SECTION 38 AND THE OPEN COURTS PRINCIPLE

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"The open court principle is a cornerstone of our democracy . . . . Section 38 is the antithesis to this fundamental principle."[1]

I. INTRODUCTION

Since October of 2001, Hassan Almrei has been held in solitary confinement at a Toronto detention centre.[2] After a thirty-nine day hunger strike in the fall of 2003, the temperature in Almrei's cell was finally raised from what guards described as "very cold" to an acceptable 22 degrees Celsius.[3] Unlike almost all other inmates at the Metro West Detention Centre, Almrei has never been charged with a crime—indeed, he's never even had an opportunity to examine the evidence used against him.[4] Currently, Almrei awaits deportation to Syria, the same country that tortured Canadian citizen Maher Arar.[5] Almrei's case is not unique, however. At least four other Canadian residents[6] are currently being detained through the use of government-issued "security certificates," a special power that allows authorities to arrest residents on the grounds that they may be a threat to Canadian national security.[7] Those arrested have only one chance to challenge the security certificate, and the

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1 *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, [2004] F.C.J. No. 1303 at para. 44.

2 See Michelle Shephard, "Branded as Terrorist Thread, Men Languish in Toronto Jail" *Toronto Star* (17 July 2004).

3 See "Accused Terrorist Suspect Ends Hunger Strike" *Globe and Mail* (12 November 2003).

4 See Thomas Walkom, "Terror Suspect Marks Time" *Toronto Star* (10 February 10 2004).

5 See Gillian Livingston, "Terror Suspect Given Reprieve" *Toronto Star* (27 November 2003).

6 Others detained on security certificates include Mohamed Harkat, Ernst Zundel, Mahmoud Jaballah, Mohamed Zeki Mahjoub, and Adil Charkaoui.

7 See *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 77(1).

government is allowed to introduce secret evidence against them in *ex parte* hearings.[8]

An expanded ability to issue security certificates[9] is only one feature of recent Canadian attempts to fight terrorism. Canadian omnibus legislation known as Bill C-36 loosened the restraints on government action after the September 11 attacks. Bill C-36 was Canada's legislative response to the attacks on the World Trade Center on September 11, 2001, and was signed into law a few months after the attacks. One of the most troubling changes wrought by C-36 was modification of Section 38 of the *Canada Evidence Act*. The modified Section 38 allows government to withhold a vast amount of information from the participants in a wide-variety of judicial proceedings in Canada, including criminal trials, extradition proceedings, and refugee hearings.[10] Even more problematic than the fact that Section 38 forces participants to apply to the court to force disclosure of information, however, is the fact that the courts can order the parties to keep the very occurrence of a disclosure hearing secret.[11]

For example, in January of 2002, the RCMP executed a search warrant at the home of Abdullah Almalki in Ottawa.[12] On a trip to Syria to visit his parents a few months later, Almalki was arrested by Syrian officials, detained, and possibly tortured.[13] As part of an inquiry into the relationship between the RCMP search of Almalki's home and his subsequent arrest in Syria, Almalki's lawyers and representatives of the Ottawa Citizen newspaper asked to see the information the RCMP used to obtain its search warrant.[14] The general rule in Canadian law is that, once executed, the information used to obtain a search warrant must be made publicly available.[15] According to news reports at the time, the Crown was considering using

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[8] See *ibid.*, s. 78.

[9] Bill C-11 removed many of the safeguards that existed in the prior security certificate process. For example, before C-11 was passed on November 1, 2001, the Security Intelligence Review Committee (the special oversight body for CSIS) was required to investigate and issue a report before a security certificate for permanent residents could be issued, and an adverse decision of the Federal Court did not act as an immediate removal order. C-11 removed both of these safeguards.

[10] See *Canada Evidence Act*, R.S.C. 1895, c. C-5, ss. 38.01-02.

[11] See *ibid.*, s. 38.02(1)(c).

[12] See Joe Paraskevas, "Amalki Search Warrants May Be Sealed, Lawyer Warns" *Ottawa Citizen* (17 November 2003) [Paraskevas].

[13] See *ibid.* Recently, Almalki was acquitted of all charges in a Syrian court, but ordered to perform 30 months of military service. See Michelle Shephard, "Ottawa Engineer Acquitted in Syria" *Toronto Star* (27 July 2004).

[14] See *ibid.*

[15] See *A-G Nova Scotia v. MacIntyre* (1982), 65 C.C.C. (2d) 129 (S.C.C.).

