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Canada Evidence Act

C-5

An Act respecting witnesses and evidence

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Definitions	38. The following definitions apply in this section and in sections 38.01 to 38.15.
“judge” « <i>juge</i> »	“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.
“participant” « <i>participant</i> »	“participant” means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.
“potentially injurious information” « <i>renseignements potentiellement préjudiciables</i> »	“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.
“proceeding” « <i>instance</i> »	“proceeding” means a proceeding before a court, person or body with jurisdiction to compel the production of information.
“prosecutor” « <i>poursuivant</i> »	“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.
“sensitive information” « <i>renseignements sensibles</i> »	“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. R.S., 1985, c. C-5, s. 38; 2001, c. 41, ss. 43, 141.

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- Notice to Attorney General of Canada **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.
- During a proceeding (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 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.
- Notice of disclosure from official (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.
- During a 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.
- Military proceedings to (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.
- Exception (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.
- Exception (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).
- Schedule (8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.
- 2001, c. 41, s. 43.



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- Disclosure prohibited** **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).
- Entities** (1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.
- Exceptions** (2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if
- (a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or
 - (b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

2001, c. 41, ss. 43, 141.

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Authorization by Attorney General of Canada **38.03** (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings (2) In the case of a proceeding under Part III of the *National Defence Act*, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice (3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

2001, c. 41, s. 43.

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Disclosure agreement **38.031** (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court (2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

2001, c. 41, ss. 43, 141.

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- Application to Federal Court — Attorney General of Canada **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).
- Application to Federal Court — general (2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,
- (a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;
- (b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and
- (c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.
- Notice to Attorney General of Canada (3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.
- Court records (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.
- Procedure (5) As soon as the Federal Court is seized of an application under this section, the judge
- (a) shall hear the representations of 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, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;
- (b) shall decide whether it is necessary to hold any hearing of the matter;
- (c) if he or she decides that a hearing should be held, shall
- (i) determine who should be given notice of the hearing,
- (ii) order the Attorney General of Canada to notify those persons, and
- (iii) determine the content and form of the notice; and
- (d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.
- Disclosure agreement (6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,
- (a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and
- (b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.
- Termination (7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or,

of Court
consideration,
hearing,
review or
appeal

in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

2001, c. 41, ss. 43, 141.

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Report relating to proceedings **38.05** If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

2001, c. 41, s. 43.

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- Disclosure order **38.06** (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.
- Disclosure order (2) If the judge concludes that the disclosure of the information 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 of the information, a part or summary of the information, or a written admission of facts relating to the information.
- Order confirming prohibition (3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.
- Evidence (3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.
- Introduction into evidence (4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).
- Relevant factors (5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.
- 2001, c. 41, s. 43.

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Notice of order **38.07** The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

2001, c. 41, s. 43.

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Automatic review **38.08** If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

2001, c. 41, s. 43.

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Appeal to Federal Court of Appeal **38.09** (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation period for appeal (2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

2001, c. 41, s. 43.

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Limitation periods
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Supreme Court of
Canada

38.1 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 10 days after the day on which the judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

2001, c. 41, s. 43.

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Special rules **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 schedule to the *National Capital Act*.

Ex parte representations (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*.

2001, c. 41, s. 43.

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Protective order **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.

Court records (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.

2001, c. 41, s. 43.

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| Certificate of Attorney General of Canada | 38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the <i>Security of Information Act</i> or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament. |
| Military proceedings | (2) In the case of a proceeding under Part III of the <i>National Defence Act</i> , the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence. |
| Service of certificate | <p>(3) The Attorney General of Canada shall cause a copy of the certificate to be served on</p> <p>(a) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;</p> <p>(b) every party to the proceeding;</p> <p>(c) every person who gives notice under section 38.01 in connection with the proceeding;</p> <p>(d) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;</p> <p>(e) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;</p> <p>(f) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and</p> <p>(g) any other person who, in the opinion of the Attorney General of Canada, should be served.</p> |
| Filing of certificate | <p>(4) The Attorney General of Canada shall cause a copy of the certificate to be filed</p> <p>(a) with the person responsible for the records of the proceeding to which the information relates; and</p> <p>(b) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).</p> |
| Effect of certificate | (5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate. |
| Statutory Instruments Act does not apply | (6) The <i>Statutory Instruments Act</i> does not apply to a certificate issued under subsection (1). |
| Publication | (7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the <i>Canada Gazette</i> . |
| Restriction | (8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131. |
| Expiration | (9) The certificate expires 15 years after the day on which it is issued and may be reissued. |

2001, c. 41, s. 43.

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| Application for review of certificate | (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be. |
| Notice to Attorney General of Canada | (2) The applicant shall give notice of the application to the Attorney General of Canada. |
| Military proceedings | (3) In the case of proceedings under Part III of the <i>National Defence Act</i> , notice under subsection (2) shall be given to both the Attorney General of Canada and the Minister of National Defence. |
| Single judge | (4) Notwithstanding section 16 of the <i>Federal Court Act</i> , for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court. |
| Admissible information | (5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence. |
| Special rules and protective order | (6) Sections 38.11 and 38.12 apply, with any necessary modifications, to an application made under subsection (1). |
| Expedited consideration | (7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1). |
| Varying the certificate | (8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the <i>Security of Information Act</i> , or to national defence or national security, the judge shall make an order varying the certificate accordingly. |
| Cancelling the certificate | (9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the <i>Security of Information Act</i> , or to national defence or national security, the judge shall make an order cancelling the certificate. |
| Confirming the certificate | (10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the <i>Security of Information Act</i> , or to national defence or national security, the judge shall make an order confirming the certificate. |
| Determination is final | (11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court. |
| Publication | (12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the <i>Canada Gazette</i> <ul style="list-style-type: none"> (a) the certificate as varied under subsection (8); or (b) a notice of the cancellation of the certificate under subsection (9). |

2001, c. 41, s. 43; 2004, c. 12, s. 19(E).

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Protection of right to a fair trial **38.14** (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

Potential orders (2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

- (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
- (b) an order effecting a stay of the proceedings; and
- (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

2001, c. 41, s. 43.

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- Fiat **38.15** (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.
- Effect of fiat (2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.
- Fiat filed in court (3) If a prosecution described in the fiat or any related process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.
- Fiat constitutes conclusive proof (4) The fiat or a copy of the fiat
(a) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and
(b) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.
- Military proceedings (5) This section does not apply to a proceeding under Part III of the *National Defence Act*.
2001, c. 41, s. 43.

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Canada Evidence Act

PART I

International Relations and National Defence and National Security

Regulations **38.16** The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of sections 38 to 38.15, including regulations respecting the notices, certificates and the fiat.

2001, c. 41, s. 43.

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