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Docket: DES-5-08

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Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Mr. Justice Simon Noël

BEFORE THE COURT:

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c.27, (the "*Act*");

IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the *Act*;

AND IN THE MATTER OF Mohamed HARKAT

EXPURGATED PUBLIC REASONS FOR JUDGMENT AND JUDGMENT

[1] On February 22, 2008, a certificate naming Mohamed Harkat as a person inadmissible to Canada on grounds of national security was referred to the Federal Court pursuant to section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*IRPA*).

[2] The Chief Justice designated me to hear this proceeding on May 6, 2008. Orders establishing a schedule for the determination of the reasonableness of the certificate and appointing two special advocates to represent the interests of Mr. Harkat during the closed hearings[a] were issued on June 4, 2008.

[3] To date, the Court has heard the submissions of the Ministers and the Special Advocates on the extent of disclosure required by *Charkaoui v. Canada (Citizenship and Immigration)* 2008 SCC 38 (*Charkaoui #2*) and, on September 24, 2008, ordered that the Ministers comply with their obligation to disclose. The Court has not yet received full disclosure in compliance with *Charkaoui #2*.

[4] Two weeks of closed hearings were held in September, 2008 and public hearings were conducted in October and November 2008. During these hearings, the Ministers presented their evidence in support of the reasonableness of the certificate and the danger associated with Mr. Harkat. The Court has also heard evidence and oral submissions in December 2008 in relation to Mr. Harkat's request to review the conditions of his release.

[5] The evidence currently before this Court discloses that […] human source(s) provided information to the Service in relation to the intelligence investigation into Mr. Harkat's activities. No determination of the reliability or weight to be given to this information has been made. Nothing in these reasons should be interpreted as giving any probative value to any of the reports originating from human sources.

[a] The term "closed hearing" refers to hearings held pursuant to paragraph 83(1)(c) which permits a designated judge to hear evidence in the absence of the public and of the permanent resident or foreign national and their counsel.

[6] In September, 2008, during a closed hearing, the Special Advocates sought an order of this Court compelling the Ministers to produce for cross-examination covert human intelligence source(s) who provided information about Mr. Harkat to the Canadian Security and Intelligence Service (the "Service"). They propose to conduct their cross-examination during a closed hearing before this Court.

[7] They are also requesting that they be granted an opportunity to interview the human source(s) prior to any evidence being given during a closed hearing.

[8] The Special Advocates wish to test the credibility of the human source(s) and possibly corroborate future explanations which may be testified to by Mr. Harkat in relation to his motives for coming to Canada in the mid-1990s. They provide no further justification to the Court beyond this general objective.

[9] The Ministers note that this is the first time that a request has been made for human source(s) to testify in the context of a security certificate proceeding. It is their position that the police informer privilege is applicable to these proceedings and that no "innocence at stake" exception exists in the context of a non-criminal proceeding pursuant to *IRPA*. The closed nature of the proceeding does not, according to the Ministers, render inoperative legal privileges. Such privileges are applicable in the absence of clear statutory language suspending them; see, for example, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (*Blood Tribe*), at para.11.

[10] The Special Advocates acknowledge that the police informer privilege would ordinarily be applicable to covert human intelligence sources recruited by the Service in public proceedings. However, they assert that the privilege has no application to the closed portion of these proceedings.

[11] Should the Court find that the police informer privilege applies to the closed portion of these proceedings, the Special Advocates argue that they have established that the information they seek to compel falls within the "innocence at stake" exception as set out in the criminal jurisprudence.

[12] The Ministers take the position that the police informer privilege is applicable to human sources of the Service and is absolute in the context of this certificate proceeding.

The Scope of the Confidential Police Informer Privilege

[13] In a leading case on the informer privilege, *R.* v. *Leipert*, [1997] 1 S.C.R. 281 (*Leipert*), the Supreme Court stated that "informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement." The receipt of information about criminal activity from confidential police informants is of "fundamental importance to the workings of the criminal justice system." (*Leipert* at p. 391). However, it is clear that a police informant is at "…risk of retribution from those involved in crime" (*Leipert*). Thus, the police informer privilege plays a two-fold role: to protect the confidential police informer and, in doing so, encourage others to come forward with essential information which will aid in the protection of the public at large.

