

Date: 20081127

Docket: T-973-08

Reference: 2008 FC 1318

[ENGLISH TRANSLATION]

Ottawa, Ontario, this 27th day of November 2008

PRESENT: The Honourable Mr. Justice Orville Frenette

BETWEEN:

HANI AL TELBANI

Applicant

and

**THE ATTORNEY GENERAL OF CANADA,
THE MINISTER OF TRANSPORT,
INFRASTRUCTURE
AND COMMUNITIES,
TRANSPORT CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] This proceeding was filed as part of an application for judicial review of a decision issued on June 4, 2008 by the Minister of Transport, Infrastructure and Communities, adding the applicant's name to the at-risk persons list, under the Passenger Protect Program.

[2] The applicant also filed a notice raising issues regarding the unconstitutionality of the *Aeronautics Act* in relation to the aforementioned ministerial decision. In that context, the applicant filed a motion to require the respondents to disclose all of the required information, which they have refused to disclose, citing section 38 of the *Canada Evidence Act*, R.S.C. (1985), c. C-5 (the Act).

[3] The applicant, who is originally from Palestine, became a permanent resident in Canada on January 22, 2004.

[4] On June 4, 2008, he went to the Pierre Elliott Trudeau Airport in Montréal for a flight to Saudi Arabia, when was refused access to the aircraft because he had been placed by the respondent Minister on an at-risk persons list for airline security.

[5] Through his counsel, he submitted a request for reconsideration of that decision, which was dismissed.

[6] On June 19, 2008, he filed an application for judicial review of the Minister's decision.

[7] From the perspective of this proceeding, he is renewing his request to obtain all information regarding the ministerial decision, citing section 317 of the *Federal Court Rules*, SOR/98-106.

[8] The respondents voluntarily provided counsel for the applicant with certain documents, but refused to provide others, citing confidentiality under subsection 38.01(1) of the Act.

[9] On July 17, 2008, the Honourable Chief Justice Lutfy issued an order under rules 8, 55 and 383 of the *Federal Court Rules* assigning administrative management of this case to Prothonotary Richard Morneau, [translation] “assigned as judge responsible for the management of this proceeding.”

[10] On September 17, 2008, de Montigny J. issued a decision dismissing the motion to obtain a confidentiality and non-disclosure order and a publication ban.

[11] In this motion, the applicant is asking that the respondents be ordered to produce and disclose to the applicant the entire file from the federal office regarding the applicant, subject to his other actions.

[12] The respondents oppose the motion as presented on three main grounds: (a) the provisions of the Act create a particular and precise system for the disclosure of potentially prejudicial information; (b) a special procedure is set out in the Act for determining those elements, and that procedure has precedence over the one set out in rules 317 and 318 of the *Federal Court Rules*; and (c), paragraph 38.02(1)(a) of the Act prohibits disclosure, in connection with a proceeding, of information about which notice is given under any of subsections 38.01(1) to (4).

[13] Before analyzing the issues raised in this proceeding, I feel that it is useful to cite the relevant paragraphs of section 38 of the Act and to briefly note the particular nature of this section, its procedure and its purpose.

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

“judge”
« *juge* »

38. Les définitions qui suivent s’appliquent au présent article et aux articles 38.01 à 38.15.

«instance »
“*proceeding*”

<p>“judge” means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.</p>	<p>«instance » Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements.</p>
<p>“participant” «<i>participant</i> »</p>	<p>«juge » “<i>judge</i>”</p>
<p>“participant” means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.</p>	<p>«juge » Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l’article 38.04.</p>
<p>“potentially injurious information” «<i>renseignements potentiellement préjudiciables</i> »</p>	<p>«participant » “<i>participant</i>”</p>
<p>“potentially injurious information” means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.</p>	<p>«participant » Personne qui, dans le cadre d’une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements.</p>
<p>“proceeding” «<i>instance</i> »</p>	<p>«poursuivant » “<i>prosecutor</i>”</p>
<p>“proceeding” means a proceeding before a court, person or body with jurisdiction to compel the production of information.</p>	<p>«poursuivant » Représentant du procureur général du Canada ou du procureur général d’une province, particulier qui agit à titre de poursuivant dans le cadre d’une instance ou le directeur des poursuites militaires, au sens de la <i>Loi sur la défense nationale</i>.</p>
<p>“prosecutor” «<i>poursuivant</i> »</p>	<p>«renseignements potentiellement préjudiciables » “<i>potentially injurious information</i>”</p>
<p>“prosecutor” means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the <i>National Defence Act</i> or an individual who acts as a prosecutor in a proceeding.</p>	<p>«renseignements potentiellement préjudiciables » Les renseignements qui, s’ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.</p>
<p>“sensitive information” «<i>renseignements sensibles</i> »</p>	<p>«renseignements sensibles » “<i>sensitive information</i>”</p>
<p>“sensitive information” means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.</p>	<p>«renseignements sensibles » Les renseignements, en provenance du Canada ou de l’étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des</p>
<p>38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.</p>	<p>renseignements à l’égard desquels celui-ci prend des mesures de protection.</p>
<p>(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in</p>	<p>38.01 (1) Tout participant qui, dans le cadre d’une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu’il s’agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d’aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l’avis la nature, la date et le lieu de l’instance.</p>
	<p>(2) Tout participant qui croit que des renseignements</p>

