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“Constitutional Chicken”: National Security Confidentiality and Terrorism Prosecutions after *R. v. Ahmad*

Kent Roach^{*}

I. INTRODUCTION

In *R. v. Ahmad*,¹ the Supreme Court unanimously ruled that the exclusive jurisdiction of the Federal Court to make national security confidentiality determinations under section 38 of the *Canada Evidence Act*² did not violate the inherent jurisdiction of the provincial superior courts or the section 7 rights of the accused. In reaching this conclusion, the Court relied on the fact that the criminal trial court could stay proceedings if it concluded that a fair trial was not possible in light of a non-disclosure order made by the Federal Court or if the trial judge lacked enough information about the non-disclosed secret information to determine its effects on the fairness of the trial. The Court stressed that the drastic remedy of a stay of proceedings was statutorily authorized under section 38.14 of the *Canada Evidence Act*. The statutory stay should be ordered if the trial court had any doubt about whether a fair trial was possible including in cases where the clearest case for a stay of proceedings had not been established under the *Canadian Charter of Rights and Freedoms*³ or abuse of process doctrine.

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¹ [2011] S.C.J. No. 6, 2011 SCC 6 (S.C.C.) [hereinafter “*Ahmad 2011*”].

² R.S.C. 1985, c. C-5.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

The Court suggested that what the parties characterized as a game of “constitutional chicken”⁴ in Canada’s two-court procedure could be avoided through a “sensible”,⁵ “practical”,⁶ “flexible”⁷ and Charter compliant interpretation of section 38 of the *Canada Evidence Act*. The Court’s reinterpretation of section 38, however, was quite modest and only required that the accused receive notice of the section 38 proceedings in relation to non-disclosure proceedings in the Federal Court. The Court did not require that the trial judge be given access to the non-disclosed information or have the power to revise the Federal Court’s non-disclosure order. This article suggests that national security confidentiality after *Ahmad 2011* still involves a dangerous game of constitutional chicken in which trial judges will have to threaten to use statutory stays and the Attorney General of Canada will have to decide whether to crash a terrorism prosecution or at the last minute release enough information to avoid a section 38.14 stay.

The Supreme Court in *Ahmad 2011* may have thought it could avoid games of constitutional chicken by sending clear signals that, contrary to previous practice, trial judges should have access to any secret information that the Federal Court ordered should not be disclosed to the accused. The Court encouraged trial judges to threaten to use a statutory stay to induce either the Federal Court or the Attorney General of Canada to provide such access. Although the Court’s attempt to provide such access is laudable and may be successful, it will not avoid a game of constitutional chicken that threatens, perhaps needlessly, to stay major terrorism prosecutions.

Even if they have access to the non-disclosed secret material, trial judges still will be powerless to revise any non-disclosure order made by the Federal Court. The Federal Court’s non-disclosure orders are generally made at a pre-trial stage long before the issues in the trial, including the accused’s defence, have crystallized. The trial judge may conclude that even if a non-disclosure order was justified at the pre-trial stage, it can no longer be justified given the issues that have emerged at trial. Unlike their counterparts in Australia, the United Kingdom and the United States, however, Canadian trial judges will remain powerless after *Ahmad 2011* to revise the original non-disclosure orders. Trial judges will

⁴ *Ahmad 2011*, *supra*, note 1, at para. 34.

⁵ *Id.*, at para. 34.

⁶ *Id.*, at para. 72.

⁷ *Id.*, at para. 50.

only be able to threaten and to use a section 38.14 stay even if a revised non-disclosure order is a more appropriate remedy to reconcile the competing interests in secrecy and disclosure and ensure a fair trial. The only actor who can avoid the drastic remedy of a stay at this point is the Attorney General of Canada who retains powers to allow secret information to be disclosed despite a non-disclosure order from the Federal Court. After *Ahmad 2011*, a high stakes game of constitutional chicken will be played between trial judges threatening to stay terrorism prosecutions and the Attorney General of Canada deciding whether to allow enough information to be disclosed to avoid a stay.

The first part of this article examines the history and context in which national security confidentiality questions arise. It will show that the choice of the Federal Court to decide national security confidentiality issues in 1982 was related to Canada's traditional anxieties as a net importer of intelligence about revealing the secrets of others. These anxieties had Cold War roots stemming back to the Gouzenko spy revelations, but they are anachronistic in a modern age where terrorism is now widely regarded as the main threat to national security and secret intelligence will often have evidentiary uses in legal proceedings.

The second part examines the trial judge's ruling that was overturned on direct appeal in *Ahmad 2011* as well as some of the related national security confidentiality rulings that he made during the trial. This discussion shows that the trial judge was more aware of the practical aspects of section 38 litigation than the Supreme Court. In particular, the trial judge was aware that section 38 applications could arise at multiple points during the trial and result in multiple appeals including appeals during the middle of a jury trial. The trial judge was also more aware than the Supreme Court of the practical nature of the section 38 process in which decisions relating to disclosure are made by counsel instructed by the Attorney General of Canada who does not bear ultimate responsibility for the prosecution. Finally, the trial judge seemed to be more aware than the Supreme Court of the practical burdens of staying proceedings and allowing those accused of very serious crimes that had attracted global attention to walk free without a trial on the merits.

The third part of the article analyzes the Supreme Court's decision in *Ahmad 2011*.⁸ In a second generation form of "constitutional minimal-

⁸ *Supra*, note 1.

ism”,⁹ the Court relied on statutory interpretation to hold that section 38 did not violate section 7 of the Charter. This approach, however, optimistically assumes that those who administer section 38, especially trial judges, will always correctly apply fine grained constitutional standards relating to a fair trial. The reliance that the Court places on the statutory stay under section 38.14 begs the question of what would happen if Parliament did not include statutory guarantees. In particular, the Court attempted to assign responsibility for stays to Parliament, even though trial judges will have ultimate responsibility for protecting the Charter right to a fair trial. The Court concluded that section 38 does not violate superior court powers under section 96 of the *Constitution Act, 1867*¹⁰ on the basis that courts historically did not question the executive’s national security confidentiality claims. This approach will be criticized for transforming weighty separation of powers issues into narrow historical questions; constitutionalizing Cold War Canada’s excessive concerns about secrecy; and discounting the evolving role of superior courts in a constitutional democracy. The Court also downplayed how section 38 determinations in a criminal trial are inextricably intertwined with constitutional rights to disclosure and a fair trial and constitutional remedies.

The fourth part of this article will speculate on how the constitutional game of chicken under section 38 might play out in the future. Though the Court stressed that its decision to uphold section 38 did not resolve the policy issue, the two-court system is likely to remain. The government has shown no interest in reforming section 38 in its response to the Air India Commission’s recommendations that criminal trial judges be allowed to make section 38 determinations or in new legislation on fair and efficient criminal trials. Specially designated Federal Court judges and special advocates will play a role under section 38, but the major players in the game of constitutional chicken will be trial judges who will be required to threaten and perhaps issue stays and the Attorney General of Canada who will often have the exclusive power to authorize enough disclosure to avoid a stay.

⁹ Cass R. Sunstein, *One Case at a Time* (Cambridge: Harvard University Press, 1999).

¹⁰ (U.K.) 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

II. HISTORICAL BACKGROUND AND POLICY CONTEXT

As the Supreme Court noted in *Ahmad 2011*,¹¹ Canada is alone among the democracies in bifurcating public interest immunity applications for non-disclosure on grounds of national security confidentiality between the trial judge and a specialized security court, in this case the 10 or so judges of the Federal Court who are specially designated to deal with section 38 and other matters involving information that the government claims is secret. Australia, the United Kingdom and the United States all allow trial judges to have access to the secret information and to decide whether and when it should be disclosed to the accused. Why has Canada refused to trust trial judges with such responsibilities?

Canada was one of the last democracies to move away from complete judicial deference to governmental claims of secrecy. Until 1982, the relevant national security confidentiality provision provided:

41(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.¹²

This provision reflected concerns about secrecy that started right after the Second World War when Igor Gouzenko, a clerk at the Soviet embassy in Ottawa, defected and revealed an espionage ring in Canada. In response, Canada appointed an inquiry chaired by two Supreme Court judges. The inquiry acted very aggressively, detaining and interrogating people in secret and without counsel with subsequent prosecutions under the *Official Secrets Act*.¹³ The Commission concluded that "much vital technical information which should still be secret to the authorities of Canada, Great Britain and the United States, has been made known to the Russians by reason of the espionage activities reported on herein".¹⁴ This conclusion underlined how Canada's secrets were often the secrets of its more powerful allies. The implicit message, one still strongly felt in

¹¹ *Supra*, note 1, at para. 71.

