Federal Court  Cour fédérale

Date: 20090527

Docket: DES-4-08

Citation: 2009 FC 546

Ottawa, Ontario, May 27, 2009

Present:

BETWEEN:

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

IN THE MATTER OF the referral of that Certificate to the Federal Court under Subsection 77(1) of the IRPA;

AND IN THE MATTER OF Adil Charkaoui;

AND THE BARREAU DU QUÉBEC, Intervener

REASONS FOR ORDER AND ORDER

Introduction

[1] On February 16, 2009, the Ministers submitted the additional documentation (Phase II) required by *Charkaoui v. Canada*, 2008 S.C.J. No. 39, 2008 SCC 38. At the same time, they provided the special advocates with redacted documents rather than the complete documents, arguing that certain privileges existed and were applicable.

[2] In the Court's communication dated February 27, 2009, it informed the person concerned and his counsel of the various reasons why the Ministers had redacted the information included in the additional disclosure, in accordance with *Charkaoui II*, [2008] 2 S.C.R. 326; see Appendix "A":

a. investigations, whether underway or not, that do not relate to the person concerned;
b. identification of human sources;
c. identification of employees of the Service;
d. matters/subjects/individuals/groups of interest to foreign agencies that do not relate to the person concerned;
e. identification of employees of foreign agencies;
f. solicitor-client privilege;
g. Cabinet confidences.

[3] In the directive issued by the Court on March 18, 2009, it then asked the Ministers to review the redacted documents for the special advocates and noted that the reasons why information could be expunged would be identification of human sources, solicitor-client privilege and Cabinet confidences; see Appendix "B".

[4] The Court invited all counsel to submit written legal argument on the rules that apply to redacting of documents. An oral hearing was held on that issue on May 5, 2009.

Positions of the Parties

(i) Counsel for the person concerned and the special advocates

[5] Counsel for the person concerned and the special advocates essentially submitted that redacting the information provided to the special counsel by the Ministers is illegal by virtue of subsection 85.4(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (IRPA) and the fact that they submitted complete, unredacted information to the Court.

[6] The privileges in issue therefore cannot be set up against the special advocates; the law is that they must receive the information judicially disclosed to the Court.

[7] Counsel for the person concerned also argued that the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23 [CSIS Act], authorizes the Canadian Security Intelligence Service to disclose information it acquires in the circumstances specified in subsections 19(2) and 18(2) of that Act.

[8] In subsection 19(2) of the CSIS Act, Parliament specifically provided that the Service could disclose information “as required by any other law”.

[9] Parliament also provided, in subsection 18(2) of the Act, that even confidential information acquired by the Service from which the identity of a person who was a confidential source of information or assistance to the Service may be disclosed in the cases covered by that subsection**.**

[10] Accordingly, subsection 85.4(1) is a law that requires disclosure of human sources, in addition to the right to make full answer and defence.

[11] As a result, the redacting done by the Ministers is illegal and unjustified. Everything should have been disclosed to the special advocates, as is also confirmed by the rules that apply to privilege.

[12] Counsel for the person concerned submitted that the Ministers have the burden of proving that the privilege applies. The Court will then have to consider the circumstances of the privilege alleged, the documents and the case: *A.M. v. Ryan* [1997] 1 S.C.R. 157.

[13] Counsel submit with respect to the human sources privilege that the Ministers must identify the person who provided information to the government and establish that person’s status and relationship with the government and the nature of the information, and explain how that person is covered by a privilege; the Court will then be able to determine whether the privilege applies as an exception to disclosure of the evidence.

[14] The Court will then have to balance the interests to determine whether the public interest in disclosure outweighs the public interests identified.

[15] Counsel submit with respect to solicitor-client privilege that the Ministers must prove that they are attempting to have information protected that is genuinely part of the solicitor-client relationship. Where the information is privileged, the Court must determine whether it is covered by an exception, such as "innocence at stake" and the right of the accused to make full answer and defence, or criminal communication between solicitor and client.

[16] In the case of Cabinet confidences, the Ministers have the burden of proving justification for denying the person concerned the information on the ground that a privilege exists.

(ii) The Ministers

[17] The Ministers submit that they had legal justification for redacting the privileged information that is part of the additional disclosure under *Charkaoui II*, *supra*. When Parliament amended section 9 of the IRPA, it did not intend to abrogate the privileges recognized at common law. The common law rules subsist absent a clear legislative expression of intent to depart from them: *Rawluk v. Rawluk* [1990] 1 S.C.R. 70.

[18] The privileges in issue in this case are virtually absolute and may be lifted only in very rare cases. It cannot be said that subsection 85.4(1) of the IRPA indicates an express intent on the part of Parliament to preclude one of the privileges cited by the Ministers.

