Date: 20081103

Docket: DES-3-08

Citation: 2008 FC 1216

Ottawa, Ontario, November 3, 2008

PRESENT: THE CHIEF JUSTICE

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Hassan ALMREI

REASONS FOR ORDER AND ORDER

[1] Special advocates may only communicate with another person about a ministerial certificate proceeding with a judge's authorization. These are my reasons for concluding that the constitutional challenge of this requirement, without an appropriate factual matrix, is premature. However, certain issues raised in this motion will be answered on the basis of statutory construction.

Procedural Background

[2] The moving party, Hassan Almrei, and three interveners, Mohamed Zaki Majoub, Mahamoud Jaballah and Mohamed Harkat, challenge the requirement that communications among special advocates and other persons, in particular themselves and their counsel, must be authorized by the judge. In their view, this constraint unjustifiably infringes their rights to freedom of expression and fundamental justice under s. 2(b) and s. 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).

[3] On February 22, 2008, legislation came into force introducing the participation of special advocates in ministerial certificate proceedings. These proceedings are governed by Division 9 of the *Immigration and Refugee Protection Act* (IRPA).

[4] One year earlier, in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 (*Charkaoui*), the Supreme Court of Canada declared that the previous procedures in Division 9 did not conform with the principles of fundamental justice as embodied in s. 7 of the *Charter* and, furthermore, could not be saved under s. 1 of the *Charter* because they did not minimally impair the rights of non-citizens (¶¶ 65, 69 and 139).

[5] Also, on February 22, 2008, the Minister of Public Safety and the Minister of Citizenship and Immigration (the Ministers) signed and referred to the Federal Court new certificates stating that Messrs. Almrei, Mahjoub, Jaballah and Harkat were inadmissible to Canada on grounds of

security. A fifth ministerial certificate was issued against Adil Charkaoui who chose not to intervene in this constitutional challenge.

[6] From late February through June 2008, there were some six common case management conferences in the five current certificate proceedings. In early April, possible conflicts of interests in the appointment of special advocates were resolved by Justice Edmond Blanchard. On May 6, 2008, a presiding judge was designated in each proceeding. In early July, Justice James K. Hugessen presided over a successful mediation concerning a motion to secure additional funding for counsel.

[7] By mid-June 2008, two special advocates had been appointed in each of the relevant proceedings. At the same time, scheduling orders were issued which, generally speaking, allowed the special advocates to review the confidential information during the summer months. The private and public hearings commenced at various times in September and October 2008.

[8] On July 22, 2008, Mr. Almrei filed his motion record in support of this constitutional challenge (the constitutional motion). The responding motion records of the Ministers and Messrs. Jaballah and Majoub (upon which Mr. Harkat also relies) were filed in a timely fashion. Special advocates were authorized to make written and oral submissions solely for the purposes of the constitutional motion, without determining their role in future open proceedings. Oral submissions were received on September 26 and October 1, 2008.

[9] None of the parties questioned the jurisdiction of a designated judge to determine this constitutional motion: *Charkaoui (Re)*, 2004 FCA 421, ¶¶ 21-62. Also, it was appropriate and just to treat this motion as part of Mr. Almrei's designated proceeding without initiating a separate court file: *Charkaoui (Re)*, ¶ 58. The three intervenors agreed to be bound by this decision subject to whatever appellate review might be applicable. As one of two case management judges, I undertook to hear the constitutional motion as expeditiously as was fair to all the parties.

The Legislative Provisions

[10] This constitutional motion implicates two sections of the *Charter*:

2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
…	…
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	*b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[11] The two impugned provisions, which require the judicial authorization for certain communications of the special advocates, are s. 85.4(2) and s. 85.5(b) in Division 9 of the IRPA.

[12] According to s. 85.4(1), the special advocate receives all information and other evidence that is not disclosed (the confidential information) to the permanent resident or foreign national (the named person). In these reasons, the moving party, Mr. Almrei, and the three interveners will be referred to collectively as the "named persons."