the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

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

(6) This section does not apply when

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

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

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

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

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

sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

(3) Le fonctionnaire — à l'exclusion d'un participant — qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

(5) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, les avis prévus à l'un des paragraphes (1) à (4) sont donnés à la fois au procureur général du Canada et au ministre de la Défense nationale.

(6) Le présent article ne s'applique pas :

a) à la communication de renseignements par une personne à son avocat dans le cadre d'une instance, si ceux-ci concernent l'instance;

b) aux renseignements communiqués dans le cadre de l'exercice des attributions du procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

c) aux renseignements dont la divulgation est autorisée par l'institution fédérale qui les a produits ou pour laquelle ils ont été produits ou, dans le cas où ils n'ont pas été produits par ou pour une institution fédérale, par la première institution fédérale à les avoir reçus;

d) aux renseignements divulgués auprès de toute

[. . .]

entité mentionnée à l'annexe et, le cas échéant, à une application figurant en regard d'une telle entité.

(7) Les paragraphes (1) et (2) ne s'appliquent pas au participant si une institution gouvernementale visée à l'alinéa (6)c) l'informe qu'il n'est pas nécessaire, afin d'éviter la divulgation des renseignements visés à cet alinéa, de donner un avis au procureur général du Canada au titre du paragraphe (1) ou de soulever la question devant la personne présidant une instance au titre du paragraphe (2).

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

[. . .]

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

[. . .]

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

[. . .]

38.11 (1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private and, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, shall be heard in the National Capital Region, as described in the

[. . .]

38.02 (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6).

[. . .]

38.04 (1) Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la divulgation de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).

[. . .]

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

[. . .]

38.11 (1) Les audiences prévues au paragraphe 38.04(5) et l'audition de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) sont tenues à huis clos et, à la demande soit du

schedule to the *National Capital Act*.

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, the opportunity to make representations *ex parte*.

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of the information to which the hearing, appeal or review relates.

(2) The court records relating to the hearing, appeal or review are confidential. The judge or the court may order that the records be sealed and kept in a location to which the public has no access.

procureur général du Canada, soit du ministre de la Défense nationale dans le cas des instances engagées sous le régime de la partie III de la *Loi sur la défense nationale*, elles ont lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada — et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* — la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)d).

38.12 (1) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) peut rendre toute ordonnance qu'il estime indiquée en l'espèce en vue de protéger la confidentialité des renseignements sur lesquels porte l'audience, l'appel ou l'examen.

(2) Le dossier ayant trait à l'audience, à l'appel ou à l'examen est confidentiel. Le juge ou le tribunal saisi peut ordonner qu'il soit placé sous scellé et gardé dans un lieu interdit au public.

[14] Lutfy C.J. analyzed the purpose, provisions and procedure under section 38 of the Act regarding the disclosure of information related to national security in *Toronto Star Newspapers Ltd. and Kassim Mohamed v. Canada (Her Majesty the Queen in Right of Canada)*, [2007] 4 F.C.R. 434.

[15] In that case, the applicant Mohamed had initiated an action for damages and other remedies against the respondent on the grounds that the Royal Canadian Mounted Police and the Canadian Security Intelligence Service had disclosed personal information to foreign security agencies and that, following that disclosure, Egyptian authorities had detained him for two weeks.

[16] The Attorney General of Canada served a notice under section 38 of the Act objecting to the disclosure of “secret information” in a separate proceeding, DES-1-06. Lutfy C.J. summarized the provisions applicable to such a proceeding in paragraphs 29 to 38 of his decision, above.

[17] The debate was basically whether section 38 of the Act infringed on paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. He found that, in response to the constitutional issues raised, subsections 38.04(4), 38.11(1) and 38.12(2) of the Act infringed on paragraph 2(b) of the *Charter* and that those infringements were not justified within the meaning of *The Queen v. Oakes*, [1986] 1 S.C.R. 103.

