The apparent certainty produced by new legislation in protecting intelligence from disclosure may be more illusory than real. Any procedure to restrict disclosure or production requirements, or to expand privileges, may duplicate and overlap with procedures already available under s.38 of the Canada Evidence Act to obtain non-disclosure orders. Rather than attempting in advance and in the abstract to restrict disclosure and production or to expand privileges, it may be fairer and more efficient to reform existing processes to allow judges to reconcile the competing interests in disclosure and non-disclosure on the facts of the particular case before them.

VI. Judicial Procedures to Obtain Non-Disclosure Orders

This section will examine the ability of the Crown to seek judicial orders authorizing non-disclosure or modified disclosure for reasons relating to the state's interests in national security, national defence, international relations or other specified public interests. The procedures examined in this section allow judges to determine on the basis of the facts of the particular case whether disclosure is required, whereas the techniques of legislative restrictions and privileges examined in the last section attempt to define information that cannot be disclosed in advance and for all cases. The *ex ante* legislative approach discussed in the last section may at first appear to provide greater certainty that intelligence will not be disclosed, but as suggested above, even the most robust privileges and legislative restrictions will be subject to some exceptions to ensure fair treatment of the accused. The techniques examined in this section are tailored to the facts of specific cases.

As will be seen, the procedures used to obtain non-disclosure orders vary considerably depending on the nature of the public interest in non-disclosure that is asserted. Specified public interests in non-disclosure, as well as common law privileges, can be determined by superior court criminal trial judges under s.37 of the CEA. In contrast, national security confidentiality claims under s.38 that the disclosure of information would injure national security, national defence or international relations, must be determined by specially designated Federal Court judges. The trial judge must accept any non-disclosure order by the Federal Court, but also retains the right to order whatever remedy is required to ensure the fairness of the trial. A number of case studies, including the *Kevork* and *Khawaja* terrorism prosecutions as well as the *Ribic* hostage-taking prosecution, will be used to examine the effects of Canada's dual court approach in resolving claims of national security confidentiality.

A) Section 37 of the CEA and Specified Public Interest Immunity

Section 37 of the CEA provides a procedure for a Minister of the federal Crown or another official to apply to a court for an order that a specified public interest justifies non-disclosure or modified disclosure of certain material. Such applications can, in criminal matters, be heard by the superior court trial judge and be subject to appeal to the provincial Court of Appeal and the Supreme Court. This procedure has been used in some cases to protect the identity of police informers and ongoing investigations.

The heart of s.37 is section 37(5) which provides:

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

This section instructs the court to balance and, to the extent possible, reconcile the public interest in non-disclosure against the public interest in disclosure. It also provides for a flexible range of conditions to be placed on disclosure in order to reconcile the interests in secrecy with the demands of disclosure. The conditions can include partial disclosure, the use of summaries, or admissions of fact. A common feature of modern legislation with respect to secrets is that judges are empowered to formulate creative solutions to reconcile to the greatest extent possible competing interests in secrecy and disclosure.

Although s.37(5) encourages flexibility in reconciling secrecy with disclosure, it also recognizes that restrictions on disclosure may affect the fairness of subsequent trials. Section 37.3 (1) provides:

> A judge presiding at a criminal trial or other 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 37(4.1) to (6) in relation to that trial or proceeding or any judgment made on appeal of an order made under any of those subsections.

Section 37.3(2) then encourages trial judges to employ remedial creativity and proportionality in fashioning remedies for the protection of fair trials when it provides that 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

The regime contemplated under s.37 of the CEA contemplates two ways for judges to reconcile state interests in non-disclosure with the accused's interest in disclosure. The first is when the judge who hears the s.37 application has the option of placing conditions on disclosure under s.37(5), including the use of summaries and partial disclosure. The second can occur under s.37.3(2) when the trial judge is encouraged to engage in remedial creativity while protecting the accused's right to a fair trial in light of a non or modified disclosure order. Although a stay of proceedings remains the ultimate remedy that can be used to protect the accused's right to a fair trial, there is also reference to less drastic remedies such as findings against a party, most likely the Crown, or dismissal of parts of the indictment.

A crucial factor in s.37 is that in criminal trials before provincial superior courts a single trial judge can exercise both the flexible range of disclosure orders under s.37(5) and the flexible remedial powers under s.37.3(2). This is a one court approach similar to those used in other democracies with respect to a broad range of state secrets and public interest immunities. It can be contrasted with the two-court structure used under s.38 of the CEA in which the Federal Court imposes restrictions and conditions on disclosure and the criminal trial court can order a range of remedies to protect the fairness of the trial while being bound by the Federal Court's decision about what can be disclosed. The comparative advantages and disadvantages of the one court approach in s.37 and the two-court approach in s.38 will be assessed and evaluated throughout this part of the study.

The procedures used in a s.37 application are flexible. They can involve *in camera* and even *ex parte* procedures when necessary to protect the secrecy of information.[364] The range of public interests that can be invoked under s.37 to justify non-disclosure has deliberately been left open-ended. The courts have, in a series of cases, recognized that the protection of police informers can be a legitimate public interest. In *R. v. Archer*[365], the Alberta Court of Appeal held that the identity of a police

364 The British Columbia Court of Appeal has indicated: "If an objection is made, and the public interest is specified, then the trial judge may examine or hear the information in circumstances which he considers appropriate, including the absence of the parties, their counsel, and the public. Whether the trial judge does hear or examine the information, or whether he does not, the trial judge may then either uphold the claim of Crown privilege or order the disclosure of the information either with conditions or unconditionally." *R. v Meuckon* (1990) 57 C.C.C.(3d) 193 at 199-200 (B.C.C.A). Charron J.A. has also upheld an *ex parte* proceeding, albeit on the basis of the consent of the accused's counsel. She also stated: "In the circumstances of this case, it was open to the applications judge to adopt the procedure that was suggested to him and consented to by all interested parties on the s. 37 application. There is no hard and fast rule on what procedure will be appropriate on this kind of application. Further, given the wide range of information that can form the subject matter of a s. 37 inquiry, it would not be advisable for this court to establish any such rule… The appellant in this case does not take issue with the notion that the applications judge could review the material in private. Indeed, if a review is to take place under s. 37, all the while preserving the secrecy of the information until a determination can be made, some form of privacy is required. The appellant submits, however, and correctly so, that the procedure followed by Watt J. in Parmar did not involve any private meeting between the judge, one of the counsel and a police officer as was done in this case. Hence, although the procedure was consented to in first instance, the appellant now takes issue with the fact that the federal Crown and the investigating officer took part in this private review of the material by the applications judge. In my view, and I express this view with the benefit of appellate hindsight, it would have been preferable if the private meeting had been recorded, or better still, if the required assistance had been provided to the applications judge in a manner that did not involve a private meeting. However, I find no reversible error in this case where the procedure was adopted with the express consent of all interested parties" *R. v. Pilotte* (2002) 163 C.C.C.(3d) 225 at paras 52, 59-60 (Ont.C.A.). See also *R. v. Pearson* (2002) 170 C.C.C.(3d) 549 at para 64 (Que.C.A.) holding that the accused can be excluded from s.37 proceedings if "pressing reasons of security and the protection of witnesses so require it."

365 (1989) 47 C.C.C.(3d) 567

informer should be withheld even when the accused sought to challenge the basis for a search warrant. In *R. v. Babes*, [366]the Ontario Court of Appeal has also recognized that the need to protect a police informer can be invoked as a public interest for non-disclosure under s.37.

The Ontario Court of Appeal has also held that common law police informer privilege can be asserted at a preliminary inquiry independent of s.37 of the CEA. The Court of Appeal indicated that in most cases at this preliminary stage the informer privilege will be upheld because the accused's innocence is not at stake.[367] This procedure may still be useful in cases where a public interest in non-disclosure is invoked at a preliminary inquiry, but s.37(1.1) now provides that an objection to disclosure under s.37(1) displaces the common law procedure. There are efficiency interests in resolving all claims of privilege together. A two year period spent by the Crown on an unsuccessful non-disclosure application under s.37 has been charged against the Crown and resulted in a stay of proceedings because the accused's right to a trial in a reasonable time was violated. [368] As discussed in the last section, there may also be a case for codifying the informer privilege in order to increase certainty about when the privilege applies and when it does not.

Section 37 can be used to protect information relating to ongoing police investigations. Such protection may be particularly relevant in terrorism prosecutions where the state continues to investigate other associates of the accused. In *R. v. Trang*[369], a judge recognized that public interest privilege could apply to investigative techniques of the police, ongoing police investigations, and material affecting the safety of individuals. Although the judge did not recognize "police intelligence" as a separate

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366 (2000) 146 C.C.C.(3d) 465 (Ont.C.A.) leave to appeal denied

367 *R. v. Richards* (1997) 115 C.C.C.(3d) 377

368 *R. v. Sander* (1995) 98 C.C.C.(3d) 564 (B.C.C.A.) In some cases trial proceedings may go on parallel to s.37 proceedings. See R. Hubbard et al *The Law of Privilege* (Aurora: Canada Law Book, 2007) at 3.40.8

369 (2002) 168 C.C.C.(3d) 145 (Alta.Q.B.). See also *R. v. Chan* (2002) 164 C.C.C.(3d) 24 (Alta Q.B.) recognizing similar common law privileges.

form of privilege, he did recognize that it could be protected from disclosure in some cases. [370]

Section 37 provides a valuable and flexible vehicle for managing the tensions between secrecy and disclosure in a case-by-case fashion. Rather than either refusing disclosure to the accused or the court, as was done in the first *Khela* trial, or attempting to predict and defend through *ex ante* legislation the appropriate range of restrictions on disclosure, s.37 allows the Crown to invoke an open ended range of specified public interests to justify non-disclosure. Section 37 allows judges, including superior court trial judges in terrorism prosecutions, to make case-by-case decisions about disclosure and partial disclosure, including authorizing the use of summaries and admissions as proportionate alternatives to full disclosure. Section 37.1 and 37.2 contemplate appeals to the relevant Court of Appeal and the Supreme Court from determinations under s.37, but there is some precedent for allowing a trial to proceed, if possible, while these separate appeal rights are exercised.[371]

Section 37.3 also allows trial judges to fashion whatever appropriate and just remedy is required to protect the accused's right to a fair trial. Section 37.3 requires the trial judge, when fashioning such remedies, to comply with a non, or partial, disclosure order previously made under s.37. This raises the possibility that trial judges may be unable to revise their previous non-disclosure orders under s.37, even if they conclude later in the proceedings that non-disclosure would adversely affect the right to a fair trial. As will be seen in the next section, judges in other countries have the ability to revise non-disclosure orders in light of developments during the trial. The ability of trial judges to re-visit and revise non-disclosure orders builds an important flexibility into the system that can benefit both

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370 Binder J. elaborated: "It seems to me that as a matter of public policy, having regard to the purpose and role law enforcement is intended to provide to society, it is in the public interest that sensitive intelligence information in the possession of the police be protected. I have little doubt that this is presumed to be so, in the minds of the public. However, I am not persuaded that in the context of disclosure, a new "police intelligence" privilege should be recognized. Rather, if protection is to be afforded, it must fall within a more specific category. For example, the items of information contained in such databases, where relevant, may be subject to privilege on a number of grounds such as investigative technique, ongoing investigation, safety of individuals, or internal communications. Likewise, the structure of the database (or aspects thereof) may be subject to privilege on the basis of investigative technique. Information regarding third parties may be privileged on the basis of privacy, which is addressed later on in these Reasons. This is not to say, however, that "police intelligence" may not be accorded privilege status in the future, particularly having regard to the events of September 11th and the possibility arising therefrom of a substantial widening of "police intelligence". As Lamer C.J.C. opined in *Gruenke*, albeit in reference to class communication privilege, policy considerations may dictate the identification of a new class of privilege on a principled basis." Ibid at para 63.

371 *R. v. McCullogh* (2001) 151 C.C.C.(3d) 281 (Alta.C.A.); *R. v. Archer* (1989) 47 C.C.C.(3d) 567 (Alta.C.A.).

the accused and the prosecution. The accused could gain disclosure to information that is necessary for a fair trial only because of developments in the criminal trial. The prosecution will often receive the benefit of non-disclosure made early in the trial process because the judge retains the ability to revisit such orders as the trial develops. Even if the judge orders disclosure later in the trial process, the prosecution retains the right to halt the prosecution in order to protect the information from disclosure.

A decision that non-disclosure is not compatible with a fair trial under s.37 could force the prosecution to return to a domestic or foreign intelligence agency and ask them to re-consider whether the information they have provided can be disclosed. The judge's ruling would make it clear that the state was faced with the difficult choice of either dismissing the prosecution or disclosing the secret evidence. In such circumstances, governments will be able to focus on the difficult trade-offs between secrecy and disclosure in the context of the specific case, rather than in the abstract through legislative restrictions or privileges that apply in all cases. The ultimate decision is such a situation about such trade offs would be made by the prosecutor and not by the judge.

B) Section 38 of the CEA and National Security Confidentiality

1. The Procedure under Section 38 of the Canada Evidence Act

Section 38 provides a complex procedure to govern the protection of information that, if disclosed, would harm national security, national defence or international relations. Unlike s.37, all non-disclosure claims under s.38 must be asserted in the Federal Court and this provision can fragment and disrupt criminal trials.

2. Notice Obligations and Disclosure Agreements

Section 38.01 places obligations on all justice system participants, including the accused, to give written notification, as soon as possible, to the Attorney General of Canada of the possibility that they will disclose or seek to call sensitive or potentially injurious information. "Potentially injurious information" is defined as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security", and "sensitive information" is defined as "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." The breadth of these terms may cause unnecessary use of the s.38 procedure. At the same time, it is open to the Attorney General of Canada to avoid litigation by entering into disclosure agreements with the accused. In addition, once notice is received from a party, the Attorney General is required to make a decision with respect to disclosure within ten days. [372]

The notification requirement under s.38.01 is designed to give the Attorney General advance notice "to permit the government to take pro-active steps in the appropriate circumstances" and to minimize the need for "proceedings to come to a halt while the matter was transferred to the Federal Court for a determination."[373] As will be seen, this is precisely what happened in the *Ribic* proceedings, to be examined below, leading to the declaration of a mistrial. At the same time, however, "the scheme continues to permit the government to invoke the provisions of the CEA during the course of the hearing".[374] This means that s.38 issues could still arise during a criminal trial if, for example, the Crown makes late disclosure accompanied by a s.38 claim or if an accused who has not given earlier notices proposes to call a witness who would testify about sensitive or potentially injurious information. Denying the accused the right to call a witness with relevant information could violate the accused's right to full answer and defence. As occurred in *Ribic*, extensive litigation might be necessary in the Federal Court during the middle of a criminal trial.

Under s.38.03, the Attorney General of Canada may "at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure" of information which is prohibited from disclosure under s.38.02 because a notice has been given under s.38.01. Section 38.031 contemplates disclosure agreements among the Attorney General and persons who have given notice under s.38.01.

3. Ex Parte Submissions and Special Advocates

If no disclosure agreement is made between the Attorney General and the accused, a hearing will take place before a specially designated judge of the Federal Court. The process used in s.38 application has been described as follows:

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372 CEA s.38.03

373 Department of Justice Fact Sheet "Amendments to the Canada Evidence Act"

374 Department of Justice Fact Sheet "Amendments to the Canada Evidence Act"

5. The [Attorney General (A.G.)] advises that the procedure that is used in s. 38.04 *Canada Evidence Act* applications follows a number of customary steps, as follows.

6. First, following the issuance of a notice of application pursuant to s. 38.04, the A.G. files a motion for directions pursuant to paragraph 38.04(5)(a) of the *Canada Evidence Act*. In his motion material, the A.G. identifies all parties or witnesses whose interests he believes may be affected by the prohibition of disclosure of information, and may suggest which persons should be formally named as responding parties to the application. The A.G. requests that this portion of the motion for directions be adjudicated in writing.
7. After reading the A.G.'s motion material, the Federal Court will, pursuant to s. 38.04(5)(c) of the *Canada Evidence Act*, designate the responding parties to the application and order the A.G. to provide notice of the application to these persons by effecting service of the notice of application and motion for directions upon them.

8. The Federal Court will then convene a case conference with the parties to the application (i.e., the A.G. and the responding parties) to discuss the remaining issues raised by the A.G.'s motion for directions, including (1) whether it is necessary to hold a hearing with respect to the matter; (2) whether any other persons should be provided with notice of the hearing of the matter; and (3) whether the application should be specially managed with a formal schedule for the remaining procedural steps. These case conferences are confidential and are held *in camera*. The public is denied access to these case conferences and, generally speaking, only the parties to the application, their counsel, the presiding judge and designated Court staff are present.

9. Following adjudication of the motion for directions, a formal schedule is established to prepare the s. 38.04 *Canada Evidence Act* application for hearing. Like ordinary applications before the Federal Court, these schedules contemplate an exchange of affidavit evidence, cross-examinations on affidavits, the preparation of application records (including memoranda of fact and law) and an oral hearing before a designated applications judge. Unlike ordinary applications before the Federal Court, these schedules contemplate that portions of the affidavit evidence, application records and the oral hearings before a designated applications judge will be "*ex parte*" (i.e., only seen and heard by the A.G. and the Court), while others will be "private" (i.e., seen and heard by the parties and the Court, but not available to the public). Indeed, a typical s. 38.04 *Canada Evidence Act* application will have the following steps:
   (a) the A.G.'s "private" affidavits are served on the responding party and filed with the Court;

   (b) the responding party's "private" affidavits are served on the A.G. and filed with the Court;

   (c) the A.G.'s "*ex parte*" affidavits are filed with the Court;

   (d) cross-examinations on the parties' "private" affidavits take place out of court;

   (e) the A.G.'s "private" application record is served on the responding party and filed with the Court;

   (f) the A.G.'s "*ex parte*" application record is filed with the Court;

   (g) the responding party's "private" application record is filed with the Court; and

(h) a hearing is convened at which there are both "private" sessions (at which all the parties are present but the public is excluded) and "*ex parte*" sessions (at which only the A.G. is present).

10. "Private" affidavits are affidavits prepared by a party to the application that are filed and served on the other parties and to which reference can be made at the portions of the hearings at which all parties are present (i.e., the "private" Court sessions). Such affidavits are, however, confidential by virtue of s. 38.12(2) and cannot be disclosed to the general public.

