Federal Court of Appeal | Cour d'appel fédérale

Date: 20260123

Docket: A-224-24

Citation: 2026 FCA 14

CORAM: **LASKIN J.A.**
LEBLANC J.A.
HECKMAN J.A.

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 4, 2025.

Judgment delivered at Ottawa, Ontario, on January 23, 2026.

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: LASKIN J.A.
LEBLANC J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20260123

Docket: A-224-24

Citation: 2026 FCA 14

CORAM: **LASKIN J.A.**
LEBLANC J.A.
HECKMAN J.A.

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

HECKMAN J.A.

[1] Where a designated judge of the Federal Court finds, under the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*CEA*), that the certified tribunal record (CTR) for a judicial review application of an administrative decision contains sensitive information whose disclosure could injure national security, can it order disclosure of the unredacted CTR to the Federal Court judge

seized with the application while withholding it from the applicant? For the reasons that follow, I would answer this question in the affirmative.

I. BACKGROUND

[2] In 2014, the British Columbia Civil Liberties Association (BCCLA) filed a complaint (the Complaint) to the Security Intelligence Review Committee (SIRC) under section 41 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (*CSIS Act*), which has since been repealed.

[3] The Complaint alleged that the Canadian Security Intelligence Service (CSIS) had investigated individuals and groups (the named groups) engaged in expressive activities against the Northern Gateway Pipeline Project and that the information gleaned from these investigations was shared with the National Energy Board and non-governmental actors in the petroleum industry (*Attorney General of Canada v. British Columbia Civil Liberties Association*, 2024 FC 853 at para. 3 [the Decision]).

[4] The BCCLA argued before the SIRC that investigating and collecting information about the named groups fell outside the authority granted to CSIS under the *CSIS Act*. It claimed that such activities, targeting groups engaging lawfully with issues of public interest and importance, resulted in a "chilling effect" and unjustifiably infringed freedom of thought, belief, opinion, expression, and association under section 2 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (Decision, at paras. 2–4).

[5] The SIRC conducted an investigation of the Complaint, led by the Honourable Yves Fortier, P.C., C.C., O.Q., Q.C. As part of the investigation, the SIRC held *in camera* hearings, in which the BCCLA participated, and *ex parte* hearings, from which it was excluded. In these *ex parte* hearings, the SIRC heard the testimony of witnesses who appeared on behalf of CSIS, and received several volumes of Books of Documents (Decision, at paras. 5–6).

[6] The SIRC released its Top Secret report (the Report) on May 30, 2017, dismissing the Complaint on the basis that the BCCLA's allegations were not supported by the evidence (Decision at para. 10). The Report made several findings. The *ex parte* evidence confirmed that CSIS had collected information on the named groups, in an ancillary manner, in the context of other lawful investigations pertaining to individuals for which appropriate targeting authorizations were in place. The collection therefore fell squarely within CSIS's mandate and CSIS had not investigated activities involving lawful advocacy, protest or dissent. While the *ex parte* evidence revealed that CSIS had participated in meetings with National Resources Canada and petroleum industry representatives, these involved national security matters and CSIS had not shared information concerning the named groups. Since CSIS had conducted itself in conformity with its enabling legislation, there was no direct link between this conduct and the "chilling effect" invoked by the BCCLA, which could therefore not form the basis for a *Charter* violation (Decision, at para. 9).

[7] The BCCLA was provided with a redacted copy of the Report. The Attorney General of Canada, in the context of this litigation, has since provided the BCCLA with a less redacted version in which there remain many redactions purportedly related to national security.

[8] The BCCLA filed a judicial review application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It claimed that, with regard to its analysis of the "chilling effects" of CSIS actions and the threshold for *Charter* engagement, the SIRC erred in its interpretation of sections 12 and 19 of the *CSIS Act*. It also argued that the non-disclosure of evidence that formed, in part, the basis of the SIRC proceeding breached procedural fairness.

[9] The BCCLA requested that the SIRC disclose all the materials within its possession relevant to the judicial review application. The documents produced in response to this request included the Report, the classified Books of Documents, transcripts of the proceedings before the SIRC and various related procedural documents. The SIRC objected to the disclosure of parts of the CTR on the basis that they included unredacted classified information. It gave notice to the Attorney General under section 38.01 of the *CEA* regarding the possible disclosure of sensitive or potentially injurious information.

