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 Hassan ALMREI;

AND IN THE MATTER OF Mohamed HARKAT;

AND IN THE MATTER OF Mahmoud JABALLAH;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB.

INDEXED AS: ALMREI (RE) (F.C.)

Federal Court, Dawson J.—Toronto, January 26; Ottawa, March 5, 2009.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Security Certificate — Whether Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326 (Charkaoui 2), para. 62 requiring designated judge verify all information disclosed if agreement between ministers, special advocates that some information irrelevant; whether information disclosed to persons named in security certificates, counsel thereof should be placed on Court's public files — Situation herein different from that in Charkaoui 2 — Special advocate having means to protect interests of named person by, inter alia, identifying irrelevant information, evidence — Therefore not necessary for Court to verify all information disclosed — Open court principle not applying to information disclosed, produced in course of litigation, but not put into evidence — As such, no need to place information not relied upon by ministers, not produced as evidence, on Court's public files — However, summaries of information provided, relied upon by ministers required to be placed on Court's public files.

Judges and Courts — Role of designated judge when parties agreeing information disclosed pursuant to Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326 may be released to person named in security certificate — Immigration and Refugee Protection Act, s. 83(1)(d) requiring judge ensure information relied upon, provided by Minister remain confidential if disclosure injurious to national security, endangering safety of person — Plain reading of Act revealing judge must fulfill that obligation before releasing information to named person — In some circumstances where intervention required for justice to be done, judge may raise concerns about documents, issues.

These were the reasons given by the Court pursuant to an order by the Chief Justice regarding the following two common issues of law that arose in the security certificate proceedings: (1) whether paragraph 62 of *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 (*Charkaoui* 2) requires

the designated judge to verify all information disclosed by the ministers if the special advocates and counsel for the ministers agree that some of the information is irrelevant, and (2) whether information disclosed to persons named in security certificates and their counsel should be placed on the Court's public files. Also addressed was the role of the designated judge when parties agree that a portion of the information disclosed pursuant to *Charkaoui* 2 may be released to the person named in the security certificate, as well as the propriety of the judge raising concerns about a document or issue.

Held, the Court need not verify information agreed to be irrelevant, and information disclosed pursuant to *Charkaoui* 2 should not be placed on the Court's public file.

(1) In *Charkaoui* 2, the Supreme Court did not interpret *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, which created the position of special advocate. The mandate and responsibilities of the special advocate include receiving a copy of all information provided in confidence to the Court, challenging the relevance, reliability and sufficiency of information provided by the ministers, and making submissions with respect to that information. The current situation was distinguishable from that before the Supreme Court in *Charkaoui* 2. The special advocate has the means to protect the interests of the person named in the security certificate by, among other things, identifying irrelevant information or evidence. The Court may thus rely upon an agreement between the ministers and the special advocates whereby information disclosed pursuant to *Charkaoui* 2 is irrelevant, and need not verify that information. In addition, the focus in *Charkaoui* 2 was on the verification of the allegations made against the named person and on the information relied upon by the ministers. There is nothing in the Supreme Court's reasons to suggest a need to focus on irrelevant information.

According to paragraph 83(1)(*d*) of the *Immigration and Refugee Protection Act*, the judge must ensure that information provided by the Minister remain confidential if its disclosure would be injurious to national security or endanger the safety of a person. This provision applies to information relied upon by the ministers as well as to information provided by them. A plain reading of the Act reveals that the judge must fulfill that obligation before information disclosed pursuant to *Charkaoui* 2 may be released to the person named in the security certificate. In addition, in circumstances where the judge may be required to intervene in order for justice to be done, the judge may raise concerns about documents or issues with counsel for the ministers and the special advocates.

(2) The open court principle, which requires public openness in proceedings and in the material relevant to resolving disputes, does not apply to information disclosed or produced in the course of litigation that is not put into evidence. Some information disclosed pursuant to *Charkaoui* 2 may not be relied upon by the ministers, and therefore not produced as evidence. In those circumstances, the open court principle does not require the information to be placed on the Court's public files. Rather, information disclosed pursuant to *Charkaoui* 2 should be released directly to counsel for each named person. When filing with the Court, in confidence, information on which a security certificate is based, ministers are also required to file a summary of the information. Because these summaries relate to information provided and relied upon by the ministers and to what transpired in the *in camera* proceedings, the open court principle requires that these summaries be placed on the Court's public files.

