Federal Court  Cour fédérale

Date: 20200630

Docket: T-120-20

Citation: 2020 FC 731

Ottawa, Ontario, June 30, 2020

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

SAAD GAYA

Appellant

and

CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) and ATTORNEY GENERAL OF CANADA

Respondents

REASONS

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I. OVERVIEW

[1] The Appellant, Mr. Saad Gaya, is a listed individual pursuant to section 8 of the *Secure Air Travel Act*, SC 2015, c 20, s 11 [*SATA*]. Accordingly, the Minister of Public Safety and Emergency Preparedness [Minister] has deemed that reasonable grounds exist to suspect that he will either "engage or attempt to engage in an act that would threaten transportation security" or "travel by air for the purpose of committing an act or omission that (i) is an offence under section 83.18, 83.19 or 83.2 of the *Criminal Code* or an offence referred to in paragraph (c) of the definition terrorism offence in section 2 of that Act, or (ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i)." See paragraphs 8(1)(a) and 8(1)(b) of the *SATA*.

[2] The Appellant remains listed under the *SATA* following the Minister's decision to deny his application for administrative recourse under section 15 of the *SATA*, which sought the removal of his name from the list. Consequently, the Appellant has brought a statutory appeal of this decision, pursuant to section 16 of the *SATA*.

[3] Following a case management conference on March 18, 2020, during which the parties voiced their disagreements as to the role and powers of an *amicus curiae* in an appeal under the *SATA*, this Court appointed Mr. Gib Van Ert as *Amicus Curiae* in an Order dated March 24, 2020

[See Order in Annex A]. This Court also ordered the parties and the *Amicus Curiae* to submit written representations on the role and powers of the *Amicus Curiae* in this appeal, to which a subsequent oral hearing via videoconference was held on May 20, 2020, to allow the Court to hear the parties and the *Amicus Curiae* on this preliminary legal question.

[4] This decision answers the preliminary legal questions concerning the role and powers of the *Amicus Curiae* in this appeal. However, key to understanding this decision is the fact that similar preliminary issues were simultaneously before this Court in *Brar v Canada (Minister of Public Safety and Emergency Preparedness)*; *Dulai v (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 729 [*Brar/Dulai*], the first two appeals under the *SATA*. Consequently, although these reasons will be responsive to the specific submissions of the parties and the *Amicus Curiae* in this matter, these reasons also rely on the detailed analysis of the legal principles at issue in *Brar/Dulai* to answer the preliminary questions before the Court.

[5] To summarize the analysis below, I perceive my role as a designated judge under the *SATA* to be twofold: (1) deciding upon the reasonableness of the Minister's decision; and (2) reconciling the competing interests in national security and individual rights in a manner that ensures the fairest judicial process possible within the parameters set by legislation and the Court's plenary power to control its own process. Accordingly, in these circumstances, my role as a designated judge requires me to appoint an *Amicus Curiae* with a robust interventionist mandate and powers that give as much effect as possible to the Appellant's right to know and meet the case against him.

[6] That being said, this decision does not answer the constitutional questions raised in the Appellant's Notice of Appeal. Rather, the Court has considered the alleged violations of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK), 1982, c 11 [*Charter*] in the course of crafting the judicial process within the Court's statutory and inherent powers to decide upon the reasonableness of the Minister's decision and the constitutionality of the *SATA* scheme. Whether the judicial process fashioned according to the circumstances and the limits of the Court's powers is sufficient to ensure a fair judicial process is a question that this Court will hear later in this appeal.

II. FACTS

[7] The Appellant appeals the Minister's decision, dated November 29, 2019, upholding his status as a "listed person" under the *SATA*. The Appellant filed a Notice of Appeal to this Court, dated January 24, 2020, pursuant to subsection 16(2) of the *SATA*. In this Notice of Appeal, the Appellant asks this Court to (1) set aside the Minister's decision to uphold his status as a "listed person"; (2) remove him as a "listed person" under the *SATA*; (3) declare the impugned provisions of the *SATA* unconstitutional and of no force and effect or, in the alternative, order the Minister to review his decision and provide detailed reasons; and (4) such further relief as may be requested or deemed just.

[8] More specifically, the Appellant notably argues that: (1) subsection 6(2) and section 12 of the *SATA* violate section 8 of the *Charter*, and cannot be saved under section 1 of the *Charter*; (2) subsection 8(1) of the *SATA* violates sections 2 and 15 of the *Charter*, and cannot be saved

under section 1 of the *Charter*; and (3) paragraphs 9(1)(a) and 9(1)(b) of the *SATA* violate sections 2, 6, 7, and 15 of the *Charter*, and cannot be saved under section 1 of the *Charter*.

[9] Finally, the Appellant requests disclosure of any material, including any classified material, on which the Minister has relied to make the decision. The Appellant also asks that any classified material be reviewed by "a security-cleared lawyer at [counsel for the Appellant's firm] or by *amicus*, as the Court deems fit."

[10] On February 27, 2020, Chief Justice Crampton assigned me to serve as Case Management Judge in this matter. Shortly after, on March 18, 2020, a case management conference was held to discuss matters of interest to the parties, which included, among other things, the appointment of an *amicus curiae* and establishing a timeline for the next steps in this appeal. Between these two dates, less than three weeks apart, COVID-19 was declared a global pandemic by the Word Health Organization and its monumental impact on Canada would become increasingly clear. During this case management conference, the parties signalled their disagreement to the Court as to the role and powers of an *amicus curiae* during the *ex parte* and *in camera* portions of appeals under the *SATA*.

[11] Following this case management conference, the Court chose to exercise its discretion and appointed Mr. Gib Van Ert as *Amicus Curiae* and set out certain timelines to advance this appeal in order to minimize delay, the whole done with consideration of the extraordinary circumstances brought on by the COVID-19 pandemic. As explained in the Order, Mr. Gib Van Ert was appointed as *Amicus Curiae* by this Court "notably given his experience in

similar appeals under the *SATA*, which are currently before this Court." Moreover, given the issues raised by the parties during the case management conference regarding the role of an *amicus curiae* in appeals under the *SATA*, the Court ordered that written representations be provided by the parties and the *Amicus Curiae* on the role, responsibilities, and powers the *Amicus Curiae* is to be assigned during the *ex parte* and *in camera* portions of this appeal.

III. PRELIMINARY LEGAL QUESTIONS

[12] Consistent with my Order dated March 24, 2020, the Court is tasked with determining the following questions at this preliminary stage of the appeal:

1. What is the role of the *Amicus Curiae* in this appeal?

2. What powers does the *Amicus Curiae* have at his disposal to fulfill this role?

[13] Of course, answering these questions will require me to first analyze the role of the designated judge in appeals under the *SATA* and the jurisdiction of this Court to name an *amicus curiae*.

IV. ARGUMENTS

A. *RESPONDENTS' REPRESENTATIONS*

[14] The Respondents argue that while the Court can appoint an *amicus curiae* in *SATA* appeals, an *amicus curiae* cannot assume a role that requires them to represent the listed person as this would conflict with their role as a friend of the Court. The Respondents hold that the role

of an *amicus curiae* is to assist the Court in fulfilling its duties and, accordingly, the powers assigned to an *amicus curiae* must reflect the role assigned to the designated judge throughout the appeal under the *SATA*. For this reason, the Respondents ask this Court to reject any interpretation of the Order appointing Mr. Gib Van Ert as *Amicus Curiae* that would assign him a role or powers consistent with acting as the representative of the Appellant during the *ex parte* and *in camera* portions of this appeal under the *SATA*.

[15] To begin, the Respondents state that the role of the designated judge can be divided according to the two phases of appeals under the *SATA*: the disclosure phase and the merits phase. During the disclosure phase, the phase in which the designated judge decides upon the Minister's confidentiality claims pursuant to paragraph 16(6)(b), the Respondents state that the role of the designated judge is that of a "gatekeeper." However, the Respondents state that during the merits phase, the phase wherein the designated judge assesses the merits of the Minister's decision under appeal, the designated judge is tasked with deciding upon the "reasonableness" of the Minister's decision pursuant to subsection 16(4). As such, the Respondents argue that, during the merits phase, the designated judge is tasked with a role akin to the role of a judge in a conventional judicial review – a role grounded in judicial restraint and deference to the decision-maker – as opposed to a role akin to that of a designated judge reviewing security certificates under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
The Respondents, however, acknowledge the need for the Court to potentially undertake a more robust role during the merits phase with regard to any new evidence that is submitted pursuant to paragraph 16(6)(e) of the *SATA*.