[10] The Attorney General reviewed the CTR and identified information the disclosure of which it objected to on national security grounds. It made an application under section 38.04 of the *CEA* for an order confirming the prohibition of disclosure of this information. The BCCLA, the respondent in the section 38.04 application, received an unclassified version of the CTR redacted to protect the information that was the subject of the application.

[11] The Federal Court conducted public hearings and *in camera* and *ex parte* hearings to decide whether to confirm the prohibition of disclosure or to order some form of disclosure (by lifting redactions or summarizing redacted information). It appointed an *amicus curiae*,

Mr. Ian Carter, to assist in the proceeding (the Amicus). The Attorney General presented its classified evidence in favour of non-disclosure and the Amicus provided the Federal Court written and oral submissions regarding disclosure.

[12] The Attorney General also sought an order under subsection 38.06(2) of the *CEA* authorizing the disclosure of the unredacted CTR to the Federal Court judge seized with the underlying judicial review application (the applications judge), making it part of the record in that application. The BCCLA opposed that request.

II. THE FEDERAL COURT DECISION

[13] The Federal Court allowed the Attorney General's section 38.04 application in part, and ordered the prohibition of disclosure of portions of the CTR on the basis that they contained sensitive or potentially injurious information (the protected information).

[14] It applied the threefold test from *Canada (Attorney General) v. Ribic*, 2003 FCA 246, [2005] 1 F.C.R. 33 [*Ribic*], which requires the Court to decide: (1) whether the information in question is relevant to an issue in the underlying proceeding; (2) if the information is relevant, whether its disclosure would be injurious to international relations, national defence or national security; and, (3) if disclosure would be injurious, whether the public interest in disclosure outweighs the public interest in non-disclosure. Based on these factors, it determined that most of the proposed redacted information could remain redacted. I have excluded many of the details of this analysis as they are not at issue in this appeal.

[15] Significantly, in applying the *Ribic* test to the redacted information in the Report, the Federal Court found that the Report was of the utmost importance to the BCCLA's application for judicial review which challenged the reasonableness of: (1) the SIRC's overall conclusion that any collection or retention of information regarding the named groups was authorized by the *CSIS Act* and fell within CSIS's mandate; (2) its conclusion that CSIS's actions did not have a "chilling effect" on these groups and engage the *Charter*; and (3) its understanding of CSIS's authority to share information under the *CSIS Act*. It held that redactions in the Report would hamper the applications judge's ability to conduct a "reasons first" review and the BCCLA's ability to establish that the SIRC's decision failed to exhibit the requisite degree of justification, intelligibility and transparency (Decision at para. 63-66). It noted that, while the redacted information was relevant to the application for judicial review, its importance would vary depending on its nature and its materiality to the issues raised in the application.

[16] The Federal Court concluded that disclosing information that revealed CSIS's investigative interests or lack of interest in particular subjects or the nature, scope or intensity of any investigations it may have undertaken engaged the "never confirm or deny" or "investigative" principle and would be injurious to national security (Decision at paras. 67-69).

[17] Accordingly, the Federal Court confirmed the prohibition of disclosure of documents identified by the Amicus as "non-contentious," meaning that he was satisfied that there was no basis to challenge the redactions over information in these documents. The Amicus also identified "contentious" documents containing redacted information that he in turn categorized

as non-contentious and contentious. The Federal Court confirmed the prohibition of disclosure of the non-contentious information.

[18] The Amicus categorized all the redacted information in the Report as contentious. The Attorney General agreed to lift a number of its redactions. It proposed summaries in relation to every redacted paragraph in the Report, essentially agreeing that the information covered by each redaction could be summarized in a way that is not injurious or that, if there is injury, it is outweighed by the public interest in disclosure of the summary. The Federal Court accepted the Attorney General's redactions in the Report except for six paragraphs, the redactions from which it lifted, finding that the contentious information in these paragraphs, along with other information disclosed in the Report, was critical to the BCCLA's ability to argue that the SIRC had erred in its understanding of CSIS's authority to collect and retain information and that the public interest in disclosure thus outweighed the public interest in non-disclosure (Decision at para. 76). It accepted the Attorney General's proposed summaries for the paragraphs of the Report that remained redacted, as did the Amicus.

[19] The Federal Court held that additional lifts of redactions were not warranted with respect to the contentious information other than that contained in the Report. It approved a single overarching summary as well as six specific summaries, each linked to a particular document.

[20] The Federal Court ordered the Attorney General to prepare a new copy of the Report redacted in accordance with its order and reasons and incorporating the summaries. It authorized

disclosure to the BCCLA on condition that the redacted Report be treated as confidential but without prejudice to the BCCLA's right to request that it be made available to the public.

