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

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

Federal Court, Tremblay-Lamer J.—Ottawa, April 28, 29, 30 and May 7, 2009.

Security Intelligence — Application by special advocates for order compelling ministers to make all reasonable efforts to seek permission of foreign agencies involved in Charkaoui case to disclose information provided to Canadian Security Intelligence Service — Issue interpretation of third party rule (relied on to refuse disclosure), application thereof to Mr. Charkaoui's certificate — Rule stating not to disclose source, content of security intelligence without permission of originating agency — Requirement to demonstrate reasonable efforts made to obtain consent not to be disregarded in this case — Fact five security certificates referred concurrently not meaning person concerned not entitled to full application of third party rule — Rule applying objectively — Ministers' flat refusal to obtain consent without presenting alternative not reconcilable with rule — Application allowed.

This was an application by the special advocates for an order compelling the ministers to make all reasonable efforts to obtain the consent of the foreign agencies involved in the Charkaoui case to the disclosure of the information provided to the Canadian Security Intelligence Service (the Service). The application stemmed from the summary of evidence submitted by the ministers in accordance with paragraph 83(1)(*e*) of the *Immigration and Refugee Protection Act* (IRPA). The special advocates wanted information to be added to the summary to reflect the evidence in the case of the person concerned as accurately as possible, not including anything injurious to national security. A witness who testified for the Service cited the third party rule to justify the objection to the disclosure and informed the Court that the Service had made an executive decision that it would not request the foreign agencies to lift the caveat in respect of the five security certificates currently before the Court. The only issue in this case was how the Service and the ministers interpreted the third party rule and how it applied to the certificate relating to Mr. Charkaoui.

Held, the application should be allowed.

The third party rule, which relates to the exchange of information between security intelligence services and other similar agencies, dictates essentially that the receiving agency may not disclose the source or content of the information without the permission of the originating agency. Consent to disclosure is necessary to not violate the third party rule, and law enforcement and intelligence agencies have a duty to prove that they have made reasonable efforts to obtain consent or that such a request would be refused. There was no evidence in this case that a request for consent would be refused.

The ministers' argument that merely contacting the foreign agencies to request that they lift the caveat would be injurious to the Service's ability to receive information in future was unconvincing. Decisions relating to the statutory schemes under the *Canadian Human Rights Act*, the *Access to Information Act* and the *Canada Evidence Act* can also be applied in the IRPA context. In this case, the requirement to demonstrate to the Court that reasonable efforts were made to seek consent should not have been disregarded. A number of factors led to

this conclusion including the fact that the case before the Federal Court is the only opportunity for the person concerned to be adequately informed of the ministers' position, and the fact that once the certificate is found to be reasonable, it is proof of inadmissibility and constitutes a removal order. The fact that five security certificates were referred to the Court concurrently does not mean that the person concerned is not entitled to the full application of the third party rule. It must be applied objectively. In addition, the rule is part of a whole and is applied in the concrete context of the day-to-day relations of intelligence and law enforcement agencies. The ministers' flat refusal to seek consent from the foreign agencies made without regard for the circumstances in this case and without an alternative being presented was difficult to reconcile with the rule.

With respect to the argument that disclosure would be injurious, this would in fact be the result if the third party rule were violated. In this scenario, there was no proposal that the third party rule be disregarded; rather, the aim was to make sure that it was followed since the rule means that authorization to disclose may be requested. Accordingly, the burden on the Service is to satisfy the Court, on a balance of probabilities, that disclosure to the person concerned is not possible because it would be injurious to national security. The ministers were ordered to report to the Court the reasonable efforts made by the Service to obtain the consent of the foreign agencies for the purpose of disclosing the information referred to or to prove, with respect to each of the agencies, that such a request would be refused.

STATUTES AND REGULATIONS CITED

Access to Information Act, R.S.C., 1985, c. A-1.

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 38.04 (as enacted by S.C. 2001, c. 41, ss. 43, 141(7)).

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].

Canadian Human Rights Act, R.S.C., 1985, c. H-6.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 83(1)(*d*) (as am. by S.C. 2008, c. 3, s. 4), (*e*) (as am. *idem*).

Privacy Act, R.S.C., 1985, c. P-21.

