Public Interest Immunity after Bill C-36

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1. Introduction

Bill C-36, the omnibus anti-terrorism legislation enacted in response to the events of September 11, 2001, came into force in December 2001. The sections of the bill that attracted the greatest public attention were the new terrorism offences and the new investigative procedures the bill created. But the bill also amended the Canada Evidence Act\(^1\) to alter the regime for determining claims of public interest immunity that fall under federal jurisdiction. In this article, I briefly describe these amendments, and then I raise several questions about them: what is the effect of the new regime on practice issues such as the Crown’s disclosure obligations? How does the new regime interact with the duties of fairness owed by members of the executive to persons affected by executive decisions? Is the new regime consistent with the rule of law values that are mentioned in the preamble to the Charter and are, according to the Secession Reference,\(^2\) part of the unwritten Constitution?

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1. R.S.C. 1985, c. C-5 (hereafter the CEA). Bill C-36 is now the Anti-terrorism Act, S.C. 2001, c. 41. Section 43 amends the CEA.

2. The Background

The doctrine of public interest immunity recognizes that sometimes the public interest in non-disclosure of information concerning the state outweighs the public and private interests in proper dispute resolution. A claim of public interest immunity can be made by an appropriate official (typically a Minister or an appropriate representative) in any litigation, whether or not the state is a party. At common law, the judge or other presiding officer would consider and determine the claim, and the court had a discretion to examine the information in question to assist in its determination. Sections 37 and 38 of the CEA, as they stood before Bill C-36, were basically similar to the common law regime, though where the claim was made on the ground of injury "to international relations or national defence or security" (former s. 38) the claim had to be determined in the Federal Court rather than by the tribunal in question.\(^3\) Section 39 of the CEA, which is not affected by Bill

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3. There is doubt as to whether an objection to disclosure under s. 37 can be determined by a court other than the Federal Court, Trial Division or a provincial superior court. The wording of s. 37(3), in both its old and new versions, is permissive: "the objection may be determined, on application, by ... the Federal Court — Trial Division ... or ... the trial division or trial court of the superior court of the province". The new versions of s. 37(4), (4.1), and (5) refer to "the court having jurisdiction to hear the application" as the body which applies the test for disclosure; these words do not in themselves confer or remove jurisdiction, but do seem to contemplate a court rather than another type of tribunal. Two cases decided on facts arising before Bill C-36 came to opposite conclusions on this question. R. v. Meuckon (1990), 57 C.C.C. (3d) 193, 78 C.R. (3d) 196 (B.C.C.A.) is sometimes read as holding that an objection under s. 37 can be determined only by a superior court or by the federal court, though the case does not deal directly with the point. In R. v. Pilotte (2002), 163 C.C.C. (3d) 225 at para. 41, 156 O.A.C. 1 (C.A.), leave to appeal to S.C.C. refused 170 C.C.C. (3d) vi, it was held that "Section 37 does not oust the jurisdiction of a preliminary hearing judge, a provincial trial court judge, or a superior trial court judge to make evidentiary rulings." In Babcock v. Canada (Attorney General) (2002), 214 D.L.R. (4th) 193 at paras. 42-44, 3 C.R. (6th) 1, [2002] 8 W.W.R. 585 (S.C.C.), affg 188 D.L.R. (4th) 678, [2000] 6 W.W.R. 577, 76 B.C.L.R. (3d) 35 (B.C.C.A.), revg 176 D.L.R. (4th) 417, 70 B.C.L.R. (3d) 128 (S.C.), the court held, in obiter dicta, that any tribunal referred to in s. 39(1) was competent to decide an objection to a certificate issued under s. 39. The reasoning, though not directly on point, is consistent with Pilotte: "s. 39(1) is essentially an evidentiary provision; questions of admissibility of evidence normally fall to be decided by the tribunal seized of the matter in which the admissibility issue arises". (ibid., at para. 42).
C-36, protects the proceedings of the federal cabinet: where a minister or the Clerk of the Privy Council "certifies in writing that . . . information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of that information shall be refused without examination or hearing of the information by the court". Section 39 has recently withstood two constitutional challenges; the reasoning in those cases may give an indication of how a court would handle a constitutional challenge to the new versions of ss. 37 and 38.

