Date: 20071206

Docket: DESA-2-07

Citation: 2007 FCA 388

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

MOHAMMAD MOMIN KHAWAJA

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 15 and 16, 2007.

Judgment delivered at Ottawa, Ontario, on December 6, 2007.

REASONS FOR JUDGMENT BY: RICHARD C.J.

CONCURRING REASONS BY: LÉTOURNEAU J.A.
CONCURRING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

RICHARD C.J.

[1] This proceeding arises from a challenge to the constitutional validity of subsection 38.11(2) of the *Canada Evidence Act* by the Appellant, Mohammad Momin Khawaja, and comes before us as the result of an appeal from a judgment of Chief Justice Lutfy of the Federal Court upholding the constitutional validity of that provision (*Canada (Attorney General) v. Khawaja*, 2007 FC 463 [2007] F.C.J. No. 648)

[2] Subsection 38.11(2) of the *Act* reads as follows:

38.11(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, the opportunity to make representations ex parte.	38.11(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la Loi sur la défense nationale — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)*d*).

[3] Subsection 38.11(2) allows the Attorney General to make *ex parte* representations as of right, and any other party to do the same with leave of the Court. *Ex parte* means a procedural step that is taken for the benefit of one party only and no notice is given to the adverse party (*Attorney General of Manitoba v. National Energy Board*, [1974] 2 F.C. 502 (T.D.). *Ex parte* proceedings do not have to be held *in camera* (*Ruby*, para. 26). It should be noted that the Appellant in this case is not challenging the provisions of subsection 38.11(1), which deal with *in camera* proceedings, simply subsection 38.11(2) and the *ex parte* process.

[4] Section 38 of the *Canada Evidence Act* establishes a scheme for dealing with information which, if disclosed, would cause injury to Canada's national security, or international relations or national defence. The latter is not relevant in this proceeding.

[5] The section 38 process is preliminary or ancillary to the main proceeding. Here the main proceeding is a criminal trial.

[6] The representations referred to in subsection 38.11(2) arise in the course of an application commenced as the result of a notice given to the Attorney General pursuant to subsection 38.01(2) which reads:

38.01 (2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.	38.01(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

[7] Where a participant in a proceeding is required or expects to disclose information that is potentially sensitive or injurious to national security, national defence, or international relations, this participant is required to give notice to the Attorney General of Canada as soon as possible pursuant to subsection 38.01(1) of the *Canada Evidence Act*. The Attorney General can either authorize the disclosure of the information pursuant to section 38.03 of the *Canada Evidence Act*, or else may

make an application to the Federal Court pursuant to subsection 38.04(1) of the *Canada Evidence Act* seeking an order prohibiting the disclosure of the information covered by the notice.

[8] The Federal Court then proceeds with the section 38 application pursuant to subsection 38.04(5) of the *Canada Evidence* Act, and determines the parties to the application. The Federal Court is then ultimately asked to make an order pursuant to section 38.06 of the *Canada Evidence Act* by applying the following three step process (*Canada (Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 2003 FCA 246 at paras. 17-21).

(a) Is the information in question relevant to the proceeding in which disclosure is sought? If no, the information should not be disclosed. If yes, then,

(b) Will disclosure of the information in question be injurious to national security, national defence, or international relations? If no, the information should be disclosed. If yes, then,

(c) Does the public interest in disclosure of the information in question outweigh the public interest in prohibiting disclosure of the information in question? If yes, then the information should be disclosed. If no, then the information should not be disclosed.

[9] The first two steps consist of an inquiry as to whether the information is relevant and, if so, whether its disclosure would be injurious to national security, international affairs or national defence, while the third step consists of a balancing of competing interests.

[10] In drafting section 38 of the Act, the legislator included a number of significant procedural protections which circumscribe the right of non-disclosure, including the following:

(i) Subsection 38.03 authorizes the Attorney General to disclose all or part of the information at any time;

(ii) Parliament has authorized the designated judge to consider the conditions of disclosure most likely to limit injury to national security in s. 38.06(2) of the *CEA*;
(iii) Sections 38.09 and 38.1 of the *CEA* provide, respectively, an appeal as of right to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada;
(iv) S. 38.14 of the *CEA* establishes additional procedural safeguards to protect the right of the accused to a fair trial, including allowing the trial judge to stay criminal charges;
(v) S. 38.11(2) of the *CEA* gives the party seeking disclosure of the secret information the right to request the opportunity to make representations in the absence of any other party, including the Attorney General.

[11] Subsection 38.11(2) is not an autonomous provision applied independently of the other sections in section 38 of the *Act*. This section refers to subsections 38.04(5) and 38.06(1) to (3). Although subsection 38.11(2) only refers to the *ex parte* procedure, this procedure is only necessary if non-disclosure of confidential information is requested by the Attorney General.

[12] As stated earlier, the main proceeding is a criminal trial in which the Appellant stands charged on an indictment alleging a total of seven counts under the *Criminal Code*, R.S., 1985, c. C-46, Part II.1 for terrorist-related offences. The Appellant is in custody awaiting trial in the Ontario Superior Court of Justice.

[13] The lead prosecutor in the criminal case delivered two notices to the Attorney General pursuant to subsection 38.01(1) of the *Canada Evidence Act*, in relation to the documents which the prosecution had disclosed or expected to disclose to the defence in the criminal case. The notices informed the Attorney General of the possibility of disclosure of sensitive or potentially injurious

information in connection with the criminal proceeding. In relation to each of the notices, the Attorney General concluded that some of the information could be disclosed while the balance could not, pursuant to section 38.03 of the *Canada Evidence Act*. Following this, the section 38 application was commenced at the Federal Court.

[14] The disclosure by the prosecutor in the main proceeding was made pursuant to the *Stinchcombe* rule (*R. v. Stinchcombe* [1991] 3 S.C.R. 326). This rule which is applicable to criminal proceedings provides that the Crown has a legal duty to disclose all relevant information to the defence. However, Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. Discretion must also be exercised with respect to the relevance of information. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case. (*Stinchcombe*, paras. 20-22)

[15] The Appellant is not challenging the *Stinchcombe* disclosure made by the lead prosecutor but the process by which the Attorney General of Canada can claim a national security privilege for certain documents or passages of certain documents proposed to be disclosed by the lead prosecutor.

[16] The information at issue in the application is in the possession of several agencies, including the RCMP, the Canada Border Services Agency and the Canadian Security Intelligence Service. It

is found in documents contained in a total of 23 binders filed with the Federal Court, in two sets, respectively, of 18 binders and 5 binders.

[17] The Attorney General filed several private affidavits explaining in general terms the need to protect the information at issue from disclosure. Several *ex parte* affidavits were also filed.

[18] Counsel for the Appellant received the private affidavits and redacted copies of all of the documents containing the information sought to be protected from disclosure or further disclosure on the section 38 application.

[19] The Appellant's counsel cross-examined each of the private affiants on their affidavits.

[20] The Appellant did not request the opportunity to make *ex parte* representations on behalf of the Appellant.

[21] In *Canada (Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 2003 FCA 246, this Court held that "[t]he application to a judge of the Trial Division is an application whereby the judge is required to make an initial determination, i.e., to determine whether the statutory prohibition of disclosure should be confirmed or not: see subsection 38.06(3) which says that if the judge does not authorize disclosure, he or she shall, by order, confirm the prohibition of disclosure. In proceedings under section 38.04, the judge is required to make his own decision as to whether the statutory ban ought to be lifted or not and issue an order accordingly" (*Ribic*, para. 15).