CASES CITED

CONSIDERED:

Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar), 2007 FC 766, [2008] 3 F.C.R. 248; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547; *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (C.A.); *Charkaoui (Re)*, 2009 FC 342, [2010] 3 F.C.R. 66; *Charkaoui (Re)*, 2005 FC 1670, [2006] 3 F.C.R. 325; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

REFERRED TO:

Ottawa Citizen Group Inc. v. Canada (Attorney General), 2006 FC 1552; *Canada (Attorney General) v. Ribic*, 2002 FCT 1044.

APPLICATION by the special advocates for an order compelling the ministers to make all reasonable efforts to obtain the consent of the foreign agencies involved in the Charkaoui case to the disclosure of the information provided to the Canadian Security Intelligence Service. Application allowed.

APPEARANCES

No one appearing for Adil Charkaoui.

Nancie Couture, *Lori A. Beckerman*, *François Joyal* and *Gretchen A. Timmins* for ministers.

Denis Couture, *François Dadour*, special advocates.

No one appearing for intervener.

SOLICITORS OF RECORD

Des Longchamps, Bourassa, Trudeau et Lafrance, Montréal, and *Doyon & Associés*, Montréal, for Adil Charkaoui.

Deputy Attorney General of Canada for ministers.

Denis Couture, Ashton, Ontario, and *François Dadour*, Montréal, special advocates.

Filteau, Belleau, Montréal, for intervener.

The following is the English version of the reasons for order and order rendered by

TREMBLAY-LAMER J.:

Introduction

[1] This is an application by the special advocates for an order to compel the ministers to contact certain foreign agencies to seek permission to disclose publicly information obtained from those agencies concerning the person concerned. The application was made to the Court at a hearing held *in camera* on April 30, 2009. The purpose of that hearing was to hear submissions by counsel regarding the form and content of the first proposal for disclosure by the special advocates.

1. Background

[2] On February 24, 2009, the Court issued a direction asking the ministers whether, having regard to the consents given in other cases, they intended to consent to disclosure of the content of any intercepted communication in which the person concerned had participated (content, month and year) and of the content of any surveillance report relating to him (content, month and year).

[3] On March 18, 2009, the Court ordered the ministers to act immediately on their proposal whenever they had indicated that they were prepared to provide a statement or general description or summary and/or to disclose information, as set out in their reply to the first proposal made by the special advocates.

[4] The ministers submitted their reply to the direction and order in the form of a summary of evidence in accordance with paragraph 83(1)(*e*) [as am. by S.C. 2008, c. 3, s. 4] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[5] At the *in camera* hearing, the special advocates presented argument on the question of the accuracy and completeness of the summaries. On that point, they asked that certain wording be reviewed and that information be added to reflect the evidence in the case of the person concerned as accurately as possible, not including anything injurious to national security. The first disclosure to the person concerned will therefore be made under paragraph 83(1)(*e*) of the IRPA.

[6] At the hearing, the ministers called a witness to support their objection to disclosing certain information from foreign agencies that was included in the first proposal by the special advocates.

[7] The witness, an employee of the Canadian Security Intelligence Service (CSIS or the Service) cited the third-party rule to justify the objection to the disclosure and informed the Court that the

Service had made an executive decision that it would not request the foreign agencies to lift the caveat in respect of the five security certificates currently before the Court.

[8] The special advocates then asked the Court to make an order compelling the ministers to make all reasonable efforts to obtain the consent of the foreign agencies involved in the Charkaoui case to the disclosure of the information provided to the Service and referred to in the special advocates' proposals 1, 2 and 3.

[9] This decision is the Court's response to the request made by the special advocates.

2. Issue

[10] The issue to be decided is a question of mixed law and fact in which the underlying facts of the case are classified and must remain confidential in accordance with paragraph 83(1)(*d*) [as am. *idem*] of the IRPA.

[11] At the outset, the Court notes that the issue is not the importance of the third-party rule, since that rule is recognized both by the Court and by counsel at the hearing. The only issue is how the Service and the ministers have interpreted that rule and how it applies to the certificate before me, i.e., the certificate relating to Mr. Charkaoui: based on that interpretation, they will not make reasonable efforts to request that the caveat be lifted or try to obtain consent to the disclosure of certain information.