¹² *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.).

¹³ S.C. 1939, c. 49.

¹⁴ Hon. Robert Taschereau & Hon. R.I. Kellock, *The Report of the Royal Commission* (Ottawa: Kings Press, 1946), at 618.

Ottawa, is that Canada should do all that it can to protect such secrets. There are strong concerns that if Canada risks secrets it may receive less intelligence from our more powerful allies, especially the United States. This sets up a strong and self-sustaining equation between secrecy and security.

In 1982, the above absolute secrecy provision was challenged in litigation involving human rights complaints made by two women who were fired from their jobs as a switchboard operator and a waitress, respectively, at the Montreal Olympics on the basis of an undisclosed security report by the RCMP. The Supreme Court unanimously upheld the constitutionality of the provision noting that the risk that the executive would invoke absolute Crown privilege maliciously or arbitrarily “does not have the effect of divesting Parliament of its power to legislate ... saying that Parliament and the legislatures cannot make the privilege absolute amounts to a denial of parliamentary supremacy ...”.¹⁵ This decision is striking in its pre-Charter celebration of Parliamentary supremacy.

The absolute nature of the national security privilege was changed in 1982 in anticipation of the Charter. Nevertheless, old habits of absolute secrecy died hard. In the 1980s, the Federal Court was often reluctant to exercise its new powers to examine material that was subject to national security confidentiality claims let alone order them disclosed.¹⁶ A terrorism prosecution in the 1980s was allowed to proceed to conviction even though neither the trial judge nor the Federal Court examined Canadian Security Intelligence Service (“CSIS”) surveillance records to determine if they should be disclosed to the accused.¹⁷ A reluctance by the courts to challenge secrecy claims presented obvious threats to rights protection, but it also meant that governmental agencies did not have to justify the necessity and the proportionality of their secrecy claims.

The Canadian emphasis on secrecy was also facilitated by the 1984 creation of the CSIS with an explicit mandate to collect secret intelligence. Much stress was placed on the fact that CSIS, unlike the former

¹⁵ *Canada (Commission des droits de la personne) v. Canada (Attorney General)*, [1982] S.C.J. No. 3, [1982] 1 S.C.R. 215, at 228 (S.C.C.).

¹⁶ See, for example, *Henrie v. Canada (Security Intelligence Review Committee)*, [1988] F.C.J. No. 965, 53 D.L.R. (4th) 568, affd [1992] F.C.J. No. 100, 88 D.L.R. (4th) 575 (F.C.A.) [hereinafter “*Henrie*”].

¹⁷ *Kevork v. Canada*, [1984] F.C.J. No. 178, 17 C.C.C. (3d) 426 (F.C.T.D.). See Kent Roach, *The Unique Challenges of Terrorism Prosecutions* (Ottawa: Ministry of Public Works, 2010), at 210-21.

security service of the RCMP, did not have law enforcement powers. This factor, combined with the Cold War emphasis on espionage and counter-intelligence as opposed to terrorism, meant that CSIS insisted that it did not collect material that might have to be disclosed as evidence. In 1987, a Special Senate Committee on Terrorism stressed that while CSIS, when possible, should cooperate with prosecutions, it should not “gather evidence to support criminal prosecutions”, and its cooperation should never prejudice “the safety of CSIS officers, their contacts, or important ongoing investigations”.¹⁸ In 1988, one of the specially designated judges of the Federal Court emphasized the danger of disclosing secret intelligence that was innocuous on its face. He stressed the dangers of disclosing information obtained from “exchanges of information between friendly countries of the western world”.¹⁹ Secret intelligence was completely different than public evidence and “more often than not ... completely inadmissible as evidence in any court of law”.²⁰

Until the Supreme Court’s 2008 decision in *Charkaoui v. Canada (Citizenship and Immigration)*,²¹ CSIS interpreted its mandate under section 12 of the *Canadian Security Intelligence Service Act*²² as authorization for the destruction of raw intelligence once analytical summaries had been prepared. This policy placed the interest of secrecy over the need to ensure that the raw intelligence was available in subsequent legal proceedings. This absolutist approach to secrecy caused problems that contributed to both pre- and post-bombing failures in the Air India investigation. Intelligence that should have been more widely distributed before the 1985 bombing was not distributed and important wiretaps and interview notes were destroyed by CSIS after the bombing. Delays in the Air India investigation and the collapse of related prosecutions of alleged Sikh terrorism in the 1980s and the 1990s over disclosure issues meant that the two-court system contemplated by section 38 remained untested.

Many of the lessons about the possible evidentiary value of secret intelligence should have been learned from the Air India failures. Nevertheless, they only started to be learned after September 11 and the

¹⁸ Chair Hon. William Kelly, *Terrorism: The Report of the Senate Special Committee on Terrorism and the Public Safety* (Ottawa: Ministry of Supply and Services, 1987), at 41.

¹⁹ *Id.*

²⁰ *Henrie, supra*, note 16, at 577-78.

²¹ [2008] S.C.J. No. 39, [2008] 2 S.C.R. 326 (S.C.C.) [hereinafter “*Charkaoui*”].

²² R.S.C. 1985, c. C-23 [hereinafter “CSIS Act”].

enactment of the *Anti-terrorism Act*.²³ Many of the new terrorist offences meant that intelligence created to warn governments about possible risks of terrorism could also be used as evidence of new terrorist crimes. The use of intelligence as evidence in a criminal trial would require the government to sacrifice its claims of secrecy given that criminal trials do not allow the use of secret evidence. The use of immigration law security certificates as the main form of anti-terrorism law in Canada between 2001 and 2004, however, meant that the two-court system contemplated by section 38 and the difficult relation between evidence and intelligence continued to remain untested.

No security certificate has been issued in a terrorist case in Canada since 2003 and there has been an increased emphasis on criminal prosecutions of suspected terrorists. The use of prosecutions represents a more appropriate response to a terrorist threat that as the *Air India* bombing underlines is by no means limited to non-citizens. Terrorism prosecutions, however, make increased use of section 38 inevitable. Section 38 was avoided in the *Air India* trial, but only because defence counsel were allowed to inspect CSIS material to determine whether it was relevant on an undertaking that the information not be shared with the accused unless approved for disclosure by either the Attorney General of Canada or the courts. As the Supreme Court noted in *Ahmad 2011*, this approach allowed the challenging prosecution to be completed and decided on the merits.²⁴ This way of avoiding the two-court approach, however, was disapproved by the Court in *R. v. Bast*²⁵ and subsequently in *Ahmad 2011* even though similar undertakings by defence counsel are used in both Australia and the United States.²⁶ The two-court system was also not used in the Toronto terrorism prosecution because the trial judge, Dawson J., in *Ahmad 2011* ruled that the two-court system violated the accused's right to a fair trial under the Charter and the constitutionally guaranteed jurisdiction of the provincial superior courts.²⁷ The Court's categorical disapproval of the undertakings approach and its reversal in *Ahmad 2011* of Dawson J.'s constitutional

²³ S.C. 2001, c. 41.

²⁴ *Supra*, note 1, at para. 11.

²⁵ [2009] S.C.J. No. 52, [2009] 3 S.C.R. 389, at paras. 45-46 (S.C.C.).

²⁶ *Ahmad 2011*, *supra*, note 1, at para. 49 (S.C.C.). For a defence of such undertakings, see Michael Code & Kent Roach, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 *Crim. L.Q.* 85.

²⁷ *R. v. Ahmad*, [2009] O.J. No. 6166, 257 C.C.C. (3d) 135 (Ont. S.C.J.) [hereinafter "*Ahmad 2009*"].

ruling means that section 38 cannot be avoided in future terrorism prosecutions, despite not being used in Canada's two most major terrorism prosecutions, the Air India trial and the Toronto terrorism prosecution.