3. Public Interest Immunity after Bill C-36

Sections 37 through 37.3 are similar to the former s. 37: they contemplate an "official" who objects to disclosure "on the grounds of a specified public interest" and a judicial determination of that objection, and they provide for various procedural protections and rights of appeal. Sections 38 through 38.16, in contrast, are quite different from the section they replace. There are six features of these new provisions that are worth noting.

(1) The Information Protected

Former s. 38 concerned "an objection . . . on grounds that . . . disclosure would be injurious to international relations or national defence or security". The new s. 38 defines "potentially injurious information" as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or security" and "sensitive informa-

4. Westergard-Thorpe v. Canada (Attorney General) (2000), 183 D.L.R. (4th) 458, [2000] 3 F.C. 185, 20 Admin. L.R. (3d) 168, sub nom. Singh v. Canada (Attorney General) (F.C.A.), leave to appeal to S.C.C. refused 188 D.L.R. (4th) vi (constitutional challenge to s. 39 on rule of law grounds rejected); Babcock, ibid., at paras. 53-61 (constitutional challenges to s. 39 based on s. 96 of Constitution Act, 1867 and on rule of law grounds rejected). In Babcock at para. 57, the Supreme Court expressed agreement with the result in Westergard-Thorpe, but there is an important difference in the reasoning: the Supreme Court's understanding of the rule of law includes a general principle that public power must be exercised for a proper purpose, whereas the understanding of the rule of law articulated by Strayer J.A. is much narrower. See Part 4(4) below and Stewart, "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity", supra, footnote *. 
tion” as “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”.

The definition of “sensitive information”, in contrast with “potentially injurious information”, does not require any detrimental consequences to any specified public interest to flow from disclosure: “sensitive information” is information on certain topics that the government has decided to “safeguard”, whether or not its disclosure would be harmful to international relations, defence, security or any other public interest. The regime that would be created by Bill C-36 is therefore potentially applicable to a much wider range of information than the traditional doctrine of public interest immunity.

(2) The Relevant “Proceedings”

Section 38 defines “proceedings” as “a proceeding before a court, person or body with jurisdiction to compel the production of information”. This broad definition must include not only civil cases and criminal prosecutions but also judicial inquiries, coroners’ inquests, and some administrative proceedings.

(3) New Obligations on “Participants”

Under s. 37, the responsibility to make an objection to disclosure on a ground of public interest immunity rests with an appropriate official. But Bill C-36 imposes new obligations on participants in proceedings to bring potential disclosures to the attention of the federal Attorney General. Sections 38.01(1) and (2) impose on a “participant”5 in a proceeding an obligation to “notify the Attorney General of Canada in writing” of

5. The definition of “participant” seems to be circular, in that s. 38 defines “participant” as “a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information” while s. 38.01(1) refers to a “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 “. 
the possibility that he or she, or anyone else, may disclose sensitive or potentially injurious information; proposed s. 38.02(1) then prohibits disclosure by anyone of that information. Exceptions are available under s. 38.01(6) and (7), and disclosure may be authorized by the Attorney General subject to conditions (s. 38.03(1)) or pursuant to an agreement with a participant (s. 38.031).

The definition of "participant" probably includes parties, witnesses and counsel in proceedings of all kinds. Virtually everyone connected with a proceeding now has a positive obligation to be aware of the nature of the information he or she might disclose and to notify the Attorney General of Canada of any possible disclosure of sensitive or potentially injurious information.