[16] To assist the Court in fulfilling the duties required by these distinct roles assigned to the designated judge in appeals under the *SATA*, the Respondents acknowledge that the Court has the inherent power to appoint an *amicus curiae* and that the *amicus curiae*'s role and powers vary according to the circumstances under which the appointment is made. That being said, the Respondents state that an *amicus curiae*'s inherent role to assist the Court, and the limits this role imposes, does not permit an *amicus curiae* to take on the role of acting on behalf of a party. The Respondents cite *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 42 at paras 49, 53, 54 and 56 [*Criminal Lawyers' Association of Ontario*], in support of the statement that an *amicus curiae* cannot mirror the responsibilities of defence counsel. They also cite *Canada (Attorney General) v Telbani*, 2014 FC 1050 at paras 27–31 and *Canada (Attorney General) v Huang*, 2018 FCA 109 at paras 35–36 [*Huang (2018) FCA*], in support of the position that an *amicus curiae* cannot have an expanded role akin to the role played by a special advocate under the *IRPA*. Instead, the Respondents argue that the Order appointing the *Amicus Curiae* should be interpreted in a similar fashion as *Huang v Canada (Attorney General)*, 2019 FC 1122 [*Huang (2019) FC*]: assigning a role to represent the interests of justice that permits the *amicus curiae* to make arguments in the excluded individual's interests. Although there may be some similarities between the tasks for which the *Amicus Curiae* may properly be engaged in this appeal and those of a defence counsel or special advocate, the Respondents state that the purpose of those tasks are quite different as the *Amicus Curiae* must always act to assist the Court in making a decision in the best interest of justice. For the Respondent, this precludes any interpretation that tasks the *Amicus Curiae* with becoming an advocate for the Appellant.

[17] Consistent with their proposed role for the designated judge in the perceived phases of the *SATA* appeal and their interpretation of the inherent limits on the role of an *amicus curiae*, the Respondents propose that the Order should be interpreted as assigning the *Amicus Curiae* the following powers. In the disclosure phase, the Respondents state that the *Amicus Curiae* has the power to: (1) review the confidential material and engage with the Respondents to narrow disclosure issues; (2) cross-examine the affiants on the validity of the confidentiality claims; (3) make oral and written submission regarding disclosure; (4) attend public hearings, and with leave of the Court, make public submissions, and (5) assist in the preparation of summaries of information for the Appellant. However, during the merits phase, the Respondents suggest that the ability of the *Amicus Curiae* to cross-examine the Respondents' witnesses on the merits of the decision under appeal be restricted to merit issues regarding new affidavit evidence filed by the Respondents and accepted by the Court, consistent with the deferential role that must be assumed by the Court in this phase. In the alternative, the Respondents state that expanding the powers of the *Amicus Curiae* beyond this interpretation would need to ensure that he always remains a friend of the Court.

B. *APPELLANT'S REPRESENTATIONS*

[18] The Appellant states that a person cannot be deprived of liberty without a fair judicial process that permits them to know and meet the case against them. As such, in the case of *ex parte* and *in camera* proceedings, the Appellant states that procedural fairness requires that there be a "substantial substitute" for full disclosure and full participation – a lawyer who, while not the Appellant's counsel of choice, will vigorously advocate for him in the *ex parte* and *in camera* portions of a proceeding in the same way as his counsel would. The Appellant notes

that the *SATA* deprives listed individuals of liberty and that the role of an *amicus curiae* is sufficiently flexible to provide a substantial substitute for the full participation by the listed person's chosen counsel in the *ex parte* and *in camera* portions of the appeal. However, the Appellant notes that, restricting the role of an *amicus curiae* to something less than this renders the *SATA* unconstitutional for a lack of procedural fairness.

[19] First, the Appellant notes that in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui I*] and *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37 [*Harkat (2014)*], the Supreme Court of Canada held that a fair judicial process is a principle of fundamental justice and that accordingly, any deprivation of one's right to life, liberty, and security of the person protected in section 7 of the *Charter* can only take place where a fair judicial process has been followed. Moreover, consistent with *Charkaoui I* and *Harkat (2014)*, the Appellant notes that the Supreme Court of Canada has stated that where an individual's ability to know and meet the case against them as well as the judge's ability to make a decision based on the facts and the law is restricted by a need for confidentiality and *ex parte* and *in camera* proceedings, a substantial substitute must be afforded to the individual to ensure a fair judicial process. For the Appellant, *Charkaoui I* and *Harkat (2014*) signal that a "special counsel" or "special advocate" may serve as this substantial substitute for the individual's full participation and ability to receive full disclosure if that lawyer receives complete disclosure and is "in a position to act as vigorously and effectively as the named person himself would act in a public proceeding" (*Harkat (2014)*, at para 47). However, the Appellant warns that a failure to provide such a substantial substitute effectively guts an individual's right to a fair judicial process.

[20] Given that the *SATA* was drafted following the Supreme Court of Canada's decisions in *Charkaoui I* and *Harkat (2014)*, the Appellant states that the Court should apply the presumption of statutory conformity and hold that the requirements stipulated in *Charkaoui I* and *Harkat (2014)* to render *ex parte* and *in camera* proceedings constitutionally compliant implicitly inhere in the *SATA*. Given the absence of an explicit substantial substitute in the *SATA*, the Appellant states that the *Amicus Curiae*'s role should be interpreted as serving as this substantial substitute for the Appellant's chosen counsel. The Appellant notes that the need for a substantial substitute was explicitly acknowledged by this Court in its Order appointing the *Amicus Curiae* and is demonstrated implicitly in the powers afforded to the *Amicus Curiae*.

[21] The Appellant states that the role of an *amicus curiae* is sufficiently flexible to encompass acting as a substantial substitute for an appellant's counsel in an appeal under the *SATA*. The Appellant argues that an *amicus curiae* should act as if they were partisan counsel and that this is common place and consistent with the general understanding that an *amicus curiae* is intended to represent interests that are not before the Court. Indeed, the Appellant notably points to *Canada (Attorney General) v Ribic*, 2003 FCA 246 at para 6 where the *amicus curiae* was appointed to "act on behalf of counsel for [the excluded individual]" as well as an Order from Justice Mosley dated September 19, 2011, in *Canada (Attorney General) v Almalki*, DES-1-11 at para 6(a) where the *amici curiae* were ordered to review documents, "acting as if they were *in camera* counsel for the respondents." The Appellant states that the Supreme Court of Canada's decision in *Criminal Lawyers' Association of Ontario* should be distinguished as this is not a case of a self-represented accused seeking the appointment of an *amicus curiae* in a public proceeding but rather a case where there is a need for a substantial substitute in *ex parte*

and *in camera* proceedings. The Appellant highlights several decisions following *Criminal Lawyers' Association of Ontario* where a court has found that the presence of a heightened potential for a miscarriage of justice called for the appointment of an *amicus curiae* to act in a partisan role: see *R v Jaser*, 2014 ONSC 2277 [*Jaser*] at para 35 and *R v Imona-Russel*, 2019 ONCA 252 at paras 85, 88 and 91 [*Imona-Russel*].

[22] In sum, given the enormous potential for a miscarriage of justice in this *SATA* appeal process where the Appellant is precluded from full participation and full disclosure, the Appellant concludes that the *Amicus Curiae* will ultimately be assisting the Court by acting as if he were the Appellant's *ex parte* and *in camera* counsel as this assists the Court by ensuring a fair judicial process. Therefore, the Order appointing the *Amicus Curiae* should be interpreted as conferring such a role and powers.

C. *AMICUS CURIAE'S REPRESENTATIONS*

[23] The *Amicus Curiae* submits that an *amicus curiae* can serve the role of a substantial substitute to full disclosure in national security proceedings. However, doing so does not make them a representative of the excluded party. The *Amicus Curiae*'s role is not to represent the Appellant but serve as a traditional friend of the court; however, discharging this role will sometimes see the *Amicus Curiae* playing a role opposite to that of the Respondents when presenting the Court with the interests of the Appellant. That being said, the *Amicus Curiae* states that the Respondents' proposed general limitation on the *Amicus Curiae*'s ability to cross-examine their witnesses must be rejected as an appeal under the *SATA* must not necessarily be

divided into two phases and because imposing a general restriction on cross-examination based on such a division is unsafe and shields the Minister's decision from scrutiny.

