Date: 20070205

Docket: T-739-06

Citation: 2007 FC 128

BETWEEN:

TORONTO STAR NEWSPAPERS LIMITED
and KASSIM MOHAMED

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER

LUTFY C.J.

[1] For some twenty-five years now, hearings in the Federal Court have been held in private for the determination of whether national security information should be disclosed, despite the objection of the Attorney General of Canada. The requirement for closed hearings applies even for those segments of the litigation where all the parties are present and no secret information is being reviewed by the Court. This proceeding is the first constitutional challenge to the mandatory statutory provisions requiring this degree of secrecy.

[2] Where the court sessions and the court records are available to all parties in the litigation, I have concluded that the confidentiality requirements infringe unjustifiably on the open court principle. The appropriate constitutional remedy is to read down the impugned statutory provisions to apply only to court sessions and court records when secret information is in play. The effect of this decision is that court sessions at which all of the parties are present and court records available to all of the parties are presumptively open to the public.

Factual Background

[3] In September 2004, Kassim Mohamed sued the Attorney General of Canada for damages and other relief, alleging that both the Royal Canadian Mounted Police and the Canadian Security Intelligence Service disclosed his personal information to foreign security agencies. In Mr. Mohamed's view, this disclosure resulted in his two-week detention by Egyptian authorities. His action is pending in the Federal Court under court file no. T-1666-04 (the civil action).

[4] During the discovery process in the civil action, the Attorney General of Canada was notified that "potentially injurious information" or "sensitive information" as defined in section 38 of the *Canada Evidence Act*, R.S.1985, c. C-5 (secret information) was about to be disclosed. Secret information, in general terms, is information relating to international relations, national defence or national security.

[5] On January 5, 2006, after receiving this notification, the Attorney General of Canada launched a designated proceeding pursuant to sections 38 and following of the Act (sometimes referred to collectively as "section 38") to have the Federal Court determine whether the secret information should be disclosed: *Canada (Attorney General of Canada) v. Mohamed*, court file no. DES-1-06 (the designated proceeding).

[6] On January 25, 2006, the Attorney General of Canada authorized counsel for Mr. Mohamed to disclose the existence of the designated proceeding. As early as August 2005, the Federal Court's publicly accessible recorded entries of the civil action disclosed that the parties intended to seek relief under section 38. In effect, the Attorney General's authorization merely confirmed what was publicly available four months earlier.

[7] Without the Attorney General's authorization, which was made under section 38.03, the disclosure of the fact that an application had been made to the Federal Court would have been prohibited by paragraph 38.02(1)(c).

[8] As the result of this authorization, the Toronto Star Newspapers Limited (Toronto Star), which had been monitoring and reporting the civil action, was informed of the designated proceeding.

[9] On February 23, 2006, the Toronto Star advised the Federal Court of its intention to challenge the confidentiality provisions to which section 38 designated proceedings are subject. If the constitutional challenge were made within the designated proceeding, section 38 may have

required the argument to be heard in private. Each of the parties and the Court preferred that the issue be adjudicated in open court.

[10] On April 19, 2006, counsel for the three parties agreed that the Toronto Star's constitutional challenge would be adjudicated as a question of law pursuant to paragraph 17(3)(b) of the *Federal Courts Act*, R.S. 1985, c. F-7.

[11] On April 26, 2006, this proceeding was launched. The consent of the parties to proceed in this fashion removed the Toronto Star's intervention from the secrecy of section 38 proceedings for adjudication in a public forum. The Court is grateful for the ingenuity and the cooperation of counsel in having this constitutional challenge resolved in open court.

[12] The first day of the public hearings took place on September 25, 2006. The second day, on October 18, 2006, focused on remedies.

The Impugned Provisions of Section 38

[13] The plaintiffs, the Toronto Star and Mr. Mohamed, challenge the constitutionality of three provisions of the *Canada Evidence Act* (the impugned provisions).

[14] First, the plaintiffs challenge subsection 38.11(1), which requires that section 38 application hearings be heard in private: "A hearing under subsection 38.04(5)…shall be heard in private…" (« Les audiences prévues au paragraphe 38.04(5)…sont tenues à huis clos… »).

[15] Second, the plaintiffs also impugn the constitutionality of two related provisions.

[16] Subsection 38.04(4) requires that confidentiality be maintained in respect of all applications made pursuant to section 38: "An application under this section is confidential. …" (« Toute demande présentée en application du présent article est confidentielle. … »).

[17] Similarly, subsection 38.12(2) requires that confidentiality be maintained in respect of all court records related to a section 38 proceeding: "The court records relating to the hearing, appeal or review are confidential. …" (« Le dossier ayant trait à l'audience, à l'appel ou à l'examen est confidentiel. … »).

