

Date: 20091015

Docket: DES-5-08

Citation: 2009 FC 1050

Ottawa, Ontario, October 15, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BEFORE THE COURT:

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

IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), section 83(1) of the *Act*;

AND IN THE MATTER OF Mohamed HARKAT

PUBLIC REASONS FOR ORDER AND ORDER

Introduction

[1] This is an Order and Reasons for Order in relation to a proceeding which took place at the initiative of the Court to review the circumstances that led to a failure by the Ministers to disclose information concerning the reliability of a human source to the Court and to the special advocates (the "polygraph information"). On being made aware of the failure to disclose the polygraph information by way of letter dated May 26, 2009 (public version attached to these Reasons as Appendix 1), this Court issued an Order and Reasons for Order dated May 27, 2009 disposing of a motion, brought previously in this proceeding by the special advocates, seeking access to human

source files. In the May 27, 2009 Order, this Court granted the special advocates' motion, in part, and gave them access to one of the human source files (see *Re Harkat* 2009 FC 553).

[2] On June 4, 2009, Senior General Counsel for CSIS wrote to the Chief Justice of the Federal Court acknowledging that “the failure to include relevant information in the source matrix was inexcusable and is of profound concern to the Service...”. (See letter of June 4, 2009 attached as Appendix 2)

[3] On June 5, 2009, the Court issued a communication to the parties informing them that it had held a closed hearing in the presence of the special advocates and counsel for the Ministers. At that hearing the Court was informed that members of the CSIS executive had asked a senior CSIS employee to conduct an investigation into the circumstances surrounding the non-disclosure of the polygraph information. The Court also informed counsel for the Ministers that it intended to recall the three witnesses who had testified and that it reserved the right to call further witnesses.

[4] On June 15, 2009, the Court held a closed hearing to discuss the manner in which the Court should proceed in relation to this matter. The special advocates and counsel for the Attorney General were present.

[5] On June 16, 2009 this Court issued a public Direction which offered the three CSIS witnesses the opportunity to explain their testimony and their failure to provide important information to the Court. An opportunity was also given to the Attorney General and the special advocates to address the following matters:

- a) the compliance of CSIS with orders of the Court, in particular the Orders of September 24 and November 28, 2008;
- b) possible prevarication by CSIS witnesses called to testify concerning the reliability of the information provided by a human source; and
- c) CSIS' compliance with the obligation of utmost good faith required by the jurisprudence in the context of *ex parte* proceedings. See *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. 73; 2002 SCC 75 at para. 27, and *Charkaoui (Re)*, [2004] F.C.J. 2060; 2004 FCA 421 at para. 153 and 154).

[6] The three witnesses chose to attend before the Court to explain their actions. They were represented by independent lawyers who were given access to all relevant information. The three witnesses were examined by their counsel and cross-examined by counsel for the Attorney-General and by Mr. Cavalluzzo, a special advocate. Independent counsel were also given an opportunity to re-examine their clients.

[7] One of the three witnesses sought, and was granted, leave to call a polygraphist to testify as a witness in this proceeding.

[8] Because of the sensitivity of the information at issue namely, information relating to a human source, closed hearings were held over three days in June 2009.

[9] Documents were filed by the three witnesses and by the Attorney General. One of these documents was a CSIS report dated June 2009 (the “internal report”) prepared by a senior member of CSIS at the request of the CSIS executive. This report was characterized by CSIS as one of the measures taken to deal with the failure to provide full disclosure of the polygraph information to the Court (see CSIS Senior General Counsel letter dated June 4, 2009 to the Chief Justice, Appendix 2).

[10] The internal report contains information in relation to the non-disclosure of the polygraph information and is based on interviews with CSIS employees. However, the investigator did not interview any person who might be called to testify during this proceeding. Thus, the internal report does not benefit from the perspective of a number of persons directly involved in the events leading up to, and resulting in, the non-disclosure of the information concerning the reliability of the human source. As such the internal report, which was filed as an exhibit pursuant to paragraph 83(1)(h) *Immigration and Refugee Protection Act* (“IRPA”) has been received into evidence but has not been given any weight in assessing the evidence of the witnesses in this proceeding. The internal report was used by counsel as a starting place from which to question the witnesses.

[11] Finally, written submissions were filed by counsel in August 2009.

[12] In their submissions dated August 27, 2009, the special advocates sought, for the first time, the exclusion of all information provided by the human source in question as a remedy pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11 (“Charter”).

[13] The Attorney General was granted leave to file submissions in reply to the *Charter* issues raised by the special advocates. Those responding submissions were filed on September 10, 2009.

[14] Throughout this process, the Court has been mindful of: the overriding importance of ensuring fairness to Mr. Harkat; the reputations of the three CSIS employees who appeared as witnesses; the reputation of other CSIS employees who are referred to in the internal report but did not testify; the reputation of those who did not testify and were not interviewed for the purposes of the internal report; the ongoing security certificate proceeding; paragraphs 83(1)(a) and (h) of *IRPA*; the requirements of the rule of law; the proper and effective administration of justice; and, the national security of Canada.