STATUTES AND REGULATIONS CITED

An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, S.C. 2008, c. 3.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, s. 12.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 77(1) (as am. by S.C. 2008, c. 3, s. 4), (2) (as

am. *idem*), 78(*f*) (as am. by S.C. 2005, c. 10, s. 34(2)(E)), 83(1)(*c*) (as am. by S.C. 2008, c. 3, s. 4), (*d*) (as am. *idem*), (*e*) (as am. *idem*), 85.1(1) (as enacted *idem*), (2) (as enacted *idem*), 85.2 (as enacted *idem*), 85.4(1) (as enacted *idem*).

CASES CITED

CONSIDERED:

Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326, 294 D.L.R. (4th) 478, 58 C.R. (6th) 45; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, 276 D.L.R. (4th) 594, 54 Admin. L.R. (4th) 1; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39, (1985), 16 D.L.R. (4th) 447, 17 C.C.C. (3d) 193; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, (1991), 120 A.R. 161, [1992] 1 W.W.R. 97; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, 211 D.L.R. (4th) 193, 40 Admin. L.R. (3d) 1; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, 285 D.L.R. (4th) 193, [2008] 1 W.W.R. 223; *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, 290 D.L.R. (4th) 193, [2008] 4 W.W.R. 1.

REFERRED TO:

Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, 240 D.L.R. (4th) 147, [2005] 2 W.W.R. 671.

AUTHORS CITED

Sopinka, John *et al. The Trial of An Action*, 2nd ed. Toronto: Butterworths, 1998.

REFERENCE pursuant to an order by the Chief Justice to determine (1) whether paragraph 62 of *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, 294 D.L.R. (4th) 478, 58 C.R. (6th) 45 requires the designated judge to verify all information disclosed by the ministers if the special advocates and counsel for the ministers agree that some of the information is irrelevant, and (2) whether the information disclosed to persons named in security certificates and their counsel should be placed on the Court's public files. The questions were answered in the negative.

APPEARANCES

Donald A. MacIntosh, *Toby J. Hoffmann* and *Caroline Carrasco* for applicants.
Barbara L. Jackman, *Marlys A. Edwardh*, *Lorne Waldman*, *Matthew C. Webber* and *Norman D. Boxall* for respondents.
Anil K. S. Kapoor and *John R. Norris* as special advocates.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicants.
Jackman & Associates, Toronto, *Marlys Edwardh, Barristers Professional Corporation*, Toronto, *Waldman & Associates*, Toronto, *Webber Schroeder*, Ottawa, *Bayne, Sellar, Boxall*, Ottawa, for respondents.
Anil K. S. Kapoor, Toronto and *John R. Norris*, Toronto, as special advocates.

The following are the reasons for order rendered in English by

[1] DAWSON J.: By order dated January 2, 2009, the Chief Justice ordered that the Court adjudicate upon two common issues of law that have arisen in these four proceedings. The two common issues were identified in the order as follows:

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

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

[2] Oral submissions were to be made on January 26, 2009. As well, on January 14, 2009, the Court requested, by way of a direction, that on January 26, 2009 counsel also be prepared to make oral submissions on the following issue:

Paragraph 83(1)(*e*) of the *Immigration and Refugee Protection Act* requires the designated judge to ensure that, throughout the proceeding, the person concerned is provided with a summary of information and other evidence that reasonably informs them of the case made by the Ministers.

Is there a distinction to be drawn between how information relied upon by the Ministers and disclosed pursuant to paragraph 83(1)(*e*) of the Act is to be treated, and how information not relied upon by the Ministers, but disclosed pursuant to *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 is to be treated?

[3] These reasons set out the Court's determination of the two common issues of law.

The First Issue

Background

[4] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 (*Charkaoui* 2), the Supreme Court of Canada considered the nature of the duty owed by the Canadian Security Intelligence Service (Service) to retain and disclose information in its possession about a person named in a security certificate issued under subsection 77(1) of the Act [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27]. Up to that point in time it had been the policy of the Service to destroy all operational notes (as defined in Service Policy OPS-217) after they had been transcribed into a report. The Supreme Court found such policy to be based upon a flawed interpretation of section 12 of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (CSIS Act). Section 12 of the CSIS Act, properly interpreted, was found to require the Service to "acquire information to the extent that it is strictly necessary in order to carry out its mandate, and [to] then analyse and retain relevant information and intelligence" (*Charkaoui* 2, at paragraph 38).