[18] The combined effect of subsections 38.04(4) and 38.12(2) is to deny the Toronto Star access to the section 38 application and all court records associated with the designated proceeding.

[19] This proceeding has focused on the application and the hearing in the Federal Court. One would expect that the outcome of the constitutional challenge here would be the same for "appeals" in the Federal Court of Appeal and the Supreme Court of Canada, under sections 38.09 and 38.1 respectively, and for "reviews" under section 38.131. However, the parties' agreed statement of facts, their memoranda of law and their oral submissions focused only on applications and hearings in the Federal Court. In the absence of an evidentiary record for proceedings in the appellate courts, this decision will be limited to the Federal Court.

[20] The impugned provisions as well as other relevant provisions of section 38 of the *Canada Evidence Act* are set out in full in Schedule A of these reasons. The plaintiffs are of the view that other provisions of section 38 may be unconstitutional. However, this proceeding is limited to the three impugned provisions.

[21] In an earlier decision, I noted the difficulties presented by the scope of paragraph 38.02(1)(c), which prohibits disclosing the existence of a section 38 application: *Ottawa Citizen Group v. Canada (Attorney General of Canada)*, 2004 FC 1052 at paragraphs 35-40. I acknowledged the possibility of an exceptional case where the disclosure of the existence of a section 38 application may cause injury to legitimate government interests or perhaps even sensitive private interests. However, I added that the absence of judicial discretion in paragraph 38.02(1)(c) was, in my view, problematic. In reiterating my concern, I refer to paragraphs 38 and 40 of the decision:

> There may be an exceptional case where the secrecy envisaged in section 38.02 may be warranted. In the more usual situation, however, where secret information is in issue, the necessity of a section 38 proceeding is made known publicly before the person presiding over the tribunal or court hearing. The Federal Court is required by section 38 to keep secret a fact which has been referred publicly in the court or tribunal from which the proceeding emanates. It is unlikely that Parliament could have intended that the drafting of section 38 would result in such a consequence.
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> […]
>
> It is unusual that a party to the litigation should be the sole arbiter to authorize the disclosure of information which is or should be public. A court should be seen as having reasonable control over its proceedings in the situation I have just described.

[22] The decision in this proceeding is premised on the fact that the existence of the designated proceeding has been made public. Until the constitutionality of the paragraph 38.02(1)(c) has been

challenged and determined, these reasons are intended to apply only to those situations where knowledge of the existence of the section 38 proceeding has been disclosed to the public.

The Issues

[23] As set out in the parties' agreed statement of facts, this proceeding raises the following constitutional questions (at paragraph 22):

1. Does s. 38.04(4) of the *Canada Evidence Act* constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*")? If so, is the infringement justified under s. 1 of the *Charter*?

2. Does the portion of s. 38.11(1) of the *Canada Evidence Act* which states that "a hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private" constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Charter*. If so, is the infringement justified under s. 1 of the *Charter*?

3. Does the first sentence of s. 38.12(2) of the *Canada Evidence Act* constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Charter*? If so, is the infringement justified under s. 1 of the *Charter*?

[24] The Attorney General of Canada agrees with the plaintiffs that the impugned provisions violate the open court principle, a core democratic value inextricably linked to the fundamental freedoms of expression and of the media protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*.

[25] Accordingly, the issues to be decided in this proceeding include:

- Are the impugned provisions saved under section 1 of the *Charter*?
- If not, what is the appropriate constitutional remedy?

[26] Put differently and in general terms, what is the justification for requiring closed hearings and maintaining the confidentiality of court documents where no secret information is disclosed? A review of the Federal Court's experience with section 38 may be useful.

[27] An earlier version of section 38, which had been part of the *Canada Evidence Act* since 1982, also required that applications be heard in private. It is not apparent that this requirement was always respected where all parties were present and no secret information was being discussed: *Mulroney v. Canada (Attorney General)*, [1997] F.C.J. No. 1 (QL) (T.D.) at paragraph 12; *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1995] F.C.J. No. 619 (QL) (T.D.) at paragraph 5.

[28] Section 38 was substantially amended in the *Anti-Terrorism Act*, S.C. 2001, c. 41. Schedule B to these reasons lists the section 38 proceedings which have been publicly disclosed under the new provisions. Each has been case managed.

Proceedings under section 38 since the 2001 amendments

[29] A section 38 application is to be heard by the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice. This provision has existed since 1982.

[30] All hearings in a section 38 proceeding are closed to the public: subsection 38.11(1). Case management conferences are also conducted in private.

[31] The exclusion of the public from all sessions of a section 38 proceeding is consistent with the secrecy envisaged by paragraph 38.02(1)(c), which prohibits the disclosure of "… the fact that an application is made to the Federal Court under subsection 38.04 …" (« … le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04 … »).