[15] I note that this proceeding, which was commenced upon the initiative of the Court, is not a complete and exhaustive review of the events leading up to the non-disclosure of the polygraph information. Only the CSIS employees who appeared before the Court as witnesses in the underlying certificate proceeding were asked to explain their actions. To engage in a more detailed inquiry would have further delayed the determination of the reasonableness of the certificate and would not have been in the interests of justice at this time. The findings of fact made in this decision must be read in the context of this narrow proceeding and should not limit or preclude any future fact-finding inquiries that may be deemed appropriate. The issue arising from the first certificate proceeding (see *Re Harkat* 2009 FC 553 at paragraph 16) could not be dealt with fully. Therefore, the Court will not deal with this matter at this time.

The failure to disclose

[16] It is the objective of these reasons to address the concerns that the Court has in relation to each witness, and to include some comment on the role played by CSIS as an institution. Because of the importance of the issues raised in this proceeding, these reasons have been written without reference to any sensitive information. The three witnesses who testified in June 2009 will remain anonymous and will be referred to as witnesses A, C and R. The positions held by A, C, and R in CSIS will not be disclosed. The polygraphist, called to testify by counsel for witness C will be referred to as such.

[17] The following paragraphs are a review of the events leading up to the issuance of the May 27, 2009 order in which the Court reserved its right to recall the three witnesses in relation to the issue of non-disclosure of the polygraph information.

[18] On May 15, 2009, the Court received an email from CSIS counsel in which he stated that he would be providing further information to the Court which may have a bearing on the Court's decision in relation to the special advocates' motion seeking access to the human source file.

[19] In a confidential letter forwarded to the Court on May 26, 2009 (which was later redacted and made public, see Appendix 1), counsel for the Ministers referred to inaccuracies in the "source matrix" which was filed, in September 2008, as part of Exhibit "A" to the closed portion of these proceedings.

[20] The purpose of the source matrix is to provide the Court, and special advocates, with the tools to enable them to test the reliability of the information provided by the source in an effective way. All relevant information regarding the source's credibility and reliability including the source's motivation, evaluation, payment and background should be included in the matrix (see *Re Harkat*, 2005 FC 393 paragraphs 93-94 and 98 per Dawson J.).

[21] In the source matrix found in Exhibit "A" to the closed portion of this proceeding there is a section entitled "polygraph testing" which discusses the administration of a polygraph to one of the human sources relied on by CSIS. In the September 2008 version of the matrix, the polygraph section stated:

"These issues cast suspicion on [REDACTED] loyalty to the service and raised questions as to [REDACTED] activities and associations, [REDACTED]. As a result, in 2002, the service conducted a polygraph examination of the source.

The polygraph charts were reviewed by an independent [REDACTED] resource who determined that [REDACTED] was truthful when stating that he was not involved with other agencies and militant organizations."

[22] This statement is incomplete and, as acknowledged by CSIS (see letter dated May 26, 2009, Appendix 1), should at a minimum have included the following information:

- in 2002, a polygraph was conducted on the (human source) and he was found to be untruthful on all relevant questions;

- in 2008, prior to the beginning of the closed hearing in early September 2008, at the initiative of witness C, the polygraph results were sent for a quality control assessment. The quality control assessment concluded that the human source was truthful on half of the relevant questions and that the results of the answers to all other relevant questions should have been found to be “inconclusive”;

[23] In the course of their evidence in the underlying certificate proceeding, and in response to any undertakings arising out of their testimony, each witness was given an opportunity to disclose the polygraph information. I will now review the actions of, and assess the explanations given by, each witness in the chronological order in which they appeared before the Court.

Witness C

[24] Witness C testified before the Court in September 2008. He was the sole witness produced by the Ministers in the closed hearings in support of the reasonableness of the certificate. In his effort to prepare himself, witness C reviewed the Harkat file, the confidential Security Intelligence Report (“SIR”) and the draft “Exhibit A” which included the source matrix. After repeated requests, witness C obtained access to the human source files of those sources that had provided information about Mr. Harkat to CSIS. As a result of his background knowledge, witness C had a concern about the polygraph information he read in one of the human source files. Acting upon this concern, he sought approval to request a quality control of that human source’s polygraph result. The approval was granted but not through the ordinary channels.

[25] The quality control report was provided to witness C on September 5, 2008. As a result of the conclusions made in that document, witness C made changes to the polygraph section of the source matrix in Exhibit “A”. More specifically, witness C replaced the 2002 finding that the source was untruthful in his answers to several relevant questions with the results of the 2008 quality control assessment, which found that the source had been truthful in relation to two of the relevant questions (see paragraphs 21 and 22). Moreover, no mention was made of the 6 year gap between the time the polygraph was administered and the time at which the quality control results were received.

