Federal Court  Cour fédérale

Date: 20101103

Docket: DES-6-08

Citation: 2010 FC 1084

Toronto, Ontario, November 3, 2010

PRESENT: Kevin R. Aalto, Esquire, Case Management Judge

BETWEEN:

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 MAHMOUD ES-SAYYID JABALLAH

REASONS FOR ORDER AND ORDER

Introduction

[1] The ability of a client to seek legal advice of counsel in absolute confidence is one of the hallmarks of Canada's judicial system. It is a right held in the highest regard and solicitor-client communications can only be accessed by third parties in the most exceptional of circumstances. None apply here.

[2] The motion before the Court raises several issues concerning the interception of solicitor-client telephone communications by the agents of the Minister of Public Safety and the Minister of Citizenship and Immigration and Multiculturalism (the Ministers) between Mr. Jaballah and his counsel. The first general issue is whether or not Canada Border Services Agency (CBSA) and its agent, Canadian Security Intelligence Services (CSIS), were authorized to intercept solicitor-client communications between Mr. Jaballah and his legal counsel. There is no doubt that CBSA and CSIS have done so. The second general issue is whether as a result of intercepting solicitor-client communications CBSA and CSIS are obliged to produce to Mr. Jaballah any collateral documents, such as memos, e-mails, reports which were generated by CSIS or CBSA as a result of recording or listening to the solicitor-client communications. On this motion, Mr. Jaballah seeks to have any such collateral or secondary documentation produced and, in addition, seeks the production of the following types of documents:

- A copy of the July, 2006 Harkat "guidelines" and the subsequent September, 2007 replacement guidelines
- Any records or logs indicating when the solicitor-client intercept recordings were accessed by CBSA and CSIS analysts, along with the frequency and duration of these accesses
- Any memos, letters or other documents establishing practices or procedures governing the sharing of information between CSIS and CBSA derived from the interceptions in any of the security certificate cases (*i.e.* Harkat, Mahjoub and Jaballah)
- Any memos, written instructions or other documents relating to the practices to be followed by CBSA and CSIS analysts in relation to solicitor-client intercepts

- Any reports, memos or other documents that refer to the content of any of the Jaballah intercepts, whether solicitor-client privileged or otherwise

[3] In the Written Representations filed on behalf of Mr. Jaballah another category of documents is referred to dealing with production of all documents (including e-mails and other electronic documents) bearing on these issues:

- The decision-making process that led CBSA and CSIS to intercept, record and review privileged solicitor-client telephone calls in Mr. Jaballah's case and in other certificate cases (Harkat and Mahjoub). These documents are wide-ranging and include requests for internal memos and the like relating to the creation of the Harkat guidelines; memos and the like relating to the scope of the release orders in Harkat, Mahjoub and Jaballah; documents relating to the revelation that solicitor-client communications had been intercepted; and any documents relating to the what was done once it was determined that solicitor-client communications had been intercepted.
- The steps taken to implement the undertaking given to the Court in December 2008 and the Court's Order directing that CSIS cease listening to solicitor-client communications and to destroy the recordings. On this issue Mr. Jaballah seeks production any documents, electronic or otherwise, that directed analysts to comply with Order and whether analysts continued to listen after December 2008.

[4] Consideration of these issues and the documentary production is reviewed below.

Background

[5] Mr. Jaballah is the subject of a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA)* which has been referred to the Federal Court. He was released from custody in April, 2007 on lengthy and strict terms, having been in custody since his arrest in 2001 on the security certificate. Specifically, the release order (Release Order) made by Madame Justice Carolyn Layden-Stevenson of the Federal Court (as she then was) included a term which allowed for the monitoring of his telephone:

> Mr. Jaballah may use a conventional land-based telephone line located in the residence (telephone line) other than the separate dedicated land based telephone line referred to on condition that before his release from detention, both Mr. Jaballah and the subscriber to such telephone service shall consent in writing to the interception, by or on behalf of CBSA, of all communications conducted using such service. For greater certainty, this includes allowing CBSA to intercept the content of oral communications and also to obtain the telecommunication records associated with such telephone line service.

[6] The terms of Mr. Jaballah's release were substantially similar to those on which Mohamed Harkat and Mohamed Zeki Mahjoub, two other security certificate detainees, had been previously released. The release orders in each of these cases authorized CBSA to intercept all communications, with no specific provision allowing for the interception of solicitor-client communications.

[7] In November 2008, a CBSA official testified that CBSA had received a report about Mr. Harkat, which included privileged solicitor-client information. It was through this testimony, and

the testimony of other officials, that Mr. Jaballah's public counsel discovered that CSIS analysts were listening to the solicitor-client telephone calls of Mr. Harkat, Mr. Mahjoub and Mr. Jaballah.

CSIS Interception of Solicitor-Client Communications

[8] CBSA and CSIS monitoring of solicitor-client communications began after Mr. Harkat was released from detention in July 2006. Elizabeth Snow, manager of the Counter Terrorism section of CBSA, testified *in camera* and in public that CSIS analysts were directed to listen to all of Mr. Harkat's calls, and then destroy solicitor-client calls if they did not involve a threat to national security or a potential breach of the terms of release. These guidelines were contained in a letter dated July 21, 2006, sent from CBSA to CSIS, whose communications analysts were acting as CBSA's agents. These guidelines are apparently referred to as the "Harkat Guidelines". They have not been disclosed to public counsel, but it appears they have been reviewed by the Special Advocates.