[22] The Appellant claims that his rights under section 7 and subsection 11(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) have been breached during the course of this proceeding by reason of the judge hearing the application having given the Attorney General of Canada the opportunity to make representations *ex parte* pursuant to subsection 38.11(2). These representations took the form of affidavits, written memoranda and oral submissions.

[23] The question to be determined is whether the *ex parte* procedure contained in subsection 38.11(2) of the *Canada Evidence Act* breaches the Appellant's rights under section 7 and/or subsection 11(d) of the *Charter* and, if so, whether this breach can be justified under section 1 of the *Charter*. These rights read as follows;

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
11. Any person charged with an offence has the right […] d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	11. Tout inculpé a le droit : […] d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

[24] At the outset, I note that subsection 38.11(2) applies to all proceedings and not only to criminal proceedings. Therefore, it may arise in circumstances where subsection 11(d) of the *Charter* is not engaged.

[25] I also note that in all cases the duty of counsel appearing on behalf of the Ministers in an *ex parte* proceeding is one of utmost good faith in the representations made to the judge. No relevant information may be withheld during these proceedings (*Charkaoui (Re)*, [2004] F.C.J. No. 2060, 2004 FCA 421). The principle of full and frank disclosure in *ex parte* proceedings is a fundamental principle of justice that has often been recognized by the Supreme Court (*Ruby v. Canada (Solicitor General*), [2002] 4 S.C.R. 3 at para. 27).

[26] The Appellant has described the issue in dispute as "whether or not subsection 38.11(2) of the *Canada Evidence Act* accords with the principles of fundamental justice and whether or not subsection 38.11(2) infringed Khawaja's right to a fair trial pursuant to subsection 11(d) of the *Charter*" (*Appellant's factum*, para. 27). Furthermore, "the real problem created by subsection 38.11(2), […] is the inability for the accused to be represented and for the interests of the accused to be fully advanced or advanced at all in the *ex parte* sessions" (*Appellant's factum*, para. 60).

[27] The Respondent's position is that "the outcome of the process under section 38 of the *CEA* has no direct or immediate impact on any liberty interest. The section 38 process is preliminary or ancillary to the main 'proceeding'" (*Respondent's factum*, para. 63). However, the Respondent also

acknowledges that "the Appellant's liberty interest is potentially engaged by the section 38 *CEA* process; however, it is crucial to examine the context" (*Respondent's factum*, para. 21).

[28] I propose to examine firstly the Appellant's claim that section 7 of the *Charter* is infringed. In his Reasons, Lutfy C.J. determined that, given the nature of the criminal charges against the Appellant, "the respondent's liberty interests as protected under section 7 are engaged" (*Reasons for Judgement*, para. 29). For the purpose of this appeal, I am prepared to proceed on the basis that the Appellant's liberty interest is engaged by section 7 of the *Charter*.

[29] However, for the reasons given by the Supreme Court of Canada in *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711 and *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, 2002 SCC 75, [2002] 4 S.C.R. 3 as well as in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, [2002] 1 S.C.R. 3, I conclude that section 7 of the *Charter* had not been infringed in these circumstances. The Supreme Court of Canada has held that "[t]he scope of principles of fundamental justice will vary with the context and the interests at stake" (*Chiarelli*, para. 45). That Court has also held that fundamental justice does not compel full disclosure of government national security information and that *ex parte* features of legislation do not fall below the level of fairness required in this section of the *Charter* (*Ruby*, para. 21).

[30] In *Ruby*, which cites *Chiarelli* extensively, Justice Arbour explained that "[t]he principles of fundamental justice are informed in part by the rules of natural justice and the concept of procedural

fairness. What is fair in a particular case will depend on the context of the case: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743 (*Ruby*, para. 39)). Justice Arbour also cites La Forest J. for the majority in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, and quoted with approval in *Chiarelli*, *supra*, at para. 45;

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness (see, e.g., the comments to this effect of Wilson J. in Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at pp. 212-13). It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

Justice Arbour continues to say that;

> In assessing whether a procedure accords with the principles of fundamental justice, it may be necessary to balance the competing interests of the state and individual: Chiarelli, supra, at p. 744, citing Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 539. It is also necessary to consider the statutory framework within which natural justice is to operate. The statutory scheme may necessarily imply a limit on disclosure. "The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve": W. Wade and C. Forsyth, Administrative Law (8th ed. 2000), at p. 509. See also Baker, supra, at para. 24 (*Ruby*, para. 39).

[31] The law is clear in saying that the specific circumstances of each situation could justify the application of different procedural protections. In some contexts, procedural protections will be constitutionally mandated, but not in others. I believe that in the situation before me, the features of subsection 38.11(2) do not fall below the level of fairness required in section 7 of the *Charter*.

[32] I now turn to the claim of *Charter* breach under subsection 11(d) of the *Charter* i.e. the right to a fair trial.

[33] It is not inappropriate at this stage to recall that the Supreme Court of Canada has already recognized that the protection of Canada's national security and related intelligence sources constitutes a pressing and substantial objective (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9, para. 68).

[34] The *ex parte* provision applies at each of the three steps of the judge's inquiry under section 38 of the *Canada Evidence Act*.

[35] I propose to examine the legislated provisions for *in camera* and *ex parte* proceedings at each of the three steps that *Ribic* has mandated.

[36] The first is the issue of relevance. At this first step, the role of the judge, as described in *Ribic*, is:

> The first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the Stinchcombe rule, that is to say in the case at bar information, whether inculpatory or exculpatory, that may reasonably be useful to the defence: R. v. Chaplin, [1995] 1 S.C.R. 727, at page 740. This is undoubtedly a low threshold. This step remains a necessary one because, if the information is not relevant, there is no need to go further and engage scarce judicial resources. This step will generally involve an inspection or examination of the information for that purpose. The onus is on the party seeking disclosure to establish that the information is in all likelihood relevant evidence. [para. 17]

[37] It should be noted that the *Stinchcombe* obligation to disclose is imposed by law and not by the *Canada Evidence Act*. The designated judge is examining the relevance of documents already proposed to be produced by the Crown prosecutor. The judge is dealing only with those documents and is not called upon to determine whether other documents exist or should be produced.

[38] As stated in *Ribic*, the test for relevance is a low threshold (*Ribic*, para. 16).

[39] The presence of counsel for the accused at this stage would not assist counsel for the accused person in obtaining the disclosure of additional documents. Any concerns that counsel may have that the test of relevance could be made without the judge being aware of the theory of the defence can be addressed by counsel of the accused persons requesting an *ex parte* hearing with the judge.

[40] The next step for the judge to follow, as described in *Ribic*, is:

> Where the judge is satisfied that the information is relevant, the next step pursuant to section 38.06 is to determine whether the disclosure of the information would be injurious to international relations, national defence or national security. This second step will also involve, from that perspective, an examination or inspection of the information at issue. 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. Tehman, [2001] H.L.J. No. 47, [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: 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 decision, 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 (para. 18).
>
> 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 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" (para. 19).
>
> An authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure. The burden of convincing the judge of the existence of such probable injury is on the party opposing disclosure on that basis (para. 20).

[41] This second step involves an assessment as to whether disclosure of the particular information would cause the alleged injury. At this stage, it is incumbent on the Attorney General of Canada to show that the assessment of fear of disclosure is reasonable and the burden of convincing the judge of the existence of probable injury is on the Attorney General of Canada (*Ribic*, paras. 18-20). The presence and participation of counsel for the accused at such stage of the inquiry would be at the best marginal, and particularly so, where counsel could not obtain access to the documents for which privilege is claimed.

[42] An authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure (*Ribic*, para. 20).

