Sogi v. Canada (Minister of Citizenship and Immigration) (F.C.A.), 2004 FCA 212 (CanLII)

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A-597-03

2004 FCA 212

Bachan Singh Sogi (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Sogi v. Canada (Minister of Citizenship and Immigration) (F.C.A.)

Federal Court of Appeal, Strayer, Rothstein and Malone JJ.A.--Toronto, April 28; Ottawa, May 28, 2004.

Citizenship and Immigration -- Exclusion and Removal -- Immigration Inquiry Process -- Appellant alleged member of terrorist organization -- Minister applying for non-disclosure of certain information -- Immigration Division determining information relevant to appellant's admissibility, disclosure would be injurious to national security, safety of any person -- Appellant provided only with summary of information -- Federal Court Judge confirming information not to be disclosed but may be considered by Court -- Under IRPA procedure (ss. 44, 86, 87), Federal Court Immigration and Refugee Protection Rules, Federal Court judge having opportunity to review propriety of keeping information confidential -- IRPA procedure in accordance with principles of fundamental justice.

Administrative Law -- Judicial Review -- Certiorari -- Immigration Division determining appellant inadmissible under Immigration and Refugee Protection Act, s. 34(1)(f) on ground member of terrorist organization -- In reviewing inadmissibility decision, Federal Court Judge correctly applied pragmatic, functional approach to determine review should be conducted on correctness basis -- Factors established by S.C.C. in determining appropriate standard of review considered -- Proper standard of review on question of whether relevant information should be disclosed to affected individual correctness -- Federal Court judge making own assessment of whether disclosure of confidential information would be injurious to national security, safety of any person -- Reviewing correctness of Immigration Division decision rather than making initial decision.

Constitutional Law -- Charter of Rights -- Life, Liberty and Security -- In making admissibility decision, Immigration Division may take into account security intelligence information without disclosing it to affected individual -- Whether procedure contrary to Charter, s. 7 -- Federal Court Judge determining information relevant to issues before Court, disclosure injurious to national security -- Finding Immigration Division correctly ordered non-disclosure open to Federal Court Judge, should not be disturbed on appeal -- IRPA procedure constitutional, in accordance with principles of fundamental justice as sufficiently similar to procedure under

former Act and upheld in Ahani v. Canada (F.C.A.) -- No violation of s. 7.

This was an appeal from a Federal Court decision dismissing an application for judicial review of a determination by a member of the Immigration Division of the Immigration and Refugee Board that the applicant was inadmissible to Canada on security grounds. The appellant arrived in Canada from India in May 2001 and made a claim for refugee protection. When informed that the appellant was a member of an organization that there are reasonable grounds to believe has engaged or will engage in acts of terrorism, the Minister of Citizenship and Immigration referred the matter to the Immigration Division for an admissibility hearing. Upon application by the Minister for non-disclosure of certain information, the Immigration Division determined that the information was relevant to the appellant's admissibility and that its disclosure would be injurious to national security or to the safety of any person. The appellant was only provided with a summary of the information. The Immigration Division member also determined that the appellant was inadmissible, pursuant to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act* (IRPA), on the ground that he was a member of a terrorist organization, the Babbar Khalsa International. The appellant's application for judicial review of that decision was dismissed by MacKay J. of the Federal Court.

Subsection 44(2) permits the Minister to refer an immigration officer's report to the Immigration Division for an admissibility hearing. Under section 86 the Minister may apply for non-disclosure of information during such a hearing and the application shall be determined in accordance with section 78. Section 78 provides that if the Immigration Division is of the opinion that disclosure of the information would be injurious to national security or to the safety of any person, it shall ensure the confidentiality of the information. Paragraph 78(*g*) points out that such information may be considered by the Immigration Division even though it is not disclosed to the affected individual. The latter is provided with a summary of the information under paragraph 78(*h*), but that summary does not include any information that the member considers would, if disclosed, be injurious to national security or to the safety of any person. The Immigration Division's decision is subject to judicial review whereas the Minister may apply for continued non-disclosure of information pursuant to section 87. Section 78 again applies. This procedure is referred to as the IRPA procedure. MacKay J. compared the IRPA procedure to the security certificate procedure set out in sections 77 and 78 which the parties accepted was analogous to the procedure under section 40.1 of the former *Immigration Act*. He held that the IRPA procedure did not contravene the principles of fundamental justice, for the same reasons that it was held that the former section 40.1 did not do so in *Ahani v. Canada*. The following question was certified for appeal: does the procedure pursuant to subsection 44(2) and sections 86, 87 of the *Immigration and Refugee Protection Act* engage section 7 of the *Canadian Charter of Rights and Freedoms* and if so, is any deprivation of liberty and security of person contrary to the principles of fundamental justice?

Held, the appeal should be dismissed and the certified question answered in the negative.