[14] The privilege is a "rule of public policy that is not a matter of discretion" (*Canada (Solicitor General)* v. *Royal Commission (Health Records)*, [1981] 2 S.C.R. 494 ("*Health Records*")). See also *Bisaillon v. Keable* [1983] 2 S.C.R. 60 ("*Bisaillon"*) at p. 93; and *Marks v. Beyfus* (1890), 25 Q.B.D. 494 at 498). Once it is properly invoked, the Court is obligated to protect the police informer's identity. Indeed, even where the Crown does not invoke the privilege, the Court is under a duty to apply it (*Bisaillon* at p.98). The only exception to this rule of law is where a person's innocence is at stake. In *Marks v. Beyfus*, Lord Esher clearly set out the "innocence at stake" exception:

> I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.

[15] The innocence at stake exception to the informer privilege is only applicable in a criminal proceeding and is based on the principle that the "…right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt [is] paramount." (*R.* v. *Scott*, (1990) 61 C.C.C. (3d) 300 (S.C.C.) (*Scott*) at p. 315).

[16] The courts have given precision to the "innocence at stake" exception. Where the police informer is a material witness to the crime or acts as an agent provocateur the privilege will be set aside (*Scott* at p. 315; see also *Named Person v. Vancouver Sun*, 2007 SCC 43 (*Named Person*) at para. 29). In *Scott*, the Supreme Court also noted that "…a third exception may exist where the accused seeks to establish that the search was not undertaken on reasonable grounds and therefore contravened the provisions of s. 8 of the Charter" (*Scott* p. 315).

[17] Police informer privilege is absolute in a civil context, even where the identity of the informant is sought in the context of a public inquiry into police wrong-doing (see *Health Records* at p. 539 *Named Person* at para. 27 and *Scott* at p. 315).

Does the police informer privilege apply in these proceedings?

[18] In the cases relied on by the Special Advocates and by the Ministers, the confidential informant whose identity was at issue was a police informer. The covert human intelligence source(s) at issue in this motion for production are recruited by a civilian intelligence agency; they are not "police" informers providing information to police in the course of their duties. Moreover, a certificate proceeding is not a criminal proceeding. Covert human intelligence sources are individuals who have been promised confidentiality in return for their assistance in gathering information relating to the national security concerns of Canada. Thus the common law privilege protecting police informers and the innocence at stake exception to that privilege are not applicable *per se* to the covert human intelligence sources recruited by the Service.

[19] However, a form of police informer privilege has been extended, by way of analogy in the incremental tradition of the common law, to statements made by informants to the National Parole Board (*Rice* v. *Canada (National Parole Board),* ([1985] F.C.J. No. 600), as well as statements made by confidential informants to child welfare authorities (*D. v. National Society for the Prevention of Cruelty to Children,* [1978] AC 171 (*D. v. N.S.P.C.C.*)) and gambling regulators in England (*Reg*. v. *Lewes Justices ex parte the Home Secretary* [1973] A.C. 388). The courts have

recognized that the public policy justifications for extending an analogous privilege to informants in the prison system or in the child protection context may be sufficient to override "…the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal." (*D. v. N.S.P.C.C. per* Lord Diplock).

[20] In *Wigmore on Evidence*, the author sets out the four fundamental conditions which must be met before a common law privilege is extended or recognized:

> 1) The communications must originate in a confidence that they will not be disclosed.
>
> 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> 3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. [cited in Imwinkelried, E.J. *The New Wigmore: Evidentiary Privileges* (New York: Aspen Law & Business, 2002) at 3.2.3).

[21] Similarly, in Sopinka's *The Law of Evidence in Canada* the authors note:

> Where the court is asked to extend the rule beyond the traditional parameters, a careful inquiry into the public policy aspects is required. Society's need to foster the informal relationship must be clearly evidenced (J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada*, (2ed.) (Butterworths: Toronto, 1999) at p. 883).

[22] The policy justifications underlying the existence of the privilege in the law enforcement context and, the extension of the privilege to parole board and child protection matters, apply with equal or greater force to the relationship between covert human intelligence sources and the Service (*Rice, supra*, at paras. 16-17 and *D. v. N.S.P.C.C. supra* at p. 4).

[23] As noted in *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records), supra* the Supreme Court perceived an even "stronger" police informer privilege in national security matters than in criminal investigations (notably, in this case, the informants were police informers who provided information to the police in the course of their investigation). Justice Martland writing for a majority of the Court observed at page 537:

> The foundation for the existence of [the informer rule], which evolved in respect of the field of criminal investigation, is even stronger in relation to the function of the police in protecting national security. A large number of the instances in which, in the present case, it was sought to obtain from the police the names of their informants concerned police investigation into potential violence against these officers of the state, including heads of state. These investigations were admittedly proper police functions. The rule of law which protects against the disclosure of informants in the police investigation of crime has ever greater justification in relation to the protection of national security against violence and terrorism.[b]

[24] Covert human intelligence sources are vital to the functioning of intelligence agencies and to the national security of Canada.[1] They are not limited to passive intelligence gathering as technical methods are, but rather are able to actively solicit and obtain information that would otherwise be inaccessible. They do so often at great risk to themselves and to their families. Fundamentally, information provided by covert human intelligence sources allows intelligence agencies to make more accurate and timely assessments of threats to the security of Canada. As such, they are essential national security assets.[2]

[b] This decision was issued in 1981, the same year as the tabling of the McDonald Commission Report which recommended the creation of a civilian intelligence agency.

