PUBLIC INQUIRY INTO FOREIGN INTERFERENCE IN FEDERAL ELECTORAL PROCESSES AND DEMOCRATIC INSTITUTIONS

NSC Hearings Written Closing Submissions

of

the Canadian Broadcasting Corporation/Société Radio-Canada; Toronto Star Newspapers Limited; La Presse Inc.; CTV, a division of Bell Media Inc.; Global News, a division of Corus Television Limited Partnership; MédiaQMI Inc.; and Groupe TVA Inc.

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1. These are the written closing submissions of the Canadian Broadcasting Corporation/ Société Radio-Canada; Toronto Star Newspapers Limited; La Presse Inc.; CTV, a division of Bell Media Inc.; Global News, a division of Corus Television Limited Partnership; MédiaQMI Inc.; and Groupe TVA Inc. (the "**Media Coalition**") following the hearings with respect to national security confidentiality which took place during the week of January 29, 2024 (the "**NSC Hearings**").

2. The importance of holding public inquiries in public – not only when it comes to the final report and recommendations, but also throughout the entire process – has been extensively covered by the Supreme Court of Canada in the context of the Commission of Inquiry into the Westray Mine Tragedy:

> "[62] One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.
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> [63] This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:
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> > I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. **They are not just inquiries; they are *public* inquiries. . . .**

> **I realized that there was another purpose to the inquiry** just as important as one man's solution to the mystery **and that was to inform the public**. Merely **presenting the evidence in public**, evidence which had hitherto been given only in private, **served that purpose**. The public has a special interest, a right to know and a right to form its opinion **as it goes along**. [Italics in original.]
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> (S. G. M. Grange, "How Should Lawyers and the Legal Profession Adapt?", in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (1990), 12 *Dalhousie L.J.* 151, at pp. 154-55.)

[64] The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

> . . . a commission . . . has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. **Its general way of looking at things is probably more important in the long run than its specific recommendations**. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.
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> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction. . . . Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.
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> (Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Jacob S. Ziegel, ed., *Law and Social Change* (1973), 79, at p. 85.)

[…]

[90] In this case the magnitude of the tragedy, its impact throughout Nova Scotia, the extensive publicity which has followed the explosion and accompanied the progress of the Inquiry, and the undeniable importance of the mining industry to the Nova Scotia economy all emphasize the great public significance of the inquiry. The public interest in learning the truth about what happened includes a very real desire to obtain all of the relevant information **in as timely a manner as possible**.

The scale of this disaster and its widespread impact are of such a notable and exceptional nature that **the strong and continuing community interest in holding an open inquiry must be given ample weight**.

[…]

[116] Openness has long been a feature of our system of criminal justice. Various justifications for the public nature of most criminal proceedings have been put forward. Most relate in some way to the simple truth that an individual is much less likely to be subject to unfair or oppressive treatment at the hands of the State if tried in open proceedings. As well, the public is much more likely to have confidence in an open system. The benefits of openness are not restricted to the criminal justice system but apply as well to civil proceedings: *Edmonton Journal v. Alberta (Attorney General)*, *supra*. The conduct of a public inquiry is no different, although it may differ from a criminal trial in that **the inquiry process itself may be more important than the result**.

[117] Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement. In the wake of the Sick Children Hospital Inquiry conducted by Justice Grange it was written:

> Imagine that the public had no access to the proceedings of the lengthy and costly Grange Inquiry into the deaths of babies at Toronto's Sick Children's Hospital, and was informed at the end of its vague conclusion that some babies had been killed by an unknown or unnamed individual. Such a conclusion to the state's failure to solve a string of murders deeply troubling to the population, after extensive investigation, prosecution and inquiry procedures, would have been entirely unacceptable. The Grange Inquiry was open, however, and **one of the virtues of the exercise in openness was that the public became privy to the problems the state faced** in trying to solve the mysterious deaths and could assess the efficacy of the state's actions. **Where different phases of the proceedings are closed or where information about them is censored, the public's ability to judge the functioning of the system, rate the government's performance and call for change is effectively removed**.
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> (Jamie Cameron, "Comment: The Constitutional Domestication of our Courts -- Openness and Publicity in Judicial Proceedings under