3. Public Version

[12] This public version was facilitated by the public release of a previous decision relating to, *inter alia*, the third-party rule: the decision of my colleague Justice Simon Noël in the *Arar* case, *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248. As a result, the general outline of the legal arguments that follow could be given here. On reading the judgment by my colleague, I saw that a position similar to the one submitted to me by counsel for the ministers seems to have been put before the Court in the past, in an application under section 38.04 [as enacted by S.C. 2001, c. 41, ss. 43, 141(7)] of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (the CEA). In that case, the Attorney General of Canada sought an order from the Federal Court prohibiting the disclosure of certain redacted portions of the public report issued by the Arar Commission on the basis that disclosure of that information would be injurious to international relations, national defence or national security, merely by requesting consent to disclosure (paragraph 74). For the purposes of these reasons, I used the public version of his judgment (a parallel confidential judgment exists that applies the same legal principles to the specific facts of the case).

4. Position of the Ministers

[13] Counsel for the ministers, Nancie Couture, first argued the importance of the testimony given by the witness they had called and stressed his experience as an intelligence officer who was very familiar with the third-party rule and with the Service's relations with foreign agencies. The ministers took the position that this was not a matter affecting only the Charkaoui case; it affects the management of five security certificates simultaneously, involving a number of different foreign agencies that have provided various information used in the five security intelligence reports (SIR). As a result, merely requesting that the third parties lift the caveat could be injurious to national security. Counsel reiterated the clarifications made by the witness, who had specified that depending on the country from which consent was requested, the probability that the request would be injurious would undoubtedly be different.

[14] Counsel also cited the mosaic effect in support of her submissions, and said that an order by the Court asking foreign agencies to lift the caveat would have significant ramifications within the

intelligence community. In the ministers' submission, an order of that nature would be perceived as a failure by the Canadian system to protect the information shared. That would be a warning to the international community that information shared in confidence as privileged information might eventually be disclosed publicly.

5. Position of the Special Advocates

[15] Denis Couture, for the special advocates, pointed out that the third-party rule does not mean a complete prohibition on disclosing information; it simply means that the consent of the agency that provided the information must be obtained before using it for purposes other than the receiving agency's purposes or before disclosing it. He noted that the witness knew nothing about the facts in the case of the person concerned (or in the other four cases) or the importance of the specific information that the special advocates in this case believe should be brought to the attention of the person concerned and his counsel.

[16] Mr. Couture stated that the importance of the third-party rule is not in issue here. The issue is the Service's decision to not even make a request, contrary to the case law, which is clear on this point: the courts have held that the ministers must show that they have made all reasonable efforts to obtain the consent of the foreign agencies to the disclosure of the information provided to the Service.

6. Analysis

(a) Third-Party Rule

[17] The Canadian courts have repeatedly noted the importance of the third-party rule, which relates to the exchange of information between security intelligence services and other similar agencies. The Court wishes to make it plain at the outset that it has no intention of minimizing the importance of the third-party rule or of not recognizing Canada's position as a net importer of intelligence.

[18] Essentially, the rule is that the receiving agency may not disclose the source or content of the information without the permission of the originating agency (see Chief Justice Lutfy in *Ottawa Citizen Group Inc. v. Canada*, 2006 FC 1552, 306 F.T.R. 222, paragraph 25).

[19] In *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, Justice Mosley expressed the same opinion, at paragraph 145:

> Clearly, the purpose of the third party rule is to protect and promote the exchange of sensitive information between Canada and foreign states or agencies, protecting both the source and content of the information exchanged to achieve that end, the only exception being that Canada is at liberty to release the information and/or acknowledge its source if the consent of the original provider is obtained. [Emphasis added.]

[20] In the *Arar* case, above, Justice Noël explained that the rule is sacrosanct among law enforcement and intelligence agencies and is, he said, premised on mutual confidence, reliability and trust. He summarized what the Federal Court of Appeal said in *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589, in which Justices Létourneau, Robertson and Sexton commented on the third-party rule in the context of the *Privacy Act*, R.S.C., 1985, c. P- 21 and the *Access to Information Act*, R.S.C., 1985, c. A-1, at paragraphs 101, 103, 110–111:

> Section 19 is a qualified mandatory exemption: the head of a government institution must refuse to disclose personal information obtained in confidence from another government or an international organization of states unless that government or institution consents to disclosure or makes the information public. This is generally referred to as the third party exemption.