[24] Pursuant to this Court's Order appointing the *Amicus Curiae* dated March 24, 2020, the *Amicus Curiae* states that he is assigned two roles: (1) assisting the Court in forming its opinion in closed hearings; and (2) assisting the Court in determining disclosure issues. The *Amicus Curiae*'s first role is responsive to the right to know and meet the case against one and the need for an adequate substantial substitute for persons who cannot participate in the closed portions of national security proceedings, citing *Harkat (2014)* and *Charkaoui I*. Meanwhile, the second role is to help ensure that the Appellant receives the "incompressible minimum amount of disclosure" required to ensure a fair judicial process that complies with section 7 of the *Charter* (*Harkat (2014)*, at paras 54–55).

[25] The *Amicus Curiae* states that, in exercising these roles, the jurisprudence is clear that the appointment of an *amicus curiae* is "generally intended to represent the interests that are not represented before the court, to inform the court of certain factors it would not otherwise be aware of, or to advise the court on a question of law" but, in doing so, always remain a friend of the Court and not a representative of any party, citing *Telbani*, at paras 27 and 30. However, by representing the interests of a party not before the Court and making arguments on their behalf, the *Amicus Curiae* states that the jurisprudence acknowledges that the assistance required of an *amicus curiae* may converge with the interests of an excluded party in some circumstances. The important part is that an *amicus curiae* must always remain a friend of the Court.

The *Amicus Curiae* cites in support: *Telbani*, at para 30; *Khadr v Canada (Attorney General)*, 2008 FC 46 at paras 30–32 [*Khadr*]; and *Huang (2019) FC*, at paras 27–31.

[26] Finally, concerning the powers afforded to the *Amicus Curiae* to fulfill these roles, the *Amicus Curiae* opposes the general restriction proposed by the Respondents on his ability to cross-examine their witnesses. First, the *Amicus Curiae* states that the basis of this proposed restriction, being the division of the appeal into two distinct phases, is unsafe and cannot be relied upon as the foundation of a general restriction because the line between issues of disclosure and issues of merit is not as a clear as the Respondents make it out to be. Second, the *Amicus Curiae* states that adopting an abstract restriction on the ability to cross-examine will not assist the designated judge in making determinations on the reasonableness of the decision under appeal, but rather hinder their ability to do so. Third, the *Amicus Curiae* states that the usual and preferable approach is for the Respondents' counsel to make objections as they see fit in the course of the hearing and have the designated judge rule on them having heard the disputed question and evidence that prompted it rather than adopt a general restriction in the abstract from the outset. Fourth, the *Amicus Curiae* argues that the proposed restriction by the Respondents would permit them to shield the Minister's decision from scrutiny by not putting forward witnesses who can speak to its merits – the *Amicus Curiae* states that he should not be precluded from any line of questioning that is fruitful due to the Respondents' strategic choices; this is not helpful to the Court.

V. ANALYSIS

[27] As noted above, the principal legal questions at issue before this Court pertain to the role and powers of the *Amicus Curiae*. However, to answer these questions, it is first essential to briefly review and analyze the role of the designed judge in appeals under the *SATA*. Accordingly, my analysis will be structured as follows: (A) Role of the Designated Judge; (B) Role of the *Amicus Curiae* – A Complement to the Designated Judge; and (C) Powers of the *Amicus Curiae*. Of course, seeing as these preliminary issues were dealt with in great length in *Brar/Dulai*, my analysis below mostly summarizes my findings in *Brar/Dulai* and adapts them to the context of this appeal.

A. *Role of the Designated Judge*

[28] In this appeal, the Respondents argue that the role of the designated judge is divided according to the two phases of appeals under the *SATA*, being the disclosure phase and the merits phase. During the disclosure phase, the Respondents state that the judge may assume a "gatekeeper" role but that, during the merits phase, the designated judge is tasked with a role akin to the role of a judge in a conventional judicial review. This argument was also made by the Minister in *Brar/Dulai*. Consistent with my findings in *Brar/Dulai*, I cannot agree with the Respondents.

[29] The *SATA* primarily relies on its appeal mechanism to balance its national security objectives with its objective to protect individual rights and freedoms. At the centre of this appeal mechanism is the designated judge, who is the "cornerstone of the procedure"

(*Charkaoui I*, at para 34; *Brar/Dulai*, at paras 90 and 105). Indeed, the appeal provisions at section 16 of the *SATA* assign significant discretion to designated judges in order to allow them to fulfill their role of (1) ensuring a fair judicial process that does not undermine the national security objectives of the *SATA*, and (2) deciding the reasonableness of the Minister's decision on appeal (*Brar/Dulai*, at paras 105–127).

[30] As I found in *Brar/Dulai*, at para 105, this role assigned by the *SATA* requires the designated judge to assume an active and interventionist role throughout the entire proceedings under the *SATA*, analogous to the role described by the Supreme Court of Canada in *Charkaoui I*, at paras 39–42 and *Harkat (2014)*, at para 46, the latter succinctly stating:

> [46] First, the designated judge is intended to play a gatekeeper role. The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers' finding of inadmissibility, but also that the overall process is fair: ". . . in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case" (C. Forcese and L. Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) (online), at p. 60). Indeed, the *IRPA* scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(a), *IRPA*. The designated judge must take an interventionist approach, while stopping short of assuming an inquisitorial role.

[31] Notwithstanding the fact that the *SATA* does not require the separation of an appeal into two distinct phases and that such a division is, in many cases, impractical as disclosure and merit issues often become intertwined, I have found that this "gatekeeper" role is essential all throughout the proceedings given the serious limits on full participation and full disclosure

imposed by the *SATA* and the potential *Charter* rights violations at play (*Brar/Dulai*, at para 105). Only by assuming such an active and interventionist role throughout the entire proceeding can a designated judge ensure their independence and impartiality, their ability to make a decision based on the facts and the law, and the appellant's right to know and meet the case against them, all key principles of a fair judicial process. That being said, as we will see below, although the assumption of an active and interventionist role throughout the proceedings is key in ensuring a fair judicial process, in many cases, this alone will not be enough to provide a substantial substitute for an excluded party (*Brar/Dulai*, at para 139). More on this later. For now, consistent with my findings in *Brar/Dulai*, I will briefly canvass the two aspects of the role assigned to the designated judge under the *SATA*.

[32] The first part of the role assigned to the designated judge under the *SATA* is ensuring a fair judicial process within the limits imposed by the *SATA* on the ability for the appellant to receive full disclosure and to fully participate all throughout the proceedings (*Brar/Dulai*, at paras 106–112). Fulfilling this role requires the designated judge to assume their "gatekeeper" role so that they may ensure that an appellant is provided with the most information possible to directly know and meet the case against them within the limits of the *SATA*. As such, the designated judge must conduct a "vigilant and skeptical" review of the Minister's confidentiality claims, given the appellant's absence from these proceedings, to ensure that the most information is directly disclosed to an appellant as possible within the limits of the *SATA* to avoid potential overclaiming by the Minister. Limiting full disclosure to a party must be exceptional and only done where required. From there, should certain information need to be kept confidential pursuant to the *SATA*, the judge must assume their role as a gatekeeper and attempt to provide an

appellant with as much information as possible within the confidentiality limits of the *SATA*, via summaries or otherwise, to ensure the fairest judicial process possible. The core of this role is summarized at para 112 of *Brar/Dulai*:

> […] The designated judge must actively search for ways to provide as much information as possible to the appellant while still protecting the confidentiality of certain information for national security reasons. Like an elastic, designated judges must stretch their statutory and inherent powers to ensure that as much disclosure is provided to the appellant while stopping short of the breaking point. A designated judge must feel satisfied that the disclosure (through summaries or by other means) is, in substance, sufficient to allow appellants to be "reasonably informed" (paragraph 16(6)(e)) of the case made against them and be able to present their side of the story, at the very least via the assistance of a substantial substitute (*Harkat (2014)*, at paras 51–63 and 110). Only then will the designated judge have the necessary facts and law to render a fair decision.

