SUPREME COURT OF CANADA

CITATION: Charkaoui *v.* Canada (Citizenship and Immigration), 2008 SCC 38

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BETWEEN:

Adil Charkaoui
Appellant
v.
Minister of Citizenship and Immigration
and Solicitor General of Canada
Respondents
- and -
Attorney General of Ontario, Criminal Lawyers' Association (Ontario),
Canadian Bar Association, Barreau du Québec, Amnesty International,
Association des avocats de la défense de Montréal
and Québec Immigration Lawyers Association
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 78) LeBel and Fish JJ. (McLachlin C.J. and Bastarache, Binnie, Deschamps, Abella, Charron and Rothstein JJ. concurring)

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charkaoui *v.* canada

Adil Charkaoui *Appellant*

v.

Minister of Citizenship and Immigration and Solicitor General of Canada *Respondents*

and

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Neutral citation: 2008 SCC 38.

File No.: 31597.

2008: January 31; 2008: June 26.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

Constitutional law — Charter of rights— Right to life, liberty and security of person— Procedural fairness— Disclosure of evidence— Review of reasonableness of security certificate— Late disclosure of summary of interviews of named person with CSIS officers— Complete notes of interviews destroyed in accordance with internal policy of CSIS— Scope of duty to retain and disclose information in possession of CSIS about person named in certificate — Appropriate remedy— Canadian Charter of Rights and Freedoms, s. 7— Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, s. 12.

Immigration law— Inadmissibility and removal— Security certificate— Evidence obtained subsequent to initial decision to issue security certificate— Whether new evidence admissible at any stage of judicial review of security certificate and detention— Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 78.

The respondent ministers signed a security certificate against C under s. 77(1) of the *Immigration and Refugee Protection Act*. C was then arrested and detained. Before the scheduled date of the fourth review of C's detention, counsel for the ministers informed the judge at an *in camera* hearing that they had recently taken cognizance of a document that should have been disclosed to C at the outset of the proceedings but had not been disclosed because of an oversight. The document consisted of a summary of two interviews C had had with CSIS officers. The judge ordered that the summary be disclosed to C's counsel forthwith. At this same hearing, counsel for the ministers filed fresh allegations about C that were based on information that was not in his file when the ministers signed the security certificate. The next day, the judge disclosed a summary of this new information to C. The detention review hearing was adjourned and C was granted a postponement. C then filed a motion to

exclude the new evidence. He also requested that the complete notes of the two interviews conducted by CSIS be disclosed to him together with the recordings of the interviews. But the ministers informed the judge that there were no recordings in the file and that notes of interviews are, in accordance with an internal policy of CSIS, systematically destroyed once the officers have completed their reports. Alleging that his right to procedural fairness had been violated, C filed a motion for a stay of proceedings, in which he asked that the certificate be quashed and that he be released. In the alternative, he asked that the new evidence be excluded. The Federal Court and the Federal Court of Appeal dismissed the applications.

Held: The appeal should be allowed in part and the application for a stay of proceedings should be dismissed.

The destruction of operational notes is a breach of CSIS's duty to retain and disclose information, which derives from s. 12 of the *Canadian Security Intelligence Service Act* and a contextual analysis of the case law on the disclosure and retention of evidence. Section 12 provides that CSIS must acquire information to the extent that it is strictly necessary in order to carry out its mandate, and must then analyse and retain relevant information and intelligence. The CSIS policy on the management of operational notes rests on an erroneous interpretation of that provision. Section 12 does not require that collected information be destroyed, but instead demands that CSIS retain its operational notes when conducting an investigation that targets an individual or group. The retention of notes, which include drafts, diagrams, recordings and photographs, must serve a practical purpose. As a result, the meaning of the word "intelligence" in s. 12 should not be limited to the summaries prepared by

officers. The original operational notes are a better source of information and of evidence. [30] [38-39] [43] [64]

Whether or not the constitutional guarantees of s. 7 of the *Canadian Charter of Rights and Freedoms* apply does not turn on a formal distinction between the different areas of law, but depends instead on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy. To protect them, it therefore becomes necessary to recognize a duty to disclose evidence based on s. 7 that goes beyond mere summaries. Investigations by CSIS play a central role in the decision on the issuance of a security certificate and the consequent removal order. The consequences of security certificates are often more severe than those of many criminal charges. As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in C's position, CSIS should be required to retain all the information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given. If the ministers have access to all the original evidence, they will be better positioned to make appropriate decisions on issuing a certificate. The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence — which he or she will have been able to check for accuracy and reliability — for the named person. The duty of CSIS to retain and disclose the information submitted to the ministers and the designated judge also applies with respect to the person named in the certificate. However, confidentiality requirements related to public safety and

state interests will place limits on how this duty is discharged. The judge must therefore filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process, both during the review of the validity of the certificate and at the detention review stage. [50] [53-54] [62-63]

In this case, the designated judge granted the appropriate remedy for the late disclosure of the interview summary and the summary of the new allegations. By adjourning the hearing and granting a postponement of C's detention review to enable C to prepare his testimony and defence, the judge averted any prejudice that might have resulted from the delay in disclosing the new evidence. Moreover, since it was C himself who had been questioned in the interviews, he had knowledge of the subject and doubtless knew what he had said on that occasion. As a result, he had sufficient time to prepare his testimony. [67]

As for the new allegations filed by the ministers, any new evidence should be admitted, regardless of whether it is submitted to the designated judge by the ministers or by the named person. The judicial review process relates, on an ongoing basis, to both the certificate and the detention. It is not limited to a review of the bases for the ministers' initial decision. Furthermore, receiving new evidence in the course of this ongoing verification process is fairer, since such evidence can be as beneficial to the named person as to the ministers. [65] [70] [73]

A stay of proceedings is not an appropriate remedy in this case. The only appropriate remedy is to confirm the duty to disclose C's entire file to the designated judge and, after the judge has filtered it, to C and his counsel. This appeal is from an

interlocutory judgment by the designated judge, not from his final decision on the reasonableness of the certificate. It would therefore be premature at this stage of the proceedings for the Court to determine how the destruction of the notes affects the reliability of the evidence. The designated judge will be in a position to make that determination, as he will have all the evidence before him and will be able to summon and question as witnesses those who took the interview notes. If he concludes that there is a reasonable basis for the security certificate but that the destruction of the notes had a prejudicial effect, he will then consider whether C should be granted a remedy. [77]

Cases Cited

Applied: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *R. v. O'Connor*, [1995] 4 S.C.R. 411; **referred to:** *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9; *Bhupinder S. Liddar v. Deputy Head of the Department of Foreign Affairs and International Trade and Canadian Security Intelligence Service*, SIRC, File No. 1170/LIDD/04, June 7, 2005; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. La*, [1997] 2 S.C.R. 680; *R. c. Egger*, [1993] 2 S.C.R. 451; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, 2005 SCC 82; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38;*R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12.

