

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Ahmad, 2011 SCC 6, [2011] 1 S.C.R. 110 | **Date:** 20110210  **Docket:** 33066 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Fahim Ahmad, Zakaria Amara, Asad Ansari, Shareef Adelhaleem,**

**Mohammed Dirie, Jahmaal James, Amin Mohamed Durrani,**

**Steven Vikash Chand, Saad Khalid and Saad Gaya**

Respondents

- and -

**Attorney General of Ontario and**

**Canadian Civil Liberties Association**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 81) | The Court |

R. *v.* Ahmad, 2011 SCC 6, [2011] 1 S.C.R. 110

**Her Majesty The Queen** *Appellant*

*v.*

**Fahim Ahmad, Zakaria Amara, Asad Ansari,**

**Shareef Abdelhaleem, Mohammed Dirie,**

**Jahmaal James, Amin Mohamed Durrani,**

**Steven Vikash Chand, Saad Khalid and Saad Gaya** *Respondents*

and

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**Indexed as:**R. ***v.* Ahmad**

2011 SCC 6

File No.:  33066.

2010:  March 18; 2011:  February 10.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the ontario superior court of justice

*Constitutional law — Validity of legislation — Section 38 scheme of Canada Evidence Act granting jurisdiction to Federal Court to determine questions of disclosure of information pertaining to international relations, national defence or national security — Whether Parliament’s decision to limit superior courts from determining those questions impermissibly invades core jurisdiction of superior courts — Canada Evidence Act, R.S.C. 1985, c. C‑5, ss. 38 to 38.16 — Constitution Act, 1867, s. 96.*

*Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Section 38 scheme of Canada Evidence Act granting jurisdiction to Federal Court to determine questions of disclosure of information pertaining to international relations, national defence or national security — Whether attribution of jurisdiction to Federal Court impedes ability of superior court judges to ensure conduct of fair trial — Canada Evidence Act, R.S.C. 1985, c. C‑5, ss. 38 to 38.16 — Canadian Charter of Rights and Freedoms, s. 7.*

In June 2006, 18 people were arrested on the suspicion that they were plotting terrorist attacks. Ten of the eighteen people were scheduled to be tried before Dawson J. of the Ontario Superior Court of Justice. In March and June 2008, the Crown notified the Attorney General of Canada that the Superior Court proceedings might disclose potentially injurious or sensitive government information. The Attorney General brought the disclosure issue before the Federal Court pursuant to the s. 38 scheme of the *Canada Evidence Act*. Noël J. of the Federal Court ordered that the accused be designated as respondents in proceedings commenced by the Attorney General, that a hearing be held, and that notice be given to the Superior Court judge. The accused then brought an application in the Superior Court to challenge the constitutionality of the s. 38 scheme. The Federal Court halted its proceedings pending the resolution of that challenge. The Superior Court judge held that the scheme was unconstitutional as it violated s. 96 of the *Constitution Act, 1867* and s. 7 of the *Charter*. He struck down the legislation to the extent that it conferred exclusive jurisdiction on the Federal Court and asserted his own responsibility, as the Superior Court judge conducting the criminal trial, to decide any national security privilege issues that might arise in the course of the proceedings.

Held: The appeal should be allowed. Sections 38 to 38.16 of the *Canada Evidence Act* are constitutional.

This appeal concerns the potential conflict between two fundamental obligations of the state under our system of government: first, to protect society by preventing the disclosure of information that could pose a threat to international relations, national defence or national security; second, to prosecute individuals accused of offences against our laws. In the s. 38 scheme, Parliament has recognized that on occasion it may become necessary to choose between these objectives, but has laid out an elaborate framework to attempt, where possible, to reconcile them. Where the conflict is irreconcilable, an unfair trial cannot be tolerated. Under the rule of law, the right of an accused person to make full answer and defence may not be compromised. The s. 38 scheme preserves the full authority and independence of the judge presiding over the criminal trial to do justice between the parties, including, where he or she deems it necessary, to enter a stay of proceedings. While the statutory scheme of s. 38, particularly its division of responsibilities between the Federal Court and the criminal courts of the provinces, raises numerous practical and legal difficulties, properly understood and applied, it is constitutionally valid. The test in *Re Residential Tenancies Act, 1979* requires as a first step that an analysis be conducted as to whether the power conferred on a tribunal other than a s. 96 court broadly conforms to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation. It is true, of course, that the judicature provisions of the *Constitution* *Act, 1867* create substantive constitutional limitations on Parliament’s ability to confer powers on courts or tribunals other than those established under s. 96. Although the Court has not fully explored the interaction of ss. 96 and 101, it accepts for present purposes (without deciding) that the constitutional analysis proceeds as the respondents contend.

In 1867, Crown claims to refuse disclosure of potentially injurious or sensitive information were generally considered by superior courts in Canada to be a matter of unreviewable executive prerogative. Given that the superior courts did not exercise any such power of review at the time of Confederation, the analysis under *Re Residential Tenancies Act, 1979* ends at the first question and there is no infringement of s. 96 under that test. Further, while it is true that a superior court’s ability to adjudicate the constitutional issues that come before it forms a part of its core jurisdiction, the issue here is not properly characterized as the authority of the superior court to protect the integrity of its process. Rather, the issue relates to authority in relation to disclosure of material for which the security exemption is claimed. Characterized in that way, the s. 38 scheme does not violate s. 96 of the *Constitution Act, 1867* because it does not impede a court’s power to remedy abuses of process. What is essential for constitutional purposes is that the criminal courts retain the ability to ensure that every person who comes before them as the subject of a criminal prosecution receives a fair trial. What is recognized in both s. 38.14 of the *CEA* and s. 24(1) of the *Charter* is that sometimes the only way to avoid an unfair trial is to have no trial at all. Through s. 38.14 and the *Charter*, the criminal court trial judge possesses the means to safeguard the accused’s fair trial rights. However, the stay of proceedings remedy in s. 38.14 is a statutory remedy to be considered and applied in its own context. It should not be limited by the non statutory “clearest of cases” test for a stay under the *Charter* jurisprudence.

For similar reasons, the challenge to the legislation under s. 7 of the *Charter* also fails. The Federal Court judge’s sole concern under the scheme is the protection of the public interest in sensitive or potentially injurious information. If the Federal Court determines that the disclosure of the information at issue would be injurious to international relations or national defence or national security, then disclosure will only be ordered by that court if in its view the public interest in disclosure outweighs the public interest in non‑disclosure (ss. 38.06(1) and (2) of the *CEA*). While the public certainly has an interest in the effective administration of justice, the s. 38 scheme recognizes that an unfair trial is not an option. The trial judge in this case was not deprived of the ability to adjudicate the *Charter* issues that flowed from the non‑disclosure order. While it is true that the legislation deprives trial judges of the ability to order the disclosure or even their owninspection of material that is withheld pursuant to the s. 38 scheme, they retain the ability in the absence of such access to order whatever remedy pursuant to the *Charter* and s. 38.14 is required to protect the accused’s right to a fair trial. If the trial process resulting from the application of the s. 38 scheme becomes unmanageable by virtue of excessive gaps between the hearing of the evidence or such other impediments, such that the right of the accused to a fair trial is compromised, the trial judge should not hesitate to use the broad authority Parliament has conferred under s. 38.14 to put an end to the prosecution.