(4) Applications Concerning Disclosure

Under s. 38.04, the Attorney General and certain other persons can apply to a judge of the Federal Court, Trial Division, for "an order with respect to the disclosure of information" that the Attorney General was notified about. Pursuant to s. 38.05, the "person presiding" over a proceeding may "provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge". The test for disclosure, set out in s. 38.06(2), is basically the traditional balancing of the possible injury to "international relations or national defence or national security" versus "the public interest in disclosure".

Applications concerning disclosure of privileged or otherwise protected information or of other protected information are typically determined by the person presiding, on the ground that he or she is best placed to balance the interests at stake. In contrast, the procedure for claims involving sensitive or potentially injurious information permits the person presiding to provide a report, but ultimately leaves the matter of disclosure in the hands of a Federal Court judge, who is likely to

have limited knowledge of the case at hand and limited experience in certain types of proceedings. In a criminal case, for example, the trial judge may furnish a report but will have to do so without having seen the information in question; the Federal Court judge will make the decision about disclosure without having sat through the trial and without having to decide the remedy (if any) for non-disclosure. This division of labour is not unprecedented, as it existed under the former s. 38 as well, and one might argue that Federal Court judges do possess some expertise in security matters arising from their jurisdiction over immigration matters; but at the same time, Federal Court judges have no special expertise in the other matters, such as the right to make full answer and defence, against which the security issues will have to be balanced.

(5) The Attorney General’s Fiat

Historically, the prosecution of Criminal Code offences has been the responsibility of the provincial Attorneys General, and the prosecution of offences created by other federal statutes has been the responsibility of the federal Attorney General. Section 38.15(1) permits the federal Attorney General to assume control of any prosecution under any federal statute where that prosecution was commenced by a provincial Attorney General or by a private prosecutor. This provision is probably constitutionally valid, in light of a series of cases holding that the federal Attorney General has at least concurrent jurisdiction over the prosecution even of offences created pursuant to the federal criminal law power. But it does permit a significant encroachment on the traditional role of the provincial Attorneys General.

7. Croft Michaelson suggested this point to me.
(6) The Minister’s New Power

Section 38.13 gives the federal Attorney General a new power to prevent disclosure of information in proceedings. It provides that he “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 . . . or for the purpose of protecting national defence or national security”. This power permits the federal Attorney General to second-guess the result of any judicial determination concerning disclosure, including determinations made pursuant to s. 38.04. The decision is protected by a strongly worded privative clause (s. 38.13(8)). A party can apply to a single judge of the Federal Court of Appeal “for an order varying or cancelling a certificate” (s. 38.131(1)) on the ground that the information is not of the right kind (s. 38.131(8), (9), (10)). There is no further appeal from the judge’s decision (s. 38.131(11)).

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

It might be argued that these concerns about s. 38.13 are misplaced, in light of the undoubted power of a prosecutor, faced with an unfavourable ruling on an issue of public interest immunity, to stay a proceeding in the face of and to reinstate the proceedings before another judge. The Supreme
Court has held that the exercise of this power, though it avoids normal appeal routes and may appear to permit judge-shopping, does not necessarily amount to an abuse of process.\textsuperscript{10} Assuming that this holding is correct, we ought nonetheless to be cautious about expanding the ability of a party to a proceeding to second-guess the evidentiary rulings of the presiding officer. In my view, the only factor that makes this type of power constitutionally permissible is that, in criminal proceedings at least, the Crown is in a different position from any other party. In the frequently quoted words of Rand J.:\textsuperscript{11}  

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime . . . The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

These words were written in response to a Crown prosecutor’s inflammatory and improper language in an address to a jury, but they flow from a larger sense of the proper role of the Attorney General and his or her prosecutors. The Attorney General’s new power, like his or her other powers, must only be exercised for a proper purpose, and not merely for tactical advantages in litigation or other improper purposes.\textsuperscript{12}