Section 38 of the *Canada Evidence Act* to keep the Almalki search warrant application sealed.[16] Did the Crown invoke Section 38? Was litigation initiated by the Ottawa Citizen or Almalki's lawyers to challenge the use of Section 38? The truth is that the public simply did not know until the issue was finally decided and the court released an opinion. "Under the current law, no one is to disclose that a notice of application under section 38 has been filed with the Federal Court. Put simply, not even the Court can acknowledge publicly that it is seized of a section 38 proceeding."[17]

Together, security certificates and the use of Section 38 of the *Canada Evidence Act* represent an alarming trend. These two expanded areas of government power constitute a veil of secrecy that increasingly shrouds judicial proceedings and prevents public access to government information. Although the Federal Court of Appeal recently examined the constitutionality of security certificates,[18] the use of Section 38 remains largely unexamined by both Canadian courts and scholars. In this note, I will consider the effects of the modified Section 38 on civil liberties in Canada. I will begin by explaining why open courts and access to information are essential to effective democracy and to fairness for accused individuals. I will then proceed to examine Section 38 in detail. Finally, I will consider alternative mechanisms to those contained in Section 38 and explain how they can do a better job of both protecting the government's interest in national security *and* promoting the public's interest in overseeing government activity.

II. THE PUBLIC'S RIGHT TO KNOW

The principle that court proceedings and documents are open to the public is "fundamental to our system of justice"[19] and "is deeply embedded in the common law tradition."[20] The traditional rationale for this principle is that "it is a restraint on arbitrary action by those who govern and by the powerful".[21] As the Supreme Court of Canada has stated:

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16 See *Paraskevas, supra* note 12.

17 See *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, [2004] F.C.J. No. 1303 at para. 35.

18 See *Charkaoui (Re)*, [2004] F.C.J. No. 2060.

19 *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at para. 27 (per Cory, J.).

20 *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at para. 21.

21 See *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113 (C.A.) ("There can be no doubt that the openness of the courts to the public is one of the hallmarks of a democratic society. Public accessibility to the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful").

> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.[22]

While the courts clearly acknowledge that public access to court proceedings and documents is necessary for effective public oversight of the judicial system,[23] another benefit derives from such access as well. Public access also allows for civilian oversight of law enforcement activity. Access to court documents like search warrant applications, affidavits, and transcripts of testimony all provide otherwise unavailable insight into the day-to-day activities of police officers. Because "[t]he tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern[,]"[24] restrictions on public access to court proceedings "seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy."[25]

An open press is vital for public awareness of judicial activity.[26] "The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny."[27] Publication bans, such as those authorized by the Criminal Code and Section 38 of the *Canada Evidence Act*, are a severe limitation on freedom of the press and the con-

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[22] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at para. 5 (per Cory, J.) [*Edmonton Journal*].

[23] See *ibid.* at para. 10 ("Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court").

[24] *R v. Mentuck*, [2001] 3 S.C.R. 442 at para. 50.

[25] *Ibid.* at para. 51.

[26] See *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at para. 23. ("That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom"). See also, Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at §40.13(b). (freedom of the press includes "the freedom to publish reports of proceedings in court"). Freedom of the press is, of course, protected by s. 2(b) of the *Charter of Rights and Freedoms*. Additionally, s. 11(d) of the *Charter* guarantees public hearings for persons charged with criminal offences.

[27] *Edmonton Journal, supra* note 22 at para. 9. The same arguments apply to press access to court documents and to pre-trial proceedings. See *ibid.* at para. 11. See also *Southam Inc. v. Coulter* (1990), 75 O.R. (2d) 1 (C.A.) ("I do not think that it is reasonable to distinguish between pre-trial proceedings and trial proceedings").

comitant right of the public to be informed about government activities. These considerations have led the Supreme Court to conclude that:

> The importance of freedom of expression and of public access to the courts through the press reports of the evidence, arguments and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.[28]

III. THE INTERESTS OF THE ACCUSED

At the same time that public access to judicial proceedings promotes public accountability and democratic oversight, it also furthers the interests of the participants in those proceedings. Public knowledge of what transpires in the courtroom forces judges and attorneys to avoid even the appearance of impropriety. It requires that judges and attorneys institute fair procedures and give an accused individual a reasonable chance to respond to the government's charges. According to the Supreme Court, public scrutiny of court proceedings helps the accused in two important ways:

> First, it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures. Second, it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public.[29]

Although public hearings are a necessary step in a fair judicial process, they are not sufficient in themselves. An accused individual must not only have access to the information used against him or her, but must also be able to force the government to disclose potentially exculpatory evidence and be able to present that evidence, even if this necessitates compelling witnesses to testify. As I will explain, the use of Section 38 to prevent the disclosure of potentially exculpatory information represents a substantial threat to the fundamental underpinning of the adversary process: the

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[28] *Edmonton Journal, supra* note 22 at para. 28.