[13] Pursuant to s. 85.4(2), after having received the confidential information, special advocates may only communicate (i) with another person; (ii) about the proceeding; and (iii) with a judge's authorization. It is the breadth of these three key components of the provision that is of concern to the named persons, their counsel and the special advocates.

[14] The prohibition against communication absent judicial authorization is reiterated in s. 85.5 for all persons, not only special advocates, apparently for a period beyond the "remainder of the proceeding," the duration stated in s. 85.4(2).

[15] There are two apparent differences between the impugned provisions. Firstly, the prohibition against communications in s. 85.4(2) is directed solely to the special advocates. In contrast, the prohibition in s. 85.5 extends to all persons with access to confidential information. Secondly, the prohibition in s. 85.5 is permanent or, in the words of the clause by clause notes "during the proceeding or any time afterwards." Consistent with the apparent permanency of the prohibition is the ability of "a judge" ("tout juge"), not only the presiding judge, to authorize communication of the confidential information.

[16] Section 85.4(2) prevents the special advocates from communicating "about the proceeding." Collaterally, this prohibition covers all information about the proceeding from both public and private sessions, including any testimony given in the absence of the public and the named person and their counsel. While I am comfortable with this view, this issue was neither expressly raised nor fully argued.

[17] Sections 85.4 and 85.5 read as follows:

85.4(1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.	85.4(1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.
(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.	(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.
…	…
85.5 With the exception of communications authorized by a judge, no person shall	85.5 Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :
(*a*) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or	*a*) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;
(*b*) communicate with another person	*b*) de communiquer avec toute

about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.	personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

[Emphasis added]

The Constitutional Issues

[18] The constitutional motion raises questions that have been presented as legal and factual issues.

[19] The principal relief sought is straightforward. Mr. Almrei asserts that the impugned provisions deny the named persons a fair hearing, infringes the free speech rights of special advocates, and offends the open court principle. These infringements, says Mr. Almrei, are not minimally impairing and, therefore, the impugned provisions must be read down. The interveners assert that the impugned provisions must be struck down or, in the alternative, read down.

[20] For Mr. Almrei, the requirement in s. 85.4(2) that judicial authorization be obtained by the special advocates prior to any of their communications "about the proceedings" should be confined to communications "about the confidential information or evidence." Mr. Almrei also urges that s. 85.5(b) should be read to include the same closing words as found in s. 85.5(a): "and that is treated as confidential by the judge at the proceeding."

[21] The interveners would read down the impugned provisions differently. They would limit the necessity for judicial authorization in both ss. 85.4(2) and 85.5(b) to those communications where a special advocate believes there is a risk of disclosing confidential information. The interveners also argue that any application by a special advocate for judicial authorization to communicate be made (a) *ex parte* or, in other words, in the absence of counsel for the Ministers; and (b) before a judge other than the presiding judge.

Adjudicative and Legislative Facts in *Charter* Claims

[22] Courts of first instance should be prudent before declaring unconstitutional newly enacted legislation.

[23] A factual foundation is generally to be preferred before determining constitutional validity: *Canada (Attorney General) v. Khawaja*, 2007 FC 463 (*Khawaja*), ¶¶ 26-7:

> *Charter* decisions should not and must not be made in a factual vacuum: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at paragraph 9; *Reference re Same-Sex Marriage*, 2004 SCC 79.
>
> This principle was somewhat qualified in *R. v. Mills*, [1999] S.C.J. No. 68 (at paragraphs 36 and 37):
>
> > The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. …
> >
> > …The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. …

[24] The distinction between adjudicative and legislative facts was outlined by Justice Sopinka in *R. v. Danson*, [1990] 2 S.C.R. 1086, ¶ 27:

> … Adjudicative facts are those that concern the immediate parties: … "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements. [internal citations omitted]

(See also *Public School Board's Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, ¶ 4; *R. v. Spence*, [2005] 3 S.C.R. 450, 2005 SCC 71, ¶¶ 56-60)

[25] The only evidence presented in this motion has been by way of affidavit.

[26] The dismay and anxiety expressed by the named persons in their affidavits may be understandable but, otherwise, their evidence is at best speculative.