[26] Witness C explained that, for an intelligence officer, the quality control report was the governing result. In essence, the result of a quality control assessment overtook any earlier assessment. As such, the quality control is the only result that he would have provided to his superiors at CSIS. It was based on this assumption that witness C chose to amend the source matrix on September 5, 2008.

[27] The evidence of witness C may explain (but not justify) his decision to alter the polygraph information in the source matrix prior to the hearings held in September 2008. His evidence does not, however, explain his failure to answer questions put to him by the Court in closed hearings about whether there was anything unusual in the file relating to the human sources. The Court gave witness C several opportunities, during his testimony in September 2008, to disclose the polygraph information and he did not do so. His explanation that “it was not in mind” is not satisfactory.

[28] The Court has noted that witness C saw his role as limited. He was clearly influenced by his training as an intelligence officer. This should not have been the case. The objective of witness C should have been the disclosure of all information required by the Court to evaluate the reliability of the information supplied by the human source. Had he done so, both the Court and the special advocates would have been in a position to fulfill their respective statutory mandates. As witness C told the Court, “knowing what I know now, the information should have been disclosed”.

[29] From an institutional perspective, CSIS should have given witness C more support and education in relation to his role as one of the primary witnesses in support of the certificate’s reasonableness. He should have been properly trained and advised by CSIS. Moreover, the decision about what human source information should be included or excluded from the human sources matrix should not have been left to him. All amendments to the source matrix should have been approved by individuals with access to the human source file and by the litigation management branch before the matrix was included as part of Exhibit “A”.

[30] Witness C acknowledged in retrospect that he should have included all of the polygraph information in the source matrix and that he should have disclosed it when questioned by the Court in September 2008. However, the explanation given by witness C in June 2009 does not lead me to conclude that witness C deliberately excluded the information or intentionally omitted to disclose it.

[31] The Court reserves its judgment on the weight to be given to witness C's testimony in support of the allegations made by the Ministers in the SIR including the weight to be given to his evidence in relation to the reliability of the information provided by the human sources for the purpose of determining the reasonableness of the certificate.

Witness A

[32] Witness A was called to testify about the necessity of maintaining redactions to certain investigative reports which indirectly concerned human sources as a result of this Court's Order of November 28, 2008 (see *Re Harkat* 2009 FC 203). He testified on three occasions: February 3, 2009, April 14, 2009 and May 13, 2009.

[33] During the course of his testimony on February 3, 2009, witness A was asked to provide the Court with information relating to a recommendation in one of the reports that a human source be subjected to a polygraph examination. Witness A undertook to do so. He determined that a polygraph was administered in 2002 and communicated that information to his counsel. He did not review the results of the polygraph and no written response to his undertakings was filed.

[34] On March 25, 2009, witness A received an email from legal counsel asking him to review the human source file for further information regarding the results of the polygraph.

[35] On March 26, 2009 the discrepancy in the source matrix came to the attention of witness A by way of an email sent to him by one of his staff members which specifically highlighted the difference between the information in the source matrix and that found in the polygraph file.

[36] On March 26, 2009, witness A referred the whole matter to the litigation management branch instead of bringing the polygraph information to legal counsel's attention. He did so because this was the bureaucratic path to be followed. Legal counsel was to refer all requests for information via that branch and not make them directly to witness A's branch. The direction from the litigation management branch was to "hold off" on any further action, which witness A did.

[37] Witness A also relied on a note to file made on September 19, 2008 which indicated that all of the relevant polygraph information had been provided to the Court by witness C. He assumed that the litigation management branch knew what information had been passed on to the Court and that they would handle the further request for information by legal counsel appropriately.

[38] I find that witness A did not fulfill his undertakings to the Court. He did not properly follow up on his undertakings of February 3, 2009, nor did he verify what "relevant" information had been provided to the Court by witness C. This is particularly problematic given the concerns expressed by his employee. That said, after reviewing the evidence before me, I find that witness A did not intend to hide information from the Court; however, considering the seriousness of making undertakings in the context of a Court proceeding, witness A should have put more effort into ensuring that the response to his undertakings was made and was complete. Relying on others to

follow up on undertakings made is not sufficient. Witnesses who make undertakings to a Court are responsible for the adequacy of the responses that are filed with the Court through counsel.

Witness R

[39] On April 16, 2009, the Court asked the Ministers to recall witness R to answer any questions the special advocates might have concerning, among other things, human source management, evaluation of human sources and payments made to the human source. Witness R undertook to familiarize himself with the human source file so that he could be examined and cross-examined on its contents. More specifically, he was asked to review the file and be prepared to answer questions concerning the remuneration of the source and the reliability to be given to the information provided by that source. His recent experience within CSIS and his knowledge of the intelligence world qualified him to testify in relation to these issues.