[21] Finally, following *Canada (Attorney General) v. Telbani*, 2014 FC 1050 at paras. 103-114 [*Telbani*], the Federal Court held that it had the power, under subsection 38.06(2) of the *CEA*, to authorize disclosure of the unredacted classified CTR to the applications judge, making it part of the record in the application. It issued an order to that effect. It held that the only question before it was whether it should disclose the classified CTR to the applications judge, giving that judge the option of considering it; whether it was necessary or appropriate for the applications judge to make use of the classified CTR or to conduct part of that proceeding *in camera* and *ex parte*, perhaps with the assistance of an *amicus curiae*, was a question properly answered in the course of the judicial review application.

III. ISSUE ON APPEAL

[22] The only issue before this Court is whether the Federal Court erred in deciding that it had the authority, under subsection 38.06(2) of the *CEA*, to authorize the disclosure of the classified CTR to the applications judge to the exclusion of the BCCLA.

IV. THE PARTIES' ARGUMENTS

A. *The Appellant*

[23] The Appellant argues that the Federal Court does not have the authority to disclose the classified CTR to the applications judge to the exclusion of the applicant for judicial review. It claims that by asserting this authority and affording the applications judge the option of considering the classified CTR in deciding the application through *in camera* and *ex parte* hearings, the Federal Court violated the fundamental right of parties in Canada's adversarial system of justice to be informed of the case against them, a bedrock principle of common law natural justice that can only be abrogated by Parliament through explicit statutory language (*Al Rawi and Others v. The Security Service and Others*, [2011] UKSC 34 [*Al Rawi*]). In the Appellant's view, the broad language of subsection 38.06(2) of the *CEA*, used by Parliament to frame the Federal Court's power to disclose sensitive or potentially injurious information, is not sufficiently explicit to abrogate fundamental common law requirements of fairness.

[24] The Appellant submits that the Federal Court erred when it relied on *Telbani* to authorize disclosure of the classified CTR to the applications judge. In its view, *Telbani*, which held that subsection 38.06(2) authorized a designated Federal Court judge to disclose protected information to the applications judge for that judge to consider and rely on the information, possibly with the assistance of an *amicus curiae* in an *in camera* and *ex parte* hearing, was wrongly decided because it did not attach sufficient weight to Canada's system of adversarial justice or to the value of natural justice.

[25] The Appellant adds that where Parliament has sought to allow parties to be heard *ex parte* by a judge, it has enacted express provisions to that effect in specific regimes and prescribed the procedure to be followed. In the face of Parliament's practice of enacting specific provisions to allow judges to hold *ex parte* hearings, the Appellant argues, Parliament cannot be assumed to have done so through the general language in subsection 38.06(2). It observes that if that provision conferred such authority, it would have been unnecessary for Parliament to enact express provisions authorizing "secure administrative review proceedings" like it did with the *Countering Foreign Interference Act*, S.C. 2024, c. 16. These new provisions expressly provide for the appointment of special counsel and authorize the presiding judge to base any decision on withheld information even if a summary has not been provided to the non-governmental party.

B. *The Respondent*

[26] The Respondent argues that the broad language of subsection 38.06(2) of the *CEA* provides designated judges of the Federal Court with discretion to authorize disclosure of protected information where this is in the public interest, including to provide the applications judge with the complete record that was before the decision-maker. The Respondent submits that the broad discretion accorded to Federal Court judges under subsection 38.06(2) is supported by a plain reading of the text and has been confirmed by the Supreme Court in *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 [*Ahmad*] and by the Federal Court in *Telbani*. It claims that the U.K. case law on which the Appellant relies is neither binding on Canadian courts nor persuasive, given the existence of substantial Canadian law on the authority of Federal Court judges to disclose protected information.

[27] The Respondent also argues that procedural fairness is enhanced when an applications judge has access to the entire record that was considered by an administrative decision-maker. It submits that procedural fairness does not always require the complete disclosure of evidence and that, in discussing the right to disclosure in the context of the review of security certificates under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the Supreme Court has recognized the legitimate need to protect information critical to national security (*Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33).

[28] The Respondent observes that, in disclosing the classified CTR, the Federal Court did not compel the applications judge to make use of it, a decision that is properly made within the hearing of the judicial review, where the Appellant will be able to raise any procedural fairness concerns it may have. However, the Respondent also argues that, since the Appellant has been afforded an opportunity to participate in the section 38.04 proceedings and has received summaries of the withheld evidence, the Appellant has sufficient information to know the case to meet and the applications judge can, if necessary, order an expanded role for the *amicus curiae* to challenge the classified CTR.