The appellant's first argument was that the differences between the IRPA procedure and the procedure under the former Act are sufficiently significant to distinguish this case from *Ahani*. The appellant also argued that a member of the Immigration Division has neither the expertise nor the institutional independence to weigh the interests of the public in keeping national security information confidential against an affected individual's interest in knowing the case to be met. The Court rejected both arguments. As long as the availability of judicial review provides the appellant with an opportunity to have a Federal Court judge decide the propriety of keeping the information confidential, the IRPA procedure is in accordance with the principles of fundamental justice. Under the IRPA procedure and the *Federal Court Immigration and Refugee Protection Rules*, the Federal Court judge hearing a judicial review involving a confidentiality order made by an Immigration Division member will have an opportunity to review the confidential information and *in camera* evidence that was before the member.

The question of the standard of review to be applied by the Federal Court judge in reviewing the decision of the Immigration Division member not to disclose the confidential information is critical to assessing the similarity of the IRPA procedure to the procedure under the former Act. MacKay J. was right to apply the pragmatic and functional approach to determine that this review should be conducted on a correctness basis. Three of the four factors which the Supreme Court of Canada has held must be considered in determining the appropriate standard of review point to a less deferential standard. First, there is no applicable privative clause. Second, balancing the right of the Minister to confidentiality against the right of the appellant to know the case to be met is not a polycentric issue but one between the state and the individual to which less deference should be shown. The third

factor is the relative expertise of the Court and the tribunal. In a number of legislative contexts, Parliament considers Federal Court judges best-suited to determine the appropriateness of disclosing information that could be injurious to national security. The wider range of legislation in which Parliament has given the task of assessing the proper level of disclosure to Federal Court judges suggests that it considers them to have greater relative expertise. Expertise considerations therefore favour less deference. The fourth factor is the nature of the question. Whether disclosure would be injurious to national security or to the safety of any person is a question of mixed fact and law which suggests a more deferential standard. On balance, the proper standard of review on the question of whether relevant information should be disclosed to the affected individual is correctness. In considering the correctness of the Immigration Division member's non-disclosure decision, the Federal Court judge will make his or her own assessment of whether disclosure of the confidential information would be injurious to national security or to the safety of any person. Unlike the procedure under the former Act, the Federal Court judge will be reviewing the correctness of the Immigration Division member's decision rather than making an initial decision based on the confidential information that was before the Immigration Division. If the judicial review is allowed, the matter will be remitted to the Immigration Division. The information will not immediately be disclosed; rather, the judge may direct that some or all of the information be included in the summary to be provided to the affected individual. The Minister will then decide whether to disclose or withdraw the information.

The IRPA procedure is in accordance with the principles of fundamental justice because it is sufficiently similar to the procedure under the former Act which was upheld in *Ahani*. Therefore, there was no violation of section 7 and the IRPA procedure is constitutional. After considering the confidential information, MacKay J. determined that the information was relevant to the issues before the Court and that its disclosure would be injurious to national security. Conducting his own assessment of the confidential information, he found that the Immigration Division member was correct to order non-disclosure. This conclusion was open to him and should not be disturbed on appeal.

statutes and regulations judicially

considered

Access to Information Act, R.S.C., 1985, c. A-1 , ss. 13(1)(*a*),(*b*), 15(1), 52 (as am. by S.C. 2002, c. 8, s. 112).

Canada Evidence Act, R.S.C., 1985, c. C-5 , ss. 38 (as am. by S.C. 2001, c. 41, ss. 43, 141), 38.01 (as enacted *idem*, s. 43), 38.02 (as enacted *idem*, ss. 43, 141), 38.03 (as enacted *idem*, s. 43), 38.031 (as enacted *idem*, ss. 43, 141), 38.04 (as enacted *idem*, ss. 43, 141), 38.05 (as enacted *idem*), 38.06 (as enacted *idem*), 38.07 (as enacted *idem*), 38.08 (as enacted *idem*), 38.09 (as enacted *idem*), 38.1 (as enacted *idem*), 38.11 (as enacted *idem*), 38.12 (as enacted *idem*), 38.13 (as enacted *idem*), 38.131 (as enacted *idem*), 38.14 (as enacted *idem*), 38.15 (as enacted *idem*).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23 , s. 12.

Criminal Code, R.S.C., 1985, c. C-46 , ss. 83.05 (as enacted by S.C. 2001, c. 41, ss. 4, 143), 83.06 (as enacted *idem*, s. 4).

Federal Court Immigration and Refugee Protection Rules, SOR/93-22 (as am. by SOR/2002-232 , s. 1), RR. 14, 15, 17 (as am. *idem*, s. 14).

Immigration Act, R.S.C., 1985, c. I-2 , s. 40.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 2(1) "foreign national", 34(1), 44(1),(2), 45(*d*), 72 (as am. by S.C. 2002, c. 8, s. 194), 73, 74, 75 (as am. *idem*), 76 (as am. *idem*), 77 (as am. *idem*), 78, 80(3), 86, 87.