[40] Witness R testified before the Court on May 6, 2009. During his evidence, he was asked about the polygraph section of the source matrix; he answered that he had not fully focused on that part of the human source file. He undertook to respond to the questions posed by the Court and did so on May 13, 2009 in the Ministers' Response to Undertakings (Exhibit M-32 to the closed proceeding) which can only be described as incomplete and inaccurate.

[41] Witness R reappeared on June 25, 2009 to explain his previous evidence and the May 13, 2009, response to his undertakings. In his evidence witness R stated that he did not have time to fully prepare for his court appearance. He had recently changed positions and was fully occupied with his day to day tasks which left him without time to thoroughly prepare for his testimony. Witness R stated that he had not focussed on the section concerning the polygraph as it had not been identified to him as an issue of particular interest to the Court. He also explained that his opinion about the value of polygraph information when assessing the reliability of a human source would not have led him to focus on that part of the file.

[42] Witness R testified that he did not prepare or review the responses to his undertakings before they were filed in Court. It is enough to say that he should have done so.

[43] Again, I do not find a deliberate attempt to hide the information on the part of witness R. However, the Court considers that witness R should have realized the importance of his testimony and should have taken the time to properly prepare and to follow up personally on the undertakings he made to the Court. This would have likely resulted in further disclosure being made to the Court.

The Role of CSIS in the non-disclosure

[44] What is clear from the evidence of the three witnesses and from the documents filed as exhibits to this hearing is that witnesses A, C and R should not bear all of the blame for what appears to be, on the facts before me, in part, an institutional failure of CSIS. Individuals asked to testify on behalf of CSIS in support of the reasonableness of the certificate must continue to cope

with their daily workload. They are not accustomed to testifying as witnesses and they come to the Court with all of their professional baggage. Most importantly, their counsel was not given access to information which would have enabled him to provide them with appropriate legal advice.

[45] This situation is unacceptable. CSIS must ensure that the witnesses they call to testify are properly educated about the function they are being asked to undertake; they must be thoroughly prepared by legal counsel; they, and their counsel, must have all the necessary factual information available to them; and, they must have the consent and backing of CSIS when they are asked to make important decisions about the proceeding.

[46] From the evidence presented to this Court in June and July 2009, it appears that a handful of CSIS employees were asked to make important decisions for the purposes of this proceeding (such as deciding on the content of a human source matrix) without proper advice or support.

[47] This lack of support and the institutional concern over releasing human source information, even to its legal counsel and persons asked to testify in support of certificate proceedings, led, in part, to the non-disclosure of information that goes to the reliability of a human source relied on by CSIS to support its case against Mr. Harkat.

[48] This Court has, in an earlier order, recognized the importance of human source information to Canada's national security and the need to protect the identity of sources (see *Re Harkat* 2009 FC 204 par. 24). The importance of human sources to intelligence gathering is not in question.

However, when human source information is used to support serious allegations against an individual, the Court and the special advocates must be able to effectively test the credibility and reliability of that information. This is consistent with the decision of the Supreme Court of Canada in the *Charkaoui* decisions (see: *Charkaoui v. Canada* [2007] 1 S.C.R. 350 (“*Charkaoui 1*”) and *Charkaoui v. Canada* 2008 SCC 38 (“*Charkaoui 2*”)) and with the legislative purpose underpinning the amendments providing for the appointment of special advocates. To conform to the law, CSIS and the Ministers must give the Court all of the information necessary to test the credibility of the source and not just the information that a witness, trained as an intelligence officer, considers operationally necessary.

[49] CSIS must also ensure that nothing prevents its legal counsel from fulfilling his role as legal advisor to CSIS or his ability to act as officer of the Court. A lawyer has an obligation to represent his client to the utmost subject to an overriding duty to the Court and to the administration of justice. Without access to all the information available, counsel is unable to effectively advise his or her client and is unable to ensure that the administration of justice is being served. It is also clear that despite his best efforts, counsel for CSIS has been overwhelmed by the magnitude of this file. Adequate administrative and legal resources must be dedicated to these complex and time consuming files.

[50] The evolution of the security certificate proceeding post *Charkaoui 1* and *Charkaoui 2* requires the Ministers to adapt to the requirements of the law as propounded by the Supreme Court of Canada and as set out by Parliament. Counsel representing the Ministers must thoroughly understand the evolving jurisprudence and law and be able to adequately prepare CSIS employees who have been asked to appear as witnesses before the Court. The rule of law cannot be set aside because of a lack of time, resources or institutional resistance to the evolving context of security certificate proceedings. CSIS employees must now testify in Court in the presence of special advocates. This is the new reality. The evidence of these witnesses must be given keeping in mind the rule of law, the judicial process, the role of special advocates and the obligation to ensure that their testimony is frank and transparent.

[51] The Ministers' decision in relation to what evidence must be adduced should not be left in the hands of a legally inexperienced witness. A process must be put in place to insure that decisions are made after a proper consultation with all stakeholders and upon receipt of legal advice. Such a process must be followed by the institution and its employees.