> the Charter" in Philip Anisman and Allen M. Linden, eds., *The Media, the Courts and the Charter* (1986), 331, at pp. 340-41.)"[1]
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> (italics in the original; our underlines and bold)

3. These important principles with respect to the public nature of commissions of inquiries have been restated in the context of many subsequent inquiries, including the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar (the "**Arar Inquiry**"), following which the Honourable Justice O'Connor stated:

> "This is a public inquiry. It was therefore essential that the proceedings be as transparent, accessible and open to the public as possible. The principles discussed above all stem from the public's interest in an inquiry."[2]

4. And, more recently, the Honourable Justice Rouleau stated in the context of the Public Order Emergency Commission:

> "[A] public inquiry is designed to fully explore relevant issues, to the extent possible, in a public setting. In the case of this Commission, transparency and openness are of particular importance. One of my functions is to promote and maintain public confidence, which is best pursued though an open process."[3]

5. As was the case in the context of the events of public significance which led to the public inquiries mentioned above, all Canadians are entitled to, and are interested in being informed about the subject matter of the *Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions* (the "**Commission**") which pertains to the integrity of our democratic

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[1] *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, paras 62-64, 90, 116-17.

[2] Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar – Analysis and Recommendations, at p 282 (URL: https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf).

[3] Public Order Emergency Commission, decision from the Honourable Paul S. Rouleau dated November 3, 2022 at para 26 (URL: https://publicorderemergencycommission.ca/files/documents/Decision-on-Applications-Under-Rules-56-and-105-108-Jeremy-Mackenzie-FINAL.pdf).

institutions. At the risk of stating the obvious, foreign interference in electoral and democratic processes is a matter of the utmost public interest.

6. However, most Canadians do not have the luxury of attending the hearings and otherwise taking independent steps to keep themselves informed of the work of this Commission. It is through the media and its press coverage that most Canadians will obtain the information they have a fundamental right to receive with respect to these crucial matters.[4]

7. The importance of holding an inquiry that is as transparent and public as possible is true for any commissions of inquiry. Yet, it is even more so in the context of this Commission.

8. Indeed, in a publication titled "*Countering an evolving threat: Update on recommendations to counter foreign interference in Canada's democratic institutions*" the Government of Canada states that "equipping citizens with knowledge" is "the best defence" against foreign interference (our emphasis).[5]

9. Therefore, holding this Commission in public will not only achieve the important social function served by any other public inquiries, but it will also serve the important additional purpose of informing the Canadian population about the threat of foreign interference, the Government has called the best way to counter that threat.

10. To that end, it will be important for the public not only to be informed of the documentary evidence submitted to the Commission, but also to have access to the Commission's hearings and

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[4] On this fundamental role of the media in advancing and encouraging debate on matters of public interest, see namely *Grant v Torstar*, 2009 SCC 61, at 52.

[5] Government of Canada, *Countering an evolving threat: Update on recommendations to counter foreign interference in Canada's democratic institutions*, April 6, 2023 (URL: https://www.canada.ca/content/dam/di-id/documents/rpt/rapporteur/Countering-an-Evolving-Threat.pdf).

witness the testimonies provided to it. The Commission should therefore also limit its *in camera* hearings as much as possible.

11. Several fact witnesses heard during the NSC Hearings (Director of the Canadian Security Intelligence Service ("**CSIS**") Mr. David Vigneault, Deputy National Security and Intelligence Advisor of the Privy Council Office ("**PCO**") Mr. Daniel Rogers, and Minister of Public Safety, Democratic Institutions and Intergovernmental Affairs Mr. Dominic LeBlanc) shared their view that this Commission is an excellent forum to fulfill this purpose of informing the public and thereby defending against foreign electoral interference.