[25] The Commission of Inquiry Concerning Certain Activities of the Royal Mounted Canadian Police (the McDonald Commission) observed at page 536 of volume 1 of its Second Report, "Freedom and Security under the Law" (Ottawa: 1981) that:

> 58. The use of human sources and undercover members, collectively referred to by us as "undercover operatives", is the most established method of collecting information about threats to security. Despite the technological revolution which has provided a variety of technical alternatives as a means of penetrating secretive organizations, the undercover operative is likely to remain an extremely important source of information to a security intelligence agency.
>
> 59. An undercover operative can be a much more penetrating means of collecting information than any technical device. A technical source (…) is essentially a passive instrument which can record only what is said or done at one particular place. In contrast, undercover operatives – human spies – have frequently penetrated the innermost circles of groups, probed the intentions of their leading members (…)

[26] To fulfill their role, sources must remain anonymous and fully protected; at no time can they be identified explicitly or implicitly by the agencies. To this end, upon recruitment, the Service gives a source a guarantee of confidentiality […]. Access to information about covert human intelligence sources is severely restricted and compartmentalized in an area that is separate from other Service information.[3]

[27] Confidentiality ensures the safety of covert human intelligence sources who often place themselves in harms way to fulfill the investigatory objectives of the Service. Given the nature of the tasks performed by covert human intelligence sources, confidentiality is required to protect them from reprisals or ostracization from their community.[4]

[28] If the Service is unable to protect the identity of its sources or is required to produce them in the context of a Court proceeding (even one that is closed to the public), the number of individuals

willing to come forward with information would be reduced. Indeed, there is evidence before this Court that the recruitment of human sources would be harmed if the guarantees of confidentiality given by the Service were not upheld by this Court.[5] I accept this evidence.

[29] Finally, it is important to note that, unlike police or criminal investigations, intelligence investigations do not end with the filing of criminal charges or the commencement of court proceedings. Intelligence investigations can be of a short-term nature, but they may also extend over longer periods of time – even decades. Investigations can be suspended, just as they can be reactivated. How an intelligence investigation unfolds hinges on many factors, including the purpose of the investigation and the persistence of threats associated with the subjects of investigation. […] Evidence before the Court establishes that identifying a source to a Special Advocate or requiring a source to testify in a closed proceeding, even anonymously, will almost certainly end the Service's relationship with that source.[6]

[30] Parliament itself has spoken on the importance of protecting human sources and covert operatives. Subsection 18(1) of the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23, (*CSIS Act*) provides:

18.(1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of	18. (1) Sous réserve du paragraphe (2), nul ne peut communiquer des informations qu'il a acquises ou auxquelles il avait accès dans l'exercice des fonctions qui lui sont conférées en vertu de la présente loi ou lors de sa participation à l'exécution ou au contrôle d'application de cette loi et qui permettraient de découvrir l'identité :
(a) any other person who is or was a confidential source of information or assistance to the Service, or	*a*) d'une autre personne qui fournit ou a fourni au Service des informations ou une

(b) any person who is or was an employee engaged in covert operational activities of the Service can be inferred. (…)	aide à titre confidentiel; *b*) d'une personne qui est ou était un employé occupé à des activités opérationnelles cachées du Service. (…)

[31] I conclude, on the evidence before me, that the relationship between the Service and a covert human intelligence source meets the four conditions enumerated by Wigmore in his treatise and should therefore be protected. Covert human intelligence sources are given absolute promises that there identity will be protected. These assurances not only foster long-term, effective relationships with the sources themselves, but increase, exponentially, the chances for success of future intelligence investigations. Confidentiality guarantees are essential to the Service's ability to fulfill its legislative mandate to protect the national security of Canada while protecting the source from retribution. It also encourages others to come forward with essential information that would not otherwise be available to the Service. The relationship between the Service and the source as well as the identity of the source is protected by a covert human intelligence source privilege.

Is there an exception to the immunity provided by a covert human intelligence source privilege?