[27] Affidavits were also provided by two senior practitioners experienced in dealing with national security information in other fora. Both acknowledge not to have participated in Division 9 proceedings until their current involvement as special advocates. Some of the concerns expressed in their affidavits of July 2008 will be reviewed in these reasons. More importantly, others have been resolved in orders made by the judges presiding over the proceedings since the affidavits were filed. This supports my view that the affidavit assertions of the special advocates, like those of the named persons, are also speculative.

[28] A third practitioner, with extensive experience as defense counsel in criminal matters, produced affidavit evidence. He emphasized the importance of open communication with his clients throughout their proceedings. However, his evidence does not take into account the national security context of Division 9 proceedings. Nor does it envisage the flexibility that may be open to designated judges under the rules currently governing Division 9 proceedings.

[29] A university law professor, specializing in national security and democratic governance, provided an affidavit summarizing his interview with a government official involved in the administration of the special advocate system in the United Kingdom. The first hand evidence of the foreign official, even if at all relevant, would have been preferable. The professor's statements concerning the Security Intelligence Review Committee, to the extent they dealt with domestic law, are well within the purview of the Federal Court.

[30] In the end, this constitutional motion is supported with little, if any, adjudicative facts or evidence. As acknowledged by counsel, the motion is substantially based on legislative facts or, in their words, constitutes a "facial constitutional challenge" of the impugned provisions in the new legislation.

[31] No case law since *Mills* has been identified by counsel where legislation has been struck down only on the basis of legislative facts.

[32] In *Charkaoui*, the certificates concerning Mr. Almrei and Mr. Harkat had been determined to be reasonable when the matter reached the Supreme Court of Canada. No such determination had been made with respect to Mr. Charkaoui because of a statutory stay under the previous scheme. More significantly, extensive portions of the record of the private hearings from Mr. Almrei's proceeding were filed in the Supreme Court of Canada. The Court described the "active" and "non-deferential" role of designated judges, their "assiduous work" and "their best efforts … to breathe judicial life" in Division 9 proceedings: *Charkaoui*, ¶¶ 38, 39, 42, 51 and 65.

[33] In *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68 (*Sauvé*), legislation limiting a prisoner's right to vote under s. 3 of the *Charter* was determined to be unconstitutional after a ten-day hearing, consisting principally of the evidence of several expert witnesses. Two of the individual plaintiffs also testified. The Supreme Court determined that the factual record was sufficient to resolve the s. 1 issues in that case.

[34] The level of adjudicative facts necessary to evaluate constitutional claims will vary. I expect that assessing s. 7 *Charter* claims will necessitate a greater degree of adjudicative facts, particularly when the alleged infringement concerns the effects on procedural rights protected by the principles of fundamental justice. Here, the affidavit evidence is of limited assistance.

[35] There may very well be cases where the impairment of a *Charter* right is obvious on the face of an impugned legislative provision. For example, in *Sauvé*, there was little dispute that

denying prisoners who are Canadian citizens the right to vote infringed their rights under s. 3 of the *Charter*. In such cases, the need for adjudicative facts may be minimal.

[36] In contrast, *Charkaoui* involved assessing the effects of Division 9 of IRPA on the procedural rights of persons subject to certificate proceedings. As noted above, in reaching its decision, the Supreme Court had the benefit of adjudicative facts from Mr. Almrei's proceeding. The adjudicative facts in *Charkaoui*, which appear to me to be more than those presented in this constitutional motion, allowed the Supreme Court to resolve the s. 7 issues before it.

[37] This constitutional motion, particularly in respect of s. 7 of the *Charter*, is premised on the argument that the alleged constitutional defects of ss. 85.4 and 85.5 are obvious on their face. However, the position of the named persons is speculative concerning decisions yet to be made and the resulting effects on their rights.