12. Of course, several aspects of the Commission's work will involve considerations of national security and, consequently, claims of national security confidentiality ("**NSC**") by the Government of Canada and its intelligence agencies such as CSIS and the Communications Security Establishment ("**CSE**").

13. In its assessment of these NSC claims, the Commission will have to keep in mind the importance of holding an inquiry that is as transparent and as public as possible, for the reasons set out above. In doing so, the Commission will also have to consider the following important points raised during last week's hearings:

14. First, experts on both panels held during the NSC Hearings described a culture of overclassifying and overclaiming on the part of the Government and its agencies. This was also noted by Justice O'Connor in the Arar inquiry:

> "As I look back at the Inquiry process, I am satisfied that it worked as well as could be expected, given the extent and nature of the NSC claims asserted by the Government. However, the public hearing part of the Inquiry could have been more comprehensive than it turned out to be, if the Government had not, for over a year, asserted NSC claims over a good deal of information that eventually was made public, either as a result of the Government's decision to reredact certain documents beginning in June 2005, or through this report. Throughout the *in*

> *camera* hearings that ended in April 2005 and during the first month of the public hearings in May 2005, the Government continued to claim NSC over information that it has since recognized may be disclosed publicly. This "overclaiming" occurred despite the Government's assurance at the outset of the Inquiry that its initial NSC claims would reflect its "considered" position and would be directed at maximizing public disclosure. The Government's initial NSC claims were not supposed to be an opening bargaining position.
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> […] I raise this issue to highlight the fact that overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of NSC concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming.
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> […]
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> I commend the Government for its efforts in reconsidering its positions over time, however, it would have been preferable if all of the information that is now being made public had been disclosed prior to the public hearings. To the extent that this did not happen, the public hearing process suffered. While I am satisfied the undisclosed areas were properly canvassed by Commission counsel during the *in camera* hearings, one of the purposes of a public inquiry is to air evidence publicly."[6]
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> (our underlines)

15. Second, panelists and fact witnesses all agreed that often, a document that is classified as "secret" or "top secret" does not solely contain "secret" or "top secret" information. Sometimes, and as was explained in response to a question from the Commissioner the Honourable Marie-Josée Hogue, only one sentence meets the test to be classified as "top secret"; the balance of the document may contain publicly available information (referred to as "public sources" information by the experts and witnesses). In that situation, the document as a whole will still be classified to the level of secrecy matching that one sentence, i.e. "secret" or "top secret".

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[6] Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar – Analysis and Recommendations, at pp 302-303 (URL: https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf).

16. Third, a panelist (former Assistant Director of CSIS Mr. Alan Jones) as well as a fact witness (Director of CSIS Mr. Vigneault) each suggested that classification decisions are made at a certain point in time, but the risk associated with the disclosure of the information so classified will (or at least may) evolve over time. An information that was considered "top secret" in 2021 for instance may not be in 2024. This is further demonstrated by certain documents in the sample of 13 classified documents which were redacted at the request of the Commission for the purposes of the NSC Hearings, in which information that was identified "S" or "TS" were not redacted and, on the contrary, deemed suitable for public disclosure.

17. Fourth, former Director of CSIS Mr. Richard Fadden explained that the task of classification is heavily based on algorithms. This task is regularly delegated to juniors within the agencies, assisted by computers applying these algorithms. He further explained that classification decisions rarely reaches senior level within the agencies, absent unusual circumstances. Mr. Jones further clarified that even when that happens and a certain classification needs a closer evaluation, this evaluation is done by a CSIS team that is not involved in the operations (such as an operations manager) but is rather in charge of judicial or quasi-judicial proceedings.

18. Fifth, Mr. Fadden decried several times that there is no openness advocate in the entire system at CSIS. Thus, nobody's task is to advocate for a lower level of classification for example, or against a NSC claim.

19. Sixth, Mr. Fadden revealed that Canada's close allies are "much much more open" than Canada. He more specifically confirmed that this was the case for the United States, the United Kingdom, and Australia.