[5] Turning to the duty owed to a person named in a security certificate, the Court wrote as follows at paragraph 62:

As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr. Charkaoui's position, CSIS should

be required to retain all the information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given. If, as we suggest, the ministers have access to all the undestroyed "original" evidence, they will be better positioned to make appropriate decisions on issuing a certificate. The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence — which he or she will have been able to check for accuracy and reliability — for the named person. [Emphasis added.]

[6] Implicit in the requirement that the Service retain and disclose to the Court "all the information in its possession" is that the ministers may rely only upon a portion of the information that is in the Service's possession. Similarly, the person concerned (either through his special advocate, or through his counsel if the Service's information has been disclosed or summarized to him) may not rely upon all of the information in the Service's holdings. It follows that a portion of the information in the Service's possession may not be considered to be relevant or pertinent by either party.

[7] Thus, in the *in camera* hearings held in these proceedings an issue arose as to whether the Court was responsible for verifying all of the information in the Service's holdings (as suggested by a reading of paragraph 62 of *Charkaoui* 2) or whether the Court was only required to verify information or evidence that a party seeks to rely upon.

The position of the parties

[8] The special advocates for Messrs. Almrei, Harkat, Jaballah and Mahjoub (named persons) submit that:

a. Paragraph 62 of *Charkaoui* 2 does not apply to these proceedings.

b. The designated judge is not to have regard to any information which is not "relied upon by the parties (through their counsel) with the assistance of the Special Advocates". The role of the designated judge "is to adjudicate the issues with reference to the information/evidence relied upon by the parties (through their counsel) with the assistance of the Special Advocates".

[9] Counsel for the named persons express agreement with, and simply adopt, the position taken by the special advocates.

[10] The ministers argue that the designated judge is not required to verify information disclosed by the ministers pursuant to paragraph 62 of *Charkaoui* 2 "if the special advocates and ministers agree that a portion of that information is irrelevant to the issues before the Court".

Consideration of the issue

[11] Both the special advocates and the ministers premise their submissions upon the fact that in *Charkaoui* 2 the Supreme Court was considering what it had previously described, in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui* 1), to be the "pseudo-inquisitorial role" then assigned to designated judges under the Act (see, for example, paragraph 51 of *Charkaoui* 1).

[12] I agree. At paragraph 18 of its reasons in *Charkaoui* 2, the Supreme Court was careful to state that no issues were then before it about the proper interpretation of *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3 (Bill C-3). At paragraph 60 of its reasons, the Supreme Court noted that the statutory framework before it did not include Bill C-3.

[13] Turning to the current legislative framework which governs these proceedings, as its long title suggests, Bill C-3 provided for the creation of the position of special advocate. To be a special advocate one must be a member in good standing of the bar of a province and have at least 10 years' experience at the bar. Salient provisions of the new legislative scheme are that after his or her appointment, a special advocate may meet with the person concerned, and his counsel. At such time, the special advocate may be briefed by the person concerned and his counsel, and may be informed about the theory of their case. Thereafter, the special advocate is to receive a copy of all of the information and other evidence that is provided in confidence to the Court (subsection 85.4(1) [as enacted by S.C. 2008, c. 3, s. 4] of the Act).

[14] The role of the special advocate is to "protect the interests" of a person named in a security certificate when evidence is received *in camera* (subsection 85.1(1) [as enacted *idem*] of the Act). In that role, the special advocate may challenge the Minister's claim that the disclosure of information or evidence would be injurious to national security or endanger the safety of a person, and may challenge the "relevance, reliability and sufficiency" of information or evidence that is provided by the Minister, but not disclosed to the person named in a security certificate (subsection 85.1(2) [as enacted *idem*] of the Act).