[32] There are always two types of hearings in a section 38 proceeding: sessions at which all of the parties are present but which are nonetheless closed to the public (private sessions) and sessions which take place in the absence of one or more of the parties (*ex parte* sessions).

[33] There is no secret information disclosed during the private sessions. The records available at the private sessions include the notice of application, the affidavits and the memoranda of law exchanged between the parties. None of these documents contains secret information. However, the combined effect of subsections 38.04(4) and 38.12(2) is to prevent the public from accessing and publicizing the contents of these documents.

[34] *Ex parte* representations are available as of right to the Attorney General of Canada and with leave of the presiding judge to every other party: subsection 38.11(2). The constitutionality of the requirement that these *ex parte* sessions are closed to the public has not been challenged in this proceeding.

[35] In every section 38 application, the Attorney General of Canada will make representations to the Court to confirm the prohibition of disclosure of the secret information in issue. Usually, the

Attorney General of Canada will be the only party before the Court when these representations are made. However, if another party to the proceeding has possession of the same secret information in issue, it is possible for that party to be present when the *ex parte* submissions are made by the Attorney General of Canada.

[36] The procedures followed in a typical section 38 proceeding are set out in some detail in the parties' agreed statement of facts, the relevant portions of which should be readily available on the public record:

> 5. The [Attorney General (A.G.)] advises that the procedure that is used in s. 38.04 *Canada Evidence Act* applications follows a number of customary steps, as follows.
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> 6. First, following the issuance of a notice of application pursuant to s. 38.04, the A.G. files a motion for directions pursuant to paragraph 38.04(5)(a) of the *Canada Evidence Act*. In his motion material, the A.G. identifies all parties or witnesses whose interests he believes may be affected by the prohibition of disclosure of information, and may suggest which persons should be formally named as responding parties to the application. The A.G. requests that this portion of the motion for directions be adjudicated in writing.
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> 7. After reading the A.G.'s motion material, the Federal Court will, pursuant to s. 38.04(5)(c) of the *Canada Evidence Act*, designate the responding parties to the application and order the A.G. to provide notice of the application to these persons by effecting service of the notice of application and motion for directions upon them.
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> 8. The Federal Court will then convene a case conference with the parties to the application (i.e., the A.G. and the responding parties) to discuss the remaining issues raised by the A.G.'s motion for directions, including (1) whether it is necessary to hold a hearing with respect to the matter; (2) whether any other persons should be provided with notice of the hearing of the matter; and (3) whether the application should be specially managed with a formal schedule for the remaining procedural steps. These case conferences are confidential and are held in camera. The public is denied access to these case conferences and, generally speaking, only the parties to the application, their counsel, the presiding judge and designated Court staff are present.

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

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

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

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

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

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

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

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

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

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

11. The A.G.'s position is that the "private" affidavits produced by him for the purposes of a s. 38.04 *Canada Evidence Act* application attempt to set out, in general terms, the factual and principled justification for protecting the information in issue from public disclosure, that is to say why the disclosure of

the information would be injurious to international relations, national defence or national security. The A.G. advises that these "private" affidavits do not detail the information in issue (i.e., the information covered by the Notice), nor do they contain other specific facts that would themselves constitute "sensitive information" or "potentially injurious information". The A.G.'s stated purpose for filing and serving such "private" affidavits is to provide the responding parties seeking disclosure of the information in issue with as much factual material as possible so that they may understand why the A.G. is attempting to protect the information without compromising the information in issue or other sensitive/potentially injurious information regarding the need to protect the information in issue from disclosure.

12. "*Ex parte*" affidavits are affidavits that are filed by the A.G. and which are not served on the responding party. They are read only by the presiding judge and are only referred to at the *ex parte* portions of the hearings where the A.G. is present and the responding party is excluded (i.e., the "*ex parte*" Court sessions) pursuant to s. 38.11(2) of the *Canada Evidence Act*.

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

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

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

16. At the "*ex parte*" Court sessions at which only the A.G. is present, the A.G. provides argument by reference to the "*ex parte*" affidavits with respect to whether disclosure of the information in issue would be injurious to international relations, national defence or national security. Counsel for the

> A.G. will be accompanied by the affiants who have sworn such affidavits so that they may be questioned by the presiding designated judge.

[37] The agreed statement of facts does not deal with the right of the non-government party to seek leave to make *ex parte* representations. In the Court's experience to date, when *ex parte* representations are made by a party other than the Attorney General of Canada, only that party is present before the presiding judge. This may occur where the underlying proceeding is a criminal prosecution. Specifically, the accused may wish to make representations to the section 38 judge concerning the importance of disclosing the secret information to assist in defending the criminal charge. In such circumstances, the accused will prefer to make these submissions without disclosing to any other party the substance or detail of the defence in the criminal proceeding.

