Date: 20090402

Docket: DES-4-08

Citation: 2009 FC 342

Ottawa, Ontario, April 2, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
This certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND LE BARREAU DU QUÉBEC, intervenor

ORDER AND REASONS FOR ORDER

Introduction

[1] Further to the order issued by this Court on September 3, 2008, granting the motion by Mr. Charkaoui (the named party) and ordering the Ministers to disclose "party-to-party" any relevant evidence or information whose disclosure would not be injurious to national security or to

the safety of any person, the Ministers filed a memorandum from the Assistant Director (Operations), Canadian Security Intelligence Service (CSIS), dated September 12, 2008, confirming the following:

> [TRANSLATION]
> This is further to the September 3 order by Madam Justice Tremblay-Lamer.
>
> On February 22, 2008, a summary that did not contain any item whose disclosure would be injurious to national security or to the safety of any person was provided to the named person to enable him to be reasonably informed of the case made by the Ministers. The document provided to the named person was 60 pages long (including the appendices) and was accompanied by a binder containing approximately 64 documents. A revised summary was sent to the named person on September 11, 2008. It was accompanied by a binder containing four documents. This revised summary did not contain any item whose disclosure would be injurious to national security or to the safety of any person.
>
> To the best of my knowledge, through these summaries and appended documents, CSIS has disclosed to the named person all of the information and other relevant evidence, whether favourable or not to the Ministers' case, that could be disclosed to the named person without being injurious to national security or to the safety of any person.

[2] The purpose of this Order was to respond to the concerns of the Court and to confirm that the Ministers had applied the principles established in *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39, 2008 SCC 38 (*Charkaoui II*), that information and other evidence that they had filed in the Court docket at the same time as the certificate and on which they based their arguments, and <u>any evidence</u> that could be disclosed to the named person, had been.

[3] This Order was based strictly on the evidence that had already been filed by the Ministers, and the term "party-to-party" communication in this context was intended to determine whether

other classified information could be placed in the public file and thus provided to the named person.

[4] Since then, the context has changed. After hearing *in camera* the testimony of Canadian Security Intelligence Service (CSIS) employees, who described the extent of disclosure needed to comply with Charkaoui II, the Court learned that additional evidence was to be provided.

[5] On October 28, 2008, the Court issued an order explaining that the Ministers and CSIS had filed before the designated proceedings section of the Court all the information and all intelligence linked to Mr. Adil Charkaoui, including rough copies, diagrams, recordings and photographs in the possession of CSIS.

[6] In a public direction dated February 18, 2009, the Court specified that this additional disclosure was to be received but not filed at this point in the proceeding, pending a decision by the Court on the merits of this issue.

[7] Since these orders, the named person has taken note of questions asked in four similar cases by Chief Justice Allan Lutfy in his Order of January 2, 2009, as follows:

> (a) What is the role of the designated judge with respect to the additional information disclosed by the Ministers pursuant to the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38? More specifically, does paragraph 62 of that decision require the judge to "verify" all information disclosed by the Ministers if the special advocates and solicitors for the Ministers all agree that a portion of that information is irrelevant to the issues before the Court?

(b) Should the information disclosed to the named persons and their solicitors be placed in the Court's public files in these proceedings? If so, when?

[8] These questions had not been addressed in the order of September 3, 2008. The named person is asking the Court to address these issues of law concerning upcoming supplementary disclosure.

[9] The special advocates also asked the Court in a communication dated December 5, 2008, to have the parties argue certain questions of law before the *in camera* hearings on their proposals for supplementary disclosure. These questions are as follows:

- What are the content and validity of the national security standard provided under the Act?
- Who bears the burden (through presentation or persuasion) of proving whether or not the disclosure would be injurious to national security or to the safety of any person?
- What standard of proof is associated with this burden?

[10] The parties filed written submissions on all of these issues of law, and public hearings were held on March 10 and 11, 2009.

[11] This judgement aims to answer these questions.

1. "Party-to-party" disclosure

[12] I believe that there is a distinction to be made between the supplementary disclosure of information filed by the Ministers in support of the certificate (relevant information) and the additional information received but not filed (additional information) further to the order of October 28, 2008.

[13] Hence, I shall address the upcoming disclosure in two categories: the supplementary disclosure of relevant information (Phase I) and the disclosure of additional information further to *Charkaoui II,* above (Phase II).

A. The supplementary disclosure of relevant information (Phase I)

[14] Subsection 77(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) requires the Minister to file with the Court the information and other evidence on which the certificate is based and a summary of this evidence for the named person:

> (2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or
>
> (2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.

> endanger the safety of any person if disclosed.

[15] As pointed out by the Ministers, any additional summary that would be provided by the Court to the named person would address evidence that is already on file.

[16] Other evidence that until then had been classified would be provided to the named person pursuant to paragraphs 83(1)(*d*) and 83(1)(*e*) of the IRPA and further to the proposals for disclosure and the answers from the Ministers, if the Court decides that the evidence can be disclosed without being injurious to national security or to the safety of any person. The IRPA does not have any provisions conferring on the named person the discretion to veto their being placed in the public files.