[29] *R v. Mentuck*, [2001] 3 S.C.R. 442 at paras. 53-54. See also, *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at para. 58 (per Wilson, J.) ("Another reason for allowing the press to provide complete accounts of what goes on in the courtroom is that an open trial is more likely to ensure that the judge and jury conduct themselves properly so as to inspire confidence in the litigants that the procedures followed and the results reached are fair. In a criminal law setting the importance of an impartial judge and jury is obvious and the role of an open trial in compelling judge and jury to act responsibly has repeatedly been noted").

right to make full answer and defence.[30] The denial of this right is not a mere technical violation of the rights of the accused—it presents a real threat that innocent people will be convicted of crimes they did not commit. The *Supreme Court in R v. Seaboyer* stated it well:

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.[31]

This interest in having a full opportunity to state one's case is not limited to traditional criminal trials—it attaches to any proceeding in which an accused faces a substantial deprivation of liberty, such as refugee hearings[32] or mental health commitment proceedings.[33]

Canadian constitutional, statutory, and common law has long embodied a preference for open hearings and for full disclosure of the evidence to an accused. The reasons for this preference are clear: open proceedings are more likely to be fair proceedings, and the public cannot exercise its obligation to ensure that justice is done if it doesn't know what is going on in the first place.

IV. SECTION 38

A. OVERVIEW

Section 38 of the *Canada Evidence Act* confers a broad power on government to withhold information from both the public and the participants in a wide variety of judicial proceedings. In addition, it imposes a duty on all private individuals who possess potentially sensitive information to notify the government and seek permission before disclosing any of that information in a proceeding. Secrecy pervades this notice-giving process. Under Section 38, the notice provided to the government, the government's response to that notice, and any hearings challenging government's refusal to allow disclosure, can all remain secret. Although Section 38 proceedings allow for the adjudication of the vital rights of both the public and participants,

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[30] See *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336. ("The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted").

[31] *R v. Seaboyer*, [1991] 2 S.C.R. 577 at para. 34.

[32] See *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 215 (per Wilson, J.).

[33] See *R v. Swain*, [1991] 1 S.C.R. 933.

knowledge of the proceedings is often limited to the Attorney General and a Federal Court judge. To all outside observers, it is as if nothing ever happened.

The statutory language of Section 38 is not straightforward. It contains several caveats and frequent uses the word "may" in reference to the discretion possessed by the Attorney General and the presiding judge. Further, the legislation sets forth vague standards for decision-making, and it is difficult to determine the applicable process to be followed from a casual reading of the statute. In this section of the Article, I will summarize Section 38 in detail and then discuss the cases in which we know the government invoked Section 38. After discussing several problems with the current statutory framework,[34] I will suggest alternative formulations that better protect vital interests of the public and the accused.

B. STATUTORY FRAMEWORK

In order to adequately understanding Section 38, we must carefully analyse several key terms used in the legislation. First, the statute generally applies to all "participants" in "proceedings."[35] A "proceeding" for the purposes of the statute is defined as "a proceeding before a court, person or body with jurisdiction to compel the production of information."[36] By its own terms, then, Section 38 applies to a wide variety of judicial and quasi-judicial proceedings, including criminal trials, civil trials, professional disciplinary hearings, public inquiries, and various sorts of "administrative" hearings related to refugee status, extradition, or the reasonableness of security certificates. Second, a "participant" in a proceeding is simply someone who is required to or expects to disclose or cause the disclosure of some type of information in connection with that proceeding.[37] This broad language covers not only the actual parties in an adversarial process, but the parties' attorneys, witnesses that expect to testify, and possessors of documents or other subpoenaed materials. Similarly, the language also covers municipal, provincial, or federal government agencies and their attorneys.

The Act contemplates two different kinds of information that may be withheld in certain circumstances. The first kind of information is called "potentially injurious information." The Act defines this as "information that, if it were disclosed to the

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[34] In the interests of completeness, this Article will also discuss problems with Section 38 that are not directly related to secrecy.

[35] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.01.

[36] *Ibid.*, s. 38.

[37] See *ibid.* (defining "participant" as "a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information").

