2020 FC 729

T-669-19

In the Matter of the *Secure Air Travel Act*

Bhagat Singh Brar (*Appellant*)

v.

Canada (Minister of Public Safety and Emergency Preparedness) (*Respondent*)

T-670-19

Parvkar Singh Dulai (*Appellant*)

v.

Canada (Minister of Public Safety and Emergency Preparedness) (*Respondent*)

INDEXED AS: BRAR V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Federal Court, Noël J.—Ottawa by telephone conference, April 16; June 30, 2020.

Security Intelligence — Secure Air Travel Act — Preliminary determination of legal questions arising in underlying appeals from decisions of respondent Minister denying appellants' applications for administrative recourse under Secure Air Travel Act (SATA), s. 15, seeking removal of appellants as listed persons pursuant to SATA, s. 8 — Appellants submitting notices of appeal asking Court to order removal of their names from list — Respondent filing redacted public appeal book for each appeal — Court ordering respondent on October 7, 2019, to file unredacted appeal book — Respondent withdrawing certain classified information while preparing unredacted appeal book — Court also appointing amici curiae on October 7, 2019, in response to inclusion of redacted information — Preliminary legal questions raised including: role of designated judge in appeal pursuant to SATA; role of amici curiae in ex parte proceedings, power thereof to cross-examine witnesses; whether designated judge, amici curiae allowed to see withdrawn information, reasons therefor; whether Federal Court, as superior court of record, should retain copy of withdrawn information; whether scheme under SATA, s. 16 allowing for ex parte hearing on merits of appeal — Designated judge's role in appeals under SATA that of "gatekeeper" — Having to ensure fair judicial process, assume robust, interventionist role — Role of judge not differing according to "phase" (disclosure or merits) of appeal — Judge having to assume "active", "non-deferential role" at all stages of proceedings — Role of amicus curiae to serve Court — Amici curiae herein not acting on behalf of appellants but rather representing their interests during ex parte, in camera portions of appeal — Role of amici curiae in appeals under SATA to assist Court in fulfilling its duties to ensure fairest judicial process possible — Cross-examination of witnesses essential component of amici curiae's role — SATA not restricting amici curiae from seeing withdrawn information, reasons for withdrawal but requiring Court ensure confidentiality of that information — SATA permitting ex parte, in camera hearing on merits — Questions answered, order dated October 7, 2019, appointing amici curiae amended accordingly.

Judges and Courts — Secure Air Travel Act — Role of designated judge — Respondent Minister denying appellants' applications for administrative recourse under Secure Air Travel Act (SATA), s. 15 — Those applications seeking removal of appellants as listed persons pursuant to SATA, s. 8 —

Respondent filing redacted, unredacted appeal books for each appeal — Court appointing amici curiae in response to inclusion of redacted information — Preliminary legal question raised regarding role of designated judge in appeal pursuant to SATA — Designated judge's role in appeals under SATA that of "gatekeeper" — Overarching role that of arbiter between collective interest in national security, rights and freedoms of individuals — Overall judicial duty to reconcile tension created by these interests — Designated judge having to take all alternative measures available within limits of relevant statutory, inherent powers to give effect to individual's right to fair judicial process — Gatekeeper role allowing designated judge to appoint amicus curiae — Designated judge having to ensure fair judicial process, assume robust, interventionist role, different from that in conventional appeal or judicial review — Having duty to provide appellant, Minister with opportunity to be heard — Role not differing according to "phase" (disclosure or merits) of appeal — Judge having to assume "active", "non-deferential role" at all stages of proceedings, test evidence presented by Minister throughout.

Practice — Secure Air Travel Act — Role of amicus curiae — Respondent Minister denying appellants' applications for administrative recourse under Secure Air Travel Act (SATA), s. 15 — Those applications seeking removal of appellants as listed persons pursuant to SATA, s. 8 — Respondent filing redacted, unredacted appeal books for each appeal — Withdrawing certain classified information while preparing unredacted appeal book — Court appointing amici curiae in response to inclusion of redacted information — Preliminary legal questions raised regarding: role of amici curiae in underlying ex parte proceedings; whether amici curiae having power to cross-examine witnesses; whether amici curiae allowed to see withdrawn information, be informed of reasons for withdrawal — Role of amicus curiae is to serve Court — Amicus curiae not acting on behalf of appellants but rather representing their interests — Role of amici curiae in appeals under SATA to assist Court in fulfilling its duties to ensure the fairest judicial process possible — This requiring robust mandate from designated judge — Amici curiae representing interests of appellants regarding disclosure of information under SATA, regarding impact of this information on reasonableness of decision to keep appellants on SATA list — Assuming substantial role — Tasked with arguing unreasonableness of Minister's decision under appeal during ex parte, in camera portions of appeal — Role of amici curiae not analogous to that of special advocate — Amici curiae not tasked with protecting interests of appellants or assuming functions of appellants' counsel during ex parte, in camera proceedings — Duty of amici curiae always with Court, not appellants — Limits imposed on communication between amici curiae, appellants to minimize risk of disclosure — Designated judge having to secure confidential information or other evidence in least intrusive manner possible — Rigid limits on two-way communication between amici curiae, appellants not preferable over exercise of thoughtful discretion — This discretion preserved herein — Amici curiae having access to confidential information, other evidence herein — Participation of amici curiae in creation of summaries of confidential information vital — Cross-examination of witnesses essential component of amici curiae's role but opportunity to cross-examine not absolute — Amici curiae allowed to see withdrawn information, reasons for withdrawal thereof.

Constitutional Law — Charter of Rights — Respondent Minister denying appellants' applications for administrative recourse under Secure Air Travel Act (SATA), s. 15 — Those applications seeking removal of appellants as listed persons pursuant to SATA, s. 8 — Minister maintaining appellants' status as listed persons under SATA following review of information — SATA engaging similar Charter rights as Immigration and Refugee Protection Act.

Construction of Statutes — Respondent Minister denying appellants' applications for administrative recourse under Secure Air Travel Act (SATA), s. 15 — Those applications seeking removal of appellants as listed persons pursuant to SATA, s. 8 — Minister maintaining appellants' status as listed persons under SATA following review of information — Findings made by Supreme Court in Charkaoui v. Canada (Citizenship and Immigration) under Immigration and Refugee Protection Act (IRPA) applicable to SATA's appeal scheme — IRPA, case law concerning IRPA may be drawn

upon to facilitate interpreting SATA, appeal provisions.

At issue herein was the preliminary determination of legal questions arising in underlying appeals from decisions of the respondent Minister denying the appellants' respective applications for administrative recourse under section 15 of the *Secure Air Travel Act* (SATA), which sought to remove them as listed persons pursuant to section 8 of SATA. The underlying appeals were the first under SATA.

The respondent advised the appellants that their status as listed persons under SATA would be maintained. Following a review of the classified and unclassified information provided, the respondent concluded that there were reasonable grounds to suspect that the appellants would engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences. The appellants submitted notices of appeal asking the Court to order the removal of their names from the list arguing, *inter alia*, that the respondent's decision was unreasonable. Following the filing of the notices of appeal, the Court ordered the respondent to serve and file a public appeal book for each appeal. These appeal books contained numerous redactions made by the respondent. Subsequently, it was ordered, on October 7, 2019, that the respondent file with the designated Federal Court registry an unredacted appeal book for each appeal, containing and clearly identifying the information that the respondent asserts could be injurious to national security or endanger the safety of any person if disclosed. While preparing this appeal book, the respondent withdrew certain classified information. In response to the inclusion of redacted information in the appeal books, two *amici curiae* were appointed in an order dated October 7, 2019. During an *ex parte* and *in camera* case management conference, the respondent and the *amici curiae* raised numerous legal issues regarding the withdrawn information, the role of the *amici curiae* in these appeals, the bifurcation of the appeals process between the "disclosure phase" and the "merits phase", and the role of the designated judge. A list of preliminary questions was subsequently endorsed by the Court. The respondent was of the opinion, *inter alia*, that section 16 of SATA provides for a two-stage procedure: a disclosure phase and a merits phase. The respondent argued that there is clear division between the role the designated judge must assume in the disclosure phase of an appeal under SATA and the role the designated judge must assume in the merits phase.

The bulk of the preliminary legal questions considered in the case at bar were: the role of the designated judge in an appeal pursuant to SATA; the role of the *amici curiae* in the *ex parte* proceedings and whether they have the power to cross-examine witnesses; whether the designated judge and the *amici curiae* should be allowed to see the withdrawn information and be informed of the reasons for which the respondent withdrew the information; whether the Federal Court, as a superior court of record, should retain a copy of the withdrawn information; and whether the scheme under section 16 of SATA allows for an *ex parte* hearing on the merits of the appeal.

Held, the role of the designated judge in SATA appeals is that of a robust and interventionist "gatekeeper"; the role of the *amici curiae* is to assist the Court by representing the interests of the appellants during the *ex parte* and *in camera* portions of the appeals; the withdrawn information, and the reasons for its withdrawal, must be provided to the designated judge and the *amici curiae*; an *ex parte* and *in camera* hearing on the merits is called for in appeals under the SATA.

The role of the designated judge in appeals under SATA is that of a "gatekeeper" vested in not only ensuring the reasonableness of the Minister's decision but also a fair process that respects the fundamental rights and freedoms of the appellant while simultaneously securing the confidentiality of certain information in the interest of national security. In national security matters, the overarching role of the designated judge is to be the arbiter between the collective interest in national security and the rights and freedoms of individuals. The designated judge's overall judicial duty is to reconcile this tension to ensure procedural fairness and the proper administration of justice while still

protecting the exceptional collective interest in the secrecy of information and evidence in this context. The designated judge must take all the alternative measures available within the limits of their relevant statutory and inherent powers to give effect to an individual's right to a fair judicial process in the circumstances. This will vary from one legislative scheme to the next. Should the active interventions of the designated judge alone be unable to ensure these fundamental components of a fair judicial process, their overarching role as a gatekeeper might require them to appoint an *amicus curiae*. The appeal provisions under SATA put in place several limits on the appeal procedures in order to protect Canada's national security interests. SATA assigns the designated judge the sole responsibility of deciding whether information or evidence meets the criterion to be kept confidential and must be heard *ex parte* and *in camera*. This duty requires a designated judge to assume a robust and interventionist role. Despite the need to keep certain information confidential from the public and the appellant, the designated judge still has the duty to "provide the appellant and the Minister with [a reasonable] opportunity to be heard". Like an elastic, designated judges must stretch their statutory and inherent powers to ensure that as much disclosure is provided to the appellant while stopping short of the breaking point. The designated judge must assume their "gatekeeper" role at all times during the SATA appeal, including when assessing the reasonableness of the Minister's decision. The power at subsection 16(5) of SATA to order that an appellant's name be removed from the SATA list is indicative of Parliament's intent of assigning designated judges a hands-on role. This jurisdiction to conclude differently from the Minister and "order the Minister" to remove the name of the appellant from the list is not an attribute of a conventional judicial review. The appeal before the designated judge is not necessarily based solely on the same record that was before the decision maker. This is an important difference between an appeal under SATA and a conventional appeal or judicial review to the Federal Court. The potential for a change in the record is indicative of an intent for the designated judge to undertake a non-deferential role, as a different record requires a designated judge to reassess afresh the evidence grounding a decision according to this change. The designated judge must be an active participant in an appeal under SATA, notably given the fact that, in ensuring that this evidence is "reliable and appropriate", the designated judge is additionally responsible for considering evidence that may not be admissible in a court of law and may not be disclosed to the appellant due to national security reasons. The role of the judge does not differ according to the "phase" of the appeal and the word "reasonableness" at subsection 16(4) does not signal that the designated judge should assume a deferential role when assessing the merits of the appeal, similar to the role assumed by a judge in a conventional judicial review. First, there is no indication in SATA of an intent to divide the proceedings or the role of the judge into two separate phases. There is no indication that Parliament intended to erode the designated judge's discretion to fashion a fair judicial process according to the circumstances of the case and notably the type of confidential information being submitted. Second, the deference owed by the designated judge is based on the circumstances. In the context of national security where one party is denied full disclosure and full participation, this requires the judge to assume an "active" and "non-deferential role" at all stages of the proceedings (*Charkaoui v. Canada (Citizenship and Immigration)*). These findings made in the context of certificate cases under the *Immigration and Refugee Protection Act* (IRPA) are applicable to SATA's appeal scheme as well. Designated judges in appeals under SATA must actively involve themselves in testing the evidence presented by the Minister all throughout the *ex parte* and *in camera* proceedings, including questioning the witnesses before the Court in *ex parte* and *in camera* proceedings. While the legislative schemes of SATA and IRPA should not be viewed as identical as they have different purposes and distinctive traits, this does not mean that IRPA, and the case law concerning it, cannot be drawn upon to facilitate interpreting SATA and its appeal provisions. SATA appears to engage similar Charter rights as IRPA, notably rights guaranteed in section 7 of the Charter. Despite some differences, the role assigned to the judge in both IRPA and SATA is overall similar. Although both legislative schemes may serve different purposes, in each case the designated judge is called upon to adjudicate in an environment where the concerned individual is denied full participation and full disclosure for national security reasons. This in itself is exceptional. Therefore, the role of the designated judge must be adjusted, relative to the conventional role

assumed during judicial reviews, so that a fair judicial process may be possible. The differences between these legislative schemes does not diminish in any way the role the designated judge must assume.

In essence, the role of an *amicus curiae* is to serve the Court. In the context of national security, the *amicus curiae*'s mandate remains to be sculpted by the respective judge who appoints them. The designated judge's inherent powers to appoint an *amicus curiae* and craft their mandate according to the circumstances do not permit the designated judge to assign the *amici curiae* a mandate that would have them act "on behalf" of the appellants. However, the inherent powers permit the designated judge to assign them a mandate to "represent the interests" of the appellants. "Representing the interests" of an appellant during the *ex parte* and *in camera* portions of an appeal is still compatible with the inherent limits on the role of the *amicus curiae* as this is consistent with what is said in *Canada (Attorney General) v. Telbani*, and consistent with the role often assigned by the Supreme Court of Canada to *amici curiae* pursuant to subsection 53(7) of the *Supreme Court Act*. The appointment of an *amicus curiae* under SATA is consistent with the implied intention of the statutory duties assigned to a designated judge in section 16 of SATA. Given that role, and the absence of the appellant and their counsel during *ex parte* and *in camera* hearings on the confidential information or evidence, the appointment of an *amicus curiae* is implicitly required to allow the judge to fulfill their duties. The appointment of an *amicus curiae* in an appeal under SATA is not only consistent with a harmonious reading of the statutory procedures for appeals under subsection 16(6) of SATA, but is also consistent with its object as well as Parliament's intent. The *amici curiae*'s role in these appeals under SATA is to assist the Court in fulfilling its duties: the review of the reasonableness of the Minister's decision in a manner that ensures the appellants are afforded a fair judicial process within the limits on disclosure and participation that have been imposed by SATA in the interest of national security. This requires the designated judge to assign the *amici curiae* a robust mandate in order to ensure the fairest judicial process possible within the judge's statutory and inherent powers. First, the *amici curiae* are tasked with representing the interests of the appellants with regard to issues of disclosure of information or evidence under SATA. Second, should the circumstances require that some information or other evidence remain confidential pursuant to the limits of SATA, the role of the *amici curiae* is to represent the interests of the appellants with regard to the impact of this information or other evidence on the reasonableness of the Minister's decision to keep the appellants on the SATA list. The *amici curiae* are called upon to assume a substantial role. The *amici curiae* are tasked with arguing the unreasonableness of the Minister's decision under appeal, in a manner that is complementary to the appellants' position on the public evidence, based on the confidential information and evidence, during the *ex parte* and *in camera* portions of the appeal. This is essential in permitting the designated judge to ground their decision on the facts and the law. Overall, the roles assigned to the *amici curiae* go beyond the roles assigned to the *amici curiae* in *Telbani* and share many similarities with the role of a special advocate. This is due to the difference in circumstances and notably the absence of a considerable discretionary power to disclose information or other evidence if, in the judge's opinion, the public interest in disclosure outweighs the public interest in non-disclosure. The role of the *amici curiae* assigned in the October 7, 2019, order must not be read as analogous to a special advocate—the *amici curiae* remain friends of the Court and have no solicitor-client relationship privilege with the appellants. As such, the *amici curiae* are not tasked with protecting the interests of the appellants and assuming the functions of the appellants' counsel during the *ex parte* and *in camera* proceedings. In sum, although representing the interests of the appellants before this Court during the *ex parte* and *in camera* portions of the appeal is the way in which the *amici curiae* assist the designated judge in fulfilling their duties to ensure a fair judicial process in the circumstances and to decide the reasonableness of the Minister's decision, the *amici curiae* must exercise this role in accordance with their inherent role of assisting the Court; their duty is always to the Court and not the appellants. It is essential that the Court sculpt a mandate that permits a free-flowing exchange between the appellants, their counsel, and the *amici curiae*. As SATA imposes limits on full disclosure, certain limits must be imposed on the communication between the *amici curiae* and the

appellants to minimize serious risk of disclosure. These limits are inevitable. However, given the importance of meaningful communication between the appellants and the *amici curiae*, a designated judge must seek to secure the confidential information or other evidence in the least intrusive manner possible. Preserving the designated judge's discretion to permit future two-way communication between the appellants and their counsel with the *amici curiae* following their access to the confidential information or other evidence is essential as is exercising this discretion in a cautious but liberal manner. Rigid limits on two-way communication must not be preferred over the exercise of thoughtful discretion. This is why this discretion was preserved in the October 7, 2019, order. This order appointing the *amici curiae* provides that they have access to the confidential information and other evidence in the appeals herein. This broad access is vital in allowing the *amici curiae* to assist the Court by representing the interests of the appellants during the *ex parte* and *in camera* portions of the appeals. It would likely require extremely exceptional circumstances to justify not permitting an *amicus curiae* to view certain confidential information. SATA pushes the designated judge onto a tightrope where they must summarize confidential information in a manner that does not include the elements of this information that would be injurious to national security or endanger the safety of any person if disclosed. These summaries are the most powerful tool at the designated judge's disposal. Consequently, the *amici curiae*'s participation in the creation of these summaries is vital.