[19] It is important to note that even in criminal law, the duty to disclose is not absolute and the Crown is by no means required to disclose evidence that is clearly irrelevant or covered by a privileged recognized in the law of evidence: *R. v. Stinchcombe* [1991] 3 S.C.R. 326, pages 339 and 340.

[20] Contrary to the argument made by the person concerned, subsection 85.1(4) does not operate to preclude application of the privilege recognized by the law of evidence and it therefore does not permit disclosure of evidence that is otherwise privileged. Accordingly, his arguments based on sections 18 and 19 of the *Canadian Security Intelligence Service Act* are of no avail. The Ministers submit that subsection 85.1(4) of the IRPA is not a "law" that requires disclosure of information that is otherwise privileged in this case.

[21] The covert human sources privilege protects both the relationship between CSIS and the source and the identity of the source: *Re Harkat*, 2009 FC 204, para. 31.

[22] In that decision, Mr. Justice Noël recognized that there is a covert human intelligence source privilege analogous to the police informer privilege in proceedings under section 9 of the IRPA.

[23] Once the human sources privilege is recognized it is absolute and the Court has no discretion to lift it. The Court must prohibit disclosure not only of the source, but also of any information that could implicitly reveal the source's identity.

[24] However, the Ministers acknowledge a limited exception where the special advocate establishes that he or she has a "need to know" the identity of a human source to prevent a flagrant denial of procedural fairness which would bring the administration of justice into disrepute: *Re Harkat*, *supra*, paras. 35, 61 and 69.

[25] Solicitor-client privilege is now recognized not only as a substantive legal rule, but also as a "fundamental civil right": *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

[26] The privilege applies where there is (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[27] In addition, the fact that advice that would be characterized as privileged is given by staff counsel does not preclude application of the privilege or alter the nature of the privilege: *Pritchard v. Ontario*, [2004] 1 S.C.R. 809, 2004 SCC 31.

[28] The privilege may be lifted only in the case of "absolute necessity" and application of the privilege does not call for the interests to be balanced in each case. With respect to the exceptions alleged by the person concerned, the "innocence at stake" rule and criminal communications, the mere fact that this case involves the application of section 7 of the Charter does not mean that the rule applies in this case, in which the "innocence" or "guilt" of the accused is not at stake; the issue

is rather the reasonableness of a certificate stating that there are reasonable grounds to believe that the person concerned is inadmissible to Canada.

[29] The case law submitted by the person concerned for the purpose of "piercing" solicitor-client privilege in this case is clearly insufficient.

[30] The arguments made by the person concerned regarding renunciation cannot stand. The only purpose of submitting the unredacted documents to the designated judge is to enable the designated judge to decide any dispute that might arise in that regard.

[31] The privilege that protects Cabinet confidences has been codified and modified by section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the CEA), which requires that where a minister or the Clerk of the Privy Counsel objects to the disclosure of information and certifies in writing that it is a confidence of the Queen's Privy Council for Canada, the court is required to refuse disclosure without examination or hearing of the information.

Issue

[32] The question is whether section 9 of the IRPA operates to preclude application of the common law privileges with the result that the Ministers have no legal justification for expunging the privileged information included in the additional disclosure under *Charkaoui II*.

[33] If not, the question is then what rules apply to the requests by the special advocates for the de-redacting of the documents.

Analysis

1. Conflict between the IRPA and the privileges

[34] The person concerned and the special advocates rely essentially on subsection 85.4(1) of the IPRA in their assertion that no legal basis exists for the redacting.

[35] Subsection 85.4(1) of the IRPA reads as follows:

Obligation to provide information	Obligation de communication
85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.	85.4 (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.

[36] Although the provision seems to indicate that Parliament intended for all information and other evidence provided to the judge to be provided as well to the special advocate, I cannot read it as containing an express intention on the part of Parliament to depart from the privileges alleged by the Ministers, which are virtually absolute for the following reasons.

[37] To begin, I note that this information is included in the disclosure under *Charkaoui II* (Phase II). It is therefore not information and evidence on which the security certificate is based. With respect to the certificate, the Ministers submitted evidence in support of their position. A complete version, with the exception of a few paragraphs of a document, was provided to the special advocates in accordance with subsection 85.4(1) of the IRPA.

[38] In my opinion, Parliament's intent in enacting subsection 85.4(1) was to ensure that all information and other evidence on which the Ministers based their position was provided to the special advocates so they would have all of the evidence that could be set up against the person concerned, to enable them to represent his interests at the *in camera* hearing.

[39] I also note that Parliament at that time could not have foreseen the subsequent decision of the Supreme Court in *Charkaoui II*, *supra*, which expanded the duty to disclose. In my opinion, it is unlikely that the decision in *Charkaoui II* held that the disclosure in issue had to include privileged material.