[32] In the *Charkaoui* decisions (*Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350 *(Charkaoui #1)* and *Charkaoui #2*, *supra*) the Supreme Court has found that the seriousness of the potential impact on the liberty and security interests of the named person engages section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*) and the right to procedural fairness set out therein. Accordingly, this Court must consider whether, in the circumstance of this

proceeding, the principles of procedural fairness set out in s.7 mandate an exception, however limited and constrained, to the covert human intelligence source privilege.

[33] Procedural fairness is to be determined in the context of this proceeding, which is a determination of the reasonableness of a certificate referred to the Federal Court pursuant to subsection 77(2) *IRPA*. A finding of reasonableness would constitute conclusive proof that Mr. Harkat is inadmissible to Canada on the grounds of national security, pursuant to one or more of paragraphs 34(1) (c), (d), and (f) of *IRPA*, and would have the effect of a removal order. That removal order could be subject to a further proceeding in which the Minister would be asked to assess the risk that the named person would be subjected torture or other mistreatment if he was returned to his country of origin or some other country (see procedures for pre-removal risk assessment at section 112 *IRPA*).

[34] The person named in a certificate is in jeopardy of losing his status in Canada and being deported, and is subject to detention until such time as they leave Canada or are released by Order of this Court. The Supreme Court noted that, given the exception set out by it in *Suresh v. Canada (Citizenship and Immigration*), [2002] 1 S.C.R. 3, there is a possibility that the circumstances may be exceptional enough to warrant the deportation of the person named in certificate to a country in which the security of that person is in question. Recently, in the 2008 Symons Lecture, Chief Justice McLachlin noted that the Supreme Court has not yet considered what might constitute "exceptional circumstances", but continued to say that these would "necessarily be very rare." (p.29 Symons Lecture notes)

[35] In light of both *Charkaoui* decisions of the Supreme Court, a person named in a security certificate is entitled to an elevated level of procedural fairness such that, where ordinarily an informer privilege analogous to the "police informer privilege" would be absolute, the engagement of section 7 may justify an exception to the privilege. I find that this exception will only be applicable in the closed portion of the proceeding where a Special Advocate has established that he or she has a "need to know" the identity of a covert human intelligence source to prevent a flagrant denial of procedural fairness which would bring the administration of justice into disrepute.

[36] This exception is based on the "need to know" rule which is a fundamental principle of the intelligence world. It is reflected in both domestic and international legislation and policies. Fundamentally, classified information is protected by compartmentalization; the integrity of which is maintained by the "need to know" principle[7]. Only those with a direct operational requirement are given access to classified information - even those cleared to the highest level. The following paragraphs provide a brief, and limited, overview of some of the instances in which the "need to know" principle has been recognized, referred to, and relied on.

[37] On February 1, 2002, the Treasury Board Secretariat issued a "Government Security Policy" which is designed to "protect employees, preserve the confidentiality, integrity, availability and value of assets…". Paragraph 10.8 deals with "access limitations" and sets out the need to know principle: "Departments must limit access to classified and protected information and other assets to those individuals who have a need to know the information…".

[38] In *R.* c. *Treu*, [1979] J.Q. no. 202, the Quebec Court of Appeal noted that a security system is based on two principles: "l'idée d'accessibilité en faveur seulement des personnes habilitées

(cleared persons) et ayant besoin de les connaître (need to know)." (para 57) References to these principles have also been made by the Federal Court of Appeal in *Canada* (*Attorney General) v. Ribic*, [2003] F.C.J. No. 1964 at para. 6, and by the Ontario Court of Appeal in *R. v. Ribic*, 2008 ONCA 790.

[39] A similar principle is found in the United Kingdom *Regulation of Investigatory Powers Act 2000* at paragraph 29(5)(e) which requires that:

> (e) records maintained by the relevant investigating authority that disclose the identity of the source will not be available to persons except to the extent that there is a need for access to them to be made available to those persons

[40] Part 4 of Executive Order 12356 sets out the classification and access policies of the executive branch of the United States of America as follows:

> Sec. 4.1 General Restrictions on Access.
>
> (a) A person is eligible for access to classified information provided that a determination of trustworthiness has been made by agency heads or designated officials and provided that such access is essential to the accomplishment of lawful and authorized Government purposes. [Emphasis added]

[41] In New Zealand, the government's security policy is set out in a publication entitled "Security in the Government Sector" which was published by the Department of the Prime Minister and Cabinet in 2002. The authors of the New Zealand publication acknowledge, in the preface, that some of the manual content is "based on or drawn from similar overseas publications – in particular, Australia's "Commonwealth Protective Security Manual", and the United Kingdom's "Manual of protective Security." Access is restricted to both of these manuals. Chapter 4 of the Manual is entitled "Control of Classified Material". This chapter sets out the need-to-know principle as follows:

4. Fundamental to all aspects of security is that the only people who received classified information are those who need it to complete the business in hand. Thus, employees receive access to classified information:
   - only because they "need to know" it to complete their duties
   - not because it would be convenient for them to know
   - not by virtue of their status, position, rank or level of authorized access.