The *amici curiae* should have the opportunity to cross-examine the witnesses on aspects relating to the merits of the appeals. This is an essential component of their role. The Court's role as a "gatekeeper" allows it to impose restrictions on this power to cross-examine should the *amici curiae*'s cross-examination go beyond assisting the Court in fulfilling its duties. Parliament could not have intended to rely on the designated judge's discretion to appoint an *amicus curiae* as a means of ensuring a fair judicial process while simultaneously intending to limit the designated judge's discretion to confer a mandate to an *amicus curiae* that includes the ability to fully cross-examine witnesses during *ex parte* and *in camera* hearings. As the *ex parte* and *in camera* proceedings evolve, it is the duty of the *amici curiae* to exercise, when opportune, their power to cross-examine in order to represent the interests of the appellants. However, the opportunity to cross-examine is not absolute and must be used astutely and professionally; it is therefore subject to the respondent's prerogative to make objections, which then calls for a ruling by the designated judge. The *amici curiae* must be given the opportunity to cross-examine the respondent's witnesses concerning the information or other evidence presented to support the respondent's confidentiality claims. A reading of SATA that prohibits the designated judge from assigning the ability to cross-examine the respondent's witnesses to the *amici curiae* is inconsistent with SATA's overall object of balancing the national security interest in secrecy with an individual's rights and freedoms, a legislative scheme that largely relies on its appeal mechanism to achieve this balance. Such limits on cross-examination would render the appeal at section 16 of SATA hollow.

The designated judge and the *amici curiae* are allowed to see withdrawn information and be provided with the reasons for its withdrawal. SATA does not restrict the designated judge, or the *amici curiae*, from seeing this withdrawn information or being informed of its withdrawal; it requires the Court to ensure its confidentiality. The Court must seek to preserve an accurate historical record of these appeals. This includes any withdrawn information or evidence seeing as it could have an impact on the other information or evidence relied upon in these appeals.

Finally, an *ex parte* and *in camera* hearing on the merits is permitted under SATA. The purpose of an *ex parte* and *in camera* hearing on the merits is to permit the designated judge to hear and actively probe confidential information that cannot be disclosed to an appellant, as well as submissions on this information, in order to determine whether the Minister's decision was reasonable.

STATUTES AND REGULATIONS CITED

Aeronautics Act, R.S.C., 1985, c. A-2.

Anti-Terrorism Act, *2015*, S.C. 2015, c. 20.

Canada Evidence Act, R.C.S., 1985, c. C-5, ss. 38, 38.06(2).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2(a),(b),(d), 6, 7, 11(d).

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, ss. 18.1, 21.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 4.

Federal Courts Rules, SOR/98-106, rr. 63(1)(e), 343.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(h)(i),(2)(g),(h),(3)(d),(f), 78, 79, 79.1(1), 83, 85.1(1), 85.2(c), 87.

National Security Act, 2017, S.C. 2019, c. 13, preamble.

Secure Air Travel Act, S.C. 2015, c. 20, **s. 11**, ss. 4(1), 5, 6, 8, 9, 10, 11, 12, 13(a), 15, 16, 17, 20.

Secure Air Travel Regulations, SOR/2015-181, ss. 5(1),(2),(3).

Supreme Court Act, R.S.C., 1985, c. S-26, s. 53(7).

CASES CITED

APPLIED:

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350; *Canada (Attorney General) v. Telbani*, 2014 FC 1050; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539; *Khadr v. Canada (Attorney General)*, 2008 FC 46, [2008] 3 F.C.R. 306; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Canada (Attorney General) v. Huang*, 2018 FCA 109, 362 C.C.C. (3d) 87; *Section 18.1 of the Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, as amended (Re)*, 2018 FCA 161, [2019] 2 F.C.R. 333.

CONSIDERED:

R. v. Osolin, [1993] 4 S.C.R. 595, (1993), 109 D.L.R. (4th) 478; *X (Re)*, 2017 FC 136, [2017] 4 F.C.R. 391; *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110; *Canadian Security Intelligence Service Act (Re)*, 2008 FC 300, [2008] 3 F.C.R. 477; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 F.C.R. 243; *R. v. Jaser*, 2014 ONSC 2277; *R. v. Imona-Russel*, 2019 ONCA 252, 145 O.R. (3d) 197; *Harkat (Re)*, 2009 FC 340, 339 F.T.R. 129; *R. v. Howard*, [1989] 1 S.C.R. 1337, (1989), 48 C.C.C. (3d) 38; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193.

REFERRED TO:

Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61, [2002] 3 S.C.R. 208; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418; *Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781, (1995), 125 D.L.R. (4th) 471; *Harkat (Re)*, 2012 FCA 122, [2012] 3 F.C.R. 635; *Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance)*, [1999] 2 F.C. 381; (1998), 159 F.T.R. 129 (T.D.); *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715, (1994), 115 D.L.R. (4th) 449; *Miron v. Trudel,* [1995] 2 S.C.R. 418, (1995), O.R. (3d) 160; *Ader v. Canada (Attorney General)*, 2018 FCA 105; *Canada (Attorney General) v. Almalki*, 2011 FCA 54, 331 D.L.R. (4th) 703; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, affd 2007 FCA 388, [2008] 4 F.C.R. 3; *Sections 16 and 21 of the Canadian Security Intelligence Service Act*, *R.S.C., 1985, c. C-23 (Re)*, 2018 FCA 207; *X (Re)*, 2018 FC 738, [2019] 1 F.C.R. 567; *X (Re)*, 2014 FCA 249, [2015] 1 F.C.R. 684; *Harkat (Re)*, 2010 FC 1241, [2012] 3 F.C.R. 251; *Soltanizadeh v. Canada (Citizenship and Immigration)*, 2020 FC 450; *Charkaoui (Re)*, 2009 FC 1030, [2010] 4 F.C.R. 448; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3.

AUTHORS CITED

Binnie, Ian. *"Entrenched Rights in the Age of Counter-Terrorism"* (Hong Kong Conference in Criminal Law, 13 November 2004).

Canada. 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.* Ottawa: The Commission, 2006.

Canada. Parliament. *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 142 (14 May 2015).

Canada. Parliament. House of Commons. Standing Committee on Public Safety and National Security, *Evidence*, 42nd Parl., 1st Sess., No. 90 (7 December 2017).

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on National Security and Defence*, 42nd Parl., 1st Sess., No. 40 (10 April 2019).

Dickens, B. M. "A Canadian Development: Non-Party Intervention", [1977] 40 *Mod. L. Rev.* 666.

Mohan, S. Chandra. "The Amicus Curiae: Friends No More?", [2010] 12 *S.J.L.S.* 352.

Osborn's Concise Dictionary, 12th ed. Sweet & Maxwell: Thomson Reuters, 2013, "court of record".

Oxford Dictionary of Law, 5th ed. Oxford: Oxford University Press, 2002, "court of record".

Schmitz, Cristin. *"Chief Justice shows where line is drawn" Lawyers Daily* (2 July 2015).

PRELIMINARY DETERMINATION of legal questions arising in underlying appeals from decisions of the respondent Minister denying the appellants' respective applications for administrative recourse under section 15 of the *Secure Air Travel Act*, which sought to remove them as listed persons pursuant to section 8 thereof. Questions

answered, order dated October 7, 2019, appointing *amici curiae* amended accordingly.

APPEARANCES

Karin Blok and *Eric Purtzki* for appellant Bhagat Singh Brar.

Rebecca McConchie, *Chantelle van Wiltenburg* and *Sadaf Kashfi* for appellant Parvkar Singh Dulai.

Colin Baxter and *Gib van Ert* as *amici curiae*.

Nathalie Benoit, *Maria Barrett-Morris* and *Helen Park* for respondent.

SOLICITORS OF RECORD

Fowler and Blok Criminal Defence Lawyers, Vancouver, for appellant Bhagat Singh Brar.

Peck and Company and *Millar & Hayes PC*, Vancouver, for appellant Parvkar Singh Dulai.

Deputy Attorney General of Canada for respondent.

The following are the reasons rendered in English by

NOËL J.:

Contents

Paragraph

I. OVERVIEW 1
II. FACTS 7
A. MR. BHAGAT SINGH BRAR (T-669-19) 9
B. MR. PARVKAR SINGH DULAI (T-670-19) 16
C. APPEALS BEFORE THIS COURT 22
(1) Redacted Information and Evidence 22
(2) *Amici Curiae* 25
(3) Preliminary Legal Issues 27
III. PRELIMINARY LEGAL QUESTIONS 29
IV. ARGUMENTS 30
A. RESPONDENT'S REPRESENTATIONS 30
(1) Role of the Designated Judge 31
(2) Role of the *Amici Curiae* 33

(3) Withdrawal of Information 36
(4) *Ex Parte* Hearing on the Merits 37
B. MR. BHAGAT SINGH BRAR'S REPRESENTATIONS 38
(1) Role of the Designated Judge 39
(2) Role of the *Amici Curiae* 41
(3) *Ex Parte* Hearing on the Merits 43
C. MR. PARVKAR SINGH DULAI'S REPRESENTATIONS 44
(1) Role of the Designated Judge 45
(2) Role of the *Amici Curiae* 47
(3) Withdrawal of Information 50
(4) *Ex Parte* Hearing on the Merits 51
D. REPRESENTATIONS OF THE *AMICI CURIAE* 52
(1) Role of the Designated Judge 53
(2) Role of the *Amici Curiae* 54
(3) Withdrawal of Information 56
(4) *Ex Parte* Hearing on the Merits 57
V. ANALYSIS 58
A. REVIEW AND ANALYSIS OF THE SATA 58
(1) Context and Legislative Object of the SATA 60
(2) Operation of the SATA 68
(3) Appeal Provisions of the SATA 80

B. ROLE OF THE DESIGNATED JUDGE 89
(1) Overview of Jurisprudence Regarding the Role of the Designated Judge 93
(2) Role in Appeal under the SATA 105
(3) Similarities Between the IRPA and the SATA 128
C. THE ROLE OF THE *AMICI CURIAE*—A COMPLEMENT TO THE DESIGNATED JUDGE. 140
(1) Third-Party Counsel in *Ex Parte* and *In Camera* Proceedings 144
(2) The *Amicus Curiae* and the Inherent Jurisdiction of the Court 151
(3) Differences Between Role of the Special Advocate and the *Amicus Curiae* 172
(4) Appointment, Role, and Powers of the *Amici Curiae* 178
D. WITHDRAWAL OF INFORMATION 247
(1) Access to Withdrawn Information and Reasons for Withdrawal 250

(2) Retention of Copy of Withdrawn Information 256
(3) Steps to Be Taken to Secure the Withdrawn Information 258
E. *EX PARTE* HEARING ON THE MERITS 260
VI. CONCLUSION 263

I. OVERVIEW

[1] At the core of a government's responsibilities is assuring the security of its citizens. As citizens, this is the principal consideration for which, in return, we provide political legitimacy; it is the underpinning of the social contract to which we adhere. However, in a constitutional democracy, governments are not afforded absolute power. They must act in conformity with the Constitution and the rights and liberties it guarantees. Inevitably, this creates a constant tension between the rights of individuals and the collective interest in security. See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui I*), at paragraph 1.

[2] This tension is acutely present in the context of national security where government is assigned the uneasy task of balancing the active prevention of harm to the security of Canada and Canadians with ensuring that the rights and liberties of individuals it perceives as potential threats are not violated in a way that cannot be justified in a free and democratic society. It is a unique context that puts extraordinary pressure on our fundamental constitutional principles. This is because there is an exceptional collective interest in maintaining the secrecy of information or evidence in this context that inherently clashes with the open court principle and standard notions of procedural fairness.

[3] These clashing interests are largely at the core of the preliminary legal questions this Court is tasked with answering in these first two appeals pursuant to section 16 of the *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11 (SATA). In particular, the Court must address in this decision: the role of the designated judge in appeals under the SATA, the role and powers of the *amici curiae* in these appeals, the procedure applicable to the withdrawal of information by the Minister of Public Safety and Emergency Preparedness (Minister) under the SATA, and the possibility and purpose of *ex parte* and *in camera* hearings on the merits under the SATA.

[4] As the analysis below will demonstrate, I perceive my role as a designated judge under the SATA to be twofold: (1) deciding upon the reasonableness of the Minister's decision; and (2) serving as an arbiter of what Justice Binnie described as the "clash of

the titans" between national security and individual rights (Justice Ian Binnie, "Entrenched Rights in the Age of Counter-Terrorism" (Hong Kong Conference in Criminal Law, 13 November 2004). In this latter regard, I must reconcile these competing interests in a manner that ensures the fairest judicial process possible within the parameters set by legislation and the Court's plenary power to control its own process. Accordingly, in these circumstances, my role as a designated judge compels me to appoint *amici curiae* with a robust interventionist mandate and powers that give as much effect as possible to the appellants' right to know and meet the case against them. This role as a designated judge under the SATA has also led me to conclude that the Court and the *amici curiae* should be given access to the withdrawn material and the reasons for its withdrawal, and that an *ex parte* and *in camera* hearing on the merits is possible should, in the judge's opinion, the circumstances require it.

[5] That being said, this decision does not answer the constitutional questions raised in the appellants' notices of appeal. Rather, the Court has considered the alleged violations of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982,* Schedule B, *Canada Act 1982*, 1982, c 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter) in the course of crafting a judicial process within my statutory and inherent powers to decide upon the reasonableness of the Minister's decision and the constitutionality of the SATA scheme. Whether the judicial process I have fashioned according to circumstances and the limits of my powers is sufficient to ensure a fair judicial process is a question that this Court will hear later.

[6] As the reader will soon become aware, my analysis of these preliminary questions is rather lengthy. However, I believe an in-depth analysis of these preliminary questions is necessary given that these are the first two appeals under the SATA and that it has been several years since a thorough review of the role of the designated judge and the role of the *amicus curiae* in national security matters has been undertaken. Furthermore, these in-depth reasons ensure that all parties have a similar understanding of the pertinent legal landscape going forward in order to level the playing field.

II. FACTS

[7] The appellants, Mr. Bhagat Singh Brar and Mr. Parvkar Singh Dulai, are both listed individuals pursuant to section 8 of the SATA. Accordingly, the Minister has deemed that reasonable grounds exist to suspect that each appellant will either "engage or attempt to engage in an act that would threaten transportation security" or "travel by air for the purpose of committing an act or omission that (i) is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code* [R.S.C., 1985, c. C-46] or an offence referred to in paragraph (c) of the definition ***terrorism offence*** in section 2 of that Act, or (ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i)." See paragraphs 8(1)(a) and 8(1)(b) of the SATA.

[8] Both appellants remain listed under the SATA following the Minister's decisions to deny their respective applications for administrative recourse under section 15 of the SATA, which sought to remove their names from the list. Consequently, the appellants have each brought a statutory appeal under section 16 of the SATA of the Minister's decision to deny their respective applications for administrative recourse.

A. *MR. BHAGAT SINGH BRAR (T-669-19)*

[9] Mr. Brar appeals the Minister's decision, dated December 21, 2018, to maintain his status as a listed person pursuant to section 15 of the SATA.

[10] On April 23, 2018, Mr. Brar's name was included on the SATA list. The following day, he was denied boarding at the Vancouver International Airport. Mr. Brar was scheduled to take two flights that would have eventually transported him from Vancouver to Toronto.

[11] On June 2, 2018, Mr. Brar submitted an application for administrative recourse pursuant to section 15 of the SATA, which sought the removal of his name from the SATA list. Mr. Brar was provided with a two-page unclassified summary of the information before the Minister supporting the decision to place his name on the SATA list. Mr. Brar was further advised that the Minister would also consider further classified information when assessing his application under section 15 of the SATA. In addition, pursuant to subsection 15(4) of the SATA, Mr. Brar was provided with an opportunity to make written representations in response to the unclassified information disclosed to him.

[12] On December 21, 2018, the Minister advised Mr. Brar that his status as a listed person under the SATA would be maintained. Following a review of the classified and unclassified information provided, including Mr. Brar's written submissions, the Minister "concluded that there [were] reasonable grounds to suspect that [Mr. Brar] will engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences."

[13] On April 18, 2019, Mr. Brar filed a notice of appeal to this Court pursuant to subsection 16(2) of the SATA. In this notice of appeal, Mr. Brar asks this Court to order the removal of his name from the SATA list pursuant to subsection 16(5) of the SATA, or to order the remittance of the matter back to the Minister for redetermination. In addition, Mr. Brar also asks this Court to declare that sections 8, 15 and 16 as well as paragraph 9(1)(a) of the SATA are unconstitutional and therefore are of no force and effect or to read in such procedural safeguards to the SATA that are sufficient to cure any constitutional deficiencies.

[14] More specifically, Mr. Brar argues the following as the grounds of his appeal: (1) the Minister's decision was unreasonable; (2) section 8 and paragraph 9(1)(a) of the SATA infringe his rights pursuant to section 6 of the Charter in a manner that cannot be justified by section 1 of the Charter; (3) sections 15 and 16 of the SATA infringe his rights pursuant to section 7 of the Charter, notably his rights to liberty and security of the person; and (4) the procedures set out in the SATA violate his common law rights to procedural fairness seeing as the SATA deprives him of his right to know the case against him and the right to answer that case.

[15] In his notice of appeal, Mr. Brar requests that the respondent disclose all related material to his application for recourse, all related material to the Minister's decision to designate him as a listed person, all material before the Minister on the application for recourse, and all other materials relating to the Minister's decision to confirm his status as a listed person under the SATA.