Another factor that makes the use of the two-court system under section 38 inevitable is that there will often be overlapping security intelligence and police investigations in cases of suspected terrorism. This overlap reflects the fact that CSIS will have jurisdiction to investigate the security threat and the police will often have jurisdiction to investigate the many new terrorist offences created by the 2001 *Anti-terrorism Act*.²⁸ A related factor is the broad disclosure rights that the accused has under *R. v. Stinchcombe*.²⁹ Even if CSIS is considered a third party and not the Crown for disclosure purposes, the Crown will under *R. v. McNeil*³⁰ have an obligation to obtain and, subject to privilege claims, to disclose relevant information possessed by CSIS. CSIS in turn will have pressing interests in non-disclosure given that it has generally promised its sources anonymity (in part relying on the fact that it is not a law enforcement agency) and because of its interests in preserving secrecy about ongoing investigations often conducted in close cooperation with foreign agencies. Canada's status as a net importer of intelligence will make the government especially concerned that foreign intelligence not be disclosed. The result is that every major terrorism investigation will likely involve CSIS and information that the government will claim should be kept secret and not disclosed to the accused. Hence, every terrorism prosecution will likely feature section 38 decisions made by the Federal Court and subject to appeal to the Federal Court of Appeal.

In his preliminary report on Air India, Bob Rae identified the dangers of continuing to ignore the potential evidential relevance of secret intelligence. He pointedly observed that

if an agency believes that its mission does not include law enforcement, it should hardly be surprising that its agents do not believe they are in the business of collecting evidence for use in a trial. But this misses the point that in an age where terrorism and its ancillary activities are

²⁸ S.C. 2001, c. 41.

²⁹ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

³⁰ [2009] S.C.J. No. 3, [2009] 1 S.C.R. 66 (S.C.C.).

clearly crimes, the surveillance of potentially violent behavior may ultimately be connected to law enforcement.³¹

In its 2010 report, the Air India Commission devoted considerable attention to the importance of section 38 non-disclosure proceedings in terrorism prosecutions. The Commission accepted broad disclosure including disclosure from CSIS as a constitutional reality. Rather, it focused on improving the efficiency and fairness of the section 38 process by allowing criminal trial judges to make such determinations.³² It expressed concerns that an accused in a terrorism prosecution “might use the two-court approach ... to sabotage a terrorism prosecution by trying to call evidence that leads to s. 38 litigation in Federal Court”.³³ It found the two-court system to be unworkable and potentially unfair. Although the trial judge could issue a stay of proceedings as a result of the Federal Court’s non-disclosure order “the trial judge has no authority to impose what will often be the most appropriate remedy — revision of the Federal Court’s non-disclosure order in light of changed circumstances”.³⁴ A trial judge who had not seen the non-disclosed information “might wrongly conclude that the accused does not need that secret intelligence to make full answer and defence. The result would be an unfair trial”.³⁵ Federal Court judges making section 38 determinations often before the trial has started will not have full information about the trial so as to evaluate the potential importance of the information. Appeals under section 38.09 could delay terrorism prosecutions and the Commission recommended that section 38 determinations be subject to appeal at the end of a criminal trial. The Air India Commission’s recommendation that criminal trial judges be allowed to make section 38 determinations was consistent with the approach taken in the ongoing Toronto terrorism prosecution, though the trial judgment in *Ahmad* was not mentioned in the Air India report because of concerns about the publication ban then in place.

³¹ Hon. Bob Rae, *Lessons to be Learned* (Ottawa: Air India Review Secretariat, 2005), at 23.

³² *Air India Flight 182: A Canadian Tragedy. Final Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (Major Commission)*, vol. 3 (Canadian Government Publishing, 2010) recommendation 14, at 126 [hereinafter “Air India Report”]. I disclose that I served as Director of Research (Legal Studies) for the Commission and prepared a research monograph recommending that trial judges be able to make s. 38 determinations.

³³ *Id.*, at 154.

³⁴ *Id.*, at 160.

³⁵ *Id.*, at 161.

The Court in *Ahmad 2011* took note of the Air India Commission's recommendations, but distanced itself from them by noting 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".³⁶ The Court was correct that the Air India Commission assumed that the trial judge would not have access to the non-disclosed material. The Court, however, was wrong to conclude that the Commission's grave reservations about section 38 were limited to such concerns. To repeat, the Commission was also concerned that under section 38 "the trial judge has no authority to impose what will often be the most appropriate remedy—revision of the Federal Court's non-disclosure order in light of changed circumstances".³⁷ The Commission was also concerned that section 38 allowed what in essence were interlocutory appeals of pre-trial rulings in terrorism prosecutions that were already burdened by voluminous disclosure, multiple accused and multiple pre-trial motions. The Court's misreading of the Air India report is not a mere academic matter: the Court's focus on giving the trial judge access to secret information that the Federal Court had ordered not to be disclosed fails to confront the fact that this is only half the dilemma confronting the trial judge. Even if trial judges after *Ahmad* have access to the secret non-disclosed information, they remain powerless to revise the initial non-disclosure order made by the Federal Court. The result may be a stay of proceedings or a threatened stay when all that is required is an amended redaction or some substituted form of disclosure. The specially designated Federal Court judge will not be able to amend a non-disclosure order, especially if it has been finalized to allow for its appeal to the Federal Court of Appeal.

The Court also argued that the Air India Commission was concerned with the "wisdom" of the two-court scheme "but the wisdom (as distinguished from the validity) of s. 38 is not a matter for this Court".³⁸ The distinction between the constitutionality and the wisdom of legislation is a long-standing feature of section 7 litigation. It has been emphasized in the first seminal section 7 cases such as *Operation Dismantle Inc. v. Canada*³⁹ and *Reference re Motor Vehicle Act (British Columbia)*

³⁶ *Supra*, note 1, at para. 72.

³⁷ Air India Report, *supra*, note 32, at 160.

³⁸ *Ahmad 2011*, *supra*, note 1, at para. 75.

³⁹ [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

S. 94(2),⁴⁰ and later in the Court's decision in *United States of America v. Burns*⁴¹ with respect to extradition to face the death penalty. In all these cases, however, the policy/validity distinction was used to justify extending section 7 review and not as in *Ahmad 2011* in retracting it. The different uses of the policy/constitutionality distinction reflects different approaches to judicial review and, as suggested in the third part of this article, *Ahmad 2011* fits into a long line of second-generation Charter cases where the Court has preferred to engage in creative statutory interpretation to avoid invalidating potentially unconstitutional laws.

Does the Court's decision in *Ahmad 2011* really suggest that policy considerations are out of bounds for the Court? It is interesting to compare the Supreme Court's 2008 decision in *Charkaoui*⁴² with its 2011 decision in *Ahmad*. *Charkaoui* contained detailed policy discussions about CSIS's formation and its subsequent evolution given the increasing importance of terrorism to its mandate. In reaching its conclusion that CSIS had erred in its long-standing interpretation of section 12 of the CSIS Act as justifying the destruction of raw intelligence, the Court stressed that while "CSIS is not a police force ... it must be acknowledged that the activities of the RCMP and those of CSIS have in some respects been converging as they, and the country, have become increasingly concerned about domestic and international terrorism".⁴³ Policy concerns seemed to drive the Court's interpretation of the CSIS Act. In contrast, policy concerns were distinguished from constitutional concerns in *Ahmad 2011* and left to Parliament even though in *Ahmad 2011*, the Court also reinterpreted security legislation. This suggests that one of the most effective constitutional defences of impugned legislation will be for the government to defend the law as a policy choice that Parliament was entitled to make. It also suggests that parties may be well advised to make policy arguments at the level of statutory interpretation without asking courts to make constitutional rulings.

⁴⁰ [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

⁴¹ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

⁴² *Supra*, note 21.

⁴³ *Id.*, at para. 26.

III. THE TRIAL JUDGE'S RULING

The trial judge's 158-paragraph ruling that section 38 of the *Canada Evidence Act*⁴⁴ was unconstitutional remained subject to a publication ban for some time and is only briefly described in one paragraph of the Supreme Court's ruling. The facts of the parties are also no longer available from the Supreme Court's website. Finally, the Supreme Court repeatedly stressed that its approach to section 38 was a "practical"⁴⁵ one, even though appellate courts often defer to trial judges on practical matters relating to pre-trial and trial processes. For these reasons, the trial judge's ruling and the related arguments made by the parties on the direct appeal to the Supreme Court will be examined in some detail.