Privacy Act, R.S.C., 1985, c. P-21 , ss. 19(1)(*a*),(*b*), 21, 51 (as am. by S.C. 2002, c. 8, s. 159).

cases judicially considered

applied:

Ahani v. Canada, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.P.R. (2d) 95; 100 F.T.R. 261 (T.D.); affd reflex, (1996), 201 N.R. 233; 37 C.R.R. (2d) 181 (F.C.A.); leave to appeal to S.C.C. refused [1997] 2 S.C.R. v.

referred to:

Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748; (1997), 144 D.L.R. (4th) 1; 50 Admin. L.R. (2d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20.

APPEAL from a Federal Court decision (2003 FC 1429 (CanLII), [2004] 2 F.C.R. 427; (2003), 113 C.R.R. (2d) 331; 242 F.T.R. 266; 34 Imm. L.R. (3d) 106) dismissing an application for judicial review of a determination by a member of the Immigration Division of the Immigration and Refugee Board that the applicant was inadmissible to Canada on security grounds. Appeal dismissed.

appearances:

Lorne Waldman for appellant.

Ian Hicks for respondent.

solicitors of record:

Waldman and Associates, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Rothstein J.A.:

OVERVIEW

[1]This is an appeal from a decision of MacKay J. of the Federal Court ([2004] 2 F.C.R. 427). The issue is whether the procedure, whereby a member of the Immigration Division of the Immigration and Refugee Board may, in making an admissibility decision, take into account security intelligence information without disclosing it to the affected individual, contravenes section 7 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (Charter).

[2]The appellant submits that section 7 is engaged because he is in detention and because he has suffered psychological stress and stigma. Accordingly, he asserts that his liberty and security of the person interests have been adversely affected. He says a member of the Immigration Division lacks the independence and expertise necessary to make an order that departs materially from the ordinary rules of procedural fairness by denying him the right to know the case he has to meet. He therefore submits that the procedure which confers this power on Immigration Division members does not accord with the principles of fundamental justice.

FACTS

[3]The appellant, a national of India, arrived in Canada on May 8, 2001 and made a claim for refugee protection. On August 7, 2002, an immigration officer reported his opinion to the Minister of Citizenship and Immigration (the Minister) that the appellant was a member of the Babbar Khalsa International, an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism. On the same day, the Minister referred the matter to the Immigration Division for an admissibility hearing.

[4]The appellant has been in detention since August 8, 2002.

[5]Before the member of the Immigration Division, the Minister applied, *in camera* and *ex parte*, for non-disclosure of certain information. The member determined that the information was relevant to the appellant's admissibility and that its disclosure would be injurious to national security or to the safety of any person. The confidentiality application was granted on August 16, 2002 and the appellant was only provided with a summary of the information.

[6]On October 8, 2002, the Immigration Division member determined that the appellant was inadmissible, pursuant to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), on the grounds alleged: that he was a member of a terrorist organization, the Babbar Khalsa International.

[7]On judicial review, the Minister applied for continued non-disclosure of information, which was granted by MacKay J. on May 8, 2003. By order dated December 16, 2003, MacKay J. dismissed the appellant's application for judicial review of the Immigration Division member's decision that the appellant was inadmissible.

STATUTORY SCHEME

[8]Subsection 44(1) of IRPA provides that an immigration officer who is of the opinion that a foreign national in Canada is inadmissible may submit a report of the relevant facts to the Minister. Under paragraph 34(1)(*f*), one ground of inadmissibility is that an individual is a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism. Under subsection 44(2), the Minister may, if she is of the opinion that the report is well-founded, refer it to the Immigration Division for an admissibility hearing.

[9]Subsection 86(1) provides that, during an admissibility hearing before the Immigration Division, the Minister may make application for non-disclosure of information. Subsection 86(2) provides that a member of the Immigration Division shall then determine the Minister's application in accordance with section 78. Section 78 provides, among other things, that if the Immigration Division is of the opinion that disclosure of the information would be injurious to national security or to the safety of any person, the Immigration Division member shall ensure the confidentiality of the information. Paragraph 78(*g*) provides that such information may be considered by the Immigration Division even though it is not disclosed to the affected individual. The affected individual is provided with a summary of the information under paragraph 78(*h*), but that summary does not include any information that the member considers would, if disclosed, be injurious to national security or to the safety of any person.

[10]Paragraph 45(*d*) allows the Immigration Division member to make a removal order against the foreign national if satisfied that the foreign national is inadmissible.

[11]Under section 72 [as am. by S.C. 2002, c. 8, s. 194], the member's decision is subject to judicial review in the Federal Court if leave is obtained. Pursuant to section 87, on judicial review the Minister may apply for continued non-disclosure of information protected by the member's confidentiality order. Section 78 is again applicable to the non-disclosure application before the Court.

[12]This procedure will be referred to in these reasons as the IRPA procedure. The relevant provisions of IRPA are set out in Appendix A.

CERTIFIED QUESTION

[13]MacKay J. certified the following question for appeal pursuant to paragraph 74(*d*) of IRPA:

Does the procedure pursuant to ss. 44(2), 86 and 87 of the *Immigration and Refugee Protection Act* engage section 7 of the *Charter of Rights and Freedoms* and if so, is there any deprivation of liberty and security of person contrary to the principles of fundamental justice.