[38] In addition, concerning paragraphs 6 and 7 of the agreed statement of facts, the order designating the respondents to the section 38 proceeding will often issue only after the motion for directions has been served on the potential interested parties, usually at the Court's request. This will occur particularly where these parties are aware that the Attorney General of Canada is in the process of filing the section 38 application. Paragraph 38.04(5)(a) requires the presiding judge to hear the representations of the Attorney General of Canada. There is no stipulation, however, that the identification of the interested parties must be done on an *ex parte* basis.

Analysis

A. *The Constitutionality of the Impugned Provisions*

[39] As often repeated now by the Supreme Court of Canada, the open court principle is a cornerstone of our democracy enshrined in section 2(b) of the *Charter*: *Toronto Star Newspapers v. Ontario*, [2005] S.C.J. No. 41 at paragraph 1; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 23; *Ruby v. Canada (Solicitor General of Canada)*, [2002] 4 S.C.R. 3 at paragraph 53; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paragraph 23; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40; and *Attorney General of Nova Scotia v. Macintyre*, [1982] 1 S.C.R. 175 at 187.

[40] All parties agree that the impugned provisions of section 38 infringe section 2(b) of the *Charter*. However, the defendant (sometimes referred to in these reasons as the Attorney General of Canada) argues that these infringements constitute reasonable limits on the open court principle and are demonstrably justifiable in a free and democratic society.

[41] The defendant bears the onus of establishing that the impugned provisions are saved by section 1 of the *Charter* in keeping with the justificatory test established in *R. v. Oakes*, [1986] 1 S.C.R. 103. In this proceeding, no section 1 affidavit evidence was filed.

[42] The plaintiffs concede that preventing the inadvertent disclosure of the secret information is a sufficiently pressing and substantial legislative objective as to satisfy the first branch of the *Oakes* test.

[43] Counsel for the Attorney General of Canada advanced the view that subsection 38.11(1) is saved by other provisions of section 38. More specifically, in his written submissions, counsel argued that subsection 38.04(5) confers upon the Federal Court the discretion to name the Toronto Star as a respondent to the application and the possibility of granting to the Toronto Star the same access to the Court records as it grants to Mr. Mohamed. Moreover, according to this view, the designated judge could order the Attorney General of Canada to notify the Toronto Star and grant to the Toronto Star the opportunity to make representations. With respect, this submission cannot be correct.

[44] Pursuant to paragraph 38.04(5)(a), the judge shall hear the representations of the Attorney General of Canada "concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject…" (emphasis added). Any such party or witness would then be designated as a respondent: paragraphs 6 and 7 of the agreed statement of facts.

[45] The same statutory provision also mandates the judge to hear the submissions of the Attorney General of Canada "concerning the persons who should be given notice of any hearing of the matter".

[46] Under paragraph 38.04(5)(c), the judge then determines who should be given notice of the hearing. This will usually be done on the basis of submissions from the Attorney General of Canada and any other party who has been identified as having an apparent legal interest. This paragraph also authorizes the judge to order the Attorney General of Canada to notify such persons and determine the content and form of the notice.

[47] In my view, neither of these provisions allows the judge to designate the Toronto Star or any other member of the media as a respondent or a person to be given notice of the hearing.

[48] As early as February 7, 2006, the parties in the designated proceeding and this Court were made aware of the Toronto Star's intention to challenge the constitutionality of those provisions which prohibited the media from accessing the private sessions. No one suggested during the designated proceeding that the Toronto Star could be named as a respondent or provided access to the private sessions through the notification process.

[49] In any event, I do not understand the Toronto Star to be seeking the status of respondent or the right to file affidavits or memoranda of law. The Toronto Star is simply seeking to enforce the open court principle and to obtain access to the private sessions as a member of the media.

[50] The media's concern in keeping the public informed about section 38 proceedings is not encompassed within the "interests" protected under subsection 38.04(5). Where an entity such as the Toronto Star wishes to exercise its "interests", in the legal sense of this term, it may seek to cause the disclosure of the information by initiating an application under paragraph 38.04(2)(c):

for example, *Ottawa Citizen Group Inc. v. Canada (Attorney General of Canada)*, 2004 FC 1052 and 2006 FC 1552.

[51] In addition, the Attorney General of Canada did not suggest a principled basis upon which the Court would be entitled to grant respondent status or access rights to the Toronto Star but not to the media at large. Again, I do not understand the defendant to be proposing that all members of the media be designated as respondents.