[33] The second part of the role assigned to the designated judge is to ensure the reasonableness of the Minister's decision. As found in *Brar/Dulai*, at para 115, this too requires the designated judge to assume an active and interventionist role. Indeed, the designated judge must decide upon the reasonableness of the Minister's decision on appeal (subsection 16(4)), on a potentially different evidentiary record that was before the Minister (subsection 16(4), and paragraphs 16(6)(e) and 16(6)(g)), which includes information that an appellant has never seen (paragraphs 16(6)(a), 16(6)(b) and 16(6)(f)), and has the power to directly order the Minister to remove an appellant from the *SATA* list, should the Minister's decision be deemed unreasonable (subsection 16(5)). The importance of assuming an active and interventionist role when assessing the reasonableness of the Minister's decision, given these important restrictions and the considerable discretion assigned to the designated judge, is summarized at para 127 of *Brar/Dulai*:

> [127] In all, a holistic reading of the appeal provisions of the *SATA* according to their legal context requires that a designated judge assume a "gatekeeper" role when assessing the reasonableness of the appealed decision. A fair judicial process requires that a judge be able to ground their decision on the facts and the law; it entails that the designated judge must be able to sufficiently test the relevancy and the trustworthiness of the evidence. This is particularly so for two reasons. First, the appeal stage of the proceedings under the *SATA* is effectively the first time the appellant is able to meaningfully question the merits of the evidence grounding the Minister's decision. Second, given that the judge will likely have to consider evidence or information not directly disclosed to the appellant, the designated judge must assume a role that gives them the ability to sufficiently test the relevancy and trustworthiness of the relied upon evidence in these circumstances. In conferring these powers upon the designated judge, Parliament evidently considered that simply deferring to the Minister's findings of fact in these cases without the designated judge's further involvement would not be in the interest of justice. It follows that designated judges in appeals under the *SATA* must actively involve themselves in testing the evidence presented by the Minister all throughout the *ex parte* and *in camera* proceedings, including questioning the witnesses before the Court in *ex parte* and *in camera* proceedings.

[34] However, although a designated judge whom assumes their role in an active an interventionist manner is a key element to ensuring a fair judicial process in the context of *ex parte* and *in camera* proceedings in national security matters, this alone does not provide for a substantial substitute. A complement to the designated judge is required given the important *Charter* rights at play and the significant limits on full participation and full disclosure imposed by the *SATA* (*Brar/Dulai*, at paras 139–141). This therefore brings me to discuss the role of the *Amicus Curiae* in this appeal.

B. *Role of the Amicus Curiae – A Complement to the Designated Judge*

[35] Despite the assumption of a "gatekeeper" role by the designated judge when an individual's *Charter* rights, notably section 7 rights, are at play and full disclosure and full participation is impossible due to national security interests, the Supreme Court of Canada has stated that this alone does not ensure a fair judicial process. This is because there is no substantial substitute for full disclosure and full participation, which, in turn, does not ensure that the designated judge's ability to ground their decision on the facts and the law is preserved given the absence of a mechanism to challenge the confidential information or evidence relied upon by the Minister. In *Charkaoui I*, the Court stated that the designated judge is "not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring" (para 64). Instead, the Court found that the appointment of a third-party counsel in *ex parte* and *in camera* proceedings could serve as a substantial substitute for full disclosure and full participation (paras 70–84). A few years later, this was confirmed by the Supreme Court of Canada in *Harkat (2014)*, at paras 45–47. See also *Brar/Dulai*, at paras 139–141.

[36] In essence, what can be drawn from *Harkat (2014)* and *Charkaoui I* is that, given the strict limits on disclosure imposed by the *SATA* (similar to the *IRPA*), a fair judicial process requires that the designated judge assume a "gatekeeper" role throughout an appeal under the *SATA* but also requires the presence of a third-party counsel in *ex parte* and *in camera* proceedings to provide a substantial substitute (*Brar/Dulai*, at para 141). In this appeal, I have appointed the *Amicus Curiae* to serve as this substantial substitute. At this preliminary stage,

I will canvass my ability to appoint an *amicus curiae* under the *SATA* and the role assigned to the *Amicus Curiae*. That being said, whether the judicial process fashioned according to the Court's statutory and inherent powers serves as an adequate substantial substitute will be decided at a later stage of this appeal when this Court considers the constitutionality of the *SATA* scheme.

(1) The *Amicus Curiae* and the Inherent Jurisdiction of the Court

[37] The appointment of *amici curiae* by courts in situations where certain critical interests are absent has become increasingly prevalent. This is notably the case in national security proceedings. For instance, the appointment of *amici curiae* has become common place in the context of proceedings under section 38 of the *Canada Evidence Act*, RSC 1985, c C-5 (*Huang (2018) FCA*, at para 36; *Telbani*, at para 26; and *Khadr*, at paras 12–16), in the context of warrants under section 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*] (*Canadian Security Intelligence Service Act (Re)*, 2008 FC 300 at para 3 [*CSIS Act (Re) (2008)*]; and *Canadian Security Intelligence Service Act* such as: Sections 16 and 21 of the *Canadian Security Intelligence Service Act, RSC 1985, c C-23 (Re)*, 2018 FCA 207), and privilege claims pursuant to section 18.1 of the *CSIS Act (X (Re)*, 2017 FC 136 at paras 31–32; and Section 18.1 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, *as Amended (Re)*, 2018 FCA 161 at paras 41–47, 53 and 56–57 [*Section 18.1 CSIS Act (Re)*]). See detailed discussion on this point in *Brar/Dulai*, at paras 157–164.

[38] The Court's jurisdiction to appoint an *amicus curiae* is inherent and grounded in its "authority to control its own process and function as a court of law" (*Criminal Lawyers' Association of Ontario*, at para 46). Nonetheless, the Supreme Court of Canada has also specified

that *amici curiae* must only be appointed when their assistance is essential to helping the judge discharge their judicial functions (*Criminal Lawyers' Association of Ontario*, at para 47).

[39] In essence, the role of the *amicus curiae* is to serve the Court. How this general role manifests itself varies according to the circumstances as their particular role and responsibilities are dependent on the judge who appoints them. However, despite this flexibility in the *amicus curiae*'s mandate, the Supreme Court of Canada has recognized that a court cannot assign an *amicus curiae* a role that obliges them to take on a solicitor-client role on behalf of a party. This is because the *amicus curiae*'s duty of loyalty must always lie with the Court rather than a party (*Criminal Lawyers' Association of Ontario*, at para 49). That being said, *amici curiae* have generally been tasked to "represent interests that are not represented before the court, to inform the court of certain factors it would not otherwise be aware of, or to advise the court on a question of law" (*Telbani*, at para 27).

[40] In the array of circumstances noted above, where it has become the common practice of this Court to appoint an *amicus curiae* in the context of designated proceedings, *amici curiae* are called upon to help designated judges fulfill their statutory duties in a manner that upholds the judge's overarching duty to ensure a fair judicial process. Seeing as *ex parte* and *in camera* proceedings inherently exclude concerned parties, the mandate of *amici curiae* have therefore largely been focused on providing the Court with the interests of the excluded party who does not have access to certain confidential information (see *Brar/Dulai*, at paras 164–167). This is observed by Justice Mosley in *Khadr* at para 32:

> [32] Similarly, I am of the view that in the context of a section 38 applications related to a criminal proceeding, such as in

> the present case, an *amicus* appointed by the Court may present the issues favouring the person seeking disclosure of the information during the *ex parte* portion of the proceedings and may be said in that respect to act for the individual at that stage. But the *amicus* has no solicitor-client relationship with the individual and his or her role will be to assist the Court in arriving at a just determination of the issues.