[18] Lutfy C.J. held that the passages “an application under this section is confidential” in subsection 38.04(4), “shall be heard in private” in section 38.11, and “the Court records relating to the hearing, appeal or review are confidential” in subsection 38.12(2) only applied to the *ex parte* representations provided for in subsections 38.11(1) and (2) of the Act.

[19] Here, the applicant is seeking to obtain his “complete” file from the federal office to find out the grounds that justified him being added to the at-risk persons list, which led to the denied boarding on an aircraft on June 4, 2008.

[20] The respondent produced certain information in part from its file, but refused to provide everything for security reasons. It cited the notice issued under subsection 38.01(1) of the Act and argued that this proceeding should be suspended and a separate proceeding begun to rule on the disclosure of the desired information.

[21] The applicant cited the judicial interpretation of section 38 of the Act and rules 317 and 318 of the *Federal Court Rules*, which read as follows:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

(2) An applicant may include a request under subsection (1) in its notice of application.

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

- (a) a certified copy of the requested material to the Registry and to the party making the request; or
- (b) where the material cannot be reproduced, the original material to the Registry.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

- a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
- b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une

all or part of the material requested be forwarded to the Registry.

copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[22] The respondent is correct in this regard, as the *Henrie v. Canada (Security Intelligence Review Committee et al.)*, [1989] 2 F.C. 229, affirmed on appeal ([1992] F.C.J. No. 100 (QL)), held that it would be inappropriate to use rules 317 and 318 to circumvent the provisions of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, regarding the protection of international relations and national defence and security.

[23] The *Aeronautics Act*, R.S.C. (1985), c. A-2, at paragraph 4.71(2)c) states:

4.71 (2) Without limiting the generality of subsection (1), regulations may be made under that subsection
[. . .]
(c) respecting the screening of persons entering or inside an aircraft or an aerodrome of other aviation facility;

4.71 (2) Les règlements visés au paragraphe (1) peuvent notamment :
[. . .]
c) régir le contrôle des personnes qui pénètrent ou se trouvent dans un aéronef, un aéroport ou d'autres installations aéronautiques;

[24] Section 3 of the *Identity Screening Regulations*, SOR/2007-82, states :

3. (1) An air carrier shall, before issuing a boarding pass to any person who appears to be 12 years of age or older, screen the person by comparing his or her name with the names of persons specified to the air carrier by the Minister under paragraph 4.81(1)(b) of the Act.

3. (1) Le transporteur aérien effectue le contrôle de toute personne qui semble être âgée de 12 ans ou plus en comparant son nom avec ceux des personnes qui lui sont précisées par le ministre en application de l'alinéa 4.81(1)b) de la Loi avant de lui remettre une carte d'embarquement.

(2) If the name of the person is the same as that of a person specified to the air carrier, the air carrier shall ask the person for one piece of government-issued photo identification that

(2) Si le nom de la personne correspond à celui d'une personne qui lui est précisée, le transporteur aérien demande à celle-ci une pièce

shows his or her name, date of birth and gender or for two pieces of government-issued identification at least one of which shows his or her name, date of birth and gender.

d'identité avec photo délivrée par un gouvernement qui comporte ses nom, date de naissance et sexe ou deux pièces d'identité délivrées par un gouvernement dont au moins une comporte ses nom, date de naissance et sexe.

(3) If the name, date of birth and gender on the identification are the same as those of a person specified to the air carrier, the air carrier shall immediately so inform the Minister.

(3) Si les nom, date de naissance et sexe qui figurent sur la pièce d'identité correspondent à ceux d'une personne qui lui est précisée, le transporteur aérien en informe immédiatement le ministre.

[25] Citing jurisprudence, the applicant argues that he is entitled to obtain the desired information (*Baker v. Canada*, [1999] 2 S.C.R. 817; *Canada (Attorney General) v. Ribic*, [2005] 1 F.C.R. 33, at paras 17 to 22; *Khadr v. Minister of Foreign Affairs*, 2005 FC 135, at para 17; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 and *Charkaoui v. Minister of Citizenship and Immigration*, 2008 SCC 38, 376 N.R. 154, at para 56).

[26] The applicant argues that the respondent's claim that there must be a separate case to decide the issues raised by the confidentiality of the desired information can be dealt with in this case, by way of this motion, in obiter in the case without having a completely separate or new case.

[27] The respondent submits that the Court does not have the jurisdiction to decide this motion and that it must proceed by way of the notice set out in section 38.04(1) of the Act.