[9] There were no specific guidelines governing the interception of Mr. Jaballah's communications when he was released. The evidence of an unnamed CSIS witness who testified *in camera*[*] was that it was understood that Mr. Jaballah's communications should be monitored according to the same protocol governing Mr. Harkat's communications. Thus, according to this CSIS witness, all of Mr. Jaballah's calls, including solicitor-client communications, were monitored by CSIS for the purpose of determining whether a communication involved a potential threat to

[*] Throughout these reasons where *in camera* evidence is referred to, it is taken from the public summaries.

national security or a breach of the terms of release. The communications were then supposed to be destroyed.

[10] CBSA and CSIS implemented new guidelines concerning the interception of communications of Mr. Jaballah, Mr. Mahjoub and Mr. Harkat in September 2007. Under these new guidelines, CSIS analysts listened to solicitor-client telephone calls, but did not destroy them. Instead, the calls were sent to CBSA to be processed. CSIS did not retain copies of interceptions or call logs.

Handling of Solicitor-Client Intercepts by CBSA and CSIS

[11] There is nothing in the record to date that suggests the Ministers have used or relied on the solicitor-client intercepts in the certificate proceedings against Mr. Jaballah.

[12] According to an unnamed CSIS analyst who testified *in camera*, CSIS analysts (acting as agents for CBSA) would make a preliminary analysis of the intercepted information. If the preliminary analysis indicated that Mr. Jaballah could be in violation of the provisions of the terms of his release, the information would be provided to CSIS for further analysis and follow up and investigation. It appears from the record that four disclosures were made to CSIS, but the CSIS witness testified that these four disclosures were not based on solicitor-client communications. The CSIS witness also testified that "CSIS has made no use of, and did not retain, any of Mr. Jaballah's solicitor-client communications".

[13] According to the public summary of Ms. Snow's *in camera* testimony, CBSA began listening to the intercepted communications in November 2007. Analysts were verbally instructed to stop listening to all calls involving a lawyer or law office staff. The public summary of her testimony states:

> Once a CBSA analyst who is listening to an intercepted communication realizes that a communication is subject to solicitor-client privilege, the analyst disengages. This means that the analyst stops listening to that call and does not listen to any further part of that call.
>
> …
>
> CBSA adopts a broad definition of a solicitor-client communication. Any call from a lawyer or anyone in the lawyer's office to Mr. Jaballah or anyone in the household is treated as privileged. Calls originating from the Jaballah household to a law firm are similarly treated.

[14] Ms. Snow further testified that CBSA had not used any of Mr. Jaballah's solicitor-client communications arising from the intercepted telephone calls and confirmed that CBSA was in the process of destroying any solicitor-client communications in its possession.

[15] Mr. Jaballah's Release Order also authorized CBSA to intercept and read the Jaballah's mail. As with the term authorizing the interception of telephone conversations, this term did not specifically address solicitor-client privileged mail. Yet, the evidence on the record indicates that CBSA officers recognized that the Release Order did not authorize the interception of solicitor-client privileged mail. As evidence of this, in December 2008, a CBSA officer inadvertently opened a letter to Mr. Mahjoub from his counsel, but immediately put the correspondence aside without reading it, and contacted his supervisors for further direction. Counsel for the Ministers

wrote to the Court the next day, explaining what had occurred and providing assurances that the letter had been inadvertently opened, but not read. In his sworn statement, the officer states:

> This incident was entirely inadvertent on my part. I am aware that solicitor-client mail is privileged and that the CBSA should not be reviewing such mail.

[16] Mr. Mahjoub and Mr. Jaballah were at the time represented by the same public counsel. Therefore, Mr. Jaballah's counsel became aware of the manner in which CBSA interpreted the terms of the Release Order in Mr. Mahjoub's case.

The Court's Response to the Solicitor-Client Intercepts

[17] In December 2008, when it was discovered that CSIS and CBSA were in fact monitoring Mr. Jaballah's solicitor-client communications, the Court acted quickly to rectify the situation. On December 18, 2008, counsel for Mr. Mahjoub applied to Justice Layden-Stevenson to have the Release Order amended to clarify that it did not authorize interception of his solicitor-client telephone calls. In response, Justice Layden-Stevenson stated:

> Let me say this, that I think the failure to provide some indication in the order in the first instance was due to an oversight both on the part of counsel and the court. There will be an amendment, you can be guaranteed of it, and I think the nature of it is probably properly addressed at the conclusion of the evidence, not in the middle of it.

[18] Later in the proceeding, Justice Layden-Stevenson stated that she would draft an amendment to the release order overnight and get it to counsel. She then went on to state:

> For the rest of us, the matter is resolved and I will draft the amendment, and I don't want to hear any more about it. It is done. It is over. It is finished. It has happened. We understand it happened. It is unfortunate, but there is nothing we can do to change the past. We

> can only look at what goes from here in terms of where it will go from here.

[19] When this comment was made, public counsel had only received disclosure of the evidence indicating that CSIS was intercepting solicitor-client communications that morning. Mr. Mahjoub was scheduled to testify regarding changes to the conditions of his release, and the Court was concerned that his testimony not be derailed by the interception issue.

[20] Counsel for the Ministers consented to the proposed amendment, which was formally made the following day, on December 19, 2008. Mr. Mahjoub's amended release order read:

> For greater certainty, when the content of the intercepted oral communications associated with the land-based telephone line in the Mahjoub residence involves solicitor-client communications, the analyst, upon identifying the communication as one between solicitor and client, shall cease monitoring the communication and shall delete the interception. [emphasis added]

[21] Mr. Jaballah's Release Order was formally varied on March 9, 2009 to read:

> When an analyst reasonably believes that a solicitor or an employee of a solicitor is a party to a communication, the analyst shall, whether the communication is written or oral, cease monitoring the communication and shall delete the interception as soon as is reasonably possible.