…

It is true that the primary thrust of the section 19 exemption is non-disclosure of the information but, as we already mentioned, it is not an absolute prohibition against disclosure. This exemption, like the others, has to be read in the overall context of the Act which favours access to the information held. Subsection 19(2) authorizes the head of a government institution to disclose the information where the third party consents.

…

In our view, a request by an applicant to the head of a government institution to have access to personal information about him includes a request to the head of that government institution to make reasonable efforts to seek the consent of the third party who provided the information. In so concluding, we want to make it clear that we are only addressing the question of onus and that we are in no way determining the methods or means by which consent of the third party can be sought. Political and practical considerations pertaining, among others, to the nature and volume of the information may make it impractical to seek consent on a case-by-case basis and lead to the establishment of protocols which respect the spirit and the letter of the Act and the exemption.

This means that the reviewing Judge ought to ensure that CSIS has made reasonable efforts to seek the consent of the third party who provided the requested information. If need be, a reasonable period of time should be given by the reviewing Judge to CSIS to comply with the consent requirement of paragraph 19(2)(*a*). [Emphasis added.]

[21] In summary, as my colleague wrote, the Federal Court of Appeal indicated in that case "that consent to disclosure is necessary to not violate the third-party rule and that law enforcement and intelligence agencies have a duty to prove that they made reasonable efforts to obtain consent to disclosure or they must provide evidence that such a request would be refused if consent to disclosure was sought" (paragraph 73 of the *Arar* case; emphasis added).

[22] That statement, of course, presumes that there may be cases in which a request is not possible, for example, because of tenuous relations with the originating foreign state or agency. In such a case, as the Federal Court of Appeal said in *Ruby*, above, CSIS must at least satisfy the Court that a request for consent to disclosure would be refused. That was not the evidence before me.

(b) Interpretation of the Third-Party Rule by the Ministers

[23] As we saw earlier, the ministers submit that merely contacting the foreign agencies to request that they lift the caveat would be injurious to CSIS' ability to receive information in future, given the number of requests that could occur in the five security certificate cases. The fact that a considerable number of requests for consent to disclosure might be made concurrently in the security certificate cases would soon become known, and Canada would be perceived as an unreliable country, which would be injurious to Canada.

(c) Issues

[24] I find the ministers' arguments unconvincing, given the case law cited above on this issue. In my opinion, it is not sufficient for the government to decide that, as a general rule, it will not request the consent of foreign agencies because of the number of agencies involved at this point in the proceedings.

[25] Although the decisions cited relate primarily to other statutory schemes, i.e., the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, the *Access to Information Act* and the *Canada Evidence Act*, it seems to me that the principles that emerge from them can also be applied in the IRPA context.

[26] In my opinion, the importance of the issues in the security certificate cases for the persons concerned cannot be minimized.

[27] The ministers have the burden of proving, on a balance of probabilities, that disclosure would be injurious to national security or would endanger the safety of any person: see *Charkaoui (Re)*, 2009 FC 342, [2010] 3 F.C.R. 66.

[28] There are a number of factors in this case that lead me to conclude that it would be incorrect to disregard the requirement to demonstrate to the Court that reasonable efforts have been made to seek consent in this case. I note the following factors:

(1) The fact that the ministers have used information in the past that came from the same foreign agencies in support of the confidential security intelligence report (SIR);

(2) The fact that information or intelligence exists that was provided by foreign agencies has been known publicly since the public release of the summary of the intelligence report;

(3) The fact that it is public knowledge that the Moroccan authorities are involved in this case. Justice Noël's decision in *Charkaoui (Re)*, 2005 FC 1670, [2006] 3 F.C.R. 305, indicated that on September 10, 2004, Morocco signed an international arrest warrant for the person concerned stating that Mr. Charkaoui was an active member of the Moroccan Islamic Combatant Group (GICM);

(4) The fact that at this stage what is being sought is only a request for consent;

(5) The fact that the special advocates have narrowed their requests and given priority to information that they regard as very important for the person concerned to be able to make full answer and defence;

(6) The fact that some information dates from several years ago and that it is therefore unlikely that the secret and confidential nature of the information is still of particular interest to the originating country: *Canada (Attorney General) v. Ribic*, 2002 FCT 1044;

(7) The fact that the case before the Federal Court is the only opportunity for the person concerned to be adequately informed of the ministers' position with respect to the proceedings and to be able to respond to it;

(8) The fact that once the certificate is found to be reasonable, it is proof of inadmissibility and constitutes an enforceable removal order.

