

The Expanding Scope of State Secrecy in Canada After September 11

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Summary:

In the fall of 2001, Parliament amended the *Canada Evidence Act* to give the state a much broader power to assert privilege over information in legal proceedings of almost any kind. The structure for appellate review of the granting of privilege over information has been curtailed from what it was previously. However, the amendments also contain a significant direction to courts to impose a 'judicial stay' when the twin aims of protecting state secrets and holding a fair trial cannot be met. Despite this safety valve of sorts, two concerns remain. First, courts dealing with very a serious crime might be inclined to subordinate a person's right to a fair trial to the state's interest in protecting information. Second, if a person, wrongfully accused, were granted a stay under these provisions (curtailing the trial and precluding a verdict as to their culpability), there would be no way of absolving the lingering suspicion of their guilt.

In recent years, Canada's Parliament has passed a number of bills dealing with access to information and the protection of state secrets.¹ The amendments to the *Canada Evidence Act*² in Bill C-36 (or the *Anti-terrorism Act*, passed in December of 2001) are among the most significant. They considerably expand the possible scope of the assertion of what is called 'public interest immunity'; they bring about new obligations on all members of the public to protect sensitive information; and they curtail rights to appeal the granting of privilege.

Bill C-36 replaced both the statutory scheme for the state's assertion of 'public interest immunity' and the assertion of privilege over certain information and the common law doctrine on point.³ Before the bill was enacted, sections 37 to 39 of the *CEA* allowed for a process by which the Crown could object to requests for disclosure, or the requirement that a witness answer certain questions, on the basis that to divulge the information would be contrary to the public interest – or that the information was a Cabinet secret. If it belonged to the former category, the court would adjudicate the claim, balancing the public's general interest in disclosure with the specific public interest at issue in the claim for protection.⁴ One of the possible grounds of public interest was that "the disclosure would be injurious to international relations or national defence or

¹ For a survey of these developments, see Craig Forcese's "Clouding Accountability: Canada's Government Secrecy and National Security Law 'Complex'" *Ottawa Law Review* 36:1, 49 to 91.

² R.S.C. 1985, c. C-5; hereafter, *CEA*.

³ Hamish Stewart "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity" in Ronald J. Daniels, Patrick Macklem, & Ken Roach, eds. *The Security of Freedom* (Toronto: University of Toronto Press, 2001) at 217.

⁴ *Ibid*, 219; see the former section 37(2) of the *CEA*.

security.”⁵ A considerable body of case law had evolved over time, and it tended to demonstrate less deference toward the executive when balancing these interests.⁶

If the information belonged in the second category (a Cabinet secret), the Clerk of the Privy Counsel for Canada could issue a certificate, pursuant to section 39 of the *CEA*, to the effect that the information was a Cabinet confidence, and this assertion was beyond review. It was an extraordinary power, but was limited to Cabinet secrets.⁷

Bill C-36 amended sections 37 and 38 of the *CEA* in a number of significant ways.⁸ The former procedure for adjudicating claims of privilege is mostly intact in the new version of section 37, but it is now subject to the procedure contemplated in sections 38 to 38.16.⁹ Those sections are meant to deal with two new and broader categories of privilege: “potentially injurious information,” which is defined as information that, if disclosed, “could injure international relations or national defence or national security”; and “sensitive information,” which is defined as information “relating to international relations or national defence or national security that is in the possession of the

⁵ *Ibid*, 220; see the former section 37(1). An attempt to assert privilege on that ground could be adjudicated only by the Chief Justice of the Federal Court, or his or her designate (see the former section 37(2)).

⁶ See Stewart, *ibid*, at 219, for a discussion of this case law.

⁷ *Ibid*; see the former section 39.

⁸ It is worth noting that on second reading of Bill C-36, on October 16th, 2001, the Minister of Justice at the time, Anne McLellan, justified the amendments in the House of Commons by stating: “The Canada Evidence Act would be amended to allow for better protection of sensitive information during legal proceedings. One of the key reasons we need this improved protection is to be able to assure our allies that sensitive information they provide to us can be protected from release.”

⁹ Section 37(1).

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.”¹⁰

In the former version of the Act, the government official involved in a proceeding was the person responsible for asserting privilege. This is also the case in the new scheme, but in addition, ‘participants’ in proceedings, whoever they may be, now have a positive obligation to bring to the attention of the Attorney General (or the Crown) the fact that they believe they possess sensitive or potentially injurious information that may be disclosed, or that they are seeking to have disclosed.¹¹ A person possessing such information is prohibited from disclosing that information except in accordance with the scheme set out in the section.¹² Hamish Stewart argues that this obligation is “remarkable”, because

virtually everyone connected with a proceeding would have a positive obligation to be aware of the nature of the information he or she might disclose and to notify the Attorney General of Canada of any possible disclosure. It is unclear how ‘participants’ are to be made aware of their obligations; whether there is any sanction for failure to discharge the obligation; and how the obligation relates to other obligations in the trial process, such as the Crown’s constitutional duty of