[22] While Mr. Jaballah's Release Order was not formally varied until three months after it was discovered that CBSA and CSIS were intercepting solicitor-client communications, CSIS counsel and counsel for the Ministers provided written assurances that Mr. Jaballah's solicitor-client calls were being handled in accordance with the variation of the Harkat and Mahjoub release orders.

The Interception of Solicitor-Client Telephone Calls after December, 2008

[23] Pursuant to a Direction of the Court made in February, 2010, CBSA subsequently disclosed recordings of 1503 intercepts of solicitor-client communications to Mr. Jaballah. A selection of these recordings has been filed under seal with the Court, but has not been provided to the Ministers' counsel.

[24] According to public counsel, the disclosure does not include any recordings of calls dated earlier then September 2007. This is consistent with an earlier protocol of CSIS of destroying solicitor-client communications that did not indicate a breach of the conditions of release or a potential threat to national security.

[25] The disclosure contains 591 calls over which Mr. Jaballah or his counsel claims privilege. These calls were recorded between September 2007 to December 2008.

[26] Surprisingly, the disclosure also included 171 recordings intercepted from the Jaballah telephone line between December 20, 2008 and May 8, 2010. Mr. Jaballah claims solicitor-client privilege over at least 58 of these calls. This disclosure indicates that CSIS continued to intercept and record solicitor-client privileged communications, contrary to counsel's assurances and the March 9, 2009 amendment to Mr. Jaballah's Release Order.

[27] Counsel for Mr. Jaballah have indicated that they intend to bring a motion alleging, among other things, that the interception of his privileged solicitor-client communications amounted to an abuse of process. Counsel for the Ministers has indicated that the Ministers will call two witnesses, a CBSA witness and a CSIS witness, during the abuse of process motion to deal with the interception of the solicitor-client communications in the post December 2008 period. Currently, the record with respect to the period following December 2008 is incomplete, and will be clarified in the abuse of process motion.

[28] In sum, the Ministers admit that CSIS analysts listened to, and then destroyed solicitor-client communications between May and September 2007. The Ministers further admit that from September 2007-December 2008 CSIS listened to solicitor-client communications, but sent them to CBSA for processing, rather than destroying them as per the earlier protocol. CBSA analysts were verbally instructed not to listen to any solicitor-client calls.

[29] While the full record regarding the interception of solicitor-client calls post-December 2008 period will be established in the upcoming abuse of process motion, it is reasonable to infer on the record before the Court in this motion that interception of Mr. Jaballah's solicitor-client communications took place after December 2008, contrary to the Ministers' written assurances, and the amended Release Order. However, the circumstances surrounding these interceptions are not yet known.

Issues

[30] This motion seeks production of documentation from CBSA and CSIS regarding the practices and procedures of those entities in dealing with privileged solicitor-client communications and any collateral documentation created by CBA or CSIS arising from a review of such communications. While counsel for Mr. Jaballah have raised six issues, these issues in fact can be conflated into four discrete matters as follows:

1. Did the original release order authorize CBSA and CSIS to intercept Mr. Jaballah's solicitor-client communications? Does the fact of having the communications intercepted pursuant to the Release Order eliminate solicitor-client privilege?
2. Is possession of the intercepts sufficient to make out a breach of solicitor-client privilege or is it necessary for the Ministers to have used or relied on the privileged material?
3. Is Mr. Jaballah entitled to disclosure of the secondary documents under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c11 (the *Charter*) and/or *Charkaoui v. Canada (MCI)*, 2008 SCC 38, [2008] 2 S.C.R. 326 (*Charkaoui II*)?
4. What is the scope of the documents to be produced, if any?

Issue one: Did the original release order authorize CBSA and CSIS to intercept Mr. Jaballah's solicitor-client communications? Does the fact of having the communications intercepted pursuant to the Release Order eliminate solicitor-client privilege?

The Jaballah Position

[31] Mr. Jaballah advances four main reasons why the original Release Order did not authorize the interception of his solicitor-client communications.

[32] First, counsel for Mr. Jaballah emphasizes that solicitor-client privilege is now recognized as a substantive right that can only be overridden in very narrow circumstances. They argue that solicitor-client privilege is recognized as a principle of fundamental justice (*Lavallee, Rackel and Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209 at paras. 16, 21). Thus, as noted at the outset of these reasons, solicitor-client privilege is afforded "near-absolute protection", and cannot be abrogated by inference (*Blank v. Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at para. 23; (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 at para. 11). Therefore, an order authorizing the interception of Mr. Jaballah's solicitor-client communications would have to be explicit.

[33] Second, it is argued that where there is doubt as to their meaning, court orders must be construed to comply with the *Charter*: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (*Dagenais*).

[34] Third, it is argued that Mr. Jaballah has not waived his *Charter* rights to a fair process in accordance with the principles of fundamental justice. The record demonstrates that Mr. Jaballah did not have the "requisite informational foundation for a true relinquishment of the right" (*R. v. Borden*, [1994] 3 S.C.R. 145 at para. 34). Mr. Jaballah's public counsel, the Designated Judge, and

CBSA appear to have understood the Release Order as not permitting interception of solicitor-client communications. Furthermore, it is argued that Mr. Jaballah's consent would not be truly voluntary, since it would force him to choose between his *Charter* right to liberty and his right to solicitor-client privilege.