Remedy

[52] On May 27, 2009, the Court ordered the Ministers to file, on a confidential basis, the human source file of the individual to whom the polygraph was administered. This was done as a result of the Ministers' acknowledgement that they had failed to provide relevant information about the human source to the Court and the special advocates. The files of the other human source(s) who

provided information relied on by the Ministers in support of the certificate were not covered by the May 27, 2009 Order.

[53] In this proceeding, which was commenced at the initiative of the Court, the special advocates are seeking a remedy under section 24(1) of the *Charter*. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[54] More specifically, the special advocates seek the exclusion of any information provided by the human source who was subjected to the polygraph. It is the opinion of the special advocates that this remedy is necessary given the damage to the integrity of the justice system that has resulted from the failure of CSIS to disclose relevant information to the Court and to the special advocates.

[55] The Attorney-General of Canada opposes the remedy sought by the special advocates since, in his submission, the evidence does not support a conclusion that damage has been done to the integrity of the justice system. He also notes that a remedy was given when the Court ordered the disclosure of one human source file to the special advocates on May 27, 2009. For the Attorney General, such an Order is a “severe sanction”.

[56] The special advocates summarized their position at paragraph 26 of their written submissions filed August 27, 2009 :

The primary position of the special advocates is that the failure to disclose all of the information about the human source to the Court and Special Advocates has had a profound effect on the integrity of the justice system. [...] It is submitted that the failure to disclose in this proceeding should result in the Court's refusal to admit and/or rely upon any information given by the human source in question whether the failure to disclose results from systemic or individual error or whether the failure to disclose was intentional or not. No other remedy will repair the damage done to the integrity of the justice system.

[57] The special advocates assert that Mr. Harkat's section 7 *Charter* rights have been infringed by the Ministers' failure to disclose the polygraph information. They submit, after referring to the requirements of procedural justice as set out in the decision of the Supreme Court of Canada in *Charkaoui 1* that: "Within one year of the decision, the State again violated Mr. Harkat's s. 7 rights by its failure to disclose all of the information about the human source." (see paragraph 22 of the Submissions of Special Advocates, August 27, 2009). No further evidence was submitted to support this allegation.

[58] I find that this assertion is insufficient to find that Mr. Harkat's rights as guaranteed by the *Charter* have been violated and, that consequently, section 24(1) is not engaged. I also note that the polygraph information was disclosed to the Court prior to the commencement of Mr. Harkat's public evidence on the reasonableness of the certificate and prior to the special advocates' cross-examination of any witnesses in relation to the reasonableness in closed proceedings.

[59] That said, I find that the failure of CSIS, and of its witnesses, to act in accordance with the obligation of utmost good faith recognized in *Charkaoui v. Canada* 2004 FCA at paras. 153-154 has undermined the integrity of this Court's process.

[60] Even more damaging to the integrity of this Court's process is the failure to observe the principle of utmost good faith where CSIS has invoked the covert intelligence human source privilege recognized in *Re Harkat* 2009 FC 204 to protect the identity of a human source. :

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

[61] This covert human intelligence source privilege goes to the heart of our national security apparatus. However, the law requires that CSIS reconcile its obligation to disclose all relevant information, frankly and fully, with its legitimate operational requirement to protect the confidentiality of its human sources. By failing to make full and frank disclosure, CSIS and the Ministers do not protect the confidentiality of their human sources: they put it at risk.

[62] The failure of CSIS and its witnesses to disclose the polygraph information has seriously damaged confidence in the current system. A judge, not the Ministers, is charged with determining the reasonableness of a security certificate pursuant to section 78 of IRPA. With the coming into force of Bill C-3, special advocates are appointed by the Court to protect Mr. Harkat's interests by among other things, testing the reliability of the information that is heard in closed proceedings. That is the law as set out in the Division 9 of IRPA. The Ministers and CSIS intelligence officers may have their own views as to the reliability of the human source information but they may not impose that view by limiting the information provided to the Court and the special advocates.

[63] How can this damage be repaired? Is there an appropriate remedy? In the opinion of the Court, there is such a remedy which may be granted in addition to the measures that have already been taken by the Court (*Re Harkat* 2009 FC 204 and *Re Harkat* 2009 FC 553) and those taken by the Attorney General and CSIS to insure that such a situation will not happen again (see letters dated May 26 and June 4, 2009).

[64] Notwithstanding all of this, the Court must still determine whether the certificate naming Mr. Harkat is reasonable or not. To reach such a decision, this Court must, among other things, determine the credibility to be given to witnesses, the weight to be given to the evidence presented by all parties, the importance or not of expert evidence. The Court must have all of the relevant information to adjudicate the reasonableness of the certificate.