**Cases Cited**

**Applied:** *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; **discussed:** *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; **referred to:** *R. v. Malik*, 2005 BCSC 350 (CanLII); *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Labour Relations Board of Saskatchewan v. The Queen*, [1956] S.C.R. 82; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, rev’d 2007 FCA 342, 370 N.R. 128; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. La*, [1997] 2 S.C.R. 680; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186; *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238; *Gugy v. Maguire* (1863), 13 L.C.R. 33; *Bradley v. McIntosh* (1884), 5 O.R. 227; *R. v. Snider*, [1954] S.C.R. 479; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *Abou‑Elmaati v. Canada (Attorney General)*, 2011 ONCA 95 (CanLII); *R. v. Ribic*, 2004 CanLII 7091.

**Statutes and Regulations Cited**

*Anti‑terrorism Act*, S.C. 2001, c. 41.

*Canada Evidence Act*,R.S.C. 1985, c. C‑5, ss. 38 to 38.16, 39.

*Canadian Charter of Rights and Freedoms*, ss. 7, 11(*b*), (*d*), 24(1).

*Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C‑23.

*Constitution Act, 1867*, ss. 96, 101.

*Constitution Act, 1982*, s. 52(1).

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

*Security of Information Act*, R.S.C. 1985, c. O‑5.

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Dawson, Eleanor. “The Federal Court and the Clash of the Titans: Balancing Human Rights and National Security”, Address at the University of Manitoba Faculty of Law, March 30, 2006.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Linstead, Stephen G. “The Law of Crown Privilege in Canada and Elsewhere — Part 1” (1968‑1969), 3 *Ottawa L. Rev.* 79.

APPEAL from a judgment of the Ontario Superior Court of Justice (Dawson J.) (2009), 257 C.C.C. (3d) 135, [2009] O.J. No. 6166 (QL), 2009 CarswellOnt 9311. Appeal allowed.

Croft Michaelson and Nicholas E. Devlin, for the appellant.

John Norris and Breese Davies, for the respondent Asad Ansari.

Rocco Galati, for the respondents Shareef Abdelhaleem and Amin Mohamed Durrani.

Delmar Doucette, for the respondent Steven Vikash Chand.

Paul B. Slansky, for the respondent Saad Gaya.

Sarah T. Kraicer and Josh Hunter, for the intervener the Attorney General of Ontario.

Anil K. Kapoor and Lindsay L. Daviau, for the intervener the Canadian Civil Liberties Association.

No one appeared for the respondents Fahim Ahmad, Zakaria Amara, Mohammed Dirie, Jahmaal James and Saad Khalid.

The following is the judgment delivered by

1. The Court ― This appeal concerns the potential conflict between two fundamental obligations of the state under our system of government: first, to protect society by preventing the disclosure of information that could pose a threat to international relations, national defence, or national security; and second, to prosecute individuals accused of offences against our laws. In s. 38 of the *Canada Evidence Act*,R.S.C. 1985, c. C-5 (“*CEA*”), Parliament has recognized that on occasion it may become necessary to choose between these objectives, but has laid out an elaborate framework to attempt, where possible, to reconcile them. At the heart of this appeal lies the respondents’ challenge to the constitutional validity of this provision. In their view, the scheme violates s. 96 of the *Constitution Act, 1867* and s. 7 of the *Canadian Charter of Rights and Freedoms*.
2. We acknowledge at the outset that in some situations, the prosecution’s refusal to disclose relevant (if sensitive or potentially injurious) information in the course of a criminal trial may on the facts of a particular case prejudice the constitutional right of every accused to “a fair and public hearing” and the separately guaranteed right “to be tried within a reasonable time” (*Charter*, ss. 11(*d*) and (*b*), respectively). Where the conflict is irreconcilable, an unfair trial cannot be tolerated. Under the rule of law, the right of an accused person to make full answer and defence may not be compromised. However, s. 38, as we interpret it, preserves the full authority and independence of the judge presiding over the criminal trial to do justice between the parties, including, where he or she deems it necessary, to enter a stay of proceedings.
3. In our view, for the reasons that follow, s. 38 itself (the text of which is attached hereto in the Appendix) provides enough flexibility to avoid the drastic result of a stay of proceedings in all but the most intractable of cases, as recently demonstrated in the *Air India* prosecution (*R. v. Malik*, 2005 BCSC 350 (CanLII)). While the statutory scheme of s. 38, particularly its division of responsibilities between the Federal Court and the criminal courts of the provinces, raises numerous practical and legal difficulties, we are satisfied that s. 38, properly understood and applied, is constitutionally valid.

A. Overview

1. Parliament has allocated to judges of the Federal Court, on application, the responsibility to consider potentially injurious or sensitive information in respect of which national security is claimed and to determine whether, and under what conditions, it ought to be disclosed. Judges presiding at criminal trials cannot order disclosure to an accused of the withheld material. Nor, under current practices, are they generally given access to that material. And yet, both at common law and under s. 38 itself, it is trial judges, not the judges of the Federal Court, who are entrusted with the ultimate responsibility of protecting the accused’s constitutional right to make full answer and defence. We were not referred to any other jurisdiction where this division of responsibility between different courts has been established in relation to criminal proceedings.
2. Nevertheless, the question before us is not whether this jurisdictional *bifurcation*  is unusual or undesirable as a matter of policy or inefficient as a matter of practice — it has been subject to considerable criticism — but whether it passes constitutional muster. That determination does not depend on whether bifurcation may in some instances lead to delays and inefficiencies in the trial process. Nor does it depend on whether a non-disclosure order will on occasion frustrate the prosecution of serious crimes. Rather, the constitutional validity of the scheme established by Parliament in s. 38 ultimately depends on whether it affords trial judges adequate means to prevent an unfair trial.
3. Parliament has conferred on the Attorney General of Canada in s. 38.03 the power to withhold (or not withhold) relevant information from the criminal courts even where a Federal Court judge has ordered such disclosure to be made. This is a drastic power which, for public policy reasons, Parliament has seen fit to confer on the most senior law officer of the Crown. At the same time, Parliament has recognized in s. 38.14 that while the judge presiding over the criminal trialis powerless to order production to himself or herself for review or divulgation to the accused of the undisclosed relevant information, the criminal court, and the criminal court alone, has the power to make any order considered necessary in order to protect the accused’s right to a fair trial. This provision applies to provincial and superior court judges alike. The remedies that may be ordered include, but are not limited to, dismissal of specified counts, a finding against any party on any issue to which the undisclosed information relates, or a complete stay of proceedings.
4. As we stated in *Charkaoui v. Canada (Citizenship and Immigration)*,2007 SCC 9,[2007] 1 S.C.R. 350, the Court “has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual” (para. 58). But we took care in *Charkaoui* to stress as well the importance of the principle of fundamental justice that “a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case” (para. 61). *Charkaoui* was an immigration case. In criminal cases, the court’s vigilance to ensure fairness is all the more essential. Nevertheless, as we interpret s. 38, the net effect is that state secrecy will be protected where the Attorney General of Canada considers it vital to do so, but the result is that the accused will, if denied the means to make a full answer and defence, and if lesser measures will not suffice in the opinion of the presiding judge to ensure a fair trial, walk free. While we stress this critical protection of the accused’s fair trial rights, we also note that, notwithstanding serious criticisms of the operation of these provisions, they permit considerable flexibility as to how to reconcile the accused’s rights and the state’s need to prevent disclosure.