[43] The final step for the judge to follow in the three-part *Ribic* test is:

> Upon a finding that disclosure of the sensitive information would result in injury, the judge then moves to the final state of the inquiry which consists in determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The party seeking disclosure of the information bears the burden of proving that the public interest scale is tipped in its favour (para. 21).

[44] This balance of competing interests is the critical feature of the proceeding. Even where disclosure would be injurious, the information may still be released if the judge determines that public interest in disclosure exceeds the injury to national security.

[45] In summary, the process to withhold sensitive information set out in section 38 of the *Canada Evidence Act* involves a balancing test in which a judge weighs the public interest in non-disclosure and is empowered to authorize forms and conditions of disclosure to reflect this balancing.

[46] As I noted at the outset, none of the protected and excluded information can be used at trial against the accused. Additionally, 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.

[47] It is useful here to evoke the words used by Chief Justice McLaughlin in *Charkaoui*; "Parliament is not required to use the perfect, or least restrictive, alternative to achieve its objective: *R. v. Chaulk*, [1990] 3 S.C.R. 1303" (*Charkaoui*, para. 85).

[48] I conclude that the impugned provision of the *CEA* does not infringe the Appellant's right to a fair trail and, if it does, it does so minimally and can be justified under section 1 of the *Charter*.

[49] The *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103) is used to determine whether a violation of a *Charter* right can be justified under section 1 of the *Charter*. This test requires that the legislation limiting a right must have a pressing and substantial objective and proportional means. The requirement of proportionality calls for: (a) means rationally connected to the objective; (b) the minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective.

[50] As I noted earlier, the Supreme Court of Canada that the protection of Canada's national security and related intelligence sources constitutes a pressing and substantial objective (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9, para. 68). I am of the view that the non disclosure of evidence or submissions at hearings under subsection 38.11(2) of the *Canada Evidence Act* is rationally connected to this objective.

[51] I believe that the minimal impairment to subsection 11(d) *Charter* rights has already been demonstrated above in the analysis on the specific process of subsection 38.11(2). The sensitive balance struck in the *Canada Evidence Act* between the need to protect confidential information and the rights of accused persons was already noted by Chief Justice McLaughlin in *Charkaoui* as she explains the processes within section 38;

> **77** The SIRC process is not the only example of the Canadian legal system striking a better balance between the protection of sensitive information and the procedural rights of individuals. A current example is found in the Canada Evidence Act, R.S.C. 1985, c. C-5 ("CEA"), which permits the government to object to the disclosure of information on grounds of public interest, in proceedings to which the Act applies: ss. 37 to 39. Under the recent amendments to the CEA set out in the Anti-terrorism Act, S.C. 2001, c. 41, a participant in a proceeding who is required to disclose or expects to disclose potentially injurious or sensitive information, or who believes that such information might be disclosed, must notify the Attorney General about the potential disclosure, and the Attorney General may then apply to the Federal Court for an order prohibiting the disclosure of the information: ss. 38.01, 38.02, 38.04. The judge enjoys considerable discretion in deciding whether the information should be disclosed. If the judge concludes that disclosure of the information would be injurious to international relations, national defence or national security, but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may order the disclosure of all or part of the information, on such conditions as he or she sees fit. No similar residual discretion exists under the IRPA, which requires judges not to disclose information the disclosure of which would be injurious to national security or to the safety of any person. Moreover, the CEA makes no provision for the use of information that has not been disclosed. **While the CEA does not address the same problems as the IRPA**, and hence is of limited assistance here, **it illustrates Parliament's concern under other legislation for striking a sensitive balance between the need for protection of confidential information and the rights of the individual**. (the emphasis is ours)

[52] The third criteria of the *Oakes* test, that which addresses the issue of proportionality between the effects of the infringement and the importance of the objective, is shown to be satisfied in the third step of the *Ribic* test. In order for the Attorney General to benefit from the right to non-disclosure of documents for reasons of national security, the judge has to be *satisfied* that the public

interest in disclosure does not outweigh the Attorney General's right to evoke privilege. In this way, the proportionality between the effects of subsection 38.11(2) which are responsible for limiting the *Charter* right, and the objective which has been identified as of "sufficient importance" remains fair. As stated in *Ribic*, "Parliament has required the designated judge to balance competing interests, not simply to protect the important and legitimate interests of the state" (*Canada (Attorney General) v. Ribic* (2001), 22 F.T.R. 310, 2002 FCT 839, para. 22).

[53] In order to achieve the valid objective of protecting national security, the *Canada Evidence Act* permits *ex parte* proceedings. In my view, the challenged provision when examined in context strikes a balance between the need for protection of sensitive national security information and the rights of the individual.

[54] For the reasons set out above, I would dismiss the appeal.

"J. Richard"

Chief Justice

LÉTOURNEAU J.A. (Concurring)

[55] I have had the benefit of reading the reasons prepared by the Chief Justice and by my colleague Justice Pelletier. They both come to the same conclusion but for different reasons which are in fact complementary.

[56] Justice Pelletier is of the view that the impugned process in paragraph 38.11(2) of the *Canada Evidence Act* (Act) does not affect the appellant's liberty although the decisions resulting from that process may affect that liberty: see paragraph 50 of his reasons for judgment. I agree.

[57] Indeed, section 38 of the Act puts in place a mechanism to enforce the public interest immunity that it confers. The focus of this section is to ensure that documents prejudicial to national security are not publicly released unless the designated judge finds otherwise in the public interest. Of course, as in a claim of solicitor-client privilege, a claimant is denied access to the documents until a judicial determination is made as to the nature of the documents. Otherwise, the very purpose of the privilege would be defeated. The same is true for documents which should not be made public because of the resulting prejudice to national security.

[58] It is in this context that paragraphs 38.11(1) and (2) of the Act provide for an *in camera* and an *ex parte* hearing. Both paragraphs refer to a process designed to ensure protection of a public interest immunity claim that the appellant, in other respects, recognizes is legitimate and valid.

[59] I fail to see how that process engages or affects the liberty of the appellant. It should be recalled that the documents found at that process to be prejudicial to national security will not be used in the appellant's criminal trial. As Justice Pelletier pointed out, it is only if documents relevant to the appellant's defence in the criminal proceedings are withheld from disclosure that the appellant's liberty rights or interests can be said to be affected. However, this does not result from the *ex parte* process in place, but from the decision on either relevancy or disclosure. This decision with respect to relevancy or the balancing of interests is reviewable and can be corrected if erroneous.

[60] I share the concern of my colleague Justice Pelletier that, in the absence of an *ex parte* process of the kind found in paragraph 38.11(2), public interest immunity claims could be seriously compromised or undermined.

[61] Were the appellant authorized to be present at the hearing where the Government seeks enforcement of its public interest immunity claim, counsel for the Government would be unduly limited and restrained in his submissions and assistance to the designated judge. As a result, he would run the risk of being unable to convince the designated judge of the existence of a validly claimed immunity and of the need to protect it in the public interest.

[62] To sum up, the *ex parte* process in paragraph 38.11(2) of the Act is designed to prevent a breach of confidentiality of the documents subject to public interest immunity. It is a necessary, reasonable, equitable and practical process to ensure the protection of legitimate privileges and

immunities. In my respectful view, such process in paragraph 38.11(2), which applies to public interest immunity claims made in the context of civil, administrative or penal proceedings, does not violate section 7 or subsection 11(*d*) of the *Canadian Charter of rights and freedoms* (Charter).