[52] The position of the Attorney General of Canada was more nuanced during oral submissions. There, counsel focused less on characterizing the role of the Toronto Star as a respondent. The suggestion was that the Court had the discretion under paragraph 38.04(5)(c) to order that the Toronto Star be given notice of the section 38 hearing and granted access to the proceeding, subject to a publication ban until the disposition of the matter.

[53] The construction of paragraph 38.04(5)(c) advanced by the Attorney General of Canada functions as a minimal impairment argument. In effect, counsel for the government argues that the impugned provisions trench justifiably on the open court principle. In his view, paragraph 38.04(5)(c) may be interpreted as conferring upon the Court the discretion to allow the Toronto Star to access the private sessions and records subject to a publication ban lasting until a final order, disposing of the application, is rendered pursuant to section 38.06.

[54] The interpretation proffered by the Attorney General of Canada does not give full effect to the open court principle. Public access to judicial proceedings cannot depend on fortuitous

circumstances which lead one or more members of the media to seek access under paragraph 38.04(5)(c). Nor can open courts depend on one of the parties to the litigation making submissions to the Court that the media be provided access.

[55] Counsel for the Attorney General of Canada acknowledged that the discretion available to the Court according to his interpretation of paragraph 38.04(5)(c) was not envisaged by Parliament. I agree. When read in their entire context and according to their ordinary sense, keeping in mind the objectives of section 38, the language of subparagraphs 38.04(5)(c)(i), (ii), and (iii) cannot be interpreted as a mechanism to apply the open court principle: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[56] In any event, and I do not decide the issue on this ground, I am not convinced that the interpretation of the Attorney General of Canada is consistent with the prohibition against disclosure of the existence of the file in paragraph 38.02(1)(c).

[57] More importantly, even if this submission of the Attorney General of Canada were accepted, granting access to one media outlet falls well short of justifying the infringement of the open court principle and the presumptive openness of judicial proceedings.

[58] In particular, counsel for the Attorney General of Canada contended that media access to the private sessions would necessarily be coupled with a publication ban. According to counsel, the Court has the authority to allow the Toronto Star and other media to attend the private sessions, but

cannot authorize the publication of any news reports about the hearing, at least until the matter has been completed.

[59] In *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, which also involved national security considerations, the Supreme Court of Canada rejected a similar argument for granting media access to a hearing subject to a publication ban (at paragraph 49):

> [W]e would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access to the materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate.

[60] It bears repeating that there is no secret information disclosed in private sessions and materials. The open court principle requires media access and timely publication. Counsel has not identified a public interest to be served by postponing publication of what occurs in private sessions until the disposition of the section 38 hearing. To support his position that publication should be postponed, counsel for the government relied upon the suggestion in *Vancouver Sun (Re)* (at paragraph 58) that the decision to publicly release sealed information should take place at the end of the judicial investigative hearing in a criminal matter. However, this conclusion was not intended for the circumstances of section 38 proceedings.

[61] In defending the constitutionality of the impugned provisions, the Attorney General of Canada advances an interpretation of the section 38 scheme that would entitle members of the media to be designated as interested parties or provided access to the private sessions subject to a publication ban. In the end, the best one can say about this position is that “necessity is usually the fuel of ingenuity”, to take the phrase used by counsel. In this case, however, the inventive

construction put forward to save the impugned provisions does not do sufficient justice to the open court principle.

[62] In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, the Supreme Court of Canada considered the constitutionality of provisions similar to those challenged in this proceeding.

[63] *Ruby* involved a narrow challenge to the constitutionality of mandatory procedural requirements set out in paragraph 51(2)(a) and subsection 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21:

51. (2) An application referred to in subsection (1) or an appeal brought in respect of such application shall	51. (2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; …
(*a*) be heard *in camera*; …	
(3) During the hearing of an application referred to in subsection (1) …, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.	(3) Le responsable de l'institution fédérale concernée a, au cours des auditions en première instance ou en appel et sur demande, le droit de présenter des arguments en l'absence d'une autre partie.
[Emphasis added]	

[64] Section 51 of the *Privacy Act* establishes the procedure governing the conduct of judicial review application hearings where a government institution refuses an individual's request for access to personal information in order to protect government interests similar to those involved in section 38 proceedings.

[65] Paragraph 51(2)(a) and subsection 51(3) require the reviewing court to hold the application hearing in private and to accept *ex parte* submissions at the request of the government institution refusing disclosure.

[66] As in these proceedings, the question before the Supreme Court of Canada was whether the impugned provisions trenched unjustifiably on the open court principle.

[67] The Supreme Court affirmed the validity of the statutory requirement that government submissions concerning secret information be received *ex parte* and in private. In view of this decision, the plaintiffs in this case, as noted earlier, did not challenge the constitutionality of the analogous requirement in subsection 38.11(2).