20. Seventh, certain bases for secrecy were considered questionable by the various experts:

a) Professor West expressed skepticism about the "mosaic effect" justification. She explained that based on this theory, everything and anything could potentially be considered prejudicial, and this is why the Federal Court requires the person raising it to substantiate its claim.

b) In the same vein, the advent of artificial intelligence and of "big data" – notably raised by Mr. Vigneault to justify classifying information that is in the public domain/ comes from open sources – is problematic for the same reasons; as Professor West put it, everything and anything could then potentially be considered prejudicial. Classifying open source information was also considered questionable by Mr. Fadden, who said that in his days as Director of CSIS, he would push back on his colleagues on that practice.

21. These elements which came out of the NSC Hearings should all be kept in mind by the Commission when faced with a NSC claim from the Government or its agencies. They demonstrate that clearly, the level of classification of any given document should not be taken at face value. The Commission should make its own assessment, and should not hesitate to challenge these classifications when, following its assessment, it is of the view that secrecy is not warranted. This view is shared by Mr. Fadden, who expressed that there is definitely some "room to push".

22. The fact witnesses' testimony (Mr. Vigneault, Mr. Rodgers, and Mr. LeBlanc) reassured the Commission of the Government and the agencies' willingness to support the Commission's initiatives to maximize transparency of its work.

23. Indeed, although a certain unwillingness transpired from the letter provided by the Government's Department of Justice on December 15, 2023, Mr. Vignault, Mr. Rodgers, and Mr.

LeBlanc all confirmed that they and their team (CSIS, PCO, Government) will assist and cooperate with the Commission so as to maximize transparency.

24. Mr. Vignault and Mr. LeBlanc further recognized that time is of the essence. They committed to assist the Commission making as much information as possible and through all the means available, including document redaction and summaries, regardless of how complicated and labor-intensive this may be for their respective teams. Mr. LeBlanc specifically affirmed his commitment that the amount of work required on the Government's part will not be an *empêchement* (impediment) or a source of delay for the work of the Commission.

25. Both witnesses (Mr. Vignault and Mr. LeBlanc) explicitly committed to collaborate on the subject of summaries of *in camera* testimonies, which were highly problematic in the Arar Inquiry, so much so that Justice O'Connor had to abandon this mechanism ensuring transparency of that commission's hearings. Mr. Vignault and Mr. LeBlanc both mentioned that the Arar Inquiry (and the Government's uncollaborative attitude faced by Justice O'Connor) happened almost 20 years ago, that things have evolved since then towards more transparency on the part of the Government and the agencies, and that the context of the present Commission is different.

26. Mr. LeBlanc further noted that the directive to work with the Commission and support its public-facing mandate is included in an Order in Council, that is, the highest form of direction to Canada's officials. He explained that this Order in Council is the clearest of indications that the Government expects its officials to maximize transparency and to collaborate and work with the Commission towards that goal. He shared the view that officials understand these instructions from Cabinet, and this is why the Government set up a process to deal with documents expeditiously.

27. The Government and its agencies must be held accountable to these promises. Therefore, the Commission should expect and require that, throughout the Commission's work, it is afforded

the highest level of government cooperation. This includes the redaction of only the classified information in the documents presented to the Commission, and the drafting of summaries of *in camera* testimonies which conceal as little facts as possible.

28. The Media Coalition submits that any disagreement between the Government and the Commission on what can and cannot be disclosed should also be made public. Tuesday's panelists during the NSC Hearings all agreed that this was of public interest.

29. If such a disagreement cannot be resolved and the Commission is forced to resort to the process set out at section 38 of the *Canada Evidence Act* ("**CEA**"), this should also be made public.

30. The Media Coalition understands that the very fact that notice was given to the Attorney General of Canada in application of section 38.01 CEA is confidential and cannot be disclosed pursuant to s. 38.02(1)(b) CEA. The Attorney General of Canada can however authorize the disclosure of all or part of the information the disclosure of which is prohibited under s. 38.02(1), pursuant to s. 38.03(1) CEA.