B. *MR. PARVKAR SINGH DULAI (T-670-19)*

[16] Similarly, Mr. Dulai appeals the Minister's decision, dated January 30, 2019, to maintain his status as a listed person pursuant to section 15 of the SATA.

[17] Mr. Dulai's name was included on the SATA list on March 29, 2018. Nearly two months later, Mr. Dulai was denied boarding on a flight from Vancouver to Toronto on May 17, 2018.

[18] On June 8, 2018, Mr. Dulai submitted an application for administrative recourse pursuant to section 15 of the SATA, which sought the removal of his name from the SATA list. Mr. Dulai was provided with a two-page unclassified summary of the information before the Minister supporting the decision to place his name on the SATA list and was advised that the Minister would also consider further classified information when assessing his application under section 15 of the SATA. In addition, pursuant to subsection 15(4), Mr. Dulai was provided with an opportunity to make written representations in response to the unclassified information disclosed.

[19] On January 30, 2019, the Minister advised Mr. Dulai that his status as a listed person under the SATA would also be maintained as "there [were] reasonable grounds to suspect that [Mr. Dulai] will engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences."

[20] On April 18, 2019, Mr. Dulai submitted a notice of appeal to this Court pursuant to subsection 16(2) of the SATA. Similarly to Mr. Brar, Mr. Dulai asks this Court to order

the removal of his name from the SATA list pursuant to subsection 16(5) of the SATA or to order the remittance of the matter back to the Minister for redetermination. Mr. Dulai also asks this Court to declare that sections 8, 15 and 16 as well as paragraph 9(1)(a) of the SATA are unconstitutional and are consequently of no force and effect or to read in such procedural safeguards to the SATA that are sufficient to cure any constitutional deficiencies.

[21] Mr. Dulai lays out similar grounds to Mr. Brar in support of his appeal. However, Mr. Dulai also argues that the Minister's decision to designate him as a listed person, and thereafter maintain that designation upon administrative review, violated and disproportionately impacted his rights under paragraphs 2(a), 2(b) and 2(d) as well as section 15 of the Charter. Mr. Dulai also requests disclosure, similar to the ask made by Mr. Brar.

C. *APPEALS BEFORE THIS COURT*

(1) Redacted Information and Evidence

[22] Following the filing of the notices of appeal, this Court ordered the respondent to serve and file a public appeal book for each appeal, the contents of which were agreed upon by the parties. These appeal books contained numerous redactions made by the respondent in order to protect the confidentiality of information or evidence it believed would be injurious to national security or endanger the safety of any person if disclosed.

[23] Subsequently, this Court ordered on October 7, 2019, that the respondent file with the designated registry of this Court an unredacted appeal book for each appeal, containing and clearly identifying the information that the respondent asserts could be injurious to national security or endanger the safety of any person if disclosed. The Court also ordered that the respondent file classified affidavits with the designated registry explaining the redactions as well as file and serve public affidavits explaining the nature of the redactions in a manner that does not injure national security or endanger the safety of any persons. During the process of preparing the unredacted classified appeal books and the affidavits, a number of the redactions were lifted by the respondent, resulting in further disclosure to the appellants.

[24] The respondent also advised the Court and the parties that, pursuant to paragraph 16(6)(g) of the SATA, it was withdrawing certain classified information from the appeal book filed in response to Mr. Dulai's statutory appeal. The Court accepted that the legislation provides for the withdrawal of information and issued an order authorizing the withdrawal of the information and the replacement of the relevant pages in the classified unredacted appeal book. However, the Court also ordered that, as a superior court of record, it would keep three copies of the appeal book containing the

withdrawn information under seal in a separate location at the designated registry, at least until the Court dealt with the issue of the retention of the withdrawn information.

(2) *Amici Curiae*

[25] In response to the inclusion of redacted information in the appeal books, the Court appointed two *amici curiae* in an order dated October 7, 2019 (order reproduced in Annex A).

[26] The Court originally ordered that the *amici curiae* would be given access to the confidential information as of December 9, 2019, following which they would not be permitted to engage in two-way communication with the appellants and their counsel, except with leave from the Court. At the request of the *amici curiae*, this was extended to January 20, 2020, in order to allow for more effective and meaningful communication with the appellants in light of the redactions lifted by the respondent.

(3) Preliminary Legal Issues

[27] On January 16, 2020, an *ex parte* and *in camera* case management conference was held in order to discuss the next steps concerning the confidential information in this case. A public summary of the case management conference was provided to the appellants shortly thereafter. During this case management conference, the respondent and the *amici curiae* raised numerous legal issues regarding the withdrawn information, the role of the *amici curiae* in these appeals, the bifurcation of the appeals process between the “disclosure phase” and the “merits phase”, and the role of the designated judge. The Court proposed that the *amici curiae* and the respondent meet to discuss the issues raised and correspond with the Court concerning the preliminary legal issues to be adjudicated before moving forward in the appeals.

[28] Notwithstanding the respondent’s position that the Court should address, on a preliminary basis, the applicable standard of review in these appeals, which the Court found to be premature at this stage, a list of preliminary legal issues was agreed upon by the appellants, the respondent, and the *amici curiae* during a case management conference held on February 13, 2020. This list of preliminary questions was subsequently endorsed by the Court via its order dated February 18, 2020 (List of Preliminary Questions, reproduced in Annex B). On April 16, 2020, a public hearing via teleconference was held where the parties and the *amici curiae* made oral submissions on these legal questions.

III. PRELIMINARY LEGAL QUESTIONS

[29] With regard to the preliminary legal questions agreed upon by the parties and the *amici curiae* (Annex B), the Court will consider the following preliminary legal questions in these appeals:

1. Role of the Designated Judge:
    a. What is the role of the designated judge in an appeal pursuant to the SATA?
2. Role of the *Amici Curiae*:
    a. What is the role of the *amici curiae* in the *ex parte* proceedings?
    b. Do the *amici curiae* have the power to cross-examine witnesses?
3. Withdrawal of Information:
    a. Should the designated judge and the *amici curiae* be allowed to see the withdrawn information and be informed of the reasons for which the Minister withdrew the information?
    b. Should the Federal Court, as a superior court of record, retain a copy of the withdrawn information?
    c. What steps should be taken by the designated registry to ensure that the withdrawn information is no longer part of the appeal book and when should this information be returned to the Minister?
4. *Ex Parte* Hearing on the Merits:
    a. Does the scheme under section 16 of the SATA allow for an *ex parte* hearing on the merits of the appeal?
    b. What is the purpose of the *ex parte* hearing on the merits?
    c. Is an *ex parte* hearing on the merits required in these appeals?

IV. ARGUMENTS

A. *RESPONDENT'S REPRESENTATIONS*

[30] The respondent argues that: (1) the role of the designated judge in appeals under the SATA is akin to the role assumed in a conventional judicial review; (2) the role of the *amici curiae* is not analogous to that of a special advocate and does not allow for the cross-examination of witnesses on the merits of the decision under appeal unless

new evidence is received by the Court; (3) the designated judge and the *amici curiae* may review the contents of the withdrawn information and be informed of the reasons for its withdrawal; and (4) an *ex parte* and *in camera* hearing on the merits is allowed under the SATA and is required in these appeals.

(1) Role of the Designated Judge

[31] The respondent explains that the statutory appeal under section 16 of the SATA is divided into two phases: the disclosure phase and the merits phase. The respondent notes that during the disclosure phase, the Court reviews the redactions made by the respondent to determine whether the disclosure of that information would be injurious to national security or endanger the safety of any person. In this phase, the designated judge undertakes a robust "gatekeeper" role. In doing so, the respondent states that the designated judge is responsible for ensuring the confidentiality of the information or other evidence provided by the Minister that would be injurious to national security or endanger the safety of any person if disclosed and is equally responsible for ensuring that an appellant is reasonably informed.

[32] During the merits phase, the respondent notes that the Court determines whether the Minister's decision is reasonable, and in doing so, assumes a role that is akin to a role adopted by a judge in a conventional judicial review. The respondent argues that this role in the merits portion of appeals under the SATA is set out in subsection 16(4), which provides that the "judge must, without delay, determine whether the decision [of the Minister] is reasonable on the basis of the information available to the judge." As such, the respondent holds that this language, along with the general scheme of the SATA, suggests that the role of the Court is akin to its role in a conventional judicial review and therefore the designated judge must show judicial restraint and respect for the distinct role of administrative decision makers. They state that the designated judge must not conduct a *de novo* analysis of the decision and must refrain from deciding the issues themselves, as this is not their assigned role.

(2) Role of the *Amici Curiae*

[33] The respondent argues that: (i) the role of the *amici curiae* is to assist the Court without acting on behalf of any specific party and is not analogous to the role of a special advocate; and (ii) that, barring new evidence, this role does not include the ability to cross-examine witnesses on the merits of the appeal.

[34] The respondent states that the *amici curiae* may participate in both the disclosure and merits portions of the appeals. However, citing this Court's decision in *Canada (Attorney General) v. Telbani*, 2014 FC 1050 (*Telbani*), at paragraph 27, the respondent argues that an *amicus curiae*'s role must be restrained to assisting a court without

acting on behalf of any specific party. The respondent notes that the SATA regime was enacted well after the creation of the special advocates regime under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and therefore Parliament would have specifically included such a regime in the SATA had it wanted to do so.

[35] In the circumstances, the respondent notes that the *amici curiae*'s role may extend to examining affiants in order to assist the Court in forming its opinion as to whether the disclosure of the information would be injurious to national security or endanger the safety of any person. However, barring new evidence that was not before the Minister at the time of the decision, the respondent states that the *amici curiae* should not be permitted to cross-examine witnesses on the merits of the Minister's decision, as this would be contrary to Parliament's intent in having enacted the SATA and would be inconsistent with the role assigned to the designated judge in the merits portion of appeals under the SATA.

(3) Withdrawal of Information

[36] The respondent advances the position that: (i) the designated judge and the *amici curiae* can be provided with the withdrawn information and the reasons for which it was withdrawn; (ii) the Court, as a superior court of record, can retain a copy of the withdrawn information; and (iii) sufficient steps have already been taken to ensure that the withdrawn information is no longer part of the appeal book and has already been returned to the Minister.

(4) Ex Parte *Hearing on the Merits*

[37] The respondent argues that: (i) paragraph 16(6)(f) of the SATA implicitly allows for an *ex parte* and *in camera* hearing on the merits of the appeal; (ii) the purpose of the *ex parte* and *in camera* hearing on the merits is to allow the Court to determine whether the Minister's decision was reasonable in light of the confidential information; and (iii) an *ex parte* and *in camera* hearing is required in these appeals.

B. *MR. BHAGAT SINGH BRAR'S REPRESENTATIONS*

[38] Mr. Brar submits that: (1) the role of the designated judge is to ensure procedural fairness and as much transparency as possible while also ensuring that the record supports the reasonableness of the Minister's finding; (2) the *amici curiae*'s role is to serve as a "substantial substitute" for the appellant during *ex parte* and *in camera* proceedings and must be empowered to cross-examine witnesses on the merits of the decision under appeal; and (3) an *ex parte* and *in camera* hearing on the merits is possible and likely required in this case. Notwithstanding these submissions, Mr. Brar

still maintains that the SATA scheme violates the norms of procedural fairness and is unconstitutional.

(1) Role of the Designated Judge

[39] Mr. Brar argues that the role of the designated judge in a SATA appeal is that of a “gatekeeper” entrusted with ensuring both the reasonableness of the Minister’s decision and a fair and transparent process, given the unique circumstances. Citing *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 (*Harkat (2014)*), at paragraph 46, Mr. Brar states that the SATA assigns to the designated judge a robust role much like the one assigned in the security certificate context under the IRPA and that the designated judge must therefore take on an “interventionist” role to ensure procedural fairness.

[40] Although Mr. Brar states that he does not disagree with the respondent that the starting point of a reasonableness review is judicial restraint and respect for the distinct role of administrative decision makers, he argues that the level of deference must be adjusted according to: (1) the ability of the designated judge to receive evidence that was not before the decision maker; (2) the fact that previously withheld information may be disclosed to an appellant, placing them in a better position to make their case as compared to the administrative recourse stage before the original decision maker; (3) the requirement that the designated judge’s decision be based on the information and evidence available as opposed to the information before the decision maker, and (4) the designated judge’s power to order that an appellant’s name be removed from the list pursuant to subsection 16(5).

(2) Role of the *Amici Curiae*

[41] Mr. Brar states that the Supreme Court of Canada has made it clear in both *Harkat (2014)*, at paragraphs 43 and 47, and *Charkaoui I*, at paragraph 63, that, in the context of *ex parte* and *in camera* proceedings, procedural fairness requires a “substantial substitute” for the full disclosure and full participation of the appellant. For Mr. Brar, a “substantial substitute” requires that a special advocate, or an *amicus curiae*, be assigned a role that permits them to “act as vigorously and effectively as the [appellant] would act in a public proceeding”, citing *Harkat (2014)*, at paragraph 47.

[42] Moreover, Mr. Brar argues that the *amici curiae* must be given the power to cross-examine witnesses on the merits of the appeal, as this power is necessary to: (1) uphold his right to meaningfully respond to information relied upon by the Minister; (2) satisfy the need for the Court to obtain sufficient information to subject the facts relied upon by the Minister to independent judicial scrutiny; and (3) uphold the terms of the order appointing the *amici curiae*.

(3) *Ex Parte* Hearing on the Merits

[43] Mr. Brar agrees with the respondent that section 16 of the SATA allows for an *ex parte* hearing on the merits and also agrees that the purpose of an *ex parte* hearing on the merits would be to permit the Court to consider confidential information or other evidence not available to an appellant when assessing the reasonableness of the Minister's decision. In addition, Mr. Brar states that an *ex parte* and *in camera* hearing on the merits would only be required in his appeal if the Minister still intends to rely on information that is not eventually disclosed to the appellants to support the reasonableness of the Minister's decision.

C. *MR. PARVKAR SINGH DULAI'S REPRESENTATIONS*

[44] Mr. Dulai argues that: (1) the role of the designated judge under the SATA is akin to that of a designated judge in security certificate cases under the IRPA; (2) the role of the *amici curiae* is to protect the interests of the named person and to make up, to the fullest extent as possible, for the named person's exclusion from the *ex parte* and *in camera* proceedings; (3) the designated judge's and the *amici curiae*'s access to the withdrawn information, and the reasons for its withdrawal, is essential to ensuring procedural fairness; and that (4) an *ex parte* and *in camera* hearing on the merits of the appeals is possible under the SATA and is likely necessary in this case.

(1) Role of the Designated Judge

[45] Mr. Dulai argues that the role of the designated judge in appeals under the SATA is akin to that of the designated judge in security certificate cases under the IRPA, and as such, the judge has the discretion and the flexibility to fashion a fair process according to the circumstances. Mr. Dulai submits that both the common law and the statutory provisions of the SATA support the conclusion that the designated judge's role as a "gatekeeper" is robust.

[46] Mr. Dulai argues that the respondent's position concerning the role of the designated judge in appeals under the SATA is not in line with the Supreme Court of Canada's jurisprudence on deference in the context of national security. Citing *Charkaoui I*, at paragraphs 38–42, Mr. Dulai points to the fact that the Supreme Court of Canada noted that having to conduct a reasonableness review did not preclude the designated judge from having to undertake an "active role". Moreover, Mr. Dulai notes that the reasoning in *Harkat (2014)* applies equally in the context of SATA appeals and therefore the designated judge must assume the role of a robust gatekeeper.
In addition, given the similarities between the SATA appeal provisions and the security certificate regime under the IRPA, Mr. Dulai notes that it can be presumed that

Parliament intended to assign the designated judge a gatekeeper role that is consistent with the one set out by the Supreme Court of Canada in *Harkat (2014)*.

(2) Role of the *Amici Curiae*

[47] Mr. Dulai submits that the role of the *amici curiae* must go beyond the traditional role of a "friend of the court" and instead be one where they are empowered to vigorously protect the interests of the appellants and to take on the functions of the appellants' counsel during the *ex parte* and *in camera* proceedings. This notably includes the ability to cross-examine witnesses on the merits during any *ex parte* and *in camera* portions of the appeals. Mr. Dulai submits that anything less would result in a clear violation of the Charter and the principles of procedural fairness.

[48] Mr. Dulai states that the Supreme Court of Canada has made it clear in *Charkaoui I* and *Harkat (2014)* that a "substantial substitute" for a person's informed participation in closed proceedings must be provided when section 7 rights are engaged and that a legislative scheme's failure to provide the opportunity for such renders it unconstitutional (*Charkaoui I*, at paragraphs 70 and 86; *Harkat (2014)*, at paragraphs 47 and 56). Moreover, he states that the Supreme Court of Canada's decision in *Harkat (2014)* makes it clear that, in order to provide a substantial substitute, a special advocate must be assigned a role that empowers them "to protect the interests of the named person and 'to make up so far as possible for the [named person's] own exclusion from the evidentiary process'" citing *Harkat (2014)*, at paragraphs 35, 37, 47 and 67. As such, Mr. Dulai holds that the role of the *amici curiae* should reflect the Supreme Court of Canada's statements in these decisions, as it would be reasonable to conclude that Parliament intended for the designated judge to exercise their discretion pursuant to their role as "gatekeepers" to appoint an *amicus curiae* with a mandate to ensure procedural fairness.