B. Facts of This Prosecution

1. In June of 2006, 18 people were arrested in the Greater Toronto Area on the suspicion that they were plotting terrorist attacks. The suspects were alleged to have conducted terrorist training camps in Ontario, to have amassed weapons, and to have made plans to storm Parliament, where they intended to behead politicians and detonate truck bombs in several locations.
2. The accused were initially brought to the attention of the Royal Canadian Mounted Police (“RCMP”) by the Canadian Security Intelligence Service (“CSIS”). On a number of occasions, CSIS provided the RCMP with information that had been gathered through surveillance and the use of informants. The June arrests were preceded by more than six months of investigative work by the RCMP’s Integrated National Security Enforcement Team.

(1) *Proceedings in the Ontario Superior Court*

1. Ten of the eighteen suspects were scheduled to be tried on terrorism-related offences before Dawson J. of the Ontario Superior Court of Justice. Extensive disclosure was provided to the accused prior to the preliminary inquiry, including more than 150,000 records and media files. Before this material was produced, however, significant redactions were made on the basis of objections raised under s. 38. For example, affidavits used to obtain judicial authorizations and warrants during the investigation of the accused were edited to conceal sensitive information.
2. A preliminary inquiry began in June of 2007, but was aborted when a direct indictment was preferred on September 24 of that year. At the preliminary inquiry, numerous objections were raised under s. 38 to prevent certain questions from being asked. In the judgment below, Dawson J. noted that those objections had not yet been resolved and would likely re-emerge at trial ((2009), 257 C.C.C. (3d) 135).
3. Pre-trial motions began in May of 2008. At the time this case came before us, it was anticipated that the pre-trial motions would still take considerable time; Dawson J. estimated in his reasons that the pre-trial motions and jury trial combined would last anywhere from two and a half to five and a half years. Since this appeal was heard, however, the charges against all of the participating respondents have been resolved (at least at first instance). Seven of the respondents pleaded guilty while the remaining three were convicted in jury trials.

(2) *Proceedings in the Federal Court*

1. On March 20, 2008, and again on June 16, 2008, the Crown notified the Attorney General of Canada, as required by s. 38.01 of the *CEA*, that the Superior Court proceedings might disclose sensitive information. On December 12, 2008, Noël J. of the Federal Court issued an order under s. 38.04(5) directing that the accused be designated as respondents in proceedings commenced by the Attorney General, stating that a hearing was required, and ordering that notice be given to Dawson J.
2. The accused then brought an application in the Superior Court to challenge the constitutionality of s. 38. The Federal Court halted its proceedings pending the resolution of that challenge.

(3) *Decision of the Ontario Superior Court*

1. Dawson J. held that the s. 38 scheme was unconstitutional. In the first place, he held that the scheme violated s. 96 of the *Constitution Act, 1867*, because vesting exclusive jurisdiction over “privilege” determinations in the Federal Court interfered with the ability of superior court judges to “apply the Constitution”, which represented an invasion of the core jurisdiction of superior courts. Dawson J. further found that this interference constituted an unjustifiable infringement of s. 7 of the *Charter*. Accordingly, he held under s. 52(1) of the *Constitution* *Act, 1982* that the scheme was of no force and effect to the extent of its inconsistency with the Constitution. He struck down the legislative framework to the extent that it conferred exclusive jurisdiction on the Federal Court and asserted his own responsibility, as the superior court judge conducting the criminal trial, to decide any national security privilege issues that might arise in the course of the proceedings.

C. Overview of the Statutory Scheme of Section 38 of the *Canada Evidence Act*

1. We will address a number of aspects of s. 38 in some detail. To begin, a brief overview of the provisions will be of assistance.
2. The s. 38 scheme provides a procedure to govern the use and protection of “sensitive” or “potentially injurious information”. Those expressions are defined in the Act as follows:

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

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

Section 38 places an obligation on all participants to a legal proceeding, as well as non-participating officials, to notify the Attorney General of the possibility that sensitive or potentially injurious information will be disclosed (s. 38.01).

1. Within 10 days of receiving notice, the Attorney General must make a decision with respect to disclosure (s. 38.03(3)). Under s. 38.03(1), the Attorney General may authorize disclosure at any time and pursuant to any conditions that are deemed fit. If the party who gave notice — for example, the provincial Crown — wishes to disclose the information at issue, it may enter an agreement with the Attorney General to do so under specified conditions (s. 38.031(1)). If the Attorney General has not authorized the unconditional disclosure of the information and no disclosure agreement has been reached, the disclosure issue may be taken before the Federal Court on the initiative of the Attorney General, the Crown, the accused (if he or she has been made aware of it), or any other person who seeks the disclosure of the protected information (s. 38.04).
2. A designated judge of the Federal Court then decides whether it is necessary to hold a hearing on the matter and, if so, who should be given notice (s. 38.04(5)). The Attorney General is required to make representations to the court concerning the identity of any persons whose interests may be affected by the disclosure order (s. 38.04(5)(*a*)). Some of the evidence, the records, and the oral hearing will be *ex parte* (seen and heard only by the Attorney General and the designated judge), while some will be private (seen and heard by the parties to the proceedings, but not by the public).
3. The designated judge must first determine if disclosure of the information would be injurious to international relations, national defence, or national security. If the judge is of the view that no such injury would result, he or she may authorize disclosure (s. 38.06(1)). Otherwise, disclosure may be ordered only if the designated judge determines that the public interest in disclosure outweighs the public interest in non-disclosure (s. 38.06(2)). The designated Federal Court judge may also impose conditions on disclosure and order that notification of the decision be given to any person (s. 38.07). It is the Crown’s position that the division of responsibility between the Federal Court and the criminal trial courts is premised on the particular expertise of Federal Court judges in determining matters pertaining to national security.
4. If a party wishes to contest the Federal Court order, it may be appealed to the Federal Court of Appeal, with the possibility of a further appeal to this Court (s. 38.09).
5. Central to the scheme of s. 38 are two ministerial powers exercised by the Attorney General of Canada, one in relation to the disclosure or non-disclosure of potentially injurious or sensitive information and the other with respect to the conduct of prosecutions.
6. First, s. 38.13 empowers the federal Attorney General to personally issue a certificate that prohibits disclosure even of information whose disclosure has been authorized by the Federal Court judge. This certificate is only subject to judicial review by a single judge of the Federal Court of Appeal, and that judge may only vary or cancel the certificate on the ground that the material it contains is not “information obtained in confidence from, or in relation to, a foreign entity . . . or to national defence or national security” (ss. 38.13 and 38.131). In short, this narrow right of review provides no effective judicial means for challenging or correcting a debatable decision by the Attorney General in balancing the public interest in non-disclosure against the public and private interests in disclosure of the subject information.
7. The validity of these powers has not been challenged in this case and, for present purposes, they must therefore be presumed to be constitutionally valid. That being so, we think it particularly difficult for the respondents to maintain that s. 38 is unconstitutional on the theory that disclosure decisions are inherently judicial in nature. As we will demonstrate, this is neither historically nor legally correct. The subset of this argument — that it is unconstitutional to allocate disclosure decisions to the Federal Court instead of to the judges in the criminal courts — is equally untenable, for the same reasons.
8. As we will see, however, this authority of the Attorney General of Canada to disclose or withhold disclosure of potentially injurious or sensitive information, and on what terms, largely independently of the regular Federal Court channel, comes at a price: the potential collapse of the prosecution, whether initiated federally or provincially.
9. Turning to the second power, the prosecutorial authority of the Attorney General is further reinforced by s. 38.15(1), which authorizes the Attorney General to assume by *fiat* exclusive control of any prosecution in connection with which sensitive or potentially injurious information may be disclosed — even where the proceedings were instituted by a provincial Attorney General.