The Section 7 Issues

The Existence of a Substantial Substitute

[38] In relying on *Charkaoui*, Mr. Almrei takes the position that any ministerial certificate proceeding that allows for private hearings, without the full disclosure of evidence to the named person, necessarily infringes s. 7 and can only be saved by s. 1. As there is substantially no s. 1 evidence in this proceeding, Mr. Almrei argues, this constitutional motion must succeed. In his view, the current scheme does not afford the named persons their right to know the case to be met.

[39] The right to know the case to be met is not absolute. In order to satisfy s. 7, the named person must be given the necessary information or a substantial substitute must be found: *Charkaoui*, ¶ 61; *Khawaja*, ¶ 35.

[40] Counsel for the Ministers submit that the new provisions afford the substantial substitute. In addition to the protections available under the old scheme, the special advocates appointed to protect the interests of the named persons have access to the confidential information that forms the basis for a ministerial certificate. The special advocates participate in the private hearings and, with judicial supervision, may also communicate with the named persons and their counsel. With the judge's authorization, they may exercise any other powers that are necessary to protect the interests of the named persons.

[41] The evidence before me in this constitutional motion is insufficient to determine definitively whether the new provisions constitute a "sufficient substitute" within the meaning of *Charkaoui*. I am satisfied it would be premature for me to conclude, absent an appropriate factual matrix, whether the new provisions violate Mr. Almrei's s. 7 rights.

[42] There is one aspect of Mr. Almrei's submissions I want to address at greater length.

[43] An important aspect of Mr. Almrei argument's against the impugned provisions is his reliance on what he characterizes as the free flow of information between counsel for the Security Intelligence Review Committee (SIRC or the Review Committee) and the complainant. For Mr.

Almrei, the "SIRC model" is an answer to the alleged constitutional deficiencies in the impugned provisions.

[44] SIRC counsel, at all times, acts on behalf of the Review Committee: *Khawaja*, ¶ 56.

[45] In recent testimony before the Special Senate Committee on Anti-terrorism, the Review Committee's executive director corrected a common misapprehension that SIRC counsel is a special advocate: *Proceedings*, June 2, 2006, Issue No. 7, at 5:

> … I will clarify certain terminology that has been used regarding the SIRC model. There is no special advocate, no special counsel and no independent counsel involved in our process.
>
> ...
>
> … SIRC counsel must be independent of both government as represented by CSIS … and the complainant.
>
> For greater clarity, SIRC's counsel is not an advocate for the complainant.
>
> [Emphasis added]

SIRC counsel includes legal agents retained from the private sector and in-house counsel.

[46] SIRC counsel, acting for the Review Committee, assists the presiding member in advancing the interests of a complainant in private hearings, much as any decision-maker must be concerned with fairness for each party. Here, my comments focus on the role of SIRC counsel generally, without distinction between ministerial certificate cases and the Review Committee's current workload.

[47] SIRC outside counsel receives instructions from the presiding member of the Review Committee and from in-house counsel. Communications between SIRC counsel and the complainant is under the explicit or implicit authority of the Review Committee member. The presiding member's function as the filter or authority for communications is analogous, though not identical, to the supervisory role of the presiding judge under Division 9 of the IPRA. The so-called "free flow" of information between SIRC counsel and the complainant is circumscribed as it has to be.

[48] In *Charkaoui*, the Supreme Court called for an independent agent to review objectively confidential information with a view to protecting the interests of the named persons (¶¶ 3 and 86).

[49] The special advocate is independent of the court, unlike the relationship between SIRC counsel and the Review Committee. This independence not only imposes fewer constraints on the special advocates, but charges them with potentially greater obligations in protecting the interests of a named person, without being the latter's solicitor.

[50] Neither the legislation creating the Review Committee nor the latter's Rules of Procedure make any mention of the role of SIRC counsel. The functions of counsel have evolved over time. Under Division 9, Parliament has made explicit the role, responsibilities and powers of the special advocates.

[51] The special advocate protects the interests of the named person in private hearings. The special advocate challenges the Minister's claim of confidentiality and the reliability of the confidential information. The special advocate makes oral and written submissions concerning the confidential information and may cross-examine witnesses during private hearings. Finally, the special advocate may, with the judge's authorization, "exercise… any other powers that are necessary to protect the interests of the [named person]".