[68] Writing for the unanimous Court, Justice Louise Arbour found that paragraph 51(2)(a) failed the *Oakes* test at the minimal impairment branch. In particular, Justice Arbour concluded that the mandatory requirement to exclude the public from portions of the review hearing when there existed no risk that national security information or foreign confidences could be disclosed was overbroad: "[S]ection [51(2)(a)] is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts (*Ruby* at paragraph 59, emphasis added).

[69] Justice Arbour's characterization of the overbroad scope of paragraph 51(2)(a) of the *Privacy Act* applies with equal force to the analogous procedural requirement in subsection 38.11(1), which prohibits public access to the private sessions of section 38 proceedings.

[70] In my view, the impugned provisions do more than is minimally required to safeguard the secret information and therefore trench unduly on the open court principle. Accordingly, I conclude that these provisions fail at the minimal impairment branch of the *Oakes* test and cannot be saved under section 1 of the *Charter*.

[71] On the basis of the same principles enunciated in *Ruby*, I find that subsection 38.11(1) is overbroad in closing the court to the public even where no secret information is at risk to justify a departure from the open court principle.

[72] Similarly, subsections 38.04(4) and 38.12(2) are overbroad in subjecting all court records associated with the private sessions to mandatory confidentiality requirements where no secret information is at risk to justify a departure from the general principle of open courts. My view in this regard is consistent with the acknowledgement by all parties that the outcome concerning the constitutionality of all three impugned provisions should be the same.

B. *The Appropriate Constitutional Remedy*

[73] During the hearing to canvass the parties' views on remedies, the Attorney General of Canada argued that, in the event this Court concluded the impugned provisions constituted an unjustified infringement of the open court principle, the appropriate remedy would be to strike down these provisions. This submission varied the original suggestion by counsel for the government that reading down was the appropriate remedial solution.

[74] In arguing that the appropriate remedy is to strike down the impugned provisions, the Attorney General of Canada purported to rely on the Supreme Court's decision in *Ruby*.

[75] First, the impugned provisions in *Ruby* were not struck down. Justice Arbour relied on reading down as a constitutional remedy in rendering section 51 of the *Privacy Act* compliant with section 2(b) of the *Charter*.

[76] It had been the practice of counsel, on consent, to conduct *Privacy Act* hearings in public where no secret information could be disclosed. The Supreme Court disapproved of this practice. For Justice Arbour, it was not open to the parties to bypass Parliament's unambiguous language clearly intended to exclude the public from section 51 hearings.

[77] I understand Justice Arbour to have relied on reading down as the appropriate constitutional remedy to cure the overbroad scope of the mandatory *in camera* hearing required by paragraph 51(2)(a). She accommodated the constitutional imperative that private sessions, where no secret information is disclosed, be open to the public by invoking the reading down mechanism (at paragraphs 58 and 60):

> Unless the mandatory requirement is found to be unconstitutional and the section is "read down" as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature.
>
> […]
>
> The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.

[Emphasis added].

[78] Second, contrary to what was argued by the Attorney General of Canada, the provisions of section 38 provide for the flexibility found in section 46 of the *Privacy Act*.

[79] In particular, subsection 38.12(1) confers a broad discretion upon the presiding judge to make any order to protect the confidentiality of the information to which the hearing relates. In addition, subsection 38.04(4) confers an analogous discretion upon the Chief Administrator of the Courts Administration Service to adopt any appropriate measure to safeguard the confidentiality of section 38 applications.

[80] Subsections 38.04(4) and 38.12(1) reflect Parliament's intent to afford the designated judge the discretion to adopt any confidentiality measures required to safeguard secret information. In the rare, indeed unlikely, event that the circumstances surrounding a section 38 proceeding require that the public be prohibited from accessing even the private sessions and related documents, the judge has the discretionary authority, analogous to that provided for in section 46 of the *Privacy Act*, capable of safeguarding the confidentiality of any information when required.

[81] The government argued that Rules 26, 29, 151 of the *Federal Courts Rules* concerning the inspection of court files, *in camera* hearings, and confidentiality orders provide the Court discretionary authority to protect secret information. In my view, this discretionary authority is conferred upon the Court by section 38 and I do not concede that recourse to the *Federal Courts*

Rules is necessary. If I am wrong, however, these Rules do afford the Court a further flexibility to adopt any measures to prevent the inappropriate disclosure of secret information.

[82] Put simply, the approach to reading down adopted in *Ruby* is the appropriate manner in which to remedy the constitutional defects in the impugned provisions of section 38.