[38] *Ibid.*, s. 38.

public, could injure international relations or national defence or national security."[38] The second kind of information is called "sensitive information." The Act defines this as information "relating to international relations or national defence or national security" that the government possesses and takes "measures to safeguard."39 Although at first glance "potentially injurious information" and "sensitive information" seem almost identical, the crucial distinction is that disclosure of the former "could injure" international relations, national defence, or national security, while the latter need only "relate" to those three concerns. The terms "international relations", "national defence", and "national security" are not defined in the Act.

Section 38 is triggered whenever a participant in a proceeding believes that any participant is about to disclose potentially injurious or sensitive information.[40] Once triggered, Section 38 requires the participant to proffer written notice to the Attorney General of Canada and to the person presiding at the proceeding. The information must not be disclosed until authorized by the Attorney General or a Federal Court judge.[41] The Attorney General may voluntarily authorize all or part of the information to be disclosed.[42] The Attorney General may also enter into an agreement with a participant that allows partial disclosure of the information subject to negotiated conditions.[43] However, unless the Attorney General voluntarily permits disclosure or enters into an agreement with a participant, the only way to gain disclosure of the information is to apply for a court order from a Federal Court judge.[44] Once an application has been made, the judge must hear representations from the Attorney General *ex parte* and "in private."[45] The judge then has broad discretion to decide whether to hold a hearing on the application and, if so, who to invite to take part in the hearing.[46]

The judge may authorize disclosure of the information unless he or she concludes doing so "would be injurious to international relations or national defence or national security[.]"[47] Alternatively, the judge may release portions of the informa-

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[39] *Ibid.*, s. 38.

[40] See *ibid.*, ss. 38.01(1) and (2). In addition to participants, "officials" who believe that potentially injurious or sensitive information may be disclosed during a proceeding may notify the Attorney General. See *ibid.*, ss. 38.01(3) and (4).

[41] See *ibid.*, s. 38.02(1)(a).

[42] See *ibid.*, s. 38.03(1). The Attorney General has ten days after receiving notice to inform the participant who proffered notice of whether or not disclosure is permitted.

[43] See *ibid*, s. 38.03 (1).

[44] See *ibid.*, s. 38.04.

[45] *Ibid.*, s. 38.11(1) and (2).

[46] See *ibid.*, s. 38.04(5).

[47] *Ibid.*, s. 38.06(1).

tion or a summary if he or she believes that the public interest in disclosure outweighs any harm.[48] The participant may appeal to the Federal Court of Appeal and to the Supreme Court but, in each case, the Attorney General is allowed to make *ex parte* representations in private.[49]

Section 38 is a rare example of a statutory provision that does not give the Supreme Court the final say. If the Court's ruling displeases the Attorney General, he or she may personally issue a certificate that prohibits disclosure, notwithstanding anything the Court may have said.[50] Strangely, the Act contemplates yet another round of judicial review after the Supreme Court to determine whether to uphold a certificate issued by the Attorney General notwithstanding a Supreme Court ruling to the contrary. A participant may apply to a single judge of the Federal Court of Appeal for an order varying or cancelling the certificate.[51] The applicant has the heavy burden of demonstrating that the information restrained by the certificate does not "relate" to national defence, national security, or information obtained in confidence from a foreign entity.[52] According to the Act, the decision of this judge is final and cannot be appealed to the Supreme Court.[53]

To summarize: participants in proceedings must notify the Attorney General if they expect that potentially injurious or sensitive information will be disclosed. Unless the Attorney General consents to the disclosure, a participant must seek a court order to force disclosure. The court may take into account the public interest in disclosure and balance it against the potential harm to "international relations", "national defence", or "national security" and fashion an order accordingly.

After a court has ordered disclosure and all appeals have been exhausted, the Attorney General may still issue a certificate prohibiting disclosure. This certificate is reviewable only by a single judge of the Federal Court of Appeal and the judge must uphold this certificate unless the certificate does not even "relate" to "national defence", "national security", or information obtained in confidence from foreign entities. Unlike the normal review process, use of the certificate power does not even

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[48] See *ibid.*, s. 38.06(2). Notice that the provision here is given in the permissible form of "may" as opposed to the mandatory form of "shall"; a judge *may* order disclosure if he or she finds the information would not be injurious to government interests or that the harm is outweighed by the public's interest. Presumably, this language would allow a judge to prohibit disclosure even if the information would not be injurious to "national defence", "national security" or "international relations".

[49] See *ibid.*, ss. 38.09(1), 38.1, 38.11.

[50] See *ibid.*, s. 38.13(1).

[51] See *ibid.*, s. 38.131.

[52] See *ibid.*, ss. 38.131(8)-(10).