11. The A.G.'s position is that the "private" affidavits produced by him for the purposes of a s. 38.04 *Canada Evidence Act* application attempt to set out, in general terms, the factual and principled justification for protecting the information in issue from public disclosure, that is to say why the disclosure of the information would be injurious to international relations, national defence or national security. The A.G. advises that these "private" affidavits do not detail the information in issue (i.e., the information covered by the Notice), nor do they contain other specific facts that would themselves constitute "sensitive information" or "potentially injurious information". The A.G.'s stated purpose for filing and serving such "private" affidavits is to provide the responding parties seeking disclosure of the information in issue with as much factual material as possible so that they may understand why the A.G. is attempting to protect the information without compromising the information in issue or other sensitive/potentially injurious information regarding the need to protect the information in issue from disclosure.

12. "*Ex parte*" affidavits are affidavits that are filed by the A.G. and which are not served on the responding party. They are read only by the presiding judge and are only referred to at the *ex parte* portions

of the hearings where the A.G. is present and the responding party is excluded (i.e., the "*ex parte*" Court sessions) pursuant to s. 38.11(2) of the *Canada Evidence Act*.

13. The A.G.'s position is that the "*ex parte*" affidavits produced for the purposes of a s. 38.04 *Canada Evidence Act* application attempt to set out, in specific terms, the factual justification for protecting the information in issue from public disclosure, that is to say why the disclosure of the information would be injurious to international relations, national defence or national security. These affidavits also contain the information in issue that is covered by the Notice.

14. "Private" application records are filed and served on the other parties and reference can be made to these records at the "private" Court sessions. "*Ex parte*" application records filed by the A.G. are not served on the other parties, are read only by the presiding judge and are only referred to at the "*ex parte*" Court sessions pursuant to s. 38.11(2) of the *Canada Evidence Act*.

15. At the "private" Court sessions at which all parties to the application are present, argument is tendered with respect to, *inter alia*, (1) the potential relevance of the information in issue (if the relevance is not conceded by the A.G.), (2) whether disclosure of the information would be injurious to international relations, national defence or national security and (3) whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. On the question of injury, such argument is presented in generalities by the A.G. because he does not wish to risk disclosure of the information in issue or risk compromising other sensitive/potentially injurious information.

16. At the "*ex parte*" Court sessions at which only the A.G. is present, the A.G. provides argument by reference to the "*ex parte*" affidavits with respect to whether

> disclosure of the information in issue would be injurious to international relations, national defence or national security. Counsel for the A.G. will be accompanied by the affiants who have sworn such affidavits so that they may be questioned by the presiding designated judge.[375]

The above process involves case conferences to determine who should receive notice, preparation and cross-examination on private affidavits that are exchanged between the parties and hearings between the parties. In addition, there are *ex* parte affidavits and hearings from which the accused and his lawyer would be excluded. In short, the s.38 procedure of serving private and *ex parte* applications, public hearings and hearing *ex parte* representations from the Attorney General of Canada and perhaps the accused can be complex and time consuming.

It is possible in a criminal case for the accused to make ex parte represBodentations to the Federal Court judge. Chief Justice Lutfy has explained: "the accused may wish to make representations to the section 38 judge concerning the importance of disclosing the secret information to assist in defending the criminal charge. In such circumstances, the accused will prefer to make these submissions without disclosing to any other party the substance or detail of the defence in the criminal proceeding."[376] The Federal Court of Appeal has recently indicated that "in order to make a meaningful review of the information sought to be disclosed, the judge must be either informed of the intended defence or given worthwhile information in this respect."[377]

Although the accused can make *ex parte* submissions, the value of these submissions will be limited by the fact that the accused will not have seen the information that is the subject of the dispute. In addition, the accused may not have developed all possible defences until he or she knows the case to meet, closer to the start of the trial.

The ability of the Attorney General to make *ex parte* submissions has been upheld from Charter challenge, but with an indication that security-cleared lawyers could, if necessary, be appointed to provide adversarial challenge. The ability of the Federal Court to appoint a security-cleared

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375 *Toronto Star v. Canada* 2007 FC 128 at para 36.
376 ibid at para 37.
377 *Canada. v. Khawaja* 2007 FCA 342 at para 35.

lawyer under s.38 is not entirely clear.[378] The appointment of such lawyers would not be governed by a new law providing for special advocates in security certificate cases.[379] A security-cleared lawyer will require time to become familiar with the case and this will likely cause further delay in s.38 proceedings. At the end of the day, the security-cleared lawyer may never be as familiar with the case as the accused's own lawyer. Special advocates may play an important role in providing adversarial challenge to the government's claim of secrecy, but they will have more difficulty protecting the accused's right to full answer and defence, given limitations on the security-cleared lawyer's familiarity with the case and perhaps his or her ability to consult the accused and take instructions from the accused about the secret information. It is also not clear whether the security-cleared lawyer will be able to demand further disclosure or call additional witnesses.[380]

In *R. v. Malik and Bagri,* the accuseds' defence lawyers were able to examine undisclosed material on an initial undertaking that the information would not be disclosed to their clients. This allowed the lawyers most familiar with the case to determine the relevance and usefulness of the information and then to present focused and informed demands for disclosure.[381] The alternative under s.38 is that defence lawyers must make broad and un-informed demands for disclosure because they have not seen the information.

4. Reconciling the Interests in Secrecy and Disclosure under Section 38.06

Under s.38.06, the Federal Court judge determines first whether the disputed information would be injurious to international relations, national defence or national security. If not, the information if relevant

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378 *Canada. v. Khawaja* 2007 FC 463 aff'd without reference to the ability to appoint security-cleared lawyers 2007 FCA 388. In his concurring judgment, Pelletier J.A. cast doubt on the ability of the court to order that secret information be disclosed to even a security-cleared lawyer when he concluded that under s.38.02 that "the Court could not order and the Attorney General could not be compelled to provide, disclosure of the Secret Information to Mr. Khawaja, or anyone appointed on his behalf in any capacity." Ibid at para 134. Nevertheless, in *Canada (Attorney General) v. Khadr* 2008 FC 46 a security-cleared amicus curaie was appointed in relation to s.38 proceedings in an extradition matter involving allegations of terrorism. Similarly in *Canada (Attorney General) v. Khawaja* 2008 F.C. 560 a security-cleared amicus curaie was appointed and participated in the second round of s.38 litigation in that case.

379 Bill C-3 *An act to amend the Immigration and Refugee Protection Act* S.C. 2008 c.3.

380 Under Bill C-3, any consultation by the security-cleared lawyer with others about the case after the security-cleared lawyer has seen the information would have to be authorized by the judge.

381 Michael Code "Problems of Process in Litigating Privilege Claims" in A. Bryant et al eds. *Law Society of Upper Canada Special Lectures The Law of Evidence* (Toronto: Irwin Law, 2004).

can be disclosed to the accused. If the information is injurious, the judge considers the public interest in both disclosure and non-disclosure. The judge also has the option of placing conditions on disclosure, including authorizing the release of only a part or a summary of the information or a written admission of fact relating to the information. The emphasis under this section is on a flexible reconciliation of competing interests in disclosure and secrecy.[382]

Section 38(6) defines the harms of disclosure broadly as material whose disclosure "would be injurious to international relations or national defence or national security." These terms are broad and vague. National security has been defined as meaning "at minimum the preservation in Canada of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms".[383] National defence has been defined to include "all measures taken by a nation to protect itself against its enemies" and "a nation's military establishment". International relations "refers to information that if disclosed would be injurious to Canada's relations with foreign nations."[384]

5. Appeals under Section 38

The accused or the Attorney General has the ability under s.38.09 to appeal a decision under s.38.06 to the Federal Court of Appeal. Although an appeal must be brought within 10 days of the order, there are no time limits on when the appeal must be heard or decided. The Federal Court of Appeal's decision is not necessarily final as the parties have 10 days after its judgment to seek leave to appeal to the Supreme Court. These provisions create a potential for national security confidentiality issues to be litigated all the way to the Supreme Court before a terrorism trial even starts. If national security confidentiality decisions were decided by the trial judge, it would be possible that they could be appealed after a verdict to the provincial Court of Appeal with the other legal decisions made by the trial judge.

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382 Section 38(6) provides: "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."

383 *Canada v. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher arar* 2007 FC 766 at para 68.

384 Ibid at paras 61-62.

6. Certificates Issued by the Attorney General to Prevent Court Ordered Disclosure

One rationale for the above appeal rights is that the Attorney General should be able to obtain an appeal before information that may harm national security is disclosed to the accused. Nevertheless, the Attorney General of Canada can personally issue a certificate under s.38.13 "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… 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." The issue of such a certificate prohibits disclosure, but can be reviewed by a single judge of the Federal Court of Appeal. The reviewing judge can only vary the certificate if he or she determines that "none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity…or to national defence or national security".[385]

The ability of the Attorney General to issue a certificate effectively blocking a Federal Court disclosure order under s.38 has been controversial. From the perspective of establishing a workable relation between intelligence and evidence, the Attorney General's certificate can be seen as the ultimate means of ensuring that commitments given to foreign agencies that intelligence not be disclosed in legal proceedings can be enforced. At the same time, any use of this extraordinary certificate power would likely come with a price. The price might well be that a criminal trial judge could conclude under s.38.14 that a fair trial was no longer possible in light of the executive certificate that effectively reverses a Federal Court order that information should be disclosed to the accused.

7. Powers of Trial Judges to Protect Fair Trials under Section 38.14

Under s.38.14, the trial judge must respect any Federal Court order or Attorney's General certificate that requires non-disclosure, but can also issue any remedy to protect the accused's right to a fair trial including a stay of proceedings or all or part of an indictment.

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385 CEA s.38.031(9)

Although s.38.14 recognizes a broad remedial discretion, criminal trial judges under s.38.14 have no power to modify the terms of the non, or partial, disclosure order made by the Federal Court judge or an Attorney General's certificate. They also do not have any explicit power to examine the material that is the subject of the Federal Court's non-disclosure order. There is no specific mention in either the Attorney General's power under s.38.03 or the Federal Court judge's power under s.38.06 to allow a trial judge to see information that cannot be disclosed under that section. Although s.38.06(2) gives the Federal Court flexibility in imposing conditions on disclosure orders, it does not contemplate that the Federal Court judge could order undisclosed information be given to the criminal trial judge. The Attorney General might, however, authorize that non-disclosed material be shown to the criminal trial judge under s.38.03, but this power applies to information the disclosure of which is prohibited under s.38.02 and does not explicitly apply to information which has been subject to a judicial non-disclosure order under s.38.06.

Section 38.05 of the CEA contemplates that a trial judge could make a report to a Federal Court hearing a s.38 matter, for example, in the middle of a criminal trial. It does not on its face contemplate a Federal Court judge making a report to a criminal trial judge in order to inform the latter's decision under s.38.14. The Federal Court judge could require the Attorney General of Canada under s.38.07 to notify the trial judge about a non-disclosure order, but this section does not authorize the lifting of the non-disclosure order for the trial judge. A recent decision suggests that the Federal Court judge who makes a s.38 decision could remain seized of the matter during a criminal trial and that the parties could apply for an order clarifying a s.38 ruling.[386] The accused, however, would not know what order was subject to a non-disclosure information and as such could not make an informed decision to ask the Federal Court judge to clarify his or her ruling. Although the trial judge's discretion to order remedies to protect the fairness of the trial under s.38.14 is vitally important, the trial judge may well have to make that critical decision without knowledge of what information has been the subject of a non, or partial, disclosure order by the Federal Court under s.38.06.

8. Summary

The two-court approach can be defended as a form of checks and balances that allows the Federal Court to see the secret information, and

386 *Canada (Attorney General) v. Khawaja* 2008 FC 560.

make decisions about non-disclosure, and then allows the trial judge to determine the consequences of non-disclosure independently. It also allows the accused to make *ex parte* submissions to the Federal Court without necessarily disclosing them to the trial judge or the prosecutor. It could even be argued that the two-court process allows the trial judge to be sheltered from knowing about intelligence about the accused that will not be used in trial but is the subject of a non-disclosure order.

Nevertheless, the two-court approach can be criticized on grounds of both efficiency and fairness. The two-court approach is inefficient because it requires separate litigation and appeals in the Federal Court, potentially in the middle of a criminal trial. It creates risks that the trial judge could err on the side of caution in protecting the accused's right to a fair trial and stay proceedings, when such a drastic remedy is not necessary to protect the accused's rights, given the nature of the non-disclosed evidence. Conversely, the two-court structure creates a risk that the trial judge might not be in a position to recognize that the information subject to the non-disclosure order is, in fact, vital to the accused's right to full answer and defence, or even to the accused's innocence. The procedure places the trial judge in the position of having to make very difficult decisions about the future of the criminal trial without having seen the information that is subject to a non-disclosure order.

C. Commentary on Section 38 of the Canada Evidence Act

Although relatively few cases have been decided since the 2001 amendments, section 38 of the CEA has been the subject of much critical commentary. With the exception of some mandatory *in camera* provisions, however, it has so far been upheld as consistent with the Charter.

Stanley Cohen has argued that the 2001 amendments to the CEA "represent an attempt to strike an appropriate balance with regard to the disclosure of important information when national security considerations are involved."[387] He noted that the Attorney General's certificate under s.38.13 may be necessary to protect Canada's undertaking to its allies and that s.38.14 provides "a substantial safeguard", including the possibility of a stay of proceedings. He argues that provisions providing for summaries and partial disclosure "sought to promote the ability of affected parties to

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387 Stanley Cohen *Privacy, Crime and Terror* (Toronto: Butterworths, 2005) at 307

access and use information relating to international relations or national defence or national security, in a manner consistent with their fair trial rights". [388]

Hamish Stewart has observed that as a result of the 2001 amendments, s.38 of the CEA is "applicable to a much wider range of information than the traditional doctrine of public interest immunity" because it applies to information that the government has safeguarded whether or not its disclosure would actually be harmful.[389] He criticized the bificurcated approach to s.38, especially in criminal cases, on the basis that "the Federal Court judge will make the decision about disclosure without having sat through the trial and without having to decide the remedy (if any) for non-disclosure." Although he recognizes that Federal Court judges have experience in security matters, Professor Stewart argues that they "have no special expertise in the other matters, such as the right to make full answer and defence, against which the security matters will have to be balanced."[390]

Peter Rosenthal has also criticized the breadth of the information covered by s.38, both in relation to the definition of sensitive information and in relation to information received from foreign entities that may be subject to a s.38.13 certificate.[391] He notes that the Attorney General has many means to protect information from disclosure. They include proceedings under the common law, under s.37 of the Canada Evidence Act, and under s.38.06 of the Canada Evidence Act and, finally, through the use of a certificate under s.38.13.[392] Rosenthal also criticizes the procedures used in s.38 to the extent that they allow *ex parte* proceedings that exclude defence counsel. Finally, he questions whether the provisions for the protection of fair trials will be adequate given that the trial judge making the decision may not always have access to the undisclosed information and the Federal Court judge will not always be able to anticipate defences that might have been raised had the accused had access to the undisclosed evidence.[393]

Kathy Grant has criticized the mandatory confidentiality and *ex parte* provisions of s.38. In her view, they mean that "the accused is kept

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388 ibid at 304
389 Hamish Stewart "Public Interest Immunity After Bill C-36" (2003) 47 C.L.Q. 249 at 252
390 ibid at 254.
391 Peter Rosenthal "Disclosure to the Defence After September 11: Sections 37 and 38 of the Canada Evidence Act" (2003) 48 C.L.Q. 186 at 191-192
392 ibid at 192-193
393 ibid at 196

deliberately in the dark about relevant information. This creates not only a risk of an unfair trial, but the risk that the dangers of an unfair trial will themselves remain secret."[394] As will be seen, both of these features of s.38 have attracted subsequent Charter challenges with mixed success. Jeremy Patrick-Justice has also criticized mandatory publication bans under s.38 and has critizized it as a "slow and unwieldy"[395] process that can threaten the completion of trials. He also argues that its scope is overbroad and should only apply to information that, if disclosed, would cause actual harm to national security, national defence or international relations.[396]

Section 38 has recently been considered by both a Senate and a House of Commons committee conducting a review of the *Anti-terrorism Act*. The House Committee recommended a series of relatively minor amendments, including shortening the length of an Attorney General's certificate from 15 to 10 years, requiring annual reports of the use of such certificates, and allowing an additional appeal from a judicial review of an Attorney General's certificate under s.38.13.[397] The Senate Committee recommended that a judge reviewing such a s.38.13 certificate be allowed to consider whether the public interest in disclosure outweighs the public interest in non-disclosure. [398]

Although the ability of the Attorney General to issue a certificate under s.38.13 has attracted considerable attention, there has yet to be any publicly reported use of this power. The ability of the Attorney General to issue a certificate that essentially reverses a court order for disclosure has rightly been regarded as extraordinary, but in some ways it only provides a further gloss on the fundamental dilemma that the government always faces in cases involving sensitive intelligence. The dilemma has been described as the disclose or dismiss dilemma.[399] A s.38.13 certificate would not in itself end a prosecution, but such an executive reversal of a court order of disclosure would certainly make it much more likely that a trial judge would stay proceedings under s.38.14 in order to protect the accused's right to a fair trial. It would also demonstrate that the Attorney General of Canada had personally assumed responsibility for protecting

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394 Kathy Grant "The Unjust Impact of Canada's Anti-Terrorism Act on the Accused's Right to Full Answer and Defence" (2004) 16 Windsor Review of Legal and Social Issues 137 at 157-158.
395 Jeremy Patrick-Justice "Section 38 and the Open Court Principle" (2005) 54 U.N.B.L.J. 218 at 229.
396 ibid at 231
397 *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* March, 2007 ch. 6
398 Ibid at 62-68.
399 Robert Chesney "The American Experience with Terrorism Prosecutions" in Vol 3 of Research Studies

secret information including promises made to allies that information would not be disclosed.

D) Traditional Cold War Approaches to National Security Confidentiality

There has been a significant evolution in the judicial approach to issues of disclosure and national security. As late as 1982, when the Charter of Rights and Freedoms came into effect, national security confidentiality was seen as a matter of unreviewable executive prerogative. Until it was amended in late 1982, s.41(2) of the Federal Court Act provided an absolute bar on disclosure whenever a federal Minister certified to the Court that disclosure of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations. The Act specifically provided that the court should not examine the document. [400]

In 1982, the *Canada Evidence Act* was amended to allow a specially designated judge of the Federal Court to consider claims that information not be disclosed because it would be injurious to national defence, national security or international relations. This amendment specifically gave the Federal Court judge the ability to examine the material in relation to which a non-disclosure order was sought. Special care was taken to ensure the security of the information that was examined by the specially-designated judges of the Federal Court.