[17] On this point, my colleague, Madam Justice Dawson, in *Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration v. Almrei, Harkat, Jaballah, and Mahjoub*, 2009 FC 240, at paragraph 60, recently stated that the open court principle requires that the information be placed in the public files:

> [60] The parties and the special advocates submit, and I agree, that because these summaries relate to information which is provided and relied upon by the Ministers, and to what transpired in the *in camera* proceedings, the open court principle requires that these summaries be placed in the Court's public files.

[18] What about privacy considerations in such a case? For the named person, placing the supplementary evidence and information in the public file even before it is provided to the named person may further compromise the procedural fairness owed to him or her because this practice

would destroy that party's right to protect the confidentiality of personal information that would be unduly prejudicial, contrary to the interests of justice.

[19] The named person submits that when the Crown sets up a file on an individual, it is required to establish the need for doing so, and to protect its confidentiality. There is no presumption that the named person has relinquished his or her privacy, including with respect to the information that he provided to CSIS or the Canada Border Services Agency since he provided it in a context where there was an expectation that this information would be treated in confidence.

[20] In this case, Rule 151(1) of the *Federal Courts* Rules, SOR/98-106 (Rules) permits the Court, on motion, to order that material to be filed be treated as confidential. Unless there is disclosure preceding the public filing with the Court, this power is or may be compromised.

[21] Counsel also claim that Rule 151 may be applied to enable the named person to assert his rights not only with respect to the evidence concerning his privacy but also regarding the admissibility and reliability of this evidence.

[22] In my opinion, a distinction should be made between the procedure to follow in determining the confidentiality of a document and its admissibility or reliability.

[23] Rule 151 enables the Court, on motion, to order that certain documents be treated as confidential. The reasons why the Court would make such an order have to do with privacy, for

instance, the fear of reprisal against an applicant or his or her family (*Ishmela v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1085, 2003 FC 838; *A.B. v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1528 (T.D.); *A.C. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1861, 2003 FC 1452); proprietary, commercial and scientific interests (*Apotex Inc. v. Wellcome Foundation LT.D.*, [1993] F.C.J. No. 1117 (T.D.); competitive harm (*International Water-Guard Industries Inc. v. Bombardier Inc.*, [2007] F.C.J. No. 372, 2007 FC 285).

[24] It was never intended that a motion under this provision would address the admissibility of evidence. Thus, I am prepared to accept the possibility that information to be disclosed could be the subject of a motion under Rule 151 (where it concerns the named person's privacy), but there is nothing to suggest that it could go beyond the context of a motion for a confidentiality order.

[25] As well, I would point out that Rule 151 applies only to documents that <u>have not yet been filed</u> with the Court.

[26] Rule 151 on the filing of confidential documents reads as follows:

> Motion for order of confidentiality
>
> 151. (1) On motion, the Court may order that material <u>to be filed</u> shall be treated as confidential.
>
> Demonstrated need for confidentiality
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings. [my emphasis]

[27] In *Harkat (Re)*, [2009] F.C.J. No. 228, 2009 FC 167, Mr. Justice Noël applied Rule 151 under circumstances similar to those in the case of Mr. Charkaoui. Rule 151 was used to mitigate the risks of violating Mr. Harkat's privacy and the serious harm he could suffer if certain summaries were placed in the Court's public files; all this was done in order to protect his most basic rights. Justice Noël gave Mr. Harkat the opportunity to review the summaries before placing them in the Court's public file, so that Mr. Harkat could decide whether he would file a motion for a confidentiality order under Rule 151.

[28] I agree with Justice Noël's reasoning. However, I would add that, in order to avoid the difficulty associated with the terms of Rule 151, which applies only to documents that have not yet been filed, I would invoke the rarely used Rule 4 of the Rules, which pertains to matters not provided for, and is often called the "gap provision". Rule 4 reads as follows:

> Matters not provided for
>
> 4. On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

[29] The novelty of the current situation, namely the requirement to produce summaries of the evidence and the *de facto* inapplicability of Rule 151, means that Rule 4 has not yet been applied in this context. However, the statements of Mr. Justice Evans in *Levi Strauss & Co. v. Era Clothing Inc.*, [1999] F.C.J. No. 1181 (T.D.) are relevant. That case was an action for trademark infringement, in which one of the parties brought a motion for a protective

confidential order with respect to documents that had not yet been placed in the court file because the parties were not yet at the discovery stage. Justice Evans stated in paragraph 27 of the decision:

> 27 No rule appears to provide specifically for the making of confidentiality orders with respect to material that is not to be filed, and thus does not fall under Rule 151. However, no such rule was contained in the previous Rules either. Nonetheless, the undertaking of confidentiality that is implied with respect to material disclosed in the course of discovery and elsewhere during the litigation process is sufficient to authorize the Court to issue confidentiality orders that cover material not included in Rule 151. This would seem to be an appropriate occasion for invoking Rule 4, the "gap" provision.