[49] Regarding cross-examination, Mr. Dulai argues that the respondent's position that the SATA does not provide for the possibility of a challenge to the relevance, reliability, or sufficiency of the information before the Minister would render the entire SATA scheme hollow. Mr. Dulai submits that the respondent's argument is inconsistent with the common law understanding of procedural fairness, which requires that the appellants be given a meaningful opportunity to challenge the credibility, reliability, and sufficiency of the evidence relied upon to limit their fundamental rights and freedoms, citing *Charkaoui I*, at paragraph 61. Seeing as the Supreme Court of Canada has recognized that cross-examination is "of essential importance" in assessing credibility and reliability (*R. v. Osolin,* [1993] 4 S.C.R. 595, at page 663, (1993), 109 D.L.R. (4th) 478) and that the appellants have not been provided an opportunity to challenge the confidential information at any point in the process under the SATA, Mr. Dulai argues that the *amici curiae* must be empowered to cross-examine witnesses during the merits phase of the appeal.

(3) Withdrawal of Information

[50] Mr. Dulai submits that: (i) the designated judge and the *amici curiae* should see the withdrawn information and be informed of the reasons for its withdrawal; (ii) the Court should retain a copy of the withdrawn information; and (iii) the Court need not take any further steps to secure the withdrawn information. Mr. Dulai argues that it would be contrary to procedural fairness to permit the respondent to unilaterally withdraw information the Minister relied upon without disclosing the information and reasons for its withdrawal. Mr. Dulai also states that, to the extent that a summary of the reasons for the withdrawal can be provided to him, the Court should do so pursuant to paragraph 16(6)(c) of the SATA.

(4) *Ex Parte* Hearing on the Merits

[51] Mr. Dulai submits that an *ex parte* and *in camera* hearing on the merits is allowed throughout the appeal process in subsection 16(6) of the SATA, and that the purpose of such a hearing is to allow the judge to hear confidential information that cannot be disclosed to an appellant, as well as submissions on this information, in order to determine whether the Minister's decision was reasonable. However, although Mr. Dulai admits that an *ex parte* and *in camera* hearing on the merits will likely be required in this case, he notes that it should not be necessarily assumed.

D. *REPRESENTATIONS OF THE* AMICI CURIAE

[52] The *amici curiae* submit that: (1) the role of the designated judge in appeals under the *I*SATA is similar to the role described in *Harkat (2014)* and is not akin to the role of a judge in a conventional judicial review; (2) their role is to serve as a substantial substitute for the full disclosure and full participation of the appellants in the *ex parte* and *in camera* portion of the appeals and that they must be empowered to cross-examine witnesses on the merits to fulfill this role; (3) there are no issues with them seeing the withdrawn information or being provided with the reasons for the withdrawal; and (4) the SATA allows for an *ex parte* and *in camera* hearing on the merits, although the Court should not pronounce itself on whether one is required at this preliminary stage.

(1) Role of the Designated Judge

[53] The *amici curiae* submit that the SATA scheme is fundamentally different from a judicial review as the judge may receive new evidence, including evidence and information not before the decision maker, may base their decision on information available to them regardless of whether it was before the decision maker, and may order the removal of an appellant from the SATA rather than having to send the

decision back for redetermination. The *amici curiae* therefore submit that the role of the designated judge in appeals under the SATA is similar to the role described in *Harkat (2014)*, at paragraph 46, being one that is “interventionist”.

(2) Role of the *Amici Curiae*

[54] The *amici curiae* argue that the constitutional norms of procedural fairness set out in *Charkaoui I* and *Harkat (2014)* are essential in understanding their role. The *amici curiae* state that the wording throughout subsection 16(6) of the SATA, notably paragraphs 16(6)(c) and 16(6)(d), clearly demonstrate a concern for procedural fairness and that *Charkaoui I* and *Harkat (2014)* clearly indicate that, for *ex parte* and *in camera* proceedings, a person must be provided with a “substantial substitute” to their right to know and answer the case against them. In *Harkat (2014)*, this meant a special advocate scheme combined with an interventionist judge. The *amici curiae* argue that the SATA must be interpreted according to these decisions seeing as Parliament is presumed to have intended to enact legislation in conformity with the Charter, citing *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 208, at paragraphs 55–56.

[55] Accordingly, the *amici curiae* disagree with the restraints proposed by the respondent on their roles as they are not required by the SATA, are inconsistent with *Charkaoui I* and *Harkat (2014)*, and are contrary to the order appointing them. Instead, the *amici curiae* hold that they are able to cross-examine witnesses in the disclosure phase for the purpose of the merits phase and that they are able to cross-examine witnesses concerning information that was before the decision maker. They note that, should their mandate not include these powers, they will be unable to serve as a substantial substitute for the full disclosure and full participation of the appellants in the *ex parte* and *in camera* portions of the appeals.

(3) Withdrawal of Information

[56] The *amici curiae* agree with the respondent that they and the designated judge should be provided with the withdrawn information as well as the reasons for its withdrawal. They also submit that the Court can retain a copy of the withdrawn information as a superior court of record.

(4) *Ex Parte* Hearing on the Merits

[57] The *amici curiae* agree that the SATA allows for an *ex parte* and *in camera* hearing on the merits of the appeal pursuant to paragraph 16(6)(a). However, although the *amici curiae* recognize a designated judge’s authority to organize an appeal by

creating distinct phases, they state that it ought not be regarded as a necessary feature of an appeal under the SATA as it is not always easy to make a distinction between disclosure issues and merit issues.

V. ANALYSIS

A. *REVIEW AND ANALYSIS OF THE SATA*

[58] In order to analyze the preliminary questions in this matter, it is first essential to undertake a review of the SATA, the legislative scheme at the heart of these questions. An understanding of its legislative object, its operation, and its appeal mechanism is the compass that will be necessary to navigate these uncharted waters. This section will therefore address: (1) the context and legislative object of the SATA; (2) the operation of the SATA; and (3) the appeal provisions of the SATA; the first issue providing the information necessary to conduct a contextual and purposive analysis of the latter two throughout this decision. Indeed, this is in accordance with the modern approach to statutory interpretation endorsed by the Supreme Court of Canada on numerous occasions. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418 (*Rizzo*), at paragraph 21 and *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 (*Rafilovich*), at paragraph 97, the latter offering a recent concise summary of the state of the law on this point:

> The issue on appeal is one of statutory interpretation. Accordingly, the analysis is to be guided by the modern approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[59] This approach will permit us to better understand what the designated judge is called upon to do when an appeal is initiated under the SATA and will help contextualize the mandate of the *amici curiae*.

(1) Context and Legislative Object of the SATA

[60] Although the SATA does not include a summary or a preamble stating its legislative object, its general object of balancing individual rights and freedoms with Canada's national security interests relating to air travel is manifest when one analyzes: the title of the Act, the summary and preamble of its enacting and amending omnibus legislations, the legal context at the time of its enactment, and the pertinent legislative debates in both chambers of Parliament.

[61] After nearly a decade of operating the Passenger Protection Program (better known as the “no-fly list”) via the *Aeronautics Act*, R.S.C., 1985, c. A-2, Parliament sought to create a specific legislative regime for the operation of this program (affidavit of Lesley Soper, at paragraph 5). Accordingly, the *Anti-Terrorism Act*, *2015*, S.C. 2015, c. 20, an omnibus legislation that significantly amended and restructured national security law in Canada, created the SATA in 2015. Following the 2015 federal election, the 42nd Parliament of Canada enacted the *National Security Act, 2017*, S.C. 2019, c. 13, which received royal assent on June 21, 2019. Once again, this omnibus legislation sought to redraw the legal landscape regarding national security in Canada and accordingly amended an array of legislation, including the SATA.

[62] The SATA’s objective of protecting Canada’s national security interests and the safety of Canadians in relation to air travel is evidenced in its short title: “*Secure Air Travel Act*” as well as its legislative title: “*An Act to enhance security relating to transportation and to prevent air travel for the purpose of engaging in acts of terrorism.*” Moreover, the summary of the *Anti-Terrorism Act, 2015* confirms this object, noting the following:

Anti-terrorism Act, 2015, S.C. 2015, c. 20

> Part 2 enacts the *Secure Air Travel Act* in order to provide a new legislative framework for identifying and responding to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence. That Act authorizes the Minister of Public Safety and Emergency Preparedness to establish a list of such persons and to direct air carriers to take a specific action to prevent the commission of such acts. In addition, that Act establishes powers and prohibitions governing the collection, use and disclosure of information in support of its administration and enforcement. That Act includes an administrative recourse process for listed persons who have been denied transportation in accordance with a direction from the Minister of Public Safety and Emergency Preparedness and provides appeal procedures for persons affected by any decision or action taken under that Act. That Act also specifies punishment for contraventions of listed provisions and authorizes the Minister of Transport to conduct inspections and issue compliance orders. Finally, this Part makes consequential amendments to the *Aeronautics Act* and the *Canada Evidence Act*.

[63] A few years later, the *National Security Act, 2017*, which amended an array of legislation relating to national security, including the SATA, was passed; its overall purpose being to address concerns expressed by civil society and experts alike regarding a perceived failure of the *Anti-terrorism Act*, *2015* to balance national security interests with individual rights and freedoms. This is reflected in its preamble, which stipulates the following:

National Security Act, 2017, 2019 S.C., c. 13

> **Preamble**
>
> Whereas a fundamental responsibility of the Government of Canada is to protect Canada’s

national security and the safety of Canadians;

Whereas that responsibility must be carried out in accordance with the rule of law and in a manner that safeguards the rights and freedoms of Canadians and that respects the *Canadian Charter of Rights and Fre*edoms;

Whereas the Government of Canada is committed to enhancing Canada's national security framework in order to keep Canadians safe while safeguarding their rights and freedoms;

Whereas the Government of Canada, by carrying out its national security and information activities in a manner that respects rights and freedoms, encourages the international community to do the same;

Whereas enhanced accountability and transparency are vital to ensuring public trust and confidence in Government of Canada institutions that carry out national security or intelligence activities;

Whereas those institutions must always be vigilant in order to uphold public safety;

Whereas those institutions must have powers that will enable them to keep pace with evolving threats and must use those powers in a manner that respects the rights and freedoms of Canadians;

Whereas many Canadians expressed concerns about provisions of the *Anti-terrorism Act, 2015*;

And whereas the Government of Canada engaged in comprehensive public consultations to obtain the views of Canadians on how to enhance Canada's national security framework and committed to introducing legislation to reflect the views and concerns expressed by Canadians;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

[64] Read together, the long and the short title of the SATA, the summary of the *Anti-Terrorism Act, 2015* and the preamble of the *National Security Act, 2017*, reveal the object of the SATA and how it fits into the overall legislative architecture of Canada's national security legislative scheme. Indeed, the *Anti-Terrorism Act, 2015* demonstrates that the object of the SATA is to give the Minister the ability to identify and respond to persons that pose a threat to transportation security or may travel by air for the purpose of committing a terrorism offence while ensuring affected persons are provided with both an administrative review and with an appeal mechanism that must protect confidential information. However, the preamble of the *National Security Act, 2017*, allows the reader to situate this objective within Parliament's overarching objective regarding national security: ensuring a careful balance between the rights and freedoms of individuals while protecting Canada's national security and the safety of Canadians.

[65] The legislative object of protecting Canada's national security interests and the safety of Canadians with regard to air travel, in a manner that carefully balances this with the rights and freedoms of individuals, is consistent with the relevant jurisprudential context at the time of the *enactment* of the SATA. Indeed, in the context of certificate proceedings under the IRPA, the Supreme Court of Canada had made it clear in years prior that a careful balance must be achieved between the collective interest in protecting confidential information for national security reasons and the interest in protecting individual rights and freedoms. See *Harkat (2014)*, at paragraphs 40–44 and *Charkaoui I*, at paragraph 1, the latter stating the following:

> One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance. [Emphasis added.]

[66] These two decisions were mentioned on numerous occasions by members of the legislature and witnesses before Parliament's two chambers when studying and debating the creation of the SATA in 2015 as well as during the amendment of the SATA between 2017 and 2019. For instance, see *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 142 (14 May 2015), at pages 3388–3389 (Hon. Senator Claudette Tardif) and House of Commons Standing Committee on Public Safety and National Security, [*Evidence*], 42nd Parl., 1st Sess., No. 90 (7 December 2017), at pages 12–13 (Cara Zwibel).

[67] In sum, this general object of balancing national security and the safety of Canadians with individual rights and freedoms is evident when one considers the SATA in its overall legislative context. Accordingly, when interpreting the legislative framework set out in the SATA, this general object must animate one's understanding of a statute's words. See *Rizzo*, at paragraph 21 and *Rafilovich*, at paragraph 97.

(2) Operation of the SATA

[68] The provisions of the SATA outline the authority of the Minister to list individuals under the SATA, to share information related to this list with domestic and foreign partners, and to direct air carriers to take the necessary measures to prevent persons from engaging or attempting to engage in an act that threatens aviation security or to prevent travel for the purpose of terrorism. The SATA also includes an internal administrative recourse mechanism for persons listed under the SATA in order to have their names removed from the list as well as a right of appeal to the Federal Court, the latter to be canvassed in detail in the following section.

[69] The starting point of any statutory analysis of the SATA is section 8. This section provides for the establishing of a list by the Minister (or their delegate) of persons whom they have “reasonable grounds to suspect” will:

Secure Air Travel Act, S.C. 2015, c. 20, s. 11

> **List**
>
> **8 (1)** …
>
> > **(a)** engage or attempt to engage in an act that would threaten transportation security; or
> >
> > **(b)** travel by air for the purpose of committing an act or omission that
> >
> > > **(i)** is an offence under section 83.18, 83.19 or 83.2 of the *Criminal Code* or an offence referred to in paragraph (*c*) of the definition ***terrorism offence*** in section 2 of that Act, or
> > >
> > > **(ii)** if it were committed in Canada, would constitute an offence referred to in subparagraph (i).

[70] The scope of this power to list persons at subsection 8(1) includes all persons, both inside and outside Canada (subsection 4(1)), and includes acts or omissions committed outside Canada that would contravene the SATA if committed in Canada, which are considered for the purpose of the SATA as acts committed within Canada (section 5). The list includes the first, middle and surname, any known alias, the date of birth, and the gender of listed persons (subsection 8(1)).

[71] This list must be reviewed by the Minister (or their delegate) every 90 days to determine if the grounds on which a person was listed still exist (subsection 8(2)) and can be amended at any time in order to remove a name or to amend information relating to a listed person (subsection 8(3)). Moreover, this list and its contents are secret as section 20 clearly prohibits the disclosure of the list or its contents, but for in accordance with the exceptions stated in the SATA. In fact, a listed individual only becomes aware that they are on the list when they are denied transportation at an airport (see subsection 8(1) and paragraph 9(1)(a) of the SATA and the affidavit of Lesley Soper, at paragraph 20).

[72] Section 10 of the SATA provides that the Minister may collect information from, and disclose information to, the Minister of Transport, the Minister of Citizenship and Immigration, the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Canada Border Services Agency (CBSA), and any other person or entity designated by regulations. The Minister may also share information obtained, or even the list itself, in whole or in part, with foreign states it holds

written agreements with, as well as receive information from these foreign states (sections 11 and 12).

[73] In practice, the members of the Passenger Protect Advisory Group (Advisory Group), chaired by Public Safety Canada, provide information to the Minister's delegate in order to determine who will be placed on the SATA list. The nominating members of the Advisory Group (Transport Canada, the CSIS, the RCMP, and the CBSA) present the full membership of the Advisory Group a recommendation for listing, including a report providing information on an individual, as well as sufficient information to support their addition to the SATA list. The listing of the individual in question is then considered by the Advisory Group, which advises the Minister's delegate (usually a Senior Assistant Deputy Minister) on whether to ultimately list the individual pursuant to subsection 8(1) of the SATA. Review and updates of listings under subsection 8(2) are undertaken according to a similar procedure. See affidavit of Lesley Soper, at paragraphs 9–12.

[74] Key to the operation of the SATA regime are air carriers themselves. The SATA notably requires that all accredited air carriers or reservation operators working out of Canada, or for flights coming to Canada, comply with the SATA and its regulations before allowing any person to board an aircraft or transporting any person (subsection 6(1)). This includes the requirement to provide information concerning the persons who are on board or expected to be on board an aircraft for any flight (subsection 6(2)).

[75] In practice, the SATA list is disclosed to Transport Canada pursuant to section 10 of the SATA who, in turn, discloses the list to air carriers and operators of aviation reservation systems pursuant to paragraph 13(a) of the SATA. Air carriers are then required, pursuant to subsection 5(1) of the *Secure Air Travel Regulations*, SOR/2015-181 (Regulations), to verify the identity of any persons who appear to be 18 years of age or older by comparing their name with the names of listed persons before issuing a boarding pass. Should the name of an individual match that of a listed person, the air carrier or reservation operator must not allow the person in question to obtain a boarding pass and must compare their name, date of birth, and gender to those of the listed person (subsection 5(2) of the Regulations). If a match is identified, the air carrier or reservation operator has a duty to inform the Minister of Transport of the match, who in turn contacts Public Safety Canada (subsection 5(3) of the Regulations; affidavit of Lesley Soper, at paragraph 16).

[76] Should a positive match arise, subsection 9(1) of the SATA provides the Minister with the power to direct an air carrier to "take a specific, reasonable and necessary action to prevent a listed person from engaging in any act set out in subsection 8(1)" as well as the power to "make directions respecting, in particular, (a) the denial of transportation to a person; or (b) the screening of a person before they enter a sterile

area of an airport or board an aircraft." Should a denial of transportation under paragraph 9(1)(a) be directed, the listed person is provided with written notice to this effect. As seen earlier, this is the first time a person becomes aware that their name is included on the SATA list as, barring denial, a listed person is not advised that their name is on the SATA list.

[77] Subsection 15(1) of the SATA provides an individual who has been denied transportation pursuant to section 9 of the SATA an administrative recourse to have their name removed from the SATA list. The individual in question can apply in writing to the Minister within 60 days after the day on which they were denied transportation, although an extension may be granted pursuant to subsection 15(2). On receipt of the application, the Minister must decide whether there "are still reasonable grounds to maintain the applicant's name on the list" pursuant to subsection 15(4).