¹⁰ Section 38 in the current version of the Act. In the Canadian Association of University Teachers’ submission to Parliament in February of 2005, the authors note (at p. 4) that the previous version of section 38 allowed for the assertion of privilege over information that “would be injurious to international relations, or national defence or security”. They argue that the amended phrasing -- “potentially injurious information” and “sensitive information” – are both vague, but that the latter threshold “has the distinction of being so low that the term could cover almost anything government officials wanted it to cover – from information relating to a Watergate, tainted water, or sponsorship-type scandal, to information relating to delicate relations with a province, to information showing government liability or government financial problems.” The submission can be found at:

<http://www.caut.ca/en/issues/civil_liberties/Default.asp> (last accessed April 11, 2007).

¹¹ Section 38.01(1) and (2); see also Stewart, *supra*, note 3, at 223.

¹² Section 38.02(1); Stewart, *ibid.*

disclosure in criminal prosecutions, or the accused's constitutional right to solicitor-client privilege.¹³

It remains unclear what sanction could be imposed for a failure to notify the state of sensitive information, or to disclose sensitive information that one *should have known* was not to be disclosed. But it seems clear that the provision could be easily violated without intending to do so, or without even being aware of the fact.

Assuming, then, that the Crown or a party other than the Crown is in possession of potentially injurious or sensitive information, an application can be made for its disclosure under sections 38.04 to 38.06. The Chief Justice of the Federal Court or a judge he or she designates has exclusive jurisdiction over the process. The test for disclosure is found in 38.06, which allows the court, *but does not require* the court, to disclose information if the court concludes that it is sensitive or would be injurious. If the court concludes that the information falls within one of those categories, it can still be disclosed if, after considering possible forms of disclosure or conditions that “are most likely to limit any injury to international relations... or national security...” and the court decides that in this case, “the public interest in disclosure outweighs in importance the public interest in non-disclosure.”¹⁴

Once the court has considered a matter under section 37 or 38 and decided that information should be disclosed, the Attorney General of Canada has an unusual power under section 38.13 to issue a certificate that appears to trump the decision of the court –

¹³ *Ibid*, at 223.

¹⁴ Section 38.06(2).

by preventing the disclosure despite the court's decision. In earlier drafts of the bill, the issuance of a certificate under this section marked the end of the process. But this aspect of the scheme provoked considerable criticism by a number of commentators, including Stewart and Kent Roach.¹⁵ The final version of the bill does something curious: instead of removing section 38.13, it subjects the Crown's certificate to review by a single judge in the Federal Court of Appeal.¹⁶ The test on appeal is whether some or none of the information subject to the certificate "relates either to information obtained in confidence from, or in relation to, a foreign entity ... or to national defence or national security..."¹⁷ The certificate can be varied, cancelled or upheld – and the decision is final.¹⁸ Stewart notes

Sections 38.13 and 38.131 as enacted represent an improvement over the earlier version. But the right of appeal is still extremely limited, both institutionally and in the scope of the grounds. It is not the person presiding over the proceeding who makes the decision either to issue the certificate or to vary or cancel the certificate; indeed these sections apply only after the person presiding *and* a judge of the Federal Court, Trial Division have done whatever they can do. Furthermore, the new provisions still provide no mechanism for correcting any error by the Attorney General in assessing the balance between the interests in non-disclosure. In short, under ss. 38.13 and 38.131 the Attorney General is permitted to second-guess the outcome of a proceeding to which he was a party.¹⁹

Another significant and novel feature of the new scheme worth noting is the inclusion of companion sections 37.3 and 38.14, headed "protection of right to a fair trial." In essence, these sections state that if the court decides that information cannot be disclosed, or a certificate has been issued under 38.13, that impairs the right of the

¹⁵ See Stewart, *supra*, note 3 and Kent Roach's contributions to the same collection.

¹⁶ Section 38.131.

¹⁷ Section 38.131(8)-(10).

¹⁸ Section 38.131(11).

¹⁹ "Public Interest Immunity after Bill C-36" (2003) 47 *Criminal Law Quarterly*, 249-264, at 255.

accused to a fair trial, the court can dismiss counts on an indictment, make a finding against the party asserting privilege, or even order a stay of proceedings.²⁰ Stewart argues that these sections add nothing to the court's jurisdiction to grant remedies under section 24(1) of the *Charter*.²¹ He also fears that these sections do not "[go] far enough to satisfy the trial right protected by s. 7 of the Charter, in that [they] subordinate the accused's right to a fair trial to the [new] disclosure regime".²² But this argument is questionable in two respects.