[30] Rule 4 is used to fill the gaps in procedural issues, not in substantive questions (*Vespoli v. Canada*, [1988] 2 F.C. 125 (T.D.)). The difference between "to be filed" and "have been filed" is a practical and procedural matter.

[31] I recognize that Rule 4 must apply in a restrictive manner, and only to overcome certain difficulties in the application of the Rules, difficulties that could not have been foreseen when the Rules were written (see, *Maple Leaf Mills LT.D.. v. Baffin Bay (The)* [1973] F.C. 1097 (T.D.)). It would be a euphemism to say that the problem caused by the expression "to be filed" in the context of summaries of confidential evidence, where the confidential evidence was filed and the summaries must also be considered filed, could have been avoided when the Rules were drafted. The application of a new legislative scheme (February 2008) in light of a subsequent judgment (*Charkaoui II*) raises factors that were difficult, if not impossible, to foresee.

[32] Even if we were to start from the premise that the Rules are in and of themselves a complete code, and that they provide the tools needed to settle the issues brought to the Court, as indicated in *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No. 1699, 2004 FC 1393, Rule 4 is used as a last resort because, in this context, there would be no other way for Mr. Charkaoui to assert his rights with regard to the confidentiality of certain information that could affect his privacy.

[33] In brief, allowing the named person to bring a confidentiality motion is the appropriate remedy for the serious harm that he could suffer if he did not have the opportunity to bring such a motion. Preventing him from doing so because of the wording of a procedure that was written at a time when it would have been impossible to imagine the circumstances would needlessly aggravate the harm.

[34] The special advocates will be able to identify the *prima facie* evidence that could be the basis of a motion under Rule 151 and bring it to the Court's attention *in camera* before public disclosure of the information. In fact, the Ministers themselves have agreed to such an approach:

> [TRANSLATION]
> …so, at this point, you agree that this information, which would be raised by the special advocates, could be placed under seal and presented to the public counsel**?**
>
> Mr. JOYAL: Absolutely, if the special advocates raise the argument, it will be given fair consideration and they will have to make a *prima facie* case, as they did before Justice Nöel, that Rule 151 applies. (Transcripts of March 11, 2009, pages 109 and 110).

[35] In my opinion, the powers granted to the special advocate in paragraph 85.2(*c*) of the IRPA to "exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national", enable them to proceed in this manner with my authorization.

[36] The Court would then delay placing this information in the public file. The information would be provided to the named person's solicitors "party-to-party" for a period of fourteen days to give them the opportunity, if necessary, to review the information and decide whether the named person wants to bring a motion under Rule 151.

[37] At the end of this 14-day period, if no such motion has been served and filed, the information will be placed in the public file. If a motion is brought, the documents will be kept under seal until the Court has disposed of the matter.

[38] The Court points to the applicable principles for bringing such a motion. The test that must be met to make an order of confidentiality under Rule 151 was set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, 2002 SCC 41, paragraph 53:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to

> free expression, which in this context includes the public interest in open and accessible court proceedings.

[39] *McCabe v. Canada (Attorney General)*, [2000] F.C.J. No. 1262 (T.D.), reiterates that concerns about confidentiality, absent the presence of subjective and objective criteria, are not sufficient to grant a confidentiality order:

> 8 The justifiable desire to keep one's affairs private is not, as a matter of law, a sufficient ground on which to seek a confidentiality order. In order to obtain relief under Rule 151, the Court must be satisfied that both a subjective and an objective test are met. See: *AB Hassle v. Canada (Minister of National Health and Welfare), [1999] F.C.J. No. 808* (A-289-98, A-315-98, A-316-98, May 11, 1999, F.C.A.) affirming (1998) 81 C.PAGER. (3d) 121. Subjectively, the party seeking relief must establish that it believes its interest would be harmed by disclosure. Objectively, the party seeking relief must prove, on a balance of probabilities, that the information is in fact confidential.

[40] This position is also reflected in the area of immigration. In *Canada (Minister of Citizenship and Immigration) v. Fazalbhoy*, [1999] F.C.J. No. 51 (T.D.), a motion had been brought for an order of confidentiality to protect the information provided by the named person in his application for Canadian citizenship. Mr. Justice Gibson denied this motion, stating as follows in paragraph 11:

> Any undertaking of confidentiality given by the Minister is not binding on this Court. The respondent has provided no special reasons to justify protection of his personal information on the records of this Court. His reliance on the words on the form provided for his use, the desire to which he attests to keep his affairs private and the fact that his personal information is before this Court not by reason of his own initiative provide a basis for sympathy for the respondent's position. But those considerations do not discharge the onus on him to justify a confidentiality order.

[41] Unfortunately, when it comes to admissibility and reliability, Rule 151 is of no use. As indicated above, exhaustive research of the jurisprudence clearly demonstrates that the reasons for a motion for confidentiality never address the exclusion of evidence.

[42] Moreover, Rule 4 cannot be used to fill this gap because it is not a matter of procedure but of substance, to which Rule 4 does not apply (*Vespoli v. Canada*, above).