[53] See *ibid.*, s. 38.131(11).

allow for the designated judge to balance the government's interest in secrecy with an accused's interest in disclosure, or to release the information in expurgated or modified form. Any information that 'relates' to one of the categories must be withheld, *simpliciter*.

I will make further reference to problems with the substantive standards employed in Section 38 later in this article, but first I will address the secrecy that pervades the entire process.

According to the Act, no person may disclose the fact that notice was given to the Attorney General,[54] that an agreement permitting limited disclosure was reached,[55] or that an application to Federal Court has been made to force disclosure.[56] In other words, the Act prohibits not only the disclosure of potentially injurious or sensitive information, but also the disclosure of the fact that a controversy regarding unspecified information exists. This is akin to forbidding a media outlet from reporting that it has filed a legal challenge to a publication ban, or prohibiting an individual from telling people that he has decided to challenge the denial of his access to information request. As mentioned earlier, the Act also requires that all courts entertaining applications for disclosure must permit the Attorney General to make *ex parte* representations in private. Court records relating to litigation under Section 38 "are confidential"[57] and judges may make any order "appropriate in the circumstances"[58] to maintain the confidentiality of information that relates to the proceedings.

From all appearances, the regime of secrecy created by Section 38 is vast in scope and likely unprecedented in the Canadian judicial system.

C. EXAMPLES

Only a handful of court opinions involving Section 38 have been released publicly. However, these cases show that government actively uses Section 38 to prevent the disclosure of information during judicial proceedings, even when non-disclosure presents a real threat to the right of an accused individual to make full answer and defence. From available case law, we know that the Crown has invoked the current

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[54] See *ibid.*, s. 38.02(b).

[55] See *ibid.*, s. 38.02(d).

[56] See *ibid.*, s. 38.02(c).

[57] *Ibid.*, s. 38.12(2).

[58] *Ibid.*, s. 38.12(1).

version of Section 38 on at least five separate occasions.[59] Three of these five occasions arose from the same criminal case, while a fourth involved a civil suit for damages.[60] A fifth involved an attempt by the media to gain access to sealed search warrants.[61] These cases demonstrate that the problems with Section 38 are not academic or abstract but affect real people in real cases.

Government first used the new Section 38 during pretrial proceedings in the criminal indictment of Nicholas Ribic.[62] Ribic was a Canadian citizen who was accused of taking hostages while a member of the Serb Forces in Bosnia. Ribic sought access to five documents held by the Crown pertaining to the situation in Bosnia at the time of the hostage-taking, and succeeded in obtaining an order for production from the presiding judge in the criminal proceeding. However, the Attorney General of Canada refused to disclose the documents on the grounds that they contained "sensitive" or "potentially injurious" information as defined by Section 38. As the statute provides, the Attorney General sought an order in Federal Court to confirm the prohibition on disclosure. A private hearing was held and ex parte submissions on behalf of the government were tendered. The Federal Court judge examined each of the five documents in camera, considered the accused's interests in disclosure and the government's interests in confidentiality, and ordered that an expurgated version of one document be released to Ribic.

From this case, we gain a preliminary indication of how the government will likely use Section 38 in the future. Although Ribic made it clear that he was not seeking access to information regarding the identities of sources, methods of information gathering, codes, or encryptions, the government still claimed that documents pertaining to the disposition of forces almost a decade ago in Bosnia presented such a

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[59] See *Canada (AG) v. Ribic*, 2002 FCT 839; Ribic v. Canada (AG), 2003 FCT 10, aff'd, 2003 FCA 246; *Canada (AG) v. Ribic*, 2003 FCT 43; *Doe v. Canada (AG)*, 2003 FCT 38, aff'd, 2003 FC 1014; *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2004 FC 1052. Obviously, a court decision is issued only if the Crown's invocation of Section 38 has resulted in litigation and if the court's resolution of that litigation resulted in a published opinion; thus, Section 38 has likely been used far more frequently than the number of published opinions would indicate. There were also two decisions involving Section 38 issued shortly after the 2001 amendments, but the decisions are unclear as to whether the prior or current versions of the statute were being applied. See *Ribic v. Canada*, 2002 FCT 290; *Canada v. Singh*, 2002 FCT 460.

[60] This case, *Doe v. Canada (AG)*, 2003 FCT 38, aff'd, 2003 FC 1014, will not be discussed further as the court opinion concerns only procedural matters.