Statutes and Regulations Cited

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

Canadian Charter of Rights and Freedoms, ss. 7, 11(*b*).

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 13, 14, 15, 16, 19.

Canadian Security Intelligence Service Act, S.C. 1984, c. 21.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 77, 78, 83.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Nadon and Pelletier JJ.A.) (2006), 272 D.L.R. (4th) 175, 353 N.R. 319, 58 Imm. L.R. (3d) 161, [2006] F.C.J. No. 868 (QL), 2006 CarswellNat 2895, 2006 FCA 206 (*sub nom. Charkaoui (Re)*), upholding a decision of Noël J. (2005), 261 F.T.R. 1, [2005]

F.C.J. No. 139 (QL), 2005 CarswellNat 814, 2005 FC 149 (*sub nom. Charkaoui (Re)*), dismissing the appellant's motion for a stay of proceedings. Appeal allowed in part.

Dominique Larochelle, *Johanne Doyon* and *Diane Petit*, for the appellant.

Claude Joyal and *Ginette Gobeil*, for the respondents.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Russell S. Silverstein, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman, for the intervener the Canadian Bar Association.

Pierre Poupart, *François Dadour* and *Nadine Touma*, for the intervener Barreau du Québec.

Vanessa Gruben, *Michael Bossin* and *Owen M. Rees*, for the intervener Amnesty International.

Walid Hijazi, for the intervener Association des avocats de la défense de Montréal.

Dan Bohbot and *Stéphane Handfield*, for the intervener the Québec Immigration Lawyers Association.

English version of the judgment of the Court delivered by

LEBEL AND FISH JJ. —

I. Introduction

[1] Adil Charkaoui appeals against the dismissal in Federal Court of his application for a stay of proceedings relating to the security certificate issued against him under s. 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). Mr. Charkaoui alleges that the government breached its duty to disclose relevant information in its possession, and its ancillary duty to do so in a timely manner. He alleges as well that the respondent ministers relied impermissibly on evidence obtained subsequent to the issuance of the security certificate. They did so, he complains, upon the designated judge's review of the reasonableness of the certificate and again during the judge's review of the appellant's applications for release from custody.

[2] We have concluded that Mr. Charkaoui's appeal succeeds. In our view, the Canadian Security Intelligence Service (CSIS) is bound to disclose to the ministers responsible all information in its possession regarding the person named in a security certificate. The ministers must convey this information to the designated judge. The judge must then disclose the information to the person named in the security certificate, except to the extent that disclosure might, in the judge's view, endanger Canada's security. These obligations of disclosure cannot be properly discharged where CSIS has destroyed what it was bound to disclose. As a matter of text and context, we have therefore concluded that CSIS is bound to retain the information it

gathers within the limits established by the legislation governing its activities. In accordance with its prior practice, it did not do so here. For reasons to be later explained, we are nonetheless satisfied that a stay of proceedings would not be an appropriate remedy in this case.

II. History of the Case

A. *Issuance of a Security Certificate Against Mr. Charkaoui*

[3] On May 9, 2003, the Minister of Citizenship and Immigration and the Solicitor General, now the Minister of Public Safety and Emergency Preparedness (the "ministers"), signed a security certificate against the appellant under s. 77(1) *IRPA*. The appellant was arrested and detained on May 21, 2003. Noël J. of the Federal Court was then designated under the relevant provisions of the *IRPA* to determine whether the certificate issued against Mr. Charkaoui was reasonable.

B. *IRPA Declared Unconstitutional and Bill C-3 Enacted*

[4] This appeal represents a new episode in the legal proceedings involving the appellant and the ministers. In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, the Court considered the constitutionality of the procedure established under the *IRPA* for determining whether a security certificate is reasonable and for reviewing the detention of the person named in the certificate (the "named person"). On that occasion, the Court held that certain aspects of that procedure deprived the appellant of his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that was inconsistent with the

principles of fundamental justice. The Court found, *inter alia*, that the *IRPA* did not adequately protect the right of the named person to a fair hearing, and therefore struck down certain of its provisions. However, the declaration of invalidity was suspended for one year to allow Parliament to amend the legislation. Parliament subsequently enacted the *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3 ("Bill C-3"), which received Royal Assent on February 14, 2008 and came into force on February 22, 2008.

C. *Continuation of the Hearings in the Federal Court, Incidents Relating to the Disclosure of New Information to the Designated Judge, and Application for a Stay of Proceedings*

[5] The proceedings to review the security certificate and the detention of the appellant continued under the scheme established by the *IRPA* before the Bill C-3 amendments. Problems with respect to the disclosure of evidence arose in the course of those proceedings, and they resulted in the application for a stay and the appeal now before this Court. To understand this case, it is important to review the history of the proceedings and to explain their origin.

[6] It was on May 23, 2003 that the designated judge began reviewing the information in support of the security certificate issued against Mr. Charkaoui. On June 25, 2003, Mr. Charkaoui filed a motion to declare Division 9 of Part 1 of the *IRPA* unconstitutional, and this Court ruled on that motion in *Charkaoui*.