[43] However, paragraph 85.1(2)(*b*) provides that one of the responsibilities of the special advocate is to challenge the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the named person.

[44] In my opinion, it would be up to the special advocates to make a specific motion to the Court if an issue were raised concerning the admissibility or reliability of classified evidence to be placed in the public file. In this case, the placing on the public file would be delayed until the Court has ruled on the issue.

Additional information under *Charkaoui II* (Phase II)

[45] The Ministers agree with the named person that the additional information that the Court ordered be communicated under *Charkaoui II*, above, should not automatically be filed in the Court docket.

[46] The Ministers submit that this evidence must be distinguished from the information and other evidence that the Ministers already filed in the docket at the same time as the certificate, in accordance with subsection 77(2) of the IRPA, on which they rely in arguing their positions.

[47] I agree that to start, non-confidential information, if any, would first be transmitted "party-to-party" to the named person.

[48] With regard to information that is confidential, the designated judge would not have to verify the reliability and accuracy of the information that the Ministers and special advocates agree is not relevant.

[49] On this point, Madam Justice Dawson, in *Almrei, Harkat, Mahjoub and Jaballah*, above, was of this opinion. She stated as follows:

> [16] The provision for a special advocate, clothed with such a mandate and responsibilities, reflects Parliament's presumed intent to assure a fair hearing in compliance with section 7 of the Charter. The special advocate is in a position to be familiar with the case to be advanced on behalf of the person named in a security certificate and to assist the person concerned to know, to the extent possible, the case to be met, as required by the Supreme Court in Charkaoui 1 at paragraphs 64 and 65.
>
> [17] Having regard to the special advocate's experience at the bar, his or her opportunity to be briefed by the person named in a security certificate, and the mandate and powers given to the special advocate, I am satisfied that the situation is distinguishable from that before the Supreme Court in Charkaoui 2. I am also satisfied by those factors that the special advocate has the means at his or her disposal to protect the interests of the person named in the security certificate by, amongst other things, identifying confidential information or evidence that is not relevant.

> [18] Thus, where the Ministers and the special advocate agree that material disclosed by the Ministers pursuant to Charkaoui 2 (Charkaoui 2 disclosure) is irrelevant to the issues before the Court, the Court may rely upon that agreement. In such a case, the Court need not verify information that the Ministers and the special advocate agree to be irrelevant.

[50] I am of the same opinion. When the Ministers and special advocates agree that the confidential information received by the Court further to *Charkaoui II*, above, is not relevant, the Court can rely on this agreement.

[51] With regard to confidential information that might be considered relevant (particularly by the special advocates since the Ministers have stated that only information filed with the Court at the same time as the certificate is relevant), a summary would be provided to the named person on a "party-to-party" basis where disclosure would be injurious to national security or endanger the safety of any person (paragraph 83(1)(*e*) of the IRPA).

[52] Any disagreement between the Ministers and special advocates that might arise will be arbitrated by the Court. The information in question or any summary that could result from it would only be part of the Court docket if one of the parties or the special advocates filed it in evidence.

2. The national security standard

A. The content and validity of the national security standard

Positions of the parties

(i) The named person

[53] Counsel for the named person submit that a constitutional interpretation of the standard under the IRPA in accordance with the principles of fundamental justice requires that the national security standard set out in the IRPA be aimed at the life of the nation, its territorial integrity or its political independence.

[54] The evidence provided by the Ministers regarding the existence of a public interest privilege in the broad sense and the determination of non-disclosure based on part of the criteria from the jurisprudence decided under the *Canada Evidence Act*, R.S. 1985, c. C-5 (CEA) are insufficient in the context of section 9 of the IRPA to meet the security standard requirement for non-disclosure of evidence that the Ministers filed in support of the security certificate or the inadmissibility of the named person.

[55] The constitutional interpretation that is used must comply with the international instruments to which Canada is signatory because the IRPA contains this requirement of compliance with

international law in paragraph 3(3)(*f*), which is determinative and which is not in the CEA or the former *Immigration Act*.

[56] Counsel for the named person point out that the provisions of section 38 of the CEA set out a complete code whereby the judge is required to weigh the public interest despite any injury to national public security, and may disclose evidence that may be injurious to national security if it is in the public interest to do so (*Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 622, 2007 FC 490), unlike the *IRPA*, which does not confer any similar residual discretionary power *(Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9 (*Charkaoui 1*).

[57] Thus, under the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (*Civil Pact*) and the related tools (including the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984), UN Doc E/CN.4/1984/4 (1984) (*Siracusa Principles*), restated in the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, UN Doc E/CN.4/1996/39 (1996) (*Johannesburg Principles*), national security may only be invoked to justify measures to protect the life of the nation, the integrity of its territory or its political independence against force or threat.

[58] In applying these principles, the House of Lords in *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, set aside the indefinite detention of foreigners who cannot be deported from the United Kingdom, stating that national security demands more than

a threat of isolated terrorism and cannot be assimilated to the national interest. The national interest is defined as that which "concerns the defence and maintenance of the social, political and economic stability of Canada" (*Government Security Policy*, February 1, 2002, Treasury Board of Canada Secretariat, available at http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12322).