D. A Practical Approach to Section 38

1. The respondents’ submissions, like the judgment below, have all assumed that because the judge presiding at a criminal trial has no right of access to potentially injurious or sensitive material, such access will not normally occur. The respondents further argue that it would be impossible for the defence to demonstrate prejudice without knowing the nature of the material and that it would be impossible for the trial judge to fashion a just and appropriate remedy under s. 38.14 or s. 24(1) of the *Charter*. Properly interpreted and applied, however, s. 38 does not command this result.
2. This Court has repeated on numerous occasions that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Moreover, “Parliament is presumed to have intended to enact legislation in conformity with the *Charter*”: *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at para. 75; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33.
3. We therefore begin from the proposition that, in the absence of clear and unambiguous statutory language to the contrary, the legislation must be understood not to contemplate that trial judges would determine the impact of non-disclosure on trial fairness in a manner that would result in granting unwarranted stays or declining to grant appropriate remedies. Parliament must have been aware of these potential injustices and cannot have intended either result.
4. Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure. For example, in the *Air India* terrorism prosecution, the prosecution and the defence reached an agreement whereby the defence was allowed to inspect documents in the possession of CSIS after giving an undertaking not to disclose the contents to anyone without permission, including the accused. In a subsequently released report on the trial, lead prosecutor Robert Wright and defence counsel Michael Code reported that “in almost every instancedefence counsel were able to conclude that the material was not relevant to the proceedings”: see the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy* (“Air India Report”) (2010), vol. 3, at p. 152.
5. We must presume that Parliament was aware of the possibility that proceedings would be needlessly stayed if the trial judge was denied access to material that could not be disclosed for valid reasons of state secrecy. In light of the vast resources expended in investigating and prosecuting offences that implicate national security and the injustice to society that would result if such prosecutions were needlessly derailed, this cannot have been Parliament’s intention.
6. Nor can Parliament have intended that trial judges be presented with an inadequate record or incomplete picture that could lead them to conclude, erroneously, that trial fairness will be unimpaired. As stated, Parliament is presumed to intend to enact *Charter-*compliant legislation. Even more significantly, in this case, the presumption of constitutionality is reinforced by the existence of s. 38.14, which expressly indicates that the fair trial rights of the accused must be protected — not sacrificed — in applying the other provisions of the scheme. This provision also suggests a recognition by Parliament that it is ultimately the trial judge, having experience with the criminal proceedings and having heard all of the evidence adduced, who will be best placed to make remedial decisions following a s. 38 non-disclosure order.
7. However, the public interest will only be served if the trial judge in the criminal proceedings is able to exercise his or her discretion with an adequate understanding of the nature of the withheld information. In other words, the drastic nature of the potential remedies specified in s. 38.14 leads us to the conclusion that Parliament expected trial judges to be provided with a sufficient basis of relevant information on which to exercise their remedial powers judicially and to avoid, where possible (and appropriate), the collapse of the prosecution.
8. Trial judges are under a duty to protect the accused’s constitutional right to a full and fair defence quite apart from s. 38.14. The broad remedial discretion under s. 24(1) of the *Charter* already includes the power to order any of the remedies listed in s. 38.14 of the *CEA* to prevent an unfair trial. Yet Parliament has chosen to explicitly set out a number of statutory remedies that range from the finely tailored (i.e., dismissing specified counts of the indictment) to the very blunt (a complete stay of all proceedings). Dismissing a specified count of the indictment (or proceeding only on a lesser included offence) as suggested by the legislation, would generally require a thorough enough understanding of the s. 38 information to evaluate it against specific elements of the offences charged. Conversely, if the trial judge lacks that understanding, it will often be impossible to determine what charge, element or component of the defence that information might relate to. In such circumstances, the trial judge may have no choice but to enter a stay. This possibility was referred to in argument as putting the Attorney General and the trial courts in the dilemma of playing *constitutional* *chicken*, an outcome which a sensible interpretation of s. 38 will help to avoid.
9. This leads us to the further observation that the stay of proceedings remedy in s. 38.14 is a statutory remedy to be considered and applied in its own context. It should not be burdened with the non-statutory “clearest of cases” test for a stay outlined in *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. O’Connor*, [1995] 4 S.C.R. 411; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. The criminal court judge may be placed in a position of trying to determine an appropriate remedy where lack of disclosure has made it impossible to determine whether proceeding with a trial in its absence would truly violate “the community’s sense of fair play and decency” (*Jewitt*, at p. 135). Nevertheless, the legislative compromise made in s. 38 will require a stay in such circumstances if the trial judge is simply unable to conclude affirmatively that the right to a fair trial, including the right of the accused to a full and fair defence, has not been compromised.
10. With those observations in mind, we turn to an analysis of specific aspects of the s. 38 scheme.