[65] To proceed as though this situation had not occurred is impossible. Evidence of a failure to disclose relevant evidence which may negatively affect the Court's determination of the reliability of a human source has been put before the Court. The explanations provided by the three witnesses have not convinced the Court that all of the relevant evidence is before it. Indeed, the evidence before the Court leads to the conclusion that the information filed in support of the certificate by the Ministers has been "filtered" and that undertakings made to the Court have not been fulfilled.

[66] Filtering evidence, even with the best of intentions, is unacceptable. Failing to properly fulfill undertakings made to a Court of law is equally unacceptable.

[67] And so, the Court is currently faced with a situation in which the integrity of its processes has been undermined.

[68] Had the polygraph information never come to the attention of the Court there is a real risk that Mr. Harkat would have suffered a flagrant denial of procedural justice. In the May 27, 2009 Order (*Re Harkat* 2009 FC 553) the acknowledgment that the Ministers failed to disclose the information was found to meet the threshold for setting aside the human source privilege as set out in *Re Harkat* 2009 FC 204. I find that, on the facts before me now, a similar justification exists for setting aside that privilege as it relates to another covert human intelligence source relied on by the Ministers in the exceptional circumstances of this proceeding.

[69] Consequently, in these exceptional circumstances, the Court has determined that it is necessary to order the production of the files of another human sources relied on by the Ministers in this proceeding. This order is made as a result of the evidence heard in this collateral proceeding, and pursuant to the Court's inherent power to ensure the integrity of its processes: *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at paragraphs 78 to 80 and 88. More specifically, it is being made pursuant to this Court's the residual power to compel the production of all relevant documents: *Cook v. Ip et al.* (1985), 52 O.R. (2d) 289 (C.A.) at paragraph 14.

[70] Such an order will ensure that there is no further concern in relation to the special advocates' ability to fully test the evidence; it is necessary to repair the damage done to the administration of justice and to reestablish the necessary climate of trust and confidence which must be present in such an exceptional legal procedure. I note however, that production of the human source file remains subject to the strict limits recognized in *Re Harkat* 2009 FC 204. More specifically, the file is to be provided only to the Court and to the special advocates. In no circumstances will this file be given to Mr. Harkat, his counsel, or to the public.

[71] At the risk of being repetitive, the non-disclosure of the polygraph information created exceptional circumstances in this proceeding. There are several important steps remaining before a judgment on the reasonableness of the certificate can be made. Mr. Harkat has yet to lead evidence in support of his position, nor have the special advocates commenced their cross-examination of the Ministers' confidential witnesses.

[72] This remedy is designed to restore trust and confidence in this process but should not in any way undermine the covert human source intelligence privilege. Access is granted in the exceptional circumstances of this file which include an acknowledgement by CSIS that it has failed to meet its obligations of utmost good faith and evidence that evidence has been filtered and undertakings left unfulfilled. To avoid similar orders being issued in the future, the Ministers must ensure that the sources matrices they provide to the Court include all information, supportive or not, related to the reliability of human sources. The circumstances of this proceeding are exceptional and hopefully will never recur. If proper care is taken in the preparation of the source matrix the instances in which this Court will find it necessary to give access to a human source file in the future will be greatly limited.

[73] As a final matter, the evidence of the polygraphist provided the Court with a significant amount of information concerning the methodology and evaluation of polygraph information. Given the negative conclusions drawn by the witness concerning the manner in which the polygraph was administered and assessed, the Court has determined that none of the information concerning the polygraph administered to the human source will be given weight in this proceeding. This finding does not foreclose the special advocates from using the information for the purposes of their cross-examination.

[74] With the resolution of this issue the Court may now continue with its primary function, namely, the determination of the reasonableness of the security certificate. Closed hearings into the reasonableness will begin in mid-November 2009; the public portion of these proceedings will be held in January and February 2010. It is in the interests of justice and in the interests of Mr. Harkat that the reasonableness of the certificate be determined as expeditiously as possible subject only to the overarching requirements of fairness.

ORDER

THEREFORE, THIS COURT ORDERS:

- The human source file concerning another covert human intelligence source whose information is relied on to support the allegations made against Mr. Harkat will be filed with the designated proceedings Registry within five (5) days from the date of this Order, in three (3) unredacted copies so that it can be reviewed by the Court and by the special advocates.

“Simon Noël”

Judge

“APPENDIX 1”



Department of Justice
Canada

Ministère de la Justice
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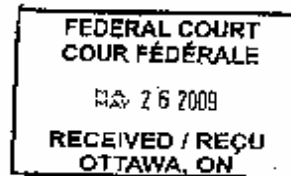
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May 26, 2009

BY HAND

Ms. Nancy Allen
Registrar
Designated Proceedings
Federal Court



Dear Ms. Allen:

RE: Mohamed HARKAT, Court File No: DES-5-08

Please bring this letter to the attention of Justice Noël.