[28] The applicant replied that the respondent did not respond to the request or send the notice and that the motion is sufficient to open the debate. He argues that all these issues are decided by a judge of the Federal Court and that the Court has sufficient jurisdiction to decide the subject of the motion.

In his view, the fact that the proceeding in *Toronto Star Newspapers Ltd.*, above, was initiated by the Attorney General of Canada does not mean that it is mandatory, that it can only be initiated by the Attorney General, and that a party to the litigation cannot do so of his or her own initiative.

[29] Section 38 of the Act creates a special system and a procedure for determining the disclosure of confidential information, by means of notices that trigger the proceeding before the Federal Court.

[30] The applicant argues that his motion is well-founded in law in terms of the procedural vehicle supported in *Mohammed v. Minister of Citizenship and Immigration*. That case was related to a motion for disclosure of evidence opposed on the grounds of national security, in an application for judicial review of an immigration officer's refusal of an application for permanent residency in Canada under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The respondent opposed that motion in a written objection on the grounds of national security. On October 11, 2006 (IMM-7498-05), Lutfy C.J. ordered: (a) that an *ex parte* hearing be held in private, and (b) that a public hearing of the respondent's motion be held in the presence of counsel for the parties.

[31] Von Finckenstein J. allowed the motion and ordered a "hearing" for the motion in two stages: a public hearing and an "*ex-parte*" hearing (*Mohammed v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 300). To justify his decision, he explained that the issue was to determine which proceeding would apply, the one set out in section 38 of the Act or the one set out in sections 86 and 87 of the *Immigration and Refugee Protection Act*. He stated the following at paragraph 23 of his decision:

[23] The parties also agree that the procedure in section 38 of the CEA is unduly complicated, would require a separate application and would involve another party, the Attorney General of Canada. I agree and, in the spirit of dealing with applications for judicial review expeditiously, I discard the CEA option.

[32] That view gave rise to another judicial theory that, in such situations, requires the procedural recourse set out in section 38 of the Act (see *Henrie*, above).

[33] In *Henrie*, Addy J. of the Federal Court was the judge assigned to decide the objection to disclosure of confidential evidence on the grounds of national security, as certified by the Minister. He dismissed the application under Rule 1402 of the *Federal Court Rules*, C.R.C., c. 663, on the grounds that, *inter alia*, the issue had to be decided by the procedure set out in subsection 36.2(3) of the Act, as it existed at that time.

[34] In *Toronto Star Newspapers Ltd.*, above, Lutfy C.J. was not required to determine the procedural issue, as he proceeded following a notice of non-disclosure by the Attorney General of Canada under section 38 of the Act. At paragraph 29, the learned Chief Justice wrote:

[29] A section 38 application is to be heard by the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice. This provision has existed since 1982 [s. 36.2].

[35] Lutfy C.J. proceeded with the hearing of the case under sections 38 *et seq.* of the Act to decide the *Charter* issue.

[36] In *Canada (Attorney General) v. Ribic*, above, the Federal Court of Appeal did not directly examine the procedural aspect raised, so it did not raise any doubt in that regard.

[37] In light of the text and purpose of section 38 of the Act and the reasoning of the second judicial theory interpreting that text, I must agree with that interpretation. The motion, as presented is therefor not well-founded.

[38] For all these reasons, the Court orders that the applicant's motion, as worded, be dismissed and orders the suspension of the proceeding to allow a separate proceeding to be presented and disposed of to determine the disclosure of the evidence by the Chief Justice of the Federal Court or a judge appointed by the Chief Justice under section 38 of the Act to hear the case.

ORDER

The applicant's motion is dismissed. The Court orders the suspension of the proceeding to allow a separate proceeding to be presented and disposed of to determine the disclosure of the evidence by the Chief Justice of the Federal Court or a judge who may be appointed by the Chief Justice under section 38 of the *Canada Evidence Act*, R.S.C. (1985), c. C-5, to hear the case.

“Orville Frenette”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-973-08

STYLE OF CAUSE: HANI AL TELBANI v. THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES, TRANSPORT CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 3, 2008

REASONS FOR ORDER AND ORDER: The Honourable Mr. Justice Orville Frenette

DATED: November 27, 2008

APPEARANCES:

Johanne Doyon FOR THE APPLICANT

Linda Mercier
Bernard Letarte FOR THE RESPONDENT

SOLICITORS OF RECORD:

Doyon and Associates FOR THE APPLICANT
Montréal, Quebec

John H. Sims, QC FOR THE RESPONDENT
Deputy Attorney General of Canada