[15] To those ends, the special advocate may cross-examine witnesses who testify in the *in camera* proceedings, may make submissions with respect to the information or evidence that is led in the *in camera* proceedings, and may, with the judge's authorization, exercise any other powers that are necessary to protect the interests of the person named in the security certificate (section 85.2 [as enacted *idem*] of the Act). All of the provisions of the Act currently in effect and referred to in these reasons are set out in the appendix to these reasons.

[16] The provision for a special advocate, clothed with such a mandate and responsibilities, reflects Parliament's presumed intent to assure a fair hearing in compliance with section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. The special advocate is in a position to be familiar with the case to be advanced on behalf of the person named in a security certificate and to assist the person concerned to know, to the extent possible, the case to be met, as required by the Supreme Court in *Charkaoui* 1, at paragraphs 64 and 65.

[17] Having regard to the special advocate's experience at the bar, his or her opportunity to be briefed by the person named in a security certificate, and the mandate and powers given to the special advocate, I am satisfied that the situation is distinguishable from that before the Supreme Court in *Charkaoui* 2. I am also satisfied by those factors that the special advocate has the means at his or her disposal to protect the interests of the person named in the security certificate by, amongst other things, identifying confidential information or evidence that is not pertinent.

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

[19] There is a second reason for reaching this conclusion. I accept the submission of the ministers that the focus in *Charkaoui* 2 was on "verification" of the allegations of fact made against the named person, and on the evidence and information relied upon by the ministers to support those allegations. This is reflected in paragraphs 60 and 61 of *Charkaoui* 2, the paragraphs that directly lead to the paragraph at issue. There, the Court wrote:

> Within the statutory framework applicable to the appeal, which does not include Bill C-3, only the ministers and the designated judge have access to all the evidence. In *Charkaoui*, this Court noted the difficulties that the Act then in force caused in the review of the reasonableness of the certificate and in the detention review, particularly with respect to the assessment of the allegations of fact made against the named person:
>
> > Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information. [para. 63]
>
> The destruction of the original documents exacerbates these difficulties. If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations. In criminal law matters, this Court has noted that access to original documents is useful to ensure that the probative value of certain evidence can be assessed effectively. In *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, at para. 46, the Court mentioned that viewing a videotape of a police interrogation can assist judges in monitoring interrogation practices, and that interview notes cannot reflect the tone of what was said and any body language that may have been employed. [Emphasis added.]

[20] The thrust of the Court's concern was with respect to the ability of the Court to assess the state's allegations concerning the person named in the security certificate.

[21] There is nothing in the reasons of the Supreme Court to suggest that this Court need focus upon the irrelevant. Indeed, subsection 78(*f*) [as am. by S.C. 2005, c. 10, s. 34(2)(E)] of the Act, in force at the relevant time, provided that the designated judge should not base a decision upon irrelevant information or evidence. Rather, the judge was to return such evidence or information to the ministers. It is unreasonable to suggest that any duty existed to verify information or evidence which was to have been returned to the ministers.

[22] This is dispositive of the first common issue of law.

[23] The written and oral submissions of the special advocates and the ministers go beyond this issue and discuss generally the role of the designated judge. Two points are raised. The first concerns the role of the designated judge when counsel for the ministers and the special advocates agree that a portion of the *Charkaoui* 2 disclosure may be released to the named person. The second concerns the ability of the designated judge to have regard to the *Charkaoui* 2 disclosure or to raise any concern about a document or an issue.

[24] Turning to the first concern, in their written and oral submissions, the special advocates

submit that when, after the *Charkaoui* 2 disclosure has been filed in confidence with the Court, the ministers and the special advocates agree that a portion of the disclosure may be released to the named person, the Court has no role in reviewing that decision. They submit that it is up to the ministers to make a claim for privilege, and where no claim for privilege is made, disclosure should automatically follow.

[25] In response, counsel for the ministers agree that disclosure should be automatic where the source of the information is not confidential. After initially expressing some doubt about what the Court's role would be if the information emanated from a confidential source, counsel for the ministers ultimately submitted that "the Ministers can take stock of what can go out and should go out". This was said to be what happened at the commencement of these proceedings when the ministers prepared and filed the initial public summaries without judicial approval.