Despite being given the power to review material that was the subject of a national security confidentiality claim, judges were initially reluctant about exercising this right. In 1983, the Federal Court of Appeal unanimously upheld the decision of a judge who denied disclosure of material relating to the RCMP's Secret Service. Former members of the Secret Service, who were charged with theft of the Parti Quebecois's party list, had requested that the material be disclosed and claimed that the material would allow them to argue that they had acted on orders and had a colour of right. Le Dain J. seemed to recognize the potential importance of the material,

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400 Section 41(2) of the Federal Court Act provided: "(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court." For background on this provision see Robert Hubbard, Susan Magotiaux and Suzanne Duncan *The Law of Privilege in Canada* (Aurora: Canada Law Book, 2007) at 4.30.

but nevertheless concluded that a judge need not examine it. He stated that he had "reluctantly come to the conclusion that the disclosure of any of the information considered to be sufficient for purposes of the appellants' defence, even under restrictions of the kind suggested above (assuming that the court, unaided, could determine such sufficiency and the adequacy of the restrictions, of which I have serious doubt) would be likely, for the reasons indicated, in the respondent's certificate and secret affidavit, to be injurious to national security and international relations, and that such injury would outweigh in importance the relative importance of the disclosure to the appellants' defence. I thus agree that the information should not be examined and that it should not be disclosed."[401] In his concurring judgment, Marceau J.A. endorsed the following statement from Chief Justice Thurlow, who had ordered non-disclosure without examining the material, namely that: "it is apparent from the nature of the subject-matter of international relations, national defence and national security that occasions when the importance of the public interest in maintaining immune from disclosure information the disclosure of which would be injurious to them is outweighed by the importance of the public interest in the due administration of justice, even in criminal matters, will be rare."[402] He added that it was not necessary to inquire into the degree of harm that disclosure might cause to national security. In his view "to accept that national security and international relations be injured, even to only the slightest extent, in order that such a remote risk of extreme incredulity on the part of 12 members of a jury be avoided, would appear to me, I say it with respect, totally unreasonable."[403] In short, the law has traditionally favoured the state's interests in keeping secrets over the accused's need for disclosure.

Traditional attitudes towards national security confidentiality were significantly shaped by Cold War considerations. A good example is an oft-cited case, decided in 1988, with respect to non-disclosure of information about a civil servant who had been denied a security clearance because of his alleged links with Communist groups. In ordering non-disclosure, Addy J. expressed concerns about the mosaic effect, in which: "however innocuous the disclosure of information might appear to be to me, it might in fact prove to be injurious to national security" when received by an 'informed reader', that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group

401 *Re Goguen* (1984) 10 C.C.C.(3d) 492 at 500 (Fed.C.A.).
402 ibid at 505
403 Ibid at 511

which constitutes a threat or potential threat to the security of Canada."[404] The assumptions behind the concerns about the mosaic effect should be re-evaluated in light of the changed circumstances. One of the main themes of this study is the need to revisit old assumptions and standard operating procedures with respect to security intelligence in light of the particular challenges of terrorism and the need to prosecute those who would plan or commit acts of terrorist violence.

Addy J. articulated the following concerns justifying non-disclosure for national security reasons:

> …generally speaking, such disclosure would either a) identify or tend to identify human sources and technical sources; b) identify or tend to identify past or present individuals or groups who are or are not the subject of investigation; c) identify or tend to identify techniques and methods of operation for the intelligence service; d) identify or tend to identify members of the service; e) jeopardize or tend to jeopardize security of the services telecommunications and cipher systems; f) reveal the intensity of the investigation; g) reveal the degree of success or lack of success of the investigation[405]

The above grounds are very broad. Indeed, there is a danger that they can take on a "boiler-plate" quality that encourages overbroad claims of national security confidentiality. For example, information about members of CSIS or CSIS operations and investigations may not in every case require non-disclosure. What might be required for non-disclosure to protect counter-intelligence operations against hostile states with their own professional intelligence services may not necessarily be required with respect to counter-terrorism operations against loosely connected terrorist cells.

E) Evolving Approaches to National Security Confidentiality and The Dangers of Overclaiming Secrecy

Justice O'Connor, in the report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, recounted a

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404 *Henrie v. Canada* (1988) 53 D.L.R.(4th) 568 at 580, 578 affd 88 D.L.R.(4th) 575 (Fed. C.A.).

405 ibid at 579. For another decision recognizing the mosaic effect see *Ternette v. Canada* [1992] 2 F.C. 75 at paras 35 and 36.

few instances in which the Attorney General of Canada initially made claims of national security confidentiality, but subsequently withdrew them. Although he noted that it may have been understandable for the government to err on the side of caution, Justice O'Connor was critical of the government's approach to national security confidentiality (NSC) claims. He commented that:

> …overclaiming exacerbates the transparency and procedural unfairness that inevitably accompany any proceeding that cannot be fully open because of NSC concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality….I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.[406]

He raised the "issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings."[407]

The Federal Court subsequently authorized the disclosure of most of the information that the government had objected to under s.38 of the CEA in the public report prepared by Justice O'Connor. This information included references to the FBI and CIA, references to the use of information obtained from Syria in obtaining a warrant in Canada and provocative statements

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406 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 302, 304.

407 Ibid at 304.

made by a senior CSIS official about the intentions of American officials in relation to Maher Arar. Justice Noël held that some of the information that the government had objected to did not even meet the test of injury to national security, national defence or international relations. [408] This is quite an extraordinary finding, given the deference that is generally paid to the government on whether it has established an injury to national security.[409]

Overbroad national security confidentiality claims are particularly dangerous in terrorism prosecutions because they can delay and fragment terrorism trials through the use of the s.38 procedure. They can create the impression that the accused is being denied access to much vital information and this could even result in a trial judge concluding under s.38.14 that a remedy was required to protect the accused's right to a fair trial. The actual use of this procedure will be examined in three subsequent case studies. At this juncture, however, I will examine the case for revising some national security confidentiality concepts in light of the challenges of terrorism and the dangers of over-use of secrecy claims.

1. Changing Approaches to the Third Party Rule

The third party rule refers to the rule that an agency which receives information subject to a restriction or caveat on its subsequent use should not distribute that information and not use it as evidence in legal proceedings without the consent of the party who sent the information. In terrorism prosecutions, this means that intelligence received from foreign, or even domestic, agencies should not be used in legal proceedings or disclosed to other parties without the consent of the party that sent the information.

Although he stressed the importance of placing restrictions or caveats on information shared with other countries and protesting any breaches of caveats, Justice O'Connor did not see the third party rule as an absolute barrier to the sharing of information. He commented:

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408 *Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766 at para 91; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar Addendum (Ottawa: Public Works, 2007).

409 Justice Noël for example commented: "It is trite law in Canada, as well as in numerous other common law jurisdictions, that courts should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such matters than the courts." Ibid at para 46.

> Caveats should not be seen as a barrier to information sharing, especially information sharing beyond that contemplated on their face. They can easily provide a clear procedure for seeking amendments or the relaxation of restrictions on the use and further dissemination of information in appropriate cases. This procedure need not be time-consuming or complicated. [410]

In a decision in s.38 proceedings in the *Khawaja* terrorism prosecution, Justice Mosley indicated that:

> Clearly, the purpose of the third party rule is to protect and promote the exchange of sensitive information between Canada and foreign states or agencies, protecting both the source and content of the information exchanged to achieve that end, the only exception being that Canada is at liberty to release the information and/or acknowledge its source if the consent of the original provider is obtained. In applying this concept to a particular piece of evidence however, the Court must be wary that this concept is not all encompassing. First, there is the question of whether or not Canada has attempted to obtain consent to have the information released. I would agree with the respondent that it is not open to the Attorney General to merely claim that information cannot be disclosed pursuant to the third party rule, if a request for disclosure in some form has not in fact been made to the original foreign source.
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> Second, as noted by the Court in *Ottawa Citizen*, where a Canadian agency is aware of information prior to having received it from one or more foreign agencies, "the third party rule has no bearing". In such a case the information should be released unless another valid security interest has been raised: *Ottawa Citizen*, above at para. 66. By way of comparison, it can similarly be argued that where information is found to be publicly available before or

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410 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works, 2006) at 339.

> after it is received from a foreign source, the third party rule equally has no bearing so long as it is the public source that is referenced.[411]

This approach suggests that the third party rule should not be applied in a mechanical way. Before it is invoked, the government should make good faith and diligent efforts to secure the consent of the third party to the use of the evidence. On the facts of the case, Justice Mosley found a British intelligence agency had refused to consent to the disclosure of information to the accused because of the security situation in that country and an ongoing investigation. At the same time, however, he indicated that a "US agency agreed during the hearing to the disclosure of a significant document that had been previously subject to a restrictive caveat."[412] Although the terrorism context will not alter the basic shape of the third party rule, it should influence the willingness of allies to consent to the disclosure of information for criminal proceedings. Our allies are also struggling with the problems of managing the relation between intelligence and evidence. As examined in the first part of this study, some agencies, such as MI5, have publicized their efforts to collect some intelligence to evidential standards. In addition, the time lag between the collection of the intelligence and its possible disclosure in the trial process may facilitate amendments of caveats to allow disclosure, For example, the completion of a particular terrorism investigation or prosecution may allow allies to agree to the disclosure of information that was originally provided under caveat.

Unfortunately, there are signs of resistance to a modified approach to the third party rule that would require the government to seek the consent of the originating agency before claiming the benefits of the third party rule. In *Canada v. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar*[413], Justice Noël describes how an affidavit filed by a person employed by the RCMP claimed that "if the RCMP were to seek consent to disclose the information in this case, the RCMP's commitment to the third party rule may be questioned, as disclosure would be sought for a purpose other than law-enforcement, and therefore outside the general accepted parameters for seeking consent (X (for the RCMP)'s

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411 *Canada. v. Khawaja* 2007 FC 490 at paras 145-147. Note that a small part of this decision has been reversed -- but on grounds of factual errors in preparing a schedule, and not on the basis of legal errors. *Canada. v. Khawaja* 2007 FCA 342.

412 Ibid at para 153. See also *Canada v. Khawaja* 2008 F.C. 560 at para 8 indicating that additional information was disclosed when a foreign agency agreed to the disclosure of information that had originally been provided under caveat.

413 2007 FC 766

affidavit, at paragraph 42)."[414] If accepted, such an approach could severely inhibit attempts to obtain consent to allow for the use of intelligence as evidence or as information that could be disclosed to the accused.[415] In my view, a request for consent for disclosure under the third party rule actually affirms Canada's commitment to the third party rule and its requirement for consent for subsequent disclosure of information. The originating agency still retains the right to say no and not amend the caveat that it originally attached to the information.

The third party rule remains a critical component of legitimate claims of national security confidentiality, but it should not be invoked in a mechanical manner. It only applies to information that has been received in confidence from a third party and should not be stretched to apply to information that either was in the public domain or was independently possessed by Canadian agencies, provided that those independent sources of information are used. Canadian agencies should generally seek the consent of the originating agency to the use of information covered by the third party rule, as recommended both by the Arar Commission and by Justice Mosley. Those agencies may refuse consent, but they too are struggling with similar problems in managing the relation between intelligence and evidence with respect to counter-terrorism investigations. Asking for consent under a caveat affirms Canada's commitment to the third party rule, and provides an opportunity for the originating agency to consent to the use or disclosure of intelligence in a terrorism prosecution.

2. Changing Approaches to the Mosaic Effect

The mosaic effect refers to a process in which the disclosure of an apparently innocuous piece of information may have harmful effects because a hostile party can fit the information into a broader mosaic of other information. This concern makes sense in the Cold War context in which a professional intelligence service such as the KGB could systematically monitor disclosures from the West. As suggested above, it makes less sense when the hostile party is a non-state actor, such as terrorist group. Although groups such as Al Qaeda may devote some

414 ibid at para 72.

415 Justice Noël does not comment directly on this assertion in his public judgment, but he does warn that "care must be taken when considering whether to circumvent the third party rule in what concerns information obtained from our most important allies." Ibid at para 80

resources to counter-intelligence, they do not have the resources available to state actors. Many terrorist groups are more loosely organized than Al Qaeda. The mosaic effect is not nearly as pressing in the counter-terrorist context as it was in the Cold War.

Despite the changed context, there is some public evidence that CSIS has continued to place reliance on the mosaic effect in justifying non-disclosure. For example, in his public judgment in the Arar Commission matters, Justice Noel cites a CSIS representative who in his affidavit states that:

> … in the hands of an informed reader, seemingly unrelated pieces of information, which may not in and of themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. By fitting the information disclosed by the Service with what is already known, the informed reader can determine far more about the Service's targets and the depth of its knowledge than a document on its face reveals to an uninformed reader. In addition, by having some personal knowledge of the Service's assessments and conclusions on an individual or the depth, or lack, of its information regarding specific threats would alert some persons to the fact that their activities escaped investigation by the Service.[416]

What is striking and disturbing about the above statement, is that it could have been written during the height of the Cold War and it provides no specific information about how the mosaic effect might apply in the particular case.

Fortunately, there are signs that courts are starting to taking a harder look at claims by the government that non-disclosure is justified because of concerns about the mosaic effect. For example, Justice Noel concluded, as did Justice Mosley in his *Khawaja* decision, that "by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece

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416 quoted ibid at para 83

of information should not be disclosed."[417] Pelletier J.A,, however, has stressed that "the difficulty in deciding whether information, apparently innocuous on its face, has value to a hostile observer goes a long way towards explaining Parliament's decision to authorize *ex parte* submissions by the Attorney General". [418] In his judgment, concerns about the mosaic effect justify the *ex parte* process under s.38. This is, of course, a slightly different question than whether invocation of the mosaic effect alone should have substantial weight under s.38.06 of the CEA in determining the appropriate balance between secrecy and disclosure.

In my view, both the courts and domestic and foreign security agencies should re-examine old assumptions behind routine invocations of the mosaic effect as a justification for broad claims of secrecy. They should consider the increased likelihood that intelligence about terrorism may have evidentiary value and the decreased likelihood that terrorist groups, as compared to foreign intelligence agencies, may be systematically monitoring all disclosed information. The assumptions behind the concept of the mosaic effect should be re-examined and re-evaluated in the context of counter-terrorism. As has been emphasized throughout this study, the practices of governments and the legal system need to evolve with the increasing importance assigned to counter-terrorism work. Concerns about the mosaic effect may have made sense during the Cold War, but they are a much less powerful justification for secrecy with respect to counter-terrorism prosecutions today.

3. Towards a More Disciplined Harm-Based Approach to Non-Disclosure

The Senate Committee that reviewed the Anti-Terrorism Act recommended that the terms "potentially injurious information", "sensitive information", and the reference to harm to "international relations" in s.38, be amended to specify the way in which information covered by s.38 would harm legitimate interests.[419] This recommendation could also be extended to the references to national security and national defence in s.38. In his s.38 decision with respect to the Arar Commission, Justice Noël attempted the difficult task of defining the operative terms of s.38 application. He suggested that national security "means at minimum the preservation in Canada of the Canadian way of life, including the safeguarding of the

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417 ibid at para 84. See also *R. v. Khawaja* 2007 FC 490 at para 136.
418 *Khawaja v. Attorney General of Canada* 2007 FCA 388 at para 124.
419 *Fundamental Justice In Extraordinary Times: The Report of the Senate Committee on the Anti-Terrorism Act* February, 2007 at 64

security of persons, institutions and freedoms".[420] National defence includes "all measures taken by a nation to protect itself against its enemies" and "a nation's military establishment."[421] Finally, international relations "refers to information that if disclosed would be injurious to Canada's relations with foreign nations."[422] Although the attempt at definition is admirable, the result is not satisfactory. It is difficult to imagine broader and vaguer statutory terms than national security[423] or international relations. Alas, these terms seem to have become even broader in the process of judicial interpretation and definition. The root problem is the vagueness of the statutory terms. In the investigative hearing cases, the Supreme Court pointedly refused to accept the government's argument that the purpose of the ATA was to protect "national security", in part because of a concern about the "rhetorical urgency" [424] of the broad term.

There is a need to re-think "boiler-plate" claims of secrecy in light of the disclosure and evidentiary demands of terrorism investigations and prosecutions. In one recent case, the Attorney General of Canada justified its s.38 on the following basis:

> The applicant asserts that CSIS has the following general concerns in relation to national security which are engaged by the potential release of information collected during the course of its investigations in that it may:
>
> a) identify or tend to identify Service employees or internal procedures and administrative methodology of the Service, such as names and file numbers;
>
> b) identify or tend to identify investigative techniques and methods of operation utilized by the Service;
>
> c) identify or tend to identify Service interest in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations;

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420 *Canada v. Commission of Inquiry* 2007 FC 766 at para 68
421 ibid at para 62
422 ibid at para 61
423 Craig Forcese "Through a Glass Darkly: The Role and Review of 'National Security' Concepts in Canadian Law" (2006) 43 Alta.L.Rev. 963.
424 *Re Section 83.28 of the Criminal Code* [2004] 2 S.C.R. 248 at para 39.

> d) identify or tend to identify human sources of information for the Service or the content of information provided by a human source;
>
> e) identify or tend to identify relationships that the Service maintains with foreign security and intelligence agencies and would disclose information received in confidence from such sources; and
>
> f) identify or tend to identify information concerning the telecommunication system utilized by the Service.[425]

Justice Mosley described the above as "a useful classification scheme with respect to the grounds advanced by the Attorney General to justify non-disclosure for all of the redacted material including that from other agencies and I have relied upon it generally in assessing the information." [426] Nevertheless, there are grounds to be cautious about such generic claims about the need for secrecy. Although the identity of some employees, some investigative techniques and some telecommunications techniques should be kept secret, this is not necessarily true in all cases. Although it is important that ongoing investigations be kept secret, it may be difficult to justify secrecy with respect to all the individuals, groups or issues that may attract the attention of CSIS. In this respect, it may be helpful to distinguish between general strategic intelligence and tactical intelligence in relations to specific targets. There are dangers in conflating the need to protect vulnerable human sources and to protect relationships with foreign agencies that may be embarrassing or the subject of legitmate criticism. Similarly, the need to respect a caveat is a more compelling reason for secrecy than the generic need to protect information that identifies relationships with foreign security and intelligence agencies. In general, there is a need to be as specific as possible about the precise harms of disclosure of secret information.