I am writing to advise the Court of three matters: first, that the Ministers have important information to provide concerning a polygraph test that was done on Human Source [redacted] second, to provide a confirmation that the Minister of Public Safety was informed of the foreign agency position; and third, to provide a response to the Court's request that the CSIS executive reconsider the position of not returning to foreign agencies to lift their caveats.

[redacted] Polygraph Information

On September 10, 2008 the Ministers filed the Security Intelligence Report (SIR) concerning Mohamed Harkat at the closed hearings. The SIR was supported by four volumes of reference material as well as a separate document on human sources used in the SIR. This document, referred to as the source matrix, was filed on the Court's record as Ministers' Exhibit "A" during the closed proceedings on September 10, 2008.

The source matrix contains a description and history of the human sources used in the Harkat SIR. The source matrix is designed to provide a frank view of the human source,

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with both positive and negative information included, in order to assist the Court in making a fair assessment of the source's credibility and the reliability of the information they have provided. The source matrix is also provided to the Special Advocates to allow them to fulfill their duties in challenging the Ministers' case against Mr. Har'kat. Furthermore, the Ministers are under an obligation to ensure that the source matrix is fair and complete and the observation of the Supreme Court on this obligation in *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 72, at paragraph 27, is apposite:

In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representation that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse interest of that party may be withheld...

In the Har'kat case, there is a section in the source matrix that evaluates [REDACTED] and is based on information from CSIS. In particular, the [REDACTED] section contains a description of a polygraph examination: that was conducted on [REDACTED] in 2002 and the results of that examination. This information is at page 16 of Exhibit "A" and reads as follows:

POLYGRAPH TESTING

These issues cast suspicion on [REDACTED] loyalty to the Service and raised questions as to [REDACTED] activities and associations. [REDACTED]

As a result, in 2002, the Service conducted a polygraph examination of the source

The polygraph charts were reviewed by an independent [REDACTED] resource who determined that [REDACTED] was truthful when stating that he was not involved with other agencies and militant organizations.

The Service has recently become aware that important information regarding [REDACTED] polygraph results were not provided to the Court and the Special Advocates. That information regarding the results of the polygraph was incomplete and should have contained the following:

1. In 2002, a polygraph was conducted on [REDACTED] was asked [REDACTED] relevant questions and the polygraph examiner determined that [REDACTED] had been untruthful on these questions. A copy of this report is enclosed. One copy had been prepared in order for the Court and one for the Special Advocates. The Special Advocates' copy has a short redaction to protect the identity of [REDACTED]

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2. In 2008, the polygraph results were sent for an independent assessment to a different polygraph examiner. (This independent assessment is what is referred to in the current source matrix noted above.) The examiner in 2008 reviewed the polygraph results only and determined that [REDACTED] had been truthful on [REDACTED] of the relevant questions and the results were inconclusive on the [REDACTED] relevant questions. A copy of this report (Court and Special Advocate copy) is enclosed.

It is clear that the Court and Special Advocate should have been made aware of the complete results of the polygraph examinations and the failure to do so is a serious matter. The Service is investigating why this information was not provided and will report to the Court as soon as the investigation is complete. A Service witness at the senior management level is available to answer any questions the Court may have in regards to this omission of information. In addition, the Service has reviewed [REDACTED] human source files and will make them available to the Court, and if the Court so directs, to the Special Advocates.

Foreign Agency Issue

On May 21, 2009, the Court directed that it receive written confirmation that the Minister of Public Safety was consulted on the issue of returning to foreign agencies to lift their caveats. In addition, the Court requested that the CSIS executive reconsider the position that CSIS would not be returning to the foreign agencies in light of a change in circumstances. The Court observed that foreign agency position was predicated on a blanket request to return to all foreign agencies to release all their information. The Court pointed out that the facts were now different as the Special Advocates had tailored their request to specific pieces of information [REDACTED]. In addition, the Special Advocates were not seeking attribution of the particular agencies and the information could be provided in summary form. Given this change of circumstances, the Court asked that the CSIS executive reconsider its position on this issue on an urgent basis.

I can confirm that the issue of returning to foreign agencies was previously discussed with the Minister of Public Safety. I can also advise that the Service has given careful consideration to the request to seek consent of [REDACTED] agencies to the public disclosure of some of their information. Given the new facts in the Harkat case, and in light of the Court's comments, however, the Service is seeking instructions from both Ministers personally. It is hoped that the Ministers will provide instructions by the end of

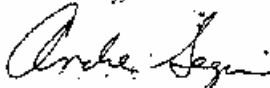
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the week. The Minister of Public Safety is out of the country, however, and it may not be possible to secure his instructions until his return.