[40] In any event, the Ministers acted cautiously by providing the judge with all of the documents (including the privileged information). The Court is therefore in a position to ensure that a privilege could be alleged. I can see in this no renunciation of the privileges alleged.

[41] Absent a clear provision expressly precluding the application of one of the privileges alleged by the Ministers, I am not prepared to read subsection 85.4(1) of the IRPA as permitting the lifting of these privileges.

[42] Accordingly, when the Court has determined, after examining the expunged material, that a privilege applies and that there is no exception that can be cited to have the privilege lifted, the documents in question will remain redacted.

2. Rules applicable to requests by the special advocates for de-redacting

(i) Identification of human sources

[43] As we saw earlier, my colleague Justice Noël, in *Harkat*, *supra*, recognized the existence of a privilege to protect covert human intelligence sources, analogous to the police informer privilege, in proceedings under section 9 of the IRPA. He summarized the principles underlying the human sources privilege as follows:

> a. Covert human sources are vital to the functioning of intelligence agencies and to the national security of Canada; they often provide information at risk to themselves and to their families.
>
> b. Human sources are given a guarantee that their identity will remain confidential; access to information about them is severely restricted and compartmentalized within CSIS.
>
> c. Recruitment of human sources would be harmed if they were not given a guarantee that the Court would keep their identity secret;

> disclosing the identity of a source in a proceeding, even a closed proceeding, would almost certainly end the source's relationship with CSIS; regard must be had to the special nature of national security investigations, which may be ongoing over time.
>
> d. The confidentiality of sources ensures that the relationship between the source and CSIS can be maintained in the long term and ensures the future success of intelligence investigations. Confidentiality is essential to CSIS's ability to fulfil its legislative mandate to protect the national security of Canada while protecting the source from retribution.

[44] Those principles are persuasive and apply in this case. However, I recognize the limited exception recognized by Justice Noël, where the special advocate establishes that he or she has a "need to know" the identity of a covert human source to prevent a flagrant denial of procedural fairness which would bring the administration of justice into disrepute.

[45] The Court will need only to determine whether the redacted documents are covered by that privilege and that the limited exception does not apply.

(ii) Solicitor-client privilege

[46] The importance of this privilege needs no explanation; it is an essential element of the justice system. Once it has been established that communications between solicitor and client fall into that class, they enjoy a *prima facie* presumption of inadmissibility: *R. v. McClure*, [2001] 1 S.C.R. 445. The privilege applies when in-house government lawyers provide legal advice to their client, a government agency: *Pritchard v. Ontario, supra*.

[47] The requirements for this privilege to apply are well known. There is no need to lay them out again. There Court will therefore need only to ascertain whether the redacted documents are covered by the privilege and that none of the exceptions alleged by the person concerned apply in this case.

[48] I accept the Minister's submission that the only purpose of providing the judge with the unredacted documents is to enable the judge to decide any dispute that might arise in that regard, and it does not constitute renunciation of the privilege.

(iii) Cabinet confidences

[49] I would briefly note that this privilege, which is codified in section 39 of the *Canada Evidence Act*, applies where the Clerk or the minister properly certifies that the information is confidential. The judge is required to refuse disclosure without examination or hearing of the information by the court: *Babcock v. Canada*, 2002 S.C.J. No. 58, 2002 SCC 57. No balancing of all parties' interests is done. Where the certificate is submitted to the court, the documents are sealed without being examined by the court.

ORDER

THE COURT ORDERS that the documents provided to the special advocates shall remain redacted until the Court has examined them to ensure that they are covered by the privileges alleged and that no exception applies.

Danièle Tremblay-Lamer
J.

Certified true translation
Stefan Winfield, reviser

APPENDIX "A"

Date: 20090227

Docket: DES-4-08

Ottawa, Ontario, February 27, 2009

Present: The Honourable Madam Justice Tremblay-Lamer

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

IN THE MATTER OF the referral of that Certificate to the Federal Court under Subsection 77(1) of the IRPA;

AND IN THE MATTER OF Adil Charkaoui;

AND THE BARREAU DU QUÉBEC, Intervener

COMMUNICATION TO ADIL CHARKAOUI AND HIS SOLICITORS OF RECORD

On February 18, 2009, the Court registry received the copy of the disclosure ordered in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*Charkaoui II*). The computer medium submitted included approximately 3,000 documents.

The Court wishes to inform the person concerned and his solicitors that it appears from the letter from the Ministers attached to the disclosure that the copy provided to the special advocates

has been redacted, while the version provided to the Court simply highlights the passages expunged from the version provided to the special advocates, so that the passages in question can still be read.