[59] The definitions of national security adopted by the Federal Court before the Supreme Court's *Charkaoui* cases cannot be used without violating the requirements of paragraph 3(3)(*f*) of the IRPA.

[60] In the past, the principles of fundamental justice recognized in criminal matters were not applicable to immigration or security certificate matters, but this is no longer so since the Supreme Court's *Charkaoui* cases.

(ii) The Ministers

[61] After taking into consideration the general objectives of the *IRPA* and its context, including provisions on inadmissibility, the Ministers pointed out that the overriding public interest is the protection of information whose disclosure would be injurious to national security or to the safety of any person. They submit that the named person proposes an approach that would render ineffective the legislative protections for information and other evidence whose disclosure would be injurious to national security.

[62] They also point out that the Canadian courts have often emphasized the pre-eminence of the public interest in maintaining the confidentiality of information sources that concern national security (*Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, page 744 (*Chiarelli*)) and that the most important public interest is national security (*Goguen v. Gibson*, [1983] 2 C.F. 463 (C.A.), page 479).

[63] In *Suresh v. Canada*, [2002] S.C.J. No. 3, 2002 SCC 1, the Supreme Court ruled on the meaning of the expression "danger to the security of Canada" and found that this phrase "is not unconstitutionally vague" (paragraph 83) and should be given a "large and liberal interpretation in accordance with international norms" (paragraph 85). It specified that "not only an immediate threat but also possible future risks must be considered".

[64] The Ministers also rely on the decision of Justice Noël in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar - O'Connor Commission)*, [2007] F.C.J. No. 1081, 2007 FC 766 (*Arar Commission of Inquiry*), which addressed the meaning of "national security" under *CEA* 38.06, and found that "'national security' means at <u>minimum</u> the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada" (paragraph 68). [my emphasis]

[65] In *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 509, 2004 FC 420, the Court emphasized the consequences to national security of the inopportune disclosure of information obtained by CSIS.

[66] The different types of information whose confidential nature has to be protected were addressed in *Harkat (Re)*, [2005] F.C.J. No. 481, 2005 FC 393. They include information obtained from human sources, information obtained from CSIS agents where the disclosure would identify the agent and put the agent's life in danger, information about ongoing investigations, secrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient, and information about the technical means and capacities of surveillance used by CSIS.

ANALYSIS

[67] At the outset, I would like to point out that it is important that the Court analyze the concept of the national security standard in light of the objectives of the IRPA, in the context of the relevant jurisprudence on this issue, which cannot be set aside merely because legislative amendments to section 9 of the IRPA were adopted, specifically paragraph 3(3)(*f*) of the IRPA.

[68] Despite the suggestion by counsel for the named person to simply erase the teachings of prior jurisprudence and "start afresh", such an approach would not be desirable because it would run the risk of an interpretation that is contrary to the intention of Parliament and the principles and policies underlying immigration law.

[69] The relevant objectives in the IRPA are in subsection 3(1) of the Act, and explicitly show Parliament's intent to give priority to security.

[70] In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, 2005 SCC 51, the Supreme Court recognized that these objectives marked "a change from the focus in the predecessor statute, which emphasized the successful integration of named persons more than security" (paragraph 10).

[71] Moreover, as the Ministers stated, Canadian courts have recognized the legitimate public interest in protecting the sources of information involving national security (*Chiarelli*, above; *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, 2002 SCC 75, restated in *Charkaoui I*, above, paragraph 58).

[72] How does the concept of national security apply in this context?

[73] The concept of national security was primarily interpreted by the Supreme Court in *Suresh*, above, and restated several times afterwards. The Supreme Court found that this concept is not unconstitutionally vague, while recognizing that the phrase "danger to the security of Canada" is difficult to define. However, the Court stated that the phrase "danger to the security of Canada" should be given a large and fair interpretation in accordance with international norms, that "the determination of what constitutes a 'danger to the security of Canada' is highly fact-based and political in a general sense" and that "all this suggests a broad and flexible approach to national

security" (paragraph 85). The Court also concluded "that to insist on direct proof of a specific threat to Canada" would set the bar too high.

[74] More recently, in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2119, 2005 FCA 436, the Federal Court of Appeal was asked to review the scope of paragraph 3(3)(*f*) of the IRPA. It confirmed that the IRPA had to be interpreted and applied in a manner that complies with the relevant international instruments under paragraph 3(3)(*f*), unless this is impossible under the modern legislative interpretation.

[75] However, the Court noted that a "consideration of the range of instruments potentially falling within paragraph 3(3)(*f*) may suggest that Parliament did not intend them all to be determinative" (paragraph 84)**,** that the range of instruments is "uncertain" (paragraph 86)**,** and that "Parliament intended them to be used as persuasive and contextual factors in the interpretation and application of IRPA, and not as determinative" (paragraph 89)**.**

[76] As seen above, the named person is proposing a restrictive interpretation of the national security standard whereby the government would be justified to claim confidentiality only to protect the life of the nation, the integrity of its territory or its political independence against force or threat.