[63] In his reasons, the Chief Justice was prepared to assume, as Chief Justice Lutfy of the Federal Court did, that the appellant's liberty interest was engaged by section 7 of the Charter. If I am wrong on my approach to section 7 and, therefore, the appellant's liberty is engaged, I agree with him, for the reasons that he gave, that section 7 of the Charter has not been infringed in the circumstances.

[64] I also share his views on his analysis of subsection 11(*d*) and his application of section 1 of the Charter.

[65] I would dispose of the appeal as my colleagues propose.

"Gilles Létourneau"

J.A.

PELLETIER J.A. (Concurring)

INTRODUCTION

[66] This is an appeal from the decision of Chief Justice Lutfy of the Federal Court (the applications judge) dismissing the appellant's application to have subsection 38.11(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the Act) declared unconstitutional on the ground that it infringes his rights under subsection 11(*d*) as well as section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*): see *Canada (Attorney General) v. Khawaja*, 2007 FC 463, [2007] F.C.J. No. 648. The rights said to be infringed are the right to freedom of the press (specifically the open court principle), the right to life, liberty and security of the person (specifically, the right to make full answer and defence, the right to disclosure, and the right to know the case to be met) and the right to a public trial. Subsection 38.11(2) is alleged to infringe upon those rights by permitting the judge hearing the Attorney General of Canada's (the Attorney General) application for a prohibition order to receive evidence and to hear representations from the Attorney General in the absence of the appellant, Mr. Khawaja.

[67] The applications judge concluded that subsection 38.11(2) did not in fact infringe Mr. Khawaja's constitutional rights because the subsection itself, as well as the overall scheme of section 38, provide a substantial substitute for the rights curtailed by the operation of subsection 38.11(2).

[68] I would dismiss the appeal for the reasons which follow.

THE DECISION UNDER APPEAL

[69] The subject of this litigation, subsection 38.11(2) of the Act, provides as follows:

38.11(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, the opportunity to make representations *ex parte*.	38.11(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)d).

[70] The *ex parte* representations referred to in subsection 38.11(2) occur in the course of an application commenced as a result of the notice given to the Attorney General pursuant to section 38.01:

…	[…]
38.01(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.	38.01(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

[71] In these reasons, the information which is the subject of the notice given under section 38.01 will be referred to as the Secret Information.

[72] After disposing of a number of preliminary issues, the applications judge began his analysis by noting that the parties conceded that Mr. Khawaja's liberty interest was engaged by the proceedings under the Act, given that they are an integral part of the process of disposing of the criminal charges pending against him. Mr. Khawaja is charged under criminal legislation relating to terrorism with six counts arising from a plan to carry out a terrorist attack in the United Kingdom.

[73] The applications judge noted that Mr. Khawaja's right to fundamental justice under section 7 overlapped with his right under subsection 11(*d*) to a fair and public trial so that it was appropriate to deal with the two together, as a finding of infringement in one case would necessarily be accompanied by a finding of infringement in the other.

[74] The applications judge then identified the basic question before him as whether the process in question was "fundamentally unfair" to Mr. Khawaja. He noted that the context in which the question arises may affect the scope of the duty of fairness but that this does not allow the Court to engage in a balancing of the interests of the accused against the requirements of national security in the course of its section 7 analysis.

[75] The applications judge noted that the right to know the case to be met is not absolute in that courts often proceed *ex parte* as well as *in camera*. Similarly, the right to disclosure may be affected

when the information to be disclosed raises issues of national security. In either case, where it is impossible to meet the requirement of fundamental justice in the usual way, adequate substitutes for the abridged procedural protections must be found. Relying on the decision of the Supreme Court in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paragraphs 57 to 59 (*Charkaoui*), the applications judge identified subsequent disclosure, judicial review and the right of appeal as adequate substitutes.

[76] Additional adequate substitutes include the fact that the Attorney General may decide to disclose parts of the information. Further, the judge hearing the section 38 application has a discretion to release the information in a form most likely to limit injury to national security. In addition, the judge presiding over the criminal trial also has a discretion to take all necessary measures to ensure fairness to the accused, including ordering a stay of proceedings. The applications judge went on to note that subsection 38.11(2) permits the Court to hear *ex parte* representations from the person seeking disclosure of the Secret Information. Finally, the applications judge noted that the three step analysis of the appropriateness of disclosure elaborated in this Court's decision in *Canada (Attorney General) v. Ribic (F.C.A.)*, 2003 FCA 246, [2005] 1 F.C.R. 33 (*Ribic*), is itself a procedural safeguard in that it establishes a balanced and nuanced approach to assessing the right to disclosure.

[77] Having identified these procedural safeguards, the applications judge accorded particular importance to a further safeguard, specifically, the Court's discretion to appoint an *amicus curiae* "to read, hear, challenge and respond to the *ex parte* representations made on behalf of the

government.": see paragraph 50 of the applications judge's reasons. In his 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.": see paragraph 57 of the applications judge's reasons.

[78] In response to the submission made by counsel for Mr. Khawaja that the appointment of an *amicus curiae* was not an adequate procedural safeguard because the authority to do so was not explicitly written into the legislation, the applications judge pointed to the experience of the Security Intelligence Review Committee which has retained counsel to act on its behalf without any specific authorization to do so other than the power to "engage staff as it requires". The applications judge pointed as well to the jurisprudence of the Federal Court itself, specifically *Harkat (Re) (F.C.)*, 2004 FC 1717, [2005] 2 F.C.R. 416, in which Justice Dawson held, at paragraph 20 of her reasons, that "... a power may be conferred by implication to the extent that the existence and exercise of such a power is necessary for the Court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision." In the applications judge's view, the absence of an explicit power to appoint an *amicus curiae* was not a reason to exclude such a power as a means of ensuring fairness to the person seeking disclosure.

[79] In the result, the applications judge found that "… section 38, including subsection 38.11(2), achieves a nuanced approach that respects the interest of the state to maintain the secrecy of sensitive information while affording mechanisms which respect the rights of the accused, including the right to full answer and defence, the right to disclosure and the right to a fair trial in the

underlying criminal proceeding. I find that subsection 38.11(2) accords with sections 7 and 11(*d*) of the *Charter*.": see paragraph 59 of his reasons.

[80] On the issue of the possible violation of the open court principle, the applications judge found that the Supreme Court of Canada had confirmed the validity of *in camera ex parte* proceedings in dealing with protected information in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 (*Ruby*). As counsel for Mr. Khawaja had not succeeded in distinguishing *Ruby*, it was the applications judge's view that the latter settled the issue. Accordingly, the applications judge dismissed Mr. Khawaja's application.

MR. KHAWAJA'S SUBMISSIONS

[81] In his Memorandum of Fact and Law (his Memorandum), Mr. Khawaja identified and addressed the following issues:

A. Did the applications judge fail to consider whether or not subsection 38.11(2) operates in accordance with the specific principles of fundamental justice engaged in the case at bar?

B. Did the applications judge err by collapsing the section 1 inquiry into section 7?

C. Did the applications judge err in holding that section 38 of the *Canada Evidence Act* contains substantial substitutes and procedural protections for Khawaja's sections 7 and 11(*d*) rights?

D. Did the applications judge err in holding that section 38 of the *Canada Evidence Act* does not create a process that is fundamentally unfair?

E. Is subsection 38.11(2) justified pursuant to section 1 of the *Charter*?

A. Did the applications judge fail to consider whether or not subsection 38.11(2) operates in accordance with the specific principles of fundamental justice engaged in the case at bar?

[82] With respect to the first of these issues, Mr. Khawaja noted that in *Charkaoui*, the Supreme Court identified the five specific principles of fundamental justice which are essential components of the right to a fair trial, specifically:

- the right to a hearing;
- a hearing before an independent an impartial magistrate;
- a decision to be made by the magistrate on the basis of the facts and the law;
- the right to know the case put against one;
- the right to answer that case.