The trial judge was influenced by the fact that section 38 national security confidentiality matters could arise throughout pre-trial and trial proceedings of a long and complex terrorism prosecution before a jury. For example, he noted that section 38 would be asserted at the preliminary stage of reviewing the adequacy of wiretap warrants and as such might prevent him as a trial judge from providing the accused with enough disclosure to exercise his right to full answer and defence in challenging the warrant. The trial judge also was aware that section 38 issues could be raised with regards to entrapment and state illegality claims made by the accused as well as those relating to whether the CSIS investigation became so focused on criminality that criminal protections would apply.⁴⁶ National security confidentiality issues could also arise with respect to issues involving the credibility of informers who had been transferred from CSIS to the RCMP.⁴⁷ The trial judge, who was faced with the difficulties of managing a sprawling and unpredictable trial, was very influenced by concerns that section 38 issues were pervasive and likely to arise at nearly every turn in the pre-trial and trial process.

The trial judge was also influenced by the fact that section 38 rulings by the Federal Court were subject to appeal as of right to the Federal Court of Appeal with the possibility of appeal with leave to the Supreme

⁴⁴ R.S.C. 1985, c. C-5.

⁴⁵ *Ahmad 2011*, *supra*, note 1, at para. 72.

⁴⁶ The so-called issues under *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757 (S.C.C.).

⁴⁷ *Ahmad 2009*, *supra*, note 27, at para. 38.

Court of Canada.⁴⁸ He adverted to the fact that a mistrial had already been declared in one trial while such appeals were undertaken.⁴⁹ He might also have adverted to the fact that two such appeals were taken in the *Khawaja* terrorism prosecution with leave to appeal to the Supreme Court of Canada being refused in one of the appeals.⁵⁰ The trial judge predicted that at least two such interlocutory appeals would happen during the trial and that at least one of them might occur with a jury empanelled raising the risk of a mistrial.⁵¹ None of these practical concerns were highlighted in the Supreme Court's judgment.

Another important contextual factor that influenced the trial judge was his awareness that the decision to contest and appeal section 38 matters would not be made by the prosecutors, but by separate counsel for the Attorney General of Canada.⁵² The bifurcation of prosecutorial and section 38 functions adds another layer of complexity to the bifurcated proceedings. Various courts and commissions of inquiry have found that the Attorney General of Canada has repeatedly overclaimed national security confidentiality.⁵³ This concern lingers unspoken yet present in the background of the trial judge's decision. In contrast, the Supreme Court seemed to assume that a practical approach to section 38 would prevent the Attorney General of Canada from overclaiming secrecy. The Court's assumption seems to be that the Attorney General will be in the best position to decide the respective importance of keeping secrets and continuing with the prosecution. The bifurcation of section 38 proceedings from other prosecutorial decisions, however, creates a risk that secrecy claims and appeals will be viewed without adequate attention to the harm that they can cause to both efficient and fair prosecutions. The Air India Commission responded to this concern by recommending an end to bifurcated prosecutorial decisions by the creation of a specialized Director of Terrorism Prosecutions who would handle both section 38 and other prosecutorial matters. Such an approach might help assure that those who make section 38 secrecy claims would

⁴⁸ *Id.*, at para. 7.

⁴⁹ *Id.*, citing *R. v. Ribic*, [2008] O.J. No. 4681, 2008 ONCA 790, at paras. 23-28 (Ont. C.A.).

⁵⁰ *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 1635, 2007 FCA 388 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 610 (S.C.C.); *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 1473, 2007 FCA 342 (F.C.A.), leave denied April 3, 2009.

⁵¹ *Ahmad 2009*, *supra*, note 27, at para. 7.

⁵² *Id.*, at para. 29.

⁵³ The Arar, Iacobucci and Air India Commissions all concluded that the Attorney General had overclaimed national security confidentiality.

be fully aware of their effects in delaying and disrupting prosecutions. The government has, however, decided not to follow this recommendation in its response to the Air India Commission.⁵⁴

The trial judge stressed that section 38 might prevent him from protecting the accused's Charter rights. He concluded that "this court may, as a result of the application of s. 38, be prevented from even privately seeing the evidence that is critical to determining whether the fair trial interests of the accused have been violated".⁵⁵ The trial judge recognized that section 38 claims would affect the accused's right to disclosure and full answer and defence.⁵⁶ Similarly, Dawson J. concluded that section 38 claims at the pre-trial stage of challenging a warrant might make it impossible for him to determine whether the accused's rights against unreasonable search and seizure was violated.⁵⁷ The accused stressed these Charter concerns in their written arguments to the Supreme Court. The trial judge took a more contextual approach to the task of ensuring Charter compliance with respect to disclosure and searches and seizures than the Supreme Court which stressed in a more abstract manner the theoretical ability of the trial judge to issue a statutory stay under section 38.14 when necessary to protect a fair trial. The Supreme Court stressed the ultimate issue of the fairness of the trial, but the trial judge focused on the component parts of a fair trial.

The trial judge also took a more contextual approach to what is actually required under section 38.06 in reconciling competing interests in secrecy and disclosure than the Supreme Court, which tended to presume that the Federal Court would make non-disclosure orders. The trial judge stressed that "s. 38 does not create a class privilege. Parliament has prescribed a balancing that must take place on a case by case basis. A judge is permitted to see the information, just not the judge who must decide important issues to which the balancing is germane".⁵⁸ Implicit in this statement was a recognition that the trial judge would be in a better position than the Federal Court judge to decide exactly how much disclosure was required for a fair trial. The trial judge also recognized that disclosure and secrecy were not necessarily zero-sum matters and

⁵⁴ Canada, "Air India Inquiry Action Plan" (December, 2010) online: <<http://www.publicsafety.gc.ca/prg/ns/ai182/ai-prg-rep-eng.aspx>>.

⁵⁵ *Ahmad 2009*, *supra*, note 27, at para. 124.

⁵⁶ *Id.*, at para. 106.

⁵⁷ *Id.*, at para. 109.

⁵⁸ *Id.*, at para. 125.

partial forms of disclosure including the use of redactions and summaries could be appropriate. This flexible process of balancing the competing needs for disclosure and secrecy could be influenced by matters that could change as the trial progressed. For example, ongoing investigations might have evolved, foreign agencies might lift restrictions or caveats on the disclosure of information and additional measures might be taken to protect informers and witnesses. Most importantly, the crystallization of the issues at trial might affect the accused's need for disclosure. Only the trial judge was in a position to monitor these changing dynamics and to adjust non-disclosure orders in a nuanced and flexible manner. Unlike the Supreme Court, the trial judge looked beyond the battle of whether he could gain access to any secret evidence that the Federal Court ordered not be disclosed to the issue of the appropriate balance between the need for secrecy and disclosure as it evolved during a long trial.

The trial judge recognized that the judges of the Federal Court who had been specially designated to hear section 38 matters had developed expertise in national security and had access to secure facilities and worked with officials with top secret security clearances. The Attorney General of Canada in its factum to the Supreme Court of Canada stressed such matters noting that the judges had participated in various conferences on security matters, had regular meetings with judges from other jurisdictions and received presentations on issues such as human rights in the national security context and the evolution of al-Qaeda.⁵⁹ The trial judge, however, wisely concluded that the debate about the relative expertise of the Federal and provincial superior courts was "a mug's game"⁶⁰ given that the superior courts had expertise in other matters relevant to section 38 including the rights of the accused. Moreover, he recognized trial judges could develop the relevant national security expertise and facilities to safely keep secret information.

Both the trial judge and the Supreme Court implicitly rejected arguments raised on appeal by a number of the accused that the Federal Court's expertise in national security matters adversely affected its judicial independence. The Supreme Court had rejected similar concerns about the independence of the Federal Court when it heard secret evidence *ex parte* in security certificate cases while still finding that the security certificate regime was unconstitutional in not providing for any

⁵⁹ Attorney General of Canada, Factum, at paras. 21-24.

⁶⁰ *Ahmad 2009*, *supra*, note 27, at para. 141.

adversarial challenge of the secret evidence that CSIS and federal lawyers presented to Federal Court judges.⁶¹ Both cases can be seen as an affirmation of the important role of the Federal Court in national security matters. At the same time, it is telling that the independence of the Federal Court was challenged in both cases. This is not a criticism of the integrity or quality of those who sit on the Federal Court, but rather a point about the institutional position of a court that is statutorily required to consider *ex parte* considerations from the government⁶² and that can by statute have its decision to disclose sensitive material effectively reversed by a certificate issued by the Attorney General of Canada.⁶³ The specially designated judges of the Federal Court are repeat players on security matters. As such, they may be susceptible to anxieties about both the nature of the security threats that Canada faces and the importance of ensuring that secret information that more powerful allies share with Canada is not disclosed.