### 4. Questions about the New Regime

#### (1) Interaction of Bill C-36 with Disclosure Obligations

According to \textit{Stinchcombe}, in criminal proceedings the Crown has a constitutional obligation to disclose to the


accused everything that is not privileged or clearly irrelevant.\textsuperscript{13} This obligation is meant to protect the accused’s right under s. 7 of the Charter (and under s. 650(3) of the Code) to make full answer and defence. Remedies for a breach of this obligation range from adjournment (to consider late disclosure) to a stay of proceedings; but, it is said, a stay of proceedings is available only as a last resort, “where the prejudice to the accused’s right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the justice system if the prosecution were continued”.\textsuperscript{14}

The new provisions of the CEA provide new grounds and new mechanisms on and with which the federal Crown can resist disclosure of information in criminal proceedings. How do these new provisions interact with the \textit{Stinchcombe} duty? In my view, there are three possible ways to think about this question.

First, it might be argued that Bill C-36 creates a new category of privilege for certain types of security-related information. If so, Bill C-36 would, by definition, be consistent with the \textit{Stinchcombe} duty. I think this interpretation of Bill C-36 is implausible. Whereas a privilege normally protects a relationship by categorically preventing disclosure, public interest immunity is essentially about balancing interests on a case-by-case basis, and it does not exist until claimed.\textsuperscript{15} Furthermore, to treat Bill C-36 as creating a new privilege so as to formally satisfy \textit{Stinchcombe} would beg the question: does the new regime operate unfairly so as to prevent the accused from being properly informed of the case against him?

\textsuperscript{14} O’Connor, supra, footnote 6, at para. 82.
\textsuperscript{15} This contrast may seem to be over-drawn, in light of the Supreme Court’s recognition of case-by-case privilege (\textit{R. v. Gruenke}, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, 8 C.R. (4th) 368) and its willingness to make inroads on traditional privileges to protect other interests (\textit{Smith v. Jones} (1999), 169 D.L.R. (4th) 385, 132 C.C.C. (3d) 225, [1999] 1 S.C.R. 455; McClure, supra, footnote 6). But it should be remembered that public interest immunity was not traditionally regarded as a privilege and that Bill C-36 nowhere describes it as one. Similarly, the Supreme Court has described the issues at stake under s. 39 of the \textit{Canada Evidence Act} as matters of Cabinet confidentiality rather than as matters of privilege: \textit{Babcock}, \textit{supra}, footnote 3, at paras. 15-23.
Second, it might be argued that the trial judge’s power to make an order, including a stay of proceedings (see ss. 37.3 and 38.14), to protect an accused’s right to a fair trial is sufficient to preserve the constitutionality of the scheme. I think the success of this defence of Bill C-36 depends on the answers to two further questions. Is the Crown prepared, in an appropriate case, to abandon the prosecution of some accused to prevent non-disclosure? Is the test for a judicial stay of proceedings under Bill C-36 to be as stringent as at common law? I suspect that it will be the very cases that the Crown most wants to prosecute — that is, terrorism offences — in which the Crown will most strenuously resist disclosure, and that the answer to the second question will be “yes”. So the mere presence of ss. 37.3 and 38.14 will not solve all the fair trial problems associated with the public interest immunity provisions of Bill C-36. If, in a particular case, non-disclosure of information is justified but at the same time necessary to make full answer and defence, either the Crown or the judiciary will have to be prepared to accept political criticism in staying proceedings to protect the right to a fair trial.

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

16. These sections might seem redundant in that they merely recognize a jurisdiction that undoubtedly exists under s. 24(1) of the Charter, but Parliament should get some credit for expressly recognizing that its new information regime may create problems for trial fairness.

(2) Interaction of Bill C-36 with Natural Justice

Through cases like Baker, the Supreme Court has imposed a rather robust duty of fairness on officials who make administrative decisions. One element of the duty of fairness is that officials must provide information to individuals affected by an administrative decision; another element is that the individual affected must have some opportunity to respond. Most recently, in Suresh, the court held that where a refugee was to be deported as a danger to the security of Canada pursuant to s. 53(1)(b) of the Immigration Act, and would after deportation face a risk to the interests protected by s. 7 of the Charter, the Minister of Citizenship and Immigration was required to provide a fair process, which the court summarized as follows:

The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act.