[52] The role of the special advocates, like that of SIRC counsel, will evolve based on the rulings of presiding judges.

[53] While I need not decide the issue, I have not been convinced that the "SIRC model" would afford more protection to the named persons than Division 9 of the IRPA.

Solicitor-Client Privilege

[54] The interveners approach the s. 7 issue with equal force but differently. For them, the requirement that special advocates obtain judicial authorization for communication with the named persons or their counsel is necessarily an impermissible intrusion into solicitor-client communications and the litigation privilege.

[55] Routine supervision of the solicitor-client communications will implicate privileged information and bring the judge, in their words, "into the brief." For the interveners, national security, in and of itself, cannot be an exception to solicitor-client or litigation privilege. The

rationalization of ongoing judicial oversight to avoid the risks of inadvertent disclosure lacks any structure of minimization.

[56] As between special advocates and named persons, Division 9 protects information and not relationships.

[57] According to s. 85.1(3), the relationship between the special advocate and the named person is not that of solicitor and client. However, under s. 85.1(4), information communicated between the named persons and the special advocates is "deemed" to be subject to solicitor and client privilege. The information that passes between them, absent the solicitor and client relationship, is deemed to be protected.

[58] It is on the basis of the "deeming" provision that the named persons seek to extend the full protection of solicitor and client privilege and litigation privilege to the relationship between special advocates and themselves.

[59] This position, it seems to me, may run counter to Parliament's assertion that the relationship between the special advocate and the named person is not that of solicitor and client. Nor are special advocates parties to the proceedings.

[60] Despite its importance, solicitor-client privilege is not absolute: *R. v. McClure*, [2001] 1 S.C.R. 445, ¶¶ 34-5. The case law relied upon by the named persons to buttress the importance of

the solicitor-client privilege does not exclude its possible breach for reasons of necessity: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, ¶¶ 17 and 22; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 6, ¶ 36; *Smith v. Jones*, [1999] 1 S.C.R. 455, ¶ 57.

[61] Avoiding injury to national security, which can include the risks of inadvertent disclosure, may constitute a necessity that warrants piercing the privilege in as minimal a way as the circumstances dictate. This should not be decided in a factual vacuum.

[62] The able submissions made on behalf of the named persons have not convinced me that the requirement of judicial authorization must by definition be struck down on the bald assertion of either solicitor-client privilege or litigation privilege. The necessity exception prevents me from doing so.

[63] There are also other reasons. First, the factual record in this motion does not convince me that every request for authorization to communicate by special advocates will necessarily implicate information deemed protected by s. 85.1(4).

[64] Second, there may be situations where special advocates will want to seek authorization for further communication with the named person. The application may be based on facts whose disclosure would breach the deemed solicitor-client privilege. The circumstances will be such that

the named person, unaware of the request by the special advocates, cannot explicitly authorize the disclosure of the privileged information.

[65] Here, it is open to special advocates to seek directions from the presiding judge to make submissions in the absence of counsel for the Ministers. The different permutations and combinations that may present will depend on the facts. Designated judges will have the flexibility from the powers vested in them in Division 9 and from the *Federal Courts Rules* to respond properly to the special advocates in accordance with varying circumstances. The presiding judges will determine the extent of the information, if any at all, that should be disclosed to counsel for the Ministers. I would expect that in most cases, if not all, the Ministers would be given notice that a request for authorization to communicate has been made by the special advocates. Early experience under the new provisions has supported this approach.

[66] Finally, the interveners' suggestion that the requirement for judicial supervision will "taint" the presiding judge, particularly where authorization is given and the named person subsequently adopts a different strategy, is a matter best determined with a factual context.

[67] In summary, the named persons have not presented a sufficient factual matrix to evaluate their section 7 claims. Their challenge under s. 7 cannot be determined in this constitutional motion.

The Section 2(b) Issues

[68] Private hearings, in the absence of the public and the named persons, as well as the restrictions on the ability of special advocates to communicate freely, infringe the open court principle and freedom of expression as guaranteed under s. 2(b) of the *Charter*.