The conduct of the Toronto terrorism trial suggests that trial judges can manage the responsibilities of deciding national security confidentiality claims. The trial judge was provided with secure laptops to examine the documents in dispute.⁶⁴ The accused requested disclosure of documents held by both the Crown and by CSIS with the judge determining that the slightly more restrictive *R. v. O'Connor*⁶⁵ scheme for obtaining disclosure from third parties applied to the CSIS documents. As anticipated in the original ruling on the constitutionality of section 38, the accused's disclosure requests were wide-ranging and included issues relating to the wiretap warrants, entrapment and the credibility of various agents.⁶⁶ At the same time, the accused accepted that information about unrelated individuals and internal police matters as well as information covered by solicitor-client and informant privilege would not be disclosed.⁶⁷ The accused did not agree to *ex parte* hearings that would be allowed under section 38 for both the Crown and the accused, but did

⁶¹ *Charkaoui v. Canada*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

⁶² For a recognition of the unfairness of *ex parte* communications in other contexts, see *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] S.C.J. No. 82, [1997] 3 S.C.R. 391 (S.C.C.).

⁶³ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.13. A very deferential form of judicial review of the certificate is available under s. 38.131.

⁶⁴ *R. v. Ahmad Ruling 16*, [2009] O.J. No. 6156, at para. 2 (Ont. S.C.J.).

⁶⁵ [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

⁶⁶ *R. v. Ahmad Ruling 16*, *supra*, note 64, at para. 8.

⁶⁷ *Id.*, at para. 9.

allow the trial judge and the Crown to engage in written *ex parte* communications which were then preserved under seal.⁶⁸ The trial judge described the approach taken as follows:

The procedure we have followed is akin to a *Garofoli* procedure: *R. v. Garofoli*, [1990] 2 S.C.R. 1421. The Crown and I can see the documents in their entire unredacted form. The accused and their counsel cannot. We have gone through the redactions one by one. Occasionally I have been able to give the accused some information about the redacted information when certain that doing so would not impinge on a protected interest. Crown counsel has done the same thing.⁶⁹

The trial judge with the consent of the accused allowed the Crown to review his draft reasons with respect to inadvertent disclosure of secrets and also issued some private reasons.⁷⁰

The trial judge upheld most of the government's redactions in hundreds of documents on various grounds including that they would tend to identify sources or investigative techniques or breach restrictions on disclosure imposed by foreign agencies. There is no evidence that the trial judge acted irresponsibly with respect to national security interests even though he did not have the benefit of the specialized education and experience accumulated by the specially designated judges of the Federal Court. The trial judge did, however, order that information that was relevant to the credibility of a police agent including his payment should be disclosed,⁷¹ but this was a matter within the expertise of a criminal trial judge.

Somewhat disturbingly, the trial judge did not have access to all the relevant information, but he concluded that "I am satisfied that the obviously highly sensitive information I am not able to view goes beyond what I need know to properly address the issues before me."⁷² Although the process was not without difficulties, trial judges are capable of making national security confidentiality decisions while also maintaining secrecy when required. The idea that only specially designated judges of the Federal Court can appreciate the harms of disclosure to national security does not make sense in a country that prides itself on a generalist

⁶⁸ *Id.*, at para. 19.

⁶⁹ *Id.*, at para. 21.

⁷⁰ *Id.*, at paras. 59-60.

⁷¹ *Supra*, note 64.

⁷² *Id.*, at para. 12.

and able judiciary. Even if the Federal Court judges are more sophisticated with respect to harms to national security, they are only one side of the section 38 equation and judges must also consider harms of non-disclosure to the accused's right to a fair trial.

Having found a violation of section 7 of the Charter, the trial judge addressed the issue of whether the violation could be justified under section 1. This meant that the trial judge considered whether there were reasonable alternatives to the two-court system and concluded that

the s. 38 scheme fails to meet the minimal impairment component of the *Oakes* test. Adequate protection for sensitive information can be provided in the Superior Court of Justice. As the court where the fair trial rights of the accused are at stake, the Superior Court of Justice is in the best position to both access and assess the evidence, and to evaluate the relationship of all relevant factors during the balancing process. Accordingly, the Crown has failed to justify the violation of s. 7 of the *Charter* on the basis that s. 38 is a reasonable limit in accordance with s. 1 of the *Charter*.⁷³

The trial judge's approach engaged questions of proportionality and less restrictive alternatives that the Supreme Court did not reach because they found that there was no section 7 violation. The question of less rights restrictive alternatives that the trial judge found central to his section 1 analysis was characterized by the Supreme Court as a matter of policy best left to Parliament. This contrast underlines the malleable nature of section 1 analysis and proportionality reasoning which can be characterized as matters of law that judges can decide or matters of policy that should be left to Parliament.

Although the Supreme Court stressed that it was necessary to take a "practical" approach to section 38 matters, its own analysis downplayed the practical matters of pre-trial motions for disclosure and challenging warrants, appeals and bifurcated counsel that made the two-court system even more unwieldy. The Supreme Court relied on the theoretical ability of trial judges to stay proceedings without perhaps fully appreciating the drastic consequence of staying a major prosecution. The trial judge, unlike the Supreme Court, appreciated that what might be required to protect a fair trial might not be the atom bomb of a stay of proceedings, but more tailored remedies that would revise non-disclosure orders made at the pre-trial stage in light of the evolving nature of the trial and the

⁷³ *Ahmad 2009, supra*, note 27, at para. 144.

flexible balancing that is required under section 38 to reconcile competing interests in secrecy and disclosure.

IV. THE SUPREME COURT'S DECISION

The case was directly appealed to the Supreme Court as a final decision not otherwise subject to appeal. The Court, in a unanimous “by the Court” judgment, overruled the trial judge with respect to both his findings of a violation of section 7 of the Charter and section 96 of the *Constitution Act, 1867*. The Court interpreted or read down section 38 to ensure that it accorded with the right to a fair trial even while acknowledging that the two-court system might cause “numerous practical and legal difficulties”.⁷⁴ The Court stressed that Parliament must have intended that the trial judge have access to secret information that was not disclosed given the responsibility placed on the trial judge to ensure the fairness of the criminal trial including the explicit recognition in section 38.14 that the trial judge could stay proceedings if a fair trial was not possible. At the same time, however, the Court did not interpret section 38 as guaranteeing that the trial judge would have such access. Instead, it relied on the ability of a constitutional game of chicken and the threat of a stay to ensure such access.

The Court's approach to the constitutional question was somewhat similar to the reading down approach used in *R. v. Butler*,⁷⁵ *R. v. Sharpe*⁷⁶ and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.⁷⁷ In other words, the Court relied heavily on a presumption that Parliament intended to comply with the Charter.⁷⁸ The Court's approach in these matters can be seen as a form of second-generation constitutionalism in which it avoids the reliance placed on declarations of constitutional invalidity seen in early Charter cases such as *Hunter v. Southam Inc.*⁷⁹ that did not attempt to cure constitutional defects. The use of robust reading down remedies in *Ahmad 2011* presents less of a danger than in cases where the creatively interpreted legislation may provide inaccurate or unclear signals to the public.

⁷⁴ *Ahmad 2011*, *supra*, note 1, at para. 3.

⁷⁵ [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.).

⁷⁶ [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.).

⁷⁷ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁷⁸ *Ahmad 2011*, *supra*, note 1, at para. 32.

⁷⁹ [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

Section 38 is administered by the designated Federal Court judges, trial judges and the Attorney General of Canada. These legal professionals can reasonably be expected to be familiar with the nuances contemplated by *Ahmad 2011* as opposed to the many citizens who might be affected by obscenity provisions or those relating to the correction of children. Nevertheless, reading down approaches presume that those who administer potentially unconstitutional laws will always exercise their discretion in a manner that is consistent with the Charter as it has been interpreted by the Court. As will be seen, the Court's approach in *Ahmad 2011* places special burdens on trial judges to threaten and impose stays to protect risks to fair trial rights even when those stays might not be justified under restrictive common law or Charter requirements.

The Court's actual reading down of section 38 was quite minimal. Even though section 38.04(5)(c)(i) appeared to give the Federal Court judge discretion in deciding who should receive notice of section 38 proceedings, the Court declared that it:

should be read as requiring notice to the criminal court that a s. 38 proceeding has been commenced in Federal Court. ... 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.⁸⁰

The Court also suggested that the Federal Court "exercising the discretion conferred by s. 38.06(2)" might order that information could be disclosed to the trial judge subject only to the condition that it not be disclosed to the accused and that it be reviewed by the trial judge in a "designated secure facility". Without noting that the trial judge had successfully used such secure methods in this case, the Court nevertheless expressed some trust in trial judges by observing that there was "minimal risk" in "providing such access to a trial judge, who is entrusted with the powers and responsibilities of high public office".⁸¹

⁸⁰ *Ahmad 2011*, *supra*, note 1, at para 39.