The powers granted to the Executive in Bill C-36, insofar as Bill C-36 expands the grounds on which a Minister can resist disclosure of information, are in tension with this holding concerning constitutionally required procedures. While Bill C-36 certainly provides "valid legal reasons" for a refusal to disclose, it also provides the power to refuse disclosure completely, subject to limited review. The reasons in Suresh take quite a deferential attitude towards the executive's decisions on matters of national security, but that deference is condi-

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tioned on "proper procedural safeguards" and "constitutional requirements" having been followed.  

(3) Defence Disclosure?

As noted above, Bill C-36 imposes obligations on "participants" in proceedings to notify the federal Attorney General if information is to be disclosed. It is unclear how "participants" are to be made aware of their obligations, or whether there is any sanction for failure to discharge the obligation. But quite apart from that, these provisions might in some situations create a duty of disclosure on the defence. Imagine an accused being prosecuted for a terrorism offence who wishes to attack the credibility of Crown witnesses, or to raise a defence (e.g., duress) that would require him to lead evidence describing the activity or operation of a terrorist organization. This evidence is precisely the kind of information that might be "sensitive" or "potentially injurious" as defined in s. 38 — thus engaging his lawyer's obligation to notify the federal Attorney General with all the procedural consequences that now entails. Now, s. 38.01(6)(a) protects solicitor-client privilege, so that the accused's lawyer does not have to notify the Attorney General when the client reveals the information in the office; but that is not the issue here. Rather, the point is that the lawyer may have to disclose the client's defences well before presenting them in court, and may, depending on the outcome of the proceedings concerning the information in question, be prevented from cross-examining effectively or even calling the client to testify in his own defence. These possibilities may require judges to ask whether the traditional rule that the defence does not have to disclose is an essential component of the right to a fair trial, or to be very creative under ss. 37.3 and 38.14.

(4) Bill C-36 and the Rule of Law

In an earlier paper, I argued that s. 38.13, as it read after first reading in the House of Commons, posed "a serious threat to the rule of law in that it grants the executive sweeping and

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21. Ibid. at paras. 32-33.
apparently unreviewable control over the disclosure of information in proceedings". Some of the defects of s. 38.13 were addressed in committee: the power to issue a certificate now arises only after other proceedings concerning the information are concluded, and a limited right of appeal is provided. But the section still leaves the Minister with the power to determine the balance between the public interest in non-disclosure and the public and private interests in disclosure. The Minister could, with the best of motives, misjudge the balance entirely, or with the worst of motives, wilfully decide to conceal information, and there is, under the statute, no mechanism to correct his misjudgment. Bill C-36 transfers a great deal of control over the disclosure of information from those who preside over proceedings to the federal executive. This aspect of Bill C-36 remains troubling, both as a matter of policy and as a matter of the rule of law.

In raising this concern, I do not mean to equate the rule of law with the rule of judges. The problem with Bill C-36 is not that it reduces the power of judges as such, but that it may reduce everyone’s access to information and increase the secretiveness of government. The proceedings to which the new sections apply include not only traditional civil and criminal cases, but also judicial inquiries, coroners’ inquests, and probably proceedings in Parliamentary and legislative committees. So it is not just judges in their traditional roles as adjudicators in litigation, but all the institutions that provide checks on government power, that are affected by Bill C-36. It may be that the Executive needs some new tools, including greater control over information, to fight the “war against terrorism”, but it has to be pointed out that these new tools may be misused or abused.

The Supreme Court has recently reiterated these concerns in a somewhat different context. In Babcock, the court considered the power of the federal executive to prevent disclosure of information by certifying it to be a Cabinet confidence pursuant to s. 39 of the CEA. Although the court rejected a con-

23. Supra, footnote 3.
stitutionally based rule of law challenge to s. 39, the court held that the executive’s power was subject to “the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the \textit{bona fide} purpose of protecting Cabinet confidences in the broader public interest”.