[41] However, consistent with the Supreme Court of Canada's statements in *Criminal Lawyers' Association of Ontario*, the jurisprudence in the context of national security is clear that an *amicus curiae*'s mandate cannot cross the line between representing interests that are not before the Court in order to assist the designated judge in fulfilling their duties and representing a party before the Court in designated proceedings. This line is well defined by Justice De Montigny (of this Court at the time) in *Telbani*, at paras 28–31, interpreting *Criminal Lawyers' Association of Ontario* in the context of an application pursuant to section 38 of the *Canada Evidence Act*:

> [28] There is no doubt, however, that the *amicus* is not the accused's lawyer (in a criminal proceeding) or respondent (in a civil proceeding). The role of an *amicus* is not any more analogous to that of a special advocate appointed under section 83 of the *IRPA* in the context of a security certificate. The role of the *amicus* is to assist the court and ensure the proper administration of justice, and the sole [TRANSLATION] "client" of the *amicus* is the court or the judge that appointed him or her. As Justice Fish (speaking on behalf of the dissenting judges) pointed out in *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (at paragraph 87), "[o]nce appointed, the *amicus* is bound by a duty of loyalty and integrity to the court and not to any of the parties to the proceedings".
>
> [29] It cannot be otherwise if the *amicus* is to be able to fully carry out the role assigned to him or her. Indeed, it is not inconceivable that he or she may be required to raise arguments or points of law that are not necessarily favourable to the accused or the respondent. Indeed, that is the reason that the Supreme Court unanimously concluded in *Criminal Lawyers' Association* that a

> lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court (see paragraphs 56 for the majority and 114 for the minority). Although the Court was divided on the issue of whether a superior court has the inherent power to set rates of remuneration for *amici*, all the judges considered that the role of an *amicus* and that of defence counsel are incompatible. I find that the same is true in a civil proceeding, although the dividing line may not always be so clear cut and the consequences of the blurring of lines may not be as dramatic.
>
> [30] In short, playing a role that may sometimes be opposite to that of the Attorney General does not make the *amicus* a defence counsel or counsel for the civil party. The objective of the *amicus* and the state of mind in which he or she acts is not to assume the role of an advocate for the accused or the respondent, but to provide the Court with insight that it would not otherwise obtain and to assist it in making a decision that is in the best interests of justice. The fact that these interests may converge in certain circumstances does not change anything and merely represents, in a manner of speaking, a marginal benefit resulting from the appointment of *amicus*. He or she must therefore act at all times with transparency, without ever attempting to take counsel for the Attorney General by surprise. The tactics and strategies that defence counsel, and even, in certain circumstances, a special advocate, may properly use are misplaced in a proceeding under section 38 of the *CEA*.
>
> [31] That said, the role of the *amicus* in such a proceeding may be modulated by the judge who appoints him or her to take into account the unique nature of an application under section 38 of the *CEA*. The very nature of the information to which the amicus will have access, the seriousness of the issues raised by the balancing of national security and the fairness of the proceedings, and the degree of transparency with which the Attorney General as well as the witnesses called in support of the application discharge their duties, are factors that may lead an *amicus* to play a more or less interventionist role depending on the circumstances.

[42] The Appellant argues that this Court has the power to assign the *Amicus Curiae* the role of acting as if he were partisan counsel to the Appellant during the *ex parte* and *in camera* portions of the appeal. In support, the Appellant cites jurisprudence emanating from Ontario following *Criminal Lawyers' Association of Ontario*, which demonstrates that where an

expanded role for the *amicus curiae* is justified due to a real risk of a miscarriage of justice, the gap between representing a party before the Court as defence counsel and representing their interests may appear to be minimal. See *Jaser*, at paras 35–42 and *Imona-Russel*, at paras 85–94. In these decisions, the courts discussed situations where the self-represented accused are incompetent and the appointment of an *amicus curiae* is necessary to avoid a potential miscarriage of justice. Interpreting *Criminal Lawyers' Association of Ontario*, these courts respectively found that an *amicus curiae* could be assigned a mandate to "act for the accused" (*Jaser*, at para 39) and to discuss legal issues and speak to the court "on behalf of the accused" without taking "on the role of defence counsel" (*Imona-Russel*, at para 88), as warned by the majority in *Criminal Lawyers' Association of Ontario*, at paras 49–56.

[43] However, this interpretation *of Criminal Lawyers' Association of Ontario* does not appear to be in line with the jurisprudence by which I am bound. This point is developed in greater detail *Brar/Dulai*, at para 170:

> [170] This interpretation of *Criminal Lawyers' Association of Ontario* does not appear to be in line with the interpretation of the Supreme Court of Canada's decision in the jurisprudence by which I am bound, notably *Telbani*, at paras 27–30 and *Huang*, at para 36, which draw a line between representing interests and acting on behalf of a party. Although Justice Mosley, at one point, uses similar language to *Jaser* in his 2008 *Khadr* decision (para 32), this was before the Supreme Court of Canada's decision in *Criminal Lawyers' Association of Ontario* and before *Telbani* and *Huang*. As such, for the time being, it is my belief that my inherent powers to appoint an *amicus curiae* and craft their mandate according to the circumstances do not permit me to assign the *Amici Curiae* a mandate that would have them act "on behalf" of the Appellants. However, my inherent powers do permit me to assign them a mandate to "represent the interests" of the Appellants. Having said that, the time may come where unforeseen important facts discovered in closed proceedings may justify the appointment of an *amicus curiae* with a more representative role in

> the *ex parte* and *in camera* proceedings. For the time being, this is not the case in these appeals.

[44] As is the case in *Brar/Dulai*, I do not believe that the current circumstances allow me to assign the *Amicus Curiae* a more representative role in the *ex parte* and *in camera* proceedings akin to the role assigned in *Jaser* or *Imona-Russel*. Nevertheless, this may change. For the time being, the *Amicus Curiae*'s mandate can extend as far as representing the interests of the Appellant during the *ex parte* and *in camera* proceedings. See para 171 of *Brar/Dulai*:

> [171] Some may say that assigning a mandate to "represent the interests" of an appellants before the Court in *ex parte* and *in camera* portions of an appeal falls beyond this inherent limit on the role of the *amicus curiae*. It may be argued that acting "on behalf" of an individual and "representing the interests" of an individual are one in the same and that the difference is largely semantic. Although these mandates may manifest themselves similarly in certain circumstances, the differences are the state of mind in which the *amicus curiae* acts and the tactics and strategies that are appropriate when acting "on behalf" of an individual as compared to presenting interests to assist the Court where they are unrepresented (*Telbani*, at para 30). It is my belief that "representing the interests" of an appellant during the *ex parte* and *in camera* portions of an appeal is still compatible with the inherent limits on the role of the *amicus curiae* as this is consistent with what is said in *Telbani*, at para 27 and consistent with the role often assigned by the Supreme Court of Canada to *amici curiae* pursuant to subsection 53(7) of the *Supreme Court Act* (*Criminal Lawyers' Association of Ontario*, at para 45 and footnote 4).

(2) Appointment of the *Amicus Curiae* in this appeal

[45] Having canvassed the general principles relating to the Court's inherent power to appoint an *amicus curiae*, and the general practice of doing so in an array of designated proceedings,

I shall now briefly consider my ability to appoint an *Amicus Curiae* in the context of an appeal under the *SATA*, referring largely to my analysis on this point in *Brar/Dulai*.

[46] First, the appointment of an *amicus curiae* in appeals under the *SATA* is consistent with the statutory duties it imposes on the designated judge. Indeed, given the conflicting duties of being forced to hold *ex parte* and *in camera* hearings (paragraph 16(6)(a)) and to ensure the confidentiality of certain information or evidence to the exclusion of the appellant (paragraph 16(6)(b)) while also being obligated to provide the appellant with an opportunity to be heard (paragraph 16(6)(d)), the appointment of an *amicus curiae* may be the only way to simultaneously give effect to these duties (*Brar/Dulai*, at paras 184–185). Moreover, an *amicus curiae* is implicitly required to assist the Court in testing the reliability and appropriateness of certain information or evidence not disclosed to the appellant during the *ex parte* and *in camera* portions of the appeal, and assist the Court in weighing this information or evidence, notably if this evidence or information cannot be summarized to the appellant and would be inadmissible in a court of law. See paragraphs 16(6)(e) and 16(6)(f) as well as *Brar/Dulai*, at paras 186–187.