⁸¹ *Id.*, at para 45.

The Court also held that “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”.⁸² Notice to the accused will alert the accused to the section 38 proceedings and likely lead to an application to the trial judge for a stay of proceedings under section 38.14. At the same time, however, the accused may not receive notice of the particulars of the information that the Federal Court might order not be disclosed.

The Supreme Court stressed that stays of proceedings under section 38.14 would play a critical role in the administration of section 38. Section 38.14 also mentions other less drastic remedies including adverse findings on an issue relating to information that cannot be disclosed and any other order “to protect the right of the accused to a fair trial” so long as it complies with the Federal Court’s non-disclosure order. The potentially wide range of remedies contemplated under section 38.14 will, however, be foreclosed by the need to respect Federal Court non-disclosure orders typically provided at the pre-trial stage. In many jurisdictions that allow the trial judge to make such non-disclosure orders, the ability of the trial judge to re-visit and revise such orders is seen as the critical means of ensuring the fairness of the trial. The House of Lords, for example, has stressed that a trial judge’s non-disclosure order “should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review”.⁸³ The European Court of Human Rights has similarly stressed the important role of the trial judge who is “in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses” and as the defence case evolves “to take a number of different directions or emphases”.⁸⁴ Given the inability of Canadian trial judges under section 38.14 to revise non-disclosure orders, the Supreme Court was correct to stress that the drastic remedy of a stay of proceedings will often be the only practical remedy available to the trial judge to ensure the fairness of the trial.

⁸² *Id.*, at para 40.

⁸³ *R. v. H.; R. v. C.*, [2004] UKHL 3, at para. 36 (H.L.).

⁸⁴ *Rowe and Davis v. United Kingdom* (2000) 30 E.H.R.R. 1, at para. 65.

The stay of proceedings under section 38.14 — or at least the threat of such a drastic remedy — will play the critical role in the constitutional game of chicken that will be played under the two-court system. In a critical passage in *Ahmad 2011*, the Court rules that if “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”.⁸⁵ The Court has thus instructed trial judges that any doubts about the fairness of the trial must be resolved in favour of the accused’s application for a stay.⁸⁶ The Court recognized that such an approach was in tension to common law and Charter doctrines that stressed that stays of proceedings are a drastic remedy that must be reserved for the clearest of cases. Nevertheless, the Court stressed that stays “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”.⁸⁷

The Court’s reliance on the statutory nature of stays in section 38.14 raises the question of what the Court would have done had Parliament not specifically mentioned stays in section 38.14. In principle, the need to protect the accused’s right to a fair trial should be the same, but the Court’s emphasis on Parliament’s decision to authorize stays suggests that the Court’s endorsement of the stay remedy might have been less robust if Parliament had not made reference to stays. The Court’s approach seeks to distance both the judiciary and the Charter from responsibility for stays of proceedings. This avoidance of responsibility is most graphic when the Court asserts that “Parliament has determined that a stay of proceedings is the lesser evil compared with the disclosure of sensitive or potentially injurious information”.⁸⁸ Although the Court places considerable reliance on statutory recognition of the availability of stays under section 38.14, the constitutional calculus arguably should have been the same with or without section 38.14.⁸⁹ With or without

⁸⁵ *Supra*, note 1, at para. 51 (emphasis added).

⁸⁶ The Court stated that “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.” *Id.*, at para. 52.

⁸⁷ *Id.*, at para. 52.

⁸⁸ *Id.*, at para. 78.

⁸⁹ The Court also seeks to transfer responsibility to Parliament for stays of proceedings that may be required to enforce Charter rights to a trial in a reasonable time when it states (*id.*, at para. 79) that

section 38.14, trial judges should have a constitutional responsibility to ensure the fairness of trials.

Statutory stays of proceedings are the ultimate threat in the constitutional game of chicken, but the Court expressed confidence that they “should be rare”.⁹⁰ One reason for the Court’s confidence was its expectation that both Federal Court judges and the Attorney General of Canada would apply section 38 in a flexible manner to give the trial judge enough information to decide whether non-disclosure or partial disclosure would actually threaten a fair trial. Even if this was not done in the first instance, the Court contemplated that the actors would have a second chance to come to their senses. It stated that trial judges should “rather than proceed directly to issuance of a stay”,⁹¹ advise the Attorney General of Canada and “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”.⁹² Here the Court seems to contemplate an actual game of chicken where the trial judge threatens to stay a major prosecution as a means to obtain disclosure.

The game of chicken contemplated by the Court is not played out between two courts with overlapping jurisdiction over terrorism prosecutions, but between the trial judge and the Attorney General of Canada. The Federal Court judge who made the initial non-disclosure decision

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.

In reality, the Court has since the early years of the *Charter* clung to the proposition that a stay of proceedings should be the court’s minimal remedy for a violation of s. 11(b) of the *Charter*. See *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 (S.C.C.). For arguments that stress how bifurcated s. 38 proceedings and appeals may delay mega-terrorism trials, see Hon. Patrick LeSage & Professor Michael Code for The Ontario Ministry of the Attorney General, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen’s Printer, November 2008), at 91-93, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf>.

⁹⁰ *Supra*, note 1, at para. 52.

⁹¹ *Id.*, at para. 51.

⁹² *Id.*

drops out as a player if only because that order will have to be finalized, often at the pre-trial stage, so that appeal provisions of section 38.09 would apply. This approach recognizes the reality that the Attorney General of Canada has to make the ultimate decision of whether to prosecute and disclose.⁹³ At the same time, however, the Court did not advert to the adverse effects of a bifurcation of prosecutorial and section 38 decision-making. Terrorism prosecutions will be conducted by the federal Director of Public Prosecutions and/or provincial prosecutors, but as the trial judge stressed, section 38 matters are conducted by a separate group of lawyers representing the Attorney General of Canada. The trial judge was concerned that section 38 decisions could be made by the latter group of lawyers without adequate consideration of their effect on the overall prosecution. Indeed, there is a danger that the section 38 lawyers may serve the interests of client departments, notably CSIS, in secrecy without full regard to how non-disclosure decisions may threaten the trial process. The Supreme Court in *Ahmad 2011* assumed that the threat of a stay of proceedings would place appropriate pressure on the Attorney General of Canada to make full disclosure at least to the trial judge. Indeed at times, the Court assumed that “Crown counsel”⁹⁴ representing the government was one entity despite the trial judge’s explicit comments about the bifurcation of section 38 and other prosecutorial functions.

The Court’s determination that section 96 was not violated by section 38 is consistent with Peter Hogg’s observations that the Court has set “a high bar indeed for a challenge to judicial independence based on adjudicative independence” and that such a deferential approach “stands in sharp contrast to the Court’s readiness to find a breach of judicial independence in any reduction of the salaries or prerequisites of judges”.⁹⁵ The Court rejected the section 96 claim by holding that the

⁹³ The Air India Commission, for example, stressed that through non-disclosure certificates under s. 38.13 that the Attorney General of Canada had the “ultimate responsibility ... with respect to the disclosure of intelligence”. The Commission, however, also recommended that a Director of Terrorism Prosecutions be created in the Attorney General of Canada’s department that would have ultimate responsibility for both prosecutorial and s. 38 decisions.

⁹⁴ For example, the Court stated that “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.” *Ahmad 2011*, *supra*, note 1, at para. 46.

⁹⁵ Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007), at 7.1(c), as updated.

first part of the *Reference re Residential Tenancies Act 1979 (Ontario)*⁹⁶ test was not made out because “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”.⁹⁷ The Ontario Court of Appeal has used similar reasoning to reject a similar challenge to the role that section 38 gives specially designated Federal Court judges in civil actions brought in a provincial superior court.⁹⁸ The problem with such reasoning is that it relies on the anachronistic attitudes of Canadian courts toward secrecy. This approach reveals section 96 as a pocket of historical framers intent jurisprudence that is in tension with the general “living tree” approach taken in other aspects of constitutional interpretation.