ANALYSIS

[14]Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except

in accordance with the principles of fundamental justice.

[15]In view of my determination that the IRPA procedure is not contrary to the principles of fundamental justice, it is not necessary to decide whether section 7 of the Charter is engaged. I will assume, without deciding, that it is. I turn then to the issue of fundamental justice.

Decision of MacKay J.

[16]MacKay J. compared the IRPA procedure to the security certificate procedure set out in sections 77 [as am. by S.C. 2002, c. 8, s. 194] and 78 which the parties accepted was analogous to the procedure under section 40.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31] of the *Immigration Act*, R.S.C., 1985, c. I-2 (the former Act). The procedure under the former Act was found not to contravene the principles of fundamental justice in *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.); affd by (1996), 201 N.R. 233 (F.C.A.); leave to appeal to S.C.C. dismissed [1997] 2 S.C.R. v.

[17]MacKay J. identified two main differences between the security certificate procedure and the IRPA procedure: (1) initial certification of the information by two ministers rather than one; and (2) review and assessment of information sought to be subject to an order for non-disclosure by a Federal Court judge rather than a member of the Immigration Division.

[18]He also observed one other difference. Under subsection 80(3), the decision of the Federal Court judge that a security certificate is reasonable is not subject to appeal or judicial review. However, under the IRPA procedure, the inadmissibility decision of the Immigration Division member is subject to judicial review by a Federal Court judge, including review of the decision that information not be disclosed for reasons of national security. As MacKay J. put it, the Federal Court judge is involved in the process but at a stage removed from the somewhat similar role that the judge plays under sections 77 and 78. He therefore held that the differences between the two procedures were not sufficient to distinguish the IRPA procedure from the security certificate procedure.

[19]It is not entirely clear why MacKay J. decided to compare the IRPA procedure to the security certificate procedure set out in sections 77 and 78 rather than directly to the procedure set out in former section 40.1. However, the parties accepted that the security certificate procedure was analogous to the procedure under the former Act. Accordingly, that MacKay J. did not explicitly compare the IRPA procedure to the procedure under the former Act does not constitute reversible error. In the end, he held that the IRPA procedure did not contravene the principles of fundamental justice, for the same reasons that McGillis J. held that the former section 40.1 process did not do so in *Ahani*.

The appellant's argument

[20]The appellant, however, submits that the differences between the IRPA procedure and the procedure under the former Act are sufficiently significant to distinguish this case from *Ahani*, He states that, since a non-disclosure application under the IRPA procedure can be initiated by a mere delegate of one Minister, rather than two ministers, acting personally, who were required to sign a security certificate, there is no political or legal accountability for the decision to seek a non-disclosure order.

[21]The appellant also argues that a member of the Immigration Division has neither the expertise nor the institutional independence to weigh the interests of the public in keeping national security information confidential against the interests of the appellant to know the case he has to meet. The appellant says that under the former Act, the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and the *Criminal Code*, R.S.C., 1985, c. C-46, this issue has always been determined by a Federal Court judge because only a Federal Court judge has the requisite expertise and independence to make such a determination.

Judicial involvement in the IRPA procedure

[22]I am unable to accept the appellant's first argument. Regardless of how the process is initiated, the decision whether to withhold the confidential information from the affected individual, as discussed below, will eventually be considered by a judge of the Federal Court. The Minister will only be allowed to rely on the information without divulging it to the individual if the judge is convinced that the information is relevant and that its

disclosure will be injurious to national security or to the safety of any person.

[23]I am also unable to accept the appellant's second argument. It is based on a reading of section 86 in isolation. Read by itself, the section does not require judicial participation in the process of deciding whether information should be kept confidential. However, as MacKay J. found, a decision of the Immigration Division member is subject to judicial review upon an applicant obtaining leave.

[24]The procedure under the former Act which required a Federal Court judge to make the initial and only decision regarding non-disclosure was found in *Ahani*, to be in accordance with fundamental justice. As long as the availability of judicial review provides the appellant with an opportunity to have a Federal Court judge decide the propriety of keeping the information confidential, the IRPA procedure must also be found to be in accordance with the principles of fundamental justice.

[25]The question is whether the appellant has that opportunity. Three concerns must be addressed:

1. Does the Federal Court judge have an opportunity to review the confidential information?

2. Can the Federal Court judge review the correctness of the member's decision not to reveal the information or must the judge show deference to the member's assessment?

3. What remedies can the Federal Court judge order if the judge finds that the information should have been revealed?

How the confidential information gets before the Federal Court judge

[26]In oral argument, both counsel agreed that the Immigration Division does not retain confidential information considered by the member; rather, the information is returned to the Canadian Security and Intelligence Service (CSIS). It was suggested that, on judicial review, the Minister might, at her discretion, submit the same information, a portion of the information or indeed even other confidential information to the Federal Court judge through an application under section 87.