[77] The named person is relying on the interpretation manual of the *Civil Pact*, the *Siracusa Principles* restated by the *Johannesburg Principles* in which the international experts found that any

restriction on access to information based on security can only be justified when the life of the nation or the integrity of its territory would be in peril.

[78] In my opinion, such an interpretation is too restrictive and does not take into consideration Canadian domestic law, which has recognized the validity of claiming confidentiality in other situations.

[79] In *Charkaoui I*, above, the Supreme Court noted that the scope of non-communication in connection with national security can be quite broad (paragraph 61). One of the examples it gave in this regard was the need to protect society or when information has been provided by countries or informants on condition that it not be disclosed or that information may be so sensitive that it cannot be communicated without compromising public security. These illustrations demonstrate that in Canadian domestic legislation, the scope of the communication is not limiting to the point where the only acceptable reason for non-disclosure would be the very life of the nation, its territorial integrity or its political independence, as advanced by counsel for the named person.

[80] As my colleague Justice Simon Noël pointed out in the *Arar Commission of Inquiry*, above, after an exhaustive review of Canadian domestic law, "'national security' means at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada" (paragraph 68).

[81] The information that has to be protected by the Court was "codified" by my colleague Justice Eleanor Dawson in *Harkat (Re)*, [2005] F.C.J. No. 481, 2005 FC 393, paragraph 89. The relevant passage is reproduced here:

> [89] Examples of information of the type that must be kept confidential include:
>
> 1. Information obtained from human sources, where disclosure of the information would identify the source and put the sources' life in danger (see the decision of Madam Justice McGillis in *Ahani*, above at paragraph 19 where Justice McGillis discusses when human source information may be disclosed). As well, jeopardizing the safety of one human source will make other human sources or potential human sources hesitant to provide information if they are not assured that their identity will be protected.
>
> 2. Information obtained from agents of the Service, where the disclosure of the information would identify the agent and put the agent's life in danger.
>
> 3. Information about ongoing investigations where disclosure of the information would alert those working against Canada's interest and allow them to take evasive action.
>
> 4. Secrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient. (See *Ruby*, above at paragraph 43 and following for discussion of the fact that Canada is a net importer of intelligence information, and such information is necessary for the security and defence of Canada and its allies.)
>
> 5. Information about the technical means and capacities of surveillance and about certain methods or techniques of investigation of the Service when disclosure would assist persons of interest to the Service to avoid or evade detection or surveillance or the interception of information.

[82] These criteria are well established in Canadian domestic law and correspond in large part to the examples provided by the Supreme Court in *Charkaoui I* to illustrate the reasons that the government may invoke for non-disclosure. I see no reason to derogate from them.

[83] In brief, I believe that the role of the designated judge in determining disclosure of information to the named person where the government claims confidentiality is to apply the criteria established through jurisprudence while taking into consideration, on the one hand, the need to preserve confidentiality and, on the other, the importance of providing the fullest possible disclosure with the smallest impact on the named person's right to know the evidence against him to enable him to refute the Ministers' allegations.

B. Who bears the burden of proving whether or not the disclosure would be injurious to national security?

[84] Counsel for the named person submit that the IRPA requires that the Ministers prove, on the balance of probabilities, to the judge's satisfaction, that the disclosure of information or evidence would imminently imperil the life of the nation, its territorial integrity or its political independence. The burden is on the party that is opposed to the disclosure to prove that this disclosure would be injurious to national security. The Supreme Court has frequently confirmed that the Crown bears the burden of justifying the non-disclosure of information to the accused in a criminal case (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R v. Egger*, [1993] 2 S.C.R. 451).

[85] Although the Ministers admit that they bear the burden of proving that disclosure would be injurious to national security, they submit that they have clearly discharged this burden.

[86] I agree with the named person's solicitors in light of the jurisprudence that the burden clearly falls on whoever claims that the disclosure would be injurious to national security or to the safety of any person, hence the government.

[87] I note that in *Charkaoui II*, above, the Supreme Court emphasized the obligation of communication based on section 7 of the Charter attached to the seriousness of the consequences of the proceeding for the named person, and that there is no formal distinction between the different areas of law. In my opinion, this means that, to the extent possible, without injuring national security, procedural fairness demands that the principles established in criminal cases be fully applied, taking into consideration the applicable administrative and immigration law in similar cases in the context of disclosure. Consequently, as in criminal cases, the Crown must justify its refusal to disclose any information.

C. The standard of proof associated with this burden

[88] Counsel for the named person maintain that the requisite standard of proof is the balance of probabilities. Under section 9 of the IRPA, the Ministers have to prove, based on the balance of probabilities and to the judge's satisfaction, that the disclosure of information or evidence would be injurious to the life of the nation, its territorial integrity or its political independence, without deference to the opinions of the Ministers.