[7] Soon afterward, in July 2003, the appellant applied to the ministers for protection pursuant to the pre-removal risk assessment procedure. The filing of this application automatically suspended the review of the reasonableness of the certificate.

The application for protection was dismissed on August 6, 2004, after which, on November 9, 2004, Noël J. scheduled a hearing on the reasonableness of the certificate for February 21, 2005. However, upon learning that Moroccan authorities had issued a warrant for Mr. Charkaoui's arrest, the judge quashed the ministers' decision to reject the pre-removal risk assessment application for protection on March 22, 2005. Mr. Charkaoui then reapplied to the ministers for protection. The judge also granted him, as a matter of right, a suspension of the review of the reasonableness of the certificate. The suspension of the proceeding was still in effect at the time of the hearing on this appeal, since the ministers had not yet decided on Mr. Charkaoui's application for protection.

[8] In the course of these proceedings, Mr. Charkaoui applied on several occasions for his release from custody. He first applied for release on June 25, 2003. That application, heard on July 2 and 3, 2003, was dismissed by the judge on July 15, 2003. Mr. Charkaoui made two other unsuccessful applications in 2003 and 2004. On November 9, 2004, the judge scheduled a fourth detention review for January 10, 2005. In the meantime, on December 30, 2004, counsel for the ministers asked the judge to hold an *in camera* hearing, in the absence of Mr. Charkaoui and his lawyer. Despite objections by the appellant and his lawyer, the judge heard counsel for the ministers *in camera* on January 5, 2005. Counsel informed him that they had recently taken cognizance of a document that should have been disclosed to Mr. Charkaoui at the outset of the proceedings in 2003. This document, they explained, had not been disclosed because of an oversight. The document consisted of a summary of two interviews Mr. Charkaoui had had with CSIS officers on January 31 and February 2, 2002. The judge ordered that the summary be disclosed to Mr. Charkaoui's counsel forthwith.

[9] At this same *ex parte* hearing held *in camera* on January 5, 2005, counsel for the ministers filed fresh allegations about Mr. Charkaoui. These allegations were based on information that was not in his file when the ministers signed the security certificate. They concerned, among other things, Mr. Charkaoui's involvement in incidents in Morocco. On January 6, 2005, Noël J. disclosed a summary of this new information to Mr. Charkaoui.

[10] At the January 10, 2005 hearing on the fourth detention review, the judge offered to adjourn the hearing and grant Mr. Charkaoui a postponement, which Mr. Charkaoui accepted. Mr. Charkaoui then filed a motion to exclude the new evidence. He also requested that the complete notes of the two interviews conducted by CSIS on January 31 and February 2, 2002 be disclosed to him together with the recordings of the interviews.

[11] The ministers informed the judge that it was impossible to accede to this request for disclosure. They told him that there were no recordings in the file and that notes of interviews conducted by CSIS officers are, in accordance with the agency's internal policy OPS-217, systematically destroyed once the officers have completed their reports. In response to this refusal, Mr. Charkaoui alleged that his right to procedural fairness had been violated. He accordingly filed, on January 12, 2005, a motion for a stay of proceedings, in which he asked that the certificate be quashed and that he be released. In the alternative, he asked that the new evidence introduced by the ministers on January 5, 2005 be excluded.

[12] The hearing on the fourth review of Mr. Charkaoui's detention was held on February 7, 2005. On February 18, 2005, the judge granted him a conditional

release. The decisions of the courts below that are in issue in this appeal relate to the application for a stay filed by Mr. Charkaoui in response to the new evidence introduced by the ministers. Mr. Charkaoui remains at liberty, and the conditions of his release are not in issue on this appeal.

III. Decisions of the Courts Below

A. *Federal Court* (2005), 261 F.T.R. 1, 2005 FC 149

[13] On January 20, 2005, Noël J. dismissed Mr. Charkaoui's application to stay the proceedings and quash the security certificate. In his view, the delay granted to Mr. Charkaoui to take cognizance of the new evidence and the fact that he could testify and relate his own version of the CSIS interviews were sufficient to neutralize any breach of procedural fairness that might have been caused by the late disclosure of the new evidence and the destruction of the notes and recordings of the interviews. Moreover, since the new evidence disclosed on January 6, 2005 was of marginal significance relative to the whole of the evidence already in the record and did not substantiate the allegations on which the security certificate was based, the judge concluded that Mr. Charkaoui had in no way been deprived of his right to procedural fairness under s. 7 of the *Charter*. Consequently, the judge did not consider it necessary to discuss the role played by CSIS in the *IRPA*'s procedures relating to security certificates. He noted that CSIS is not a police agency responsible for laying criminal charges. In his view, its activities were governed by administrative law and were therefore not subject to the duties of a police force under criminal law.

[14] The judge then turned to the application to exclude the new evidence, which he also dismissed. In his view, the ministers' authority under s. 78(*e*) *IRPA* to submit fresh information to the court in support of the allegations means that the information available to and taken into account by the designated judge when reviewing the certificate may be more extensive than the information that was available to the ministers when they decided to issue it. Mr. Charkaoui appealed Noël J.'s decision to the Federal Court of Appeal.

B. *Federal Court of Appeal* (2006), 353 N.R. 319, 2006 FCA 206

[15] Pelletier J.A., writing for the Federal Court of Appeal, concluded that the postponement ordered by the judge was an appropriate remedy for the late disclosure of the new evidence. He also discussed the systematic destruction of interview notes by CSIS The Federal Court of Appeal agreed with Noël J. that the principles of criminal law relating to the disclosure of evidence do not apply in administrative law matters and therefore do not govern the activities of CSIS. However, Pelletier J.A. rejected the interpretation of s. 12 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 ("*CSIS Act*"), proposed by the ministers to define the scope of the duty to retain information collected by CSIS. In his view, s. 12 does not, as the ministers argued, merely require a minimal retention of the information collected by that organization. Rather Pelletier J.A. noted that the Act recognizes the need, as a practical matter, to retain information obtained by CSIS — information that would otherwise serve no useful purpose.