[26] As a practical matter, absent inadvertent error on the part of the ministers, it is difficult to imagine a situation where the Court would conclude that information that the ministers were willing to disclose could not be disclosed for reasons of national security or the safety of any person. However, as a matter of law, I disagree with the submission that any portion of the *Charkaoui* 2 disclosure that is filed in confidence with the Court can be disclosed to the person named in the certificate without the prior approval of the Court.

[27] In my respectful view, the submissions made to the Court fail to properly consider paragraph 83(1)(*d*) [as am. by S.C. 2008, c. 3, s. 4] of the Act which provides that "the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person". Paragraph 83(1)(*d*) of the Act applies not just to information and evidence relied upon by the ministers, but also applies to the information and evidence "provided" by the Minister.

[28] The predecessor of paragraph 83(1)(*d*) was one of the provisions of the legislative scheme that led the Supreme Court to observe that "[c]onfidentiality is a constant preoccupation of the certificate scheme": see *Charkaoui* 1, at paragraph 55.

[29] The submission that the ministers must assert a claim for privilege before the Court may assess the validity of that claim is contrary to the plain wording of paragraph 83(1)(*d*) of the Act.

[30] Similarly, the analogy drawn by counsel for the ministers with the issuance of the initial public summary by the Minister of Public Safety and Emergency Preparedness fails, in my respectful view, to take into account that subsection 77(2) [as am. *idem*] of the Act expressly obliges the Minister to exercise his own opinion as to what information may be disclosed in that summary without injuring national security or endangering the safety of any person. No other provision in Division 9 of the Act reposes a similar discretion in the Minister.

[31] It follows, in my view, from a plain reading of the Act that none of the *Charkaoui* 2 disclosure may be disclosed to the named person or his counsel without first affording to the designated judge the opportunity to fulfill his or her obligation under paragraph 83(1)(*d*) of the Act.

[32] Turning to the second concern, the special advocates urge that the designated judge's role is

limited to deciding the case on the basis of the information relied upon by the parties, as assisted by the special advocates. The role of the designated judge with respect to the *Charkaoui* 2 disclosure is limited to adjudicating claims of relevance and national security privilege. The designated judge is not to have regard to any portion of the *Charkaoui* 2 disclosure unless it is the subject of some disagreement or is relied upon by a party. In oral argument the special advocates submitted, and the ministers' counsel agreed, that the designated judge should not be permitted to raise a concern about a document or an issue with the special advocates and counsel for the ministers.

[33] These issues were not put before the Court by the order of the Chief Justice. At the time these matters were argued the *Charkaoui* 2 disclosure had not been filed in confidence with the Court in a number of cases. Thus, in a number of cases, neither the Court nor the special advocates are aware of the form, nature and content of the *Charkaoui* 2 disclosure. In that circumstance it is, in my view, premature to make pronouncements circumscribing the role of the designated judge.

[34] To illustrate, it is possible that the *Charkaoui* 2 disclosure may contain information that has been redacted on grounds including solicitor-client privilege, cabinet confidence, or that the information relates to the investigation of other persons and does not touch upon the named person. The designated judge may, therefore, have a role in reviewing the propriety of redacted information. Each case will depend on its own circumstances.

[35] The role of the designated judge is best determined on a proper evidentiary basis where counsel and the special advocates may address submissions that are informed by the facts and matters before the Court.

[36] As to the propriety of the designated judge raising concerns about a document or issue, there are a myriad of different circumstances that might give rise to a concern on the part of a designated judge. The variety of those circumstances makes it unwise to make unequivocal pronouncements.

[37] I note, however, that in written submissions filed on this issue in DES-3-08 (prior to the issuance of the Chief Justice's order) the position of the special advocates was different. At paragraph 14 of those submissions they wrote:

> The proper action to be taken by a judge who considers that the parties have not identified an issue or brought sufficient evidence with respect to an issue is to make this known to the parties so that they may address the deficiency in the record.

[38] To a similar effect were the oral submissions in reply of Ms. Edwardh, counsel for Messrs. Jaballah and Mahjoub. She noted that "[s]ometimes the court is best suited to at least raise a question to ensure the ultimate fairness of the process. That is also your responsibility". No one disavowed that submission.

[39] Ms. Edwardh's submission is consistent with jurisprudence such as *Brouillard v. The Queen*, [1985] 1 S.C.R. 39 where, at page 44, Justice Lamer (as he then was) wrote for the Supreme Court that "it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may

and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order."