[35] Finally, Mr. Jaballah' counsel point to the factual record in support of the position that the interception of solicitor-client communications was not authorized. The record suggests that all parties understood the Release Order as not authorizing the interception of solicitor-client privileged communications. CBSA officers apparently understood that solicitor-client mail was privileged, and also disengaged from solicitor-client calls. The Ministers did not attempt to justify such an intrusion into Mr. Jaballah's solicitor-client communications and consented to varying the Release Order. Justice Layden-Stevenson, the Designated Judge, specifically commented that "the failure to provide some indication in the order in the first instance was due to an oversight both on the part of counsel and the court".[1] All of these facts suggest that no one intended the Release Order to authorize the interception of Mr. Jaballah's solicitor-client communications.

The Ministers' Position

[36] The Ministers' primary position is that it is unnecessary to determine whether the telephone conversations between Mr. Jaballah and his counsel prior to December 2008 were privileged, as these communications have already been addressed by the amended Release Order. Further, it is unnecessary to determine whether the post-December 2008 communications were privileged,

because there is nothing on the record to establish any monitoring of solicitor-client communications after December, 2008.

[37] In the alternative, the Ministers assert that the Release Order clearly authorized interception of all communications because the Release Order was drafted on consent and with the benefit of legal advice from senior counsel. Mr. Jaballah's counsel expressed some awareness that their communications could be monitored.[2] Because Mr. Jaballah and his counsel did not have an expectation of confidentiality around their communication, they do not meet the third criteria to establish solicitor-client privilege, as set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. Therefore the solicitor-client communications at issue were never in fact privileged.

[38] In response to Mr. Jaballah's *Charter* arguments, the Ministers argue that there is no principle that solicitor-client privilege cannot be abrogated by inference, or waived on consent. This is because, so it is argued, that privilege is not a free-standing *Charter* right, and does not engage the *Charter* waiver issues.

[39] Finally, the Minsters take the position that *Dagenais*, above, applies to court orders, but not to the Ministers.

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[1] Application Record, Exhibit "I", Transcript of proceedings heard before the Honourable Madam Justice Layden-Stevenson, December 18, 2008, at p. 2-3.

Discussion

[40] In my view, the positions of the Ministers on Issue One cannot be sanctioned for the reasons that follow.

[41] As noted at the outset, solicitor-client privilege is virtually sacrosanct in the Canadian judicial system. While not enshrined *per se* in the *Charter*, it is a fundamental underpinning of the judicial system that individuals are able to seek legal advice in complete confidence without the state or anyone else eavesdropping.

[42] The argument by the Ministers that the Release Order sanctioned the interception, recording and monitoring of solicitor-client communications is simply not tenable. In my view this conclusion is supported for many reasons.

[43] First, because privileged solicitor-client communications are an accepted fundamental element of our judicial system, it cannot be said that the Ministers' counsel at the time the Release Order was granted honestly believed that CBSA were given an open invitation to intercept, monitor and review solicitor-client communications. To obtain such a wide ranging power to infringe a basic precept of law requires a specific request of the Court and supporting materials. No such specific authority was sought on the facts of this case. To obtain such a wide ranging power to infringe Jaballah's solicitor-client privilege the Release Order would have to authorize that in clear and unmistakeable terms.

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[2] Application Record, Applicant's factum at p. 31, footnote 34.

[44] Second, Mr. Jaballah could not be said to have consented to his solicitor-client communications monitored by CSIS. While it is easy, after the fact, for the Ministers to point fingers at Mr. Jaballah's counsel and the Court for granting such a sweeping Release Order to justify their actions, the fact remains that it was not in the contemplation of anyone that this would take place. For example, as soon as it was learned that the interceptions were taking place an amendment to the Release Order was immediately issued on consent. The Ministers at that time did not try and justify their actions nor did they seek leave of the Court to continue the interceptions. As Justice Layden-Stevenson stated, the failure to carve out protections for solicitor-client communications in the Release Order was an oversight. Furthermore, when the Release Order was amended, the amendment specified in the Mahjoub case that it was "for greater certainty", indicating that the amendment was intended to clarify the meaning of the original Release Order.

[45] Third, it is quite clear on the record that CBSA knew the importance of solicitor-client communications. This is evident from the fact that a CBSA officer inadvertently opened a letter from Mr. Mahjoub's counsel and immediately reported it to his superiors advising that as soon as he realized it was from counsel he did not read it. Mr. Mahjoub's release order and Mr. Jaballah's Release Order were identical in their substantive terms. CBSA knew they were not to intercept solicitor-client mail even though the Release Orders did not specifically exempt solicitor-client mail. Why is it different for telephone communications?

[46] Simply put, I agree with the submission made on behalf of Mr. Jaballah that something more than oversight is needed to authorize such a significant intrusion into solicitor-client communications.

[47] On the factual record before the Court I am satisfied that the Release Order did not authorize the interception of the Applicant's solicitor-client communications. Even if this were not so I accept Mr. Jaballah's *Charter* arguments on this point as further justification for this conclusion.

[48] The authorities cited provide more than ample authority to establish that solicitor-client privilege is a principle of fundamental justice. Mr. Jaballah's section 7 right to liberty is infringed by the fact that he is detained. Therefore, his detention must be in accordance with the principles of fundamental justice, including solicitor-client privilege, unless justified under section 1 of the *Charter*. The Ministers have never suggested that it is necessary to monitor Mr. Jaballah's communications with his lawyers, and have never attempted to justify the solicitor-client interceptions under section 1.

[49] The record does not establish that Mr. Jaballah intended to waive his right to conditions of detention that are in accordance with the principle of solicitor-client privilege. If none of the parties understood the Release Order as authorizing the interception of his solicitor-client communications, Mr. Jaballah could not have knowingly consented to this even though he was represented by counsel.