[16] Pelletier J.A. nonetheless refused to grant the stay of proceedings sought by Mr. Charkaoui. He considered that the destruction of CSIS's notes did not result

in any prejudice to Mr. Charkaoui. That they no longer existed could just as easily have worked in his favour as against him. In Pelletier J.A.' s view, extensive evidence had been put before Noël J., who had to assess its consistency and probative value.

[17] Pelletier J.A. also rejected Mr. Charkaoui's submission that the judge, in reviewing the security certificate, could consider only the evidence that was in the ministers' possession at the time the certificate was issued and therefore had to exclude the new evidence. According to Pelletier J.A., the wording of s. 78(*b*), (*d*), (*e*) and (*j*) *IRPA* confirms that Parliament intended to allow the judge to receive all the information and evidence on which the certificate is based and to accept any material he or she considers appropriate, whether or not it would be admissible in a court of law.

IV. Analysis

A. *Issues*

[18] We note from the outset that this appeal cannot serve as an occasion to revisit the issue resolved by the Court in *Charkaoui*. There is thus no need to reconsider here the constitutionality of the rules and procedures applicable to the issuance of security certificates. Nor do we need to examine Bill C-3. No issues requiring an interpretation of Bill C-3 or relating to its constitutionality are now before the Court.

[19] It is important to be clear about the scope of Mr. Charkaoui's appeal. This appeal concerns interlocutory decisions by Noël J. relating to a specific aspect of the

proceedings against Mr. Charkaoui, namely, the retention and disclosure of information in the possession of CSIS. Our discussion will therefore be limited to these questions:

(a) What are the nature and scope of CSIS's duty to retain information?

(b) Does CSIS have a duty to disclose information in its possession? If so, what are the bases and scope of the duty to disclose such information? For whose benefit does this duty exist?

(c) What are the consequences of delays in disclosing information to the designated judge, and what is the appropriate remedy?

(d) May the designated judge admit new evidence after the security certificate has been issued? Is new evidence admissible at any stage of the proceedings? If so, how does admitting this evidence affect the validity of the certificate?

Finally, if relief is warranted, we will determine what remedies are appropriate in the circumstances of this case.

B. *Duty of CSIS to Retain Information*

(1) Statutory Framework of the Mandate of CSIS

(a) *Enactment of the CSIS Act*

[20] Before discussing the duty to retain information collected by CSIS, we must first review the origin and nature of the current statutory framework for the

organization's activities. CSIS was created in 1984, when Parliament enacted the *CSIS Act*, S.C. 1984, c. 21 (now R.S.C. 1985, c. C-23). When CSIS was established, the Security Service of the Royal Canadian Mounted Police ("RCMP") ceased to exist. The establishment of CSIS was the culmination of the work of the Royal Commission on Security (1969), the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1979, 1981) and the Special Committee of the Senate on the Canadian Security Intelligence Service (1983).

(b) *Legislative Purpose and Guiding Principles*

[21] The reports of these bodies advocated the creation of a "civilian" security agency that would be entirely separate from and independent of the RCMP, but more closely integrated "with the rest of government" (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, *Freedom and Security Under the Law*, vol. 2, August 1981, at p. 753; see also the *Report of the Royal Commission on Security* (abridged, June 1969), at p. 21, and the report of the Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society*, November 3, 1983, at para. 19). The collection of security intelligence and information was seen as a specialized function distinct from policing (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, vol. 2, at p. 799).

[22] Since CSIS was to be granted broad powers of investigation, it was recommended as well that its functions should be strictly related to the objective of protecting the security of Canada:

> A credible and effective security intelligence agency does need to have some extraordinary powers, and does need to collect and analyze information in a way which may infringe on the civil liberties of some. But it must also be strictly controlled, and have no more power than is necessary to accomplish its objectives, which must in turn not exceed what is necessary for the protection of the security of Canada.
>
> (Report of the Special Senate Committee, at para. 25)

[23] The Report of the Special Senate Committee, which was prepared after Bill C-157 (*Canadian Security Intelligence Service Act*) had been tabled, stressed the distinction between the policing function and the role of an intelligence agency. Law enforcement agencies generally react to the commission of criminal offences, whereas those responsible for prevention and for the protection of security must try to anticipate threatening events (para. 14). Finally, as the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police noted, ministers and senior officials have a role in the decision-making process of a security agency that they do not have where law enforcement operations are concerned (Second Report, vol. 2, at p. 757; see also the Report of the Special Senate Committee, at para. 15).

(c) *Duties and Functions of CSIS*

[24] The *CSIS Act* reflects the organizational and operational principles recommended in the reports that preceded its enactment. It sets out the various duties and functions delegated to CSIS, including the following examples. CSIS is primarily responsible for collecting "information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada"

(s. 12). There are also situations in which it provides "security assessments to departments of the Government of Canada" (s. 13) or gives advice, or provides a minister with information on matters relating to the security of Canada (s. 14). CSIS may conduct investigations into such matters (s. 15). It may also collaborate with the Minister of National Defence or the Minister of Foreign Affairs to collect information or intelligence relating to the activities of a foreign state or persons other than citizens or permanent residents of Canada (s. 16). Finally, information with respect to a criminal prosecution that is collected by CSIS in the performance of its duties and functions may, under certain conditions, be disclosed to peace officers, to the Attorney General of Canada or to the attorney general of a province (s. 19).

(2) Relationship Between the Mandate of CSIS and Problems Resulting From Terrorist and Criminal Activities

[25] In this case, the Federal Court judge noted that CSIS is not a police agency and that its role is not to lay charges. As a result, in his view, it cannot be subject to the same obligations as a police force (para. 17).

[26] Indeed, CSIS is not a police force. This is clear from the legislative history set out above. In reality, however, it must be acknowledged that the activities of the RCMP and those of CSIS have in some respects been converging as they, and the country, have become increasingly concerned about domestic and international terrorism. The division of work between CSIS and the RCMP in the investigation of terrorist activities is tending to become less clear than the authors of the reports discussed above seem to have originally envisioned.