[40] To similar effect is the comment in John Sopinka *et al.*, *The Trial of An Action*, 2nd ed. (Toronto: Butterworths, 1998), at page 137, that a judge's ability to question a witness "is not limited to questions designed to clear up doubtful points, but extends to questions concerning matters not dealt with by counsel."

[41] Thus, I reject the oral submission of the special advocates and the ministers that, in proceedings brought under Division 9 of the Act, a designated judge may not raise concerns about documents or issues with counsel and the special advocate. As in any other proceeding, circumstances may require a designated judge to intervene in a variety of circumstances in order for justice to be done, and to be seen to be done.

[42] I now turn to the second common issue.

The Second Issue

Background

[43] The second issue also relates to the *Charkaoui* 2 disclosure. Such disclosure, it is to be remembered, consists of disclosure to the designated judge and the special advocate of all of the information in the possession of the Service concerning the named person. Because, in these cases, the ministers have already filed with the Court, and put into evidence, "the information and other evidence on which the [security] certificate is based" (as required by subsection 77(2) of the Act), what is contemplated is disclosure of information which is not relied upon by the ministers.

[44] The parties agree that once the information is filed in confidence with the Court, in each case a determination must be made about what information should and may be disclosed or summarized to the person named in the security certificate and his counsel. Once that has been decided, the second question of law now before the Court inquires as to whether that disclosure is made directly to the named person and his counsel, without also being filed on the Court's public file.

The position of the parties

[45] The special advocates submit that such information produced, or summarized, to a person named in a security certificate should be provided privately, that is "party to party". This production or disclosure should not be filed in the Court's public registry. Counsel for the named persons and the ministers agree with this submission.

[46] In making this submission, the special advocates and counsel for the ministers argue that:

a. In litigation, production or disclosure between the parties is treated differently than the record of the proceedings. Such production is private between the parties.

b. The open court principle does not attach to private disclosure of information that is not relied upon

or placed on the record of the proceeding.

[47] The ministers also rely upon one paragraph contained in the reasons of the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. There, when considering the Crown's obligation to make disclosure to the defence in a criminal proceeding, at page 338, the Court wrote:

> In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. The King*, [1952] 1 S.C.R. 232, at p. 257:
>
> > I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise . . . . [Emphasis added in original.]
>
> This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed. [Emphasis added.]

Consideration of the issue

[48] Consideration of this issue properly begins with the open court principle.

[49] The Supreme Court of Canada has often emphasized that the open court principle is a constitutionally protected cornerstone of the common law. See, for example, *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paragraphs 22–26. The principle requires "public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution": see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2005 SCC 41, [2002] 2 S.C.R. 522, at paragraph 1.

[50] A fuller description of the principle is found in the reasons of Justice LeBel (in dissent, but not on this point) in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253. At paragraph 81, he wrote:

> The open court principle is now well established in Canadian law. This Court has on numerous occasions confirmed the fundamental importance and constitutional nature of this principle . . . . In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as a witness, under a pseudonym. [Emphasis added.]

[51] As suggested by the quotations from the *Sierra Club* and *Named Person* cases set out above, the open court principle has not been held to apply to information disclosed or produced in the course of litigation, but not put into evidence by a party.

[52] Thus, in the passage from *Stinchcombe* relied upon by the ministers, in the context of the

criminal law, the Supreme Court contemplated disclosure of information to an accused and his counsel privately, and not by way of calling evidence in public.

[53] Similarly, in *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, at paragraph 21, the Supreme Court observed that, in the civil context, pre-trial discovery does not take place in open court. Therefore, it followed that the "only point at which the 'open court' principle is engaged is when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial."

[54] In the cases now before the Court, the *Charkaoui* 2 disclosure consists, or will consist, of information not relied upon by the ministers, and therefore not before the Court in evidence.[1] Further, that information may never be relied upon by the named person. In those circumstances, I accept the submissions of counsel that the open court principle does not require that information or evidence contained in the *Charkaoui* 2 disclosure be placed on the Court's public file. Such an outcome in this administrative proceeding would be inconsistent with the manner in which production or disclosure is treated in both the criminal and civil context. The *Charkaoui* 2 disclosure should be made directly to counsel for each named person.