[78] In considering a listed person's application for administrative recourse, the nominating member of the Advisory Group will provide information to help the Minister determine whether reasonable grounds exist to maintain the person's name on the SATA list. The Minister will also provide the listed person with a "reasonable opportunity to make representations", which the Minister will consider in their decision (subsection 15(3)). However, section 15 of the SATA imposes no explicit obligation on the Minister to disclose any information to a listed person in order to assist them in making representations. That being said, each appellant in these appeals was provided with a two-page "unclassified summary" of the information that was placed before the Minister along with a statement that the Minister would also consider "classified information" in his decision. (Affidavit of Lesley Soper, Document ii of Exhibit B.)

[79] Finally, once the Minister makes a decision on the listed individual's application for administrative recourse pursuant to subsection 15(4), the Minister must give notice to the listed individual without delay (subsection 15(5)). However, pursuant to subsection 15(6), if the Minister does not make a decision within a period of 120 days after the day that the application is received, the Minister is deemed to have decided to remove the individual's name from the list. The Minister may nevertheless extend this period by an additional 120 days, upon notice, if there is a lack of sufficient information available to make a decision.

(3) Appeal Provisions of the SATA

[80] Beyond the internal decision-making process and administrative recourse provisions in the SATA, the legislative scheme provides for an external appeal to the Chief Justice of the Federal Court, or a judge designated by the Chief Justice, pursuant to the appeal procedures set out in section 16 of the SATA. In particular, the SATA provides that a person listed pursuant to section 8, who has been denied transportation

as a result of a direction made pursuant to section 9, may appeal a decision made under section 15 within 60 days of the notice of decision (see subsections 16(1) and 16(2)). Pursuant to paragraph 63(1)(e) of the *Federal Courts Rules*, SOR/98-106, the originating document to begin this process is a notice of appeal. In the present appeals, the parties submitted notices of appeal in accordance with the *Federal Court Rules*.

[81] Subsection 16(4) tasks the designated judge with determining "whether the decision [of the Minister pursuant to section 15] is reasonable on the basis of the information available to the judge" and that this determination must be done "without delay." Should the decision be deemed unreasonable, subsection 16(5) allows the judge to order that an appellant's name be removed from the list. These subsections are key in defining the nature of the appeal under the SATA as they: set the standard applicable for the designated judge's review, do not limit the evidence before the judge to the evidence that was before the Minister, and allocate powers to the judge to directly make a decision concerning the removal of an individual from the SATA list.

[82] To frame the appeal, subsection 16(6) of the SATA sets out numerous procedural provisions:

Secure Air Travel Act, S.C. 2015, c. 20, s. 11

> **16 (1)** …
>
> **Procedure**
>
> **(6)** The following provisions apply to appeals under this section:
>
> **(a)** at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;
>
> **(b)** the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
>
> **(c)** throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;
>
> **(d)** the judge must provide the appellant and the Minister with an opportunity to be heard;
>
> **(e)** the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

> **(f)** the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;
>
> **(g)** if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the information or evidence, the judge must not base a decision on that information or other evidence and must return it to the Minister; and
>
> **(h)** the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.

[83] Finally, section 17 of the SATA confirms that section 16 of the SATA applies to any further appeal of the decision, with necessary modifications.

[84] Overall, an analysis of the SATA in its entirety demonstrates that the provisions, regulations and practices relating to the listing of individuals, the prohibitions regarding disclosure of information, the strategic sharing of information with select partners, and the issuing and application of directions to deny transportation or to screen individuals, are key measures in furthering the SATA's objective of protecting Canada's national security interests and the safety of Canadians in relation to air travel. However, a plain reading of these provisions, along with the operational practices in place, demonstrates that the listed individual is not involved in the procedure set out in the SATA until such time they are denied transportation, if ever.

[85] Therefore, a holistic reading of the SATA suggests that this legislative scheme relies on the administrative recourse provisions at section 15 and the appeal provisions at section 16 to balance the SATA's object of protecting national security interests with its object of ensuring the protection of individual rights and freedoms. As the administrative recourse provisions at section 15 offer no explicit guarantee of disclosure, and a limited opportunity to make "written submissions", a heavy burden is therefore placed on the appeal mechanism in section 16 of the SATA to ensure the balance sought by the SATA.

[86] More specifically, given the broad discretion afforded to the designated judge in section 16 of the SATA, this substantial burden falls upon the designated judge who, as seen above, is given the heavy responsibility, among others, of ensuring the confidentiality of all sensitive information (paragraph 16(6)(b)) while also ensuring that the appellant is provided with summaries so that they may be reasonably informed of the Minister's case and with an opportunity to be heard (paragraphs 16(6)(c) and 16(6)(d)). This is a demanding task that requires a refined approach, particularly considering that this is the first opportunity throughout the entire SATA process for the appellant to "be heard". It is a sensitive balancing act where the designated judge must balance the protection of national security with the right to know and meet the case.

[87] What is more, the designated judge may also receive into evidence anything that is reliable and appropriate while also having the power to base their decision on information or other evidence, even if a summary of that information or other evidence has not been provided to the appellant (paragraphs 16(6)(e) and 16(6)(f)). Given the potential for instances where the designated judge will be obliged to rely on information or evidence that cannot be disclosed to the appellant, even in summary form, and therefore cannot be challenged by the appellant, an onerous burden is placed on a designated judge to ensure that they are able to ground their decision on the facts and the law in an independent and impartial manner.

[88] In order to knowledgeably answer the preliminary questions in these first appeals under the SATA, an in-depth understanding of the role of the designated judge is required; an analysis of this role shall be undertaken below, with particular emphasis on the past two decades of jurisprudence regarding designated judges and the statutory provisions of the SATA.

B. *ROLE OF THE DESIGNATED JUDGE*

[89] It is the position of the respondent that the role of the designated judge is fluid in these appeals: at times robust and interventionist during the disclosure phase, at other times akin to the role of a judge in a conventional judicial review during the merits phase. It is their submission that section 16 of the SATA provides for a two-stage procedure, being: the disclosure phase and the merits phase. As the following reasons will demonstrate, I cannot agree with this position.

[90] As outlined above, the SATA is heavily reliant on the appeal mechanism in order to achieve its object of balancing Canada's collective national security interests with individual rights and freedoms. A simple reading of the appeal provisions at section 16 of the SATA make it clear that the designated judge is a central figure in ensuring this overall balance given the broad discretion afforded to them.

[91] Accordingly, this section will first analyze (1) the jurisprudence concerning the role of designated judges in national security and then proceed to analyze (2) the role attributed to the designated judge throughout section 16 of the SATA, interpreted with the help of the above-mentioned analysis of the SATA and relevant jurisprudence. From there, this Court will (3) compare the role assigned to the designated judge in the provisions of the SATA with the role assigned to the designated judge in the provisions of the IRPA.

[92] To summarize the findings below, this analysis leads me to conclude that the role of the designated judge in appeals under the SATA is that of a "gatekeeper" vested in

not only ensuring the reasonableness of the Minister's decision but also a fair process that respects the fundamental rights and freedoms of the appellant while simultaneously securing the confidentiality of certain information in the interest of national security. Although the IRPA has a different purpose and some distinct attributes, it can be said that the designated judge is generally assigned a similar role in the SATA.

(1) Overview of Jurisprudence Regarding the Role of the Designated Judge

[93] Again, the respondent takes the position that the IRPA certificate procedure does not compare to the SATA appeal, although the respondent does recognize that the designated judge is to assume a robust and interventionist role during the disclosure phase. Let us see what the jurisprudence says about the role of designated judges when dealing with national security matters.

[94] In national security matters, the overarching role of the designated judge is to be the arbiter of the "clash of the titans" between the collective interest in national security and the rights and freedoms of individuals. As these two pillars of our constitutional democracy collide in the context of national security, immense pressure is put on the core principles of our justice system such as the open court principle and the right to procedural fairness. The designated judge's overall judicial duty is to reconcile this tension created as much as possible to ensure procedural fairness and the proper administration of justice while still protecting the exceptional collective interest in the secrecy of information and evidence in this context. To meet this task, they must begin by assuming the role of a "gatekeeper". See *Harkat (2014)*, at paragraph 46.

[95] The role of the designated judge, as we know it today, was discussed at length by the Supreme Court of Canada in *Charkaoui I* and *Harkat (2014)* in the context of the issuance and review of certificates of inadmissibility for permanent residents or foreign nationals deemed to be a threat to national security pursuant to the IRPA. In the IRPA, there are provisions that permit public hearings and *ex parte* and *in camera* hearings (see paragraph 83(1)(c) of the IRPA). Similarly, the SATA provides for the same types of hearings (see paragraph 16(6)(a) of the SATA). Therefore, both the interested person in the IRPA as well as the appellant in the SATA are not present during these *ex parte* and *in camera* hearings, contrary to the fundamental value that a party be present all through the proceedings. This similarity between both proceedings is at the heart of the designated judge's role. In these decisions penned by former Chief Justice McLachlin, the core principles of the designated judge's role were clearly set out and have regularly been applied by courts since.

[96] In *Charkaoui I*, the Supreme Court of Canada stated that designated judges must exercise their powers in a way that upholds the components of a fair judicial process. This notably requires a judge to be, as well as appear to be, independent and impartial

(at paragraphs 32–47) and to base their decision on the facts and the law (at paragraphs 48–52). However, to do so, the Supreme Court of Canada has stated that the excluded party's right to know the case against them and to be given the opportunity to answer that case must be upheld, or a substantial substitute to this right must be afforded (at paragraphs 53–64). What this entails is responsive to the circumstances (at paragraph 63). Consequently, designated judges must, to the best of their ability, exercise their powers in a way that ensures these components of a fair judicial process are upheld in the context of national security matters. Of course, given the exceptional context of designated proceedings relating to national security, this requires designated judges to take on a unique role.

[97] Indeed, in *Charkaoui I*, the Supreme Court of Canada held that the designated judge is "the only person capable of providing the essential judicial component of the process" (at paragraph 34) and must assume an "active role" (at paragraph 39); the designated judge must not be a "rubber stamp" (at paragraph 41) but must instead be "non-deferential" (at paragraph 42). The Supreme Court of Canada noted that this role is key to ensuring that a judge does not appear to be overly deferential to the government's position and thus not appear to be independent and impartial (paragraphs 39–42). It also found that this active interventionist role, and the heightened ability to skeptically scrutinize and vet evidence it entails, is, in part, key in ensuring that the designated judge is able to make a decision based on the facts and the law (at paragraphs 48–52).

[98] The core principles of this role were neatly reiterated and clarified seven years later by former Chief Justice McLachlin on behalf of the entire Court on this point in *Harkat (2014)*, at paragraph 46:

> First, the designated judge is intended to play a gatekeeper role. The judge is vested with broad discretion and must ensure not only that the record supports the reasonableness of the ministers' finding of inadmissibility, but also that the overall process is fair: "… in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case" (C. Forcese and L. Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) (online), at p. 60). Indeed, the *IRPA* scheme expressly requires the judge to take into account "considerations of fairness and natural justice" when conducting the proceedings: s. 83(1)(*a*), *IRPA*. The designated judge must take an interventionist approach, while stopping short of assuming an inquisitorial role.

[99] Reading this paragraph, we can conclude that even though a special advocate protects the interests of the concerned individual, the role of the designated judge does not change. Also of note is the final sentence of the foregoing paragraph where the limit of this "interventionist" role is firmly established as being one that is robust, while not going as far as to assume the functions of an "inquisitorial" judge. To better understand

this limit, it is helpful to refer to the Supreme Court of Canada's comments in *Charkaoui I*, at paragraph 50, which briefly compare and contrast the inquisitorial system with the adversarial system:

> There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence.

[100] As mentioned earlier, although the Supreme Court of Canada's comments on the role of the designated judge in *Charkaoui I* and *Harkat (2014)* were made in the context of security certificate proceedings under the IRPA, in instances where legislative schemes require *ex parte* and *in camera* hearings for national security reasons (like the IRPA and the SATA), this Court has found in the past that this active and robust role extends to these national security proceedings as well. This is canvassed in *X (Re)*, 2017 FC 136, [2017] 4 F.C.R. 391 (*X (Re) (2017)*), at paragraphs 31–32 in the context of privilege claims pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23:

> The designated judge plays an expanded gatekeeper role in national security matters because he or she bears wider responsibilities, due to the confidential and closed nature of the proceedings. Both the jurisprudence and the legislation establish the responsibilities of the designated judge, notably the Supreme Court's *Harkat* decision in 2014 and the IRPA. The Supreme Court provided a useful synopsis of these responsibilities at paragraph 46 of *Harkat* 2014:
>
> [Quotation omitted.]
>
> Given that the designated judge's duties, as elaborated above, stem from an overriding responsibility to ensure fairness and the proper administration of justice, such duties are not limited to security certificate proceedings. The distinction between the responsibilities of the designated judge, *amici curiae,* and special advocates extends beyond certificate proceedings and applies to all relevant situations in the field of national security where confidential information and CSIS human source issues can arise.

[101] This special role in national security matters applies in all similar instances, unless, of course, the legislation at issue expressly assigns a different role than what was found to be constitutionally required in the context of the *Charkaoui I* and *Harkat (2014)* decisions.

[102] In sum, consistent with the overarching judicial duty to ensure procedural fairness and the proper administration of justice in the context of national security, which extends beyond the IRPA, the designated judge must take all the alternative measures available within the limits of their relevant statutory and inherent powers to give effect to

an individual's right to a fair judicial process in the circumstances. Of course, this will vary from one legislative scheme to the next. Given the exceptional restraints on the judicial process brought on by the need for secrecy to ensure national security, these alternative measures must ensure that the designated judge is still able to base their decision on the facts and the law, and must also ensure that the excluded party is provided with a substantial substitute to knowing the case against them and having the opportunity to answer that case. Should the active interventions of the designated judge alone be unable to ensure these fundamental components of a fair judicial process, their overarching role as a gatekeeper might require them to appoint an *amicus curiae* with a mandate tailored to assist the judge in upholding procedural fairness in the circumstances (*Khadr v. Canada (Attorney General)*, 2008 FC 46, [2008] 3 F.C.R. 306 (*Khadr*), at paragraph 12).

[103] That being said, if the designated judge finds that the discretion and flexibility afforded to them to ensure a fair process is insufficient in the circumstances, their role and overarching duties dictate that "[they] must not hesitate to find a breach of the right to a fair process and to grant whatever remedies are appropriate" (*Harkat (2014)*, at paragraph 4).

[104] Seeing as the SATA is the legislative scheme in these appeals, an in-depth understanding of the role of the designated judge when presiding over SATA appeals is essential. To achieve this comprehensive understanding, I will be analyzing how these general principles regarding the role of the designated judge apply to designated judges in appeals under the SATA. In doing so, I will also canvass the appeal procedures under the SATA and directly address the respondent's argument regarding the division of appeals under the SATA into two distinct phases and how this affects the role of the designated judge.

(2) Role in Appeal under the SATA

[105] Similar to the IRPA, as we will see below, the designated judge in appeals under the SATA can be described as the "'cornerstone of the procedure established by Parliament'" (*Charkaoui I*, at paragraph 34). It is an appeal procedure that calls for balancing national security with individual rights and freedoms. Consistent with the Supreme Court of Canada jurisprudence canvassed above, the appeal provisions at section 16 of the SATA can be understood as assigning significant discretion to the designated judge in order to fulfill their role of (i) ensuring a fair judicial process that does not undermine the national security objectives of the SATA as well as their role of (ii) deciding the reasonableness of the Minister's decision on appeal. It is the role of a "gatekeeper", similar to that expressed in *Harkat (2014)*, at paragraph 46, as it is clear that keeping an individual on the SATA list seriously engages several Charter rights, as raised by the appellants in their respective notices of appeal.

(i) Ensuring a Fair Judicial Process that Protects National Security Interests

[106] The first part of the role assigned to the designated judge is ensuring a fair judicial process in light of the limits imposed by the SATA on the open court principle and on the conventional pillars of procedural fairness, in the interest of national security. This role assigned to the designated judge under the SATA mirrors its overarching balancing object, as described earlier.

[107] First, the SATA appeal provisions put in place several limits on the appeal procedures in order to protect Canada's national security interests. For instance, as seen earlier, paragraph 16(6)(a) requires that a judge hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, "its disclosure could be injurious to national security or endanger the safety of any person." Moreover, paragraph 16(6)(b) assigns the judge the duty of ensuring the confidentiality of information or other evidence provided by the Minister if, in the judge's opinion, "its disclosure would be injurious to national security or endanger the safety of any person."

[108] These limits on the disclosure of information or other evidence are not unique to the SATA. It is now well recognized that certain information or other evidence must be protected by our judicial system in the interest of national security, even when rights of individuals are at play. Parliament has enacted other laws to this effect: see the IRPA or the *Canada Evidence Act*, R.C.S., 1985, c. C-5. However, the SATA does not assign the Minister a unilateral privilege of asserting confidentiality. Rather, it provides the designated judge with the power to decide whether information or other evidence meets the criterion to be kept confidential for national security reasons and provides the discretion to fashion a fair judicial process in response to the necessity of confidentiality in the circumstances.