Yours truly,



André Seguin
Counsel

Enclosure

cc: Paul Cavaluzzo, Special Advocate
Paul Cypriand, Special Advocate

[REDACTED]

“APPENDIX 2”



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Appendix 2

June 4, 2009

The Honourable Allan Lutfy
Chief Justice of the Federal Court
Federal Court
90 Sparks Street
Ottawa, Ontario
K1A 0H9

Dear Chief Justice:

RE: Source Matrix

On May 27, 2009, Justice Noël issued Reasons for Order in the matter of DES-5-08, in response to a letter from counsel providing new information concerning the reliability of a human source.

The information, which was significant and went to the weight to be given to the evidence of the source, was omitted from the source matrix provided to the Court and Special Advocates. Justice Noël found "this troubling situation" raised questions concerning the Service's compliance with orders of the Court, possible perjury by Service witnesses, and the Service's compliance with the obligation of *utmost good faith* required in the context of *ex parte* proceedings.

The failure to include relevant information in the source matrix was inexcusable and is a matter of profound concern to the Service. It betrays the commitment of the Service and its employees to the judicial process and their respect for the fundamental legal principles referred to in Justice Noël's Reasons for Order. To the extent "this troubling situation" has given the Court any cause to doubt the integrity of the Service's evidence and question the credibility of its employees, the Service is resolved in its determination to restore judicial confidence in that integrity and credibility.

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On becoming aware of the omission of relevant information from the source matrix, counsel for the Ministers took immediate steps to advise the Court of the omission. Since then, the Service has assigned a senior Service manager to undertake a fact finding review of the circumstances surrounding the preparation of this particular source matrix, to determine how information of obvious relevance to the Court's inquiry could have been omitted from it. The Service will advise the Court of the results of the review, including any changes made to the Service's practices or policies as a result of the review.

While the issue considered by Justice Noël related to a single source matrix, the Service recognizes the omission of relevant information from this matrix may give rise to concern about the integrity of other source matrices filed in the security certificate cases currently before the Court. To address this concern, the Service is undertaking an exhaustive review of all security certificate-related human source matrices and the supporting human source files. Each matrix and its associated human source file will be reviewed by at least two experienced intelligence officers who have been charged to confirm that the matrix discloses all relevant information and that the information is presented in an accurate and balanced manner. Following this review, each source matrix will be challenged by a three-person team consisting of two senior managers, at the level of Director General or Deputy Director General, and a Department of Justice counsel.

Source matrices also figure prominently in the warrant application process, where they appear in an exhibit to the affidavit filed in support of a warrant application. Effective immediately, the human source matrices used on all warrant applications will be challenged by Department of Justice counsel assigned to the National Security Group, the same counsel who currently challenge the factual accuracy of affidavits filed in support of warrant applications.

In addition to these immediate steps, the Service is engaged in a broader review of its practices concerning the presentation of evidence in legal proceedings generally. The omission of relevant information from the source matrix referred to by Justice Noël justifies a critical assessment of current practices and the taking of such steps as may be necessary to prevent similar occurrences, not just in relation to human source matrices but in relation to all information placed before the Court. In this regard, the Service is studying a number of options, including the need for more robust internal checks and balances as well as the possibility of employing a check and balance mechanism external to the Service. The Service will advise the Court of the steps taken as a result of this broader process review.

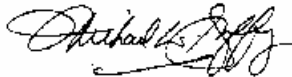
The Court will recall that, in relation to the warrant application process, the Director imposed what was referred to as a "moratorium" in response to a case in which the Court found the Service had failed to make full disclosure of all relevant information. Under the terms of the moratorium, an application for a warrant could only be filed where the Director was personally satisfied the proposed application fully disclosed all relevant

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facts. The Director, in consultation with the Deputy Attorney General and other officials, is considering the advisability of imposing a similar moratorium in relation to the filing of human source matrices. Pending the outcome of ongoing discussions and completion of the various reviews to which I have referred, the Director believes it would be premature to impose such a moratorium at this time. However, the Service will advise the Court as soon as a decision is taken on the matter.

As I indicated, the incident brought to Justice Noël's attention is a matter of profound concern to the Service. It is one the Service is determined to address in a way that will assure the Court, Special Advocates, public counsel, parties and the public of the Service's respect for the judicial process and its commitment to the rule of law. The Service is confident that the steps outlined in this letter, together with those that will be taken in the coming weeks, will provide that level of assurance.

Sincerely,



Michael W. Duffy
Senior General Counsel

ld/ 51600-72-5

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: In the matter of a Certificate pursuant to Section 77(1) of the *Immigration and Refugee Protection Act* and
In the matter of Mohamed Harkat

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 26, 30, July 2 and 3, 2009
Final submissions filed September 10, 2009;

REASONS FOR ORDER: NOËL S. J.

DATED: October 15, 2009

APPEARANCES:

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Mr. Patrick F. D. McCann	FOR WITNESS R
Mr. Jean G. Legault	FOR WITNESS A
Mr. P. Copeland	SPECIAL ADVOCATE
Mr. P. Cavalluzzo	SPECIAL ADVOCATE

SOLICITORS OF RECORD:

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