The reasons advanced by the Ministers to justify the redacting of the copy provided to the special advocates are:

(a) investigations, whether or not underway, that do not relate to the person concerned;

(b) identification of human sources;

(c) identification of employees of the Canadian Security Intelligence Service (CSIS);

(d) matters/subjects/individuals/groups of interest to foreign agencies that do not relate to the person concerned;

(e) solicitor-client privilege; and

(f) Cabinet confidences.

The Court attaches hereto a letter from the special advocates dated February 25, 2009. You will note, in the second salient point on page 2 of the letter, that the special advocates intend to request de-redacting for their benefit and that their requests be heard *in camera* in the event that the Ministers refuse.

The Court wished to bring this information to the attention of the person concerned and his solicitors so that they would also have an opportunity to present legal arguments regarding the rules that apply in determining the requests to be made by the special advocates, *in camera*, regarding the

documents covered by disclosure under *Charkaoui II*, to the extent possible, during the public argument on questions of law to take place on March 10 and 11.

The Court also issued a written direction to the Ministers on February 24, 2009, asking whether they were prepared to consent to disclosure of the content of any intercepted communication to which the person concerned was a party and any surveillance report concerning him. A similar approach has been taken in other cases.

As well, after considering the first proposal for disclosure made by the special advocates and the Ministers' response, and in order to make a ruling regarding possible disclosure to the person concerned, the Court also ordered that the Ministers immediately obtain the approvals that seem to be required in relation to information originating from the domestic agencies involved, and one foreign agency, which they said they were prepared to disclose, subject to approval from the foreign agency in question.

Danièle Tremblay-Lamer
J.

Certified true translation
Stefan Winfield, reviser

APPENDIX "B"

Date: 20090318

Docket: DES-4-08

Ottawa, Ontario, March 18, 2009

Present: The Honourable Madam Justice Tremblay-Lamer

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

IN THE MATTER OF the referral of that Certificate to the Federal Court under Subsection 77(1) of the IRPA;

AND IN THE MATTER OF Adil Charkaoui;

AND THE BARREAU DU QUÉBEC, Intervener

DIRECTION

First, to facilitate argument on the issue of redacting at the public hearing on May 5, 2009, and *in camera* on May 7, 2009, the Court would note that all information received by the Court registry (disclosure under *Charkaoui II*) that may have been expunged for the following reasons:

(a) investigations, whether or not underway, that do not relate to the person concerned;

(b) identification of human sources;

but that relate to people, groups or organizations referred to in the summary of the security intelligence report and/or of the confidential security intelligence report relating to the person concerned should be re-examined by the Ministers with a view to de-redacting, it being the opinion of the Court that the special advocates should be able to have access to that information because the Court has access to it and that the special advocates must be able to fulfil the responsibilities assigned to them under subsection 85.1 (2) of the IRPA.

In addition, the Court requests re-examination of any expunging that may have been done for the following reasons:

(c) identification of employees of the Service involved in sensitive operations;

(e) identification of employees of foreign agencies.

The rule is that such information not be expunged, and since what is involved here are documents provided to the special advocates in confidence for viewing in a secure location, written submissions regarding the exception to that rule, addressing the applicable rules, may be filed by the parties (by March 27, 2009, for the person concerned; by April 3, 2009, for the special advocates; by April 10, 2009, for the Ministers) and argued at the public hearings and *in camera* hearings.

In view of this direction, the Court notes that any information that would still be expunged would be expunged on the following grounds:

(b) identification of human sources;

(f) solicitor-client privilege; and

(g) Cabinet confidences.

For those three classes, the Court notes, first, that section 39(1) of the *Evidence Act* provides that a minister or the Clerk of the Privy Council may certify in writing that information constitutes a confidence of the Queen's Privy Council for Canada.

With respect to information that allegedly reveals the identity of human sources, the Court would note that this class must be applied narrowly and should not include documents that merely refer to the use of human sources and in respect of which methods have been utilized within the document to preserve the anonymity of the human source.

If that is the case, the Court observes that the most fundamental ground for expunging alleged by the Ministers is the ground alleging that the information is covered by solicitor-client privilege.

Danièle Tremblay-Lamer
J.

Certified true translation
Stefan Winfield, reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-4-08

STYLE OF CAUSE: **IN THE MATTER OF a certificate under subsection 77(1) of the *Immigration and Refugee Protection Act* (IRPA);**

IN THE MATTER OF the referral of that certificate to the Federal court under subsection 77(1) of the IRPA:

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PLACE OF HEARING: Montréal, Quebec

DATES OF HEARING: May 5, 2009

REASONS FOR ORDER: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

DATE OF REASONS: May 27, 2009

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