[109] In fact, the SATA assigns the designated judge the sole responsibility of deciding whether information or evidence meets the criterion to be kept confidential and must be heard *ex parte* and *in camera*. This is a duty that requires a designated judge to assume a robust and interventionist role given the government's tendency to overclaim confidentiality, the important effect this has on an appellant's right to procedural fairness, and the lack of redress available to the appellant to counter these claims of confidentiality. This point is well canvassed in *Harkat (2014)*, at paragraphs 61–64:

> Only information and evidence that raises a *serious* risk of injury to national security or danger to the safety of a person can be withheld from the named person. The judge must ensure throughout the proceedings that the Minister does not cast too wide a net with his claims of confidentiality.
>
> While the *IRPA* scheme provides that closed hearings must be held when the disclosure

> of information *could* be injurious (s. 83(1)(*c*), *IRPA*), it mandates the withholding of information from public summaries only if its disclosure *would*, ***in the judge's opinion***, be injurious (s. 83(1)(*e*), *IRPA*). The judge must err on the side of caution in ordering closed hearings during which he can ascertain the validity of the Minister's position with respect to the sensitivity of given information or evidence. However, once the judge has heard the parties, he must ensure that only information or evidence which *would* injure national security or endanger the safety of a person is withheld from the named person. "It is the Ministers who bear the burden of establishing that disclosure <u>not only could but would be injurious</u> to national security, or endanger the safety of any person": *Jaballah, Re*, 2009 FC 279, 340 F.T.R. 43, at para. 9, *per* Dawson J. [Emphasis added by McLachlin C.J.].
>
> The judge must be vigilant and skeptical with respect to the Minister's claims of confidentiality. Courts have commented on the government's tendency to exaggerate claims of national security confidentiality: *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 F.C.R. 508, at para. 108; *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80, at paras. 73–77 and 98; see generally C. Forcese, "Canada's National Security 'Complex': Assessing the Secrecy Rules" (2009), 15:5 *IRPP Choices* 3. As Justice O'Connor commented in his report on the Arar inquiry,
>
> > overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality.
>
> (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. 302)
>
> The judge is the gatekeeper against this type of overclaiming, which undermines the *IRPA* scheme's fragile equilibrium. Systematic overclaiming would infringe the named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s. 24(1) of the *Charter*. [Emphasis in original.]

[110] Nonetheless, following this "vigilant and skeptical" review of the Minister's confidentiality claims by the designated judge, there is likely to remain some information or evidence which, pursuant to paragraph 16(6)(b), the designated judge must ensure its confidentiality because its disclosure would be injurious to national security or endanger the safety of any person. Yet, despite this need to keep certain information confidential from the public and the appellant, and the need to hear this information *ex parte* and *in camera*, the designated judge still has the duty to "provide the appellant and the Minister with [a reasonable] opportunity to be heard" pursuant to paragraph 16(6)(d). As suggested by the *amici curiae*, the opportunity to be heard is a fundamental safeguard and is an integral part to the *audi alteram partem* rule (see L'Heureux-Dubé J.'s observations in *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781, (1995), 125 D.L.R. (4th) 471 (*Telecommunications Workers Union*), at paragraph 29).

[111] A coherent reading of these two seemingly contradictory statutory duties, which require the designated judge to ensure that the parties have an opportunity to be heard despite the appellant not having access to all the relevant information or evidence, along with a reading that is in line with the balancing object of the SATA and the jurisprudence canvassed above, implies that the designated judge has a duty to exercise their powers in a manner that ensures a fair judicial process in the given circumstances. Notably, this can only be accomplished where a judicial process provides a substantial substitute to the appellant for full disclosure and full participation in order to permit them to know and meet the case against them as well as permit the designated judge to make a decision based on the facts and the law. This is a key component of the "gatekeeper" role as it is described in *Harkat (2014)*, at paragraph 46. More will be said later on how to ensure fairness when the SATA forbids the appellants from directly being heard in the *ex parte* and *in camera* portions of the appeals.

[112] This tension between these seemingly contradictory duties is somewhat alleviated by the designated judge's duty to provide the appellant with a "summary of information and other evidence that enables them to be reasonably informed of the Minister's case" but that does not include anything the judge has deemed confidential (paragraph 16(6)(c)). Having experienced issuing summaries in lieu of direct, straightforward, evidence, designated judges will do their utmost to issue substantial informative summaries without disclosing injurious national security information. Having said that, paragraph 16(6)(f) permits the designated judge to "base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant." In these cases, the "gatekeeper" role assigned to the designated judge by the procedure set out in section 16 as a whole requires the designated judge to actively assume their powers to fashion a fair judicial process that gives meaning to the appellant's right to be heard at paragraph 16(6)(d), without overstepping their jurisdiction. The designated judge must actively search for ways to provide as much information as possible to the appellant while still protecting the confidentiality of certain information for national security reasons. Like an elastic, designated judges must stretch their statutory and inherent powers to ensure that as much disclosure is provided to the appellant while stopping short of the breaking point. A designated judge must feel satisfied that the disclosure (through summaries or by other means) is, in substance, sufficient to allow an appellant to be "reasonably informed" (paragraph 16(6)(e)) of the case made against them and be able to present their side of the story, at the very least via the assistance of a substantial substitute (*Harkat (2014)*, at paragraphs 51–63 and 110). Only then will the designated judge have the necessary facts and law to render a fair decision.

(ii) Ensuring the Reasonableness of the Minister's Decision

[113] The second part of the role assigned to the designated judge in the SATA is clearly stated at subsection 16(4): "the judge must, without delay, determine whether the decision is reasonable on the basis of the information available to the judge."

[114] Although the respondent agrees that the designated judge must assume a robust and interventionist role when assessing the confidentially claims of the Minister pursuant to paragraph 16(6)(b), it is the respondent's position that this role does not apply when the designated judge assesses the reasonableness of a decision. Instead, the respondent argues that there is clear division between the role the designated judge must assume in the disclosure phase of an appeal under the SATA and the role the designated judge must assume in the merits phase. During the latter phase, it is submitted that the designated judge must assume a deferential role when assessing the merits of a decision under appeal as their role is akin to the role of a judge in a conventional judicial review.

[115] In light of the SATA's object, the jurisprudence canvassed above, as well as the wording of the provisions at section 16 of the SATA, I cannot agree with this position. The designated judge must assume their "gatekeeper" role at all times during the SATA appeal, including when assessing the reasonableness of the Minister's decision. To support this finding, I will analyze the provisions of the SATA to extract the role intended for the designated judge when assessing the reasonableness of the Minister's decision. I will then directly address the respondent's argument that the judge's role changes from the disclosure phase to the merits phase of the appeal as well as the argument that, barring new evidence, the judge's review of the decision under appeal is akin to a conventional judicial review.

[116] It is quickly understood that the role assigned to the designated judge in the appeal provisions of the SATA goes beyond the deferential role of a judge in a traditional judicial review. The SATA equally assigns the designated judge a robust role that requires them to take an "active" and "interventionist" approach when assessing the merits of a decision. The first indication of this is that the designated judge is given the power at subsection 16(5) to order that an appellant's name be removed from the list, in contrast with traditional appeals or judicial reviews to the Federal Court, which are usually referred back to the decision maker should the decision be found unreasonable. This in itself is indicative of Parliament's intent of assigning designated judges a hands-on role. It is a clear invitation for the designated judge to vigorously immerse themselves in the appeal when determining the decision's reasonableness. This jurisdiction to conclude differently from the Minister and "order the Minister" to remove the name of the appellant from the SATA list is not an attribute of a conventional judicial review.

[117] Moreover, the appeal before the designated judge is not necessarily based solely on the same record that was before the decision maker. This is an important difference between an appeal under the SATA and a conventional appeal or judicial review to the Federal Court. As stated at subsection 16(4) of the SATA, the appeal must be determined on the "information available to the judge." In practice, although the parties must, by default, follow the provisions at rule 343 of the *Federal Courts Rules* when

determining the evidence and information to be included in the appeal book, the SATA provides that information or evidence before the decision maker can be withdrawn by the Minister pursuant to paragraph 16(6)(g) and that additional information or evidence that was not before the decision-maker can be adduced pursuant to paragraph 16(6)(e). This potential for a change in the record is again indicative of an intent for the designated judge to undertake a non-deferential role, as a different record requires a designated judge to reassess afresh the evidence grounding a decision according to this change.

[118] For instance, if the Minister withdraws information or other evidence pursuant to paragraph 16(6)(g), this same paragraph of the SATA states that the designated judge "must not base a decision on that information or other evidence and must return it to the Minister." To fulfill their role of deciding the reasonableness of the Minister's decision, the designated judge must therefore play a non-deferential role and assess the remaining information and evidence afresh as a potential key factual element underpinning the Minister's decision is no longer part of the record available to the judge. Moreover, the reasons for its withdrawal could affect the remaining information or evidence. Similarly, a key piece of new information or evidence may require a designated judge to reassess the information or evidence that was before the decision maker in a new light, notably if it contextualizes or contradicts certain information.

[119] Compounding the non-deferential nature of the role of the designated judge in deciding the reasonableness of the decision on appeal in light of a potentially different record is the fact that the judge is given immense discretion pursuant to paragraph 16(6)(e) in deciding whether to receive additional information into evidence. Indeed, as stated in paragraph 16(6)(e), the designated judge "may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence." This role requires the designated judge to assume a delicate approach, considering the type of evidence at play and considering the range of individual rights and freedoms potentially involved. It is indicative that a designated judge must be an active participant in an appeal under the SATA, notably given the fact that, in ensuring that this evidence is "reliable and appropriate", the designated judge is additionally responsible for considering evidence that may not be admissible in a court of law and may not be disclosed to the appellant due to national security reasons. The difficult nature of the task is aptly described by my colleague Justice Mosley in *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163 (*Almrei (Re)*), at paragraph 84:

> …. Evidence may be relevant but not useful or fitting for a variety of reasons including the manner in which it was obtained. This is reinforced where the term is coupled with "reliable" ("digne de foi") which imports a notion of "trustworthy", "safe", "sure", "worthy of belief.

[120] In *Almrei (Re)*, Justice Mosley was commenting on paragraph 83(1)(h) of the IRPA, which paragraph 16(6)(e) of SATA replicates by using the exact same language.

Contrary to what the respondent argues, this assessment is one that extends beyond any disclosure phase. To assess "reliability" ("*digne de foi*"), a designated judge's "gatekeeper" role cannot be limited only to disclosure issues but must also extend to the merits of the case against an appellant.

[121] Nevertheless, another indicator in the SATA provisions supporting the interpretation that a designated judge must assume an active role when assessing the reasonableness of a decision is the discretion afforded to the designated judge at paragraph 16(6)(f) to "base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant." The allocation of this discretionary power to the designated judge makes it clear that the designated judge cannot assume a deferential role, as that concept is traditionally understood, when assessing the reasonableness of a decision. If such a situation occurs, the designated judge is given the task of making a decision grounded on the facts and the law as an impartial and independent adjudicator without the benefit of having the appellant being able to directly test the reliability and sufficiency of the evidence or information in question. This duty to assess the reasonableness of a decision must see the designated judge assuming a robust active role that is interventionist but short of inquisitorial; to hold otherwise would be an open invitation for miscarriages of justice. In my view, it is inconceivable that this is what Parliament intended.

[122] It is with regard to the provisions canvassed above, notably when read in light of the object of the SATA and the pertinent jurisprudence, that I must disagree with the respondent's argument that the role of the judge differs according to the "phase" of the appeal and that the word "reasonableness" at subsection 16(4) signals that the designated judge should assume a deferential role when assessing the merits of the appeal, similar to the role assumed by a judge in a conventional judicial review.

[123] First, regardless of the clear intent in the statutory provisions of the SATA for the designated judge to assume a "gatekeeper" role when assessing the reasonableness of the decision under appeal, there is no indication in the SATA of an intent to divide the proceedings or the role of the judge into two separate phases. Had Parliament wished to opt for a two-phase approach to appeals under the SATA, it could have included a process similar to the one outlined in section 87 of the IRPA or could have opted to integrate section 38 of the *Canada Evidence Act* into the judicial process for appeals under the SATA. In fact, the creation of the SATA did the exact opposite of this as it replaced the former procedure under the *Aeronautics Act*, which was subject to section 38 of the *Canada Evidence Act*, as was the case in *Telbani*. This is not to say that a designated judge cannot organize appeal proceedings under the SATA in a manner that creates separate disclosure and merits phases if it is appropriate in the circumstances. Rather, it is a finding that there is no indication that Parliament intended to erode the designated judge's discretion to fashion a fair judicial process according to the

circumstances of the case and notably the type of confidential information being submitted.

[124] Second, it cannot be said that, barring new evidence, the designated judge must assess the merits of the decision on appeal in a deferential manner similar to the role of a judge in a conventional judicial review because subsection 16(4) of the SATA provides for a review of the reasonableness of the Minister's decision. Beyond the analysis of the appeal provisions above, and the distinct powers and duties they assign to the designated judge that go beyond the scope of a conventional judicial review, the Supreme Court of Canada found the following in *Charkaoui I,* at paragraphs 38 and 41–42 concerning the deference owed by the designated judge in deciding whether a certificate is "reasonable":

> The first concern is linked to the degree of deference that the judge accords to the ministers' conclusion that the facts supported the issuance of a certificate and the detention of the named person. Judges working under the process have eschewed an overly deferential approach, insisting instead on a searching examination of the reasonableness of the certificate on the material placed before them: *Jaballah, Re* (2004), 247 F.T.R. 68, 2004 FC 299; *Charkaoui (Re)*, [2005] 2 F.C.R. 299, 2004 FCA 421, at para. 74. They are correct to do so, having regard to the language of the provision, the history of its adoption, and the role of the designated judge.
>
> …
>
> Finally, the fact that the designated judge may have access to more information than the ministers did in making their initial decision to issue a certificate and detain suggests that the judge possesses relative expertise on the matters at issue and is no mere rubber stamp: *Charkaoui (Re)*, 2003 FC 1419, at para. 125.
>
> I conclude that a non-deferential role for the designated judge goes some distance toward alleviating the first concern, that the judge will be perceived to be in the camp of the government.

[125] Although some may argue that this is only applicable to certificate proceedings under the IRPA, and not the SATA, I invite the reader to note that both legislative schemes require the judge to assess the "reasonableness" of the decision and that both schemes require this judicial exercise to be done on a record that may or may not be identical to the one before the decision maker.

[126] To summarize, what *Charkaoui I* demonstrates is that the obligation to review a decision in the national security context according to the standard of reasonableness does not mean that the judge must assume a deferential role akin to the role assumed in a conventional judicial review. Rather, *Charkaoui I* states that the deference owed by the designated judge is based on the circumstances and that, in the context of national security where one party is denied full disclosure and full participation, this requires the judge to assume an "active" and "non-deferential role" at all stages of the proceedings

(at paragraphs 38–42). These findings made in the context of certificate cases under the IRPA are applicable to the SATA appeal scheme as well. At this preliminary stage, I will not say more on this matter as it will be a public issue before this Court later in these proceedings when assessing the proper standard of review to be applied.

[127] In all, a holistic reading of the appeal provisions of the SATA according to their legal context requires that a designated judge assume a “gatekeeper” role when assessing the reasonableness of the appealed decision. A fair judicial process requires that a judge be able to ground their decision on the facts and the law; it entails that the designated judge must be able to sufficiently test the relevancy and the trustworthiness of the evidence. This is particularly so for two reasons. First, the appeal stage of the proceedings under the SATA is effectively the first time the appellant is able to meaningfully question the merits of the evidence grounding the Minister’s decision. Second, given that the judge will likely have to consider evidence or information not directly disclosed to the appellant, the designated judge must assume a role that gives them the ability to sufficiently test the relevancy and trustworthiness of the relied upon evidence in these circumstances. In conferring these powers upon the designated judge, Parliament evidently considered that simply deferring to the Minister’s findings of fact in these cases without the designated judge’s further involvement would not be in the interest of justice. It follows that designated judges in appeals under the SATA must actively involve themselves in testing the evidence presented by the Minister all throughout the *ex parte* and *in camera* proceedings, including questioning the witnesses before the Court in *ex parte* and *in camera* proceedings.

(3) Similarities Between the IRPA and the SATA

[128] In the interest of thoroughness in these first appeals under the SATA, and notably given the many arguments in these appeals based on the IRPA, this Court deems it necessary to compare the SATA and the IRPA in order to give the reader a broad understanding of their similarities and differences. At the outset, I agree with the respondent that both legislative schemes should not be viewed as identical as they have different purposes and distinctive traits. However, this does not mean that the IRPA, and the jurisprudence concerning it, cannot be drawn upon to facilitate interpreting the SATA and its appeal provisions.

[129] The SATA and the IRPA have similar objects. In both enactments, Parliament created a scheme to protect Canada’s national security interests while also considering the important Charter rights at play. This is to say, both the SATA and the IRPA seek to balance national security interests with individual rights. In this regard, the objectives of the IRPA demonstrate both a concern for national security and a will to protect individual rights and freedoms:

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Objectives — immigration

3 (1) The objectives of this Act with respect to immigration are

…

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

…

Objectives — refugees

(2) The objectives of this Act with respect to refugees are

…

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Application

(3) This Act is to be construed and applied in a manner that

…

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

…

(f) complies with international human rights instruments to which Canada is signatory.

[130] At first glance in this preliminary stage and without comparing the severity of the alleged Charter violations, the SATA appears to engage similar Charter rights as the IRPA, notably rights guaranteed in section 7 of the Charter. In *Charkaoui I,* at paragraphs 12–16 and *Harkat (2014)*, at paragraph 40, former Chief Justice McLachlin found that the IRPA security certificate scheme engaged significant life, liberty, and security of the person interests. The appellants claim the same in their respective notices of appeal. Without saying more than necessary at this stage, it is clear that

being placed on the SATA list engages one's liberty by restricting the ability to use air transportation as well as one's security of the person given the potential stigma and impact on one's reputation (*Harkat (Re)*, 2012 FCA 122, [2012] 3 F.C.R. 635, at paragraph 39). Subsection 6(1) of the Charter also protects the "mobility rights" of Canadian citizens to "enter, remain in and leave Canada", which the notices of appeal clearly signal will be at issue later in these proceedings. At this stage, nothing further will be said, as this will be a matter for another time.