[69] The statutory requirement that national security confidential information be received in private hearings has been upheld by the Supreme Court Canada: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (*Ruby*); see also *Khawaja*.

[70] In *Ruby* and *Khawaja*, the s. 2(b) infringement was saved under s. 1.

[71] To the degree that the impugned provisions protect confidential information, the s. 1 analysis in *Ruby* and *Khawaja* is applicable here. If a private hearing concerning confidential information is justifiable under s. 1, so too is a prohibition on disclosing the contents of such a private hearing. This must be true.

[72] However, in this constitutional motion, unlike the situations in *Ruby* and *Khawaja*, the issue of communications between the special advocates and other persons, in particular the named persons, is a new issue. Neither the named persons, nor the special advocates have satisfied me that the ability to obtain judicial authorization for communication does not minimally impair their s. 2(b) rights. For the reasons mentioned under my s. 7 analysis, this issue should remain open pending adjudication with an appropriate factual matrix.

The Alternative Relief Sought

[73] The constitutional motion describes the alternative relief sought in factual terms. In Mr. Almrei's view, it is unconstitutional to require judicial authorization where:

(a) the special advocates communicate with office staff and colleagues and family members concerning their whereabouts;

(b) the special advocates communicate with those officials responsible for their administrative support;

(c) the special advocates communicate between themselves in the same proceeding;

(d) the special advocates appointed in an ongoing proceeding communicate with other special advocates on the list established by the Minister of Justice but not participating in an ongoing proceeding;

(e) the special advocates appointed in one proceeding communicate with special advocates appointed in a separate ongoing proceeding;

(f) the special advocates communicate with the media and Parliament concerning the effectiveness of the proceedings;

(g) the special advocates communicate with the named persons and their counsel concerning rulings made in private and the advisability of appealing or seeking judicial review of such rulings;

(h) the special advocates communicate with the named persons and their counsel concerning matters not envisaged prior to the special advocates' receipt of confidential information.

In each of these eight circumstances, Mr. Almrei asserts that the communications of the special advocates should be free flowing and without the filter of court approval.

[74] Importantly, Mr. Almrei concedes in five of the eight instances that the free flow of communications being sought for the special advocates should not directly or indirectly disclose

confidential information. Put more simply, the envisaged communications have nothing to do with confidential information. Concerning (c), (d) and (e), the concession is formulated differently and will be dealt with below.

[75] A review of the principles of statutory interpretation will assist in assessing the alternative relief sought by Mr. Almrei.

[76] For over a decade now, the Supreme Court of Canada has reiterated the modern principle of statutory interpretation, rooted in Driedger's often quoted maxim: "… the words of an Act are to be read in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 272, ¶ 21; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, ¶ 34)

[77] Parliament is presumed to legislate in a way that avoids absurd or unjust consequences. (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada Inc., 2008) at 300-323) Professor Sullivan, relying on several Supreme Court of Canada decisions, highlights the following propositions (at 300-01):

> (1) It is presumed that the legislature does not intend its legislation to have absurd consequences.
>
> (2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.

> (3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.
>
> (4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

[78] An essential element of Division 9 proceedings is confidential information. The legislation denies named persons and their counsel access to the confidential information because of its sensitivity. Mr. Almrei and the interveners concede that the protection of confidential information is a legitimate governmental objective. The broad limitations found in the impugned provisions must, therefore, be interpreted by courts keeping in mind the risks of disclosure, particularly inadvertent disclosure, of confidential information, while avoiding absurd consequences.

[79] The first three categories of relief sought by Mr. Almrei can be determined definitely through statutory construction and do not give rise to constitutional issues.

> (a) communications with office colleagues or family members concerning their whereabouts

[80] Parliament could not have intended to prohibit communications between the special advocates and their office colleagues or family members concerning the whereabouts of special advocates during the proceedings. In each proceeding, scheduling orders have been issued publicly. They can be obtained through the registry. The recorded entries are available on the internet, even if they do not refer to specific private hearings.