5. Adherence to the need to know principle helps protect the employees as well as the information.

6. The need to know principle applies both within an organization and when dealing with people outside it.

[42] The very manner in which the Service handles human sources provides an illustration of the "need to know" principle in play.

[43] Evidence heard in closed hearings establishes that […] files concerning human sources are handled by a separate division within the Service which is contained in a highly protected area within an already secure environment.[8] […]. This assists the Service in fulfilling its duty to protect the human source and allows the Service to control and assure the quality of the information provided to them by that source. The greater the pool of persons given access to the identity of a human source, the more difficult it becomes to prevent inadvertent disclosures and to investigate security breaches.[9] Widening the number of people with access to the identity of a human source puts both the personal safety of the source and the national security of Canada into jeopardy.

[44] Those who work in the Human Source Directorate are required to meet certain security standards greater than those imposed on most other Service employees. […]

[45] […] Communications about human sources, more so than other classified information, are on a need-to-know basis only.[10] Documents referring to sources […] must be classified […]. Indeed, there is evidence before the Court that even the Director of the division would not normally have access to the identities of the human sources except where he has an operational need to know that information.[11]

[46] A "need to know" this closely protected information, given the concerns of individual safety and operational control, will only be established where evidence is adduced demonstrating that the identity of the covert human intelligence source must be disclosed to prevent a flagrant breach of procedural justice which would bring the administration of justice into disrepute. In defining when such a threshold will be met, I refer to the words of the European Court of Human Rights which characterized the use of the term "flagrant" as denoting "a breach so fundamental as to amount to a nullification, or destruction of the very essence" of the right to procedural fairness. (See *EM (Lebanon)* v. *UK Home Sec'y* (2008), citing *Mamatkulov and Askarov* v. *Turkey* (2005) 41 EHRR 494 at 537-539). Such a need to know may arise where, in the judge's opinion, there is no other way to test the reliability of critical information provided by a covert human intelligence source except by way of cross-examination.

[47] This exception to the covert human intelligence source privilege is also consistent with the intent of Parliament set out in subsection 18(2) of the *CSIS Act*, which provides for limited disclosure of information concerning human sources and covert operatives.

[48] The covert human intelligence source privilege, and its necessarily limited exception, is designed to balance the rights of individuals with those of the collective. A similar concern was

expressed by Justice Iacobucci, regarding the need: "…to do everything possible to protect our country" and the need to do so "…with genuine respect for the fundamental rights and freedoms of Canadian citizens." (Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin (Ottawa: Public Works and Government Services Canada, 2008) at 5.

Impact of the closed nature of the proceeding and the Special Advocate

[49] The Special Advocates take the position that they are entitled to access any information, related to the investigation of Mr. Harkat, held by the Service because of their top secret clearance and because they have been appointed as Special Advocates in this file, as well as the fact that they are persons permanently bound to secrecy under the *Security of Information Act*. The Special Advocates maintain that their right to access information includes the opportunity to cross-examine covert human intelligence sources and implicitly, if not explicitly, know the identity of these sources.

[50] The Ministers take the opposite position and assert that nothing in *IRPA* abrogates the operation of common law privileges. I agree.

[51] Parliament may abrogate common law privileges by legislation; however, it must do so explicitly (see *Blood Tribe* at para 11).[c] Section 39 of the *CSIS Act* provides an example of the clear language required to abrogate common law privileges:

39. (1) Subject to this Act the Review Committee may determine the procedure to be followed in the performance of any of its duties or functions.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, but subject to subsection (3), the Review Committee is entitled:

(a) to have access to any information under the control of the service or of the Inspector General that relates to the performance of the duties and functions of the committee and to receive from the Inspector General, Director and employees such information, reports and explanations as the Committee deems necessary for the performance of its duties and functions; and

(b) during any investigation referred to in paragraph 38 (c), to have access to any information under the control of the deputy head concerned that is relevant to the investigation.

(3) No information described in subsection (2) other than a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the *Canada Evidence Act* applies may be withheld from the committee on any grounds. (Emphasis added)

39. (1) Sous réserve des autres dispositions de la présente loi, le comité de surveillance peut déterminer la procédure à suivre dans l'exercice de ses fonctions.