[50] Finally, with respect to the argument that there is no evidence of interception of solicitor-client communications post December 2008, there is evidence before the Court in the form of the disc of recordings provided at the hearing. It is a reasonable inference from all of the evidence before the Court that monitoring of solicitor-client communications continued into 2010. The Ministers cannot rationally be of the belief that this did not happen.

Issue Two: Is possession of the intercepts sufficient to make out a breach of solicitor-client communications or is it necessary for the Ministers to have used or relied on the privileged material?

The Jaballah Position

[51] Mr. Jaballah argues that possession is the triggering factor for a breach of solicitor-client privilege. The party who is asserting the breach does not bear the burden of establishing that the party who has come into possession of solicitor-client material has relied on the material in some way.

[52] Further, Mr. Jaballah points to the Supreme Court's decision in *Celanese Canada Inc. v. Murray Demolition Corp*., 2006 SCC 36, [2006] 2 S.C.R. 189 (*Celanes*e) to support this proposition. In this case, the Supreme Court repeatedly stated that possession of solicitor-client information was sufficient to establish a breach of solicitor-client privilege:

- Paragraph 34: "Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice."

- At paragraph 42, the Court notes that in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 Justice Sopinka held that the moving party need only establish that the opposing party has obtained solicitor-client information relevant to the matter at hand. There was no obligation to adduce further evidence of the nature of the information.
- Paragraph 46: "The gravamen of the problem here is the possession by opposing solicitors of relevant and confidential information attributable to a solicitor-client relationship to which they have no claim of right whatsoever."

[53] Finally, at paragraphs 48-51, the Supreme Court also held that the onus of establishing that the solicitor-client breach did not cause prejudice falls to the party in receipt of the solicitor-client information.

[54] In Mr. Jaballah's submission, *Celanese* is a complete answer to the Ministers' argument that possession is not sufficient to trigger a breach of solicitor-client privilege.

The Minister's Position

[55] The Ministers argue that CBSA and CSIS's possession of solicitor-client communications is not sufficient to establish a breach of solicitor-client privilege. The Ministers assert that *Celanese* is a case about removal of counsel, and that the condition precedent for the *Celanese* principles to apply is possession of solicitor-client information by counsel, not the client.

[56] In the present case, there is no allegation that counsel has come into possession of solicitor-client communications, and therefore it is argued that *Celanese* has no application. In the Ministers' view, the Court should distinguish between counsel and client in this case, because CBSA and CSIS

strictly control the confidential information on a need-to-know basis. There is therefore no basis for presuming that the monitoring of solicitor-client communications resulted in any prejudice to Mr. Jaballah.

[57] Further, the Ministers also note that the original Release Order required them to intercept solicitor-client communications. Thus, it cannot be that there is an adverse inference of prejudice where the Ministers come into possession of solicitor-client information as a natural consequence of a Court order.

Discussion

[58] The possession of the solicitor-client communications by an opposing party, as noted by the Supreme Court in *Celanese*, "affects the integrity of the administration of justice". Having determined that the interception of solicitor-client communications was not duly authorized, it is up to the Ministers to demonstrate on the abuse of process motion that it did not cause prejudice to Mr. Jaballah.

[59] The Ministers' argument that *Celanese* has no application because it only deals with removal of counsel and the possession by counsel of privileged solicitor-client communications does not hold water.

[60] The Ministers are entirely correct that *Celanese* is a case about counsel, and much of the Supreme Court's analysis is focused on the right to be represented by counsel of choice. It is also to be noted that some of the reasoning in *Celanese* is predicated on the fact that the solicitor-client

material was obtained through an *Anton Piller* order, which placed certain duties on the counsel executing the order. Notwithstanding these differences, the general principles from *Celanese* should apply in this case.

[61] In *Celanese*, the Supreme Court identified four reasons why a presumption of prejudice should apply once possession of privileged information is established, and why the party who obtained the confidential information to which they are not entitled should bear the onus of rebutting this presumption. All of these reasons are applicable to the case at bar, although with some modifications.

[62] First, the Ministers are best positioned to discharge the burden of establishing that there was no prejudice to Mr. Jaballah. He has no knowledge of who had contact with the solicitor-client communications and how the information was handled. The Ministers do.

[63] Second, putting the onus on the party conducting the search (or in this case, the monitoring) increases the incentive on its part to take care to ensure that privileged information is appropriately protected in the first place. This factor is particularly relevant in circumstances where Mr. Jaballah was required to consent to the monitoring in order to be released from lengthy detention, and where it appears that monitoring of solicitor-client communications continued after December 2008, contrary to the Release Order and the assurances given by the Ministers.

[64] Third, the Supreme Court found that in the circumstances of an *Anton Piller* order, it was procedurally unfair to subject a party to a surprise search where solicitor-client information is seized under an extraordinary order, and then throw the onus on the party subjected to the seizure to demonstrate prejudice. While the facts of this case are considerably different it is nonetheless procedurally unfair to require Mr. Jaballah to bear the onus of demonstrating prejudice caused by the solicitor-client breaches, in circumstances where he was required to grant the Ministers extraordinary access to his communications in order to be released from lengthy incarceration.

[65] Finally, the Supreme Court noted that under the terms of the *Anton Piller* order, *Celanese* should have kept careful records, and should be able to discharge the onus of rebutting the presumption of prejudice. While the Ministers in this case are not subject to the terms of an *Anton Piller* order, Ministers' counsel emphasized that the handling of information by his clients is subject to very strict regulation. The Ministers should therefore also be able to discharge the onus to rebut the presumption of prejudice.