[83] Concerning the mandatory exclusion of the public from the private sessions, I find that the structure of subsections 38.11(1) and 38.11(2) mirrors that of paragraph 51(2)(a) and subsection 51(3) of the *Privacy Act*. Accordingly, subsection 38.11(1) ought to be read down as a constitutional remedy to apply only to the *ex parte* representations provided for in subsection 38.11(2).

[84] As in *Ruby*, the effect of this decision will be that private sessions, as defined in these reasons, are presumptively open to the public. To repeat, in the exceptional event where the exclusion of the public may be justified even when all parties are present, subsections 38.04(4) and 38.12(1) provide the Court with the discretionary authority to adopt such measures as are warranted by the circumstances to protect the confidentiality of secret information.

[85] The "rare, indeed unlikely, event" I have referred to in paragraph 80 is to be understood in the context of the premise of this decision, that the existence of the designated proceeding has been made public.

[86] The mandatory confidentiality requirements in subsections 38.04(4) and 38.12(2) should also be read down, as a constitutional remedy, to apply only to the *ex parte* representations provided

for in subsection 38.11(2). As a result of this decision, all court records accessible to the non-government party are presumptively available to the public. Again, subsections 38.04(4) and 38.12(2) provide the discretion, if ever necessary, to maintain confidentiality with respect to any record available to all parties.

[87] The reading down I am adopting will exclude the public from all *ex parte* representations, those made by the Attorney General of Canada as of right and those made by a non-government party with leave of the Court. This conclusion masks an outstanding legal issue not addressed by the parties.

[88] The debate in this case centered on national security considerations, not on the interests which might be asserted by a non-government party during *ex parte* representations. The focus was on sessions where all parties were present and on *ex parte* sessions granted as of right to the Attorney General of Canada. There was no discussion of the constitutionality of closed hearings to receive the *ex parte* representations of a non-government party.

[89] In its written submissions, the Toronto Star acknowledged that it was not seeking access to *ex parte* sessions on the basis of the decision in *Ruby*. However, under subsection 38.11(2), the non-government party may also seek to make *ex parte* representations. This is an additional legal consideration which was not at issue in *Ruby*. This distinction was not referred to in the agreed statement of facts, nor was it the subject of any submissions in this proceeding.

[90] In the absence of both an evidentiary record and submissions of counsel, I have chosen to leave the matter open and to preserve the *status quo* concerning the mandatory exclusion of the public where the non-government party is permitted to make *ex parte* representations. In this decision, the impugned provisions will be read down so as to apply to all *ex parte* representations envisaged in subsection 38.11(2).

Conclusion

[91] For the foregoing reasons, the constitutional questions raised by this motion are answered as follows:

1. Do subsections 38.04(4), 38.11(1), and 38.12(2) of the *Canada Evidence Act* constitute infringements of the Toronto Star's rights as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes, as was conceded by the defendant.

2. Are the infringements constituted by subsections 38.04(4), 38.11(1), and 38.12(2) *Canada Evidence Act* justified under section 1 of the *Canadian Charter of Rights and Freedoms*?

   Answer: No. The impugned provisions fail the *Oakes* test at the minimum impairment branch.

   The words in subsection 38.04(4), "An application under this section is confidential. …" («Toute demande présentée en application du présent article est confidentielle. …»), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

   The words in subsection 38.11(1), "A hearing under subsection 38.04(5) … shall be heard in private..." (« Les audiences prévues au paragraphe 38.04(5) … sont tenues à huis clos…»), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

   The words in subsection 38.12(2), "The court records relating to the hearing… are confidential. …" (« Le dossier ayant trait à l'audience… est confidential.

> …»), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

[92] The defendant shall pay to the plaintiff Toronto Star Newspapers Limited the costs of this motion. There will be no order as to costs concerning the plaintiff Kassim Mohamed.

"Allan Lutfy"
Chief Justice

Schedule A: Excerpts from Section 38 of the *Canada Evidence Act*

INTERNATIONAL RELATIONS AND NATIONAL DEFENCE AND NATIONAL SECURITY

…

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.

(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.

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

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act. …

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);

RELATIONS INTERNATIONALES ET DÉFENSE ET SÉCURITÉ NATIONALES

…

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) 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.

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

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi. …

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*) 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). …

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).

…

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

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(*c*), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions. …

38.04 (2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

…

(*c*) a person who is not required to disclose information in connection with a proceeding but who

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). …

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.