[27]Normally, judicial reviews are conducted based on the record of the proceedings before the tribunal. The Court therefore asked for further written submissions on the procedure by which confidential information is placed before the judge conducting the judicial review. These submissions confirmed what was agreed on by counsel at the hearing. The joint submission stated that the justification for the retention of the information by CSIS is section 12 of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (CSIS Act) which provides:

12. The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

[28]Based on my reading of the relevant statutory provisions and Court rules, I am unable to accept the submissions of counsel for the parties as a correct interpretation of the relevant law.

[29]Subsection 86(2) provides that the procedure set out in section 78 applies to the determination of an application for non-disclosure before an Immigration Division member, as if the reference to a "judge" in section 78 referred to the member.

[30]If the member decides that information or evidence is not relevant or that it is relevant but should be included in the summary provided to the individual, paragraph 78(*f*) requires the information to be returned to the Minister. However, paragraph 78(*g*), which allows the member to consider relevant but potentially injurious material without disclosing it, makes no mention of subsequently returning the considered material to the Minister. Any information considered by the member under paragraph 78(*g*) should thus form part of the Immigration Division's record, albeit a confidential portion.

[31]Under Rule 14 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 [(as am. by

SOR/2002-232 , s. 1)], "[w]here the judge considers that documents in the possession or control of the tribunal are required for the proper disposition of the application for leave," the judge may order the Immigration Division to produce the documents to the Court. Once leave is granted, Rule 17 [as am. *idem*, s. 14] requires the Board to prepare a record including, among other things, "all papers relevant to the matter that are in the possession or control of the tribunal" and submit it to the Court. When the confidential information is produced to the Court, either on the leave application or at the hearing of the judicial review, the Minister may make an application under subsection 87(1) for continued non-disclosure.

[32]As earlier explained, it appears that, for security reasons, the usual practice was for physical custody of this information to remain with CSIS. I am not entirely satisfied that section 12 of the CSIS Act necessarily requires this procedure. Just as confidential documents considered by the Federal Court on judicial review may be retained by that Court in a sealed record accessible only by a designated judge, I see no reason why a similar procedure could not apply to the Immigration Division.

[33]However, if the information is to be returned to CSIS, an undertaking must be given that the precise information that was before the Immigration Division member will be produced for judicial review purposes if required. The confidential information must be retained intact in a format that allows for precise identification of exactly what information was considered by the Immigration Division member in making the inadmissibility decision. The information that has been considered by the Immigration Division but returned to CSIS must be considered information "under the control of the tribunal" for the purpose of its production to the Federal Court on judicial review. If the information is returned to CSIS, the onus is on the Minister to satisfy the judge hearing the judicial review that the precise record that was before the member has been provided to the Court. The precise record will include the confidential information and any transcript of evidence given in the *in camera* proceeding before the member.

[34]In the event the evidence was not transcribed, an affidavit attesting to the evidence given before the member would be required. Because the proceeding was conducted *ex parte*, the judge hearing the judicial review must be satisfied that this affidavit sets out completely the evidence that was before the member. One method of satisfying the judge could be to produce an affidavit from one of the Minister's counsel who appeared before the member attesting, as an officer of the court, that the first affidavit accurately reflects all evidence given in the *in camera* proceedings.

[35]Federal Court judges deciding whether to grant leave in a judicial review involving a member's decision not to disclose may, under Rule 14, if they consider it necessary, order the Immigration Division to provide the confidential information. I would expect that, unless it is clear from the public record that leave should be refused, a Federal Court judge would order production of the confidential information and review it before dismissing the application for leave. I do not see how a judge could otherwise dismiss a leave application without reviewing the confidential information. Of course, if leave is to be granted, either on consent or because the public record discloses grounds for granting leave, the judge granting leave need not review the confidential information.

[36]Once leave is granted, the confidential information will, pursuant to Rule 17, automatically become part of the record before the judge hearing the application for judicial review. This portion of the record should be sealed and available only to the judge designated to hear the judicial review.

[37]I cannot accept that section 87 allows new confidential information to be submitted on the application for judicial review. In my view, section 87 presumes that a complete and accurate record containing the confidential information will be provided to the Court hearing the judicial review. Subsection 87(1) merely allows the Minister to make an application for the continued non-disclosure of any or all of the information that was protected by the Immigration Division member under subsection 86(1).

[38]This view of subsection 87(1) is supported by subsection 87(2) which expressly does not require the provision of a further summary to the affected individual. Such a further summary would be required if the Minister had a discretion under subsection 87(1) to submit new confidential information that was not before the Immigration Division member.

[39]I conclude therefore that, under the IRPA procedure and the *Federal Court Immigration and Refugee Protection Rules*, the Federal Court judge hearing a judicial review involving a confidentiality order made by an

Immigration Division member will have an opportunity to review the confidential information and *in camera* evidence that was before the member.

The standard of review is correctness

[40]On judicial review, the Federal Court judge is reviewing the inadmissibility decision of the Immigration Division member. One component of that decision may be whether information supplied by the Minister *in camera* should have been considered by the member without completely disclosing it to the affected individual.