[131] Moreover, both legislative schemes provide for judicial involvement in order to review the reasonableness of the Minister's decision. Despite some differences, the role assigned to the judge in both the IRPA and the SATA is overall similar. Under the SATA, the designated judge is tasked with reviewing the Minister's decision to refuse an appellant's request for administrative recourse, which has the consequence of stopping an appellant from travelling by airplane inside or outside Canada. Likewise, under the IRPA, the designated judge is tasked with reviewing the joint issuance of a security certificate by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration, which, in some cases, has the consequence of permitting the immediate detention of the individual in question and their eventual deportation if the certificate is deemed valid.

[132] I pause to note that, notwithstanding their similarities, there are some differences between the processes established under the SATA and the IRPA, respectively. One of the principal differences between these two judicial procedures is that, in the case of the SATA, its initiation is optional and done by the listed person, whereas under the IRPA, the judicial procedure is automatic following the issuance of a certificate. Another difference is that the decision on appeal under the SATA is the Minister's review of the appellant's status as a listed person while the decision reviewed by the designated judge under the IRPA is the issuance of the certificate itself by two ministers. In addition, the judicial procedure under the SATA is an "appeal" while the procedure under the IRPA was described by former Chief Justice McLachlin as a "judicial review" in *Harkat (2014)*, at paragraph 2.

[133] However, despite these differences, the designated judge is put in essentially the same position and assigned a similar role. Indeed, under the IRPA, the designated judge is tasked with expeditiously determining whether the certificate is "reasonable" (section 78 and paragraph 83(1)(a)) based on a body of information or evidence that may not be identical to what was before the ministers (see paragraphs 83(1)(h), 83(1)(j), and 83(1)(k)). In both legislative schemes, the decision being reviewed by the Court will have been made without providing the individual in question with a meaningful opportunity to be heard, and the Court must make this decision without the benefit of the full participation of the individual in question given the limits on full disclosure due to national security interests. Moreover, in both legislative schemes, the designated judge is expressly given the power to order substantive action beyond remitting the matter

back to the decision maker should the decision under review be found unreasonable. In this regard, the SATA provides that the designated judge may order the appellant to be removed from the SATA list (subsection 16(5)) while the IRPA provides that the designated judge shall quash the certificate if it is deemed unreasonable (section 78).

[134] The foregoing similarities are key in interpreting the role of the designated judge in appeals under the SATA. Although both legislative schemes may serve different purposes, in each case the designated judge is called upon to adjudicate in an environment where the concerned individual is denied full participation and full disclosure for national security reasons. This in itself is exceptional. Therefore, the role of the designated judge must be adjusted, relative to the conventional role assumed during judicial reviews, so that a fair judicial process may be possible. The differences between these legislative schemes do not diminish in any way the role the designated judge must assume.

[135] The similarities between the appeal under the SATA and the review of the security certificate under the IRPA are most evident when one compares, side by side, the procedure set out at section 16 of the SATA with the procedure in section 83 of the IRPA. To illustrate the many similarities and few differences between these provisions, I have created a chart comparing these provisions.

Section 83 of the IRPA	Section 16 of the SATA
Paragraph 83(1)(a) of the IRPA states that "the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." It is also stated at section 78 that the designated judge shall "determine whether the certificate is reasonable."	Subsection 16(4) of the SATA requires that the designated judge "must, without delay, determine whether the decision is reasonable on the basis of the information available to the judge." (subsection 16(4))
Paragraph 83(1)(b) of the IRPA provides that the judge shall appoint a special advocate.	No such provision exists in the SATA.
Paragraph 83(1)(c) of the IRPA states that, at any time during a proceeding, a judge "<u>may</u>" on their own motion and "<u>shall</u>" on request of the Minister, hear information or other evidence *ex parte* and *in camera* if, in the judge's opinion, "its disclosure could be injurious to national security or endanger the safety	Paragraph 16(6)(a) requires that "the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person".

of any person.”	Contrary to the IRPA, the judge cannot hold an *ex parte* and *in camera* hearing on their own motion.
Paragraph 83(1)(d) requires that the judge “ensure the confidentiality of information and other evidence provided by the Minister if, in the judge’s opinion, its disclosure would be injurious to national security or endanger the safety of any person”.	Paragraph 16(6)(b) is nearly identical to paragraph 83(1)(d) of the IRPA.
Paragraph 83(1)(e) states that “throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed”.	Paragraph 16(6)(c) provides for the same.
Paragraph 83(1)(j) states that the “judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it”. Moreover, paragraph 83(1)(f) requires that the judge ensure the confidentiality of this withdrawn information or evidence.	Paragraphs 16(6)(g) and 16(6)(h) set out identical duties for the designated judge in appeals under the SATA, as compared to the IRPA.
The designated judge “shall” quash the certificate if it is found to be unreasonable (section 78).	The designated judge “may” order that the appellant’s name be removed from the list if the Minister’s decision is found to be unreasonable (subsection 16(5)).
Paragraph 83(1)(g) requires that the judge provide the concerned individual and the Minister with an opportunity to be heard.	The SATA requires the same at paragraph 16(6)(d).
Paragraph 83(1)(h) permits the judge to “receive into evidence anything that, in	The SATA provides the judge with an identical discretionary power at paragraph

the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence."	16(6)(e).
Paragraph 83(1)(i) gives the judge the discretionary ability to "base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national."	The SATA provides for an identical power at paragraph 16(6)(f).
Paragraph 83(1)(k) states that "the judge shall not base a decision on information that the Minister is exempted from providing to the special advocate, shall ensure the confidentiality of that information and shall return it to the Minister."	No such provision exists in the SATA as this legislative scheme does not explicitly provide for the appointment of a special advocate.
An appeal to the Federal Court of Appeal can be made only if the judge certifies that a serious question of general importance is involved. However, no interlocutory appeals may be made during the proceedings (section 79). Notwithstanding the foregoing, the Minister may appeal "any decision made in the proceeding requiring the disclosure of information or other evidence if, in the Minister's opinion, the disclosure would be injurious to national security or endanger the safety of any person" (subsection 79.1(1)).	The Federal Court's decision may be appealed to the Federal Court of Appeal (section 17).

[136] As this comparative table shows, the similarities are much more striking than the differences. The principal differences are: (1) the absence of special advocate provisions in the SATA; (2) designated judges cannot, on their own motion, call for an *ex parte* and *in camera* hearing in the SATA; and (3) the possibility of appeal to the Federal Court of Appeal is unrestricted by the provisions of the SATA.

[137] That being said, the primary difference is the absence of special advocate provisions in the SATA, as compared to the IRPA. Instead, as we will see below, it was

Parliament's intent to rely on the designated judge's inherent power to appoint an *amicus curiae* to serve as a substantial substitute (see paragraphs 180 to 194 below).

[138] For the sake of an exhaustive comparison, it is equally important to note that the procedure set out in both legislative schemes does not explicitly require separate and distinct disclosure and merit phases. Contrary to what the respondent asserts, this is simply absent from these legislative schemes. In fact, in my experience with IRPA certificate cases, the disclosure and merit issues of a case are often intertwined. This does not mean that a designated judge cannot structure the case before them in two distinct phases as it is their prerogative to do so—it is just not mandatory.

[139] To conclude, a minutiose comparison of both statutes confirms that the designated judge must assume essentially the same "gatekeeper role" under the SATA, as they are required to assume under the IRPA. This necessarily contemplates that the designated judge assume an active and interventionist role throughout the entire SATA appeal process. As we have seen, former Chief Justice McLachlin made it clear in *Harkat (2014)*, at paragraphs 45–47, that even with the appointment of a special advocate, the role of the designated judge must not be diminished in any way. In the present case, I ordered the appointment of the *amici curiae* and provided them with a particular mandate that aspires to complement the role of the designated judge in these proceedings. We now transition to the heart of the preliminary questions currently before the Court: the role of the *amici curiae* in these appeals.

C. *THE ROLE OF THE* AMICI CURIAE—*A COMPLEMENT TO THE DESIGNATED JUDGE*

[140] Despite the assumption of a "gatekeeper" role by a designated judge when an individual's Charter rights, notably section 7 rights, are at play and that full disclosure and full participation is impossible due to national security interests, the Supreme Court of Canada has stated that such an active role alone does not ensure a fair judicial process. Indeed, the Supreme Court of Canada found that, in such situations, the designated judge does not constitute a substantial substitute for full disclosure and full participation because the designate judge cannot rely on the ordinary process where evidence is tested and the law is argued to arrive at their conclusion, given the absence of a mechanism to challenge the confidential information or evidence relied upon by the Minister. In *Charkaoui I*, the Supreme Court of Canada was clear that the designated judge is "not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring" (paragraph 64). For this reason, the Supreme Court of Canada noted that the appointment of third-party counsel in *ex parte* and *in camera* proceedings could serve as a substantial substitute for full disclosure and full participation (paragraphs 70–84). In *Harkat (2014)*, the Supreme Court of Canada found that such a third party, in the form of a special advocates scheme created as a response to *Charkaoui I*, combined with the

“gatekeeper” role assigned to the designated judge, provided for a fair judicial process that did not violate the named person’s right to know and meet the case against them, or the right to have a decision made on the facts and the law (*Harkat (2014)*, at paragraphs 45–47 and 110–112).

[141] In essence, what can be drawn from *Charkaoui I* and *Harkat (2014)* is that, given the strict limits on disclosure imposed in the SATA, similar to the IRPA, a fair judicial process requires not only that the designated judge assume a “gatekeeper” role in appeals under the SATA but also that a third-party counsel in *ex parte* and *in camera* proceedings be named in order to provide the appellant with a substantial substitute to full disclosure and full participation.

[142] This discussion below will therefore: (1) expand on the jurisprudence concerning third-party counsel in *ex parte* and *in camera* proceedings and their role as substantial substitutes; (2) canvass the general principles pertaining to *amici curiae*; and (3) analyze the appointment and the role and powers of the *amici curiae* in these appeals.

[143] However, it is important to mention that, as we are at the preliminary stages of these appeals, this decision aims to set out the role of the *amici curiae* in light of the Charter rights at play according to what is alleged in the appellants’ notices of appeal. The constitutionality of the SATA scheme, in particular whether the *amici curiae* serve as an adequate substantial substitute in the circumstances, will be decided at a later stage of these appeals. For now, my role as a designated judge is to take note of the Charter interests and craft a fair judicial process within the limits of the Court’s jurisdiction, keeping in mind the nature of the *amicus curiae* and the parameters imposed by the SATA.

(1) Third-Party Counsel in *Ex Parte* and *In Camera* Proceedings

[144] As a brief reminder, the Supreme Court of Canada in *Charkaoui I* found that the former version of the IRPA engaged the individual’s interests protected in section 7 of the Charter, being life, liberty and security of the person. It then proceeded to conclude that the scheme did not provide a fair judicial process because there was no substantial substitute for the individual’s right to be informed of the case against them and to respond to that case (*Charkaoui I*, at paragraph 139). Without this, the Supreme Court found that the process was not fair, as the named person was not provided with the necessary information, or a substantial substitute, to be able to contradict errors, identify omissions, challenge the credibility of informants, or refute false allegations (*Charkaoui I*, at paragraphs 53–64). The Court observed that despite having an active and interventionist role, the designated judge, without more, could not ensure that their decision was based on all of the relevant information and evidence given that the individual’s interests are not represented in the *ex parte* and *in camera* portions of the

proceedings where the Minister's confidential information or other evidence is heard (*Charkaoui I,* at paragraphs 48–52). In other words, the Supreme Court found that a complement to the designated judge was necessary to ensure a fair judicial process, even when the designated judge assumes a gatekeeper role.

[145] The Court went on to consider whether the violation of section 7 of the Charter could be justified under section 1 of the Charter. On this point, the Court concluded that the legislative scheme's lack of substantial substitute did not minimally impair the rights of the named persons and thus could not be saved under section 1 of the Charter. The Court grounded this finding in the fact that less intrusive alternatives existed and went on to review some of these alternatives *(Charkaoui I*, at paragraph 69).

[146] In *Charkaoui I*, the Court canvassed different possible substitutes. First, it pointed to section 38 of the *Canada Evidence Act* as an example of a less intrusive alternative that strikes a better "balance between the need for protection of confidential information and the rights of the individual" by giving the designated judge the discretion to disclose certain information if they believe that the public interest in disclosure outweighs the public interest in non-disclosure (*Charkaoui I*, at paragraph 77). This alternative was not chosen by the legislator in the SATA as paragraph 16(6)(b) makes non-disclosure mandatory if it meets certain confidentiality criteria.

[147] Concerning the third-party counsel in *ex parte* and *in camera* proceedings alternative, the Court listed several examples where they have been used as a substantial substitute to strike a better balance between the demands of national security and the rights of individuals. For instance, the Court pointed to the use of a panel of independent security cleared lawyers acting as counsel to the Security Intelligence Review Committee in order to represent the interests of non-citizens during *ex parte* and *in camera* portions of proceedings (*Charkaoui I*, at paragraphs 71–77). The Court also noted that during the Arar Inquiry, the "Commissioner was assisted by independent security-cleared legal counsel with a background in security and intelligence, whose role was to act as *amicus curiae* on confidentiality applications" in order to balance these conflicting concerns (*Charkaoui I*, at paragraph 79). Finally, the Court also relied on the Special Advocate system employed by the Special Immigration Appeals Commission in the United Kingdom as an example of a less intrusive alternative (*Charkaoui I*, at paragraphs 80–84). Parliament's answer to *Charkaoui I* was ultimately to opt for a special advocate scheme, which was reviewed at length by the Supreme Court of Canada in *Harkat (2014)*, where the Court found that it provided the substantial substitute that procedural fairness required in the circumstances (*Harkat (2014)*, at paragraphs 47, 67–73 and 77).

[148] That being said, if one reads *Harkat (2014)* and *Charkaoui I* carefully, they do not stand for the position that only a special advocate can fulfill the role of a substantial

substitute in the context of national security. The establishment of a special advocate scheme was only one of the less intrusive alternatives identified by the Supreme Court of Canada in *Charkaoui I*, which Parliament decided to adopt. In fact, former Chief Justice McLachlin explicitly points to the appointment of *amici curiae* during the Arar Commission as a potentially less intrusive substantial substitute, being the late Honourable Mr. Ron Atkey (an individual with a wide range of experience in matters of national security) and Mr. Gordon Cameron. See *Charkaoui I*, at paragraph 79 and Canada, 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*] (Ottawa: The Commission, 2006).

[149] In the absence of a special advocate scheme in the SATA, and a clear indication by former Minister of Public Safety and Emergency Preparedness, the Honourable Ralph Goodale, that the designated judge is expected to appoint an *amicus curiae* if the circumstances require it (see full excerpt at paragraph 193), my role as a designated judge required me to appoint the *amici curiae* in these appeals. In turn, this required me to undertake the delicate task of creating a mandate for the *amici curiae* that will complement my role as a designated judge within the limits of my statutory and inherent powers, while ensuring a "substantial substitute" for the appellants to know and meet the case against them. Whether these statutory and inherent powers are sufficient to ensure a fair judicial process is a question for my review of the merits of the Minister's decision and the constitutionality of the SATA. This will come later in these proceedings.

[150] Therefore, as my order of October 7, 2019, stipulates, two *amici curiae* were appointed, being Mr. Colin Baxter and Mr. Gib Van Ert, to serve as a substantial substitute for the appellants' full participation and full disclosure, pursuant to *Charkaoui I* and *Harkat (2014)*, in order to assist the Court in fulfilling its duties in appeals under the SATA. I will now undertake a review of the general legal principles relating to the role of *amici curiae*, the Court's jurisdiction to appoint *amici curiae* in appeals under the SATA, and the role they are to undertake in these appeals.

(2) The *Amicus Curiae* and the Inherent Jurisdiction of the Court

[151] At the outset, I note that courts have increasingly relied on *amici curiae* when put in positions where certain critical perspectives are absent, both in criminal and civil proceedings. Unusual situations arise where courts must call upon a friend of the court for assistance. In national security proceedings, the use of *amici curiae* in such situations has increased exponentially since 9/11, nearly 20 years ago. A brief review of the history of the *amicus curiae* will help us understand this developing trend.

[152] *Amici curiae* have occupied a role in our judicial system for hundreds of years. The common law origins of this Latin term, which literally translates to "friend[s] of the

court", dates back to the fourteenth century where the common law courts of England would receive assistance from *amici curiae* to preserve the "honour of the court" by helping it deliver justice and continue the rational development of the law in the public interest. Its role has since been a staple in common law jurisdictions throughout the world, including Canada, where this common law tradition has been received. Today, there remains no doubt as to its ongoing acceptance. See *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (*Criminal Lawyers' Association of Ontario*), at paragraphs 44–45 and S. Chandra Mohan, "The *Amicus Curiae*: Friends No More?", [2010] 12 *S.J.L.S.* 352.

[153] The Court's jurisdiction to appoint an *amicus curiae* is inherent. It is grounded in the Court's "authority to control its own process and function as a court of law" (*Criminal Lawyers' Association of Ontario*, at paragraph 46). As the Supreme Court of Canada noted in *Criminal Lawyers' Association of Ontario*, this authority is linked to a court's authority to "'request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberations'" (*Criminal Lawyers' Association of Ontario*, at paragraph 46 citing B. M. Dickens, "A Canadian Development: Non-Party Intervention", [1977] 40 *Mod. L. Rev.* 666, at page 671). Nonetheless, the Supreme Court of Canada has also specified that *amici curiae* must only be appointed when their assistance is essential to a judge's ability to discharge their judicial functions in the case before them and should only be used in response to "specific and exceptional circumstances" (*Criminal Lawyers' Association of Ontario*, at paragraph 47).

[154] In essence, the role of an *amicus curiae* is to serve the Court. Their client —the judge. An *amicus curiae*'s mandate varies according to the circumstances as their role and responsibilities are dependent on the judge who appoints them. However, the role of an *amicus curiae* has generally been to "represent interests that are not represented before the court, to inform the court of certain factors it would not otherwise be aware of, or to advise the court on a question of law". See *Telbani*, at paragraph 27.