Thus, although a tribunal may not look at the information in question while deciding a challenge to the exercise of the s. 39 power, the tribunal may set aside the certification “as an unauthorized exercise of executive power” if “it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39”. In order to make such a challenge possible, “the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category”.

Similar reasoning should be applicable to the Attorney General’s power under s. 38.13. A certificate issued under s. 38.13 should be set aside if it does not concern the right kind of information or if it was issued for an improper purpose. Bill C-36 provides for the first ground only (see s. 38.131(8), (9)); but s. 39, on its face, provides for neither ground. The Supreme Court nonetheless recognized these grounds for setting aside a certificate issued under s. 39, flowing from its holding that exercises of public power must be \textit{bona fide}. This general principle is just as relevant to s. 38.13 as to s. 39.


25. \textit{Ibid.}, at para. 25, \textit{per} McLachlin C.J.C. In a somewhat cryptic concurrence, L’Heureux-Dubé J. stated that the executive did not have to take any competing public interests in disclosure into account in issuing a certificate under s. 39: “the clerk or Minister must only answer two questions before certifying, namely, whether (1) the document is a Cabinet confidence, and (2) it is information that the government wishes to protect”. \textit{Ibid.} at para. 65. This narrow view of what would amount to proper grounds of review for the use of the s. 39 power approach is somewhat surprising coming from the author of the majority reasons in \textit{Baker, supra}, footnote 18.


27. \textit{Ibid.}, at para. 28.
An application to set aside a s. 38.13 certificate would be afflicted by the same disadvantage as a similar application with respect to s. 39: the presiding officer could not examine the information in question in making his or her determination.\(^28\) Nonetheless, there might be situations, possibly involving political scandals or other unusual situations, where a tribunal, even though unable to view the information in question, would be justified in inferring from “the evidence or the circumstances”\(^29\) that a certificate was not validly issued and so should be set aside. The Supreme Court’s approach to s. 39 in Babcock makes room for constitutional rule of law values without striking down or otherwise modifying the statute on rule of law grounds, and without requiring disclosure during the review itself. The same approach should be applied to s. 38.13.

5. Conclusion

Bill C-36 has important implications for claims of public interest immunity that fall under federal jurisdiction. Where information is “potentially injurious” or “sensitive” as defined in s. 38 of the CEA, Bill C-36 imposes obligations on participants in proceedings to assist the federal government in its efforts to control the information, and shifts power over disclosure (or further disclosure) of the information from the courts to the federal Attorney General. This shift is backed up by the Attorney General’s new power to issue a certificate prohibiting disclosure, notwithstanding the outcome of any judicial proceedings concerning the information (s. 38.13). Bill C-36 provides a limited mechanism for judicial review of the certificate (s. 38.131); I argued in Part 4(4) above that the general principle that public power must be exercised for proper purposes should also be recognized as a ground for judicial review of a certificate.

In an earlier paper, I expressed the concern that the public interest immunity provisions of Bill C-36, as the bill appeared after first reading in the House of Commons, posed a threat to

\(^{28}\) Ibid., at para. 44; Westergard-Thorpe, supra, footnote 4, at para. 50.
\(^{29}\) Babcock, supra, footnote 3, at para. 25.
the rule of law and might even be used to shield the federal
government from political scandal.30 The remedy for this con­
cern may be found partly in some of the provisions added to
Bill C-36, as enacted, and partly in the rule of law values that
the Supreme Court has continued to recognize. But the remedy
will be complete only if the federal Attorney General and his
representatives continue to see themselves as ministers of jus­
tice rather than as subservient advocates for the federal gov­
ernment, and if the courts are willing to give substance to the
rule of law values that they have adopted.

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30. Stewart, supra, footnote *.