The Court in *Ahmad 2011* to its credit, did not simply rely on the easy and unsatisfying answer that courts in 1867 would not review executive claims of secrecy. It went on to the second test in *Residential Tenancies*,⁹⁹ namely, whether the power to determine section 38 matters was a judicial matter. The Court accepted that “a superior court’s ability to adjudicate the constitutional issues that come before it forms a part of the essential core”¹⁰⁰ of the functions of a superior court. It then characterized section 38 matters more narrowly as the disclosure of material where national security confidentiality was claimed.¹⁰¹ This approach followed a similar approach taken in the Cabinet confidentiality case of *Babcock v. Canada (Attorney General)*.¹⁰² *Babcock*, however, could have been distinguished on the basis that national security confidentiality claims in criminal trials are inextricably intertwined with the constitutional question of whether a fair trial was possible in a way that Cabinet confidentiality claims are not. The Court implicitly recognized the constitutional stakes of national security confidentiality claims in criminal trials, but held that they were satisfied by the ability of trial judges to stay proceedings under section 38.14. At this juncture, however, the Court recognized that the Charter would sometimes mandate the

⁹⁶ [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.) [hereinafter “*Residential Tenancies*”].

⁹⁷ *Ahmad 2011*, *supra*, note 1, at para. 60 (S.C.C.).

⁹⁸ *Abou-Elmaati v. Canada (Attorney General)*, [2011] O.J. No. 474, 2011 ONCA 95 (Ont. C.A.).

⁹⁹ *Supra*, note 96.

¹⁰⁰ *Ahmad 2011*, *supra*, note 1, at para. 62.

¹⁰¹ *Id.*, at para. 64.

¹⁰² [2002] S.C.J. No. 58, [2002] 3 S.C.R. 3 (S.C.C.).

use of a stay of proceedings.¹⁰³ This conclusion, however, undermines the idea that section 38 is practically distinct from the adjudication of constitutional issues. Section 96 emerges as a weak device to protect the separation of powers both because of the Court's historicist approach to essential superior court functions and its tendency to define the claimed core of superior court functions in narrow terms that avoid the constitutional essence of disclosure and non-disclosure in the context of a criminal trial.

In summary, the Court's reading down of section 38 to avoid constitutional violations promises more than it delivers. The Court's only reading down remedy is to require that the trial judge receive notice of related section 38 proceedings being conducted in the Federal Court. The Court does not interpret section 38 to ensure that the Federal Court or the Attorney General give the trial judge access to non-disclosed information that might nevertheless be relevant to the criminal trial. Even if the threat of the trial judge staying proceedings is sufficient in most cases to ensure that the trial judge will now be able to see the undisclosed information, the trial judge will remain powerless to revise the Federal Court's non-disclosure order. Such revisions are common in other democracies and they may often be more appropriate and less drastic than the statutory stay of proceedings that the Supreme Court celebrates as the key to ensuring that the accused's fair trial rights and the guaranteed powers of superior trial courts are respected.

V. THE FUTURE OF CONSTITUTIONAL CHICKEN

Although the Court stresses that its conclusion that section 38 is constitutional does not resolve the policy debate about the wisdom of Canada's unique two-court approach to resolving national security confidentiality claims, it is likely that the Court's decision will end the debate. Although the Air India Inquiry and the Lesage/Code Task Force both concluded that the two-court approach was unworkable, the federal government in its response to the Air India report did not propose legislation to give trial judges powers to make section 38 determinations.¹⁰⁴ No such changes were included in the government's bill on fair

¹⁰³ *Ahmad 2011, supra*, note 1, at para. 65.

¹⁰⁴ Canada, "Air India Inquiry Action Plan" (December, 2010), at 9, online: <<http://www.publicsafety.gc.ca/prg/ns/ai182/ai-prg-rep-eng.aspx>>. The government stated:

and efficient criminal trials that received Royal Assent subsequent to *Ahmad 2011* in June 2011.¹⁰⁵

The unique role of the Federal Court in all cases involving national security secrecy claims reflects long-standing Canadian anxieties about the disclosure of secret information that, as discussed in the first part of this article, stem back to the Gouzenko revelations after the Second World War. Despite the growing numbers of people that are of necessity given access to secret information in the post-9/11 era, the Supreme Court's decision in *Ahmad 2011* upholds a restrictive regime that still does not as a matter of course allow trial judges to have access to secret material despite the fact that trial judges have access to and make decisions about potentially life and death matters affecting police informers. In short, Canada's unique bifurcated approach to national security confidentiality is a testament to our continued anxieties about secrets stemming from our oft-noted status as a net importer of intelligence.

The Federal Court will remain an important national security institution with exclusive jurisdiction to decide not only matters related to national security confidentiality, but also matters relating to CSIS warrants, judicial review of the listing of terrorists and security certificates. The Court has in the security certificate context done much important work and has not always agreed with governmental claims of secrecy. Yet much will depend on a handful of specially designated Federal court judges. There is a danger that the court may because of its repeat player status, its intimate awareness of Canada's reliance on foreign intelligence and the serious security threats facing Canada and its inexperience in criminal trial matters be inclined to favour secrecy claims over those relating to the accused's rights. Indeed, the Supreme Court seems to anticipate this result when it states that "the Federal Court judge's sole concern under the scheme is the protection of the public interest in sensitive or potentially injurious information."¹⁰⁶ This statement is technically inaccurate because section 38.06 of the *Canada Evidence Act*,¹⁰⁷ unlike security certificate provisions of immigration law, requires

The procedure whereby a judge reviews and balances the competing public interests in disclosing or not disclosing relevant intelligence information can be time consuming and subject to change if new evidence is presented during the trial. The current procedure relies on the Federal Court to appropriately protect sensitive information.

¹⁰⁵ *Fair and Efficient Criminal Trials Act*, S.C. 2011, c. 16.

¹⁰⁶ *Ahmad 2011*, *supra*, note 1, at para. 68.

¹⁰⁷ R.S.C. 1985, c. C-5.

specially designated judges to weigh the competing interests in disclosure and non-disclosure. Nevertheless the Court's statement is telling in indicating that the Federal Court may well lean towards the state's security and secrecy interests, especially given that the accused's competing interests in full answer and defence may not have crystallized when section 38 decisions are typically made in pre-trial proceedings. If the two-court system is ultimately about the expertise of the specially designated Federal Court judge, it must be acknowledged that this expertise relates to the harms that disclosure of secret information may cause to national security, national defence and international relations and not to expertise in protecting the rights of the accused and to fair criminal trials.

In any event, the specially designated Federal Court judges who make decisions under section 38 may tend to be minor actors in the constitutional game of chicken that will be a central feature of terrorism prosecutions after *Ahmad 2011*. The real game of chicken will be played between the trial judge and the Attorney General of Canada. The Supreme Court may have ensured that in most cases the trial judge will be given more information about material that the Federal Court has ordered should not be disclosed because of national security concerns. The Court has also hinted that the Federal Court judge and perhaps also the trial judge may be assisted by special advocates. Special advocates may play a helpful role in challenging overclaiming of secrecy, but they may be at a disadvantage in alerting either the Federal Court or the trial judge to whether non-disclosure will adversely affect the fairness of the trial especially if the accused's defence evolves over time or if the non-disclosed information might reveal some unanticipated line of defence for the accused and special advocates are restricted from consulting with the accused and their lawyers after having seen the secret information.

How will *Ahmad 2011* affect terrorism and other national security provisions? Until recently, Canada had a spectacularly poor record of terrorism prosecutions with various cases in the 1980s and 1990s, including those against the suspected mastermind of the 1985 Air India bombing, being abandoned over disclosure issues.¹⁰⁸ One non-terrorism case resulted in a mistrial after section 38 was invoked in the middle of a

¹⁰⁸ See generally, Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, vol. 4 (Ottawa: Supply and Services, 2010) for an account of these many failed prosecutions.

jury trial though that person was subsequently convicted.¹⁰⁹ As discussed above, two-court section 38 proceedings were deliberately avoided in both the Air India and Toronto terrorism prosecutions. Terrorism prosecutions will undoubtedly become more difficult after *Ahmad 2011* given that the expedients used in the Air India trial and Toronto terrorism prosecution to avoid litigating section 38 issues in the Federal Court will no longer be available and the threat of a statutory stay under section 38.14 for both fair trial and trial within a reasonable time reasons will hang over most terrorism prosecutions. Guilty pleas and negotiated approaches are the only remaining ways to avoid section 38 litigation, but these may be less likely in light of recent increases in sentencing tariffs which diminish the incentive for those accused of terrorism to plead guilty.

