent, avec les adaptations nécessaires, à la demande présentée au titre du paragraphe (1).

Expedited consideration

(7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Traitement expéditif

(7) Le juge étudie la demande le plus tôt possible, mais au plus tard dans les dix jours suivant la présentation de la demande au titre du paragraphe (1).

Varying the certificate

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence

Modification du certificate

(8) Si le juge estime qu'une partie des renseignements visés par le certificat ne porte pas sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une

or national security, the judge shall make an order varying the certificate accordingly.

telle entité ni sur la défense ou la sécurité nationales, il modifie celui-ci en conséquence par ordonnance.

Cancelling the certificate

(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security, the judge shall make an order cancelling the certificate.

Révocation du certificate

(9) Si le juge estime qu'aucun renseignement visé par le certificat ne porte sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, ni sur la défense ou la sécurité nationales, il révoque celui-ci par ordonnance.

Confirming the certificate

(10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or national security, the judge shall make an order confirming the certificate.

Confirmation du certificate

(10) Si le juge estime que tous les renseignements visés par le certificat portent sur des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, ou sur la défense ou la sécurité nationales, il confirme celui-ci par ordonnance.

Determination is final

(11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court.

Caractère définitif de la decision

(11) La décision du juge rendue au titre de l'un des paragraphes (8) à (10) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel ni de révision judiciaire.

Publication

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions

Publication

(12) Dès que possible après la décision du juge, le procureur général du Canada fait publier dans la Gazette du Canada, avec mention du certificat publié antérieurement :

the original publication of the certificate, cause to be published in the Canada Gazette
(a) the certificate as varied under subsection (8); or
(b) a notice of the cancellation of the certificate under subsection (9).

Protection of right to a fair trial

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.

Potential orders

(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.

a) le certificat modifié au titre du paragraphe (8);
b) un avis de la révocation d’un certificat au titre du paragraphe (9).

Protection du droit à un procès équitable

38.14 (1) La personne qui préside une instance criminelle peut rendre l’ordonnance qu’elle estime indiquée en l’espèce en vue de protéger le droit de l’accusé à un procès équitable, pourvu que telle ordonnance soit conforme à une ordonnance rendue en application de l’un des paragraphes 38.06(1) à (3) relativement à cette instance, a une décision en appel ou découlant de l’examen ou au certificat délivré au titre de l’article 38.13.

Ordonnances éventuelles

(2) L’ordonnance rendue au titre du paragraphe (1) peut notamment :

a) annuler un chef d’accusation d’un acte d’accusation ou d’une dénonciation, ou autoriser l’instruction d’un chef d’accusation ou d’une dénonciation pour une infraction moins grave ou une infraction incluse;
b) ordonner l’arrêt des procédures;

c) être rendue à l’encontre de toute partie sur toute question liée aux renseignements dont la divulgation est interdite.

Fiat

38.15 (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.

Fiat du procureur général du Canada

38.15 (1) Dans le cas où des renseignements sensibles ou des renseignements potentiellement préjudiciables peuvent être divulgués dans le cadre d'une poursuite qui n'est pas engagée par le procureur général du Canada ou pour son compte, il peut délivrer un fiat et le faire signifier au poursuivant.

Effect of fiat

(2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.

Effet du fiat

(2) Le fiat établit la compétence exclusive du procureur général du Canada à l'égard de la poursuite qui y est mentionnée et des procédures qui y sont liées.

Fiat filed in court

(3) If a prosecution described in the fiat or any related process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.

Dépôt auprès du juge ou du tribunal

(3) L'original ou un double du fiat est déposé devant le tribunal saisi de la poursuite — ou d'une autre procédure liée à celle-ci — engagée par le procureur général du Canada ou pour son compte.

Fiat constitutes conclusive proof

(4) The fiat or a copy of the fiat
(a) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and
(b) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

Preuve

(4) Le fiat ou le double de celui-ci :
a) est une preuve concluante que le procureur général du Canada ou son délégué a compétence pour mener la poursuite qui y est mentionnée ou les procédures qui y sont liées;
b) est admissible en preuve sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du procureur général du Canada.

Military proceedings

(5) This section does not apply to a proceeding under Part III of the *National Defence Act*.

Instances militaries

(5) Le présent article ne s'applique pas aux instances engagées sous le régime de la partie III de la *Loi sur la défense nationale*.

Regulations

38.16 The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of sections 38 to 38.15, including regulations respecting the notices, certificates and the fiat.

Règlements

38.16 Le gouverneur en conseil peut, par règlement, prendre les mesures qu'il estime nécessaires à l'application des articles 38 à 38.15, notamment régir les avis, certificats et fiat.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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