[66] If the Ministers' argument that *Celanese* has no application is correct, and it was only the client that had access to the solicitor-client communications, how is one to know whether the instructions given to counsel in the conduct of the proceeding were tailored to undermine positions or strategies of the opposing party? There is no evidence on this motion that such is the case. However, that prospect is clearly there if the client has access to solicitor-client communications. In my view, this would bring the administration of justice into disrepute. Thus, *Celanese* cannot be

narrowly interpreted to mean that only if solicitor-client communications fall into the possession of the opposing party, as opposed to their counsel, there has been a breach of solicitor-client privilege.

[67] The real issue is whether the Ministers can rebut the presumption of prejudice, given the information in the record regarding CBSA and CSIS' handling of solicitor-client communications, and the assurances given that solicitor-client information was not used or relied on.

[68] Further, although the Release Order can be read as permitting the interception of solicitor-client privileged communications, for the reasons noted above this does not legitimize the possession by the Ministers of the solicitor-client information nor does the Release Order compel the Ministers to intercept solicitor-client communications. It can be said just as easily that the possession of solicitor-client mail was required by the Release Order, yet the protocol utilized by CBSA was that such mail was not to be opened. The Release Order is permissive and does not require CSIS to intercept. If there was any doubt by CSIS, as there should have been, then all parties should have immediately returned to Court.

[69] For all of these reasons, it is my view that a breach has been made out which opens the door to production of documentation as discussed below.

Issue Three: Is Mr. Jaballah entitled to disclosure of the secondary documents under s. 7 of the *Charter* and/or *Charkaoui II*?

Mr. Jaballah's Position

[70] In his written representations, Mr. Jaballah states that this motion is intended to provide him with the information he needs to litigate his forthcoming *Charter* application fairly and efficiently. He asserts that he must have access to this information in order to make full answer and defence in the proceedings against him.

[71] At the hearing, Mr. Jaballah placed significant reliance on his section 7 right to procedural fairness. In his view, the Minister's breach of solicitor-client privilege has the potential to compromise the fairness of the proceedings against him. It would be contrary to the principles of fundamental justice for the Ministers to breach solicitor-client privilege, and then use the fruits of the breach against Mr. Jaballah, either directly or indirectly.

[72] Refusing disclosure of relevant documentation would therefore allow the state to breach solicitor-client privilege in a fundamental way, and then force the individual to take their word that the breach has been rectified. The state should not be allowed to withhold information that goes directly to the fairness of the proceedings.

The Minister's Position

[73] The Ministers contend that Mr. Jaballah's motion must fail, because it is based on the right to make full answer and defence, a concept which does not apply to security certificate proceedings.

[74] They further argue that even if the concept of full answer and defence could be imported into security certificate proceedings, it does not apply in the context of an abuse of process motion, for two reasons. First, Mr. Jaballah's innocence is not at stake, and second, he is the moving party. Mr. Jaballah cannot claim a right to make full answer and defence in regard to his own application. He cannot engage in a fishing expedition under cover of full answer and defence by launching an abuse of process motion.

[75] The Ministers argue that the right to disclosure in security certificate cases is founded on the section 7 right to procedural fairness, not on full answer and defence. Specifically, it is founded on the right to know the case made by the Ministers in support of the reasonableness of the certificate. The documents sought by Mr. Jaballah have nothing to do with the case made by the Ministers, or the reasonableness of the certificate. Therefore, Mr. Jaballah is not entitled to production of these documents under the *Charkaoui II* principles.

Discussion

[76] Security certificate cases are not conducted pursuant to principles evolved from criminal law. They are *sui generis* proceedings (see *Charkaoui v. Canada (MCI)*, 2004 FCA 421, [2005] 2 F.C.R. 2009 at para. 53). They are a hybrid proceeding with a different burden of proof and a legislative admonition (see paragraph 83(1)(a) of *IRPA*) which requires that these proceedings be conducted as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

[77] Full answer and defence is a criminal law concept. It has no automatic application to certificate cases. While Mr. Jaballah raises this concept in support of his forthcoming *Charter* application, whether it applies or not need not be decided on this motion.

[78] The simple answer to this issue is based on procedural fairness. It is neither procedurally nor fundamentally fair for the Ministers to access solicitor-client communications, many of which are privileged, and have the ability to use that information directly or indirectly against the interests of Mr. Jaballah. There is no evidence that either CBSA or CSIS have done so, but the fact remains that they have accessed and were in possession of such communications. The documents sought in question go to the fundamental fairness of the proceeding. It is not a question of Mr. Jaballah knowing the case he has to meet, but rather knowing the extent to which information obtained through the intercepts has been used, directly or indirectly.

[79] In *Charkaoui II* the Supreme Court emphasized the flexible nature of the *Charter's* section 7 rights to procedural fairness. Section 7 does not require a particular procedure. The appropriate procedural protections are determined through a contextual analysis, based on the factors set out in *Suresh v. Canada (MCI)*, 2002 SCC 1, [2002] 1 S.C.R. 3: the nature of the decision to be made, the role of the particular decision in the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choice of procedure made by the agency (*Charkaoui II*, at para. 57).

[80] Applying the *Suresh* factors to the security certificate context, the Supreme Court held that:

> In the context of information provided by CSIS to the ministers and the designated judge, the factors considered in *Suresh* confirm the need for an expanded right to procedural fairness, one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation. As we mentioned above, these procedures may, by placing the individual in a critically vulnerable position vis-à-vis the state, have severe consequences for him or her (*Charkaoui II* at para. 58).

[81] The Ministers argue that *Charkaoui II* disclosure should be limited to information relating to the reasonableness of the certificate. I do not agree that *Charkaoui II* should be read so restrictively. As Mr. Jaballah's counsel noted, when discussing the procedural rights accorded by section 7, the Supreme Court used the word 'includes' (see, for example, paragraph 56), which does not suggest a restrictive approach.