[89] In the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, a commission of inquiry set up on February 5, 2004, by Order 2004-48, under Part I of the *Inquiries Act*, R.S. 1985, c. I-11, Commissioner O'Connor was of the opinion that the use of the phrase "would be injurious" in the "Terms of Reference" in the Order setting up the Arar Commission demanded a stricter standard of proof than the one in section 38.01 of the CEA.

[90] Similarly, counsel for the named person note that, given the phrase used in the English version "would be injurious to national security" in paragraph 83(1)(d) of the IRPA, the standard of proof is stricter than the one in section 38.01 of the CEA or in section 15 of the *Access to Information Act*, R.S., 1985, c. A-1.

[91] On the contrary, the Ministers consider that it would be incongruous, on judicial review, to believe that a higher standard than that of reasonable grounds for believing should be applied to determine whether the disclosure of information would be injurious to national security or to the safety of any person.

[92] The standard of reasonable grounds for believing is consistent with the objective of the IRPA to ensure that foreigners or permanent residents who pose a risk to national security are inadmissible to Canada. In view of the prospective nature of the exercise in which the Court is engaged, it would be inappropriate to impose a more onerous burden than that of reasonable grounds.

[93] The Ministers rely on the decision of Justice Noël in *Charkaoui (Re)*, [2003] F.C.J. No. 1816, 2003 FC 1419, where he stated in paragraph 126 that "national security is such an important interest that its protection warrants the use of standards other than the preponderance of evidence standard".

[94] I note at the outset that Justice Noël did not have to decide on the interpretation of the new provisions of section 9 of the IRPA dealing with the confidentiality of information.

[95] I agree with the Ministers that the judge's exercise is prospective and that the risks inherent in the inopportune disclosure of information related to national security call for prudence because once the information is disclosed, there is no going back.

[96] However, the terminology used in the applicable provisions, i.e., paragraphs 83(1)(*d*) and (*e*) of the IRPA, indicate that it is up to the Court to guarantee the confidentiality of information whose disclosure "would be injurious" to national security.

[97] According to statutory interpretation, "[t]oday there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Rizzo & Rizzo Shoes LT.D.. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21).

[98] The *Canadian Oxford Dictionary*, Oxford University Press, 2004 (2nd ed.) defines "would" as "to express probability".

[99] In my opinion, Parliament therefore chose not to adopt an overly speculative approach to determining whether certain information should not be disclosed.

[100] Moreover, I note that the terms used by Parliament in paragraph 83(1)(c) are less strict because the judge can hold an *in camera* hearing if the disclosure "could" be injurious to national security. This difference in language suggests to me that Parliament wanted a higher standard for non-disclosure.

[101] The jurisprudence supports the use of the balance of probabilities standard in interpreting the expression "could be injurious" to national security. Several legal interpretations of the distinction between what "could be injurious" to national security and what actually is injurious to national security have been formulated in connection with the application of the CEA.

[102] The *Arar Commission of Inquiry* decision, above, paragraph 49, states as follows:

> 49 The *CEA* at section 38 offers the following definition of "potentially injurious information":
>
> | | |
> |---|---|
> | "potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. [Emphasis added] | « renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales. [Je |

souligne]

> Of interest, this definition uses the word "could" whereas section 38.06 of the *CEA* states that a judge is to determine whether the disclosure of information "would" be injurious to international relations, national defence, or national security. The Federal Court of Appeal in *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470 at paragraph 14, spoke to the meaning of the words "would" and "could" in the context of the *CEA*:
>
> > Counsel for the appellants also contended that even if it could be said that Parts D and E of the Buckley certificate were effectively adopted by the respondent, the certificate is itself defective because nowhere therein is it stated, in compliance with subsection 38(1), that the release of the information "would" be injurious to Canada's international relations. That phraseology suggests that in order to secure the benefit of sections 37 and 38 a party must show a probability that a feared injury will result from disclosure. The record contains nothing showing that the disclosure of information sought by the series of "vote buying" questions "would be injurious to international relations". It is noted that the phraseology employed in Parts D and E to the Buckley certificate is "could" and "could reasonably" rather than "would". The statute would seem to require a showing of probability of injury instead of mere possibility.
>
> [Emphasis added]
>
> I agree with the Federal Court of Appeal. The use of the word "would" by the legislator indicates that the Government under section 38.06 of the *CEA* must satisfy the reviewing judge that the injury alleged must be probable, and not simply a possibility or merely speculative.

[103] Consequently, the *Arar Commission of Inquiry* decision, above, clearly indicates the application of the balance of probabilities standard to determine what "would be injurious" to national security.

[104] Also, in *Canada (Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 2003 FCA 246 (*Ribic*), also in connection with the application of the CEA, when determining whether the

disclosure “would be injurious”, the Federal Court of Appeal, at paragraph 20, indicated that the applicable standard is that of the balance of probabilities:

> 20 An authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure. The burden of convincing the judge of the existence of such probable injury is on the party opposing disclosure on that basis.

[105] Outside of the CEA, the jurisprudence supports applying the balance of probabilities standard in interpreting the expression “would be injurious”.