[83] Mr. Khawaja concedes that the first two of these components are not in issue in these proceedings. He did not concede that the third was not in issue but he did not pursue it in his Memorandum. Mr. Khawaja argued that he was entitled to have the applications judge address the final two components of a fair trial, the right to know the case to meet and the right to make full answer and defence, in his analysis of the validity of subsection 38.11(2). Accordingly, he says, the applications judge erred in limiting his analysis to the global issue of fairness, as opposed to addressing the merits of each individual component of a fair trial.

B. Did the applications judge err by collapsing the section 1 inquiry into section 7?

[84] Mr. Khawaja raises this issue in spite of the application judge's explicit reference to the Supreme Court's *dictum* in *Charkaoui* to the effect that national security concerns cannot be used to limit the extent of the rights guaranteed by section 7. According to Mr. Khawaja, if there is to be a

balancing of interests as between his section 7 rights and the demands of national security, it must occur in the context of the section 1 analysis and not by a restrictive definition of the specific rights themselves. Mr. Khawaja points to the following paragraph from the applications judge's reasons as an indication of the balancing which he says the latter undertook in the course of his section 7 analysis:

> An analysis of national security considerations is inherently engaged in Section 38 proceedings. The sensitive information in issue arguably necessitates *ex parte* review. However, section 38 provides a number of substantial substitutes to accommodate the competing interests of fundamental justice. These protections are set out below.

[85] This passage was then followed by a lengthy analysis of the "substantial substitutes" and "procedural protections" described above. According to Mr. Khawaja, this is a clear indication that the applications judge was impermissibly balancing interests while assessing the fairness of the procedure under section 38.

C. Did the applications judge err in holding that section 38 of the *Canada Evidence Act* contains substantial substitutes and procedural protections for Khawaja's sections 7 and 11(*d*) rights?

[86] Mr. Khawaja's third issue involves an examination of the "substantial substitutes" and "procedural safeguards" identified by the applications judge. In Mr. Khawaja's view, substantial substitutes must address his right to know the case to meet and his right to make full answer and defence to that case in order to be constitutionally significant.

[87] The fact that the Attorney General can disclose the Secret Information at any time does not address the issue of procedural safeguards at all. The Attorney General alone decides whether or not

to disclose the information and to what extent, without being required to consider the interests of persons seeking disclosure.

[88] Similarly, the fact that the Federal Court judge has the discretion to order the release of all, or some, or a summary of the Secret Information does not address the fairness of the process by which the judge decides whether to do so or not. It is the process itself which Mr. Khawaja challenges.

[89] Mr. Khawaja further contends that the right of appeal to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada, does not address the case to meet principle. The level of disclosure on the appeal is the same as it was in the Federal Court. Given that it is the fairness of the procedure in the Federal Court which is being challenged, a right of appeal which involves the same procedure does nothing to address the lack of fairness which is the subject of the proceedings. In both the application and the appeal, the interested person does not know the content of the Secret Information and does not know the content of the *ex parte* representations made by the Attorney General.

[90] According to Mr. Khawaja, the right of the trial judge to address any unfairness by an appropriate order, up to and including a stay of proceedings, is not a substantial substitute. It is simply the recognition that the Federal Court has no jurisdiction over the criminal proceedings themselves. The constitutional problem does not arise once the Federal Court decides that the preponderance of the public interest favours non-disclosure. It arises in the process by which that

determination is made. The provision of a remedy once that conclusion has been reached does not vitiate the unfairness of the process.

[91] Mr. Khawaja says that the right to make *ex parte* representations of his own does not in any way address the unfairness which results from the Attorney General's ability to make representations in his absence.

[92] According to Mr. Khawaja, the *Ribic* test does not address the lack of fairness inherent in *ex parte* representations. The third leg of that test requires the interested person to demonstrate that the public interest in disclosure exceeds the public interest in non-disclosure, a test which it is practically impossible to meet when the person has none of the Secret Information and no opportunity to respond to the Crown's *ex parte* representations.

[93] Mr. Khawaja's position as to the appointment of an *amicus curiae* is that it is but a mere possibility, since the legislation does not specifically give the Court that power. Furthermore, even if the Court can appoint an *amicus curiae*, that person is to assist the Court, not the accused (in the case of a criminal proceeding). Consequently, the *amicus curiae* is not in a position to receive confidential information and instructions from the accused, with a view to advancing the latter's interests. More to the point, Mr. Khawaja doubts that the Court can deny the Crown its right to proceed *ex parte* by means of the appointment of an *amicus curiae* when the right to proceed *ex parte* is guaranteed in the Act.

D. Did the applications judge err in holding that section 38 of the *Canada Evidence Act* does not create a process that is fundamentally unfair?

[94] Mr. Khawaja's fourth issue puts into question the applications judge's conclusion that section 38 does not create a process that is fundamentally unfair. In brief, Mr. Khawaja argues that the applications judge erred in not addressing the specific components of the right to a fair process. Had he done so, the argument goes, he would not have come to the conclusion to which he came.

[95] In particular, Mr. Khawaja says that the applications judge cannot rely on *dicta* in *Charkaoui* to the effect that the process under section 38 is fairer than the process which was provided in the case of security certificates. Mr. Khawaja argues that the comments made by the Supreme Court were made in the context of the disclosure which *results* from a section 38 application, not the disclosure available to the interested person *in the course of* the section 38 application. Mr. Khawaja goes on to note that the problems inherent in the *ex parte* proceedings are made all the more acute by the fact that the judge may receive, in the course of those proceedings, evidence which would not otherwise be legally admissible. The interested person has no opportunity in those circumstances to show the unreliability of that evidence.

[96] Mr. Khawaja's position on this branch of the case is best summarized by the following passage, taken from paragraph 74 of his Memorandum:

> The statement of the law in *Charkaoui* could not be more clear and applies to the case at bar: where the liberty of an accused person is at stake, as in the criminal context, the accused must know the case he has to meet or else a substantial substitute has to be provided or else section 7 and 11(d) are violated. As the *ex parte* proceedings deprive Khawaja of knowing his case to meet, and there is no substantial substitute provided under the *Canada Evidence Act*, it is submitted that the section 38 process is fundamentally unfair, and Khawaja's section 7 and 11(*d*) rights are violated.

E. Is subsection 38.11(2) justified pursuant to section 1 of the *Charter*?

[97] The last of the five issues identified by Mr. Khawaja is whether the breach of his rights under sections 7 and 11 is justified under section 1 of the *Charter*. This analysis goes beyond the applications judge's reasons since he concluded that there was no breach and therefore no need to undertake the analysis required by section 1.

[98] Mr. Khawaja concedes that the protection of information whose disclosure could reasonably be expected to be injurious to Canada's national security is a pressing and substantial objective, and that subsection 38.11(2) is rationally connected to this objective. The issue is whether the procedure mandated by subsection 38.11(2) minimally impairs his constitutional rights.

[99] To demonstrate that *ex parte* proceedings do not minimally impair his rights under sections 7 and 11, Mr. Khawaja suggests a number of less intrusive measures. He says that *ex parte* proceedings could be deleted in their entirety. The proceedings could be held *in camera* and the record of proceedings sealed. Counsel could provide an undertaking not to further disclose the materials, not even to his client. Alternatively, the evidence and the submissions could be disclosed to independent counsel with the appropriate security clearance who could represent the interests of the accused in the course of the hearings before the Federal Court.