(1) *The Trial Judge Ought to Receive Notice of a Section 38 Application*

1. Parliament did not intend for trial judges to exercise their authority under s. 38.14 other than judicially. To this end, the Attorney General, as the chief law officer of the Crown, and the Crown prosecutor, pursuant to his or her duties of fairness, should take all steps available to them within the limits imposed by the legislation to provide trial judges with the information required to discharge both the duty to safeguard the fair trial rights of the accused as well as the obligation to Canadian society not to grant unwarranted stays of proceedings.
2. Section 38.04(5)(*b*) contemplates that the Federal Court judge may proceed without a hearing simply on the representations of the Attorney General of Canada (or in defence matters the Minister of National Defence). It is only “if” the designated judge decides to proceed to a hearing that he or she will “determine who should be given notice of the hearing” (s. 38.04(5)(*c*)(i)).
3. In the context of criminal proceedings, it is our view that unless the designated judge decides without a hearing that the information in question should be disclosed to the criminal court, there must be a hearing on the disclosure issues, and that s. 38.04(5) should be read as requiring notice to the criminal court that a s. 38 proceeding has been commenced in Federal Court. Although s. 38.04(5)(*c*)(i) may at first blush appear to grant Federal Court judges a wide discretion in determining who “should” be given notice, this Court has held in the past that “[e]nabling words are always compulsory where they are words [used] to effectuate a legal right”: *Labour Relations Board of Saskatchewan v. The Queen*, [1956] S.C.R. 82, at p. 87. Given that the criminal trial judge will require notice to effectively discharge the duty to protect the accused’s legal rights under the *Charter*, it will always be the case (subject of course to the other provisions of that Act) that he or she “should” be given notice. The word “may” in s. 38.07 will similarly be understood to require that notice of the Federal Court judge’s final order be given to the trial judge. Although the determination *whether* to give notice to a criminal trial judge is not discretionary, the *content* of that notice remains at the discretion of the designated judge. This will vary with the different circumstances of each case.
4. Similarly, absent compelling reasons to the contrary, the Federal Court judge should generally order that notice of the existence of the proceedings in the Federal Court be given to the accused in the criminal trial.  This is not the occasion for the Court to pronounce in detail on how the notice provisions in s. 38.04 interact with the s. 38.02 prohibition of disclosure of the existence of proceedings in the Federal Court.  It is clear, however, that there is sufficient flexibility in the overall scheme to permit notice to be given whenever possible and appropriate.

(2) *Empowering the Trial Judge to Exercise the Section 38 Discretion Judicially*

1. The broad discretion conferred by s. 38 must be interpreted in accordance with the purpose of the legislation, which is to balance the public interest in secrecy against the public interest in the effective administration of a fair system of justice*.* This purposerequires that trial judges have the information required to discharge their duties under the *CEA* and the *Charter* in an informed and judicial manner.
2. The notice given under s. 38.04(5)will trigger s. 38.14, at which point the trial judge will be bound to consider the impact of non-disclosure on trial fairness. In order to discharge this duty, the trial judge will require some information about the withheld information. In some cases, a summary may be sufficient, while in other instances,more extensive access will be required.
3. As noted earlier, the Attorney General ofCanada has the ultimate power to disclose — or refuse to disclose — relevant information under the s. 38.03(1) certificate power. This provision permits the Attorne*y* General to make disclosure “at any time and subject to any conditions” of “all or part of the information”. Where a case is prosecuted by a provincial Crown, ss. 38.031 and 38.04(6) would allow the Crown to make an agreement with the Attorney General enabling the province to make partial or conditional disclosure of the information to the trial judge. If the Attorney General declines to do so, and in the result puts the trial judge in the position of having to consider a stay of the criminal proceedings, that is a decision for the Attorney General to make, having regard of course to the potential adverse consequences for the prosecution.
4. Section 38 creates a scheme that is designed to operate flexibly. It permits conditional, partial and restricted disclosure in various sections. Section 38.06(1) affirmatively requires the Federal Court judge to consider the public interest in making disclosure along with what conditions are “most likely to limit any injury to international relations or national defence or national security” (s. 38.06(2)). In making this determination, the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding. One example of how this might work in practice can be found in *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, appeal allowed on other grounds, 2007 FCA 342, 370 N.R. 128, where the Federal Court judge disclosed a summary of the material being withheld under s. 38 to counsel for the parties, and directed that it be made available to the trial judge and prosecutor if necessary to determine whether the fair trial rights of the accused had been infringed (para. 187).
5. The problems created by the division of judicial responsibilities may be addressed in different ways. For example, a Federal Court judge exercising the discretion conferred by s. 38.06(2) might find that the only condition required in order to authorize disclosure to the criminal court judge without risking injury to national security is that he or she not reveal the information to the accused, or a condition that the information be reviewed in a designated secure facility. Disclosure of the information to the trial judge alone, as is the norm in other jurisdictions, and for the sole purpose of determining the impact of non-disclosure on the fairness of the trial, will often be the most appropriate option. This is particularly true in light of the minimal risk of providing such access to a trial judge, who is entrusted with the powers and responsibilities of high public office.
6. Crown counsel will also have an important role to play as the proceedings unfold. For example, if it becomes obvious to the Crown that non-disclosure under s. 38 will significantly and irreparably impact trial fairness, then the Crown itself ought normally to enter a stay of proceedings.
7. Under some circumstances, the trial judge might conclude that it is not possible to assess the relevance of the withheld material without submissions from a counsel opposed in interest to the prosecution. In such a situation, the appointment of a security-cleared special advocate could prove to be beneficial if he or she is adequately informed of the matters in issue by authorization of the Attorney General of Canada under s. 38.03. In *Charkaoui*, we discussed the advantages and some disadvantages of resort to the special advocate systems employed in other contexts in Canada and (subsequently) in the United Kingdom. Since then, a statutory regime for special advocates has been created under the *Immigration and Refugee Protection Act*, S.C. 2001,c. 27 (“*IRPA*”). While there are numerous criticisms of the special counsel procedure under the *IRPA*, and we do not by any means discount the weight of these criticisms, it is nevertheless the case that the assistance of a special counsel might be of considerable help (depending on the circumstances) to the judge presiding at a criminal trial attempting to determine the effect of s. 38 non-disclosure on what s. 38.14(1) itself describes as “protect[ion of the] right . . . to a fair trial”.
8. In the Air India Report, the Honourable John C. Major, Q.C. (the “Commissioner”) noted that the *IRPA* regime “has led to the creation of a cadre of security-cleared lawyers with experience in matters involving national security confidentiality” (vol. 3, at pp. 167-68) and recommended that these special advocates be permitted to protect the accused’s interests during s. 38 applications. In reaching this conclusion, the Commissioner noted that there was extensive support before him for the use of special advocates in s. 38 proceedings: see Air India Report, at pp. 167-69 (citing the recommendations of the House of Commons and Senate committees that reviewed the operation of the *Anti-terrorism Act*, S.C. 2001, c. 41, as well as submissions from the Federation of Law Societies of Canada, the Canadian Bar Association, and the Criminal Lawyers’ Association, and also noting that the Federal Court has already appointed security-cleared *amici curiae* to assist it in s. 38 proceedings).
9. We recognize that the procedural flexibility of the s. 38 scheme allows for arrangements (such as the one that was reached between the prosecution and the defence in the *Malik* prosecution previously discussed), whereby defence counsel might be allowed to access the withheld material on an undertaking not to disclose it to the accused. However, we would urge caution in resorting to such procedures. In *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, we noted that even where the client’s consent is obtained, arrangements of this nature will “at best, strain the necessary relationship between defence counsel and their accused clients” (para. 45). At worst, such arrangements may place lawyers in a conflict between their duty to represent the best interests of their client and their duty to honour the undertakings they have given with respect to the privileged information, such that they are forced to withdraw their representation (para. 46).
10. The flexible procedures under s. 38 may be contrasted with the inflexible treatment of Cabinet confidences in s. 39(1) at issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, which states:

**39.** (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen’s Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

The absolute language of s. 39 is intended to oust the developing common law approach to Cabinet confidences, which allows courts to balance the public interest in protecting confidentiality against the public interest in disclosure: *Babcock*, at paras. 19-23. We recognize that there are important substantive differences between the different disclosure provisions contained in the *CEA*. Nonetheless, one would expect Parliament to have used similarly clear language if it had intended to preclude the trial judge’s access to at least a summary of the type of information that is subject to a s. 38 challenge.