[82] More importantly, I do not think that Mr. Jaballah's right to procedural fairness is limited to the determination of the reasonableness of his certificate. While it is clear that the procedure for determining the reasonableness of Mr. Jaballah's security certificate must be in accordance with the principles of fundamental justice, it is also true that Mr. Jaballah's detention engages his section 7 rights by limiting his liberty. The circumstances of his detention, including the monitoring of his communications, must also be in accordance with the principles of fundamental justice. Fundamental justice includes the principle of solicitor-client privilege (*Lavallee, Rackel & Heintz*, above, at para. 26), and also includes the common law principles of procedural fairness (*Suresh*, above, at para. 113). Thus, even if *Charkaoui II* could be read as limited to disclosure relating to the

reasonableness of the certificate, section 7 procedural fairness rights are still applicable in this motion.

[83] The link between disclosure and the fairness of the proceedings is most obvious when the disclosure is related to the reasonableness of the certificate; because Mr. Jaballah must know the case he has to meet.[3] The difficulty on this motion is that the link between the disclosure requested by Mr. Jaballah and the fairness of the proceedings is much less direct. This motion does not directly challenge the fairness of the proceedings against Mr. Jaballah: "the Court is not at this stage being called on to decide whether the interception of Mr. Jaballah's solicitor-client telecommunications has prejudiced the fairness of the proceedings against him" (para. 38 of the Jaballah Written Representations). Yet, in order to grant the remedy requested under section 7, the Court must find that disclosure is necessary to ensure the proceedings are fair.

[84] Similarly, the motion is not simply a claim for breach of solicitor-client privilege, an issue which presumably will also be dealt with in the *Charter* application. Because solicitor-client privilege is a substantive right, this may be sufficient grounds on which to order the relief requested, without relying on the *Charter*. In *Descôteaux v. Mierzeinski*, [1982] 1 S.C.R. 860, the Supreme Court recognized that a breach of solicitor-client privilege can give rise to a variety of remedies:

> Like other personal, extra-patrimonial rights, it gives rise to preventive or curative remedies provided for by law, depending on the nature of the aggression threatening it or of which it was the object. Thus a lawyer who communicates a confidential communication to others without his client's authorization could be

[3] On the issue of knowing the case to be met, the Court has made a Direction regarding the provision of will-says and expert reports prior to the commencement of the reasonableness hearing.

> sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them.

[85] Instead, Mr. Jaballah argued that he needs disclosure in order to pursue his forthcoming *Charter* application. I am not satisfied this is sufficient grounds to justify granting disclosure, particularly if full answer and defence does not apply outside of the criminal law context. However, under section 7 of the *Charter*, the question is whether production of the collateral documents is necessary in order to ensure the proceedings against Mr. Jaballah are fundamentally fair.

[86] In this motion, given that the impact of the interceptions on the fairness of the proceeding cannot be determined yet, is it not reasonable to find that disclosure of the collateral documents are necessary in order to determine whether the solicitor-client breach has impaired the fairness of the proceedings? When viewed in this light, disclosure is necessary to ensure the proceedings are fair.

[87] There are several factors which suggest these documents should be disclosed in order to ensure the procedure against Mr. Jaballah is fair. As the Supreme Court noted at paragraph 54 of *Charkaoui II*, "[i[nvestigations by CSIS play a central role in the decision on the issuance of a security certificate and the consequent removal order". If CSIS (or CBSA) agents have been monitoring solicitor-client communications, the potential impact on the fairness of the proceedings, depending on the ultimate evidence before the Designated Judge hearing the abuse motion, against Mr. Jaballah may be very significant.

[88] In this case the record establishes at least a *prima facie* breach of solicitor-client privilege. As solicitor-client privilege has now been recognized as a principle of fundamental justice, this may mean, again contingent on the evidence, that the proceedings against Mr. Jaballah have not been conducted in accordance with the principles of fundamental justice. In order to ensure the proceedings are fair, Mr. Jaballah should be assured that the monitoring has stopped, and should know the extent to which his solicitor-client communications have been used and handled by the CBSA and CSIS. Currently, only the Ministers know exactly how the solicitor-client communications were handled, while Mr. Jaballah's knowledge remains limited. Ordering disclosure would put the parties on a level playing field on this issue.

[89] Even if CBSA and CSIS have not used or relied on the solicitor-client communications such that the fairness of the proceedings against Mr. Jaballah would be substantively impaired, the appearance of fairness is also important.

[90] While *Charkaoui II* deals with knowing the case which must be met, it does not throw out the concept of fundamental or procedural fairness. Documentation must therefore be produced.

[91] Finally, it should be noted that there is no evidence that ordering production would cause any prejudice to the Ministers in this proceeding. Any disclosure is subject to the Ministers' own claims of privilege.

Issue Four: What is the scope of the documents to be produced, if any?

Position of the Parties

[92] The list of documents requested is set out at the outset of theses reasons as enumerated at paras. 41-43 of the Jaballah Written Representations. As noted during argument, the request is wide-ranging because counsel do not know what documents there are or what documents may have been generated in the course of the monitoring of the solicitor-client communications. Thus, Mr. Jaballah has requested documents related to the question of how far information from the solicitor-client intercepts was disseminated, as well as documents bearing on the decision-making process that led CBSA and CSIS to intercept, review and record solicitor-client communications, and steps taken to implement CSIS counsel's December 2008 undertaking and the Court's March 9, 2009 amended Release Order requiring CSIS analysts to stop listening to all solicitor-client interceptions and destroy them.