31. The prohibition on disclosure of even the fact that notice was given to the Attorney General of Canada under s. 38.01 CEA has been criticized by the Federal Court in at least two decisions.[7] Doubts on the constitutionality of s. 38.02(1)(b) CEA were even raised by its Chief Justice, although not decided, in light of the fundamental freedom of expression guaranteed by s. 2*b*) of the *Canadian Charter of Rights and Freedoms*.[8] The fact that the Attorney General of Canada is the "sole arbiter" to authorize the disclosure pursuant to s. 38.03(1) CEA was also considered

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[7] *Ottawa Citizen Group Inc v Canada (Attorney General)*, 2004 FC 1052, paras 34-40; *Toronto Star Newspapers Ltd v Canada (FC)*, 2007 FC 128, para 21.

[8] *Toronto Star Newspapers Ltd v Canada (FC)*, 2007 FC 128. See paras 21-22.

unusual and contrary to the principle that a court should have reasonable control over its proceedings.[9]

32. The Media Coalition agrees with these concerns raised by Chief Justice Lutfy of the Federal Court of Canada. Any disagreement between the Commission and the Government or one of its agencies over NSC claims is of public interest. Likewise, any disagreement leading to a notice under s. 38.01 CEA and further proceedings under the s. 38 CEA regime is also of public interest. All three experts on Tuesday's panel during the NSC Hearings (Professors Trudel, Nesbitt and West) were of the same view.

33. Therefore, if the Commission is forced to notify the Attorney General of Canada under s. 38.01 CEA over any given NSC claim, the Media Coalition is of the view that the Attorney General of Canada must authorize disclosure pursuant to s. 38.03(1) CEA. The Commission should make that specific request to the Attorney General of Canada if such a circumstance arises. As stated by Chief Justice Lutfy in *Ottawa Citizen Group Inc v Canada (Attorney General)*, with respect to the Attorney General's authorization in that case:

> "[39] Subsequently, on February 9, 2004, the Attorney General of Canada consented to the applicants making public the fact that the Federal Court had been asked to make an order with respect to disclosure of the secret information. On April 1, 2004, the Attorney General of Canada authorized the applicants to publish the notice of application in this proceeding, should they wish to do so.
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> [40] In authorizing the disclosure of the existence of this proceeding and the contents of the notice of application, the Attorney General of Canada was doing so in the sole exercise of his discretion. His authorization, in my respectful view, simply recognized the obvious. Anyone attending the proceedings before Justice Dorval in the Ontario Court of Justice would understand that the matter had been referred to this Court. There was no secret information in the notice of application. This same reality applies to most other section 38 proceedings. The Attorney General of Canada is likely to participate in all section 38 proceedings: section 38.04. It is unusual that a party to the litigation should be the sole arbiter to

[9] *Ottawa Citizen Group Inc v Canada (Attorney General)*, 2004 FC 1052, para 40.

> authorize the disclosure of information which is or should be public. A court should be seen as having reasonable control over its proceedings in the situation I have just described."[10]
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> (our underlines)

34. The Media Coalition respectfully submits that these comments equally apply in the context of this Commission.

35. To be coherent with the previously-mentioned statements by Mr. LeBlanc about the importance of the public-facing mandate of the Commission and about the Government's commitment to cooperate with the Commission, the Attorney General of Canada should systematically authorize disclosure pursuant to s. 38.03(1) CEA, should s. 38 CEA proceedings be instituted at any given time over the course of the Commission's mandate. Not doing so would be considered by the Media Coalition and the public as an attempt to avoid being held accountable to these very statements.

36. Disclosing this information publicly would also ensure at least a certain level of adversarial debate during these s. 38 CEA proceedings.