(3) *The Section 38 Process May Proceed in Stages Before the Criminal Trial Judge*

1. It will always be left to trial judges to determine whether they have a sufficient basis on which to exercise their remedial discretion judicially. If, under the arrangements that are made, there is simply not enough information to decide whether or not trial fairness has been materially affected, the trial judge must presume that the non-disclosure order has adversely affected the fairness of the trial, including the right of the accused to make full answer and defence. In such a case, rather than proceed directly to issuance of a stay, the Crown should be advised accordingly. The Attorney General will then have an opportunity to make further and better disclosure under the Attorney General certificate procedure to address the trial judge’s concerns. If no (or inadequate) additional information can be provided to the trial judge, a stay of proceedings will be the presumptively appropriate remedy.
2. It bears repeating that although stays of proceedings pursuant to the common law and the *Charter* are considered to be extraordinary in nature, they are an expressly contemplated remedy under s. 38.14 to protect the fair trial rights of the accused from the adverse impact of non-disclosure. As we have outlined above, if the legislation is applied flexibly and in light of what the trial judge requires to exercise his or her discretion judicially, and with the sense of fairness to be expected from the Attorney General and the prosecutor, stays of proceedings that, unknown to the trial judge, are not in fact warranted should be rare. Trial judges should almost always be given enough information to either order a more finely tailored remedy or, where appropriate, to conclude that no remedy is necessary. However, the *Charter* requires, and the legislation acknowledges, that where the government is withholding information and the trial judge is unable to satisfy himself or herself that non-disclosure has not adversely affected trial fairness, and no lesser step or remedy can assure it, a stay of proceedings under s. 38 must issue. Doubt, in this respect, should be resolved in favour of protecting the fair trial rights of the accused, including the right of full answer and defence.
3. As a final note, we would add that although the trial judge will retain the discretion to decide whento order a remedy, the impact on violations or abuses “on the fairness of the trial . . . is often best assessed in the context of the trial as it unfolds”:  *R. v. La*, [1997] 2 S.C.R. 680, at para. 27.

E. The Constitutional Analysis in Light of the Foregoing Interpretation of Section 38

1. Having interpreted the relevant legislation, we now return to the constitutional issues before us.

(1) *Section 38 Does Not, as Correctly Interpreted, Violate Section 96 of the Constitution Act, 1867*

1. A major focus of the argument before us was the trial judge’s inability to access the material that is the subject of a non-disclosure order under s. 38. In cases where the trial proceeds before a superior court judge, the respondents contend, and Dawson J. accepted, that s. 38 interferes with the ability of superior court judges to “apply the Constitution” and protect the s. 7 rights of accused persons. This, the respondents submit, offends s. 96 of the *Constitution Act, 1867* by impermissibly transferring these responsibilities to the Federal Court, a non-section 96 tribunal, and by invading the “core jurisdiction” of superior courts. It also, in their submission, violates s. 7 of the *Charter*.
2. There are three short answers to these submissions: superior courts historically did not have the jurisdiction to review Crown claims to refuse disclosure of potentially injurious or sensitive information of state; such authority is not within the protected core of superior court jurisdiction; and the challenged provisions do not prevent a trial judge presiding over a criminal prosecution from protecting the fair trial rights of an accused. Inability to rule on production does not infringe s. 96 or s. 7.
3. It is true, of course, that the judicature provisions of the *Constitution* *Act, 1867* create substantive constitutional limitations on Parliament’s ability to confer powers on courts or tribunals other than those established under s. 96. Although the Court has not fully explored the interaction of ss. 96 and 101, we accept for present purposes (without deciding) that the constitutional analysis proceeds as the respondents contend.
4. They submit that to determine whether a conferral of power on a tribunal other than a s. 96 court violates s. 96 of the *Constitution* *Act, 1867*, one first applies the test set out by Dickson J. (as he then was) in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, and as developed in the subsequent cases. In brief, the test asks (1) whether the power conferred broadly conforms to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation; (2) if so, whether the power is a judicial power; and (3) if so, whether the power is either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function: *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 74.
5. Applying this test, there is no violation of s. 96 in this case. As noted in *Re Residential Tenancies Act, 1979*, the first question requires a historical inquiry into “whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation”(p. 734). As the Court later noted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, “if the power in question does not conform to one exercised by a superior court in 1867, the inquiry ends” (para. 12). Notably, the power must also have been exercised exclusivelyby superior courts at Confederation. For example, if jurisdiction was concurrent between superior and inferior courts, the inquiry will still end at the first stage of the *Residential Tenancies* test: *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238.
6. In 1867, Crown claims to refuse disclosure of potentially injurious or sensitive information were generally considered by superior courts in Canada to be a matter of unreviewable executive prerogative: *Gugy v. Maguire* (1863),13 L.C.R. 33 (Q.B.); *Bradley v. McIntosh* (1884),5 O.R. 227 (C.P.). See, generally, S. G. Linstead, “The Law of Crown Privilege in Canada and Elsewhere ― Part 1” (1968-1969), 3 *Ottawa L. Rev.* 79. While the law has since evolved away from this exceptionally deferential approach (see, e.g., *R. v. Snider*, [1954] S.C.R. 479, and *Carey v. Ontario*, [1986] 2 S.C.R. 637), the respondents’ argument that s. 38 is constitutionally vulnerable because it removes part of the historical jurisdiction of the superior courts is misconceived. Given that the superior courts did not exercise anysuch power of review at the time of Confederation, the analysis under the *Residential Tenancies Act,* *1979* ends at the first question; there is no infringement of s. 96 under that test. We note that the Ontario Court of Appeal reached the same conclusion in *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95 (CanLII), though in the context of pre-trial discovery in a civil action.
7. However, even though the grant of power passes the *Residential Tenancies* test, it will be unconstitutional if the legislation purports to confer exclusive jurisdiction respecting a matter within the core jurisdiction of s. 96 courts: *MacMillan Bloedel*, at paras. 27-28. A power that is “integral” to the operation of superior courts is part of the “core or inherent jurisdiction” that cannot be stripped from the superior court (para. 15) without violating s. 96 of the *Constitution Act, 1867*. An element of the superior court’s“inherent jurisdiction” is the power to enforce its own orders and maintain its dignity and respect (paras. 33 and 37). In *Reference re Amendments to the Residential Tenancies Act (N.S.)*, at para. 56, Lamer C.J. further refined the definition of the “core” jurisdiction, stating that it included

. . . only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system.

The respondents contend that s. 38 has the effect of removing the core jurisdiction of a s. 96 court to safeguard the fair trial rights of an accused.