[100] Finally, Mr. Khawaja argues that the deleterious effects of the section 38 procedure far outweigh its purported benefits due to the increased risk of a wrongful conviction. His position is

that national security concerns are insufficient to justify any abridgement of constitutionally protected rights.

STATEMENT OF ISSUES

[101] This appeal raises the following issues:

1- Is Mr. Khawaja's liberty interest engaged by proceedings under section 38?

2- Are *ex parte* proceedings a denial of fundamental justice?

3- If not, are *ex parte* proceedings in a section 38 application a denial of fundamental justice?

4- If they are not, are they a denial of Mr. Khawaja's rights to a fair and public trial under subsection 11(*d*) of the *Charter*?

ANALYSIS:

Issue No. 1 – How is Mr. Khawaja's liberty interest engaged by proceedings under section 38?

[102] A few terms need to be defined for the sake of clarity. I will use the expression Section 38 proceedings to refer to the whole of the process contemplated by sections 38 to 38.16 of the Act. The expression Injurious Information has the same meaning as "potentially injurious information" does in the Act, namely "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security." Secret Information was defined earlier in these reasons to mean information in respect of which notice has been given pursuant to section 38.01.

[103] Since the Attorney General conceded that Mr. Khawaja's liberty interest was engaged by the Section 38 proceedings, the applications judge did not address the nature of that engagement, which is the threshold question for the application of section 7. Since the requirements of fundamental justice vary according to the context (see *R. v. Lyons*, [1987] 2 S.C.R. 309, at page 361), the manner in which subsection 38.11(2) engages Mr. Khawaja's liberty interest will define the specific rights, or elements of fundamental justice, at stake.

[104] Mr. Khawaja is best placed to tell us how his liberty interest is engaged by subsection 38.11(2). The material portions of his notice of constitutional question succinctly set out his position. I have taken the liberty of dropping certain non-contentious paragraphs and renumbering the others, which leaves the following:

> A- The principles of fundamental justice dictate that where a court is assessing such a claim for privilege, the criminal accused is entitled to know the case he has to meet in opposing the privilege claim, is entitled to know the evidence that is being relied upon in support of the privilege claim and to present evidence to refute the evidence being tendered in support of the privilege claim, and is entitled to know the representations being made by the party seeking to uphold the privilege claim and to make his own representations in response.
>
> B- Subsection 38.11(2) of the *Canada Evidence Act* allows the Attorney General to mandate that the Federal Court receive and rely upon ex parte evidence and submissions in a subsection 38.04(5) proceeding without providing the accused a right of reply to such submissions or evidence.
>
> C- As a result of subsection 38.11(2), subsection 38.04(5) proceedings undertaken in relation to potential evidence in a criminal proceeding do not adhere to the principles of fundamental justice and deprive the accused of the right of full answer and defence when he is left without the opportunity to see and respond to all of the Attorney General's evidence and submissions.
>
> D- The *ex parte* proceedings effectively allow the Attorney General to make use of unopposed evidence and submissions in an effort to deprive an accused of this only meaningful remedy to protect his right to full answer and defence, that being the disclosure

> of the records in question, and as such the ex parte proceedings effectively deprive an accused of the right to make full answer and defence in violation of an accused's section 7 rights.
>
> E- The limit to the right to make full answer and defence imposed by ex parte evidence and submissions which can be resorted to in the exclusive discretion of the Attorney General without judicial oversight or any participation on the part of the accused is not a reasonable limit on the right to make full answer and defence and thus subsection 38.11(2) cannot be upheld pursuant to section 1 of the *Charter*.

[105] Paragraph A is a statement that fundamental justice precludes *ex parte* proceedings in the adjudication of a claim of privilege. Paragraph B is simply the observation that subsection 38.11(2) mandates *ex parte* proceedings. Neither of those propositions engage Mr. Khawaja's liberty interest.

[106] Paragraph C does raise Mr. Khawaja's liberty interest but it does so by reference to the criminal charges pending against him. Paragraph C goes on to raise the right to make full answer and defence in connection with the *ex parte* proceedings under Section 38 proceedings, by tying those proceedings to the pending criminal charges.

[107] Paragraph D makes the link between the Section 38 proceedings and the right to full answer and defence more explicit by asserting that the right to full answer and defence consists in the disclosure of the records in respect of which notice has been given under section 38, and that the recourse to *ex parte* proceedings deprives him of that right.

[108] Paragraph E completes the analysis by alleging that the breach of his section 7 rights is not saved as a reasonable limit prescribed by law.

[109] There is a distinction to be drawn between the criminal proceedings which engage Mr. Khawaja's liberty interest and the Section 38 proceedings which engage his liberty interest, if they do so at all, only by virtue of their connection with the criminal proceedings. In other words, section 38 is a provision of general application. It may be invoked in circumstances which have no element of criminal law where it may, or may not, raise questions of fundamental justice. Where section 38 is invoked in the course of criminal proceedings, the question is whether the individual's liberty interest is engaged solely by reason of its being grafted onto a criminal proceeding.

[110] The criminal proceedings engage Mr. Khawaja's right to make full answer and defence, as well as his right to know the case to be met, because of the possibility of incarceration. If the Section 38 proceedings engage Mr. Khawaja's liberty interest, it can only be because the outcome of those proceedings impinge upon the conduct of the criminal trial, in that they may result in an order authorizing the non-disclosure of Secret Information which may be relevant to Mr. Khawaja's defence. Paragraph D of Mr. Khawaja's notice of constitutional question makes this connection clear.

[111] The provisions which authorize the withholding of Secret Information from a criminal accused are subsections 38.06(2) and 38.06(3). Subsection 38.06(2) permits disclosure, or partial disclosure on terms when the public interest in disclosure exceeds the public interest in non-disclosure. Subsection 38.06(3) authorizes an order prohibiting disclosure where the Court is not satisfied that the public interest in disclosure exceeds the public interest in non-disclosure. Since Mr. Khawaja has not attacked subsections 38.06(2) and (3), they must be presumed to be validly enacted

legislation: see *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at paragraph 35. Mr. Khawaja seeks to achieve the same result by attacking the process leading to the making of an order under either of subsection 38.06(2) or (3).

[112] In the context of a criminal prosecution, Section 38 proceedings do raise an issue of full answer and defence. They raise that issue because subsections 38.06(2) and (3) authorize the withholding of information which may be relevant to the defence of the criminal charges. The fact that the Attorney General may proceed *ex parte* also raises issues of fundamental justice, but not necessarily the same issues as those raised by subsections 38.06(2) and (3).

[113] The issues of fundamental justice raised by an order limiting or prohibiting the disclosure of information relevant to the defence were identified in *Charkaoui*:

> 28 The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. "It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process": *Ferras*, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John.
>
> 29. This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.
>
> [*Charkaoui*, at paragraphs 28 and 29.]

[114] It is clear that an order which deprives an accused of information relevant to his defence raises issues of full answer and defence, and of the case to be met. It is less clear that a statutory disposition which allows *ex parte* proceedings in the course of the process of making such an order raises issues of full answer and defence in the same way. I do not dispute that *ex parte* proceedings raise an issue of procedural fairness, an issue best described circumscribed by the maxim *audi alteram partem*. That maxim requires a decision-maker to ensure that the person affected by a decision has a chance to be heard before the decision is made. In that regard, see *Gill v. Canada (Correctional Service)(F.C.A.)*, [1989] 3 F.C. 329 (*Gill*), per Marceau J.A., at p. 341, where the following appears:

> The rationale behind the *audi alteram partem* principle, which simply requires the participation, in the making of a decision, of the individual whose rights or interests may be affected, is, of course, that the individual may always be in a position to bring forth information, in the form of facts or arguments, that could help the decision-maker reach a fair and prudent conclusion. It has long been recognized to be only rational as well as practical that the extent and character of such a participation should depend on the circumstances of the case and the nature of the decision to be made. This view of the manner in which the principle must be given effect in practice ought to be the same whether it comes into play through the jurisprudential duty to act fairly, or the common law requirements of natural justice, or as one of the prime constituents of the concept of fundamental justice referred to in section 7 of the *Charter* [Footnote: "It is also clear that the requirements of fundamental justice are not immutable; rather they vary according to the context in which they are invoked,' per la Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309, at page 361.]. The principle is obviously the same everywhere it applies.