37. Indeed, the Court suggested that members of the media be granted status in the context of s. 38 CEA proceedings in application of s. 38.04(2)(c) CEA. In *Toronto Star Newspapers Ltd v Canada (FC)*, the Federal Court states:

> "[49] In any event, I do not understand the Toronto Star to be seeking the status of respondent or the right to file affidavits or memoranda of law. The Toronto Star is simply seeking to enforce the open court principle and to obtain access to the private sessions as a member of the media.
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> [50] The media's concern in keeping the public informed about section 38 proceedings is not encompassed within the "interests" protected under subsection 38.04(5). Where an entity such as the Toronto Star wishes to exercise its "interests", in the legal sense of this term, it may seek to cause the disclosure of the information

[10] *Ottawa Citizen Group Inc v Canada (Attorney General)*, 2004 FC 1052, paras 39-40.

> by initiating an application under paragraph 38.04(2)(c) [as enacted idem]: for example, *Ottawa Citizen Group, No. 1* and [*Ottawa Citizen Group Inc. v. Canada (Attorney General)*] 2006 FC 1552."[11]
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> (our underlines)

38. In that context, the Media Coalition or other interested parties defending the public's fundamental right to information may make submissions at minimum in the private portion of the s. 38 CEA proceedings. Submissions by such non-governmental parties during the *ex parte* portion of the proceedings may also be contemplated. As explained in *Toronto Star*, *supra*:

> "[60] It bears repeating that there is no secret information disclosed in private sessions and materials. The open court principle requires media access and timely publication. Counsel has not identified a public interest to be served by postponing publication of what occurs in private sessions until the disposition of the section 38 hearing. […]
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> […]
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> [82] Put simply, the approach to reading down adopted in *Ruby* is the appropriate manner in which to remedy the constitutional defects in the impugned provisions of section 38.
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> [83] Concerning the mandatory exclusion of the public from the private sessions, I find that the structure of subsections 38.11(1) and 38.11(2) mirrors that of paragraph 51(2)(a) and subsection 51(3) of the *Privacy Act*. Accordingly, subsection 38.11(1) ought to be read down as a constitutional remedy to apply only to the *ex parte* representations provided for in subsection 38.11(2).
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> [84] As in *Ruby*, the effect of this decision will be that private sessions, as defined in these reasons, are presumptively open to the public. To repeat, in the exceptional event where the exclusion of the public may be justified even when all parties are present, subsections 38.04(4) and 38.12(1) provide the Court with the discretionary authority to adopt such measures as are warranted by the circumstances to protect the confidentiality of secret information.
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> […]
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> [86] The mandatory confidentiality requirements in subsections 38.04(4) and 38.12(2) should also be read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2). As a result of this decision, all court records accessible to the non-government party are presumptively available to the public. Again, subsections 38.04(4) and 38.12(2)

[11] *Toronto Star Newspapers Ltd v Canada (FC)*, 2007 FC 128, paras 49-50.

> provide the discretion, if ever necessary, to maintain confidentiality with respect to any record available to all parties.
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> [87]The reading down I am adopting will exclude the public from all *ex parte* representations, those made by the Attorney General of Canada as of right and those made by a non-government party with leave of the Court. […]
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> […]
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> [89] […] However, under subsection 38.11(2), the non-government party may also seek to make *ex parte* representations. […]"[12]
>
> (our underlines)

39. This would ensure at least a certain level of adversarial debate. It bears repeating that adversarial debate is a principle of public order and a cornerstone of the Canadian justice system. It enables decisionmakers to reach a decision with the best information and arguments possible. As the Supreme Court cites in a recent decision, "from this constructive dialectic emerges the truth, the most just result for the judge."[13]

40. To that effect, any confidentiality measures requested by the Government or any other participants that would not relate to NSC should be considered by the Commission with the participation of the Media Coalition in order to ensure a proper adversarial debate.

41. The Media Coalition remains at the entire disposal of the Commission to assist in the important aspect of its mandate of maximizing transparency of its work, as hearings are held, documents are submitted and analyzed and, ultimately, the final report is released.

RESPECTFULLY SUBMITTED this February 9, 2024.

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[12] *Toronto Star Newspapers Ltd v Canada (FC)*, 2007 FC 128, paras 60, 82-89.

[13] *Resolute FP Canada Inc v Hydro-Québec*, 2020 SCC 43 at 265; see also *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at 64.

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