[29] Finally, the Respondent submits that the provisions that implement the new secure administrative review proceedings in the *CEA* codify judges' pre-existing power under subsection 38.06(2) to authorize disclosure to a judge in an underlying proceeding.

V. ANALYSIS

[30] I begin by briefly discussing the standard of review that applies to the Federal Court's conclusions on the scope of its authority to disclose protected information under subsection 38.06(2) and by describing the applicable statutory provisions. After reviewing the jurisprudence of the Supreme Court of Canada, the Federal Court and this Court on the scope of subsection 38.06(2), I address the Appellant's specific arguments on this appeal.

A. *Standard of Review*

[31] The appellate standards of review apply on this appeal from the Federal Court's decision under section 38.06(2) of the *CEA*. Questions of law are reviewable on a correctness standard and questions of fact and of mixed fact and law are reviewable for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The scope of the Federal Court's power to disclose classified information to the applications judge is a question of law reviewable on the correctness standard.

B. *Legislative Scheme*

[32] The primary legislative provisions at issue in this appeal are subsections 38.06(1) and (2) of the *CEA*:

Disclosure order	**Ordonnance de divulgation**
38.06 (1) Unless the judge concludes	**38.06 (1)** Le juge peut rendre une

that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.	ordonnance autorisant la divulgation des renseignements ou des faits visés au paragraphe 38.02(1), sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.
Disclosure — conditions	**Divulgation avec conditions**
(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.	**(2)** Si le juge conclut que la divulgation des renseignements ou des faits porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements ou des faits, d'un résumé des renseignements ou d'un aveu écrit des faits qui y sont liés.
[Underlining added].	[Mes soulignements].

[33] The text of subsection 38.06(2) indicates that this provision confers on the designated judges of the Federal Court a broad discretion to devise conditions under which the judges may disclose protected information where the public interest in such disclosure outweighs the public interest in non-disclosure. This view finds support in the Supreme Court of Canada's interpretation of this discretion in *Ahmad*, a decision to which I now turn.

C. *The scope of the Federal Court's discretion under subsection 38.06(2) of the CEA*

[34] In *Ahmad*, the Supreme Court provided guidance on the interpretation and application of section 38 of the *CEA*. The case involved a challenge to the constitutionality of this provision in the context of criminal prosecutions for terrorism offences. It was argued that by conferring on the Federal Court the authority to decide whether protected information should be disclosed, and by preventing superior court judges presiding at criminal trials from reviewing any withheld information, section 38 prevented those judges from fashioning a just and appropriate remedy under section 38.14 of the *CEA* or subsection 24(1) of the *Charter* to enforce an accused's section 7 *Charter* right to disclosure and to full answer and defence. Section 38.14 grants trial judges the discretion to make any order they consider appropriate in the circumstances to protect the accused's right to a fair trial (as long as it complies with the Federal Court's order regarding disclosure of the protected information), including a stay of criminal proceedings, an order dismissing specific counts of an indictment or information or an order permitting that indictment or information to proceed only in respect of a lesser or included offence.

[35] The purpose of the *CEA* played a key role in the Supreme Court's interpretation of the scope of the powers conferred under section 38:

> The broad discretion conferred by s. 38 must be interpreted in accordance with the purpose of the legislation, which is to balance the public interest in secrecy against the public interest in the effective administration of a fair system of justice. This purpose requires that trial judges have the information required to discharge their duties under the *CEA* and the *Charter* in an informed and judicial manner.
>
> (*Ahmad* at para. 41, underlining added)

[36] The Supreme Court recognized that the scheme created by section 38 is designed to operate flexibly, and that section 38.06 in particular gives the Federal Court discretion to order the disclosure of protected information so as to ensure that trial judges know enough about the withheld information to discharge their duties under the *CEA* in a way that achieves the statute's purpose:

> … Section 38.06(1) affirmatively requires the Federal Court judge to consider the public interest in making disclosure along with what conditions are "most likely to limit any injury to international relations or national defence or national security" (s. 38.06(2)). In making this determination, the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding. (…)
>
> … [A] Federal Court judge exercising the discretion conferred by s. 38.06(2) might find that the only condition required in order to authorize disclosure to the criminal court judge without risking injury to national security is that he or she not reveal the information to the accused, or a condition that the information be reviewed in a designated secure facility. Disclosure of the information to the trial judge alone, as is the norm in other jurisdictions, and for the sole purpose of determining the impact of non-disclosure on the fairness of the trial, will often be the most appropriate option. This is particularly true in light of the minimal risk of providing such access to a trial judge, who is entrusted with the powers and responsibilities of high public office.
>
> (*Ahmad* at paras. 44-45, underlining added)