[61] See *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2004 FC 1052. The application for disclosure under Section 38 was dismissed by the Court due to simultaneous proceedings in the Ontario Court of Justice under an analogous provision of the Criminal Code. As only procedural issues were involved in the decision, this case will also not be discussed further.

[62] See *Canada (AG) v. Ribic*, 2002 FCT 839 at para. 29 (thanking counsel for assistance in the first Section 38 application since the 2001 amendments).

serious, if unspecified, threat to national security or international relations that they must be withheld.

The result was similar when Ribic attempted to call two members of the Canadian Forces to testify.[63] A Federal Court judge ordered a Crown attorney to question the witnesses *ex parte*, and then released heavily-edited transcripts of the questioning to the jury in lieu of live testimony. This occurred in spite of the long-standing reluctance of courts to substitute mere transcripts for live testimony. For example, in *Singh v. Canada*, Justice Wilson noted that:

> [W]here a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. . . . I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings solely on the basis of written submissions.[64]

The Federal Court of Appeal approved this process in *Canada (AG) v. Ribic*, noting that, although it was "unusual", the accused did not challenge Section 38 on Charter grounds.[65] Subsequently, Section 38 was used to prevent full disclosure of a seven-minute videotape that the defendant already had in his possession and which the defendant had obtained independently. The video depicted NATO bombing runs in Bosnia in 1995.[66]

Apart from the fact that, on every occasion in which the Crown invoked Section 38 against Ribic, the Court allowed significant information to be withheld, the Section 38 process has another major downside: it is slow and unwieldy. Because a Section 38 proceeding must take place in Federal Court, it necessitates interrupting a normal criminal proceeding for as long as it takes to resolve the disclosure issue. Depending on the case, this may mean interrupting the criminal trial until the defendant exhausts all appeals. Such delays can have serious consequences for the original criminal trial. The trial judge in Ribic's criminal trial, for example, declared a mistrial due to the time delays. Another judge almost dismissed the charges against Ribic on speedy trial grounds as over five years elapsed from the date of his arrest in May of 1999 to the scheduled beginning of his trial in June of 2004.[67] The Court

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[63] See *Ribic v. Canada (AG)*, 2003 FCT 10, aff'd 2003 FCA 246.

[64] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 213-14 (per Wilson J.)

[65] See *Canada (AG) v. Ribic*, 2003 FCA 246.

[66] See *Canada (AG) v. Ribic*, 2003 FCT 43.

[67] See *R v. Ribic*, [2004] O.J. No. 2525 (S.C.J.).

attributed a significant portion of this delay to the Section 38 proceedings,[68] a process the judge labelled "cumbersome" and "destructive of the trial process."[69]

Although we are aware of only a few of the occasions when government has invoked Section 38, these occasions serve to reveal several problems with the current statutory regime. In the next section, I will discuss these problems in more depth and suggest possible solutions to some of them.

D. PROBLEMS & SOLUTIONS

Even before Section 38 was implemented, lawyers, academics, and others interested in maintaining the proper balance between national security and civil liberties criticized it heavily.[70] My examination of these criticisms, the real-life cases, and the statute itself shows that Section 38 is seriously defective in a number of ways. The definition of the triggering mechanism as anything that "could injure" or "relate" to "international relations," "national defence," or "national security," is overbroad. The triggering mechanism is also largely immune to judicial review. The secrecy inherent in the process severely derogates from the public's right to access information and the accused's right to make full answer and defence. Finally, the Attorney General's ability to issue a certificate to prevent the disclosure of information, even after the Supreme Court has ordered it released, is simply an unnecessary and dangerous extension of government authority.

In recent decades, Canadian courts have tended to show less and less judicial deference to government claims of executive privilege.[71] Section 38 reverses the effect of the common law trend. It does this by requiring parties to give notice of intent to disclose potentially sensitive information and by ensuring temporary non-disclosure of any such information. One of the most serious problems with Section

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[68] See *ibid.* at para. 46 (attributing a year and a half's delay to the Section 38 proceedings).

[69] See *ibid.* at para. 49. This concern with delay is echoed in James K. Hugessen, "Watching the Watchers: Democratic Oversight", in David Daubney, ed., *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Éditions Thémis, 2002). Hugessen writes that Section 38 "is certainly capable of producing considerable delay and confusion in the proper forward march of a criminal jury trial" and that it is "an awkward kind of provision and it is not one that is particularly easy to administer." *Ibid.* at 383. Although the question of delay will not be discussed further in this Article, it seems like some form of expedited review or appeal of Section 38 claims should be instituted to enable adequate consideration of the issue while still protecting an accused's interest in a speedy trial.