Accès aux informations

(2) Par dérogation à toute autre loi fédérale ou toute immunité reconnue par le droit de la preuve, mais sous réserve du paragraphe (3), le comité de surveillance :

a) est autorisé à avoir accès aux informations qui se rattachent à l'exercice de ses fonctions et qui relèvent du Service ou de l'inspecteur général et à recevoir de l'inspecteur général, du directeur et des employés les informations, rapports et explications dont il juge avoir besoin dans cet exercice;

b) au cours des enquêtes visées à l'alinéa 38*c*), est autorisé à avoir accès aux informations qui se rapportent à ces enquêtes et qui relèvent de l'administrateur général concerné.

Idem

(3) À l'exception des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 39(1) de la *Loi sur la preuve au Canada*, aucune des

[c] Other instances in which Parliament has explicitly abrogated common law privileges are rare; examples may arguably be found in section 36 of the *Access to Information Act*, R.S.C. 1985, c. A-1 and section 34 of the *Privacy Act*, R.S.C. 1985, c. P-21.

informations visées au paragraphe (2) ne peut, pour quelque motif que ce soit, être refusée au comité.

[52] There is no analogous provision in IRPA. If Parliament had intended the Special Advocates to have access to all information, including information over which the government claims solicitor client or other privilege, it would have explicitly stated so in the legislation. The limited powers given to Special Advocates in s. 85.2 do not, without this Court's authorization, permit them to call witnesses or require the production of a witness or document particularly where to do so would pierce a common law privilege.

[53] The Ministers' obligation to disclose information is set out in section 77(2) of IRPA and was expanded by the decision of the Supreme Court in *Charkaoui #2*. The Act requires the Ministers to "file with the Court the information and other evidence on which the certificate is based…" (s. 77(2) IRPA). Once filed, the judge must determine whether the information provided by the Minister meets the disclosure requirements in *Charkaoui #2* which requires that all operational notes and information relating to Mr. Harkat be provided to the Court. This information will be made available to the Special Advocates at a time set by direction of the Court (s. 85.4(1) IRPA). The Service's obligation to disclose information does not extend to purely administrative files unless such information is shown to be necessary for the Court to meet its obligation to verify the accuracy and reliability of the allegations in relation to the reasonableness of the certificate. In such a case the Court has the power to order the information to be provided to the Court for review. (see *Blood Tribe,* at paras. 23, 31, 33-34 see also *R. v. Chaplin* at para. 25) Where the information is

determined to be relevant and not excluded by privilege a direction will be issued requiring the information to be filed and granting the Special Advocates access to the information.

[54] Nothing in *Charkaoui #2* indicates that the Supreme Court intended to abrogate the application of common law privileges in the context of a security certificate proceeding. The limits on disclosure were recognized by the Supreme Court in *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, a criminal proceeding, when it stated that information to be provided to an accused is subject to the common law of privilege (see paras 16 & 22; see also *Chaplin*, *supra* at para. 21).

[55] The closed nature of the proceedings may limit the harm where a designated judge finds it necessary to apply the need to know exception to the covert human intelligence source privilege in the context of a security certificate proceeding. However, the private closed nature of the hearing merely minimizes the impact of the disclosure order on an individual human source; it does not abrogate the privilege or eliminate the policy basis on which it is founded.

[56] The Special Advocates also assert that they are entitled to obtain copies of any information provided by the Ministers to the Court. This cannot be the case.

[57] Special advocates are not in the same position as the Court. They are participants in the closed hearings solely for the purpose set out in IRPA namely, to represent the best interests of the person named in the certificate. The Court will always have the power to order that information be provided to it to determine whether that information is relevant or privileged. That is the role of the independent and impartial arbiter. Where the information is relevant and not otherwise excluded by statute or common law privilege, the Court will order the information to be filed and provided to the

Special Advocates. The provisions of IRPA and the reasons of the Supreme Court in the *Charkaoui* decisions do not remove this overarching superintending role of the judge.

Have the Special Advocates established that they have a "need-to-know" this information to prevent a flagrant denial of procedural justice such that an exception to the covert human intelligence source privilege rule should be applicable?

[58] Special Advocates play a unique but limited role in a certificate proceeding. While their communications with the named person are deemed to be covered by solicitor-client privilege, there is no solicitor client relationship between the Special Advocate and the named person. The primary role of the Special Advocate is to protect the interests of the named person where evidence is heard in his or her absence. This is accomplished in two steps: by maximizing the disclosure to be made to the named person and counsel and by testing the reliability and credibility of evidence in the *closed* portion of the proceedings by cross-examining witnesses produced by the Ministers. Any further action proposed to be taken by the Special Advocates must be authorized by the judge who is charged with ensuring that the proceeding move forward as expeditiously, informally and fairly as possible (*IRPA* provisions s. 85.2(c), and *Almrei* v. *Canada*, 2008 FC 1216, at para. 57-59).