[41]The appellant argued that on judicial review, the Court may only interfere with the Immigration Division member's non-disclosure decision if the decision is patently unreasonable. If this argument is correct, it is arguable that the Federal Court judge will not review the decision to keep the information confidential with the same degree of intensity as that performed by a judge under the section 40.1 procedure found constitutional in *Ahani*. Therefore, the question of the standard of review to be applied by the Federal Court judge in reviewing the decision of the Immigration Division member not to disclose the confidential information is critical to assessing the similarity of the IRPA procedure to the procedure under the former Act.

[42]MacKay J. applied the pragmatic and functional approach to determine that this review should be conducted on a correctness basis. I agree.

[43]Of the four factors which the Supreme Court has held must be considered in determining the appropriate standard of review (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226), three point to a less deferential standard. The first factor is the presence or absence of a privative clause. Here, there is no applicable privative clause; instead, sections 72 [as am. by S.C. 2002, c. 8, s. 194], 73, 74, 75 (as am. *idem*) expressly recognize that inadmissibility decisions are subject to judicial review once leave is obtained.

[44]The second factor is whether the decision is polycentric or one in which the state is the singular adversary of the individual. Section 86 requires balancing the right of the Minister to confidentiality against the right of the appellant to know the case he has to meet. This is not a polycentric issue but one between the state and the individual to which less deference should be shown.

[45]The third factor is the relative expertise of the Court and the tribunal. Federal Court judges are experts in assessing the advisability of disclosing security intelligence information. In section 40.1 of the former Act, sections 77 and 78 of IRPA, sections 38 [as am. by S.C. 2001, c. 41, ss. 43, 141] to 38.15 [as enacted *idem*] of the *Canada Evidence Act*, sections 83.05 [as enacted *idem*, s. 4, 143] and 83.06 [as enacted *idem*, s. 4] of the *Criminal Code*, section 52 [as am. by S.C. 2002, c. 8, s. 112] of the *Access to Information Act*, R.S.C., 1985, c. A-1, and section 51 [as am. *idem*, s. 159] of the *Privacy Act*, R.S.C., 1985, c. P-21, Parliament has given the task of deciding how much security intelligence information can be disclosed without unduly endangering national security to the Chief Justice of the Federal Court and other Federal Court judges designated by the Chief Justice (see Appendix B). Parliament has precluded not only administrative tribunal members but even judges of provincial superior courts from this task. It appears that, in a number of legislative contexts, Parliament considers Federal Court judges best-suited to determine the appropriateness of disclosing information that could be injurious to national security.

[46]While the enactment of section 86 of IRPA indicates that Parliament now considers Immigration Division members to have sufficient expertise to consider non-disclosure applications, the wider range of legislation in which Parliament has given the task of assessing the proper level of disclosure to Federal Court judges suggests that Parliament considers Federal Court judges to have greater relative expertise. As well, the question of whether an affected individual should be denied the opportunity to fully know the case against him on national security grounds raises issues of fairness, an area which has traditionally been the domain of the courts. Expertise considerations therefore favour less deference.

[47]The fourth factor is the nature of the question. Whether disclosure would be injurious to national security or to the safety of any person is a legal standard which must be applied to the facts as found by the member. The question is thus one of mixed fact and law which suggests a more deferential standard. However, in reviewing the decision of an administrative tribunal, the nature of the question is just one of the four factors to consider (*Dr. Q*,

at paragraph 33).

[48]The Supreme Court has held that expertise is "the most important of the factors that a court must consider in settling on a standard of review" (*Canada (Director of Investigations and Research) v. Southam Inc.*, 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748, at paragraph 50). On balance, I am of the opinion that the proper standard of review on the question of whether relevant information should be disclosed to the affected individual is correctness.

[49]As a result, a Federal Court judge conducting a judicial review of an Immigration Division member's decision to order non-disclosure of information to the affected individual will review the member's decision on a correctness standard. To uphold the member's decision, the judge must agree with it. If he or she does not, the judicial review will be allowed.

[50]In considering the correctness of the Immigration Division member's non-disclosure decision, the Federal Court judge will make his or her own assessment of whether disclosure of the confidential information would be injurious to national security or to the safety of any person. Doing so will require a review of the information which was the subject of the member's decision and any explanations of that information provided by witnesses who appeared *ex parte* before the member.

[51]Unlike the procedure under the former Act, here the Federal Court judge will be reviewing the correctness of the Immigration Division member's decision rather than making an initial decision. That is, the Federal Court judge will not be hearing fresh evidence explaining the reasons for non-disclosure. Rather, the Federal Court judge will be reviewing the confidential information that was before the Immigration Division member and any evidence given in the *in camera* proceedings before the member.

[52]The confidential portion of the IRPA procedure was conducted *ex parte*. Accordingly, the onus is on the Minister to satisfy the judge that the member's decision not to disclose was correct. If the judge is not satisfied because he or she finds the witness' explanations inadequate for any material reason, the judicial review will be allowed and the decision on inadmissibility will be remitted to the Immigration Division for redetermination.

