

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Superior Court of Justice)**

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

- and -

**FAHIM AHMAD, ZAKARIA AMARA, ASAD ANSARI,
SHAREEF ADELHALEM, MOHAMMED DIRIE,
JAHMAAL JAMES, AMIN DURRANI, STEVEN CHAND,
SAAD KHALID and SAAD GAYA**

RESPONDENTS

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

-and-

ATTORNEY GENERAL OF ONTARIO

INTERVENERS

**FACTUM OF THE INTERVENER
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FACTUM OF THE INTERVENER
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File No. 33066

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ATTORNEY GENERAL OF ONTARIO****INTERVENERS**

**FACTUM OF THE INTERVENER
The Canadian Civil Liberties Association**

PART I - STATEMENT OF THE FACTS

1. The Canadian Civil Liberties Association (CCLA) takes no position on the facts.

PART II - QUESTIONS IN ISSUE

2. The Chief Justice has stated the following questions in this case:
- i. Are ss. 38 to 38.16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, ultra vires the Parliament of Canada on the ground that they infringe ss. 96 and 101 of the Constitution Act, 1867?
 - ii. Do ss. 38 to 38.16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, infringe s. 7 of the Canadian Charter of Rights and Freedoms?
 - iii. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

PART III - ARGUMENT

3. The CCLA restricts its submission to the second and the third questions stated by the Chief Justice. The CCLA respectfully submits that ss.38 to 38.16 infringe s.7 of the *Charter* and are not saved by s.1 of the *Charter*.

Introduction

4. The CCLA respectfully submits that the impact of bifurcation upon the fundamental rights guaranteed by the Charter must be assessed; namely the impact upon the right to a fair trial, and the right to disclosure as necessary to make full answer and defence.¹ We note that the NSP can arise in litigation matters that may be civil, criminal or administrative, and may not be before the Federal Court. The constitutionality of ss.38-38.16 (bifurcation process) turns upon whether an individual's Charter rights are affected.

5. The CCLA respectfully submits that when a Charter analysis is applied to ss.38-38.16, the provisions do infringe s.7 of the Charter and cannot be saved by s.1.

Section 7 - The Right to Disclosure and Full Answer and Defence

6. There is a constellation of constitutionally guaranteed procedural protections that are fundamental to the fair trial process. Included for example, is the requirement for an independent trier (including both of law and fact) to decide the case, a process which allows the accused to know the case to meet, a process which allows the accused access to information in the hands of the state which s/he can "harvest" to defend the case, and a process which permits calling of evidence in one's defence, to mention a few². All of the protections work together to provide a framework for the just determination of criminal allegations, always guarding against convicting the innocent.

¹ This Honourable Court has recognized that the right to disclosure forms an integral part of the right to make full answer and defence. *R. v. La*, [1997] 2 S.C.R. 680, para 23 (per Sopinka J.)

² See *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 at ¶ 29 where this Honourable Court held that in order for s.7 of the Charter to be satisfied each of the above noted requirements must be met in substance. See also *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Appellant's Authorities, Tab 42).

7. The Bi-furcated Process is incompatible with the *Charter* as it creates a system for the delivery of constitutionally required disclosure that deprives the accused of a trier of law, the trial Judge, who is possessed of all the necessary information with which to provide a meaningful constitutional remedy for non-disclosure. Under the Bi-furcated Process the accused is denied access to a trier of law who will decide the scope of information that the accused may access to defend his case (disclosure). This is the direct result of the fact that the trial judge does not have access to the actual information that is the subject of the NSP claim.³

8. The trial judge has the responsibility to provide a constitutional remedy for non-disclosure.⁴ The remedy may range from a stay of proceedings to the provision of summaries of the privileged material. However, where the trial Judge does not have access to the privileged material it is virtually impossible to fashion a just and appropriate remedy. It is the accused who suffers as s/he does not have access to a court that is equipped with all the information necessary to provide an efficacious constitutional adjudication. It is this structural deficiency created by the Bi-furcated Process that most acutely engages and infringes s.7 of the *Charter* in the circumstances of this case.

9. As well, under the present regime there is no flexibility to permit the trial Judge the opportunity to reconsider NSP determinations. This is a serious problem. For example, consider the situation where during a trial a witness testifies about a particularly important fact, something that was not foreseen when the NSP litigation took place, and there exists in the privileged material information to the contrary. In the present system the trial Judge would not know that there existed contrary information. The prosecuting counsel may not even know, as the NSP litigation is conducted in the FCC by counsel other than the prosecuting counsel.⁵ The trial Judge is unable to ensure a fair trial by revisiting the earlier ruling to determine if the balance between protecting the information and providing

³ This Honourable Court has made it clear that the trial judge is vested with the responsibility to ensure that the Crown has fulfilled their obligation to provide complete disclosure. See *ibid Stinchcombe* at ¶ 22-23 (Appellant's Authorities, Tab 42).

⁴ See *Supra* note 1 at ¶ 22 - 25

⁵ As was the case in this instance, see *R. V. Ahmad et al.*, Ruling No. 9 (January 15th, 2009) Brampton CRIMJ(F)2025/07 (Ont. S.C.J.) at ¶ 29 (Appellant's Record, Tab 2).

disclosure to allow full answer and defence should be recast.

