

Annual Report concerning section 38.17 of the *Canada Evidence Act*

July 15, 2019 – July 14, 2020

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SECTION I – INTRODUCTION

Section 38 of the *Canada Evidence Act* establishes pre-trial, trial and appellate procedures to assist parties and persons involved in proceedings in which there is a possibility that information injurious to international relations or national defence or national security would be disclosed.

SECTION II – OVERVIEW OF SECTION 38.17 OF THE *CANADA EVIDENCE ACT*

The *Combating Terrorism Act* (formerly known as Bill S-7 in the 41st Parliament, 1st session) came into force on July 15, 2013. It created section 38.17 of the *Canada Evidence Act*, which provides that: “Each year the Attorney General of Canada shall prepare and cause to be laid before each House of Parliament a report for the previous year on the operation of sections 38.13 and 38.15 that includes the number of certificates and fiats issued under sections 38.13 and 38.15, respectively.”

Section 38.17 of the *Canada Evidence Act* is aimed at making any use of the certificate and fiat process more visible to Canadians. This provision implements recommendation 37 of the report of the House of Commons Subcommittee on the Review of the *Anti-terrorism Act* from 2007, which recommended that “... the *Canada Evidence Act* be amended to require the Attorney General of Canada to table in Parliament an annual report setting out the usage of section 38.13 certificates and section 38.15 fiats.”

Prohibition Certificate

Section 38.13 of the *Canada Evidence Act* authorizes the Attorney General of Canada to personally issue a certificate to prohibit 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 *Security of Information Act*¹ or for the purpose of protecting national defence or national security, but only after

¹ “Foreign entity” means

- (a) a foreign power,
- (b) a group or association of foreign powers, or of one or more foreign powers and one or more terrorist groups, or
- (c) a person acting at the direction of, for the benefit of or in association with a foreign power or a group or association referred to in paragraph (b).

an order or decision has been made, pursuant to the *Canada Evidence Act* or by any other Act of Parliament, that would result in its disclosure. The certificate expires 10 years after it is issued and may be reissued.² The certificate is subject to review pursuant to section 38.131 of the Act.

Fiat

Section 38.15 of the *Canada Evidence Act* gives the Attorney General of Canada the power to assume carriage of a prosecution that is not instituted by the Attorney General of Canada and in connection with which sensitive or potentially injurious information may be disclosed. The terms, “sensitive information” and “potentially injurious information,” are defined in section 38 of the *Canada Evidence Act*. 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.” 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.”

SECTION III - STATISTICS

The Attorney General of Canada confirms that, from July 15, 2019 to July 14, 2020, there was one certificate issued under section 38.13 of the *Canada Evidence Act*, and no fiat was issued under section 38.15 of the *Canada Evidence Act*.

² The expiry date for the prohibition certificate was reduced from 15 years to 10 years as a result of the *Combating Terrorism Act*, which implemented recommendation 35 of the report of the House of Commons Subcommittee on the Review of the Anti-terrorism Act (March 2007). <https://www.ourcommons.ca/DocumentViewer/en/39-1/STER/report-7/page-147>.