[37] The Supreme Court held that this flexible application of the *CEA* is able to ensure that trial judges almost always receive enough information to decide whether or not trial fairness is materially affected by non-disclosure, whether a remedy short of a stay of proceedings can assure trial fairness, or whether no remedy is necessary (*Ahmad* at paras. 51-52). With respect to this latter scenario, the Court noted that there would be instances where non-disclosure of

protected information “will have no bearing at all on trial fairness” or where alternatives to full disclosure, such as the provision of summaries, “may provide assurances that trial fairness has not been compromised by the absence of full disclosure” (*Ahmad* at para. 30).

[38] The Supreme Court also noted that trial judges could enlist security-cleared counsel, opposed in interest to the prosecution and to whom the Attorney General authorized disclosure of all or part of the protected information under section 38.03 of the *CEA*, to assist them in attempting to determine the effect of section 38 non-disclosure on the accused’s right to a fair trial (*Ahmad* at para. 47).

[39] In *Telbani*, the Federal Court decided that the Supreme Court’s teachings in *Ahmad* with regard to the interpretation of section 38 were not restricted to the context of criminal trials, and that section 38.06 of the *CEA* authorized it to disclose protected information to a designated judge of the Federal Court seized of an underlying application for judicial review.

[40] Mr. Al Telbani had challenged the decision of the Department of Transport, Infrastructure and Communities to add his name to the Specified Persons List (SPL) as part of the Passenger Protect Program on the basis that he posed an immediate threat to aviation security. He had also challenged the decision to maintain his name on the list following his request for reconsideration. Mr. Al Telbani argued, among other things, that the various instruments under which the decision was made infringed his rights under sections 6, 7 and 15 of the *Charter*. The Attorney General, having received notification that protected information could

be disclosed in the judicial review application, applied for non-disclosure under subsection 38.04(1) of the *CEA*.

[41] The Federal Court rejected the claim that it could not, under section 38.06, order disclosure of protected information to the applications judge because the options provided to trial judges to reduce the impact of non-disclosure recognized by the Supreme Court in *Ahmad* were not available in non-criminal trials, since section 38.14 applied only to criminal trials. It stated:

> This restricted reading of section 38 does not seem justified to me. It is true that *Ahmad* applied to a criminal context and determined whether it was constitutional for Parliament to remove from judges hearing criminal trials the power to determine whether information tied to national security concerns should be disclosed and confer this power on Federal Court judges. However, a careful reading of this decision reveals that the Court did not intend to restrict its statements on the flexibility of the scheme to just the criminal context… It is quite true that section 38.14 only applies to criminal matters. However, the presence of this section can be explained by Parliament's need to explicitly provide that the established scheme would not in any way infringe on the right to a fair trial guaranteed under paragraph 11(d) of the *Charter*.
>
> (*Telbani* at para. 110)

[42] Accordingly, the Federal Court decided that subsection 38.06(2) granted it the authority to provide the applications judge with the information for which it had ordered non-disclosure:

> [113] … Even though Mr. Al Telbani is not facing criminal charges, the repercussions of his name remaining on the SPL are not any less serious. It is even possible that the judge who will hear the application for judicial review may find that his constitutional rights have been infringed. In this context, it is essential that the application for judicial review be decided based on all the information that was before the original decision-maker. Administrative decisions cannot be sheltered from review by superior courts, and the legality and constitutionality of decisions that can have a considerable impact on individuals must be assessed in consideration of all the relevant information as is possible.

> This is not just in the interest of the person before the court but also in the public interest. In the same way that we cannot allow a person to be subject to an illegal administrative decision, or worse a decision that infringes fundamental rights and freedoms, it would be just as damaging for our institutions if the legitimate exercise of a delegated authority were overturned because the reviewing judge did not have all the information that the decision-maker had access to.
>
> [114] In short, I believe that the option of appointing a designated judge to hear an application for judicial review when that application involves a federal administrative decision increases the options under subsection 38.06(2) when the conditions for disclosure most likely to limit the injury to national security are being considered. If it is possible to consider disclosing sensitive information to a provincial court judge, it must *a fortiori* be desirable to provide such information to a designated judge under the appropriate context. In doing so, this ensures that the application for judicial review will be heard on its merits and will not be dismissed or allowed for lack of information. It would also be damaging for the administration of justice and the rule of law for a decision to be deemed reasonable or unreasonable solely on the fact that a judge did not have all the information that the decision-maker had.