1. It is true that a superior court’s ability to adjudicate the constitutional issues that come before it forms a part of the essential core described by Lamer C.J. in the cases cited above. However, our view is that this is not what is truly in issue in this case. Proper characterization of the subject matter of the challenged power is critical.
2. *MacMillan Bloedel* insisted that “[a] proper characterization [of the subject matter] for s. 96 purposes must be narrow and consider the nature of the dispute” (para. 25). Similarly in *Babcock*, at paras. 58-61, where the constitutional challenge related to the non-disclosure of Cabinet confidences under s. 39 of the *CEA*, the Court precisely characterized the dispute as a “superior court[’s ability] to compe[l] disclosure of Cabinet [and Privy Council] confidences” (para. 58), not the much broader formulation as to whether s. 39 limited the “courts’ ability to control their own process” (para. 59).
3. The issue here is not properly characterized as the authority of the superior court to protect the integrity of its process; that authority is acknowledged by Parliament in s. 38.14. Rather, the issue here relates to authority in relation to disclosure of material for which the security exemption is claimed. When the issue is characterized in that way, as it was in *Babcock*, s. 38 of the *CEA* does not violate s. 96 of the *Constitution Act, 1867* because it does not “in and of itself, impede a court’s power to remedy abuses of process” (*Babcock*, at para. 60).
4. What is essential for constitutional purposes is that the criminal courts retain the ability to ensure that every person who comes before them as the subject of a criminal prosecution receives a fundamentally fair trial. What is recognized in both s. 24(1) of the *Charter* and s. 38.14 of the *CEA* is that sometimes the only way to avoid an “[un]fair” trial is to have no trial at all. As we have explained, through s. 38.14 and the *Charter*, the criminal court trial judge possesses the means to safeguard the accused’s fair trial rights.

(2) *Division of Judicial Responsibilities Does Not Infringe Section 7*

1. For similar reasons, the respondents’ s. 7 challenge to the legislation must also fail.
2. In the court below, Dawson J. held that the removal of the disclosure determination from the criminal courts to the Federal Court and his inability to review the withheld information had the effect of “preventing th[e Superior Court] from protecting and enforcing the rights of an accused to disclosure and to full answer and defence” (para. 11). Dawson J. held that the resolution of the disclosure issue and the determination of whether there had been a violation of the accused’s right to timely disclosure as guaranteed by s. 7 of the *Charter* were “so fundamentally intertwined” that they could not be separated (para. 101). In his view, an “incorrect” non-disclosure order by the Federal Court would likely result in a violation of the accused’s s. 7 rights. He concluded that depriving the Superior Court of the ability to resolve the privilege issue in the usual way necessarily prevented him from determining whether there was a breach of the accused’s *Charter* rights. With respect, we disagree.
3. Parliament’s understanding of the respective roles of judges conducting criminal trials and Federal Court judges is perhaps best understood by reference to the following exchange made before the Special Senate Committee on the Subject Matter of Bill C-36, Issue No. 1, 1st Sess., 37th Parl., October 22, 2001:

**Mr. Piragoff:** . . . The certificate issued by the Attorney General, which other senators have asked about, would be the ultimate guarantee that information such as sources of information and names of informers would not be made public.

. . .

**Senator Kelleher:** Would we not be hit by the judge? That is my concern.

**Mr. Piragoff:** The legislation recognizes that if the Attorney General exercises power to withhold information, the trial judge could assess the impact of not having that information upon a trial. That could involve dismissing the case.

Other amendments try to get as much information to that trial judge as possible. The Federal Court judge will try, for example, to make an edited copy or indicate that for the purposes of a trial, certain facts may be assumed to exist to try to keep the trial alive, but it is up to the trial judge in the provincial court who is conducting a murder trial to finally rule on whether there could be a fair trial without the information. That is at that judge’s discretion, not at the Federal Court’s discretion.

**Senator Kelleher:** That is what troubles me.

**Mr. Piragoff:** We are now balancing two issues. We are balancing the interests of the state to protect information and the interests of the accused to have a fair trial, which is protected by the Charter. There may be situations where both of those cannot be reconciled and it then becomes a question of whether the prosecution of the individual or the protection of the information is more important in a particular situation. That is a difficult choice, but it is a stark choice that may have to be made sometimes. [Emphasis added; pp. 63-64.]

The Federal Court judge’s sole concern under the scheme is the protection of the public interest in sensitive or potentially injurious information. If the Federal Court determines that the disclosure of the information at issue would be injurious to international relations or national defence or national security, then disclosure will only be ordered by that court if in its view the public interest in disclosure outweighs the public interest in non-disclosure (ss. 38.06(1) and (2)). While the public certainly has an interest in the effective administration of justice, or “keep[ing] the trial alive”, s. 38 recognizes that an unfair trial is not an option. Dawson J. was not deprived of the ability to adjudicate the *Charter* issues that flowed from the non-disclosure order. While it is true that the legislation deprives trial judges of the ability to order the disclosure or even their owninspection of material that is withheld pursuant to s. 38, they retain the ability in the absence of such access to order whatever remedy pursuant to the *Charter* and s. 38.14 is required to protect the accused’s right to a fair trial. When it enacted s. 38 of the *CEA*, Parliament was aware that limiting the trial judge’s power to order disclosure may lead to the imposition of a more drastic remedy than might otherwise be justified. In s. 38.14, Parliament chose to live with that possibility by explicitly contemplating in such circumstances a stay of proceedings.