[59] Subsection 83(1) of *IRPA* puts the ultimate responsibility for the safeguarding of the sensitive information on the shoulders of the designated judge. This obligation must inform any consideration of whether the Special Advocates have a need to know the identity of the covert human intelligence source(s).

[60] The Special Advocates assert that the human source(s) [see paragraph 8 supra for summary of argument] […] This argument is not supported by evidence. No additional information or evidence is offered to justify the Special Advocates' request.

[61] The "need to know" exception cannot be used as an instrument of corroboration. In the context of security certificate proceedings, the need to know exception may only apply if it is the only way to establish that the proceeding will otherwise result in a flagrant denial of procedural justice which would bring the administration of justice into disrepute. It is not to be used as a part of an arsenal of litigation strategy.

[62] The Special Advocates also seek to cross-examine human sources in order to test the credibility and the reliability of the information.

[63] There are other ways in which a Special Advocate may test the credibility and reliability of the information provided by a human source which do not require that the source be identified and produced as a witness by the Ministers.

[64] In her decision on the reasonableness of the first certificate issued naming Mr. Harkat as a person inadmissible to Canada under *IRPA*, Justice Dawson outlines the principles relevant to the assessment of confidential information in paragraphs 93 to 100. She observed:

> 93. In testing evidence which cannot be disclosed for security reasons, the designated judge must adopt a principled approach to the exercise. To that end the presence or absence of corroboration, consistency of the evidence, and whether it is hearsay, are among factors to consider. To test the reliability of the evidence the judge may probe into the credibility and reliability of the source of

> the information. This may be done by the designated judge putting questions directly to affiants and possibly to other persons. In addition the judge may question counsel representing the Service on their submissions.
> (…)
>
> 94. While not in any way commenting upon the source or sources of information of confidential information before the Court in this case, I believe that, generally, if any confidential information is provided by a human source, some relevant inquiries and areas for examination by the Court of one or more witnesses under oath may include matters such as the following: the origin and length of the relationship between the Service and the human source; whether the source was paid for information; what is known about the source's motive for providing information; whether the source has provided information about other persons, and, if so, particulars of that; the extent to which information provided by the source has been, or is, corroborated by other evidence or information; the citizenship/immigration status of the source and whether that status has changed throughout the course of the source's relationship with the Service (to the extent that such status touches upon the source's security within Canada and their vulnerability to duress); whether the source has been subject to any form of pressure to provide information, and if so, why and by whom; whether the source has a criminal record or any outstanding criminal charges in Canada or elsewhere; the nature of any relationship between the source and the subject of the investigation; whether there is any known or inferred motive for the source to provide false information or otherwise mislead the investigation in any way. This list is not exhaustive (…)(*Re Mohammed Harkat* 2005 FC 393)

[65] Consistent with the approach of Justice Dawson, in this proceeding a Service witness testified and was cross-examined by the Special Advocates about the value, reliability and usefulness of information provided by the human source(s). The witness also gave evidence as to the motivation of the source(s), handling issues, monetary payments made to the source(s), as well as the personal history and the history of the source(s) as a covert human intelligence source.

[66] The Ministers also filed an "Exhibit "A" with the Court which was provided to the Special Advocates.[12] Exhibit "A" is consistent with the testimony of the Service witness. In the exhibit, the Service addresses the background of the human source(s), the source(s)'s motivation, meetings with the source(s)'s handlers, targeting of the source(s), source handling issues. The Exhibit also

evaluates the value of the information received from the source(s) by highlighting instances of corroboration with other sources of information obtained through various investigation techniques. These techniques might include other human sources, technical sources such as intercepts, and information provided by foreign intelligence agencies.[d]

[67] It has been the experience of this Court that the approach set out by Justice Dawson, in combination with an examination of the Exhibit provided by the Ministers in relation to the source's credibility, is consistent with the judicial duties of the designated judge and meets the requirements of fundamental justice.

[68] Special Advocates raised a further issue concerning the reliability of information from the source(s) and sought further evidence from the Service […]. The Service witness provided detailed evidence on this point. […]

[69] Given the nature of the information provided by the Service, the cross-examination of the Special Advocates, the primary role of the Special Advocates, and the other motions for further production, I conclude that, at this time, the Special Advocates have not established that the production of a human source(s) as a witness in these proceedings is necessary to avoid a flagrant denial of procedural fairness.