It is possible that the regime contemplated under *Ahmad 2011* will be workable, but much will depend on how trial judges and the Attorney General of Canada play their respective roles. There is a danger that trial judges may hesitate to threaten to end major terrorism prosecutions because they may not have all the details about non-disclosed evidence or even if they do, they may view a stay of proceedings as a manifestly disproportionate remedy to the harms to the accused of non-disclosure. Nevertheless, the Supreme Court has given trial judges clear instructions that they should use the statutory stay remedy robustly even if the remedy would not otherwise be warranted under the common law or the Charter. The Court has stressed that its decision will put the trial judge in an informed position to protect the accused's right to a fair trial, but it has not grappled with difficulties presented by trial judges being unable to revise the Federal Court's original non-disclosure order and having to rely on the drastic and perhaps disproportionate remedy of a stay of proceedings. Trial judges will also have to decide whether they should give the Attorney General guidance about how to revise the non-disclosure order made by the Federal Court or whether they should just threaten to use the statutory stay under section 38.14.

The Court has attempted to shift responsibility for stays from the trial judge and the Charter to Parliament. Informed commentators may blame any subsequent stays of terrorism prosecutions on Parliament's choice of

¹⁰⁹ *R. v. Ribic*, [2004] O.J. No. 2525 (Ont. S.C.J.). The judge in that case rejected two claims that extensive delays ranging from five to six years violated the accused's right to a trial in a reasonable time, largely on the basis that the accused had initiated the s. 38 proceedings by seeking to call classified evidence. *Id.*, *R. v. Ribic*, [2005] O.J. No. 2631 (Ont. S.C.J.).

an awkward two-court system, but trial judges will be the ones on the hot seat. They will be the ones who must actually pull the trigger and end major terrorism prosecutions that may have attracted national and even global attention and alarm. Trial judges will have to be willing to play a game of chicken even if the result is a stay of proceedings in a very serious case with strong evidence that the accused had planned or even committed deadly acts of terrorism and even in cases where the revision of the original non-disclosure order might be a more proportionate and appropriate remedy. *Ahmad 2011* creates risks that trial judges will refuse to stay proceedings in cases where a non-disclosure order might result in an unfair trial and potentially a miscarriage of justice. Conversely, section 38 creates the risk that trial judges will have to stay proceedings even when the more appropriate response would be to amend the original non-disclosure order. The risks created by the constitutional game of chicken inherent in section 38 are unfortunate because giving the trial judge jurisdiction to make and revise section 38 non-disclosure decisions would significantly minimize the risk of either unfair trials or unnecessary stays. It would also follow international best practices.

The game of constitutional chicken that emerges from *Ahmad 2011* may make it even more important for the federal government to reconsider the way it prosecutes terrorism cases. When the predecessor of section 38 was first enacted in 1982 and when it was updated in 2001, the Attorney General of Canada was able to assert ultimate responsibility for criminal prosecutions involving conduct that constituted threats to the security of Canada.¹¹⁰ In 2006, however, and without apparent consideration of the effects that it might have on terrorism prosecutions, an independent federal Director of Public Prosecutions (“DPP”) was inserted into the prosecutorial mix. As the trial judge but not the Supreme Court noted in *Ahmad 2011*, this meant that governmental decisions under section 38 would remain with the Attorney General of Canada even though other lawyers under the federal Director of Public Prosecutions and/or provincial Attorneys General would be responsible for the prosecutions.

The Air India Commission recommended that terrorism prosecutions be returned to the Attorney General of Canada in part because “managing the relationship between intelligence and evidence is difficult enough without in addition dividing the prosecution process into two parts by

¹¹⁰ *Security Offences Act*, R.S.C. 1985, c. S-7; *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.25.

having the DPP conduct the prosecution and the Attorney General of Canada make decisions under s. 38”.¹¹¹ The Air India Commission also noted that it might be important for the Attorney General to consult his or her colleagues in Cabinet especially in relation to possible disclosure of intelligence obtained from foreign agencies.¹¹² The government in its response to the Air India report ignored these recommendations and contemplated that the DPP would continue to prosecute terrorism offences.¹¹³ This decision should be revisited in light of *Ahmad 2011* given the critical role of the Attorney General of Canada in responding to provisional stay decisions that will now likely be made by trial judges. *Ahmad 2011* places the Attorney General of Canada in the driver’s seat in the constitutional game of chicken. Given this, the Attorney General should be placed in the best position to weigh the costs of disclosure against those of stayed prosecutions. At present, there is a danger that the Attorney General may not fully internalize and weigh the costs of a stayed and terminated prosecution if that official does not bear ultimate responsibility for the prosecution and if that official sees her role as only protecting the secrets of Canada and her allies.

VI. CONCLUSION

Ahmad 2011 will make terrorism prosecutions more difficult in the future. The Court has disapproved of attempts made in both the Air India trial and in the Toronto terrorism prosecution to avoid using the unique and awkward two-court system in section 38 of the *Canada Evidence Act*¹¹⁴ to determine whether unused intelligence has to be disclosed to the accused in a terrorism prosecution. Now in almost every terrorism prosecution, we can expect that criminal trial judges will threaten to stay proceedings if they do not obtain access to any secret information that the Federal Court has ordered should not be disclosed because of harms to national security. Even if trial judges do obtain access to such informa-

¹¹¹ Air India Report, *supra*, note 32, at 57.

¹¹² *Id.*, at 55. See also, Kent Roach, “Prosecutorial Independence and Accountability in Terrorism Prosecutions” (2010) 55 Crim. L.Q. 486.

¹¹³ The Air India Action Plan does not address the merits of this recommendation and implicitly contemplates that the Public Prosecution Service of Canada will continue to conduct terrorism prosecutions. Canada, “Air India Inquiry Action Plan” (December, 2010), at 9, online: <<http://www.publicsafety.gc.ca/prg/ns/ai182/ai-prg-rep-eng.aspx>>, at 4.

¹¹⁴ R.S.C. 1985, c. C-5.

tion, they will remain powerless to revise the Federal Court's non-disclosure orders. They will have to rely on the blunt and perhaps disproportionate remedy of a stay to ensure that the accused has a fair trial. Although the Supreme Court in *Ahmad 2011* has stressed that it is not necessary for common law or Charter standards to be satisfied for the section 38.14 stay, there is a danger that trial judges may hesitate to impose a stay in circumstances where a less drastic revision of a non-disclosure order is more appropriate. Although Parliament bears ultimate responsibility for the two-court structure that forces the trial judge to rely on a stay, the risk of public backlash against a trial judge who imposes a stay in a major prosecution such as the Air India or Toronto terrorism prosecutions is difficult to overestimate. The accused's right to disclosure and a fair trial will suffer if trial judges do not have the stomach for playing their role in the game of constitutional chicken.

The Court in *Ahmad 2011* has upheld the role of specially designated Federal Court judges under section 38, but it is a mistake to think that those judges will play a key role in the constitutional game of chicken. They will have the difficult task of reconciling the accused's right to a fair trial with the state's interests in secrecy at a pre-trial stage and their expertise lies on the secrecy side of the equation. The Federal Court judges may tailor their non-disclosure orders to allow trial judges within the ring of secrecy, but they will not be able to revise their section 38 decisions in the middle of a trial, in part because their orders will have to be finalized to allow them to be appealed to the Federal Court of Appeal under section 38.09. In most cases, only the Attorney General of Canada will be able to avoid a stay by allowing secret information to be disclosed despite the Federal Court's original non-disclosure order.

The stakes of the constitutional game of chicken contemplated by section 38 and now upheld as constitutional in *Ahmad 2011* could not be higher. Although prudent actors may be able to avoid the disasters of staying a major terrorism prosecution or allowing one to proceed where important evidence has not been disclosed to the accused, constitutional games of chicken do not inspire confidence that Canada can conduct efficient and fair terrorism prosecutions. The Court in *Ahmad 2011* may have assured itself that terrorism prosecutions will remain fair, but only at the cost of instructing trial judges to threaten to stay proceedings whenever they are left in doubt about the fairness of the process. Trial judges will have to use the drastic remedy of a stay in cases where the more appropriate remedy would be to revise the Federal Court's non-disclosure order

often made long before the trial has started. The Attorney General of Canada is ultimately the decisive driver in this game of chicken. Much will depend on that official's willingness to ensure that not only the trial judge but more importantly the accused receives enough disclosure to avoid the statutory stay that will now hang over most terrorism prosecutions.