[70] See, e.g., Hamish Stewart, "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) [Stewart]; Alan Leadbeater, "Antiterrorism and Secrecy" in David Daubney, ed., Terrorism, *Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Éditions Thémis, 2002).

[71] See *Stewart, ibid.* at 219.

38 is the overbreadth of its definition of sensitive information as anything that "could injure" or "relate" to "international relations," "national defence," or "national security," As Alan Leadbeater notes, "[o]ne would be hard pressed to imagine any operational information held by any of our investigative, defence, security, intelligence, immigration or foreign affairs institutions, which would not 'relate to' one or more of these three broad categories."[72] This clearly places a heavy burden on parties and witnesses in adversarial proceedings. Each piece of information held and subject to disclosure must be closely scrutinized to see if it even remotely "relates" to one of the three *undefined* subject matters and if it is the "type" of information Canada is interested in safeguarding.[73] Speculation that *some* private individual *somewhere* may *someday* reveal something potentially damaging is simply not a sufficient justification for the imposition of such a burden. I submit that the triggering definition should be limited in a reasonable fashion to apply only to information that could "seriously" or "significantly" cause *actual harm* to Canadian national security or national defence. Harm to international relations should not be considered grounds for prohibiting disclosure unless it rises to such a degree that serious harm to national security or national defence would result. By narrowing the scope of the threshold trigger for Section 38, participants in the Canadian judicial system will face a far more rational and far less burdensome obligation to notify the government before disclosing information, while still fulfilling their obligation to protect national security and defence.

In a candid and informative speech given a few months after the passage of Section 38, Federal Court judge James K. Hugessen discussed the difficulties inherent in adjudicating requests for disclosure under the statute.[74] The primary problem from his perspective was that a key feature of the process consists of *ex parte* and *in camera* submissions by the Attorney General:

> This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function. Often, when I speak in public, I make the customary disavowal that I am not speaking for the Court and I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon. I can tell you because we talked about it, we hate it. We do not like this process of having to sit alone hearing only one party and

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[72] *Leadbeater, supra* note 70 at 334.

[73] For example, information that Canadian judges were involved in a bribery scandal at the Olympics could be withheld because it might harm the country's "international relations", or videotapes of atrocities committed by Canadian soldiers overseas could be withheld because it might cause the public to agitate for troop withdrawal and harm our "national defence."

[74] James K. Hugessen, "Watching the Watchers: Democratic Oversight" in David Daubney, ed., *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Éditions Thémis, 2002).

> looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined.[75]

Unfortunately, the inevitable result of an ex parte hearing is that the judge has no real choice but to defer to the assertions of the party before it, especially when it is assumed that that party is an expert on the issues involved.[76] After hearing *ex parte* submissions from the Attorney General in a Section 38 proceeding, the designated judge may order a hearing and invite parties to participate. However, those parties will likely have great difficulty in effectively responding to the Attorney General's comments because they will probably not know the nature of the withheld information or why the information is alleged to be a threat to international relations, national security, or national defence.

Two different federal court judges involved in these kinds of proceedings have raised a possible solution:[77] allow for the appointment of a special advocate in Section 38 hearings. Special advocates would be lawyers with security clearances sufficient to examine the withheld documents, cross-examine government witnesses, and take other steps necessary to argue against non-disclosure. They could be appointed to act on behalf of the public's generalized interest in disclosure or on behalf of an accused's specific interest in obtaining potentially exculpatory information. Candidates for special advocate status could be drawn from the ranks of retired judges, attorneys for access to information or privacy departments, or esteemed

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[75] *Ibid.* at 384. Hugessen goes on to say that "when it is only given to us by one party we are not well suited to test the materials that are put before us. We hate hearing only one party. We have having to decide what, if any, sensitive material can or should be conveyed to the other party." *Ibid.* at 384. Later in the speech, Hugessen argues that Section 38 proceedings cannot be analogized to applications for search warrants or wiretaps, because in those instances the material will be accessible to the public once the searches or wiretaps are executed; arguments or evidence submitted by the Attorney General under Section 38, on the other hand, will "never see the light of day [if successful] and the fact that something improper has been said to the Court may never be revealed." *Ibid.* at 385.

[76] See, e.g. *Canada (AG) v. Ribic*, 2003 FCA 246 at para. 19 ("the Attorney General's submissions regarding his assessment of injury to national security, national defence or international relations, because of his access to special information and expertise, should be given considerable weight . . . If his assessment of the injury is reasonable, the judge should accept it").