There are some very good reasons to protect secrets, including threats to the safety of informants, threats to ongoing investigations and promises made to our allies. These reasons, however, may be lost in references to the vague generalities of national security, national defence and

425 *R. v. Khawaja* 2007 FC 490 at para 132 rev'd in part on other grounds 2007 FCA 388
426 ibid at para 133

threats to international relations. The breadth of the definitions may play a role in encouraging the government to overclaim national security confidentiality. In light of both the overclaiming controversies discussed above, as well as the need to re-evaluate the relation between secret intelligence and evidence in terrorism prosecutions, thought should be given to reforming the broad terms of s.38 to list the specific and serious harms that the disclosure of secret information can cause in some cases. A disciplined harm-based approach might help the government avoid overclaiming in the future. It could also address the public suspicion and cynicism that Justice O'Connor accurately noted would follow patently overbroad NSC claims made by the government.

4. Increasing Adversarial Challenge in the Section 38 Process

Another criticism that has been made of s.38 is the ability of the Attorney General to make *ex parte* submissions, and the fact that only the government and the judge can examine the secret information. The Commons committee recommended that either the presiding judge or the party excluded from *ex parte* and *in camera* hearings under s.38 be able to request the appointment of a security-cleared special advocate to challenge the government's case for non-disclosure.[427] The Special Senate Committee made a similar recommendation.[428] In *R. v. Khawaja*, Chief Justice Lutfy demonstrated some willingness to consider the appointment of a security-cleared special advocate when the Attorney General makes *ex parte* submissions under s.38.11 to support an application for non-disclosure. [429] In upholding his decision, however, the Federal Court of Appeal did not indicate that security-clearedspecial advocates could be appointed under s.38. Indeed. Pelletier J.A. suggested that the court might be powerless to order the disclosure of secret information to anyone in the absence of the agreement of the Attorney General of Canada.[430] A security-cleared *amicus curiae* has, however, been appointed to assist with s.38 proceedings in relation to an extradition matter involving allegations of terrorism. One of the conditions of the appointment was that the counsel not have contact with the accused or the accused's lawyer after having seen the secret information without the leave of the Court. [431] The *amicus curiae* would also not be allowed to see any information covered

427 *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* March, 2007 at 81.
428 *Fundamental Justice In Extraordinary Times: The Report of the Senate Committee on the Anti-Terrorism Act* February, 2007 at 39-42.
429 *R. v. Khawaja* 2007 FC 463
430 *Khawaja v. Attorney General of Canada* 2007 FCA 388 at para 135.
431 *Khadr v. The Attorney General of Canada* 2008 FC 46

by informer privilege.[432] The same security-cleared lawyer has also been appointed and participated in a 2 day hearing in relation to a second round of s.38 proceedings in the Khawaja trial[433] which will be discussed as a case study later in this section.

The design issues around the use of security-cleared counsel are, as recognized by the Supreme Court in *Charkaoui* , complex and worthy of Parliamentary deliberation. Crucial issues are whether the security-cleared lawyer should be able to consult with the accused or the accused's lawyer after having seen the secret information and whether the security-cleared lawyer can call witnesses or obtain further disclosure. Bill C-3 only contemplates the use of special advocates from a list established by the Minister of Justice with respect to immigration law security certificates, and not under s.38 of the Canada Evidence Act. The judge would have to authorize any communication between the special advocate and other persons about the proceedings after the special advocate has seen the secret information, as well as any attempt by the security-cleared lawyer to obtain further disclosure or call additional witnesses.[434] If special advocates find that it is difficult to obtain judicial permission for these activities, their ability to defend the interests of the accused may be seriously attenuated. That said, special advocates might still be in a good position to counter governmental claims for secrecy.

A security-cleared special advocate or amicus curaie is not the only option with respect to increasing adversarial challenge. In the Malik and Bagri prosecution, the accused's defence lawyers were able to examine the undisclosed material on an initial undertaking that the information would not be disclosed to their clients. This allowed the lawyers most

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432 Ibid at para 37. In *Named Person v.Vancouver Sun* 2007 SCC 43 at para 48, the Supreme Court contemplated that an amicus curiae could be appointed to compensate for the non-adversarial nature of proceedings in which both the Attorney General and the informer sought the protection of informer privilege and the accused was excluded. The Court warned, however, that "the mandate of the *amicus* must be precise, and the role of the *amicus* must be limited to this factual task. The legal issues are of another nature. The judge alone makes the legal determination that a confidential informer is present, and that the informer privilege applies. Here, the *amicus* was asked what the scope of the privilege was. Moreover, given the importance of protecting the confidential informer's identity, if a trial judge decides that the assistance of an *amicus* is needed, caution must be taken to ensure that the *amicus* is provided with only that information which is absolutely essential to determining if the privilege applies. Given the mandate of the *amicus* in the present case, it appears that the appointment was inappropriate."

433 *Canada (Attorney General) v. Khawaja* 2008 FC 560.

434 Bill C-3 *An act to amend the Immigration and Refugee Protection* Act S.C. 2008 c. 3. The special advocate has the ability under s.85.2 (c) to "exercise, with the judge's authorization, any other powers that are necessary to protect the interest of the permanent resident or foreign national." These powers could include making further disclosure requests and the calling of witnesses.

familiar with the case to determine the relevance and usefulness of the information and then to present focused and informed demands for disclosure.[435] The alternative under s.38 is that lawyers must make often broad and uninformed demands for disclosure because they have not seen the information. A security-cleared lawyer will require time to become familiar with the case and this will likely cause further delay in s.38 proceedings. At the end of the day, the security-cleared lawyer may never be as familiar with the case as the accused's own lawyer. Although the introduction of adversarial challenge to the Crown's case for non-disclosure has the potential to respond to the dangers of overclaiming of national security confidentiality, it may have more difficulty protecting the accused's right to full answer and defence.

5. Increasing Transparency in the Section 38 Process

Mandatory provisions for closed hearings under s.38.11 were successfully challenged in *Toronto Star v. Canada*.[436] Chief Justice Lutfy noted that these mandatory provisions had existed for 25 years, since the introduction of the CEA provisions, but that they could not be justified as a reasonable restriction on freedom of expression and the open court principle. In an earlier case, Chief Justice Lutfy had observed that:

> The Federal Court is required by section 38 to keep secret a fact which has been referred publicly in the court or tribunal from which the proceeding emanates… It is unusual that a party to the litigation should be the sole arbiter to authorize the disclosure of information which is or should be public. A court should be seen as having reasonable control over its proceedings in the situation I have just described.[437]

This passage notes the reality that the Attorney General of Canada could effectively trigger s.38 and its corresponding secrecy provisions. In *Toronto Star v. Canada*, Chief Justice Lutfy held that under the Supreme Court's *Ruby* decision, mandatory closed court provisions could not be justified in those parts of s.38 proceedings that did not consider secret information.[438]

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435 *R. v. Malik and Bagri* 2003 BCSC 1709. See also *R. v.Fisk* (1996) 108 C.C,C,(3d) 63 (B.C,C.A,); *R. v. Guess* (2000) 148 C,C.C,(3d) 321 (B.C.C.A.) *; Ontario (Ministry of Correctional Services) v. Goodis* 2006 SCC 31.

436 2007 FC 128.

437 *Ottawa Citizen v. Canada* 2004 FC 1052 at paras 38, 40.

438 2007 FC 128 at paras 70-71

The remainder of this section will feature three case studies of the use of s.38 procedures. The first *Kevork* case study involves the use of a predecessor to the present s.38 in a terrorism prosecution in the earlier 1980's. The second *Ribic* case study involves the prosecution of a hostage taking incident in Bosnia in which the use of s.38 in the middle of a criminal trial resulted in a mistrial. This case was influential in producing amendments to s.38 that are designed to ensure that the Attorney General of Canada receives advance warning of s.38 issues. The final case study involves two separate s.38 proceedings including appeals that were taken before the first terrorism prosecution under the 2001 ATA went to trial.

F) Non-Disclosure of CSIS Material Not Seen by the Trial Judge: A Case Study of R. v. Kevork

This case study of a terrorism prosecution in the 1980s reveals how the accused may seek disclosure of CSIS material in a terrorism prosecution, how the prosecution can be affected by separate Federal Court non-disclosure proceedings and finally the very difficult position that the criminal trial judge may be placed in when attempting to determine whether non-disclosure of information that they have not seen is consistent with a fair trial.

Between 1982 and 1985, there were three separate acts of terrorism against Turkish targets in Canada. In 1982, a Turkish military attaché, Atilla Altikat, was shot and killed in Ottawa. In 1985, a security guard, Claude Brunelle, was killed in an attack on the Turkish embassy in Ottawa. These cases demonstrate the reality of terrorist violence in Canada before the Air India bombing.

In April, 1982, a Turkish diplomat, Kani Gungor, was shot and left paralysed. Three accused, Haroutine Kevork, Raffic Balian, and Haig Gharakhanian, were charged in March 1984 with conspiracy to commit murder and attempted murder in relation to the shooting. The Crown relied on testimony from two co-conspirators, Hratch Bekredjian and Sarkis Mareshlian, in this prosecution. The accused challenged the credibility of the Crown witnesses, and claimed that they were responsible for the shooting. As with the Khela case study, this case study reveals the importance of human sources. There was also an international dimension to the prosecution because the Crown sought to use evidence from electronic surveillance in the United States as well as in Canada. The

case also demonstrates how issues of disclosure, witness protection and secrecy can be closely intertwined in terrorism prosecutions.

The case involved numerous pre-trial motions, both in the provincial superior court and the Federal Court, before the accused pleaded guilty to conspiracy to commit murder. One pre-trial motion involved an attempt by the accused to require the Ottawa police to disclose the identity of a key informant at the bail hearing. Ewaschuk J. noted that the informant would likely have to testify and characterized him as a potential witness. At the same time, however, he concluded that the life of the informant could be in jeopardy if disclosed and that it was not necessary at this preliminary stage to disclose the informant's identity.[439] A critical aspect of this ruling was that the credibility of the informant was not relevant to matters to be determined at the bail hearing[440] or even at the preliminary hearing. Although a preliminary hearing was held in this case, the Crown subsequently used a direct indictment. The subsequent *Stinchcombe* decision on disclosure recognizes that, while evidence and other relevant material should be disclosed to the accused, disclosure is subject to the discretion of the Crown with respect to timing. Crown discretion with respect to the timing of disclosure could allow the government to ensure that witness and source protection measures were in place before a person's identity would have to be disclosed to the accused.

In other pre-trial rulings, Justice Ewaschuk held that evidence derived from American wiretaps could be admitted into the bail hearing without requiring proof of compliance with either Canadian or American constitutional standards. He stressed the informal nature of bail hearings while leaving open the possibility of the Charter applying should such evidence be sought to be admitted at trial.[441] In subsequent cases, the Supreme Court has ruled that the Charter does not apply to the law enforcement actions of foreign officials,[442] even when they act in co-operation with Canadian officials,[443] or to Canadian officials acting abroad.[444] At the same time, the admissibility of evidence gathered abroad might be found to violate the Charter if it resulted in an unfair trial or another violation of s.7 of the Charter.

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439 *R. v. Kevork* [1984] O.J. No. 926

440 The accused were denied bail in part because of concerns that they would flee as well as concerns about the safety of the informant if they were released. *R. v . Kevork* [1984] O.J. no. 929.

441 *R. v. Kevork* (1984) 12 C.C.C.(3d) 339.

442 *R v. Harrer* [1995] 3 S.C.R. 562

443 *R. v. Terry* [1996] 2 S.C.R. 207

444 *R. v. Hape* 2007 SCC 26.

During the preliminary inquiry, the accused requested disclosure of electronic surveillance conducted by CSIS, and CSIS profiles with respect to Hratch Bekredjian and Sarkis Mareshlian, the two Crown informants and witnesses, as well as the identity of CSIS officers who conducted physical surveillance on the accused. These issues were relevant in the trial, in part because they might reveal the locations of the Toronto-based accused with respect to a crime that was committed in Ottawa. The preliminary inquiry was adjourned when the Crown objected to the disclosure of such information on grounds of national security confidentiality in Federal Court.

The Attorney General of Canada produced an affidavit in Federal Court proceedings under then s.36.1 and 36.2 of the *Canada Evidence Act* (CEA), from the Director of CSIS, which maintained "that the disclosure would be injurious to national security because it would reveal or tend to reveal the methods used for surveillance, the capacity and ability of the Service to carry out electrical surveillance, the places and means used for same and the identity of the persons involved in conducting it."[445] Addy J. denied a request by the accused to cross examine the Director on the affidavit, holding that no cross-examination should be allowed "unless perhaps very weighty and exceptional circumstances are established".[446] He noted that there was no explicit right to cross-examine under the CEA procedure, which provided for mandatory *in camera* hearings and a mandatory right by the Crown to make *ex parte* submissions. He stressed the state's interests in secrecy:

> What might appear to the uninitiated, untrained layman to be a rather innocent and unrevealing piece of information might very well, to a trained adversary or a rival intelligence service, prove to be extremely vital when viewed in the light of many other apparently unrelated pieces of information. Because of this and by reason of the extreme sensitivity surrounding security matters it would be a very risky task indeed for a judge to decide whether a certain question should or should not be answered on cross-examination. Furthermore, the person being cross-examined might be put in the difficult position of in fact revealing the answer by objecting to disclosure. Finally, it is easy to foresee that many of the questions in cross-examination would be objected to in

445 *Re Kevork* (1984) 17 C.C.C.(3d) 426 at 437 (F.C.T.D.)
446 ibid at 440

> the same manner as the original questions which form the basis of the present application. This would inevitably lead to further inquiries and further applications, thus prolonging the matter indefinitely, creating a real danger of an eventual breach of security.[447]

This conception of the state's interest in security and in particular its emphasis on the mosaic effect, in which one piece of information might provide the enemy with vital clues about ongoing operations, reflected thinking about the state's interest in secrecy at the time. As suggested above, the assumptions behind such understandings of secrecy are not well-suited to terrorism cases.

Addy J. dismissed the accused's request for disclosure of CSIS material without examining the material. He stressed that "the mere fact that Parliament has chosen to allow this court to consider an objection to disclosure on the grounds of national security, national defence or international relations when the subject-matter was previously within the exclusive realm of the executive arm of government, is not any indication that it is in any way less important than before the statutory enactment."[448] Addy J. upheld the Attorney General of Canada's objection to disclosure of the requested material on national security grounds. He stressed that the proposed line of cross-examination related to the activities of CSIS and to CSIS profiles about the informers. The accused requested the CSIS material primarily to impugn the credibility of the Crown informers but, in Justice Addy's view, the credibility of the informers was already impugned by the admission that they were co-conspirators. He then stated:

> …evidence regarding the credibility of a witness is, of its very nature, not the type of evidence which must be considered or taken into account where an objection has been raised pursuant to s. 36.2. Credibility of a witness is not the main issue to be determined even at trial but merely a side issue. It does not go towards directly countering any of the elements of the offence and it is clearly not evidence the production of which is "of critical importance to the defence" (see the Goguen case, supra). This test of course applies with equal force

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447 ibid at 439-440.

448 *Re Kevork* (1984) 17 C.C.C.(3d) 426 at 431. (F.C.T.D.) See also *Re Gold* [1985] 1 F.C. 642 aff 25 D.L.R.(4th) 285 also not examining the documents.

> to evidence sought to be produced at the trial of an accused as well as upon the preliminary hearing. All of the jurisprudence, both Canadian and English, relating to this principle in fact deals with it in the context of an actual trial. One comes to precisely the same conclusion when considering the other purpose for which evidence is sought by the applicants, namely, the theory of the defence that one of the informers had in fact committed the offence of attempted murder. This would not necessarily mean that the three applicants who stand so accused would still not be parties to either the offence of attempted murder or of conspiracy to commit murder. On the above ground alone I would be obliged to hold that the present application must fail.[449]

In upholding the Attorney General's request for non-disclosure, Justice Addy imposed high standards that required the accused to demonstrate at least the probability that the requested material would be helpful to the defence. He concluded that "the applicants are hoping that something might be unearthed which would be helpful. The proposed exercise amounts to nothing less than a fishing expedition or a general discovery. This would be fatal to the application even if the evidence sought to be obtained were of vital importance and had a direct bearing on the issue of guilt or innocence."[450] Justice Addy's rejection of the accused's disclosure request as "a fishing expedition" that involved the "credibility of the witness", which he characterized as "a side issue" in the criminal trial, stands in stark contrast to Justice Watt's conclusion two years later in *Parmar* that the disclosure of information used to obtain a wiretap warrant was required for full answer and defence and was a "fishing expedition in constitutionally protected waters".[451]

Justice Addy also questioned the evidentiary value of the intelligence created by CSIS about the two informers. He stated that the requested CSIS profiles of the Crown witnesses contained "the most glaring type of hearsay and could not be used in evidence even if it had been shown that they probably contained information vital to the defence. The documents could be used neither in examination-in-chief nor in cross-examination of the officers in whose possession they might be. The documents are really general discovery documents which, were it not for the subject-matter,

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449 Ibid at 434
450 ibid at 435
451 *R. v. Parmar* (1986) 34 C.C.C.(3d) 260 at 279-280 (Ont.H.C.) discussed infra Part III.

might possibly be compellable in an examination for discovery in a civil suit but their production could never be compelled at trial in any type of action governed by the rules of evidence."[452] Today, *Stinchcombe* disclosure obligations apply to much information that would not necessarily be admissible at trial, and the Supreme Court has recognized that the accused's right to full answer and defence can be violated by denying the accused information that could open up valuable lines of inquiry.[453] That said, any inability of the accused to use intelligence at trial would be a factor to be considered in determining the effect of non-disclosure of intelligence on the accused's right to full answer and defence.

After the request for non-disclosure under the CEA was decided in favour of the Attorney General of Canada, the preliminary inquiry resumed. After hearing 30 days of evidence, the provincial court judge committed the accused on the conspiracy to murder charges, but not on the attempted murder charges. The Crown subsequently issued a direct indictment on the attempted murder charges and this procedure became the subject of an unsuccessful Charter challenge by the accused. The direct indictment procedure was held not to violate the Charter. The Court of Appeal subsequently held that it had no jurisdiction under the Criminal Code to hear an appeal of this determination. It noted in this regard that there were "strong policy reasons against interrupting the trial process with appeals to the Court of Appeal. The same policy reasons in our view apply to the delay of criminal trials by proceedings of this sort. The fragmentation of criminal proceedings should not be encouraged."[454] The Court also rejected an attempt to make an interlocutory civil appeal, holding that the proper pleadings and notice to the Attorney General had not been made by the accused.[455] Similar pre-trial appeals are available under both ss. 37 and 38 of the CEA and, as will be seen in connection to the ongoing Khawaja case, they can delay terrorism prosecutions.