The proper remedy if the judicial review is allowed

[53]If the judicial review is allowed, the information will not immediately be disclosed. Rather, in remitting the matter to the Immigration Division, the judge may direct that some or all of the information be included in the summary to be provided to the affected individual. In such a case, it will be up to the Minister to decide whether that information should be disclosed to the individual in order to allow it to be considered by the Immigration Division member or withdrawn from consideration in order to maintain the confidentiality of the information.

The IRPA procedure is constitutional

[54]The precise record that was before the Immigration Division member will be before the judge conducting the judicial review and the member's decision not to disclose the confidential information will be reviewed on a correctness standard. For these reasons, I agree with MacKay J. that the IRPA procedure is in accordance with the principles of fundamental justice because it is sufficiently similar to the procedure under the former Act which was upheld in *Ahani*. As the IRPA procedure conforms with the principles of fundamental justice, there is no violation of section 7 and the IRPA procedure is constitutional.

MacKay J. complied with the IRPA procedure

[55]The appellant did not allege that MacKay J. failed to properly review the decision of the Immigration Division member; rather, he attacked the constitutionality of the statutory regime under which that decision was made. However, as my finding that the IRPA procedure is constitutional is based on the opportunity for a correctness review of the member's non-disclosure order by a Federal Court judge, I will consider whether MacKay J. did in fact conduct his own review of the propriety of not disclosing the confidential information to the appellant.

[56]At paragraphs 22-25 of his December 8, 2003, reasons for order, MacKay J. states that the information that had not been disclosed to the appellant in the course of his inadmissibility hearing was put before the Court in *in*

camera hearings. He also confirms that no other information was introduced then or at any later time. MacKay J. thus had access to the information that was before the Immigration Division member and no other information.

[57]As stated above, MacKay J. held that the standard of review of the Immigration Division member's decision not to disclose the information to the appellant was correctness (paragraph 28). He thus applied the proper standard of review to the member's decision.

[58]After considering the confidential information, MacKay J. determined that the information was relevant to the issues before the Court and that its disclosure would be injurious to national security. Conducting his own assessment of the confidential information, he found that the Immigration Division member did not err in concluding that the information should be considered without revealing it to the appellant (paragraph 37).

[59]MacKay J. found that the Immigration Division member was correct to order non-disclosure. This conclusion was open to him and should not be disturbed on appeal.

CONCLUSION

[60]The appeal should be dismissed and the certified question answered in the negative.

Strayer J.A.: I agree.

Malone J.A.: I agree.

APPENDIX A--THE IRPA PROCEDURE

Immigration and Refugee Protection Act [section 76 (as am. by S.C. 2002, c. 8, s. 194)]

2. (1) The definitions in this subsection apply in this Act.

. . .

"foreign national" means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

. . .

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

. . .

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).

. . .

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, ...

. . .

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

. . .

(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

. . .

72. (1) Judicial review by the Federal Court with respect to any matter--a decision, determination or order made, a measure taken or a question raised--under this Act is commenced by maki ng an application for leave to the Court.

. . .

74. Judicial review is subject to the following provisions:

. . .

(*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

. . .

76. The definitions in this section apply in this Division.

"information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of eith er of them.

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

77. (1) The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.

. . .

78. The following provisions govern the determination:

(*a*) the judge shall hear the matter;

(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*c*) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(*d*) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;

(*e*) on each request of the Minister or the Solicitor General of Canada made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Solicitor General of Canada and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

(*g*) the information or evidence described in paragraph (*e*) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

(*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and

(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

. . .

86. (1) The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, make an application for non-disclosure of information.

(2) Section 78 applies to the determination of the application, with any modifications that the circumstances require, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

87. (1) The Minister may, in the course of a judicial review, make an application to the judge for the non-disclosure of any information with respect to information protected under subsection 86(1) or information considered under section 11, 112 or 115.

(2) Section 78, except for the provisions relating to the obligation to provide a summary and the time limit referred to in paragraph 78(*d*), applies to the determination of the application, with any modifications that the circumstances require.

Federal Court Immigration and Refugee Protection Rules

14. . . .

(2) Where the judge considers that documents in the possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.

(3) The Registry shall send to the tribunal a copy of an order made under subrule (2) forthwith after it is made.

(4) Upon receipt of an order under subrule (2), the tribunal shall, without delay, send a copy of the materials specified in the order, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry.

. . .

15. . . .

(2) The Registry shall send to the tribunal a copy of an order granting leave forthwith after it is made.

. . .

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

(*a*) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,

(*b*) all papers relevant to the matter that are in the possession or control of the tribunal,

(*c*) any affidavits, or other documents filed during any such hearing, and

(*d*) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

APPENDIX B--CONFIDENTIAL INFORMATION AND THE FEDERAL COURT

Immigration Act

40.1 (1) Notwithstanding anything in this Act, where the Minister and the Solicitor General of Canada are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(*c*.1)(ii), paragraph 19(1)(*c*.2), (*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or subparagraph 19(2)(*a*.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator.