First, precisely because the general remedy provision in the *Charter* (section 24(1)) is sufficiently broad, a remedy could be granted to the accused to prevent his or her section 7 rights from being subordinated. That is, there would be no difference between the way that courts would exercise the power under section 24(1) in a case involving an egregious deprivation of material information under the new scheme and the way in which the power was applied in a typical, summary drug-trafficking case under the former scheme. Second, Stewart underestimates the significance of including an explicit direction to judges to *consider* the otherwise extraordinary remedy of a judicial stay of proceedings in this context. By presenting the remedy to judges within the provisions that set out the scheme, Parliament is, in effect, suggesting to judges that even though judicial stays are extraordinary, including *under the Charter*, they are to be considered less extraordinary in this context. In short, by articulating the remedies, and giving judges full discretion to apply them, a stay might become a more common remedy in these cases.

²⁰ This is set out in subsection (2) of 37.3 and 38.14.

²¹ *Supra*, note 3, at 221.

²² *Ibid.*

However, as both Kent Roach and Kathy Grant point out, this can work both ways. Grant expands on Roach's comment that a dispute between a court and a Crown prosecutor over a question of privilege may well result in a stay of proceedings *if the court* takes the view that a violation of the right to a fair trial is more serious in that case than the nature of the crime in question.²³ Grant suggests that "while incredulous, the interests of justice in a case such as murder or terrorism might tip the balance in favour of proceeding in an unfair trial rather than ordering a judicial stay."²⁴ She cites McLachlin and Iacobucci JJ. in *R. v. Mills*,²⁵ to the effect that "it can never be in the interests of justice for an accused to be denied the right to make full answer and defence"; however, as she notes, "these comments were made prior to September 11th and we have not experienced cases of terrorism in Canada. There is a real possibility that trial judges, responding to the changing values of society, would prefer in such cases to proceed with a trial that may be borderline unfair."²⁶

The new scheme is certainly unusual and may well have the *practical* effect of expanding the scope of government privilege, or, as Kathy Grant suggests, of lowering the threshold of the Crown's duty to disclose.²⁷ However, the two features – the

²³ See Grant's "The Unjust Impact of Canada's *Anti-terrorism Act* on an Accused's Right to Full Answer and Defence" 16 Windsor Rev. Legal & Social Issues 137, 2003, at 159, which cites Roach's 2002 article, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" 47 McGill L.J. 893.

²⁴ Grant, *ibid.*

²⁵ [1999] 3 S.C.R. 688.

²⁶ *Supra*, note 23, at 159.

²⁷ *Ibid.*, at 167.

possibility of judicial review of the Attorney General's power to issue a certificate, and the remedy provisions to protect fair trial rights -- arguably bring this set of amendments in Bill C-36 in closer conformity with older ideas of the administration of justice than earlier versions of the Bill. Stewart is skeptical on this point:

...it might be held that Bill C-36 infringes s. 7, with the Crown having to establish a justification under s. 1. I think that such a justification would be very hard to make out. Quite apart from the fact that the Supreme Court has never upheld a s. 7 breach under s. 1, Bill C-36 does not satisfy all the elements of the *Oakes* test. The restrictions on disclosure undoubtedly have a pressing and substantial objective and are rationally connected ... but where the right to a fair trial could be protected by not trying the accused, *i.e.*, through a stay of proceedings entered either by the Crown or by the court, it is hard to see how a refusal to disclose material relevant to making full answer and defence could be a minimal impairment of the fair trial right.²⁸

Grant concurs with this assessment, arguing that the *CEA* amendments in Bill C-36 would fail the 'minimal impairment' portion of the *Oakes* test because "there are no effective limits on prosecutorial discretion to prohibit disclosure."²⁹ She also takes issue with the fact that "the law is permanent and not of temporary duration" and asks, "if the law is part of the 'War on Terror' should not the law only impair rights while the war is being fought? If the War on Terror is a permanent war, then the provisions cease to be extraordinary and the problem of being overbroad becomes more serious."³⁰ There might also have been other measures in the legislation to mitigate the impairment to an accused's right to a fair trial, including the use of *amicus curiae* to access the information on the accused's behalf, but without disclosing it to anyone.

²⁸ *Supra*, note 19, at 258.

²⁹ *Supra*, note 23, at 163.

³⁰ *Ibid.*

The more critical point, however, is whether even if the powers of the state could be restrained in some acceptable way, the changes to the *CEA* will, over the long run, result in a normalization of a deeper shift in our thinking about privilege. If it is acceptable to allow the government to make these demands on ‘participants’ and to create what amounts to a separate proceeding within existing litigation, one has to ask where will the process end? In other words, if it becomes acceptable to build into the law so many protections for state secrets – and to make it easier to assert privilege over something as nebulous as ‘national security’ (a term not defined in any federal legislation),³¹ at what point will the principle of holding a full trial in open court cease to mean anything? Even if charges were stayed more frequently in this context, in many cases the cloud of suspicion would linger over the wrongfully accused indefinitely – and with no recourse.

³¹ Forcese, *supra*, note 1, at 88, notes that the closest term in Canadian law that functions as a synonym for ‘national security’ that has been defined is ‘threats to the security of Canada’ in the *Canadian Security Intelligence Service Act*, R.S.C. 1985 c. C-23.