The accused in the *Kevork* case renewed their Charter challenge to the direct indictment procedure before the criminal trial judge, but this was rejected on the basis that "the accused had no occasion to complain. They were already in custody on the conspiracy to murder charge; they were held without bail on that charge. They had the benefit of extremely thorough and complete discovery; the process of discovery remains an

452 *Re Kevork* (1984) 17 C.C.C.(3d) 426 at 431 at 435 (F.C.T.D.).
453 *R. v. Taillifer*[2003] 3 S.C.R. 307.
454 *Re Kevork* (1985) 21 C.C.C.(3d) 369 at 372 (Ont.C.A.)
455 ibid at 373

on-going one, as I am advised. The discharge on the attempted murder count was at least open to question…"[456]

The trial judge considered the non-disclosure order made by Justice Addy under the *Canada Evidence Act* in another pre-trial motion. Smith J. noted that the conflicts between the state's interests in secrecy and the accused's rights were complex and confronted in many democracies. "The question, simply put, is whether the accused can, on the facts of this case, make full answer and defence in the absence of the disclosure which was denied them. This calls for a definition of the scope of the right to make full answer and defence. Is it absolute? If not, what are the parameters of this right, assuming a violation of the right at common law or under statute law or of the constitutional right to make full answer and defence? Can resort be had to s. 1 of the Charter in order to give primacy to national security and compel the accused to stand trial without access to the information sought?"[457]

The accused again sought to obtain evidence of any CSIS wiretaps and CSIS surveillance before the trial judge. This illustrates how a pre-trial determination by the Federal Court may not end continuing attempts to obtain disclosure from the trial judge, The judge noted that the accused "argued that the electronic surveillance which is the subject of a subpoena, if it does exist for its very existence is not admitted, will nail the coffin shut and destroy completely the co-conspirators' credibility. The case is far too complex, in my view, to enable me to accept this extreme contention. The most that can be said at this stage is that it might well prove material and relevant one way or the other on the issue of the reliability of the evidence of the co-conspirators. I should again emphasize that it is clear that, their credibility has already been quite significantly impaired at the preliminary hearing."[458] This suggests that the precise effects of non-disclosure can only be evaluated in relation to the precise issues in the case and the totality of the evidence presented at trial. The Federal Court judge presiding at a pre-trial hearing would not be in the same position as the trial judge in determining how non-disclosure would relate to the live issues in the trial. The trial judge expressed unease with the fact that Justice Addy had not examined the material that he ordered not to be disclosed. He stated:

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456 *R. v. Kevork* (1985) 27 C.C.C.(3d) 271 at 281
457 *R. v. Kevork* (1985) 27 C.C.C.(3d) 523 at 526 .
458 *R v. Kevork (*1985) 27 C.C.C.(3d) 523 at 530

> I am, nevertheless, prepared to accept, as I read his reasons, that in Justice Addy's mind concerns for national security occupied a priority position when compared with the rights of the accused. In the end though, as already stated, he was only concerned with disclosure. He did not choose to inspect the material. I feel uncomfortable with the notion of lack of inspection in Federal Court. If the Chief Justice or his judge designate should, in any given case, be satisfied not to order disclosure in the interests of national security without having inspected, the trial judge may well be on the horn of a real dilemma if, in his judgment, inspection is needed.[459]

As will be seen in subsequent cases, the Federal Court has moved away from its early position that, generally, judges need not inspect material when deciding matters of national security confidentiality. This at least ensures that a judge, albeit not the trial judge, examines the material over which the Attorney General of Canada seeks non-disclosure.

Smith J. commented at length on the implications of the two-court approach which took issues of national security confidentiality away from the trial judge and placed them in the hands of specially designated judges of the Federal Court. He stated:

> Parliament has reserved the matter of possible injury to international relations, national defence or security to the Chief Justice of the Federal Court or to his justice designate with certain directions affecting the balancing process as between competing interests. There is now in this country a bifurcation of duties which admittedly did not exist at common law. It must now be accepted by trial judges that the privilege in those three areas of defence, international relations and national security, to the extent that they were committed to the judiciary by statute, have no place in the trial courtrooms in so far as disclosure or discovery is concerned. But at the same time trial courts cannot say that by way of corollary they must abdicate the responsibility of ensuring that persons accused of crimes are given a fair trial and afforded the right to make full answer and defence and are allowed

459 ibid at 536.

> to otherwise enjoy all of the rights and privileges traditionally reserved to them, in what, as we now have, a constitutionally entrenched form. Disclosure will not be available but s. 24(1) will enable courts to fashion a remedy, where one is indicated, in the appropriate case.[460]

The trial judge accepted that Parliament had allocated questions of national security confidentiality to the Federal Court, but he also concluded that questions of full answer and defence, fair trial, and Charter remedies that could arise as a consequence of non-disclosure orders made by the Federal Court would be decided by the trial judge. Justice Smith's focus on preserving a fair trial has been confirmed in s.38.14 of the CEA, which affirms the trial judge's right to make any order necessary to protect the accused's right to a fair trial while, at the same time, requiring the trial judge to comply with non-disclosure orders made by the Federal Court.

The trial judge appeared to have misgivings about the two-court structure of the CEA. He noted that: "Blame must be laid squarely at the feet of Parliament which unwittingly may well have created an impasse in certain cases by resorting to two courts instead of one and assigning tasks to each of them that collide or run at cross-purposes to one another." He added that "there appears to be nothing left to do at trial except to consider the impact of the Federal Court determination on the exigencies of a fair trial…Parliament could not have intended to give the Federal Court jurisdiction nor, in my opinion, could such jurisdiction be exercised by the Federal Court in such a way as to operate in derogation of the duty imposed on trial judges, as courts of competent jurisdiction, to enforce the rights of the accused in the course of the trial, rights that are now constitutionally entrenched."[461] These comments raise the possibility that, as a result of the two-court approach, trial judges may err on the side of protecting the accused's right to a fair trial by staying proceedings: because they are deprived of the ability to see the evidence that the accused wants disclosed or because the trial judge is unable to balance between the competing interests in secrecy and disclosure.

Justice Smith rejected the argument that all evidence must be disclosed to the accused if a prosecution was to occur. He stated:

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460 ibid at 537.
461 ibid at 538, 540.

> In the context of national security, I reject the contention that the moment there is found to be some material evidence in possession of the State to which access is denied, the State must adopt the "stark choice rule" in U.S. v. Reynolds et al. (1953), 345 U.S. 1, and desist from prosecution. I allow, however, that this begs the very thorny question of inspection. The defence urges that I not adopt the "novel" notion that evidence must be essential and critical before a stay will be granted. The contention is that in the criminal field a government could only invoke an evidentiary privilege at the price of letting the defendants free as long as there was material evidence being withheld (the stark choice rule). I am not convinced that that has been the case at common law or in the U.S. I have already referred to the Classified Information Procedures Act in the U.S. The court, under that Act, is authorized to delete certain portions of the classified material. The proceeding which is contemplated is separate from the trial and is *ex parte*. The government may even substitute a summary.[462]

The trial judge was attracted to a flexible approach to reconciling competing interests in fairness and secrecy. He accepted that a stay was not the only possible remedy and other remedies could include a requirement that a witness be prevented from testifying unless disclosure was made, or that the witness testify without revealing his identity or testify by means of written questions and answers that could be screened for secrets. At the same time, he indicated that "most of these remedies" would not be available to the trial judge because they would have the effect of collaterally attacking the Federal Court order that the CSIS material not be disclosed to the accused. In other words, the Federal Court, rather than the trial judge, would have to impose conditions on disclosure such as the use of summaries or substitutions. Again, this approach has now been codified in s.38.06(2) of the CEA.

The trial judge was left in the difficult position of not being able to alter the Federal Court's non-disclosure order and of having a limited range of practical remedies that could be applied at trial. Smith J. recognized that a judicial stay of proceedings was a drastic remedy that would

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462 ibid at 543

permanently stop the prosecution. He indicated that a stay would only be an appropriate remedy if the evidence not disclosed "is critical or essential…without which the applicants will probably not be able to make full answer and defence". He elaborated:

> Such a burden imposed upon accused persons to show that the evidence is crucial or essential is, in my view reasonable if we are to avoid fishing expeditions in all cases when it is likely that CSIS had some hand in gathering information. CSIS will be involved in virtually all cases where the security of the State and of its citizens is in jeopardy through acts precisely of the kind that will be under investigation in this trial.[463]

Applying this test, the trial judge concluded that a stay was not appropriate because the accused had not established that it was denied evidence essential to a fair trial or full answer and defence by being denied access to CSIS wiretaps, CSIS surveillance or CSIS profiles. He concluded:

> To stay in the case at hand, or in any case, where only some or any material information is withheld comes close to conferring immunity from prosecution upon all those charged with terrorist acts. The defence position, in my view, had no support at common law and the Charter does not require that it be adopted…., neither credibility of the co-conspirators, nor the alleged alibi, nor the evidence relating to the weapons, nor the American wiretaps which may not even be admissible and as to which I have no real present knowledge, nor a combination of all make a compelling case, in my judgment, for this court to intervene to prevent a Charter violation at this stage.[464]

Even while reaching this conclusion that a stay was not required and the accused had not established a violation of the right to full answer and defence, the trial judge expressed misgivings, namely that "the absence of inspection does bother me. A case could arise where the defence will make a strong case for disclosure, for purposes of a fair trial, in which the Federal Court refused even to inspect. The trial court might then have to

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463 ibid at 546
464 ibid at 546

impose a conditional stay urging inspection at least so that an informed decision can be made." [465] This statement held open the possibility that a conditional stay by a trial judge could require the Attorney General, and perhaps the Federal Court, to reconsider a non-disclosure order. A conditional stay might provide time to make provision for the security of vulnerable informers or for an ongoing operation, or to obtain an amendment of a caveat that restricted the use of information obtained from a foreign agency.

The trial in the *Kevork* case involved many pre-trial motions, including testimony about an FBI wiretap and testimony from the victim before the jury.[466] In late April, 1986 the trial was aborted when the accused agreed with the Crown's offer to plead guilty to the conspiracy charge in exchange for dropping the attempted murder charge. Although it is impossible to know for sure, the undisclosed CSIS material might have been more relevant to the attempted murder charge if it disclosed the whereabouts of the Toronto accused on the days in question.

Kevork was sentenced to nine years imprisonment, Balian was sentenced to six years imprisonment and the youngest accused, Gharakhanian was sentenced to two years less a day. The Crown appealed the sentences and the Court of Appeal increased Balian's sentence to eight years imprisonment. It, however, rejected the Crown's appeal of Kevork's sentence on the basis that when double time was counted for pre-trial custody it was only six months less than the fourteen years maximum. The Court of Appeal also took note that Kevork's decision to plead guilty had avoided a long trial. The Court of Appeal also rejected the Crown's appeal of Gharakhanian's sentence in part on the grounds that he was only seventeen years old. [467] Kevork was subsequently found guilty of perjury in relation to material submitted at sentencing and received an additional year of imprisonment.[468]

The *Kevork* prosecution reveals how accused in terrorism prosecutions may request access to intelligence generated by CSIS and other intelligence agencies. Today the proceedings would be conducted differently in some

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465 ibid at 546

466 135 potential jurors were rejected after being questioned about whether they could fairly try a case involving an allegation of terrorism and in light of the pre-trial publicity in the case. Special security arrangements were also made for the trial. John Kessel "Jury selection finished for envoy's shooting trial" Ottawa Citizen March 21, 1986 C.1.

467 *R. v. Kevork* (1988) 29 O.A.C. 387.

468 John Kessel "Chronology of terror: the plot to kill a Turkish diplomat" Ottawa Citizen June 14, 1986 A1; "Convicted in envoy plot, Armenian's term extended" Globe and Mail Jan 18, 1988 A15.

respects. The Federal Court would almost surely examine the information that was the subject of the non-disclosure application. At the same time, however, the main problems revealed by the Kevork case study--namely the need for separate proceedings in the Federal Court and the dilemma of trial judges having to decide whether a fair trial was possible in light of a non-disclosure of material that the trial judge had not seen--would remain. In addition, the case today would have to be decided in light of more generous understandings of both 1) the accused's right to disclosure of all relevant and non-privileged information; and 2) the accused's right to full answer and defence, which could be infringed by the cumulative effects of non-disclosure, including non-disclosure of information that might open up important avenues of investigation and adversarial challenge to the accused.

G) Use of Section 38 During a Criminal Trial: A Case Study of R. v. Ribic

Nicholas Ribic was charged with four counts of hostage-taking, under s.279.1 of the Criminal Code, in relation to events in Bosnia involving the Canadian Armed Forces. The case involved the infamous chaining of a Canadian solider, Captain Patrick Rechner, to a pole in an effort to stop NATO bombing of Serb forces in May, 1995. This case is particularly interesting because it involves litigation both before and after the major amendments made to s.38 of the *Canada Evidence Act* under the 2001 *Anti-Terrorism Act*. It involves two criminal trials, one which failed to reach verdict because of the surprise, delay and fragmentation of the trial caused by s.38 proceedings, and another trial that successfully reached a verdict despite litigation and appeal of national security confidentiality issues before the Federal Court under s.38.

Ribic consented to his extradition from Germany in 1999, and he was arrested and released on bail upon his return to Canada. The trial was held in Ottawa despite the fact that Ribic lived in Edmonton.[469] The Criminal Code now provides for the possibility of terrorism cases to be tried outside the territorial jurisdiction in which they were alleged to have been committed.[470] A preliminary inquiry was not completed and, in October, 2000, a direct indictment was preferred, with a trial being scheduled for November, 2001. Because of various disclosure and pre-trial motions, including motions before the Federal Court under s.38, this trial

469 For an order for extra costs caused by this choice of venue see *R. v. Ribic* [2000] O.J. no. 565.
470 Criminal Code s.83.25.

was postponed until October, 2002. At that time, the Crown presented its case to the jury over eight days and by calling six witnesses. After the Crown's case went in, Ribic's lawyers announced that they proposed to call two witnesses with the Canadian military who had been in Bosnia and who they said had extensive information about the hostage-taking incident.

The issue of whether the proposed witness's evidence could be given was litigated in the Federal Court under s.38 of the *Canada Evidence Act*. In December, 2002, the trial judge recalled the jury and explained that "this is an unfortunate situation over which I, and frankly counsel, have no control", and asked the jury if they were willing to return in January. The jury agreed to the postponement.[471] The trial judge, however, concluded on January 20, 2003, that with more Federal Court proceedings pending, he must dismiss the jury and declare a mistrial.[472] This incident reveals how a bifurcated court process for determining national security confidentiality can adversely affect the criminal trial process, to the point of preventing the court from reaching a verdict. If similar issues had arisen during the Malik and Bagri trial, and if the accused had not re-elected to be tried by judge alone, there would also have been a risk of a mistrial.

1. Federal Court Pre-Trial Proceedings Over Disclosure

A significant part of the delay that led to a mistrial being declared in the Ribic case in 2003 was related to the fact that there was no advance notice by the defence of the s.38 issues until a jury had been empanelled. Section 38.01(1) as amended by the *Anti-Terrorism Act* is now designed to place an obligation on all parties to notify the Attorney General of s.38 issues "as soon as possible." This could potentially prevent the problems that arose in Ribic's first trial. The accused could have given early notice of the intent to call the witnesses; or the witnesses themselves, if contacted by the accused, might have notified the Attorney General or the person presiding at the hearing, as contemplated under s.38.01(3) or (4).

Although the new provisions can be helpful, there is no explicit sanction for a failure to give advance notice. A trial judge might have difficulty justifying denying the accused an opportunity to call perhaps important evidence in full answer and defence as a sanction for late notice. The

471 "Ribic's hostage-taking trial to proceed" Edmonton Journal Dec. 10, 2002 p.A10.

472 This account is taken from *R. v. Ribic* [2004] O.J. No. 2525 in which Rutherford J. rejected an application for a stay of proceedings on the basis of a violation of the s.11(b) Charter right to a trial in a reasonable time.

accused could argue that the case to meet principle[473] also justifies some delay in informing the Attorney General of what witnesses should be called. In other words, the Ribic scenario in which s.38 issues have to be litigated in the middle of a criminal trial could still arise.

The first Ribic trial involved a range of pre-trial motions being heard by the Federal Court in relation to various disclosure matters. In all of these cases, the Federal Court judge examined the information over which non-disclosure was sought. In March, 2002, Hugessen J. of the Federal Court, after hearing from both parties, including *ex parte* representations from CSIS, decided that he would examine the material that was the subject of a non-disclosure claim. In reaching this decision, he noted that the criminal trial judge in the Ontario Superior Court had indicated in a judgment that it would be helpful to see the withheld material. Hugessen J. commented: "While that view does not, of course, bind me, I think it is entitled to the very greatest respect for it comes from the person who will ultimately have to make the decision as to the admissibility and relevance of the evidence at trial."[474] This statement demonstrates how the Federal Court judge can be aware of, but not bound by, the judgments of the trial judge about whether material should be disclosed. The ultimate decision about what the trial judge could see, however, would be determined by the Federal Court after it had balanced the competing public interests in disclosure and non-disclosure. [475]

Hugessen J. ordered that some CSIS documents be disclosed to the accused, but that they be subject to editing. In the course of this editing, he "excluded information regarding sources, names of agents of the Service, routing information, codes and things of that technical nature which are in fact of no interest to the defence at all."[476] He also excluded "information which would be likely to reveal investigative techniques again of no interest to the accused and all references to authorizations sought or obtained under the Canadian Security Intelligence Service Act". Finally, he excluded "information which would be likely to affect Canada's international relations" and which "was of no conceivable interest or help to the accused in the conduct of his defence."[477] The editing used in this

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473 *R. v. Rose* [1998] 3 S.C.R. 262.
474 *Ribic v. Canada* [2002] F.C.J. no 384 at para 4.
475 As Hugessen J. stated "Whether or not the withheld material should be disclosed is, of course, another matter and will depend upon the balancing of the competing interests involved, a process which I now propose to undertake."Ibid at para 6.
476 Ibid at para 7.
477 Ibid at paras 9- 10

case represents an attempt to protect the legitimate objects of national security confidentiality while, at the same time, disclosing to the accused evidence that is relevant to the criminal trial.