[29] It seems to me that the Court is entitled to expect, at a minimum, a simple demonstration that reasonable efforts have been made to seek consent. In my opinion, the fact that five security certificates have been referred to the Court concurrently does not mean that the person concerned, named in the certificate before me, is not entitled to the full application of the third-party rule. That rule may not be invoked and applied only when it supports the position taken by the ministers. It must be applied objectively.

[30] It is not my role to decide the importance of certain facts in the other cases that are not before me. It may be that some information from foreign sources could be disclosed because the information has been neutralized, for example because it came from more than one source.

[31] In addition, the rule does not apply in a vacuum; it is part of a whole, and, as the witness explained, it is applied in the very concrete context of the day-to-day relations of the various intelligence and law enforcement agencies. As a result, I find it difficult to reconcile that statement with the flat refusal in this case, a refusal made without regard for the circumstances and without an alternative being presented by the ministers.

[32] With respect to the argument that disclosure would be injurious, it is my opinion that this would in fact be the result if the third-party rule were violated. In this scenario, there is no proposal that the third-party rule be disregarded; rather, the aim is to make sure that it is followed, since the third-party rule means that authorization may be requested. If that fact is known, I believe that it would reassure foreign agencies that Canada honours its agreements but, at the same time, makes the necessary efforts to give an individual the opportunity to answer the serious allegations made against

him or her, in accordance with Canadian values and the obligations created by the *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].

[33] The Supreme Court pointed out in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at paragraphs 50 and 54, that:

> … [determining] whether a security certificate is reasonable takes place in a context different from that of a criminal trial…. [T]he serious consequences of the procedure on the liberty and security of the named person bring interests protected by s. 7 of the *Charter* into play….
>
> …
>
> The consequences of security certificates are often more severe than those of many criminal charges. [Emphasis added.]

[34] Accordingly, the issuance of a certificate and consequences thereof demand great respect for the named person's right to procedural fairness. Every effort must be made to enable the person to answer the allegations made against him or her.

[35] I further note that what is being sought here is not that the foreign agencies be requested to disclose sensitive information involving, for example, the identity of a target of investigation or investigation methods; the request only covers the information that is the subject of the special advocates' proposals, and this information can be neutralized by purging the parts that could be sensitive to the originating country.

[36] In any event, the Service has demonstrated its ability in the past to summarize certain information from certain foreign agencies so that it can be disclosed. That same good faith will surely make it possible for the Service to ensure that reasonable efforts are made to seek consent.

[37] To meet their burden of satisfying the Court, on a balance of probabilities, that disclosure to the person concerned is not possible because it would be injurious to national security (paragraph 83(1)(*c*) of the IPRA), the Court orders the ministers to report to the Court the reasonable efforts that the Service has made to obtain the consent of the foreign agencies involved for the purpose of disclosing the information referred to in the special advocates' proposals in the case of Adil Charkaoui, or to prove, with respect to each of the agencies concerned, that a request for consent to neutral disclosure of the information would be refused. A hearing for that purpose will be held *in camera* on a date to be set by the Court.

ORDER

To meet their burden of satisfying the Court, on a balance of probabilities, that disclosure to the person concerned is not possible because it would be injurious to national security (paragraph 83(1)(*c*) of the IRPA), the Court orders the ministers to report to the Court the reasonable efforts that the Service has made to obtain the consent of the foreign agencies involved for the purpose of disclosing the information referred to in the special advocates' proposals in the case of Adil Charkaoui, or to prove, with respect to each of the agencies concerned, that a request for consent to neutral disclosure of the information would be refused. A hearing for that purpose will be held *in camera* on a date to be set by the Court.