[43] Applying the *Ribic* criteria to the information sought to be protected by the Attorney General, the Federal Court decided that most of this information was relevant to Mr. Al Telbani's application for judicial review, that its disclosure would be injurious to national security and that the public interest in non-disclosure outweighed the public interest in disclosure. It ordered that the information be disclosed to the applications judge:

> [I]t seems crucial to me in this case that the judge hearing the judicial review be able to see the redacted information in order to be able to assess the legality of the impugned decisions, or at least determine whether it is possible to rule on this issue despite Mr. Al Telbani's ignorance of certain facts. The applications for judicial review should thus be heard by a designated judge. It will be up to that judge to decide whether *ex parte* and *in camera* hearings should be held and whether an *amicus curiae* or a special advocate should be appointed to help him or her in this task.
>
> (*Telbani* at para. 116, underlining added)

[44] I agree with the Federal Court's view, in *Telbani*, that the Supreme Court's guidance with regards to interpreting and applying section 38 is not restricted to the criminal context.

[45] First, the purpose that animates the *CEA*, including the discretion conferred on the Federal Court by subsection 38.06(2), which is to balance the public interest in secrecy against the public interest in the effective administration of a fair system of justice, is not limited to criminal trials. It extends to civil proceedings, including applications for judicial review of administrative decisions.

[46] Second, the Supreme Court concluded in *Ahmad* that Parliament had intended the Federal Court to exercise its broad discretion under subsection 38.06(2) to disclose protected information in such a manner as to provide trial judges with a record sufficiently complete to allow the judges to properly assess whether non-disclosure could impair trial fairness. In doing so, the Supreme Court relied on the presumption that Parliament intends to enact *Charter*-compliant legislation. This presumption of constitutionality was simply "reinforced" by the existence of section 38.14, which expressly indicated that, in the criminal context, the fair trial rights of the accused had to be protected – not sacrificed – in applying the other provisions of the scheme (*Ahmad* at para. 32).

[47] I note that this Court applied *Ahmad*'s teachings on the disclosure of protected information under section 38 of the *CEA* to civil proceedings in *Sakab Saudi Holding Company v. Canada (Attorney General)*, 2024 FCA 92 [*Sakab*]. In that decision, this Court upheld a designated Federal Court judge's decision to conduct a section 38.04 review on a lawyer's brief,

prepared by the defendant in a civil action before the Ontario courts, which contained the information relevant to its defence that potentially engaged section 38 and was likely to be disclosed at trial. Such a review avoided the delay and disruption that would result from the filing of multiple section 38 applications as the litigation progressed. This was consistent with the flexible operation of the *CEA* scheme described in *Ahmad* to encourage and enable early-stage disclosure proceedings. While recognizing that *Ahmad* involved the disclosure of information in the context of a criminal prosecution, the Court saw "no reason why the same reasoning would not apply in the context of civil proceedings" (*Sakab* at para. 35).

[48] Following the Supreme Court's approach in *Ahmad*, it stands to reason, in the context of civil proceedings including applications for judicial review, that absent clear and unambiguous statutory language to the contrary, and consistent with the *CEA*'s purpose, it should be presumed that Parliament intended to protect, rather than sacrifice, the rights of individuals to procedural fairness and natural justice. An applications judge is no less duty-bound to protect the parties' right to a fair hearing than a judge presiding over a criminal trial.

[49] Accordingly, I agree with the Federal Court's assessment, in *Telbani*, that the authority of the Federal Court under subsection 38.06(2) extends at least to disclosing to a designated judge of the Federal Court seized of a judicial review application the unredacted classified CTR in order to allow them to determine whether they can rule on the lawfulness of the impugned decision despite the applicant's ignorance of certain facts.

[50] As noted by the Supreme Court in *Ahmad*, lack of disclosure will not necessarily result in unfair proceedings, and alternatives to full disclosure may provide assurances that fairness has not been compromised (*Ahmad* at para. 30). In this respect, it is noteworthy that while the Federal Court accepted all but six of the Attorney General's redactions in the Report, it approved, as did the Amicus, summaries of paragraphs of the Report that remained redacted which go "as far as the *CEA* section 38 scheme permits in informing BCCLA about information in this document that must continue to be withheld" (Decision at para. 78). Moreover, it approved the Attorney General's global summary of the contested redacted information in the Books of Documents, in addition to individual summaries for six specific documents.