[27] For example, CSIS occasionally discloses information to the RCMP. In the report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Commissioner O'Connor pointed out that CSIS and the RCMP frequently interact with respect to national security-related intelligence:

> CSIS may . . . disclose information to police officers if the information could be used to investigate or prosecute any alleged contravention of federal or provincial law. . . . The primary form of interaction between [CSIS and the RCMP] is the exchange of information. A significant portion of the national security-related information and intelligence that the RCMP receives comes from CSIS; thus, a significant amount of the RCMP's national security work is initiated by information received from CSIS. [Emphasis added.]
>
> (*A New Review Mechanism for the RCMP's National Security Activities* (2006), at pp. 138-39)

[28] In this light, we would qualify the finding of the Federal Court that CSIS cannot be subject to the same duties as a police force on the basis that their roles in respect of public safety are, in theory, diametrically opposed. The reality is different and some qualification is necessary.

(3) Rules and Policies on Retention

[29] Mr. Charkaoui has since 2003 repeatedly requested the production of the witness statements that convinced the ministers to issue the security certificate. An oral request was made on July 3, 2003, and a formal motion for full disclosure of the evidence before the judge, including all witness statements (his own among them) and recordings, was filed on October 17, 2003. At the hearing on January 10, 2005, Mr. Charkaoui again put questions to the designated judge to obtain more information about the evidence disclosed on January 5 and 6, 2005. Regarding the evidence

disclosed on January 5, Mr. Charkaoui wanted to find out whether the Court record contained a mechanical recording of and notes from his interviews or his own written statements, which CSIS had apparently summarized. Mr. Charkaoui also sought information about the 5 percent of the evidence that was not disclosed in what he received on January 6. His applications thus raised the issue of the policies of CSIS relating to the retention and destruction of notes.

[30] Mr. Charkaoui learned only in January 2005, through information received from counsel for the ministers, of CSIS's policy of destroying operational notes. The CSIS policy on the management of operational notes, identified as OPS-217, was adopted to control the use and retention of operational notes. It was first adopted on December 15, 1994, and was then renewed on June 19, 2001 and May 1, 2006. This Court had access to the first two versions of OPS-217, which are for all practical purposes identical (except for one word). The respondents assured the Court that the policy on operational notes was not changed when the third version was adopted.

OPS-217

[31] The "policy provides the principles for the handling and retention of operational notes" (para. 1.4). Operational notes include information recorded on or in the following formats:

> Any rough note, preliminary draft, drawing, diagram, photograph, calculation, audio or video recording, electronically stored information or other material made by an employee which is to be used in the preparation of a record of the Service. [para. 1.12]

[32] The policy stresses the confidential nature of operational notes, which, if compromised, could cause injury to the national interest or harm to an individual affected by their content (paras. 2.2 and 2.3). When taking notes, employees must therefore do everything necessary to keep them confidential (para. 3.2).

[33] According to the policy, operational notes are temporary in nature (paras. 1.2 and 3.1). They must be destroyed after they have been transcribed into a report by the employee who took them (paras. 2.4, 2.4.1 and 3.5).

[34] The policy does not appear to require CSIS employees to consult a supervisor or obtain his or her authorization before destroying their notes. Supervisors become involved only if employees believe that they "have acquired information of possible evidentiary value" (para. 3.6). Information of possible evidentiary value is most likely information that concerns crimes (paras. 3.6.1 and 3.7).

[35] The policy provides two justifications for retaining notes. First, relevant portions of notes may be retained where "information in [them], such as a sketch or diagram, cannot be transcribed into a report". Second, notes of CSIS employees must be retained where "information contained in the notes may be crucial to the investigation of an unlawful act of a serious nature and employees may require their notes to refresh their memories prior to recounting the facts of an event" (para. 3.5).

[36] We will now consider the validity of this policy in light of s. 12 of the *CSIS Act*.

(4) Interpretation of the *CSIS Act* With Respect to Retention

(a) *Interpretation of Section 12 of the CSIS Act*

[37] CSIS based its policy on the management of operational notes on the following provision of its enabling statute:

> **12.** The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

[38] Nothing in this provision requires CSIS to destroy the information it collects. Rather, in our view, s. 12 of the *CSIS Act* demands that it retain its operational notes. To paraphrase s. 12, CSIS must acquire information to the extent that it is strictly necessary in order to carry out its mandate, and must then analyse and retain relevant information and intelligence. In short, OPS-217 rests on an erroneous interpretation of s. 12.

(b) *Practical Purpose of Retention*

[39] In our view, the retention of notes must serve a practical purpose. It follows that the meaning of the word "intelligence" in s. 12 of the *CSIS Act* should not be limited to the summaries prepared by officers. The original operational notes will be a better source of information, and of evidence, when they are submitted to the ministers responsible for issuing a security certificate and to the designated judge who will determine whether the certificate is reasonable. Retention of the notes will make it easier to verify the disclosed summaries and information based on those notes. Similarly, it is important that CSIS officers retain access to their operational notes

(drafts, diagrams, recordings, photographs) in order to refresh their memories should they have to testify in a proceeding to determine whether a security certificate is reasonable — a proceeding that is not mentioned in OPS-217.

[40] The difficulties caused by OPS-217 are illustrated by a case concerning a complaint filed against the Department of Foreign Affairs and CSIS that was decided by the Chair of the Security Intelligence Review Committee ("SIRC"). In that case, the Department had denied the complainant Liddar a "Top Secret" security clearance. The notes submitted to SIRC by CSIS were not supported by sufficient evidence. SIRC concluded that the report submitted to it in support of the Department's position was inaccurate and misleading because the information provided by CSIS, which had destroyed its operational notes, was inaccurate and incomplete. SIRC criticized this policy of destroying such notes:

> The inability of the investigator who interviewed Mr. Liddar to provide me with the answers that Mr. Liddar gave to important questions highlights a long-running concern of the Review Committee with respect to the CSIS practice of destroying the notes that investigators take of security screening investigations. The issue of what was said during security screening interviews is a perennial source of argument in the course of the Review Committee's investigation of complaints. Complainants frequently allege that the investigator's report of their interview is not accurate: that their answers are incomplete, or have been distorted or taken out of context. Even if there were a security concern with allowing a complainant to review notes of questions that were asked and answers given at the interview, there is no reason why such notes could not be preserved for a reasonable period so that they are available to the Review Committee in the event of a complaint in respect of the security screening activity in question. [Emphasis added.]
>
> (*Bhupinder S. Liddar v. Deputy Head of the Department of Foreign Affairs and International Trade and Canadian Security Intelligence Service*, File No. 1170/LIDD/04, June 7, 2005, at para. 72)

[41] In his report, Commissioner O'Connor stressed that accuracy is crucial where reported information is concerned and that access to information obtained in a manner that is reliable and did not involve coercion is of critical importance:

> The need to be precise and accurate when providing information is obvious. Inaccurate information or mislabeling, even by degree, either alone or taken together with other information, can result in a seriously distorted picture. It can fuel tunnel vision. . . . The need for accuracy and precision when sharing information, particularly written information in terrorist investigations, cannot be overstated.
>
> (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), at p. 114)

[42] Where the assessment of the reasonableness of a security certificate is concerned, the ability of the ministers and of the designated judge to properly perform their respective duties regarding the issuance and review of security certificates, and the review of the detention of persons named in such certificates, may be compromised by the destruction of original documents. The submission of operational notes to the ministers and to the designated judge may be necessary to ensure that a complete and objective version of the facts is available to those responsible for issuing and reviewing the certificate. The retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence because of problems connected with the handling of information by intelligence agencies. In addition, the destruction of information may sometimes hinder the ability of designated judges to effectively perform the critical role, delegated to them by law, of assessing the reasonableness of security certificates, reviewing applications for release by named persons and protecting their fundamental rights. We therefore

conclude that there is a duty to retain information. We must now define the terms and scope of this duty.

(c) *Duty to Retain Limited to Targeted Investigations*

[43] In our view, as a result of s. 12 of the *CSIS Act*, and for practical reasons, CSIS officers must retain their operational notes when conducting investigations that are not of a general nature. Whenever CSIS conducts an investigation that targets a particular individual or group, it may have to pass the information on to external authorities or to a court.

[44] The argument based on the importance of protecting privacy applies primarily to general investigations. Where targeted investigations are concerned, the interests at stake differ. Privacy should of course be respected, but not to the point of giving inaccurate or unverifiable information to the ministers and the judge. In the context of the procedures relating to the issuance of the security certificate and the review of its reasonableness, it may prove necessary to disclose notes to the ministers and the designated judge. The law makes the designated judge responsible for ensuring the confidentiality of information in the proceeding arising from the issuance of a security certificate (pursuant to s. 78(*b*) of the former *IRPA* (now s. 83(1)(*d*) of the new *IRPA*)).

[45] One limitation must, however, be noted. Requiring CSIS officers to retain their operational notes will not always fully guarantee the right of named persons to procedural fairness. There will be cases in which officers take note of facts that must remain secret for the named person, whether on national security grounds or for other

reasons. Moreover, while it is true that CSIS officers routinely take notes, they doubtless do not prepare accurate transcripts of their interviews with the individuals they are investigating. Finally, important information may go missing as a result of simple human error.

[46] Furthermore, our opinion on the interpretation of s. 12 of the *CSIS Act* and operational policy OPS-217 should not be taken to signify that we consider investigations conducted pursuant to s. 12 and proceedings in which the policy was applied to be unlawful. The seriousness of the consequences of applying this policy may vary considerably. These consequences must be assessed by the designated judge in light of all the information in his or her possession. The fact that the notes are unavailable because they have been destroyed will be a relevant factor, but not determinative, in every case. For the future, this Court's opinion will of course determine the legal frameworks for the interpretation of s. 12 and for the policy on the retention of operational notes.

C. *Conduct of the Proceedings Relating to the Security Certificate and Duty to Disclose Information in the Possession of CSIS*

[47] We turn now to problems concerning the disclosure of information in the possession of CSIS. As we have seen, CSIS occasionally passes information on to various officials and agencies. It may disclose information to police services, to the Attorney General of Canada, to the attorney general of a province, to the Minister of Foreign Affairs and to the Minister of National Defence (s. 19 of the *CSIS Act*). In this section, we will consider the manner in which information in CSIS's possession should be disclosed to the ministers and the designated judge in the context of the proceeding relating to the security certificate. This will require a more nuanced approach than

simply importing the model developed by the courts in criminal law. All the interests at stake that relate to public safety and to certain essential functions of the state must be taken into account.

(1) Review of the Criminal Law Principles Governing Disclosure; Distinguishing the Context of the Security Certificate

(a) *Review of the Criminal Law Principles Governing Disclosure*

[48] We begin by reviewing the principles that apply to the disclosure of evidence in criminal law. In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, a criminal case, the Court established the rule that a police force's investigation file must be as complete as possible, so that all evidence that might be relevant to the defence can eventually be disclosed to counsel. Otherwise, the right of the accused to make full answer and defence could be impaired:

> Apart from the practical advantages . . . there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the [*Charter*] as one of the principles of fundamental justice. . . . The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. [p. 336]

[49] Later, in *R. v. La*, [1997] 2 S.C.R. 680, the Court reiterated that the duty to disclose entails a corollary duty to preserve information, exhibits, recordings, investigation notes and any other relevant evidence (see also *R. v. Egger*, [1993] 2 S.C.R. 451). There is no question that original notes and recordings are the best evidence.

> Since [*Stinchcombe*], the obligation of the Crown to disclose all relevant information in its possession, whether inculpatory or exculpatory, whether the Crown intends to rely on it or not, has been well established. [para. 16]

(b) *Distinguishing the Context of the Security Certificate*

[50] The principles governing the disclosure of evidence are well established in criminal law, but the proceeding in which the Federal Court determines whether a security certificate is reasonable takes place in a context different from that of a criminal trial. No charges are laid against the person named in the certificate. Instead, the ministers seek to expel the named person from Canada on grounds of prevention or public safety. However, the serious consequences of the procedure on the liberty and security of the named person bring interests protected by s. 7 of the *Charter* into play. A form of disclosure of all the information that goes beyond the mere summaries which are currently provided by CSIS to the ministers and the designated judge is required to protect the fundamental rights affected by the security certificate procedure.