[47] Second, as I found in *Brar/Dulai*, the appointment of the *Amicus Curiae* is equally consistent with the *SATA*'s object and Parliament's legislative intent (*Brar/Dulai*, at para 189). Indeed, the appointment of an *amicus curiae* is consistent with its overall object of balancing the rights and freedoms of individuals with the protection of Canada's national security interests and the safety of Canadians relating to air travel (*Brar/Dulai*, at para 190). Meanwhile, Parliament's intent to rely on the possibility of appointing an *amicus curiae* to balance these interests is also clearly expressed in legislative debates pertaining to the *SATA*, notably in the following

exchange between Senator Marilou McPhedran, the Honourable Ralph Goodale (then Minister of Public Safety and Emergency Preparedness), Doug Breithaupt (Director and General Counsel, Criminal Law Policy Section), and Malcolm Brown (then Deputy Minister of Public Safety) on April 10, 2019, before the Senate Standing Committee on National Security and Defence:

> **Senator McPhedran:** Minister, thank you for the courtesy of agreeing to stay a bit longer to answer the question.
>
> My question goes to Part 6 of this bill and to the balancing of security and rights. As we know, we have recourse provisions in the *Secure Air Travel Act*, a reference in Part 6, and the restrictions to the information that an applicant may be able to receive on the reasons for their listing on the no-fly list. As some of that information can be deemed sensitive and secret, that's absolutely acceptable. Section 16 of the *Secure Air Travel Act* requires that the presiding judge hear information or evidence without the individual present, with the summary provided to the individual, excluding information that was deemed injurious to national safety or might endanger the safety of any person if disclosed.
>
> Minister, given that we already have a system in the *Immigration and Refugee Protection Act* that allows for a mediated approach with security-cleared lawyers accessing secret information as special advocates that work in the security certificate regime, why not bring a proven system over to the *Secure Air Travel Act* as covered in this bill?
>
> **Mr. Goodale:** Senator McPhedran, I will double-check this to make sure that I'm correct. It's my understanding that if a judge in those circumstances feels that the help of some kind of *amicus* would be appropriate, the judge can require that. I believe that is in existing law.
>
> It would really fall to the presiding justice to determine whether or not the assistance of a special advocate or some other friend of the court would be necessary in order to ensure that the proceeding was, in fact, fair to those who are before the judge.
>
> **Senator McPhedran:** That's a huge area of discretion. If the existing security certificate with the special advocates was in place, then individuals that are being reviewed and monitored would consistently receive representation as opposed to the potential for inconsistent application in this area of discretion for the judge.

> **Mr. Goodale:** I hear your point, but I would make the counterpoint that in courts of law all across the country, judges are called upon to make judgment calls of that nature almost every day.
>
> **Senator McPhedran:** But not with so much secrecy.
>
> **Mr. Goodale:** Do you want to comment on this, Mr. Breithaupt?
>
> **Mr. Breithaupt:** Just to confirm that the Federal Court has the ability to appoint an *amicus curiae* or friend of the court to assist in such proceedings if the Federal Court judge considered that such an appointment is warranted. That's the kind of decisions that they make.
>
> **Senator McPhedran:** My concern is with the "if." That's what I'm highlighting here.
>
> **Mr. Goodale:** I hear your point, senator.
>
> **Mr. Brown:** I would add the role of special advocates in the security certificate process is really very unique to a very rarely used process. The more traditional process to address the concerns you raise is the *amicus*. I think the legal view is — and I'm turning to Doug on this as well — that there are well-established precedent in terms of using *amicus* to protect the very interest you're concerned about, without having to go to the much more elaborate and complicated process of the special advocates which are linked to the security certificates.
>
> *Proceedings of the Standing Senate Committee on National Security and Defence*, 42nd Parl, 1st Sess, Issue No 40 (10 April 2019).

[48] As concluded in *Brar/Dulai*, the *SATA* assigns "designated judges the discretion to ensure that procedural fairness is afforded to the appellant, and to decide whether this requires the appointment of an *amicus curiae* with a mandate that is responsive to the circumstances" (*Brar/Dulai*, at para 194). It relies on this discretion to meet its overarching object of balancing national security and the safety of Canadians with individual rights and freedoms.

(3) Role the *Amicus Curiae* in this Appeal

[49] Consistent with the general jurisprudence regarding the role of an *amicus curiae*, the legislative object and Parliament's intent to rely on the Court's ability to appoint an *amicus curiae* to ensure a fair judicial process, and my decision in *Brar/Dulai*, I shall now set out the precise role assigned to the *Amicus Curiae* in this appeal. Given the limits on full disclosure and full participation, and the alleged *Charter* rights at play, my role as a designated judge requires me to assign the *Amici Curiae* a robust mandate in order to ensure the fairest judicial process possible within my statutory and inherent powers.

[50] The role assigned to the *Amicus Curiae* in my Order dated March 24, 2020, can be summarized as representing the interests of the Appellant before the Court during the *ex parte* and *in camera* portions of the appeals, where the participation of the Appellant and his counsel is prohibited by the *SATA*. In accordance with the two principal duties of the designated judge, the *Amicus Curiae*'s role in representing the interests of the Appellant before the Court during the *ex parte* and *in camera* portions of the appeal can be understood in a similar way:
(i) representing the interests of the Appellant with regard to issues of disclosure of information or other evidence; and (ii) representing the interests of the Appellant with regard to the impact of confidential information or other evidence on the reasonableness of the Minister's decision on appeal.

[51] First, by representing the interests of the Appellant with regard to issues of disclosure of information or other evidence, the *Amicus Curiae* assists the Court in attempting to ensure a fair

judicial process: a process that attempts to give the most effect possible to the Appellant's right to directly know and meet the case against him within the limits imposed by the *SATA*. This has the *Amicus Curiae* providing an opposite perspective to the Respondents' confidentiality claims and helping the judge to include as much information as possible in the summaries issued by the Court, subject, of course, to the confidentiality limits imposed by the *SATA* and the submissions of the Respondents. An identical role is summarized at para 200 of *Brar/Dulai*:

> [200] Despite the assumption of an active and interventionist role by the designated judge, the *ex parte* and *in camera* advantage afforded to the Respondent places the designated judge in a position where they are exposed to potential systematic overclaiming of confidentiality identified by the Supreme Court of Canada in *Harkat (2014)*, at para 63, given that the interests of the Appellants are not heard during this portion of the appeal. The appointment of the *Amici Curiae* attempts to address this vulnerability, as their role is to assist the Court by representing the interests of the Appellants during the disclosure portion of the appeal, thereby allowing the designated judge to fully scrutinize the merits of the confidentiality claims made by the Respondent. Should the designated judge ultimately decide that certain information must remain confidential pursuant to paragraph 16(6)(b), the role of the *Amici Curiae* is to then help the designated judge summarize this information in a manner that provides the Appellants with as much information as possible within the confidentiality limits of the *SATA*.

[52] Second, by representing the interests of the Appellant with regard to the impact of the confidential information on the reasonableness of the Minister's decision to keep the Appellant on the *SATA* list, the *Amicus Curiae* is helping the designated judge ensure that they are making their decision based on the facts and the law and ensure that the Appellant is provided with a substantial substitute to full disclosure and full participation. This is a substantial role that mirrors what is summarized at para 203 of *Brar/Dulai*:

> [203] As the Appellants will be able to make their case as to why the Minister's decision was unreasonable based on the information and evidence disclosed to them, and the summaries provided concerning the confidential information, their argument is limited given their inability to make full submissions that account for the confidential information and the Respondent's submissions during the *ex parte* and *in camera* hearings on the merits of the Minister's decision. The role of the *Amici Curiae* is to understand the Appellants' position and to represent their interests to the Court with regard to this confidential information and evidence in order to avoid a gap in the appeal where the interests of the Appellants are not being presented to the Court. In other words, the *Amici Curiae* are tasked with arguing the unreasonableness of the Minister's decision under appeal, in a manner that is complementary to the Appellants' position on the public evidence, based on the confidential information and evidence, during the *ex parte* and *in camera* portions of the appeal. This is essential in permitting the designated judge to ground their decision on the facts and the law.

[53] Overall, this role goes beyond the role assigned to the *amici curiae* in *Telbani*, at para 31 as it is more robust and interventionist. This is partly due to the difference in circumstances, notably the absence of a discretionary power to disclose information or other evidence if, in the judge's opinion, the public interest in disclosure outweighs the public interest in non-disclosure. See subsection 38.06(2) of the *Canada Evidence Act* as well as the discussion on this discretionary power as a less intrusive alternative in *Charkaoui I*, at para 77. It is a role similar to that assigned in *Section 18.1 CSIS Act (Re)*, at paras 47, 53–54 and 57, *CSIS Act (Re)* (2008), at para 3, or *Khadr*, at paras 31–32, keeping in mind the comments above regarding my ability to appoint an *amicus curiae* to act "on behalf" of a party. See *Brar/Dulai*, at paras 204–212.