[93] The Ministers simply take the position that no collateral documents should be produced.

Discussion

[94] Based on the conclusions on the first three issues, it is my view that Mr. Jaballah is entitled to production of documentation relating to the interception of his solicitor-client communications. The scope of that production is more problematic, as it is understandable that a wide net has been cast by Mr. Jaballah in search of documentation to assist in the abuse of process of motion.

[95] However, production should only be ordered to the extent it is necessary to ensure the fairness of the proceedings against Mr. Jaballah. As discussed above, in order to determine whether

the proceedings are fair, it is important to know how the solicitor-client intercepts were handled. Further, Mr. Jaballah should be satisfied that the monitoring has stopped, and should know what has been done to ensure it has stopped. However, document production should not be an endless fishing expedition. There must be reasonable limits.

[96] Thus, dealing with the various categories of documents outlined in Mr. Jaballah's Written Representations:

- the July, 2006 Harkat Guidelines and the subsequent September, 2007 replacement guidelines

  In my view, as these documents appear to set out a protocol for the interception of solicitor-client communications they are relevant and should be produced. The Special Advocates appear to have received or reviewed copies of them but public counsel have not. It is not readily apparent why such guidelines have not also made available to public counsel except to say that national security privilege must have been asserted by the Ministers. In keeping with the protocol established for this production motion (the Production Protocol), if the Ministers continue to assert national security privilege over these guidelines then they will be reviewed by a Designated Judge to determine if they should be produced to public counsel in their entirety or in some redacted form.

- Records or logs indicating when the solicitor-client intercept recordings were accessed by CBSA and CSIS analysts, along with the frequency and duration of these accesses

Any such documents are also relevant to the issue of knowing the scope of knowledge of the Ministers regarding discussions between Mr. Jaballah and his counsel.

- Any memos, letters or other documents establishing practices or procedures governing the sharing of information between CSIS and CBSA derived from the interceptions in any of the security certificate cases (*i.e.* Harkat, Mahjoub and Jaballah)

The argument for their production was that these documents deal with how the fruits of the interceptions could be disseminated. As opposed to fairness, they are more directed to the abuse of process motion. To the extent that there are documents which establish any practices of sharing information between CSIS and CBSA they would be relevant and should be produced.

- Any memos, written instructions or other documents relating to the practices to be followed by CBSA and CSIS analysts in relation to solicitor-client intercepts

This category of documents appears to be the same as the Harkat Guidelines. To the extent there are documents in addition to the Harkat Guidelines which fall within this description they should also be produced.

- Any reports, memos or other documents that refer to the content of any of the Jaballah intercepts, whether solicitor-client privileged or otherwise

Any such documents are directly relevant to fairness in this proceeding as they will demonstrate the extent to which any solicitor-client information was accessed or in any way used. Again, if national security privilege is claimed in respect of any of these documents then the Production Protocol will apply.

- Documents relating to the decision-making process that led CBSA and CSIS to intercept, record and review privileged solicitor-client telephone calls in Mr. Jaballah's case and in other certificate cases (Harkat and Mahjoub)

This request appears to be largely repetitive of other groups of documents i.e. the Harkat Guidelines, and related documents which have been dealt with above. The individual descriptions of the categories of documents casts the net too wide as they may include, for example, privileged communications. This category must therefore be limited to documents relating to: the creation of the two sets of Harkat Guidelines; the scope of the Release Order relating to Mr. Jaballah and the handling of solicitor-client communications; and the discovery that CSIS was intercepting Mr. Jaballah's solicitor-client communications. Documents are also sought from the Harkat and Mahjoub proceedings because the discovery that solicitor-client communications were being intercepted occurred in the Harkat case. However, this request is too open-ended. Production must be limited to communications between CBSA and CSIS that directly relate to the approach taken in this case involving Mr. Jaballah.

- Documents relating to the steps taken to implement the undertaking given to the Court in December 2008 and the Court's Order directing that CSIS cease listening to solicitor-client communications and to destroy the recordings.

The post-December 2008 period is relevant to fairness and abuse of process. Thus, documents relating to the continued interception of solicitor-client communications should be produced and would encompass any documents of CSIS or CBSA regarding the handling, review and destruction of solicit-client communications; documents relating to the knowledge of CSIS or CBSA regarding the undertaking to the Court and the revised term of the Release Order concerning solicitor-client communications; and documents relating to the continuation of the interception of solicitor-client communications after December 2008.

Conclusion

[97] In the end result, for all of the reasons noted above I am satisfied that Mr. Jaballah is entitled to production of documents which directly impact on his ability to know the extent of the policies of CBSA and CSIS regarding solicitor-client interceptions generally and as they relate specifically to him and the extent to which either or both of CBSA or CSIS have used any information gleaned from listening to intercepts. As was conceded during argument by Mr. Jaballah's counsel, those documents are difficult to more accurately define because they do not know the nature of the documents maintained by CBSA and CSIS. Thus, the parties may return to the Court for further clarification in the event there is any issue concerning the scope of production that is not apparent from these reasons.

ORDER

THIS COURT ORDERS that:

1. The Ministers shall make production of documentation in accordance with the reasons herein.

2. All documents produced shall be subject to the Production Protocol which was set out in the Court's Direction dated August 24, 2010.

3. Any issues regarding the specific scope of production in light of these reasons may be referred back to the Court for further clarification, as required.

"Kevin R. Aalto"
Case Management Judge

FEDERAL COURT
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	DES-6-08
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 MAHMOUD ES-SAYYID JABALLAH
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	September 17, 2010
REASONS FOR ORDER AND ORDER BY:	AALTO P.
DATED:	November 3, 2010

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