…

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

38.031 (1) Le procureur général du Canada et la personne ayant donné l'avis prévu aux paragraphes 38.01(1) ou (2) qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais veut divulguer ou faire divulguer les renseignements qui ont fait l'objet de l'avis ou les faits visés aux alinéas 38.02(1) *b*) à *d*), peuvent, avant que cette personne présente une demande à la Cour fédérale au titre de l'alinéa 38.04(2) *c*), conclure un accord prévoyant la divulgation d'une partie des renseignements ou des faits ou leur divulgation assortie de conditions. …

38.04 (2) Si, en ce qui concerne des renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4), le procureur général du Canada n'a pas notifié sa décision à l'auteur de l'avis en conformité avec le paragraphe 38.03(3) ou, sauf par un accord conclu au titre de l'article 38.031, il a autorisé la divulgation d'une partie des renseignements ou a assorti de conditions son autorisation de divulgation :

…

c) la personne qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais qui

wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information. …

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

(5) As soon as the Federal Court is seized of an application under this section, the judge

(*a*) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(*b*) shall decide whether it is necessary to hold any hearing of the matter;

(*c*) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(*d*) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations. …

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

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations

veut en divulguer ou en faire divulguer, peut demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements. …

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

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge :

(a) entend les observations du procureur général du Canada — et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;

(*b*) décide s'il est nécessaire de tenir une audience;

(c) s'il estime qu'une audience est nécessaire :

(i) spécifie les personnes qui devraient en être avisées,

(ii) ordonne au procureur général du Canada de les aviser,

(iii) détermine le contenu et les modalités de l'avis;

(d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations. …

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

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de

or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

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

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une ordonnance confirmant l'interdiction de divulgation. …

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

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

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

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

38.1 Notwithstanding any other Act of Parliament,

38.1 Malgré toute autre loi fédérale :

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

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

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

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

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

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

(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*.

(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*).

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

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

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. …

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

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

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

38.13 (1) Le procureur général du Canada peut délivrer personnellement un certificat interdisant la divulgation de renseignements dans le cadre d'une instance dans le but de protéger soit des renseignements obtenus à titre confidentiel d'une entité étrangère — au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* — ou qui concernent une telle entité, soit la défense ou la sécurité nationales. …

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

Schedule B: List of Section 38 Applications Filed in Federal Court

Since the coming into force of the *Anti-Terrorism Act*, S.C. 2001, c. 41 on December 24, 2001, fifteen (15) section 38 applications have been publicly disclosed. These are:

- *Ribic v. Canada*, court file DES-7-01: 2002 FCT 290.

  This file, commenced on December 10, 2001, was decided under section 38 as amended by the *Anti-Terrorism Act*.

- *Canada (Attorney General) v. Ribic*, court file DES-1-02: 2002 FCT 839.

- *Canada (Attorney General) v. Ribic*, court file DES-2-02: 2002 FCT 1044.

- *Ribic v. Canada (Attorney General)*, court file DES-3-02: 2003 FCT 10, aff'd 2003 FCA 246.

- *Canada (Attorney General) v. Ribic*, court file DES-5-02: 2003 FCT 43, aff'd 2003 FCA 246.

- *Canada (Attorney General) v. Kempo*, court file DES-1-03: notice of discontinuance filed on October 27, 2005.

- *Canada (Attorney General) v. Ouzghar*, court file DES-4-03: notice of discontinuance filed on July 20, 2005.

- *Canada (Attorney General) v. Brad Kempo*, court file DES-5-03: 2004 FC 1678.

- *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, court file DES-1-04: 2004 FC 1052.

- *Canadian Broadcasting Corporation v. Canada (Attorney General)*, court file DES-2-04: notice of discontinuance filed on March 31, 2004.

- *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, court file DES-4-04: notice of discontinuance filed on April 4, 2004.

- *Ribic v. Canada*, court file DES-1-05: adjourned *sine die* on June 3, 2005.

- *Canada (Attorney General) v. Mohamed*, court file DES-1-06.

- *Canada (Attorney General) v. Khawaja*, court file DES-2-06.

- *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, court file DES-4-06.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-739-06
STYLE OF CAUSE:	TORONTO STAR NEWSPAPERS LIMITED and KASSIM MOHAMED Plaintiffs and HER MAJESTY THE QUEEN IN RIGHT OF CANADA Defendant
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 25, 2006 October 18, 2006
REASONS FOR ORDER:	Lutfy, C. J.
DATED:	February 5, 2007

APPEARANCES:

Paul Schabas Ryder Gilliland Rahool Agarwal	for Plaintiff – Toronto Star Newspapers Ltd.
Lorne Waldman	for Plaintiff – Kassim Mohamed
Alain Préfontaine	for Defendant

SOLICITORS OF RECORD:

Blake, Cassels & Graydon LLP Toronto, Ontario	for Plaintiff – Toronto Star Newspapers Ltd.
Waldman & Associates Toronto, Ontario	for Plaintiff – Kassim Mohamed
John H. Sims, Q.C. Deputy Attorney General of Canada	for Defendant