[77] See *Hugessen, supra* note 74 at 386 ("It does occur to me, however, that it might be helpful if we created some sort of system somewhat like the public defender system where some lawyers were mandated to have full access to the CSIS files, the underlying files and to present whatever case they could against the granting of the relief sought"); *Canada (AG) v. Ribic*, 2003 FCA 246, at para. 45 (approving of suggestion made by European Court of Human Rights for a "judge to appoint a special counsel to represent the interests of the person seeking disclosure"). See also, *Tinnelly & Sons Ltd. v. United Kingdom* (1998), 4 BHRC 393 (European Ct. Human Rts) (discussing the *U.K. Special Immigration Appeals Act*, 1997 that provides for special advocates).

members of the private bar. Although by definition they would be unable to work closely with their "clients" in crafting arguments regarding confidential information, the appointment of special advocates would still go a long way towards ensuring that judges presiding over Section 38 hearings hear more than just one side of the issue.

Section 38 prompts us to ask: how much secrecy is too much secrecy? We can understand why parties are prohibited from disclosing certain sensitive information until a court has ruled on the issue, but Section 38 also mandates that parties keep secret the fact that any proceedings are even underway. As Hamish Stewart notes, "[t]his level of secrecy goes well beyond what is necessary to protect the information in question."[78] There appears to be no legitimate government interest in forbidding the mere public acknowledgement that Section 38 proceedings are taking place. It is understandable why Section 38 prevents the parties and the media from discussing the *content* of Section 38 proceedings. However,it is not easy to see how disclosing the existence of Section 38 proceedings would harm "international relations", "national defence", or "national security." This is equally the case where a criminal trial has been interrupted so a party can seek a ruling on whether an unidentified videotape could injure international relations,[79] and where a public inquiry has been halted because the government has used Section 38 to withhold particular types of documents,[80] Disclosure of the fact that notice has been given under Section 38 or that proceedings are underway would benefit the public in that it would allow for interested parties, such as the media, to attempt to intervene in the hearings. At the very least, such disclosure would inform Canadians about the scope and frequency of government invocation of the statute.

As troublesome as the secrecy provisions of Section 38 are, they are not the worst aspect of this legislation. Arguably, the most bizarre and excessive power granted to the government by Section 38 is the ability to order information withheld by issuing a certificate, even after the normal procedure for adjudicating the issue has been followed and concluded in the court system. The government faces a very low hurdle before issuing a certificate: the information must "relate" to "national security", "national defence", or information obtained from foreign entities. A single Federal Court judge is allowed to review the certificate, but the standard of review does not inspire confidence in the process:

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[78] *Stewart, supra* note 70 at 224.

[79] See *Canada (AG) v. Ribic*, 2003 FCT 43.

[80] See Michelle Shephard, "Arar Probe Evidence to Be Screened" *Toronto Star* (30 July 2004) (noting that Justice Dennis O'Connor "is also dismayed that anti-terrorism measures in the Canada Evidence Act prevent him from making public any ruling to keep documents secret on national security grounds"). Indeed, although the *Ribic* line of cases indicate otherwise, it is not even clear from Section 38 itself whether rulings on an application for disclosure, as part of the "confidential" court file, can be legally disclosed.

> This "relates to" form of judicial review does not authorize the reviewing judge to make any independent assessment of the sensitivity of the information or of the Attorney General's purpose in issuing the certificate. This form of judicial review is significantly less rigorous than the independent review of secrecy certificates available in our major allied countries. [It] has been aptly termed "window dressing" because it does not subject the Attorney General to any meaningful accountability for the use of certificates.[81]

It would be a poor lawyer indeed who could not convince a judge in an ex parte proceeding that information protected in the certificate "relates" to one of the protected categories. As Section 38 already provides for judicial review of non-disclosure orders, there appears to be no reason to give the government a second bite at the apple.

V. CONCLUSION

My analysis of Section 38, and of the certificate power in particular, leads to only one conclusion: Section 38 poses a serious danger to the civil liberties and constitutional rights of Canadians. Further, "it is unclear why this extraordinary power, so easily susceptible of abuse, is required."[82] Section 38 should be amended or repealed as soon as possible. At a minimum, the threshold definitions used to trigger the statute must be narrowed, special advocates should be appointed to represent the interests of the public and of accused individuals, disclosure of the fact that proceedings are underway or that notice has been given should be allowed, and the certificate power should be eliminated.

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[81] *Leadbeater, supra* note 70 at 334. See also, *Stewart, supra* note 70 at 226 (criticizing breadth of certificate power).

[82] *Stewart, supra* note 70 at 232.