[115] However, the requirements of fundamental justice apply differently as between the fairness of the process leading to the making of an order under subsections 38.06(2) or (3) and the consequences of such an order for Mr. Khawaja's trial on the criminal charges pending against him. Mr. Khawaja's liberty is not affected by the process leading to a decision under one of

subsections 38.06(1), (2) or (3). It may be affected by the making of an order under one of those sections.

[116] This is not to say that subsection 38.11(2) does not raise an issue of procedural fairness. The issue of procedural fairness arises whether the criminal process is engaged or not. That interest is best circumscribed by the maxim *audi alteram partem*. A decision which has consequences for Mr. Khawaja is being made in circumstances where he does not have access to some of the evidence filed, and some of the representations made. On its face, this does not comply with the requirements of procedural fairness. Does it result in a decision which is made outside the requirements of fundamental fairness? That is the issue raised by this appeal.

[117] In the result, I conclude 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. That said, I am also of the view that even if Mr. Khawaja's liberty interest is engaged, subsection 38.11(2) proceedings do not affect that liberty interest other than in accordance with the principles of fundamental justice, a question to which I now turn.

Issue No. 2- Are *ex parte* proceedings a denial of fundamental justice?

[118] What is the status of *ex parte* proceedings in constitutional terms?

[119] The Supreme Court recently addressed the issue of *ex parte* proceedings in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paragraph 47, where the following appears:

> … However, it is important to note at the outset that the fallacy in Mr. Rodgers' argument is that it presupposes that notice and participation are themselves principles of fundamental justice, any departure from which must be justified in order to meet the minimal constitutional norm. As I read his reasons, Fish J. adopts the same reasoning. With respect, it is my view that this is not the proper approach. The constitutional norm, rather, is procedural fairness. Notice and participation may or may not be required to meet this norm - it is well settled that what is fair depends entirely on the context: see *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 99; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14; *R. v. Finta*, [1994] 1 S.C.R. 701, at p. 744; *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 225; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 540; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Ruby*, at para. 39.

[120] This passage is relevant because it dispels any notion that *ex parte* proceedings are inherently unfair. Whether they are or not depends upon the circumstances and the context.

[121] The Supreme Court confirmed this position in *Charkaoui* where, in the context of an argument about the right to know the case to be met, it confirmed that the latter was not absolute in that legislation sometimes provides for *ex parte in camera* proceedings: see *Charkaoui*, at paragraph 57.

[122] It remains to be seen, therefore, whether *ex parte* proceedings are unfair in the context of Section 38 proceedings.

Issue No. 3- If not, are *ex parte* proceedings in a section 38 application a denial of fundamental justice?

[123] A useful starting point for this portion of the analysis is an examination of the rationale for *ex parte* submissions in Section 38 proceedings. Mosley J.'s comments in the section 38 application which gave rise to the decision under appeal are instructive. At paragraphs 135 and 136 of his reasons, Mosley J. wrote of the difficulty of assessing the possible value, to a patient and intelligent enemy, of seemingly innocuous bits of information:

> 135 The applicant asserts that in weighing these concerns the ability of an informed reader to correlate information must be taken into account. Known as the mosaic effect, this principle stipulates that each piece of information should not be considered in isolation, as seemingly unrelated pieces of information, which may not be particularly sensitive by themselves, could be used to develop a more comprehensive picture when assessed as a group. The applicant recognized in oral argument however that there is some level of difficulty in applying this in practice.
>
> 136. The mosaic effect was aptly described by the Federal Court in *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 at para. 30 (T.D.), aff'd, 88 D.L.R. (4th) 575 (C.A.) [*Henrie*] wherein the Court recognized:
>
> > 30. It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security...
>
> That being said, though it is important to keep this underlying principle in mind when assessing whether or not information could be injurious if disclosed, in light of the difficulty of placing oneself in the shoes of such an "informed reader", 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 of information should not be disclosed.

[124] 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.

[125] This uncertainty about seemingly innocuous information is what sets Section 38 proceedings apart from other proceedings where the Court must decide whether to disclose information which, at the time of argument, is known to only one of the parties. An obvious example of the latter is a challenge to a claim of solicitor-client (legal advice) privilege. In those cases, the Court can rely on its own expertise in the subject matter and need not rely on the guidance of the parties: see *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at paragraph 21. In the case of Section 38 proceedings, the subject matter is outside a judge's normal range of experience and requires some assistance, assistance which can only be rendered *ex parte* if the information in question is to be kept confidential.

[126] As a result, it appears that the *ex parte* proceedings serve two purposes. They allow the Attorney General to provide the Court guidance on the intelligence value, if any, of information whose disclosure is sought, and they protect the confidentiality of that information at the same time.

[127] The fact that there is a rationale for *ex parte* proceedings does not make them fair. As we saw in the passage from *Gill* quoted above, *ex parte* proceedings are unfair because the affected party is not able to challenge the positions taken by the other party, thereby depriving the decision-maker of the advantages of the adversarial system.

[128] From that perspective, fairness would appear to be achieved by disallowing *ex parte* proceedings, so that whatever is said or given to the decision-maker is said or given to the other party. This case is different in that the nature of the material is such that disallowing *ex parte* proceedings changes the nature of what is said or given to the decision-maker.

[129] This is so because the material submitted *ex parte*, to the extent that it contains or discloses information which is subject to the notice served under section 38.01, cannot be disclosed except by the Attorney General or in accordance with the terms of the Act. In order to usefully assist the Court, the evidence submitted and the representations made should make specific reference to the Secret Information and explain specifically how the disclosure of that specific information would be injurious. The disclosure of the Secret Information to the judge for that purpose is authorized by paragraph 38.01(6)(*b*) of the Act. The disallowance of *ex parte* proceedings would not in and of itself result in the disclosure of the Secret Information to Mr. Khawaja because that disclosure is not

authorized by the Act. If the Secret Information cannot be disclosed in the course of the proceedings, then the evidence filed and the representations made by the Attorney General must be tailored to reflect that reality. As a result, if *ex parte* proceedings are disallowed in Section 38 proceedings, the result may be more disclosure but not necessarily more meaningful disclosure.