[51] Consistent with *Ahmad*, and as noted by the Federal Court in *Telbani*, it should also be open to the applications judge to enlist a security-cleared *amicus curiae* to assist them in deciding whether proceeding with the judicial review on the basis of the unredacted CTR, while withholding the redacted information from the BCCLA, would infringe BCCLA's right to a procedurally fair hearing.

D. *The Appellant's specific arguments*

[52] The Appellant relies on *Al Rawi* for the proposition that express statutory language is required to authorize reliance by an applications judge on an unredacted classified CTR that has not been disclosed to the applicant for judicial review. In *Bank Mellat v. Her Majesty's Treasury*, [2013] UKSC 38 [*Bank Mellat*], the U.K. Supreme Court succinctly summarized the principles it had set out in *Al Rawi*. It explained that "an arrangement where the court can look at evidence or

hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions" gives rise to "inequality or even unfairness as between the parties" and offends "the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully" (*Bank Mellat* at para. 3). It noted, at paragraph 4, that the common law would "in no circumstances" permit such a "closed material" procedure: "[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that" (citing *Al Rawi* at para. 35). The U.K. Supreme Court therefore ruled that courts could not conduct a closed material procedure in the absence of authorizing legislation.

[53] The Appellant argues that no express statutory authorization exists for an applications judge to consider "closed material" in conducting a judicial review proceeding and that a designated judge of the Federal Court cannot, under section 38, disclose protected information for the purpose of allowing an applications judge to conduct a form of *ex parte* proceeding. It claims that its argument is bolstered by the fact that Parliament recently amended the *CEA* to expressly confer on applications judges presiding over "secure administrative review proceedings" the power to rely on protected information that has not been disclosed to a non-governmental party (*CEA*, s. 38.33). The amendments also specifically authorize the applications judge to, "in consideration of the principles of fairness and natural justice," appoint a special counsel whose role is to protect the interests of the non-governmental party where information

and other evidence is presented, or representations are made in private and in the absence of the non-governmental party and their counsel (*CEA*, ss. 38.34-38.35).

[54] I note that in describing these amendments to the Standing Committee on Public Safety and National Security, a witness appearing before the Committee on behalf of the Department of Justice made the following statements:

> Turning now to the amendments to the Canada Evidence Act and the Criminal Code in Bill C-70, currently the Canada Evidence Act provides a regime that protects sensitive information from disclosure in court proceedings but generally does not allow the courts to consider that information when deciding the matter before them.
>
> However, there are some stand-alone regimes that allow for the protection and use of sensitive information in administrative proceedings. Judges can take the sensitive information into account when making their decision.
>
> Some stand-alone regimes exist on judicial review – for example, in connection with charities' registrations and revocations, terrorist entity listings, the passenger protect program and some passport revocations and refusals.
>
> The bill repeals these existing stand-alone regimes and establishes a universal process.
>
> This is a universal procedure for the use of information and (sic) administrative proceedings that we call a secure administrative review proceeding. This would apply to federal administrative proceedings, such as judicial reviews and appeals to the Federal Court and the Federal Court of Appeal when sensitive information is part of the record.
>
> (House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 44-1, No 109 (May 30, 2024) at 4, underlining added)

[55] It would thus appear that, when these statements were made on May 30, 2024, the Department of Justice was of the view that, outside of certain stand-alone regimes that allowed

judges to take into account protected information when making decisions, there was no statutory basis in the *CEA* for a court conducting judicial review proceedings to consider the protected information when deciding the matter before it. As noted previously, that is not the Respondent's position on this appeal. The Respondent argues that the provisions that now implement the "secure administrative review proceedings" codify Federal Court judges' pre-existing powers under section 38.06 to authorize disclosure to the applications judge.

[56] The Respondent's position finds support in this Court's recent decision in *Brar v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2024 FCA 114, leave to appeal to SCC refused, 41388 (February 27, 2025) at para. 36 [*Brar*]. In *Brar*, the appellant had claimed that the fact that the *Secure Travel Act*, S.C. 2015, c. 20 did not explicitly provide for the involvement of an *amicus curiae* or a special advocate to access confidential security information and represent the interests of affected persons in closed proceedings, was a fatal procedural shortcoming and contrary to the principles of fundamental justice under section 7 of the *Charter*. The Court held that it was not constitutionally incumbent on Parliament to require the use of an *amicus curiae* in every case arising under the *Secure Travel Act* and that leaving it up to the Federal Court to decide what was necessary in the circumstances was consistent with the principles of fundamental justice (*Brar* at paras. 35-37).