[54] That being said, as I have found in *Brar/Dulai*, at paras 213–214, despite the many similarities between the role assigned to the *Amicus Curiae* in this appeal and a special advocate or counsel for a party, the inherent limits on the *amicus curiae*'s role, as set out in *Telbani*,

at paras 27–32 and *Huang*, at paras 35–37, still apply. As such, the role assigned to the *Amicus Curiae* in my Order dated March 24, 2020, must be read according to this inherent limit, which prohibits the Court from assigning an *amicus curiae* a role that obliges them to take on a solicitor-client role.

[55] Therefore, I must deny the Appellant's interpretation of the *Amicus Curiae*'s role as one permitting him to "act on behalf" of the Appellant during the *ex parte* and *in camera* portions of the appeal. Rather, the *Amicus Curiae*'s role is to represent the interests of the Appellant during the *ex parte* and *in camera* portions of the appeal. While the difference between these two interpretations may appear to be semantic, the latter is consistent with the *Amicus Curiae*'s inherent role of assisting the Court as it does not place the *Amicus Curiae* in a conflict between assisting the Court and acting on behalf of the Appellant – the *Amicus Curiae*'s duty must always be to the Court and not to the Appellants. Assigning the *Amicus Curiae* the role of acting "on behalf" of the Appellant is not in line with what *Telbani* and *Huang* state concerning what is required to ensure that the *Amicus Curiae* does not undertake a solicitor-client role, inconsistent with an *amicus curiae*'s inherent function. As said earlier, this may change as the appeal progresses, notably depending on what the *ex parte* and *in camera* hearings reveal. However, for the time being, the role assigned to the *Amicus Curiae* is limited to representing the interests of the Appellant during the *ex parte* and *in camera* portions of the appeal. Nevertheless, whether this inherent limit on the role of the *Amicus Curiae* prevents the Court from providing the Appellant with an adequate substantial substitute is a question that will be decided when the Court considers the alleged *Charter* rights violations.

C. *Powers of the Amicus Curiae*

[56] To ensure that the *Amicus Curiae* can undertake this robust and interventionist role of representing the interests of the Appellant throughout the *ex parte* and *in camera* portions of this appeal, my Order appointing the *Amicus Curiae* assigned the following powers: (1) to access the confidential information or other evidence; and (2) to meet and communicate with the Appellant prior to having access to the confidential materials while preserving the Appellant's solicitor-client privilege. In addition, it is my intention to amend this Order to include the following powers: (3) to assist in the preparation of summaries of information, as discussed above; (4) to make oral and written submissions in *ex parte* and *in camera* hearings, attend public hearings, and make oral and written submissions during public hearings, with leave of the Court; and (5) to cross-examine the Respondents' witnesses. Regarding the content of these powers and the justification for assigning them to the *Amicus Curiae*, I rely on my reasons in *Brar/Dulai*, at paras 215–246 and I will amend the Order appointing the *Amicus Curiae* accordingly. That being said, seeing as the parties and the *Amicus Curiae* disagree regarding the limits of the *Amicus Curiae*'s power to cross-examine the Respondents' witnesses, I will elaborate on this point.

[57] The Respondents propose that the *Amicus Curiae* should be allowed to cross-examine their witnesses on issues of disclosure but argue that, barring new evidence, the *Amicus Curiae* should not be afforded the power to cross-examine their witnesses regarding the merits of the Minister's decision on appeal. I cannot agree with this position. First, my reading of the *SATA* does not provide for two distinct mandatory phases: the disclosure phase and the merits phase. In fact, as I have learnt in my nearly two decades of experience as a designated judge, we are

often called upon to deal with issues that relate to both the disclosure of information and the merits of a decision at the same time. Furthermore, consistent with the role of the designated judge, the alleged *Charter* rights violations in this appeal, and the role I assigned to the *Amicus Curiae*, it is my position that the *Amicus Curiae* should have the opportunity to cross-examine the witnesses on aspects relating to the merits of these appeals as well. That being said, the Court's role as a "gatekeeper", and its inherent right to control its own process, does allow it to impose restrictions on this power to cross-examine should the *Amicus Curiae*'s cross-examination go beyond assisting the Court in fulfilling its duties. Indeed, the *Amicus Curiae*'s cross-examination is, of course, subject to objections made by the Respondents' counsel and the rulings of this Court. See *Brar/Dulai*, at paras 235, 238, and 246.

[58] Cross-examination is a vital tool to the discovery of truth. The opportunity to cross-examine has consistently been found by the Supreme Court of Canada as a key principle protected at section 7 and subsection 11(d) of the *Charter*; it is essential to a fair judicial process, being a fundamental principle of justice under section 7 of the *Charter*. See *R v Lyttle*, 2004 SCC 5 at paras 41–44 [*Lyttle*]. Therefore, it is essential that the *Amicus Curiae* be provided with the opportunity to cross-examine the Respondents' witnesses on the merits of the confidentiality claims made as well as on the merits of the Minister's decision to not remove the Appellant's name from the *SATA* list; imposing limits on his ability to cross-examine witnesses in the *ex parte* and *in camera* portions of the appeal is inconsistent with a fair judicial process. See *Brar/Dulai*, at paras 236–238.

[59] A finding contrary to this would permit the Respondents to shield their secret evidence, never seen by the Appellant, from challenge and scrutiny, which in turn, prevents the Court from fulfilling its duty to decide upon the reasonableness of the Minister's decision based on the facts and the law. This is inconsistent with what the Supreme Court of Canada has found on what is required for the designated judge to be able to ensure a fair judicial process to a party denied full disclosure and full participation in the interest of national security. See *Charkaoui I*, at para 64, *Harkat (2014)*, at para 35, and *Brar/Dulai*, at para 242. It is equally inconsistent with the general balancing object of the *SATA* and a harmonious interpretation of its express appeal provisions. Indeed, adopting the Respondents' proposed limitations on the *Amicus Curiae*'s ability to cross-examine would be inconsistent with the designated judge's duty to provide an appellant with an opportunity to be heard at paragraph 16(6)(d) and the duty to determine whether evidence is relevant at paragraph 16(6)(g). See *Brar/Dulai*, at para 244.

[60] In sum, this Court finds that the *Amicus Curiae* must be given the opportunity to cross-examine the Respondents' witnesses on both issues of merit and disclosure as this power is necessary to assist the Court in ensuring a fair judicial process and the reasonableness of the Minister's decision, in light of the limitations on the Appellant's ability to receive full disclosure and fully participate in this appeal. When conducting cross-examination on issues of disclosure, the *Amicus Curiae* plays a vital role by testing the Respondents' confidentiality claims to ensure that only the information or other evidence that must be kept confidential for national security reasons under the *SATA* is excluded from disclosure to the Appellant. As I have stated in *Brar/Dulai*, a fair judicial process is one that attempts to provide as much information as possible to know the case against one within the national security limits imposed so that they may directly

respond to that case, as opposed to having to rely on a substantial substitute. See *Brar/Dulai*, at paras 239–240. While cross-examining on issues of merit, the *Amicus Curiae* assists the designated judge by testing the reliability and appropriateness of new evidence and testing the confidential information grounding the Minister's decision. See *Brar/Dulai*, at paras 241–244.

VI. Conclusion

[61] To conclude, my answer to each one of the preliminary questions is as follows: (A) the role of the designated judge in *SATA* appeals is that of a robust and interventionist "gatekeeper," as described in both *Charkaoui I* and *Harkat (2014)*; (B) the role of the *Amicus Curiae* is to assist the Court by representing the interests of the Appellant during the *ex parte* and *in camera* portions of the appeal in a robust and interventionist manner that does not go as far as have him assume the role of counsel for the Appellant; and (C) the powers assigned to the *Amicus Curiae* includes, among others, the opportunity to cross-examine the Respondents' witnesses on both issues of disclosure and merit, subject to successful objections made by the Respondents' counsel and the rulings of this Court. As I have mentioned earlier, and consistent with the present reasons, the Order dated March 24, 2020, will be amended accordingly. To that purpose, a public case management conference will be held in order to receive the input of all parties and the *Amicus Curiae* on the amendments to be made and to discuss further matters essential to moving the proceedings forward.