10. Another unconstitutional consequence of the Bi-furcated Process is the disruption caused by managing NSP claims during the currency of a trial. Once a jury is empanelled a trial should not be interrupted by proceedings in the FCC. That is highly disruptive and will result in mistrials.⁶ There is no policy imperative that can justify this consequence. If, however, the trial Judge were to have carriage of the NSP issue the matter would be handled like any other evidentiary issue with the appropriate allocation of national security concerns.⁷

11. Appeals from NSP decisions in the Federal Court system will cause criminal proceedings in the Superior Court to come to a halt. This can result in undue delay and prejudice to the accused. There are a number of problems with such appeals. First, the Federal Court system is not answerable for the delays caused by their process. It will be the Superior Court that has to provide a remedy for delay that was not of its making. In short, the Superior Court is rendered powerless to ensure a timely trial. Second, it is often argued by proponents of the current regime that appeals of NSP rulings are necessary to correct “wrong” judicial production Orders which, if complied with, will result in the privilege being forever lost. This concern does not justify the Bi-furcated Process. Pursuant to s.38.13⁸ the Attorney General can issue a certificate prohibiting disclosure of information despite being ordered by the court⁹. As well, the Crown is free to seek leave to appeal to this Honourable Court (as they have done in this case) in appropriate circumstances. A direct appeal to this Honourable Court can be better managed so as to not unduly delay the trial, in part because the cause originates from the trial process. As well, there is no

⁶ See *ibid* at ¶ 7 wherein J. Dawson refers to *R. v. Ribic*, 2008 ONCA 790; 238 C.C.C. (3d) 225 (ONCA) at ¶ 22-28.

⁷ This may include the use of a closed courtroom appropriately secured etc.

⁸ The constitutionality of this provision was not considered by Justice Dawson in the case on appeal (see *supra* note 4 at ¶157 (Appellant's Record, Tab 2).

⁹ The personal certificate of the Attorney General is the ultimate protection against the disclosure of intelligence. The certificate has value in that it is a safeguard that the Attorney General can use to prevent the disclosure of intelligence that a foreign government does not want disclosed or to honour promises of secrecy made by Canadian agencies. Neither CSIS nor the RCMP can provide that kind of guarantee. The CCLA does not support the constitutionality of that the point of this submission is to say that on the current state of the law the Attorney-General has the ability to protect information in an exceptional case, that is to say to protect against unreasonable or unsound rejections of claims of privilege.

intermediate appellate step, saving time as well. While these extraordinary steps should be exercised cautiously and sparingly they exist to provide protection when all else fails independently of the Bi-furcated Process.

12. In conclusion, the determination of NSP in criminal proceedings has to be conducted in a manner that does not deprive the accused of guaranteed fair trial rights that are necessary pre-requisites to a just determination of criminal allegations.

Section 1 - Reasonable Limits

13. In addition to the reasons of Justice Dawson, the CCLA wishes to rely upon the fact that other western democracies who are confronted with similar challenges posed by claims of NSP do not employ the Bi-furcated Process. This is important in assessing whether there exists viable constitutional alternatives to the present system.

14. In Australia¹⁰, the United Kingdom¹¹ and the United States¹², the trial judge is allowed to examine secret information to determine whether its disclosure is necessary for a fair trial. The Australian legislation, enacted in 2004, makes the trial judge responsible for reconciling the competing interests in secrecy and disclosure and for managing issues of national security confidentiality, including requiring defence lawyers to obtain security clearances as a condition of access to secret information. This legislation was enacted after a thorough review of options by the Australian Law Reform Commission.¹³

15. Interestingly, the European Court of Human Rights has held that the ability of the trial judge to see the information and “to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues

¹⁰ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

¹¹ *R. v. H. and C*, [2004] UKHL 3

¹² *Classified Information Procedures Act* PL 96-456, s. 2

¹³ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth.); Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au/other/alrc/publications/reports/98>> .

were emerging,”¹⁴ was critical to the fairness of the United Kingdom’s system of public interest immunity, which has come into play in many UK terrorism prosecutions. This procedure also promotes an efficient trial process by allowing trial judges to make provisional non-disclosure orders, secure in the knowledge that these orders can be revisited as the trial evolves if fairness for the accused requires it.

16. The Canadian two-court system has also been the subject of international criticism, including in a recent report by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights:

In Canada, the trial judges, who must ultimately decide whether to proceed or order a stay of proceedings, are arguably placed in a difficult position of having to assess the potential prejudice of non-disclosure upon the rights of the accused, without seeing the withheld material.¹⁵

17. The report also observed that the United Nations Human Rights Committee expressed concerns that the s.38 procedure might violate the right to a fair trial, a right protected by Article 14 of the *International Covenant on Civil and Political Rights*.¹⁶

18. In conclusion, the infringement here is not reasonable in a free and democratic society because it does not minimally impair an accused’s s. 7 rights. Western democracies with similar legal systems employ measures which while not identical to each other in all respects, provide the trial judge with jurisdiction to manage claims of NSP. Trial Judges should have access to all the necessary information to ensure the proper scope of disclosure and where necessary to determine the just and appropriate remedy for non-disclosure. When dealing with claims of NSP, the only just mechanism is to have the trial judge decide the extent of privilege and then manage the consequence of it by fashioning appropriate remedies, including revisiting earlier determinations as circumstances warrant.

¹⁴ *Rowe and Davis v. United Kingdom*, (2000) 30 E.H.R.R. 1 at ¶ 65. See also *R. v. H and C*, [2004] UKHL 3 at ¶ 36 emphasizing that a trial judge’s decision not to disclose information because of public interest immunity concerns “should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.”

¹⁵ Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, (Geneva, 2009). p. 153.

¹⁶ *Ibid* at p. 153.

PART IV - COSTS

23. The CCLA makes no submission as to costs.

PART V - ORDER SOUGHT

24. The CCLA respectfully requests leave to present 15 minutes of oral argument at the hearing of this appeal.

ALL OF WHICH is respectfully submitted.

Dated at Toronto, Ontario this 25th day of February, 2010

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PART VI - TABLE OF AUTHORITIES

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