[55] Moreover, nothing in the Act requires the ministers to file the *Charkaoui* 2 disclosure as evidence in either the public or private proceeding. Subsection 77(2) and paragraph 83(1)(*c*) [as am. *idem*] of the Act contemplate the ministers adducing evidence on which the certificate is based, or evidence to refute evidence relied upon by a named person. The ministers are not obliged to put into evidence information they do not rely upon.

[56] Turning to the Court's direction of January 14, 2009, and the treatment of the information that is relied upon by the ministers, I begin by briefly reviewing the disclosure regime set out in the Act.

[57] Certificate proceedings are commenced when the ministers refer a duly executed security certificate to the Court (subsection 77(1) [as am. *idem*] of the Act). At that time, the ministers must file with the Court, in confidence, the information and other evidence on which the certificate is based. They must also file on the Court's public record a summary of information. That summary should enable the person named in the security certificate to be reasonably informed of the case made by the ministers. The summary must not, however, include anything that, in the opinion of the Minister of Public Safety and Emergency Preparedness, would be injurious to national security or endanger the safety of any person if disclosed (subsection 77(2) of the Act).

[58] The requirement that a summary be filed with the Court, and be available for review by the public, is consistent with the requirement of the open court principle that pleadings and evidence be publicly available. At the same time, the summary balances that need for openness against the need to protect information that, if disclosed, would be injurious to national security or endanger the safety of any person.

[59] Thereafter, there is an ongoing obligation on the part of the designated judge to ensure that the person named in the certificate is provided with summaries of information and other evidence that enables them to be reasonably informed of the case made by the ministers (paragraph 83(1)(*e*) [as am. *idem*] of the Act) and what transpired in the *in camera* proceedings. The latter information

would include, for example, salient information obtained in the course of the cross-examination of a witness called by the ministers. Such summaries must not disclose information injurious to national security or endanger the safety of any person.

[60] The parties and the special advocates submit, and I agree, that because these summaries relate to information which is provided and relied upon by the ministers, and to what transpired in the *in camera* proceedings, the open court principle requires that these summaries be placed on the Court's public files. In the words of Mr. Kapoor, one of the special advocates, these summaries are "essentially a proxy for the attendance of the named person . . . and a proxy for the attendance of the public" at the Court's *in camera* proceeding.

[61] This is dispositive of the second, common issue of law.

Conclusion

[62] For the above reasons, I conclude that:

(a) Where the ministers and the special advocate agree that material disclosed by the ministers pursuant to *Charkaoui* 2 is irrelevant to the issues before the Court, the Court may rely upon that agreement. In such a case, the Court need not verify information that the ministers and the special advocates agree to be irrelevant.

(b) No information filed with the Court in confidence pursuant to *Charkaoui* 2 can be disclosed to the person named in a security certificate without the prior approval of the Court.

(c) Information or evidence disclosed to the named persons pursuant to *Charkaoui* 2 should be disclosed directly to counsel for each person named in a security certificate. The *Charkaoui* 2 disclosure should not be placed on the Court's public file. Such information or evidence would only become public if it is relied upon by a party and placed into evidence.

(d) Summaries of evidence or information made pursuant to paragraph 83(1)(*e*) of the Act must be placed on the Court's public file because they relate to information relied upon by the ministers and to what transpired in the *in camera* proceedings.

[63] In the event that any party wishes that an order issue in relation to these reasons, a brief written submission may be filed containing that request and setting out the proposed content of the requested order.

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[1] It may be that the ministers might later seek to augment the information upon which the security certificate is based, or to amend the report filed in support of the certificate, by relying upon a portion of the *Charkaoui* 2 disclosure. I make no determination about the permissibility of this.

APPENDIX

Subsections 77(1) and (2), paragraphs 83(1)(*c*), (*d*) and (*e*), subsections 85.1(1) and (2), section

85.2, subsection 85.4(1) of the *Immigration and Refugee Protection Act*.

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

. . .

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

. . .

(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

(*e*) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

. . .

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

(2) A special advocate may challenge

(*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

(*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

. . .

85.4 A special advocate may

(*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

(*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and

(*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

. . .

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.