(3) *The Policy Debate Is Not Before Us*

1. The Attorney General argues, at para. 104 of its factum, that s. 38 strikes a “careful and sensitive balance” between the government’s need for secrecy and the protection of individual rights by dividing jurisdiction between Federal Courts and trial courts on the basis of each forum’s expertise. He points to the fact that the Federal Court has dealt with national security matters for more than 20 years under the *Canadian Security Intelligence Service Act*,R.S.C. 1985, c. C-23, as well as other legislation, such as that governing immigration and refugee matters.
2. The Attorney General also points out that there are a limited number of designated judges at the Federal Court who deal with issues of national security. These designated judges frequently meet to discuss national security issues, new developments in the jurisprudence and best practices. He says that they have developed relevant programs concerning privacy, human rights and national security, in conjunction with judges from other jurisdictions and scholars (see E. Dawson, “The Federal Court and the Clash of the Titans: Balancing Human Rights and National Security”, Address at the University of Manitoba Faculty of Law (March 30, 2006)). All proceedings that implicate national security issues are conducted in a secure facility in the National Capital Region. This facility contains a secure registry for storing confidential information, secure offices and computers and secure hearing rooms. Every staff member who is involved in a national security proceeding has a Top Secret level security clearance and is bound by the *Security of Information Act*,R.S.C. 1985, c. O-5, to permanently maintain the secrecy of classified information.
3. Be that as it may, the bifurcation of criminal proceedings has come under heavy criticism from judges, lawyers and academics. Most notably, in the recently released Air India Report, the Commissioner concluded that “[t]he present two-court system used in deciding section 38 applications is out of step with systems in other democracies” and “has demonstrated unequivocally that it is a failure” (p. 160). The Commissioner recommended to the government that the two-court system be abolished and that national security confidentiality determinations be left to Superior Court judges (pp. 160 and 165). The ultimate fate of this recommendation is not yet known.
4. We note that the Commissioner’s concerns were largely tied to the inability of trial judges to obtain information about, or access to, the withheld material, which we hope to have addressed in a practical way in this ruling.
5. However, the Commissioner also expressed concerns in his report about the manner in which the s. 38 process “affects both the efficiency and the fairness of terrorism prosecutions” (p.162). He noted that apart from the Attorney General of Canada, the parties before him “were almost unanimous in concluding that the current two-court system was inadequate and could cause problems” (p. 158). The majority of the criticisms were centred on the delays that are occasioned by fragmenting the criminal trial process and the duplicated effort involved in litigating the same issue before two separate courts.
6. The Commissioner noted that even without the burden of s. 38 litigation, “terrorism prosecutions already sorely tax the stamina of judges and jurors” (p. 154). He expressed a concern that extensive litigation and appeals on disclosure issues might result in permanent stays of proceedings due to unreasonable delays. The Commissioner cited *R. v. Ribic*, 2004 CanLII 7091 (Ont. S.C.J.), as an example of how the accused might attempt to use the two-court system to sabotage a terrorism trial by purposely calling evidence that would engage s. 38. (In *Ribic*, the s. 38 litigation began during the criminal trial before a jury, and the delay caused by the back and forth to the Federal Court resulted in a mistrial.)
7. These comments challenge the underlying wisdom of the s. 38 scheme adopted by Parliament. That, of course, was properly a matter for the Commissioner, but the wisdom (as distinguished from the validity) of s. 38 is not a matter for this Court. To the extent that the practical problems of bifurcation create unfairness to the accused or otherwise jeopardize the due administration of justice, the criminal court is authorized to order a s. 38.14 remedy.
8. We recognize that the legislative division of responsibilities does have the potential to cause delays and to pose serious challenges to the fair and expeditious trial of an accused, especially when the trial is by jury. While we do not find that this potential invalidates the legislative scheme, situations may well arise in which the division of responsibilities between courts will give rise to unreasonable trial delays, undue disruption to jurors and risk of juror contamination. These will have to be addressed on a case-by-case basis and the appropriate remedies issued to avoid an unfair trial.
9. An important step the parties can take is attempting to identify potential national security issues during pre-trial proceedings. This would allow the disclosure arguments to take place at an early date. Section 38 encourages early-stage disclosure proceedings. In fact, it was amended in 2001 to allow the scheme to be engaged prior to the criminal trial and to “permit the government to take pro-active steps in the appropriate circumstances” (Department of Justice, “Amendments to the *Canada Evidence Act* (“*CEA*”)” (online: http://www.justice.gc.ca/antiter/sheetfiche/ceap2-lpcp2-eng.asp)). Due diligence in this respect will work to minimize the risk of mistrials. Disclosure by the Crown in a series of stages over a period of time, each new stage of disclosure triggering additional s. 38 proceedings, will heighten the risk of resort by the trial judge to s. 38 remedies.
10. As we have stated, co-operative arrangements between the prosecution and the defence are to be encouraged, as they have the potential to greatly facilitate complex trials for all parties involved and to reduce the strain on judicial resources. However, the defence is under no obligation to cooperate with the prosecution and if the end result of non-disclosure by the Crown is that a fair trial cannot be had, then Parliament has determined that in the circumstances a stay of proceedings is the lesser evil compared with the disclosure of sensitive or potentially injurious information.
11. We noted earlier that the exercise by the trial judge of the s. 38.14 statutory remedy is not constrained by the ordinary *Charter* jurisprudence concerning abuse of process. Neither is it constrained by the ordinary *Charter* jurisprudence in relation, for example, to trial within a reasonable time. If the trial process resulting from the application of the s. 38 scheme becomes unmanageable by virtue of excessive gaps between the hearing of the evidence or other such impediments, such that the right of the accused to a fair trial is compromised, the trial judge should not hesitate to use the broad authority Parliament has conferred under s. 38.14 to put an end to the prosecution.
12. It will ultimately be for Parliament to determine with the benefit of experience whether the wisdom of the bifurcated scheme should be reconsidered. We conclude, however, that s. 38 as we have interpreted it passes constitutional muster. Trial unfairness will not be tolerated.

F. Conclusion

1. The appeal is allowed. The constitutional questions are answered as follows:

l. Are ss. 38 to 38.16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, *ultra vires* the Parliament of Canada on the ground that they infringe ss. 96 and 101 of the *Constitution Act, 1867*?

Answer: No.

2. Do ss. 38 to 38.16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

3. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

**APPENDIX**

*Canada Evidence Act*, R.S.C. 1985, c. C-5

International Relations and National Defence

and National Security

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

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

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

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

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

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

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

**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.

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

(6) This section does not apply when

(*a*) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;

(*b*) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

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

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

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

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

**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).

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

(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.

**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).

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

(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.

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(*c*) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

**38.04** (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

(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,

(*a*) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(*b*) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

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

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

(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.

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

(*a*) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or part of the information or disclosure of the facts or information subject to conditions; and

(*b*) if an agreement is entered into, the Court’s consideration of the application or any hearing, review or appeal shall be terminated.

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court’s consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

**38.05** If he or she receives notice of a hearing under paragraph 38.04(5)(*c*), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

**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 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.

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

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

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

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

**38.07** The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

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

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

(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.

**38.1** Notwithstanding any other Act of Parliament,

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

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

**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*.

(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*.

**38.12** (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. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

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

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

(*a*) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(*b*) every party to the proceeding;

(*c*) every person who gives notice under section 38.01 in connection with the proceeding;

(*d*) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;

(*e*) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;

(*f*) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

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

(4) The Attorney General of Canada shall cause a copy of the certificate to be filed

(*a*) with the person responsible for the records of the proceeding to which the information relates; and

(*b*) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

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

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

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

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

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

**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.

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

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

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

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

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

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

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

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

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

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

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the *Canada Gazette*

(*a*) the certificate as varied under subsection (8); or

(*b*) a notice of the cancellation of the certificate under subsection (9).

**38.14** (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

(*a*) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;

(*b*) an order effecting a stay of the proceedings; and

(*c*) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

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

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

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

(4) The fiat or a copy of the fiat

(*a*) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and

(*b*) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

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

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

*Appeal allowed.*

*Solicitor for the appellant:  Public Prosecution Service of Canada, Toronto.*

*Solicitor for the respondent Asad Ansari:  John Norris, Toronto.*

*Solicitors for the respondents Shareef Abdelhaleem and Amin Mohamed Durrani:  Rocco Galati Law Firm Professional Corporation, Toronto.*

*Solicitors for the respondent Steven Vikash Chand: Marlys Edwardh Barristers Professional Corporation, Toronto.*

*Solicitor for the respondent Saad Gaya:  Paul B. Slansky, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties Association:  Kapoor Barristers, Toronto.*