. . .

(3) Where a certificate referred to in subsection (1) is filed in accordance with that subsection, the Minister shall

(*a*) forthwith cause a copy of the certificate to be referred to the Federal Court for a determination as to whether the certificate should be quashed; and

. . .

(4) Where a certificate is referred to the Federal Court pursuant to subsection (3), the Chief Justice of that Court or a judge of that Court designated by the Chief Justice for the purposes of this section shall

(*a*) examine within seven days, *in camera*, the security or criminal intelligence reports considered by the Minister and the Solicitor General and hear any other evidence or information that may be presented by or on behalf of those Ministers and may, on the request of the Minister or the Solicitor General, hear all or part of such evidence or information in the absence of the person named in the certificate and any counsel representing the person where, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(*b*) provide the person named in the certificate with a statement summarizing such information available to the Chief Justice or the designated judge, as the case may be, as will enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the information should not be disclosed on the grounds that the

disclosure would be injurious to national security or to the safety of persons;

(*c*) provide the person named in the certificate with a reasonable opportunity to be heard;

(*d*) determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to the Chief Justice or the designated judge, as the case may be, and, if found not to be reasonable, quash the certificate; and

(*e*) notify the Minister, the Solicitor General and the person named in the certificate of the determination made pursuant to paragraph (*d*).

(6) A determination under paragraph (4)(*d*) is not subject to appeal or review by any court.

Canada Evidence Act

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

"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.

. . .

"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" means a proceeding before a court, person or body with jurisdiction to compel the production of information.

. . .

"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.

. . .

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).

(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.

. . .

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.

(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.

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

Criminal Code

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are reasonable grounds to believe that

(*a*) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(*b*) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (*a*).

. . .

(2) On application in writing by a listed entity, the Solicitor General shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity.

. . .

(4) The Solicitor General must give notice without delay to the applicant of any decision taken or deemed to have been taken respecting the application referred to in subsection (2).

(5) Within 60 days after the receipt of the notice of the decision referred to in subsection (4), the applicant may apply to a judge for judicial review of the decision.

(6) When an application is made under subsection (5), the judge shall, without delay

(*a*) examine, in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Solicitor General and may, at the request of the Solicitor General, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;

(*b*) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;

(*c*) provide the applicant with a reasonable opportunity to be heard; and

(*d*) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

. . .

(11) In this section, "judge" means the Chief Justice of the Federal Court or a judge of that Court designated by

the Chief Justice.

83.06 (1) For the purposes of subsection 83.05(6), in private and in the absence of the applicant or any counsel representing it,

(*a*) the Solicitor General of Canada may make an application to the judge for the admission of information obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or an agency of an international organization of states; and

(*b*) the judge shall examine the information and provide counsel representing the Solicitor General with a reasonable opportunity to be heard as to whether the information is relevant but should not be disclosed to the applicant or any counsel representing it because the disclosure would injure national security or endanger the safety of any person.

(2) The information shall be returned to counsel representing the Solicitor General and shall not be considered by the judge in making the determination under paragraph 83.05(6)(*d*), if

(*a*) the judge determines that the information is not relevant;

(*b*) the judge determines that the information is relevant but should be summarized in the statement to be provided under paragraph 83.05(6)(*b*); or

(*c*) the Solicitor General withdraws the application.

(3) If the judge decides that the information is relevant but that its disclosure would injure national security or endanger the safety of persons, the information shall not be disclosed in the statement mentioned in paragraph 83.05(6)(*b*), but the judge may base the determination under paragraph 83.05(6)(*d*) on it.

Access to Information Act

13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

(*a*) the government of a foreign state or an institution thereof;

(*b*) an international organization of states or an institution thereof;

. . .

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities . . .

. . .

52. (1) An application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason of paragraph 13(1)(*a*) or (*b*) or section 15 shall be heard and determined by the Chief Justice of the Federal Court or by any other judge of that Court that the Chief Justice may designate to hear those applications.

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard *in camera*; and

(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

Privacy Act

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained in confidence from

(*a*) the government of a foreign state or an institution thereof;

(*b*) an international organization of states or an institution thereof;

. . .

21. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as defined in subsection 15(2) of the *Access to Information Act*, or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the *Access to Information Act*, including, without restricting the generality of the foregoing, any such information listed in paragraphs 15(1)(*a*) to (*i*) of the *Access to Information Act*.

51. (1) Any application under section 41 or 42 relating to personal information that the head of a government institution has refused to disclose by reason of paragraph 19(1)(*a*) or (*b*) or section 21, and any application under section 43 in respect of a file contained in a personal information bank designated as an exempt bank under section 18 to contain files all of which consist predominantly of personal information described in section 21, shall be heard and determined by the Chief Justice of the Federal Court or by any other judge of the Court that the Chief Justice may designate to hear the applications.

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard *in camera*; and

(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.