[130] Is it the case that the Secret Information cannot be disclosed in the course of the proceedings? To answer that question, a brief review of the scheme described in sections 38 to 38.16 of the Act is necessary. Proceedings under the Act are triggered by the giving of notice by a party or an official that injurious information is about to be disclosed. Notice is to be given to both the Attorney General (subsection 38.01(1)) and to the officer presiding over the proceedings in the course of which disclosure would occur (subsection 38.01(2)). That presiding officer is bound to see that the information is not disclosed except in accordance with the provisions of the Act (subsection 38.01(2)). Subsection 38.01 (6) provides that these restrictions on disclosure do not apply in three circumstances, one of which is disclosure to the Attorney General and to the judge or judges responsible for making the determinations as to whether disclosure is authorized: see paragraph 38.01(6)(*b*). These provisions are reproduced below:

38.01(1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.	38.01(1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.	(2) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.
…	[…]
(6) This section does not apply when	(6) Le présent article ne s'applique pas :
…	[…]
(*b*) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;	*b*) aux renseignements communiqués dans le cadre de l'exercice des attributions du procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

[131] Once the application of section 38 and its related provisions has been triggered, there is a blanket prohibition on disclosure which applies to the judge or judges disposing of the section 38 application, except to the extent that an order permitting disclosure is made pursuant to subsections 38.06(1) or (2). This is the combined effect of subsection 38.02(1)(*a*) and the limited exception found at paragraphs 38.02(2)(*b*):

38.02(1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(*b*) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

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

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

…

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(*a*) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

[My emphasis.]

38.02(1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6)

[…]

(2) La divulgation des renseignements ou des faits visés au paragraphe (1) n'est pas interdite :

a) si le procureur général du Canada l'autorise par écrit au titre de l'article 38.03 ou par un accord conclu en application de l'article 38.031 ou du paragraphe 38.04(6);

b) si le juge l'autorise au titre de l'un des paragraphes 38.06(1) ou (2) et que le délai prévu ou accordé pour en appeler a expiré ou, en cas d'appel ou de renvoi pour examen, sa décision est confirmée et les recours en appel sont épuisés.

[Je souligne.]

[132] The conclusion which I draw from this is that the judge presiding over a section 38 proceeding has no power to disclose, or to order the disclosure of, the Secret Information for the purpose of the section 38 application itself. This conclusion is unavoidable given the blanket prohibition at subsection 38.02(1)(*a*), to which a specific exception is made for an order pursuant to subsections 38.06(1) and (2). This narrow exception leaves no room for any kind of implied power of disclosure for the purposes of the application itself.

[133] The Act allows the Attorney General to disclose all or part of the information at any time and upon such terms as the Attorney General chooses: see subsection 38.03(1):

38.03(1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).	38.03(1) Le procureur général du Canada peut, à tout moment, autoriser la divulgation de tout ou partie des renseignements ou des faits dont la divulgation est interdite par le paragraphe 38.02(1) et assortir son autorisation des conditions qu'il estime indiquées.

[134] Presumably, that discretion would extend to disclosure to counsel appointed on behalf of the accused person (in the criminal context). If the Attorney General chose not to exercise his discretion in that fashion, I can see nothing in the Act which would allow the Court to intervene.

[135] The upshot of all this is 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.

[136] This, in turn, means that if the Attorney General were not allowed to proceed *ex parte*, the evidence which he put before the Court, and his submissions opposing the disclosure of the information in question would necessarily be drafted so as to not communicate any information which would disclose, directly or indirectly, the Secret Information. So, for examples, *ex parte* representations which said "The notes of Agent X with respect to his conversation with Mr. Y cannot be disclosed because they allow the reader to infer that Mr.Y has a source within group Z." would simply become "The passage at lines 5 to 20 on page 12 of volume 10 cannot be disclosed because they either disclose, or allow one to infer, the existence of a source." The presiding judge, who would have the material in question before him or her, would be severely constrained in his or her ability to test or challenge that assertion in the presence of the person interested. That person, who would not have the confidential material before them, would simply be unable to mount any kind of a reasoned challenge to the Attorney General's assertion.

[137] In the end, the disallowance of *ex parte* proceedings would have the unintended consequence of reducing, rather than increasing, scrutiny of the Attorney General's allegations with respect to injury to national security without providing any additional protection for the accused person's interests. In those very particular circumstances, if the process set out in section 38 and its related sections is unfair to Mr. Khawaja, it is not because of the *ex parte* proceedings which are authorized by subsection 38.11(2) but because of the provisions which prohibit disclosure of the Secret Information except pursuant to subsections 38.06(1) and (2). Without that disclosure, Mr. Khawaja's participatory rights, which subsection 38.11(2) denies him, are hollow in any event. As a result, their denial is not, in and of itself, a denial of fundamental justice.

[138] Is it a denial of fundamental justice for the Attorney General to say, in Mr. Khawaja's absence, things which he could not say in his presence? Given that notice and participation are not themselves principles of fundamental justice, the question cannot be answered on the basis of an invariable rule that notice and participation are required. If the rationale for the *audi alteram partem* rule is to allow a party to bring forward information "that could help the decision-maker reach a fair and prudent conclusion" (see *Gill* as quoted above), then the question is whether the capacity of the decision-maker to arrive at such a conclusion has been diminished by the fact of *ex parte* proceedings.

[139] Taking the law as to disclosure to be as I have described it, the answer to the question just posed is that the capacity of the decision-maker to arrive at a fair and prudent decision has, in the circumstances been improved, over what it would otherwise have been, by the fact of *ex parte* proceedings. 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 by the judge hearing the application.

[140] As a result, I am of the view that Mr. Khawaja has failed to show that subsection 38.11(2) is constitutionally invalid for depriving him of his right to liberty other than in accordance with the principles of fundamental justice. On the contrary, assuming that Parliament was entitled to restrict the disclosure of the Secret Information in the way it did, *ex parte* proceedings appear to me to be

the best way to ensure that the judge's decision as to the public interest in non-disclosure is as well informed as it could be. The possibility of *ex parte* communications from Mr. Khawaja as to his intended defence, which is also an exercise of the right to make *ex parte* proceedings authorized by subsection 38.11(2), could also assist the judge is assessing the optimal level of disclosure consistent with the demands of national security. Mr. Khawaja chose not to take advantage of that opportunity for tactical reasons but that does not detract from the contribution which such representations could make to the quality of the ultimate decision to disclose, in whole or in part, the Secret Information.

Issue No. 4- If they are not, are they a denial of Mr. Khawaja's right to a fair and public trial under subsection 11(*d*) of the *Charter*?

[141] In the circumstances, the last issue, whether subsection 38.11(2) is saved by section 1 of the Charter does not arise. In addition, Mr. Khawaja's challenge to subsection 38.11(2) on the basis on that it infringes his right to a fair and public trial also fails. The challenge with respect to fairness fails for the same reason as does the challenge based on section 7. The challenge based on the right to a fair trial fails as well. Nothing in subsection 38.11(2) has any incidence upon his right to a public trial. All of the state's evidence against him will be put before the Court and before him in an open courtroom.

CONCLUSION

[142] Mr. Khawaja has not succeeded in showing that the fact that the Attorney General is authorized to make *ex parte* representations is an infringement of his right not to be deprived of liberty except in accordance with the principles of fundamental justice. He has not shown that

subsection 38.11(2) engages the elements of fundamental justice in a criminal context, in particular, the right to know the case to meet and the right to make full answer and defence. Subsection 38.11(2) does not engage Mr. Khawaja's section 7 liberty interest, but if it does, it does so only with respect to Mr. Khawaja's participatory rights in the Section 38 proceedings.

[143] Those participatory rights have limited scope in light of the stringent restrictions on disclosure of the Secret Information. So long as the state is entitled to withhold that information in the name of a protected interest, then, paradoxically, *ex parte* proceedings advance the policy underlying notice and participation.

[144] As a result, I would dismiss the appeal.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	DESA-2-07
APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED APRIL 30, 2007, FILE NO. DES-2-06	
STYLE OF CAUSE:	MOHAMMAD MOMIN KHAWAJA v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 15 and 16, 2007
REASONS FOR JUDGMENT BY:	RICHARD C.J.
CONCURRING REASONS BY:	LÉTOURNEAU J.A.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	December 6, 2007

APPEARANCES:

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