[70] Indeed, it is only in exceptional circumstances that this Court will order the disclosure of the identity of covert human intelligence source to a Special Advocate and even more exceptional

[d] Exhibit A is the product of the probing questions asked by the Court in other national security proceedings. It has developed over time and under judicial supervision to meet the concerns of the judges of the Court in assessing human source information.

would be a requirement that the Service produce the source for examination during the closed portion of a certificate proceeding. Even documents supporting warrant applications pursuant to the *CSIS Act*, which are heard in the absence of and without notice to the public, do not refer to names of sources […]. To facilitate the judicial decision-making process, the Service prepares a document that permits an assessment of the human source's reliability and pertinence which is similar if not identical to Exhibit "A" in this proceeding. […] once the warrant application has been disposed of, it is returned to the Service so that it can be kept in a secure place to be made available upon request by a designated judge.

[71] The identity of a human source will only be confirmed or provided to the Court during a warrant application where the designated judge determines that there is a judicial need to know. The situations in which such a "need to know" will arise are rare […].

The Impact of Renunciation on the Privilege

[72] […] The Special Advocates also assert that they are aware of the identity of the human source(s) [...].

[73] In *Bisaillon* the Supreme Court stated:

> The question then arose whether the informer can himself waive the exclusionary rule which protects him, as for example by revealing his identity. In his treatise Evidence in Trials at Common Law, vol. 8, revised by John T. McNaughton, 1961, at p. 766, Wigmore states: "If the identity of the informer is admitted […], then there is no reason for pretended concealment of his identity." If that is so, it is not an exception but a situation where, as Wigmore points out, the reason for the rule no longer exists, as other police informers, knowing that the disclosure was made by the informer himself or with his consent, would no longer feel threatened. Even then, I am far from being convinced that a peace officer could

> be asked to provide confirmation, as that would mean weakening a rule which should remain firm." [*Bisaillon, supra* at. pp. 94-95]

[74] Analogous to police informer privilege, I find that covert human intelligence source privilege cannot be renounced unilaterally either by the human source or by the Crown. Any renunciation must be a joint decision based on a full understanding of the consequences. Until such time as proof of a joint and informed waiver is provided to it, the Court has an obligation to protect the asserted privilege subject only to the exception set out above. Indeed, the Supreme Court has found that the privilege in the context of a police informer is "… a legal rule of public order by which the judge is bound." [*Bisaillon, supra* at p. 93: The Court also stated: "…if no one raises it (the privilege) the Court must apply it of its own motion."]

[75] For all of these reasons, I come to the conclusion that the request of the Special Advocates that the covert human intelligence source(s) be identified and made available to them for cross-examination must be denied.

[76] There are issues which, on occasion, transcend the proceeding in which they arise. Issues that impact not only on similar proceedings but potentially on the intelligence system as a whole. The issue before me is one such question which will reverberate throughout our intelligence network – nationally and internationally. Great care must be taken by the Court in balancing the competing issues that have been reviewed in these reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The request to interview and cross-examine covert human intelligence source(s) is denied.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-08
STYLE OF CAUSE:	In the matter of a Certificate pursuant to Section 77(1) of the *Immigration and Refugee Protection Act* and In the matter of Mohamed Harkat
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 10, 11, 12, 15, 16, 17, 18, 19, 2008
EXPURGATED PUBLIC REASONS FOR JUDGMENT AND JUDGMENT:	NOËL S. J.
DATED:	December 22, 2008

APPEARANCES:

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Mr. P. Copeland Mr. P. Cavalluzzo	AS SPECIAL ADVOCATES

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[1]The Top Secret testimony of […] p. 1354, line 10-17. See also the Top Secret testimony of […], given during an *closed, ex parte* session of the Federal Court in the matter of Mohamed Harkat held September 10th-19th, 2008 at p.60, lines 19 and following.
[2] *[…]*, p.1036, lines 5-9.
[3] *[…]*, p.1356, line 5 and following, and p. 1352, lines 16-19 and following.
[4] *[…]*, p. 1362, line 20 to p.1363, line 13.
[5] *[…]*, p. 1388, line 15 and following, and *[…]*, p.77, lines 16-25.
[6] *[…]*, p. 1388, line 22 to p.1390, line 1.
[7] *[…]*, p. 1353, line 24 to p.1354, line 24.
[8] *[…]*, p. 1356, line 5.
[9] *[…]*, p. 1382 and following.
[10] *[…]*, p. 1357, line 12-17
[11] *[…]*, p. 1356, lines 13-24.
[12] For an explanation of Exhibit «A », please see *[…]* at page 1367.