[81] There may be an exceptional case where disclosure of the date or location of a private hearing may detrimentally affect national security. In this extreme situation, the presiding judge, responsible for ensuring the confidentiality of information, would have the burden of issuing an order to protect that information. Otherwise, the whereabouts of the special advocates is an administrative matter not encompassed by the legislation.

[82] In short, the impugned provisions cannot reasonably be read to limit communications of special advocates with this class of persons concerning their whereabouts.

(b) communications concerning their administrative support

[83] Parliament has mandated the Minister of Justice in s. 85(3) to provide special advocates with administrative support. It is suggested that that Parliament simultaneously prohibited special advocates from communicating with the officials responsible for delivering that administrative support without judicial authorization. I am satisfied that this could not have been the intention of Parliament.

[84] In my view, special advocates may communicate freely concerning their administrative support and resources with those officials responsible for ensuring their delivery under s. 85(3).

[85] For greater clarity, it is open to special advocates to seek a blanket order that would allow them, without further judicial direction, to communicate with any other person, except the named

persons or their counsel, with whom it is necessary to confer about administrative matters not connected with the substance of the proceedings. Such an order could mirror s. 76.25(3)(d) of *The Civil Procedure (Amendment No. 2) Rules 2005* of the High Court of Justice of England and Wales.

[86] Again, I do not believe that such a "comfort" order is necessary in law. Communications between special advocates and their office colleagues and families concerning the whereabouts of special advocates are not captured by the legislation. Nor are communications between special advocates and those officials acting pursuant to s. 85(3) concerning administrative support or resources.

(c) communications between special advocates in the same proceeding

[87] Mr. Almrei contemplates under (c), (d) and (e), unlike the other categories, the potential communication of confidential information. For him, there should be no judicial supervision of communications among special advocates because each has the necessary security clearance.

[87] The legislation does not prohibit the appointment of more than one special advocate in a proceeding. In the five ongoing proceedings, each presiding judge has appointed two special advocates. Neither Parliament nor the presiding judge could have envisaged that the two special advocates, after *both* have received the confidential information, could not communicate freely between themselves in a secure manner during their joint effort to protect the interests of the named person.

[89] Suggesting otherwise is as absurd as suggesting, which no one has, that special advocates need judicial authorization to communicate with counsel for the Ministers assigned to the private hearings in the same proceeding. Such a result could not have been the intention of Parliament and must be rejected.

(d) communications with special advocates not yet appointed in a proceeding

[90] Communications between appointed special advocates and those named to the list of special advocates by the Minister of Justice under s. 85(1) but not yet participating in a proceeding may be problematic. As the special advocates themselves noted in oral argument, such communication may be "fraught with difficulty."

[91] None of the counsel raised the issue of a possible conflict of interest for the other special advocate to the communication. Nor did anyone demonstrate how this limitation could in any practical sense detrimentally affect the right of the named persons to fundamental justice or constitute more than a minimal impairment of anyone's freedom of expression. Again, absent a factual context where such judicial authorization would be refused, I choose not to comment further, particularly since confidential information has been put in issue.

(e) communications with other special advocates appointed in another ongoing proceeding

[92] Mr. Almrei, joined by the special advocates, argues that special advocates in one proceeding should be allowed to communicate freely with those participating in one or more of the other four proceedings. In advancing this position, the situation of the special advocates is compared to that of counsel for the Ministers. This comparison is of little assistance, particularly in the absence of any evidence concerning the communication of confidential information among government counsel acting in different proceedings.

[93] Special advocates who wish to communicate with their counterparts in other ongoing proceedings should seek judicial authorization. In the event the authorization is not granted, there will then be a factual context against which one could determine whether the procedural rights of the named persons would be detrimentally affected by the restriction.

[94] In my view, this issue cannot be determined without a factual matrix and, therefore, I will refrain from further comment.

(f) communications with the media and Parliament concerning the effectiveness of the proceedings

[95] The named persons argue that special advocates should have an unfettered right to communicate with the media and Parliament concerning "the effectiveness of the proceedings." I have understood their concern to be with respect to the efficacy of ongoing proceedings. I take

comfort in this view from the special advocates, who disassociated themselves from this aspect of the constitutional motion.

[96] The insight of special advocates that might be of interest to the media and Parliament presumably flows from their access to confidential information and their participation in private proceedings.

[97] The named persons provided no evidence or examples to show how this limitation would detrimentally affect their right to fundamental justice. The impugned provisions do not limit the named persons or their counsel from properly communicating with the media and Parliament. Again, this issue is better left to another day with an appropriate factual context.

(g) communications with the named persons and their counsel concerning rulings made in private

[98] As noted by the Ministers, this concern is weakened by the statutory prohibition on appeals from interlocutory orders. (see: ss. 79 and 82.3)

[99] The apprehension of the named persons is further diminished in light of the publicity surrounding the rulings made thus far in the proceedings. Even while this constitutional motion was before me, presiding judges, in various ways and where appropriate, have made public certain rulings and other information concerning private hearings.

[100] Special advocates may always seek judicial authorization for the communication of rulings made in private where judges do not do so on their own initiative. It is my expectation that most, if not all, of the rulings that do not directly or indirectly disclose confidential information could be made public.

[101] In the absence of evidence demonstrating how this issue could detrimentally affect the *Charter* rights of the named persons, it would be premature to comment further.

(h) communications with the named persons and their counsel after the special advocate receives confidential information

[102] As presented by Mr. Almrei, the communications envisaged in this category have nothing to do with confidential information.

[103] The named persons argue that special advocates should determine on their own when judicial authorization is required for their communications with other persons under s. 85.4(2). In their view, special advocates should not be fettered concerning communications about the proceeding where confidential issues are not being discussed. Otherwise, in their opinion, the impugned provisions intrude on the *Charter* rights of the named persons and special advocates.

[104] Parliament has mandated that special advocates require judicial authorization for *all* communications after having received the confidential information. Section 83(1)(d) stipulates that the judge shall ensure the protection of confidential information. The legislation aims to prevent the

disclosure of confidential information, intentionally or through inadvertence, through the mechanism of judicial supervision.

[105] In my view, if Parliament's objective is to be met, special advocates cannot communicate with another person about the proceeding, absent judicial authorization, even concerning an order or direction made public by the presiding judge. If special advocates were allowed to determine on their own initiative when they could communicate about the proceeding, even where confidential information is not being discussed, Parliament's attempt to limit inadvertent disclosure would be compromised. Absent a factual context, it is again premature to determine in any definitive way the constitutional validity of these impugned provisions.

Conclusion

[106] In the wake of *Charkaoui*, Parliament modified the ministerial certificate proceeding by introducing to the process a special advocate. Five certificate proceedings are underway, and the hard work of everyone involved is breathing life into Parliament's amendments to the IRPA. I am of the view that it is premature to evaluate whether the impugned provisions, as implemented in the ongoing proceedings, should survive scrutiny under ss. 2(b) and 7 of the *Charter*.

ORDER

THIS COURT ORDERS that:

1. The constitutional motion is dismissed as premature, without prejudice to any party's right to challenge, with an appropriate factual matrix, the constitutionality of ss. 85.4(2) and 85.5(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended (the impugned provisions).
2. There are three factual matters in this motion that can be disposed of on the basis of statutory construction. Parliament could not have intended that these factual matters would be captured by the impugned provisions. They do not raise constitutional issues. These three factual matters are those where:
    a. the special advocates communicate with their office staff and colleagues and family members concerning their whereabouts;
    b. the special advocates communicate concerning their administrative support and resources with those officials responsible for their delivery under s. 85(3) of the IRPA;
    c. the special advocates in the same proceeding communicate between themselves in a secure manner, after both have received the confidential information.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	DES-3-08
STYLE OF CAUSE:	**IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);** **AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;** **AND IN THE MATTER OF Hassan ALMREI**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 26, 2008 and October 1, 2008
REASONS FOR ORDER:	LUTFY C.J.
DATED:	November 3, 2008

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