[51] In the case at bar, the Federal Court of Appeal refused to impose a duty to disclose on CSIS on the basis that this duty does not apply in administrative law. It relied in particular on the following passage from *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, a case in which this Court had held that the right to be tried within a reasonable time under s. 11(*b*) of the *Charter* applies only in criminal law matters:

> This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur

> concepts which under our *Charter* are clearly distinct. [Emphasis added; para. 88.]

[52] With this in mind, we pointed out in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, 2005 SCC 82, that the consequences of a criminal prosecution are severe in comparison with those attached to a question of an administrative nature:

> It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context. [Emphasis added; para. 91.]

In *May*, inmates were challenging decisions by prison authorities to transfer them.

[53] But whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the Court recognized in *Charkaoui*. To protect them, it becomes necessary to recognize a duty to disclose evidence based on s. 7.

[54] Investigations by CSIS play a central role in the decision on the issuance of a security certificate and the consequent removal order. The consequences of security certificates are often more severe than those of many criminal charges. For instance, the possible repercussions of the process range from detention for an

indeterminate period to removal from Canada, and sometimes to a risk of persecution, infringement of the right to integrity of the person, or even death. Moreover, as Justice O'Connor observed in his report, "the security certificate process . . . provides for broader grounds of culpability and lower standards of proof than criminal law" (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, at p. 436).

[55] Finally, it should be noted that the confirmation that a security certificate is reasonable is not a purely administrative measure, since a Federal Court judge must make that determination. It is therefore simplistic to characterize the proceeding to determine whether a security certificate is reasonable as a purely administrative procedure, as the respondents do.

(2) Duty to Disclose Based on Section 7 and Related to the Severity of the Consequences of the Procedure for the Named Person

[56] In *La* (para. 20), this Court confirmed that the duty to disclose is included in the rights protected by s. 7. Similarly, in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at paras. 39-40, the Court stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled. In our view, the issuance of a certificate and the consequences thereof, such as detention, demand great respect for the named person's right to procedural fairness. In this context, procedural fairness includes a procedure for verifying the evidence adduced against him or her. It also includes the disclosure of the evidence to the named person, in a manner and within limits that are consistent with legitimate public safety interests.

[57] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 113, concerned the nature of the right to procedural fairness in a context where a person had been deprived of rights protected by s. 7 of the *Charter*. This Court emphasized the importance of being sensitive to the context of each situation:

> [D]eciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself. . . . [para. 115]

[58] In the context of information provided by CSIS to the ministers and the designated judge, the factors considered in *Suresh* confirm the need for an expanded right to procedural fairness, one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation. As we mentioned above, these procedures may, by placing the individual in a critically vulnerable position vis-à-vis the state, have severe consequences for him or her.

[59] It is not enough to say that there is a duty to disclose. We must determine exactly how that duty is to be discharged in the context of the procedures relating to the issuance of a security certificate and the review of its reasonableness, and to the detention review.

(3) Duty Adapted to the Nature of the Procedures Designed to Ensure the Proper Performance of the Mandates of the Ministers and, in Particular, of the Designated Judge

[60] Within the statutory framework applicable to the appeal, which does not include Bill C-3, only the ministers and the designated judge have access to all the evidence. In *Charkaoui*, this Court noted the difficulties that the Act then in force caused in the review of the reasonableness of the certificate and in the detention review, particularly with respect to the assessment of the allegations of fact made against the named person:

> Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information. [para. 63]

[61] The destruction of the original documents exacerbates these difficulties. If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations. In criminal law matters, this Court has noted that access to original documents is useful to ensure that the probative value of certain evidence can be assessed effectively. In *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, at para. 46, the Court mentioned that viewing a videotape of a police interrogation can assist judges in monitoring interrogation practices, and that interview notes cannot reflect the tone of what was said and any body language that may have been employed.

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

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

(4) Duty to the Individual Adapted to the Requirements of Confidentiality of the Information in Question That is Being Reviewed by the Designated Judge

[63] The duty of CSIS to retain and disclose the information submitted to the ministers and the designated judge also applies with respect to the person named in the certificate. As this Court recognized in *Charkaoui*, however, confidentiality requirements related to public safety and state interests will place limits on how this duty is discharged. In short, the judge must filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process, both during the review of the validity of the certificate and at the detention review stage.

(5) Breach of the Duty to Retain and Disclose

[64] In conclusion, it is our view that the destruction of operational notes is a breach of CSIS's duty to retain and disclose information. CSIS is required — pursuant to s. 12 of the *CSIS Act* and based on a contextual analysis of the case law on the

disclosure and retention of evidence — to retain all its operational notes and to disclose them to the ministers for the issuance of a security certificate and subsequently to the designated judge for the review of the reasonableness of the certificate and of the need to detain the named person. This conclusion flows from the serious consequences the investigation will have for the life, liberty and security of the named person. The designated judge then provides non-privileged information to the named person, as completely as the circumstances allow.

D. *Delay in Disclosing the Information: Problem Corrected by the Designated Judge's Decisions*

[65] The summary of the interviews conducted by CSIS on January 31 and February 2, 2002 should have been disclosed to Mr. Charkaoui at the outset of the proceedings in 2003, but the ministers did not submit it to the designated judge until January 5, 2005, at a hearing held *in camera*, in the absence of Mr. Charkaoui and his counsel. At that time, the judge ordered that this summary be disclosed to Mr. Charkaoui forthwith. As for the new allegations filed by the ministers at that hearing, the judge prepared a summary of them that was disclosed to Mr. Charkaoui the next day, January 6, 2005.