Hugessen J. deleted information subsequent to the event in question on the basis that it had "no direct bearing on the matters charged against the applicant".[478] Sometimes the precise and discrete nature of the criminal charge will make it easier to rule that matters subject to national security confidentiality are not relevant. At the same time, criminal charges in terrorism cases, particularly those relating to conspiracies, facilitation or participation in a terrorist group, may be so wide-ranging that more material in the state's possession will be relevant to the charge.

Hugessen J. deleted from the disclosed material "analyses conducted by the Service of the information which is essentially of a forward looking nature taking the form of prediction of what may be going to happen… "[479] Intelligence about possible future security threats, matters that lie at the heart of the security intelligence mandate, may often not be valuable to the defence. In some contexts, the distinctions between predictive and even speculative intelligence and concrete evidence may be so great that the accused may not have a legitimate interest in access to the intelligence in order to defend him or herself in court. In other contexts, however, the information as it relates to informers or alibi witnesses may be more closely related to the accused's right of full answer and defence.

Another pre-trial proceeding was held over whether the accused could have access to five documents held by the Department of National Defence (DND) that did not make any reference to Mr. Ribic. Lutfy A.C.J. held that most of the DND documents should not be disclosed, either because they were not relevant to the case or marginally relevant. He ordered the disclosure of one document that related to hostages on the basis that it was not "clearly irrelevant", as that standard is understood in *Stinchcombe* and that it was also "'likely relevant' to the ability of the respondent Ribic to make full answer and defence. [480] Lutfy A.C.J. also stressed that the criminal context of the case affected the balancing test to be applied under s.38.06(2) when he stated:

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478 ibid at para 10.
479 Ibid at para 7.
480 *R. v. Ribic* [2002] F.C.J. no. 1186 at para 19

> Decisions in other section 38 applications where documents were not inspected or which came to this Court from a commission of inquiry, an administrative tribunal or a civil action can be distinguished from this case.
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> The respondent Ribic is accused with hostage taking under section 279.1 of the Criminal Code in the Ontario Superior Court of Justice and, if convicted, is liable to imprisonment for life. The seriousness of the criminal charges caused my inspection of the documents without applying the two-step procedure in *Goguen*…Parliament has required the designated judge to balance competing interests, not simply to protect the important and legitimate interests of the state.
>
> In weighing the competing interests, the designated judge is assisted, it seems to me, by specific evidence concerning the harm caused in the disclosure of an expurgated document for a criminal trial involving serious charges.[481]

The accused in this case recognized some legitimate national security interests and did not seek "the names of sources or targets, addresses, routing information, codes or encryptions, file numbers, sources of information, whether they be individuals or otherwise, or information concerning the technical means or other methods of information gathering."[482] In other contexts, however, an accused could argue that the source of information, whether individual or institutional, was relevant to its reliability and that the method of information gathering was relevant to the legal admissibility of the information.

A month later, Hugessen J. decided another pre-trial motion involving the disclosure of material relating to the time and location of the alleged crime which was held by DND but obtained from a foreign government under a promise of non-disclosure. He recognized that, taken by itself, this case raised what some have called "a clash of the titans": the accused's right to full answer and defence against the state's interest in national security, national defence and international relations. In the end, however, he decided that the material could be disclosed because the foreign

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481 ibid at paras 17-18,22-23.
482 Ibid at para 9

government had not responded to repeated requests by Canada to allow the disclosure of the document. He drew an adverse inference that the matter was "clearly not a matter of prime importance"[483] to the foreign power, and ordered that the material be disclosed with some information edited out. This ruling is significant because it demonstrates that caveats or restrictions on the use of intelligence are not absolute and can be subject to requests for amendments when necessary to satisfy disclosure obligations. It is consistent with the modifications of the third party rule discussed above.[484]

2. The Proceedings in Relation to the Witnesses that Ribic Proposed to Call at Trial

A number of s.38 motions were heard in the Federal Court after the Crown had put in its case to a jury in the Ontario Superior Court, but before a mistrial was declared. These motions dealt with the difficulties presented by attempts by the accused to call witnesses to testify about secret information. In early January, 2003, Blanchard J. of the Federal Court decided a number of issues under s.38 of the *Canada Evidence Act,* including the admissibility of a transcript of testimony of the two witnesses from the military that the accused had proposed to call at the criminal trial about the events in Bosnia, but who were subject to the s.38 notice. Chief Justice Lutfy had in November, 2002, ordered that the two witnesses be asked questions by a security-cleared lawyer employed by the Attorney General of Canada. The questions were, however, submitted by the accused's lawyer. The accused challenged this innovative procedure as violating his right to fully cross-examine witnesses and to put relevant witnesses before the trier of fact in the criminal trial, and thus, his right to full answer and defence, but these arguments were rejected by Blanchard J. and subsequently by the Federal Court of Appeal. They stressed that the novel procedure was used when issues of national security confidentiality arose in the middle of the criminal jury trial and when there was no time for the accused's lawyers to seek security clearances. Letourneau J.A. explained for the Court of Appeal that "the jury was kept waiting. The applicable legislation was new and a solution had to be found quickly…. Creativity often carries their proponents into the realm of the unusual, as it did here, but I am satisfied that fairness accompanied them throughout their journey."[485]

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483 *R. v. Ribic* [2002] F.C.J. no. 1835 at para 8.
484 *Attorney General of Canada v. Khawja* 2007 F.C. 490.
485 *R. v. Ribic* [2003] F.C.J. no 1964 at paras 43, 56 (Fed.C.A.).

Both Blanchard J. and Letourneau J.A. expressed concerns that it was neither safe nor practical to allow the two witnesses to give *viva voce* evidence in the criminal trial. In a passage that was specifically endorsed by the Court of Appeal, Blanchard J. warned of the danger that testimony at a criminal trial might inadvertently reveal secret and damaging information:

> In their testimony, the two witnesses wove innocuous information with information that cannot be publicly disclosed. There is no demarcation line easily separating what is authorized from what is not. Implementing a demarcation line, in the context of a criminal trial conducted before a jury, is clearly not practical if not impossible. The learned trial judge will not have the benefit of reviewing all of the information to allow him to fully appreciate the potential impact of a disclosure of what may appear to be an innocuous piece of information. What may appear to be trivial information may in fact be the one missing piece in the jigsaw piece created by a hostile agency.[486]

The reference to the jigsaw puzzle may reflect what has been described as the mosaic effect in terms of the dangers of releasing information.[487] The Ribic case involved military action and alliances. As suggested above, concerns about revealing evidence to the enemy through the mosaic effect may be less pressing with respect to non-state actors in loosely organized terrorist cells.

Leaving the applicability of the mosaic effect to counter-terrorism investigations aside, the above comments by Blanchard J. are significant because they reveal some of the difficulties created by s.38's two-court structure. The Federal Court, which had heard *ex parte* submissions from various witnesses about the harms of disclosing the material, [488]was concerned the criminal trial court might not have the full picture about possible harms to security. At the same time, however, it could also be argued that the Federal Court itself might not be in the best position to

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486 *R. v. Ribic* [2003] F.C.J. no. 1965 at para 35 per Blanchard J. and endorsed in *R. v. Ribic* [2003] F.C.J. no 1964 at para 51(Fed.C.A.).

487 See for example *Henrie v. Canada (Security Intelligence Review Committee)* (1988) 53 D.L.R.(4th) 568 affd (1992) 88 D.L.R.(4th) 575 (Fed.C.A.)

488 During a five day hearing, Blanchard J. had heard *in camera* and *ex parte* testimony from three witnesses: "a member of the Directorate General Intelligence Division of the Canadian Forces, an employee of another governmental agency; and a representative from the Department of Foreign Affairs and International Trade." *R. v. Ribic* [2003] F.C.J. no. 1965 at para 7.

have the full and evolving picture about the importance of the information to the accused. These comments underline the difficulties of a bifurcated process in which issues of national security confidentiality are decided by one judge in the Federal Court who has heard *in camera* evidence from government witnesses about the harms to national security, national defence or international relations while a criminal trial judge must decide the effect of any non-disclosure order on the accused's right to a fair trial.

Although the bifurcated process has significant shortcomings, both in terms of efficiency and in terms of giving the relevant decision-makers the fullest information on which to make their decisions, the Court of Appeal in *Ribic* found that it had one benefit to the accused: namely it provided a means through which the accused could disclose his defence to the Federal Court to assist in its decision-making, but without disclosing it to the separate prosecutorial team or to the judge who would decide the criminal charges in the Superior Court. Letourneau J.A. stated that "the whole process leading to the determination of the State secrecy privilege compels an accused to reveal his defence and disclose information that supports the defence." [489] Nevertheless:

> It is of fundamental importance to note that disclosure of the sensitive information that the appellant [the accused] wants to rely upon is not made to the prosecution, but, under the seal of absolute confidentiality, to the Attorney General and a designated judicial forum where the matter will be decided in private. It is therefore not a disclosure which violates an accused's right to silence and the presumption of innocence in criminal proceedings. In addition, as the appellant requests in the present instance, this Court has the authority to issue an order that none of the information disclosed in the context of the section 38 process be released without the consent of the defence. In my view, sufficient and adequate guarantees are offered by the system, which protect an accused's right not to disclose to the prosecution his defence.[490]

Similarly, the criminal trial judge also stressed that the prosecutors in the criminal case, although "employed and instructed federally", took no

489 *R. v. Ribic* [2003] F.C.J. no 1964 at para 29 (Fed.C.A.).
490 ibid at para 30.

part in the Federal Court proceedings and "were not privy to any of the information"[491] in those proceedings. Section 38.11(2) allows the accused to make *ex parte* representations before the Federal Court judge.

In addition to the above procedural innovations, the decisions by Blanchard J. and the Federal Court of Appeal are also interesting because of their reconciliation of competing interests in security and disclosure. Much of the material held by DND was obtained from NATO in the expectation that it would not be disclosed. There were concerns that disclosure would prejudice future intelligence sharing from allies as well as operations. Blanchard J. determined that much of the information, for example that relating to operations not related to the hostage-taking incident, was simply not relevant and need not be disclosed.[492] Other information was relevant and "logically probative to issues that may be raised at trial and certainly could assist the jury in putting the events leading up to the hostage-taking and the event itself into the proper context."[493] Nevertheless, he determined that there was enough material in the edited transcripts to inform the jury about the relevant context of events leading up to the hostage-taking. [494] This decision, which was upheld by the Court of Appeal, demonstrates a willingness to allow evidence that has been edited to reconcile the competing demands for secrecy and disclosure. At the same time, decisions by the Federal Court that material is not relevant under *Stinchcombe* may be handicapped by the fact that all the circumstances that might arise from the trial, including those that could arise from the accused's defence, may not be known to the Federal Court judge who is not the trial judge or generally charged with reviewing matters of the adequacy of the Crown's disclosure in criminal cases.

3. The Federal Court of Appeal's Three Step Approach

The Court of Appeal rejected the accused's request to disclose all relevant evidence, subject to the Attorney General issuing a certificate under s.38.13

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491 *R. v. Ribic* [2004] O.J. no. 2525

492 *R. v. Ribic* [2003] F.C.J. no. 1965 at para 25.

493 Ibid at para 26

494 Blanchard J. concluded that the undisclosed "information, although corroborative, would not, in my view, disclose any new information that would be helpful to the defence that is not already contained in the expurgated transcripts of the testimony of the two witnesses….for the purposes of the defences to be raised at trial, the expurgated transcripts fairly reflect the nature and substance of the testimony of the two witnesses. I therefore conclude that the information which I include in this second category, although relevant, need not be disclosed." Ibid at para 37

that would block the court ordered disclosure on the basis that "the Federal Court would be remiss of its duties under the act if it were to endorse the appellant's philosophy of general disclosure based on mere relevancy, a philosophy that can only lead to and incite fishing expeditions."[495] At the same time, the Court of Appeal recognized that accused will often have to make broad initial claims for disclosure because they have not seen the information that the government seeks to protect.[496] In addition, the idea that disclosure on the basis of "mere relevancy….can only lead to and incite fishing expeditions" is in some tension with the idea in *Stinchcombe* that disclosure of all relevant evidence held by the Crown is required to respect the accused's Charter rights and prevent miscarriages of justice. This decision raises questions whether the Federal Court might apply a more restrictive approach to *Stinchcombe* than criminal courts.

The first step in applying s.38 is to determine whether the evidence is subject to *Stinchcombe* disclosure requirements as relevant information, either exculpatory or inculpatory, that would be useful to the defence. The accused will bear the onus of demonstrating relevance and the court should usually examine the information to determine whether it is relevant. This represents an important and salutary departure from earlier precedents, in which the Federal Court had ordered non-disclosure without even examining the information. The Court of Appeal commented that the relevance standard is "undoubtedly a low threshold".[497] Nevertheless, the relevance standard was used in *Ribic* to decide that most of the five hundred and fifty-five pages of transcript were not relevant and not subject to disclosure.[498] The differences between the mandate of police forces and security intelligence agencies may very well result in a significant amount of background intelligence not being relevant to a criminal charge. At the same time, however, broad- based criminal charges, whether based on conspiracies or on new terrorism offences such as participation in a terrorist group, may make the activities of the accused and a broad range of associates relevant over a long period of time.

If the information is determined to be relevant, the second step is to determine whether the executive has established that the disclosure of the information would be injurious to international relations, national defence or national security. Letourneau J.A. indicated that the Attorney's

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495 *R. v. Ribic*[2003] F.C.J. no 1964 at para 13.
496 Ibid at para 11
497 Ibid at para 17
498 ibid at para 40-41

General submission as to the injury of disclosure "should be given considerable weight" because "of his access to special information and expertise".[499] Letourneau J.A. elaborated the deferential standard to be used in determining whether the disclosure of the information would be injurious to international relations, national defence or national security:

> The judge must consider the submissions of the parties and their supporting evidence. He must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence: *Home Secretary* v. *Rehman*, [2001] 3 WLR 877, at page 895 (HL(E)). It is a given that it is not the role of the judge to second-guess or substitute his opinion for that of the executive. As Lord Hoffmann said in *Rehman*, *supra*, at page 897 in relation to the September 11 events in New York and Washington, referred to in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraph 33:
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> They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.
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> This means that the Attorney General's submissions regarding his assessment of the injury to national security, national defence or international relations, because of his access to special information and

499 ibid at para 19

> expertise, should be given considerable weight by the judge required to determine, pursuant to subsection 38.06(1), whether disclosure of the information would cause the alleged and feared injury. The Attorney General assumes a protective role *vis-à-vis* the security and safety of the public. If his assessment of the injury is reasonable, the judge should accept it. I should add that a similar norm of reasonableness has been adopted by the House of Lords: see *Rehman*, *supra*, at page 895 where Lord Hoffmann mentions that the Special Immigration Appeals Commission may reject the Home Secretary's opinion when it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held".[500]

The fact that judges have found that this deferential standard of determining injury to the broad concepts of international relations, national defence or national security has not been satisfied underlines the problems with the overclaiming of secrecy discussed above.

The third step requires the judge to determine whether the public interest in disclosure outweighs the public interest in non-disclosure. At this stage, "the party seeking disclosure of the information bears the burden of proving that the public interest is tipped in its favour."[501] Here the Court of Appeal discussed two possible standards, one that required the accused to establish a fact crucial to its case,[502] and another more restrictive standard requiring the accused to establish that his or her innocence was at stake. [503] The Court of Appeal expressed some preference for the more restrictive latter test, given the similarities between the protection of informers and the safety of the nation, but applied the former test because it was more favourable to the accused and had been applied by Blanchard J.[504] The Court of Appeal concluded that Blanchard J. had committed no error either in applying the relevant tests. In particular, "the prohibition against the two witnesses to testify at the criminal trial was, in the circumstances, the only viable and efficient condition which would most likely limit any injury to national defence,

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500 ibid at paras 18-19.
501 ibid at para 21.
502 As applied in *Jose Pereira E Hijos S.A. et al v. The Attorney General of Canada* [2002] F.C.J. no. 1658
503 As applied in *R. v. Leipert* [1997] 1 S.C.R. 281 and *R. v. Brown* [2002] 2 S.C.R. 185
504 R. v. Ribic [2003] F.C. no. 1964 at para 27

national security or international relations."[505] It should be noted that the Federal Court would generally apply either standard in a pre-trial setting where it may be difficult to know what facts are crucial to the case or what may indicate that innocence may be at stake.

4. The Matter Returns to the Criminal Trial Judge

In the bifurcated scheme established by s.38, trial judges have to accept the Federal Court's judgment about what information can be disclosed and in what form, but they also have a complete freedom to fashion whatever remedy they determine is necessary to protect the accused's right to a fair trial. Although now specifically codified in s.38.14, this system of checks and balances has long been in place. It was, for example, asserted in the Kevork case study discussed above.

The *Ribic* case returned to a new trial judge, Rutherford J., who decided a number of motions before eventually presiding over the trial and sentencing of the accused. Despite all the s.38 proceedings that had been taken in Federal Court in relation to disclosure, Rutherford J. had to deal with a late-breaking disclosure issue in relation to the disclosure of documents in seventeen boxes that were said to constitute the office of a military attaché in Belgrade. DND personnel had inventoried and examined every page of those documents, and had disclosed to the accused fifty four pages of documents that contained a number of key words relevant to the case, including the names of the accused, the victims, the place, the hostage-taking and the military capacity in the area. Rutherford J. rejected the accused's request for a fuller inventory of the documents or the inclusion of additional key words on the basis that the Crown's procedure had "established a prima facie basis for irrelevance", and that it was "hard to imagine, without some basis being shown by the defence", how the remaining documents could be relevant, concluding that the defence's case "seems to me to be little more than a fishing exercise".[506]

As the criminal trial judge, Justice Rutherford also dealt with the admissibility of the edited transcripts of the two governmental witnesses whose evidence was subject to protracted litigation and appeal in the Federal Court. In an oral judgment at the end of May, 2005, Rutherford J.

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505 ibid at para 53
506 *R. v. Ribic* [2004] O.J. no 569 at para 14

dealt with the defence application to admit the transcripts of witnesses A and B when they gave *in camera* and *ex parte* testimony in the Federal Court. Rutherford J. admitted the transcripts, concluding that they constituted a principled exception to the rule against admitting hearsay statements that could not be cross-examined, on the basis that the edited transcripts were "sufficiently necessary and taken under circumstances supportive of its threshold reliability so that it may be so admitted."[507] He also relied on his powers to fashion a broad range of orders necessary to protect the fairness of the accused's trial, while respecting Federal Court rulings about what evidence could be disclosed. Although the transcripts were admitted in this case, it should be stressed that they were used for evidence that the accused sought to introduce. The same procedure might be more difficult to justify, either as a reliable and necessary exception to the hearsay rule, or as consistent with the accused's right to a fair trial, in a case in which the Crown sought to introduce transcripts of testimony that had been taken *ex parte* and *in camera* and had been edited to delete material that would adversely affect national security.