[57] Relying on *Ahmad*, the Court held that Federal Court judges could devise procedures to protect the procedural rights of individuals engaged in hearings and processes under various legislative regimes, including "sensitive proceedings" under legislation such as the *CEA*:

> Under many legislative regimes and in many hearings and processes in our legal system, it is left to judges to devise and implement protective procedures based on the particular circumstances that present themselves: see, e.g., *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 at para. 40 and sensitive proceedings under legislation such as the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23. And there is no gap in protection. If the Federal Court fails to devise and implement any necessary protective procedures while operating under this particular legislative regime, for example by not appointing an *amicus curiae* when one is needed to protect an affected individual's interests, this Court will quash its decision.
>
> (*Brar* at para. 36)

[58] The approach laid out in *Brar* for the protection of procedural rights in regimes providing for the review by the Federal Court of decisions where confidential security information is at play is consistent with the "practical approach" to the interpretation of section 38 of the *CEA* outlined by the Supreme Court in *Ahmad*. In the absence of clear and unambiguous statutory language to the contrary, subsection 38.06(2) should be understood as empowering the Federal Court to exercise its broad discretion to disclose protected information in furtherance of the *CEA*'s purpose of balancing the public interest in secrecy against the public interest in the effective administration of a fair system of justice. In doing so, the Federal Court must ensure that the rights of individuals to procedural fairness and natural justice are protected. This approach is no less protective of the procedural rights of non-governmental parties than that outlined by the U.K. Supreme Court in *Bank Mellat* and *Al Rawi*.

[59] While, as a general rule, "a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position," this general rule does "tolerate certain exceptions" (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para. 40 [*Ruby*]). Accordingly,

the Supreme Court upheld as procedurally fair proceedings under the *Privacy Act*, R.S.C. 1985, c. P-21, whereby the Federal Court reviewed a government institution's refusal to disclose information for which an exemption was claimed on grounds of national security or maintenance of foreign confidences based in part on the government institution's *ex parte* and *in camera* submissions. The Court recognized that the provisions requiring *ex parte, in camera* proceedings operated in exceptional circumstances to protect the significant and legitimate state interest in national security and in maintaining foreign confidences in order to balance this interest against that of individuals seeking access to their personal information. While it limited the adversarial challenge to the government institution's claim of exemptions, the mandatory *ex parte, in camera* provision met the constitutional requirements of procedural fairness in this specific statutory context because the *Privacy Act* provided alternative procedural safeguards to protect the interests of applicants:

> [W]hen making *ex parte* submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest. I also stress again that recourse to these exemptions is subject to two independent levels of scrutiny: the Privacy Commissioner and the Federal Court on a judicial review application under s. 41. Both the Privacy Commissioner and the reviewing court have access to the information that is being withheld… in order to determine whether an exemption has been properly claimed. In addition, the Federal Court has the power to order the release of the personal information if the court determines that the material was not received in confidence from a foreign source or is not within the bounds of the national security exemption.
>
> (*Ruby* at para. 47)

[60] In the case at bar, it falls to the applications judge to ascertain whether proceeding on an *ex parte* basis by considering the unredacted classified CTR without disclosing it to the applicant meets the requirements of procedural fairness. Consistent with the Supreme Court's approach in

Ruby, this determination will require the applications judge to consider factors that include the specific statutory context in which the challenged decision was made (here, the *CSIS Act*), the interests at stake, including the state's interest in protecting national security and the applicant's interests, and the presence of alternative procedural protections, including the availability of summaries of redacted information and the participation in the proceedings of an *amicus curiae* adverse in interest to the respondent. As observed by this Court in *Brar*, should the applications judge fail to proceed in a manner that protects the BCCLA's right to procedural fairness, the Court stands ready to intervene.

[61] For the foregoing reasons, I would dismiss the appeal. As the respondent does not seek costs, I would award none.

"Gerald Heckman"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-224-24
STYLE OF CAUSE:	BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 4, 2025
REASONS FOR JUDGMENT BY:	HECKMAN J.A.
CONCURRED IN BY:	LASKIN J.A. LEBLANC J.A.
DATED:	JANUARY 23, 2026

APPEARANCES:

Paul Champ	FOR THE APPELLANT
Andre Seguin Natalie Scott	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPELLANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT