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THE DEPARTMENT



The *Anti-terrorism Act*

AMENDMENTS TO THE *CANADA EVIDENCE ACT (CEA)*

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A Definitions

Section 38 provides, *inter alia*, the following definitions:

Participant:

A person who, in connection with a proceeding, is required to disclose, or expects to disclose, or cause the disclosure of information (i.e. a party, counsel, witness, etc.).

Potentially injurious information:

Information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

Proceeding:

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

Sensitive information:

Information relating to international relations or national defence or national security and that is of a type that the government is taking measures to safeguard.

B. Notice of disclosure from a participant

Subsections 38.01(1) and (2) of the *CEA* provide that any participant in connection with, or in the course of, a proceeding is required to notify in writing as soon as possible the Attorney General of Canada of the possibility of the disclosure of information that the participant believes is sensitive or potentially injurious information. The notice must include the nature, date and place of the proceeding. In the case of a proceeding under Part III of the *National Defence Act*, notice shall be given to both the Attorney General of Canada and the Minister of National Defence (subsection 38.01(5) *CEA*).

The statutory obligation to give notification arises during the proceeding, and this could be prior to or during the hearing. In the latter instance, when the matter is raised by the participant or the official, the person presiding at the proceeding must ensure that the information is not disclosed other than in accordance with the *CEA*.

However, under subsection 38.01(7), the government institution that either produced or first received the information may inform a participant that a notice is not required (i.e. that the information can be disclosed).

C. Notice of disclosure from an official, other than a participant

Under subsections 38.01(3) and (4), an official, other than a participant may, if he or she believes that sensitive or potentially injurious information may be disclosed in connection with, and in the course of, a proceeding, notify the Attorney General of Canada. In the case of a proceeding under Part III of the *National Defence Act*, both the Attorney General of Canada and the Minister of National Defence must be notified (subsection 38.01(5) *CEA*).

D. Exceptions

Section 38.01 *CEA* does not apply when the information is disclosed by a person to his/her solicitor in connection with a proceeding, if the information is relevant to that proceeding. It also does not apply if the government institution that either produced or first received the information authorized the disclosure of that information. The information may also be disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court to discharge their responsibilities under the scheme. As well, notice would not have to be given when the information is disclosed to an entity and,

where applicable, for a purpose, listed in the schedule to the *CEA*.

E. Rationale

Formerly, section 38 could only be engaged by an objection having been made in the course of a proceeding. This required the government to be aware of the likelihood of the disclosure of such information during the course of the proceeding and required someone to be present to raise an objection at the moment that the disclosure was about to take place. The person might have attended court for days waiting to raise an objection as necessary to prevent the disclosure of information that would be injurious to international relations or national defence or security, regardless of whether such a moment would arise.

In addition, if an objection were raised, then it might be necessary for those proceedings to come to a halt while the matter was transferred to the Federal Court for a determination.

The scheme continues to permit the government to invoke the provisions of the *CEA* during the course of the hearing. The provisions that require notice to be given to the Attorney General of Canada were designed to make the government aware, prior to the hearing, of such matters, and permit the government to take pro-active steps in the appropriate circumstances.

F. The Decision of the Attorney General of Canada

Pursuant to sections 38.02 and 38.03 of the *CEA*, disclosure of the information, which is the subject of a notice, is prohibited unless such disclosure has been authorized in writing by the Attorney General of Canada, who has ten days to do so after he or she first received the notice. The Attorney General of Canada may, subject to any conditions he or she considers appropriate, authorize the disclosure of all or part of the information.

The Attorney General of Canada may, in addition, enter into a disclosure agreement with the participant who has given notice and is not required to disclose information, but wishes, in connection with a proceeding, to disclose the information or cause that disclosure (subsection 38.031(1) *CEA*).

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