In any event, the defence argued a month later, after it had put its case to the jury, that the reading of the edited transcripts of witnesses A and B to the jury violated the rights to a fair trial and full answer and defence under ss.7 and 11(d) of the Charter and that the appropriate remedy was a stay of proceedings. Although he suggested that there was "some merit"[508] to these submissions, Justice Rutherford held that no Charter violations had been established. He noted that the Federal Court, in the editing process, had applied a standard more favourable to the accused than the innocence at stake exception with respect to the disclosure of the identity of police informers. Moreover, he stressed that A and B had only provided evidence relating to the context of the hostage- taking, as opposed to the hostage-taking itself, and that there was no evidence that went against the testimony of A or B or that challenged their credibility. (B's testimony related to the bombing procedures used by NATO, and A's related to NATO consideration that Serb forces might use hostage-taking as their only feasible tactic to stop the bombing.) Justice Rutherford stated:

> I have concluded that the limits as to A and B's evidence complained of by the defence do not go so far as to

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507 *R. v. Ribic* [2005] O.J. no 2628 at para 6. Justice Rutherford did refuse to qualify witness B as an expert, however, in part because of the inability to cross-examine witness B. ibid at para 16.

508 *R. v. Ribic* [2005] O.J. no. 2631 at para 26

> render the trial constitutionally unfair. The accused relies on A and B's evidence for his defence and I think it was made available in a process of sufficient fairness in all the circumstances….A and B do not speak to the subjective and personal aspects of Mr. Ribic's individual role and activity in the hostage-taking. I might be more reluctant and hesitant to find that evidence going directly to such core issues of an offence, such as the identity of the accused or the extent of his participation in the actus reus of the offence, could be similarly limited without more seriously impairing the fair trial rights of the accused.[509]

This decision affirms the availability of creative means to reconcile the state's interests in secrecy with the accused's rights to full answer and defence. Nevertheless, reliance on edited transcripts might not be acceptable if the evidence was more centrally related to the crime. In this case, the accused was charged with the discrete crime of hostage-taking, and the judge could be satisfied that the witnesses in the edited transcripts were not giving evidence crucial to guilt or innocence. The same approach might not be available if the accused was charged with a less discrete terrorism offence. In such cases, relevant witnesses might more often be in a position to speak to whether the accused committed the crime. In such circumstances, a trial judge might be less willing to accept edited transcripts as opposed to live testimony and direct cross-examination. Justice Rutherford's consideration of this issue also indicates how the two court structure may result in a subsequent duplication of effort as the trial judge determines the admissibility of information that complies with the Federal Court order. Although s.38.06(4) of the CEA seems to contemplate that the Federal Court judge could permit evidence to be introduced in the subsequent criminal trial in a manner that does not comply with the ordinary rules of admissibility, the trial judge might, as Rutherford J. did, also consider the admissibility of the evidence.

5. Trial within a Reasonable Time Issues

Given all the motions and delays in this case, it was hardly surprising that the accused claimed that his right to a trial in a reasonable time had been violated and that proceedings should be stayed. In a June, 2004, decision, Rutherford J. charged almost a year of pre-trial delay to the Crown for failing to make prompt disclosure of material in its possession that was

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509 ibid at para 36

relevant to the case. At the same time, he noted the difficulties of disclosure in cases that involve international investigations and intelligence:

> In large and complex cases, particularly one such as this in which a large number of governments, international agencies and foreign personnel have been involved, some centrally and some most peripherally, satisfactory compliance with the duty to disclose can be very difficult to define.[510]

Justice Rutherford next considered the delay from November, 2002, to April, 2004, when the Federal Court of Appeal eventually resolved the s.38 procedures with respect to the accused's application to have two military witnesses give testimony. Although noting that the Federal Court made "real efforts to deal with the issues put before them with dispatch", and that leaving such issues "in the hands of trial courts to deal with in the course of a criminal trial may not be sufficiently protective of national security interests", he commented that the s.38 scheme:

> …is cumbersome, and in this case was destructive of the trial process then in mid-course…It would be hoped that a mistrial and similar delay would not automatically result in every such case, as experience leads to even greater effectiveness in dealing with this legislative scheme. While such proceedings may be rare, one cannot help but wonder whether in this world of increasing terrorism, we may not, sadly, have cause to increase our experience with such issues and procedures substantially. The importance of Canada being able to do these things and to make them work without throwing in the towel and saying that we have no capacity to administer criminal justice in cases where national security issues are at stake, cannot be overstated.[511]

Justice Rutherford stressed that the 20 months spent in Federal Court proceedings were in relation to evidence "said to be of great value and potential benefit to the accused, by his counsel". This suggests that he may have been less tolerant of the delay if the s.38 proceedings had been initiated by the Crown and not the accused.

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510 *R. v. Ribic* [2004] O.J. no. 2525 at para 32
511 ibid at para 49

In the end, Justice Rutherford found that the accused's s.11(b) rights were not violated by the total five-year delay. He reasoned that "the national and international interests in bringing this case to trial are great…even where the issues involving sensitive information require collateral and time-consuming proceedings in the Federal Court…"[512] A year after this ruling, and after the Crown and defence evidence had gone before the jury, Rutherford J. dismissed another s.11(b) application. He recognized that "the six years between the charges and the trial in this case is beyond all normal guidelines and may be quite unprecedented". Nevertheless, he found that the balance of interest still favoured the conclusion that the right to a trial in a reasonable time had not been violated.[513] Although not amounting to a s.11(b) violation, the 6 years of delay in this case underlines the difficulties of prosecutions that involve intelligence and s.38 applications.

On June 12, 2005, the second jury convicted Mr. Ribic of two counts of hostage-taking by detaining but found him not guilty of hostage-taking by forcible seizing. He was subsequently sentenced to three years imprisonment.[514]

6. Summary

Some might argue that the eventual verdict in the Ribic case, combined with the 2001 amendments to s.38 to encourage earlier notification of the Attorney General of Canada, affirm the viability of Canada's two-court approach to managing the relation between evidence and intelligence in criminal trials. Nevertheless the Ribic case was hardly an unqualified success, and the innovative procedures it employed may be less acceptable in a terrorism prosecution and less acceptable in cases where the accused is not attempting to introduce evidence that implicated secret information. Similarly, much of the delay caused by litigation in the Federal Court was charged against the accused because the accused sought to call governmental witnesses. In other more typical cases such as *Kevork* and *Khawaja* where it is the Attorney General of Canada who seeks a non-disclosure order under s.38, the delay would likely be charged against the Crown. The innovative procedure of allowing edited transcripts (of witnesses' replies to questions posed by a security-cleared

512 ibid at para 50

513 *R. v. Ribic* [2005] O.J. No 2631. Only a few months of this further year were attributed to the Crown because of disclosure problems, with some of the delay being attributable to the accused because of its unsuccessful motion decided in December, 2004, for further disclosure.

514 *R. v. Ribic* [2005] O.J. No. 4261

lawyer employed by the federal government) may not be found to be satisfactory in cases where the evidence is given on crucial issues at trial and not, as in Ribic, on more general issues of context.

Finally, Justice Rutherford's warnings that the two-court procedure required by s.38 "is cumbersome, and in this case was destructive of the trial process then in mid-course…It would be hoped that a mistrial and similar delay would not automatically result in every such case" should provide pause. He indicated that the importance of Canada being able to bring terrorism cases to verdict even though they often will involve intelligence "cannot be overstated." [515] As will be seen in the next case study, the litigation and appeal of issues under s.38 has caused significant delays in the prosecution of Canada's first case under the *Anti-Terrorism Act*.

H) Use of Section 38 Before a Criminal Trial: A Case Study of R v. Khawaja

Although the Ribic case discussed above tested some of the provisions of s.38 that were added in the 2001 *Anti-Terrorism Act*, the first test of the new legislation in the context of a terrorism prosecution has come in the Khawaja case. The case was commenced by the laying of multiple charges against Mohammad Momin Khawaja in March, 2004. Khawaja brought a partially successful pre-trial Charter motion before the trial judge with respect to the constitutionality of the various terrorism offences of which he was charged. This motion was decided in October, 2006, and the Supreme Court subsequently denied leave to hear an appeal from that pre-trial ruling.[516] The parties next engaged in proceedings under s. 38 of the Canada Evidence Act both with respect to its consistency with the Charter and with respect to the disclosure of about one thousand, seven hundred pages out of almost ninety-nine thousand pages of material that had been disclosed to the accused.[517]

1. The Charter Challenge to Section 38

A constitutional challenge by the accused that s.38.11(2) infringed ss.2(b), 7 and 11(d) of the Charter was commenced in March, 2007, and

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515 *R. v. Ribic* [2004] O.J. no. 2525 at para 49
516 *R. v. Khawaja* (2006) 214 C.C.C.(3d) 399 (Ont. Sup.Ct.)
517 *Canada v. Khawja* 2007 FC 463 at para 10.

decided by Chief Justice Lutfy in late April, 2007. The impugned provision provides that the judge conducting the s.38 proceeding, and any judge hearing an appeal or review of an order under s.38.06, may give any person making representations and shall give the Attorney General of Canada "the opportunity to make representations *ex parte*." Chief Justice Lutfy interpreted the Supreme Court's judgment in *Charkaoui* to allow accommodations to be made for the national security context in terms of substitute measures for access to secret information while at the same time ensuring fundamental fairness.

> The right to know the case to be met is not absolute. Canadian statutes sometimes provide for *ex parte* or *in camera* hearings in which judges must decide important issues after hearing from only one side. *Charkaoui* at para 57. In order to satisfy s.7, either the person must be given the necessary information or a substantial substitute for that information must be found. *Charkaoui* at para 61.[518]

He then cited the ability of the judge to authorize partial disclosure under s.38.06(2); a "flexibility…not written into the version of section 38 which existed prior to the amendments enacted by the *Anti-Terrorism Act*"[519]; the ability of the accused to make *ex parte* representations; the ability of the accused to appeal Federal Court decisions under s.38.06; and the ability of the trial judge under s.38.14 to order appropriate remedies in light of any non-disclosure order to protect the accused's right to a fair trial, as all factors that supported the constitutionality of the *ex parte* provisions in s.38.11.

A final safeguard considered by Chief Justice Lutfy that supported the constitutionality of s.38 was the ability of the judge conducting a s.38 hearing to appoint an *amicus curaie* to challenge the government's *ex parte* representations.

> In my view, the Court's ability, on its own initiative or in response to a request from a party to the proceeding, to appoint an *amicus curiae* on a case-by-case basis as may be deemed necessary attenuates the respondent's concerns with the *ex parte* process. This safeguard, if and when it need be used in the discretion of the presiding

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518 Ibid at para 35.
519 Ibid at para 39.

> judge, further assures adherence to the principles of fundamental justice in the national security context.[520]

The details about how an *amicus curaie* would operate were left to the discretion of the presiding judge, and there was no apparent consideration of the alternative that was used in the Malik and Bagri case of disclosure to the accused's lawyer subject to undertakings not to share the information with the client.

The accused's appeal of this ruling was dismissed by the Federal Court of Appeal. Two of the judges concluded that s.38 proceedings did not even engage the right to liberty under s.7 of the Charter because they were preliminary to the criminal trial. Pelletier J.A. concluded for this majority that "the *ex parte* proceedings which subsection 38.11(2) authorizes do not raise issues of full answer and defence, and of knowing the case to be met. I am also inclined to the view that *ex parte* proceedings under subsection 38.11(2) do not engage Mr. Khawaja's liberty interest simply because those proceedings have no impact upon Mr. Khawaja's liberty interest, even though the product of those proceedings may do so."[521]

This approach stresses a divide between the s.38 process and the ultimate criminal trial. It runs the risk of leaving the difficult issues of trial fairness to a trial judge who will not have seen the information that is subject to a Federal Court non-disclosure order and who will have no ability to revise that order. Even Richard C.J. who concluded that s.38 proceedings affected the accused's liberty interests stressed the ability of the trial judge to protect the accused's fair trial rights when he stressed that "the judge presiding at a criminal proceeding has further powers under section 38.14 of the *Canada Evidence Act* to protect the right of an accused to a fair trial by making (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 proceedings; and (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited."[522] The emphasis that the Federal Court of Appeal accorded to the ability of the trial judge to orders remedies under s.38.14 to protect the accused's right to a fair trial reflects the division of labour between the two courts, but does not respond to the fact that the trial judge will have a limited range

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520 Ibid at para 59
521 *Canada v. Khawaja* 2007 FCA 388 at para 117
522 ibid at para 46-48

of blunt and often drastic remedies available to protect the fairness of the trial. The trial judge cannot re-visit a non-disclosure order made by the Federal Court and may have little choice but to stay proceedings, or stay proceedings in relation to a particular charge, if the trial judge is concerned that the non-disclosure of information adversely affects the accused's right to full answer and defence.

Even assuming that the accused's right to liberty was engaged by the s.38 process, all the judges concluded that the *ex parte* proceedings complied with the principles of fundamental justice or were capable of justification under s.1 of the Charter. They stressed the importance of protecting secret intelligence and the dangers of disclosure to the accused. Richard C.J. stressed that any concerns about the relevance of the material to the accused's defence could be addressed by the ability of the accused to make *ex parte* submissions to the Federal Court to inform him or her of "the theory of the defence".[523] Pelletier J.A. held that *ex parte* proceedings were justified in part by concerns about the mosaic effect discussed above. He stated:

> The difficulty in deciding whether information, apparently innocuous on its face, has value to a hostile observer goes a long way towards explaining Parliament's decision to authorize *ex parte* submissions by the Attorney General. In order to permit the Attorney General to address the Court candidly without worrying about disclosing information whose disclosure, it is alleged, would be injurious to Canada's legitimate interest in her national security, Parliament authorized the Court to receive *ex parte* evidence and submissions from the Attorney General.[524]

Pelletier J.A. concluded that without *ex parte* proceedings, the government would only be able to speak in generalities about the information that was the subject of s.38 proceeding. "The absence of Mr. Khawaja means that the Attorney General can speak freely and specifically of the risks of disclosure but more importantly, the applications judge can ask specific questions and expect specific answers. None of this is possible if the judge and counsel for the Attorney General are required to speak at a level of generality which precludes full disclosure and close questioning

523 Ibid at para 39.
524 Ibid at para 124.

by the judge hearing the application."[525] *Ex parte* proceedings that allow the judge, perhaps assisted with a security cleared special advocate, to see the secret material and question the government's lawyer may well be required, but the issue is whether such hearings would be best held before the Federal Court or the trial judge. A trial judge who conducted such hearings would have the option of revising the initial non-disclosure as well as ordering the remedies contemplated under s.38.14.

2. Two Rounds of Section 38 Hearings and an Appeal

Litigation was also conducted under s.38 with regard to what information should be disclosed to the accused. The Attorney General of Canada sought non- disclosure of five hundred and six documents from the RCMP, CSIS and Canadian Border Services Agency, including material that they had received in confidence from foreign agencies. These five hundred and six documents consisted of several thousands of pages, of which seventeen hundred pages had redacted information.[526] At the same time, they constituted only two percent of the almost ninety-nine thousand pages that had been disclosed to the accused, including two hundred and twenty-six cd's of intercepted conversations, thirteen surveillance tapes and various surveillance records. The accused made "clear that he is not seeking the disclosure of information that would reveal sensitive investigative techniques, the identity of any undercover operatives of law enforcement and/or intelligence agencies, or the targets of any other investigation."[527]

Justice Mosley released a judgment outlining the principles and procedures to decide the merits of the Attorney General's non-disclosure application under s.38 of the CEA. This judgment described the undisclosed material as consisting of about three hundred and fifty documents that dealt with internal administrative matters, two hundred and sixty documents that dealt with operational methods, and one hundred and thirty-eight documents about ongoing investigations into other targets. He noted that the accused did not even seek disclosure of those types of information.[528]

About one hundred and forty documents related to information received in confidence from foreign third parties. They included an intelligence

525 Ibid at para 139.
526 *Attorney General of Canada v. Khawaja* 2007 FC 490 at paras 5, 31
527 *Attorney General of Canada v. Khawaja* 2007 FC 490 at para 8.
528 Ibid at para 44

report that had not been disclosed in the British trials. The originating foreign intelligence agency refused to consent to the disclosure of this intelligence report. Justice Mosley reviewed the intelligence report and concluded that it was "not evidence that will be used against the accused, nor does it go to exculpate him or to undermine the Crown's case."[529] This suggests that undisclosed intelligence may not always have evidentiary value or be useful to the accused. The conclusion that the undisclosed intelligence does not exculpate the accused or undermine the Crown's case applies a more restrictive standard than would normally be applied under *Stinchcombe*.

Some of the undisclosed material included abstracts of the FBI's interview of a potential key witness in the Khawaja case. The FBI did not consent to disclosing this material because it contained material relating to ongoing operations. The FBI did, however, substitute an unclassified ninety-nine-page report of the information that they obtained from the witness. After reviewing both classified and unclassified versions, Justice Mosley concluded that the differences "are not, in my view, material."[530] He noted the accused's interest in knowing what consideration this witness received from American officials, but concluded that there was no information about any payments to the potential witness in any the disputed material.[531] In addition, at the court's direction, Canadian officials obtained a new consent from American officials to agree to the release of the plea agreement with the potential witness.[532] Thus, substitutions and consent to disclose were obtained with respect to documents that American officials would initially not consent to disclose. As suggested above, this supports a more flexible approach to the third party rule in which Canadian agencies will seek consent from foreign agencies to the disclosure of information.

The judgment was followed by a public and a private order specifying that some of the information need not be disclosed because it was not relevant to the criminal proceeding, but that 67 documents should be fully or partially disclosed.[533] The confidential summary could be of use to the trial judge if it provides the trial judge with a better sense of what material was not disclosed and its potential effect on the accused's right to a fair trial and full answer and defence. That said, the Federal Court of Appeal

529 ibid at para 50
530 ibid at para 55
531 ibid at para 177
532 ibid at para 57.
533 Public Order May 17, 2007 DES-2-06

subsequently determined that Justice Mosley had erred by including descriptive information in the schedule of undisclosed documents that would injure national security.[534]

Justice Mosley noted that some of the non-disclosures made by the Attorney General were not properly brought under s.38 because they involved claims of common law privileges or specified public interest immunities under s.37 of the CEA. Such issues would have to be decided by the trial judge.[535] Although the designated judge has a limited mandate under s.38, the division of labour raises concerns about the efficiency of the process. Decisions about disclosure decided by the Federal Court judge under s.38 of the CEA could potentially be re-litigated before the trial judge under s.37 and under the common law, if the Crown chose to reformulate its legal claims for non-disclosure.