"Simon Noël"

Judge

ANNEX A

ORDER

UPON conducting a public case management conference by teleconference on March 18, 2020, in the presence of counsel for the parties to discuss matters of interest, which included, among others, the appointment of an *amicus curiae* and establishing a timeline for the next steps in this appeal;

AND UPON acknowledging that this appeal is governed by the provisions set out in subsection 16(6) of the *Secure Air Travel Act*, SC 2015, c 20, s 11 [*SATA*];

AND UPON noting that the Respondents have informed the Court that the Appeal Book will contain redacted information regarding the decision to maintain the Appellant's status as a listed person under section 15 of the *SATA*, information which they believe would be injurious to national security or endanger the safety of any person if disclosed. The Court will therefore accept the filing of a redacted copy of the Appeal Book at this stage, the whole subject to this Court's decision as to whether the disclosure of such would be injurious to national security or endanger the safety of any person;

AND UPON noting that the Appellant and his counsel will be excluded from part of the appeal if a request is made by the Respondents, pursuant to paragraph 16(6)(a) of the *SATA*, that this Court hear submissions on the information or other evidence in the absence of the public and the Appellant and his counsel in order to prevent an injury to national security or to protect the safety of any person;

AND UPON noting that the Appellant requested in his Notice of Appeal the appointment of security cleared lawyer from the firm chosen by the Applicant to represent him or by *amicus curiae*, as the Court deems fit;

AND UPON considering that the appointment of an *amicus curiae* will assist the Court in performing its obligations, including those under the *SATA*;

AND UPON noting the alleged violations of the *Canadian Charter of Rights and Freedoms*, noting the right to know and meet the case against one, and noting that there must be an adequate substantial substitute for persons who cannot personally participate in secret proceedings: *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 27, *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43;

AND UPON noting that the appointment of an *amicus curiae* in such a situation will assist the Court in forming its opinion during the hearing of information or other evidence presented by the Respondents in the absence of the Appellant and the public and in determining whether its disclosure would be injurious to national security or endanger the safety of any person;

AND UPON noting that the appointment of an *amicus curiae* is at the discretion of the Court and that *amici curiae* have been appointed in similar ongoing appeals under the *SATA*;

CONSIDERING that fairness dictates that one of the most essential parts of the *amicus curiae*'s mandate will be meeting and communicating with the Appellant and his counsel to discuss the matters at hand and, to that purpose, such meetings may be held via telephone or in person in Toronto;

CONSIDERING the importance of ensuring full and open communication between the Appellant, his counsel, and the *amicus curiae* prior to the *amicus curiae*'s review of the confidential information in this case;

CONSIDERING this Court's statutory duty to determine this appeal without delay under subsection 16(4) of the *SATA*, the inherent delays due to the COVID-19 pandemic, and the following positions taken by the parties concerning the role of the *amicus curiae* in this appeal:

a. The Appellant's position is that the *amicus curiae* should be given a role that allows them to represent him before the Court in the *ex parte in camera* proceedings in this appeal; and

b. The Respondents' position is that the role requested by the Appellant for the *amicus curiae* is incompatible with the legal nature of an *amicus curiae*;

CONSIDERING that the appointment of Mr. Gib van Ert would limit delay and further assist the Court in this matter, notably given his experience in similar appeals under the *SATA*, which are currently before this Court;

AND UPON hearing from counsel for the Respondents that the COVID-19 pandemic is causing unforeseen delays in finalizing the redactions to information in the documents that were before the Minister, the disclosure of this information, which in the opinion of the Respondents, would be injurious to national security or endanger the safety of any person;

THIS COURT ORDERS that:

1. Mr. Gib van Ert of Gib van Ert Law in Ottawa, Ontario, be appointed as *amicus curiae* in this matter and shall assist the Court in performing its obligations, including those under the *SATA*, in a manner coherent with this Order and any subsequent Order(s) concerning the mandate of the *amicus curiae* in this matter, and should seek guidance from the presiding judge in this proceeding on an as-needed basis and in any circumstances not provided for within the current or subsequent Orders;

2. The *amicus curiae* shall have access to the confidential information in this appeal as determined by the Court;

3. Until such time as the *amicus curiae* has had access to the confidential information and documents in this appeal, the *amicus curiae* may meet or communicate with counsel for the Appellant for the purpose of understanding matters of interest to the Appellant in relation to this appeal, including communicating with the Appellant himself in the presence of his counsel, if counsel for the Appellant and the *amicus curiae* believe it to be necessary and the Appellant agrees. The Court encourages that this communication begin in a timely manner to ensure that this appeal may proceed with minimal delay following the lifting of the Court's exceptional measures in response to the COVID-19 pandemic, subject to any other considerations of heightened importance;

4. The *amicus curiae* shall then inform the Court and counsel in writing when he is ready to proceed with the review of the confidential material. The *amicus curiae* will also inform the Court and counsel for the Respondents once he has finished reviewing the confidential materials;

5. Once the *amicus curiae* has had access to the confidential information in this appeal, the *amicus curiae* shall not have any communication with the Appellant or his counsel without prior leave of the Court;

6. For clarity, paragraph 5 of this Order does not prohibit counsel for the Appellant from sending one-way communications to the *amicus curiae* at any time during the proceeding, the receipt of which the *amicus curiae* may acknowledge;

7. Any communication between the Appellant and his counsel, which is protected by solicitor/client or litigation privilege, will not lose that privilege if it is shared with the *amicus curiae*;

8. The *amicus curiae* will keep confidential from the Appellant, his counsel, and any other persons not participating in the *in camera ex parte* proceedings, all information and documents to which the *amicus curiae* has had access;

9. The Respondents will pay reasonable fees and disbursements, including travelling expenses of the *amicus curiae* if required and the *amicus curiae* will do his utmost to ensure that they shall be reasonable;

10. The Respondents and the *amicus curiae* may address the Court should there be any disagreements or misunderstandings on the reimbursement of the reasonable fees and disbursements of the *amicus curiae*;

11. Given that the parties have signalled their disagreement as to the role of the *amicus curiae* during the *in camera ex parte* proceedings in this appeal, written representations on this issue shall be provided by the parties and the *amicus curiae* before this Court

decides the role, responsibilities, and powers the *amicus curiae* is to be assigned during the *ex parte in camera* proceedings;

12. The above noted written submissions shall be provided in accordance with the following timeline:

a. The Respondent's submissions shall be provided on, or before, April 24, 2020;

b. The Appellant's submissions shall be provided on, or before, May 8, 2020;

c. The *amicus curiae*'s submissions shall be provided on or before May 8, 2020;

13. Given the Respondents' familiarity with the issue of the role of the *amicus curiae* in the context of an appeal under the *SATA*, due to their involvement in two similar ongoing appeals, the Court asks that the Respondents make reasonable efforts to submit their written representations as soon as possible in order to limit delay. Should the Respondents submit their written representations prior to April 24, 2020, the Appellant and the *amicus curiae* will have two weeks to submit their respective written representations;

14. The Respondents shall report to the Court in writing during the week of April 20, 2020, concerning the timeline for the next steps in this appeal. This includes the following steps: (1) informing the Court as to any agreement regarding the content of the Appeal Book; (2) the filing of the classified Appeal Book; (3) the service and filing of the public Appeal Book containing the redacted information; (4) the filing of the classified affidavits; and (5) the service and filing of the public affidavits. In the week following receipt of this report, subject to the evolving situation regarding the COVID-19

pandemic, the Court intends to hold a public case management conference in order to discuss timelines for these next steps in this appeal;

15. The parties or the *amicus curiae* may apply to the presiding judge, or the case management judge, in this proceeding, on notice to the other participants, to vary the terms of this Order.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-120-20
STYLE OF CAUSE:	SAAD GAYA v. CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARING HELD BY VIDEOCONFERENCE IN OTTAWA, ONTARIO
DATE OF HEARING:	MAY 20, 2020
REASONS:	NOËL S. J.
DATED:	June 30, 2020

APPEARANCES:

Mr. Zachary Al-Khatib	FOR THE APPELLANT
Ms. Maria Barrett-Morris Mr. Ian Hicks Ms. Michelle Lufty Ms. Suzanne Bruce	FOR THE RESPONDENTS
Mr. Gib Van Ert	*Amicus Curiae*

SOLICITORS OF RECORD:

Stockwoods LLP Barristers Toronto, Ontario	FOR THE APPELLANT
Attorney General of Canada	FOR THE RESPONDENT