[106] In interpreting the provisions of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (Code), the decision in *Chalk River Technicians & Technologists v. Atomic Energy of Canada LT.D. et al*, [2002] F.C.J. No. 1742, 2002 FCA 489, relying on *Hijos*, above, in order to interpret the expression “could pose” in the Code, indicated the following at paragraph 52:

> 52 The words which appear in the statute, both in the English and French versions, require, in my view, less certainty on the part of the Board in reaching a conclusion concerning the existence of an immediate and serious danger than if the statute had used the words “would pose”.

[107] In *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1, regarding the interpretation of Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)* (GA res. 39/46, annex., 39 U.N. GAOR suppage (No. 51), at 197, U.N. Doc. A/39/51 (1984)), which states “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture,” the Federal Court of Appeal at

paragraph 22, relied on *Hijo*s, above, and *Chalk River*, above, in interpreting the expression "would be":

> 22 This Court has found that use of the word "would" requires a showing of probability. See *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, [2002] F.C.J. No. 1658, at paragraph 14 per Stone J.A. and *Chalk River Technicians and Technologists v. Atomic Energy of Canada LT.D.*. (C.A.), [2003] 3 F.C. 313, at paragraph 52. Had the Convention used the words "could", "might", or "may", I think a lower level test might be implied. But the word "would" in the Convention, together with the other words used by the Committee, imply that the Committee adopted a probability test.

[108] The jurisprudence supports using the balance of probabilities standard to interpret the expression "would be injurious".

[109] Consequently, I conclude that the standard of proof required for non-disclosure is that of the balance of probabilities.

D. Opposing future disclosure

[110] The parties agree that in the absence of a concrete factual situation, it is premature at this stage to discuss this issue. However, I note that, in general, it would be difficult for the Ministers to argue that evidence that was not filed in support of the certificate, that is not part of the information that the Ministers characterize as "relevant information", and after the Ministers have stated that their evidence-in-chief is closed, the Phase II disclosure would be set up against the named person.

CONCLUSION

[111] For these reasons I conclude that:

1. **Party-to-party disclosure**

A. Future supplementary disclosure (Phase I):

(a) I believe that giving the named person the opportunity to bring a confidentiality motion is the appropriate remedy for the serious harm that he could suffer if he did not have the opportunity to bring such a motion. Preventing him from doing so because of the wording of a procedure written at a time when it would have been impossible to imagine the circumstances would needlessly aggravate the harm.

(b) Consequently, the special advocates will be able to identify the *prima facie* evidence that could be the basis of a motion under Rule 151 and bring it to the Court's attention *in camera* before the public disclosure of the information. The Court will then delay placing this information in the public file. It will be provided to counsel for the named person "party-to-party" for a period of fourteen days to give them the opportunity, if necessary, to decide whether the named person wants to bring a motion under Rule 151.

(c) At the end of this period, if no such motion has been served and filed, the information will be placed in the public file. If a motion is brought, the documents shall be kept under seal until the Court disposes of the matter.

(d) With regard to the admissibility and reliability of the evidence, given that Rule 151 is not available, it will be up to the special advocates to file with the Court a specific motion if an issue arises as to the admissibility or reliability of classified evidence to be placed in the public file.

B. The disclosure of additional information further to *Charkaoui II* (Phase II):

(a) Non-confidential information, if any, would first be forwarded "party-to-party" to the named person.

(b) When the Ministers and special advocates agree that confidential information received by the Court further to *Charkaoui II*, above, is not relevant, the Court may rely on such an agreement.

(c) With regard to confidential information that might be considered relevant (particularly by the special advocates since the Ministers have stated that only information filed with the Court at the same time as the certificate is relevant), a summary would be provided to the named person "party-to-party" where the disclosure would be injurious to national security or endanger the safety of any person (paragraph 83(1)(e) of the *IRPA*).

(d) Any disagreement between the Ministers and special advocates that might arise will be arbitrated by the Court. The information in question or any summary would not be placed in the Court docket unless one of the parties or the special advocates file it as evidence.

2) <u>The national security standard</u>

(a) The role of the designated judge in determining whether to disclose information to the named person where the government claims confidentiality is to apply the criteria established through jurisprudence while taking into consideration, on the one hand, the need to preserve confidentiality, and on the other, the importance of providing the fullest possible disclosure with the smallest impact on the named person's right to know the evidence against him to enable him to refute the Ministers' allegations.

(b) The burden is on the Ministers to prove that the disclosure would be injurious to national security.

(c) The requisite standard of proof for non-disclosure is the balance of probabilities.

[112] As Justice Dawson suggested in *Almrei, Harkat, Mahjoub and Jaballah,* above, a party that wants an order based on these reasons will submit a proposal in writing to the Court stating the reasons why an order is required, as well as a draft order.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-4-08
STYLE OF CAUSE:	**IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*)** **AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*** **AND IN THE MATTER OF Adil Charkaoui** **AND THE BARREAU DU QUÉBEC, intervenor**
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	March 10 and 11, 2009
REASONS FOR ORDER BY:	JUSTICE TREMBLAY-LAMER
DATED:	April 2, 2009

APPEARANCES:

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