Justice Mosley applied the three part test outlined by the Federal Court of Appeal in the *Ribic* case discussed above. Despite recognition that the first requirement under *Stinchcombe*, that the documents be relevant, was a low threshold, and that the prosecutor had conceded the relevance of the undisclosed material, Justice Mosley concluded that some of the material was simply not relevant to the case and need not be disclosed on that basis. He included "in the irrelevant category analytical reports of a general nature, some of which were prepared years before the events that gave rise to the charges against the respondent and are not specific to the context of those charges."[536] This decision, combined with similar ones made in *Ribic*, underlines that analytical and general intelligence may, in some cases, simply not be relevant information that has to be disclosed. It also raises concerns that prosecutors may be prepared to disclose irrelevant material that does not have to be disclosed under *Stinchcombe*.

In applying the second step of whether the disclosure of the information would harm national security or international relations, Justice Mosley was presented with information that stressed that Canada was a net importer of intelligence, including an estimate by a RCMP officer that Canada imports

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534 *Attorney General v. Khawaja* 2007 FCA 342 at para 12.

535 *Attorney General of Canada v. Khawaja* 2007 FC 490 at para 34

536 ibid at para 116. The accused's argument on appeal that the s.38 judge should accept relevance as determined by the prosecutor's application of *Stinchcombe* was rejected on the basis that the Federal Court judge had an independent obligation to determine whether the material was relevant. *Attorney General of Canada v. Khawja* 2007 FCA 342 at paras 23-25.

intelligence on a factor of 75:1.[537] As discussed above, he indicated that the Attorney General could not claim the protection of the third party rule if it had not requested the foreign agency to consent to disclosure, or if the information was received from CSIS as opposed to a foreign agency, or if the information was publicly available.[538] As discussed above, this approach demonstrates an appropriate recognition that caveats placed on the disclosure of information can be amended, and that the third party rule should not be applied in a rigid or mechanical fashion to thwart disclosure. He ordered some documents to be fully disclosed on the basis that their disclosure would not cause injury to international relations or national security.[539] Such a conclusion that the harm of disclosure has not been established raises concerns about the overclaiming of national security confidentiality, especially given the deferential standards that judges apply in determining whether the disclosure of information will cause harm to national security or international relations and the breadth of the harms encompassed by those terms.

With respect to the third stage, Justice Mosley noted that the accused had the onus of demonstrating that the public interest in disclosure outweighed the public interest in non-disclosure. He stated that while the accused's "fair trial rights are an important factor, I do not accept that they 'trump' national security or international relations in every case particularly where, as here, it is not at all clear that there would be any infringement of the right to make full answer and defence by non-disclosure of this information."[540] He noted that the accused had not revealed to the Court what his defences would be or made *ex parte* submissions to him. He reconciled the competing public interest in non disclosure and in disclosure, given the serious charges faced by the accused, by making use of summaries of information that, if disclosed, would harm national security or international relations.[541] In the end, he ordered that sixty-seven of the five hundred and six documents be disclosed or summarized for the accused.

The Federal Court of Appeal allowed the government's appeal, only to the extent that some of the information that Justice Mosley revealed in

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537 ibid at para 127
538 ibid at paras 146-150.
539 For another decision apparently holding that some of the information that the government claimed did not satisfy the injury test see *Canada v. Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766 at para 91.
540 Ibid at para 166
541 ibid at para 186

his schedule describing items that were not to be disclosed had the effect of disclosing information that should not have been disclosed. The Court of Appeal rendered its judgment two weeks after hearing the appeal, and noted that all efforts had been made to proceed expeditiously in the interests of justice.[542] Pelletier J.A. concurred in the result, but held that the more expeditious and proper method of proceeding would have been for the Attorney General of Canada to have returned to Justice Mosley for a clarification of his ruling.[543]

The Court of Appeal rejected the accused's non-constitutional appeal, holding that Justice Mosley was entitled to order the non-disclosure of information that did not have to be disclosed under *Stinchcombe* even though the prosecutors in the case had conceded that the material was relevant under *Stinchcombe*. The Court of Appeal also indicated that, as part of discharging its burden to establish the case for disclosure, the accused should have made *ex parte* submissions under s.38.11(2). Letourneau J. A. stated:

> Obviously, the right to full answer and defence when facing serious criminal charges is a highly relevant consideration in balancing the competing public interests. However, in order to make a meaningful review of the information sought to be disclosed, the judge must be either informed of the intended defence or given worthwhile information in this respect.[544]

In that case, the accused had apparently made a tactical decision not to make *ex parte* submissions that would explain the defence. Even in the absence of such a tactical decision, the accused would have difficulty arguing that information that he had not seen was critical to his defence.

The accused sought leave to appeal this decision to the Supreme Court of Canada, but it was denied.[545] This appeared to set the stage for the

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542 Letourneau J. A. stated: "I should say at the beginning that the reasons for judgment will be succinct. The respondent is in custody. He is awaiting his trial in the Ontario Superior Court of Justice on seven criminal charges relating to a conspiracy to commit terrorist acts in the United Kingdom. At the request of counsel for the respondent, the hearing of this appeal has been adjourned once. In the interest of justice, which includes those of the respondent, all efforts have been made to proceed expeditiously to render a decision." *Canada. v. Khawaja* 2007 FCA 342 at para 6.

543 *Canada. v. Khawaja* 2007 FCA 342 at paras 50-51.

544 ibid at para 35.

545 April 3, 2008 per McLachlin C.J.C., Fish and Rothstein JJ.

commencement of the trial. In early 2008, however, the Attorney General of Canada served a number of notices that it would be seeking non-disclosure orders in fresh s.38 proceedings in relation to 32 documents held by the RCMP. Issues of late disclosure frequently arise in long and complex trials, but the fresh round of s.38 litigation caused the trial judge, Justice Rutherford, to raise the question of whether it is possible to conduct trials involving issues of national security confidentiality; comments similar to those the same experienced trial judge had made in relation to the *Ribic* case study examined above.[546] Indeed, it is still possible that more s.38 issues may emerge at trial if, for example, the accused seeks to call witnesses from Canada, the United States or the United Kingdom who may have access to secret information.

In the second round of s.38 proceedings, the Federal Court appointed a security-cleared *amicus curiae* and two days of hearing were held in April, 2008 on the matter. On April 29, 2008, the Attorney General of Canada advised the court that it had authorized the disclosure of some of the disputed documents in unredacted form in part because a foreign agency had agreed to the release of the information that had been provided under caveat.[547] The next day, Justice Mosley issued a ruling holding that the remaining documents which dealt with administrative matters and communications with foreign agencies need not be disclosed. These documents did not satisfy the threshold test of relevance because they "would not be of assistance to the defence in the underlying criminal proceedings and does not meet the low threshold of relevance"[548] which was equated with the *Stinchcombe* standard of material that was not clearly irrelevant.[549]

Justice Mosley added that had he been required to consider the next stage of the three-part *Ribic* analysis, he "might have found that the Attorney General had not met his burden of establishing that disclosure of some of the redacted information would cause injury to the protected interests. As I have previously noted, there tends to be an excessive redaction of innocuous information in these cases."[550] This decision is noteworthy in confirming a persistent practice in this case of the Attorney General overestimating the demands of disclosure under

546 Ian MacLeod "Terror trial delay angers judge Provincial magistrate in Khawaja case frustrated by interference from Federal Court" The Ottawa Citizen Jan 25, 2008.
547 *Canada v.Khawaja* 2008 FC 560
548 Ibid at para 14
549 Ibid at paras 9-10.
550 Ibid at para 14.

Stinchcombe and bringing s.38 proceedings with respect to information that was subsequently determined did not need to be disclosed because the information was not relevant to the accused even under the broad *Stinchcombe* standards of disclosure. That said, it is also possible that the Federal Court is applying a more restrictive reading of *Stinchcombe* than those prosecuting the case are used to being applied in criminal courts. In any event, the decision also suggests that the Attorney General again claimed national security confidentiality in a case where the reviewing judge was not convinced that disclosure of the information would even cause harm to national security, despite the deference that judges give to the executive on this issue and the broad nature of possible harms to national security.

This decision also contains some interesting procedural innovations. It suggests that the Federal Court is prepared to use security cleared special counsel to provide adversarial argument on s.38 issues that arise in connection to a criminal trial and that this can be done in an expeditious manner. The security cleared counsel was appointed on April 3, 2008 and participated in hearings on the s.38 matter on April 15, and 18, 2008.[551] It is not known whether the security cleared lawyer had access to the voluminous disclosure in this case or what, if any, contact he had with the accused and his lawyer before or after examining the secret information that was the subject of the s.38 application. Justice Mosley remained seized of the matter pending the outcome of the criminal trial and indicated that the parties could seek "clarification" of his order at any time. In this case, Justice Mosley did not prepare a detailed schedule of the material subject to the non-disclosure order because he determined that it was largely clear what material was subject to the non-disclosure order and the material was not relevant in any event.[552] In more difficult cases, however, the accused could be at a disadvantage in seeking any clarification of the order having not seen the information. [553] It is not clear whether the security cleared lawyer would continue to play a role at trial.

Even if this decision is not appealed to the Federal Court of Appeal and if it represents the final round of s.38 litigation, the Attorney General and the accused could continue to fight similar battles before the trial judge. The Attorney General of Canada would be able to claim specified public interest

551 Ibid at para 6.
552 Ibid at para 17.
553 In this case, the accused's lawyers had actually seen seven of the documents because of inadvertent disclosure. This material was the subject of a continuing non-disclosure order. Ibid at para 16.

immunities under s.37 of the CEA and the common law before the trial judge. This could potentially allow issues about the protection of sources and witnesses and intelligence and police methods of investigation to be re-litigated in cases where the Federal Court had rejected a case for a non-disclosure order under s.38. Even if this was not done, it is almost certain that the accused will argue before the trial judge that a remedy, including a stay of proceedings, should be ordered under s.38.14 of the CEA in order to protect the right to a fair trial.[554] It is not clear what, if any, role that the security cleared lawyer appointed in *Khawaja* could play in such proceedings. This security cleared lawyer would be bound not to disclose secret information to the trial judge. Justice Mosley's provision of a confidential schedule of non-disclosed items may put the trial judge in a more informed position to decide whether a fair trial is still possible in light of the non-disclosure order, but some of the information included in this schedule will be deleted as a result of the Federal Court of Appeal's decision that its release would harm national security. Justice Mosley did not order a similar schedule in the second round of the s.38 litigation, but he remained seized of the matter and indicated that he could "clarify" the order on a motion by the parties. This opens up the possibility that an order could be amended in response to changed circumstances in the trial, but both the accused and trial judge would still not have access to the information subject to the non-disclosure order.

The prospects of continued and protracted disputes over the non-disclosure of information raises questions about the workability of the unique two-court system that Canada uses to resolve claims of national security confidentiality. Mr. Khawaja's alleged co-conspirators in Britain were tried before Khawaja's trial had even started in Canada. He was charged in 2004 and 1,492 days elapsed between the charge and the latest decision under s.38 of the Canada Evidence Act.[555] The British terrorism trial started in March, 2006 and was completed by the end of April, 2007 despite the fact that the British trial was long and involved nearly a month of jury deliberations.[556] The Canadian trial has not started as of the end of April, 2008. As will be seen in the next section, issues of national security confidentiality in Britain are decided by the trial judge.

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554 The trial judge will not have access to the documents that are not disclosed but Justice Mosley's order contemplates that he or she may have access to the private order and schedule that presumably provides more detail than the public order about what has been disclosed and not disclosed. *Attorney General of Canada v. Khawaja* Public Order May 17th, 2007 at para 7.

555 Ian MacLeod "Ruling Clears Way for Khawaja Trial" *Ottawa Citizen* May 2, 2008.

556 Doug Saunders "Long list of strange delays plagued court" Globe and Mail May 1, 2007 p.A-15.

I) Summary

Attitudes towards national security confidentiality have evolved considerably over the last twenty-five years. Until 1982, a federal Minister could assert an unreviewable claim to protect information on national security grounds. Courts were reluctant even to examine such material.[557] There was considerable concern that the disclosure of even innocuous information could harm national security, national defence and international relations through the mosaic effect because of the abilities of Cold War adversaries to put together the pieces of information.[558] In recent years, however, courts are more cautious about claims of the mosaic effect, and have indicated that Canada should seek permission from allies to allow the disclosure of information under the third party rule.[559] Concerns have been raised that the overclaiming of national security confidentiality causes delays and creates cynicism about legitimate secrets.[560] The third party rule remains a critical component of legitimate claims of national security confidentiality, especially given Canada's status as a net importer of intelligence, but it should not be invoked in a mechanical manner. It only applies to information that has been received in confidence from a third party and should not be stretched to apply to information that either was in the public domain or was independently possessed by Canadian agencies. Canadian agencies should also generally seek the consent of the originating agency to the use of information covered by the third party rule.

The 2006 RCMP/CSIS MOU contemplates the use of s.38 of the CEA as a means to protect intelligence passed from CSIS to the RCMP from disclosure in criminal and other proceedings. Nevertheless, s.38 imposes a time- consuming and awkward process for reconciling the need for disclosure with the need for secrecy. Section 38 applies to a very broad range of information, and thought should be given to narrowing the range of information covered by s.38 and to specifying with much more precision the harms that can be caused by the disclosure of secret information. The Senate Committee reviewing the ATA has recommended that the harms to international relations be enumerated more precisely.

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557 *Re Goguen* (1984) 10 C.C.C.(3d) 492 at 500 (Fed.C.A.).

558 *Henrie v. Canada* (1988) 53 D.L.R.(4th) 568 at 580, 578 affd 88 D.L.R.(4th) 575 (Fed.C.A.).

559 *Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766; *Canada. v. Khawaja* 2007 FC 490.

560 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 302, 304.

Such a harm-based approach could also be applied to the vague terms "national security" and "national defence".[561] In other words, s.38 could be amended to specify the harms of disclosure to vulnerable sources and informers, to ongoing operations and methods of operation and with respect to undertakings given to foreign partners. Providing specific examples of harms to national security and international relations could help discipline the process of claiming national security confidentiality and respond to the problem of overclaiming secrecy. In addition, it appears from both the *Ribic* and *Khawaja* prosecutions that prosecutors need to be reminded that they need not seek s.38 non-disclosure orders if the information is clearly irrelevant to the case and can be of no assistance to the accused.

The ability of the Attorney General to make *ex parte* representations to the s.38 judge is only partly compensated for by the ability of the accused to make *ex parte* representations. The value of the accused's *ex parte* representations will be attenuated by the fact that the accused has not seen the secret information that is the subject of the dispute. Several decisions by the Federal Court Trial Division [562] have opened up the possibility of appointing an *amicus curaie* who, unlike the accused's lawyer, will be able to see the information and provide adversarial challenge to the *ex parte* submissions made by the Attorney General for non-disclosure. The use of such security cleared lawyers has not yet been approved by the Federal Court of Appeal. [563] In any event, the appointment of such a person could delay the proceedings because that person will need to become familiar with the material that has already been disclosed to the accused and the possible uses that the accused might have for the undisclosed information. A special advocate or other security cleared lawyer will never be as familiar with the accused's case and the possible uses of the undisclosed information as the accused's

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561 The vagueness of the term national security is notorious. My colleague M.L. Friedland, for example, prefaced a study for the McDonald Commission with the following statement: "I start this study on the legal dimensions of national security with a confession: I do not know what national security means. But then, neither does the government." M.L. Friedland *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980) at 1.

562 *Canada v. Khawaja* 2007 FC 463; *Khadr v. The Attorney General of Canada* 2008 FC 46; *Canada v. Khawaja* 2007 F.C. 560.

563 In upholding the constitutionality of s.38, the Federal Court of Appeal made no mention of the ability of appoint security cleared lawyers to assist in such proceedings. *Khawaja v. Attorney General of Canada* 2007 FCA 388 at para 135. In his concurring judgment, Pelletier J.A. cast doubt on the ability of the court to order that secret information be disclosed to even a security-cleared lawyer when he concluded that under s.38.02 that "the Court could not order and the Attorney General could not be compelled to provide, disclosure of the Secret Information to Mr. Khawaja, or anyone appointed on his behalf in any capacity." Ibid at para 134.

own lawyers, but may play a valuable role in providing an adversarial challenge to the government's claim for secrecy.

Although the Federal Court has been given explicit flexibility under s.38.06 in reconciling competing interests in secrecy and disclosure, including editing and summarizing information, as was done in *Khawaja*, creating substitutes for classified information, such as the edited transcript used in *Ribic,* and making findings against the parties, the ultimate effect of these orders will depend on the judgment made by the criminal trial judge under s.38.14 about the effects of the non-disclosure order on the accused's right to a fair trial. There is a danger that the Federal Court judge may not be in the best position to know the value of information to the accused, given that the accused will not have access to the information and the trial often will not have started. In turn, there is a danger that the criminal trial judge may not be in the best position to know the effects of the non-disclosure of information on the fairness of the trial when he or she will not have seen the information. There is no specific mention, in either the Attorney General's powers under s.38.03 or the Federal Court judge's powers under s.38.06, of an ability to make an exception to a non-disclosure order that would allow a trial judge to see the undisclosed information. The blind spots of both the Federal Court judge and the trial judge run the risk of causing stays of proceedings that are not necessary in order to protect the fairness of the trial as well as trials that are not fully fair, and that could even result in wrongful convictions, because of the non-disclosure of information that the Federal Court and trial judges did not realize was necessary for the accused to make full answer and defence.

Although an innovative approach was devised between counsel in the Malik and Bagri prosecution in order to avoid Federal Court proceedings, the ultimate dispute resolution process when no agreement is reached involves separate proceedings in Federal Court. Section 38 proceedings will delay and fragment the criminal trial as seen in the *Kevork*, *Ribic* and *Khawaja* case studies discussed above. They will also not resolve all the disputes, as the Attorney General can still claim common law privileges and invoke s.37 of the CEA. In turn, the accused will seek a remedy for partial or non-disclosure under s.38.14 of the CEA when the matter returns to the trial judge. As will be seen, other democracies have not duplicated Canada's unique and cumbersome two-court process for resolving national security confidentiality claims.