[66] On the other hand, at the hearing on the fourth detention review on January 10, 2005, the designated judge offered to adjourn the hearing and grant Mr. Charkaoui a postponement to examine the additional information before testifying, which Mr. Charkaoui accepted. This hearing was held on February 7, 2005.

[67] In our view, the designated judge granted the appropriate remedy for the late disclosure of the interview summary on January 5, 2005 and of the summary of

the new allegations on January 6, 2005. By adjourning the January 10, 2005 hearing and granting a postponement of Mr. Charkaoui's detention review to enable him to prepare his testimony and defence, the judge averted any prejudice that might have resulted from the delay in disclosing the new evidence. Moreover, it was Mr. Charkaoui himself who had been questioned in the interviews of January 31 and February 2, 2002. He therefore had knowledge of the subject and doubtless knew what he had said on that occasion. As a result, he had sufficient time to prepare his testimony.

E. *New Evidence*

(1) Decisions of the Courts Below

[68] In this case, the Federal Court took cognizance of the new evidence approximately 18 months after Mr. Charkaoui's security certificate — the reasonableness of which was not yet confirmed — had been issued. Before the designated judge, Mr. Charkaoui complained that all the information had not been disclosed to the ministers at the time the security certificate was issued and that they therefore did not have all the available information in order to make an informed initial decision.

[69] The designated judge was apparently satisfied that the new evidence submitted to him was reliable (para. 38). According to him, the new facts came from various sources and their reliability had been established using other means of corroboration (paras. 26 and 38).

[70] Pelletier J.A. of the Federal Court of Appeal was of the view that under s. 78 *IRPA*, new evidence may be received at any stage of the judicial review process:

> These provisions demonstrate Parliament's intention to allow the judge to receive any evidence that pertains to the reasonableness of the certificate, even if some of that evidence was unknown to the Ministers when the certificate was issued. [para. 42]

Pelletier J.A. therefore concluded — correctly, in our opinion — that any new evidence should be admitted, regardless of whether it is submitted to the designated judge by the ministers or by the named person (para. 43).

(2) Judicial Review Relates to the Certificate on an Ongoing Basis, Not to the Ministers' Initial Decision

[71] There is a danger in the "perpetual" acceptance of new evidence. It would in theory be possible for CSIS to intentionally submit an incomplete file to the ministers and then, after the ministers had in turn issued a security certificate and an arrest warrant to detain the named person, to continue accumulating and retaining evidence until the designated judge's review of the reasonableness of the certificate. But as this Court stated in *Charkaoui*, such an approach may sometimes be dictated by national security concerns:

> The executive branch of government may be required to act quickly, without recourse, at least in the first instance, to the judicial procedures normally required for the deprivation of liberty or security of the person. [para. 24]

With this in mind, it is better to err on the side of caution and allow the ministers to act quickly where necessary, provided that at the time of the detention review by the designated judge there is sufficient evidence to justify the detention.

[72] The English version of s. 78(*e*) *IRPA* ("on each request . . . made at any time during the proceedings . . .") suggests that the designated judge may have more information before him or her than the ministers did when they issued the certificate. Furthermore, it should be noted that s. 78 of the *IRPA* applies to both the review of the security certificate and the detention review (see ss. 77 and 83 *IRPA*). The judge exercises similar powers as regards the admission of evidence.

[73] In short, the ministers may submit new evidence at any point in the process, either in the review of the reasonableness of the certificate or in the detention review. The judicial review process in issue relates, on an ongoing basis, to both the certificate and the detention. It is not limited to a review of the bases for the ministers' initial decision. Furthermore, receiving new evidence in the course of this ongoing verification process is fairer, since such evidence can be as beneficial to the named person as to the ministers.

F. *Remedies*

[74] Mr. Charkaoui asks for a stay of the proceedings relating to the security certificate issued against him. If a stay were granted, the proceedings for his removal would cease. Though the context of this case differs from that of a criminal prosecution, the principles set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411, nonetheless

remain relevant. Thus, a remedy such as the one requested here is appropriate only if two criteria are met (para. 75):

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

[75] Furthermore, in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, this Court urged the courts to be prudent in resorting to a stay:

> A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: "that ultimate remedy", as this Court in *Tobiass*, [[1997] 3 S.C.R. 391, at para. 86], called it. It is ultimate in the sense that it is final. [para. 53]

[76] Given the finality of the stay of proceedings, it must remain a remedy of last resort:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.
>
> (*O'Connor*, at para. 82; see also *La*, at para. 23)

[77] The case at bar is not such a case. The appeal before the Court is from an interlocutory judgment by the designated judge, not from his final decision on the reasonableness of the certificate. Consequently, it would be premature at this stage of the proceedings for the Court to determine how the destruction of the notes affects the

reliability of the evidence. The designated judge will be in a position to make that determination, as he will have all the evidence before him and will be able to summon and question as witnesses those who took the interview notes. If he concludes that there is a reasonable basis for the security certificate but that the destruction of the notes had a prejudicial effect, he will then consider whether Mr. Charkaoui should be granted a remedy. A stay would be an inappropriate remedy here. The only appropriate remedy is to confirm the duty to disclose Mr. Charkaoui's entire file to the designated judge and, after the judge has filtered it, to Mr. Charkaoui and his counsel.

V. Disposition

[78] The appeal from the decision of the Federal Court of Appeal is allowed in part with costs to the appellant throughout. However, the application for a stay of proceedings is dismissed.

Appeal allowed in part, with costs.

Solicitors for the appellant: Des Longchamps, Bourassa, Trudeau & Lafrance, Montréal.

Solicitor for the respondents: Attorney General of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Criminal Lawyers' Association (Ontario): Russell S. Silverstein, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

Solicitors for the intervener the Québec Bar: Poupart, Dadour et Associés, Montréal.

Solicitor for the intervener Amnesty International: Community Legal Services (Ottawa-Carleton), Ottawa.

Solicitors for the intervener Association des avocats de la défense de Montréal: Desrosiers, Turcotte, Massicotte, Montréal.

Solicitor for the intervener the Québec Immigration Lawyers Association: Pia Zambelli, Montréal.