[155] For instance, pursuant to subsection 53(7) of the *Supreme Court Act*, R.S.C., 1985, c. S-26, which codifies this inherent power to appoint *amici curiae,* the Supreme Court of Canada has appointed *amici curiae* on many occasions to represent interests that are affected by the case before it and with respect to which counsel does not appear (see *Criminal Lawyers' Association of Ontario*, at paragraph 45 and footnote 4). One of the most notable cases being the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385, where the province of Quebec chose not to participate in the reference. In that case, the Supreme Court of Canada named Mr. André Joli-Coeur of Québec City, and his team of lawyers, to argue that Québec could unilaterally secede from Canada under the Constitution of Canada and under international law, an interest that the Court deemed was affected but not represented before the Court (see *Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance)*, [1999] 2 F.C. 381, (1998), 159 F.T.R. 129 (T.D.)). See also: *Reference re*

Quebec Sales Tax, [1994] 2 S.C.R. 715, (1994), 115 D.L.R. (4th) 449 and *Miron v. Trudel,* [1995] 2 S.C.R. 418, (1995), O.R. (3d) 160.

[156] That being said, despite the recognition of the flexibility of an *amicus curiae*'s mandate, which is largely responsive to the circumstances and its role in representing interests that are not before a court, the Supreme Court of Canada has recognized that the nature of the position itself imposes certain inherent limits on an *amicus curiae*'s role. Indeed, there is a recognized line separating the role of an *amicus curiae* and the role of counsel for a party that must not be crossed. This is because an *amicus curiae* plays a "fundamentally different" role as its duty of loyalty lies with the Court rather than a party (*Criminal Lawyers' Association of Ontario*, at paragraph 49). Therefore, a court must avoid giving an *amicus curiae* a mandate that obliges them to take on a solicitor-client role.

[157] As a designated judge since 2002, I can say from experience that the appointment of *amici curiae* in the context of national security is well-established as they are regularly called upon by this Court in designated proceedings to assist in discharging the designated judge's judicial functions in response to the "specific and exceptional circumstances" created by *ex parte* and *in camera* proceedings. Indeed, as the important interests at play in national security often impose serious restrictions on the open court principle, a fundamental pillar of our legal system, this Court has regularly appointed *amici curiae* to help strike an appropriate balance between the public interest in secrecy and the procedural fairness rights of individuals. The importance of engaging *amici curiae* whenever important questions of law arise in the national security context has also been publicly stated by the Chief Justice of the Federal Court in past interviews (see Cristin Schmitz, "Chief Justice shows where line is drawn" *Lawyers Daily* (2 July 2015)).

[158] For instance, this Court has relied on *amici curiae* to help manage this "clash of the titans" between individual rights and the collective interest in national security in the context of proceedings under section 38 the *Canada Evidence Act*. Despite the absence of any legislative provisions in the *Canada Evidence Act* requiring or permitting the appointment of an *amicus curiae*, it is firmly recognized that this Court has the jurisdiction to do so. In fact, the Federal Court of Appeal has recently noted in *Canada (Attorney General) v. Huang*, 2018 FCA 109, 362 C.C.C. (3d) 87 (*Huang*), at paragraph 36 that:

> …. As the Designated Judge pointed out, section 38 of the CEA does not explicitly provide for the possibility to appoint an *amicus*. It is as a matter of judicial discretion that the Federal Court and this Court have developed the practice to appoint an *amicus*, and it is for the court appointing an *amicus* to determine precisely the role and attributions it intends to confer on the *amicus*.

[159] This practice of appointing an *amicus curiae* in proceedings under section 38 of the *Canada Evidence Act* is also confirmed in cases such as: *Telbani*, at paragraph 26; *Ader v. Canada (Attorney General)*, 2018 FCA 105, at paragraph 5; *Canada (Attorney General) v. Almaki*, 2011 FCA 54, 331 D.L.R. (4th) 703, at paragraph 20; and *Khadr*, at paragraphs 12–16.

[160] In fact, as Justice Mosley points out in *Khadr*, the existence of the discretion to appoint an *amicus curiae* in the context of a proceeding under section 38 of the *Canada Evidence Act* was a significant factor underpinning the finding in *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547 (affirmed by *Canada (Attorney General) v. Khawaja,* 2007 FCA 388, [2008] 4 F.C.R. 3) that the provisions allowing for *ex parte* and *in camera* hearings under section 38 of the *Canada Evidence Act* were constitutional (*Khadr*, paragraph 12). The scheme at section 38 of the *Canada Evidence Act* was ultimately found to be constitutional by the Supreme Court of Canada in *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, in large part due to the flexibility afforded to the judge to exercise their judicial discretion, including the discretion to appoint an *amicus curiae* (see paragraphs 41–50).

[161] The appointment of an *amicus curiae* has also become the practice of this Court in warrants under section 21 of the *Canadian Security Intelligence Service Act* when questions of law arise. For instance, in *Canadian Security Intelligence Service Act (Re)*, 2008 FC 300, [2008] 3 F.C.R. 477 (*CSIS Act (Re) (2008)*), despite the absence of any express provision authorizing the appointment of an *amicus curiae*, the Court noted at paragraph 3:

> ….The need for an *amicus curiae* became evident since the CSIS could not objectively fully represent to the Court all the different points of view that the question of law brings up. It was clearly in the interest of justice that an *amicus curiae* should be appointed by the Court to deal with the opposite point of view presented by the CSIS to support the application for warrants […].

[162] The presence of an *amicus curiae* can also be observed in subsequent decisions pertaining to warrants under the *Canadian Security Intelligence Service Act* such as: *Sections 16 and 21 of the Canadian Security Intelligence Service Act*, *R.S.C., 1985, c C-23 (Re)*, 2018 FCA 207; *X (Re)*, 2018 FC 738, [2019] 1 F.C.R. 567; and *X (Re)*, 2014 FCA 249, [2015] 1 F.C.R. 684. This is, of course, not an exhaustive list.

[163] The practice of appointing an *amicus curiae* has also extended to *ex parte* and *in camera* proceedings where privilege is claimed pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*. This Court found that a judge's "overriding responsibility to ensure fairness and the proper administration of justice" justifies the appointment of an *amicus curiae* in *X (Re) (2017)*, at paragraph 32. The Federal Court of Appeal also confirmed this practice in *Section 18.1 of the Canadian Security*

Intelligence Service Act, R.S.C., 1985, c. C-23, as amended (Re), 2018 FCA 161, [2019] 2 F.C.R. 333 (*Section 18.1 CSIS Act (Re)*), at paragraphs 41–47, 53 and 56–57.

[164] In this array of circumstances where it has become the practice of this Court to appoint an *amicus curiae* in the context of designated proceedings, *amici curiae* are called upon to occupy a role that is unique and exceptional to the national security context. The Court has turned to the use of *amici curiae* in the context of national security to help designated judges fulfill their statutory duties in a manner that upholds the judge's overarching duty to ensure a fair judicial process.

[165] Nevertheless, in the context of national security, the *amicus curiae*'s mandate remains to be sculpted by the respective judge who appoints them. Therefore, an *amicus curiae*'s mandate may vary from one case to the next according to what is required to fulfill a designated judge's statutory duties and overarching duty to ensure procedural fairness in the matter at hand. See *Telbani*, at paragraph 31 and *Huang*, at paragraph 36.

[166] That being said, seeing as *ex parte* and *in camera* proceedings inherently exclude concerned parties, the mandates of *amici curiae* have therefore largely been focused on providing the Court with the interests of the excluded party who does not have access to certain confidential information. This was observed by Justice Mosley in *Khadr*, at paragraph 32:

> Similarly, I am of the view that in the context of a section 38 application related to a criminal proceeding, such as in the present case, an *amicus* appointed by the Court may present the issues favouring the person seeking disclosure of the information during the *ex parte* portion of the proceedings and may be said in that respect to act for the individual at that stage. But the *amicus* has no solicitor-client relationship with the individual and his or her role will be to assist the Court in arriving at a just determination of the issues.

[167] In fact, in *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 F.C.R. 243 (*Sellathurai*), Dawson J.A. even found that a failure to consider whether fairness required appointing an *amicus curiae* in the context of *ex parte* and *in camera* proceedings was an error, going as far as suggesting the following mandate according to the circumstances at paragraph 55:

> In these circumstances, the appointment of an *amicus*, perhaps authorized by the Court to have discussions with counsel for Mr. Sellathurai before having access to the privileged information, would allow submissions directed to Mr. Sellathurai's concerns to be made to the Court based upon the confidential record. This was a relevant factor the Judge should have considered, and which was not addressed in the jurisprudence the Judge relied upon to reject the appointment of an *amicus*.

[168] However, consistent with the Supreme Court of Canada's statements in *Criminal Lawyers' Association of Ontario*, the jurisprudence in the context of national security is clear that an *amicus curiae*'s mandate cannot cross the line between representing interests that are not before the Court in order to assist the designated judge in fulfilling their duties and representing a party before the Court in designated proceedings. This line is well defined by Justice de Montigny (of this Court at the time) in *Telbani*, at paragraphs 28–31 in the context of an application pursuant to section 38 of the *Canada Evidence Act*:

> There is no doubt, however, that the *amicus* is not the accused's lawyer (in a criminal proceeding) or respondent (in a civil proceeding). The role of an *amicus* is not any more analogous to that of a special advocate appointed under section 83 of the IRPA in the context of a security certificate. The role of the *amicus* is to assist the court and ensure the proper administration of justice, and the sole [TRANSLATION] "client" of the *amicus* is the court or the judge that appointed him or her. As Justice Fish (speaking on behalf of the dissenting judges) pointed out in *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (at paragraph 87), "[o]nce appointed, the amicus is bound by a duty of loyalty and integrity to the court and not to any of the parties to the proceedings".
>
> It cannot be otherwise if the *amicus* is to be able to fully carry out the role assigned to him or her. Indeed, it is not inconceivable that he or she may be required to raise arguments or points of law that are not necessarily favourable to the accused or the respondent. Indeed, that is the reason that the Supreme Court unanimously concluded in *Criminal Lawyers' Association* that a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court (see paragraphs 56 for the majority and 114 for the minority). Although the Court was divided on the issue of whether a superior court has the inherent power to set rates of remuneration for *amici*, all the judges considered that the role of an *amicus* and that of defence counsel are incompatible. I find that the same is true in a civil proceeding, although the dividing line may not always be so clear cut and the consequences of the blurring of lines may not be as dramatic.
>
> In short, playing a role that may sometimes be opposite to that of the Attorney General does not make the *amicus* a defence counsel or counsel for the civil party. The objective of the *amicus* and the state of mind in which he or she acts is not to assume the role of an advocate for the accused or the respondent, but to provide the Court with insight that it would not otherwise obtain and to assist it in making a decision that is in the best interests of justice. The fact that these interests may converge in certain circumstances does not change anything and merely represents, in a manner of speaking, a marginal benefit resulting from the appointment of *amicus*. He or she must therefore act at all times with transparency, without ever attempting to take counsel for the Attorney General by surprise. The tactics and strategies that defence counsel, and even, in certain circumstances, a special advocate, may properly use are misplaced in a proceeding under section 38 of the *CEA*.
>
> That said, the role of the *amicus* in such a proceeding may be modulated by the judge who appoints him or her to take into account the unique nature of an application under section 38 of the *CEA*. The very nature of the information to which the *amicus* will have access, the seriousness of the issues raised by the balancing of national security and the fairness of the proceedings, and the degree of transparency with which the Attorney General as well as the witnesses called in support of the application discharge their duties, are factors that may lead an *amicus* to play a more or less interventionist role depending on the circumstances.

[169] That being said, it would be remiss of me if I did not mention the jurisprudence emanating from Ontario following *Criminal Lawyers' Association of Ontario*, which demonstrates that where an expanded role for the *amicus curiae* is justified due to a real risk of a miscarriage of justice, the gap between representing a party before the Court as defence counsel and representing their interests may appear paper-thin. See *R. v. Jaser*, 2014 ONSC 2277 (*Jaser*), at paragraphs 35–42 and *R. v. Imona-Russel*, 2019 ONCA 252, 145 O.R. (3d) 197 (*Imona-Russel*), at paragraphs 85–94. In these decisions, the courts discussed situations where the self-represented accused are incompetent and the appointment of an *amicus curiae* is necessary to avoid a potential miscarriage of justice. Interpreting *Criminal Lawyers' Association of Ontario*, these courts respectively found that an *amicus curiae* could be assigned a mandate to "'act for the accused'" (*Jaser*, at paragraph 39) and to discuss legal issues and speak to the court "on behalf of the accused" without taking "on the role of defence counsel" (*Imona-Russel*, at paragraph 88), as warned by the majority in *Criminal Lawyers' Association of Ontario*, at paragraphs 49–56. This last restriction may be a difficult to apply in reality.

[170] This interpretation of *Criminal Lawyers' Association of Ontario* does not appear to be in line with the interpretation of the Supreme Court of Canada's decision in the jurisprudence by which I am bound, notably *Telbani*, at paragraphs 27–30 and *Huang*, at paragraph 36, which draw a line between representing interests and acting on behalf of a party. Although Justice Mosley, at one point, uses similar language to *Jaser* in his 2008 *Khadr* decision (paragraph 32), this was before the Supreme Court of Canada's decision in *Criminal Lawyers' Association of Ontario* and before *Telbani* and *Huang*. As such, for the time being, it is my belief that my inherent powers to appoint an *amicus curiae* and craft their mandate according to the circumstances do not permit me to assign the *amici curiae* a mandate that would have them act "on behalf" of the appellants. However, my inherent powers do permit me to assign them a mandate to "represent the interests" of the appellants. Having said that, the time may come where unforeseen important facts discovered in closed proceedings may justify the appointment of an *amicus curiae* with a more representative role in the *ex parte* and *in camera* proceedings. For the time being, this is not the case in these appeals.

[171] Some may say that assigning a mandate to "represent the interests" of an appellant before the Court in *ex parte* and *in camera* portions of an appeal falls beyond this inherent limit on the role of the *amicus curiae*. It may be argued that acting "on behalf" of an individual and "representing the interests" of an individual are one and the same and that the difference is largely semantic. Although these mandates may manifest themselves similarly in certain circumstances, the differences are the state of mind in which the *amicus curiae* acts and the tactics and strategies that are appropriate when acting "on behalf" of an individual as compared to presenting interests to assist the Court where they are unrepresented (*Telbani*, at paragraph 30). It is my belief that "representing the interests" of an appellant during the *ex parte* and *in camera* portions of an appeal is still compatible with the inherent limits on the role of the *amicus curiae* as this is consistent with what is said in *Telbani*, at paragraph 27 and consistent with the

role often assigned by the Supreme Court of Canada to *amici curiae* pursuant to subsection 53(7) of the *Supreme Court Act* (*Criminal Lawyers' Association of Ontario*, at paragraph 45 and footnote 4).

(3) Differences Between Role of the Special Advocate and the *Amicus Curiae*

[172] Consistent with what is noted in *Telbani*, the principal difference between the *amicus curiae* and the special advocate in the context of national security largely rests in the source of their legal roles, responsibilities, and powers. Whereas the *amicus curiae*'s role derives from a recognized common law discretionary power afforded to judges, special advocates are creatures of statute whose existence and role entirely depend on Parliament.

[173] This difference in their legal sources accounts for the difference in their fundamental roles and responsibilities in a particular proceeding as well as the powers they possess.

[174] Indeed, the special advocate is assigned a specific role under the IRPA: to "protect" the interests of the named person (subsection 85.1(1)). Meanwhile, the *amicus curiae*'s role is to serve the Court and to assist it in discharging its duties. That being said, in the context of national security, a judge often assigns an *amicus curiae* the role of representing the interests of a party that is not before the Court in order to assist the Court in discharging its duties to ensure a fair process while maintaining the secrecy of sensitive information and evidence not disclosed to a party. Similarly, the IRPA assigns the special advocate the role of protecting the interests of the named person with regard to confidential information and evidence not disclosed. This is consistent with the Supreme Court of Canada's decision in *Charkaoui I*, which found that the fairness of a proceeding cannot rest entirely on the shoulders of a designated judge's interventionist mandate (paragraph 65) and that an independent counsel could help designated judges uphold their duty to ensure a fair process (paragraphs 70–84).

[175] However, although the *amicus curiae* is often assigned the role of representing the interests of a party before the Court, their mandate is entirely dependent on the judge who appoints them. In contrast, the role, responsibilities, and powers of the special advocate are fixed and explicitly provided for in the IRPA, thus giving a judge very little discretion to shape their mandate but for a provision that allows the judge to grant additional powers: see paragraph 85.2(c) of the IRPA. What is more, the appointment of an *amicus curiae* is discretionary while the special advocate is mandatory. This certainty from one case to the next is often touted as an important advantage of the special advocate's system, as compared to the *amicus curiae*.

[176] Meanwhile, in appointing an *amicus curiae*, a judge retains the flexibility to craft an *amicus curiae*'s mandate according to the circumstances in order to balance the duty to ensure a fair process with concerns of judicial efficacy and limiting delay, the latter often a statutory duty in the context of national security (see subsection 16(4) of the SATA and paragraph 83(1)(a) of the IRPA). Indeed, delay has been an ongoing concern for this Court with regard to special advocates: see *Harkat (Re)*, 2009 FC 340, 339 F.T.R. 129, at paragraphs 19–23 where this Court refused the special advocates' request for the additional disclosure of "thousands of documents" because such "an order would be akin to a fishing expedition and would unacceptably delay [the] proceeding" (paragraph 21). See also this Court's comments regarding public costs and delay in *Harkat (Re)*, 2010 FC 1241, [2012] 3 F.C.R. 251, at paragraphs 37–38. The special advocate's role, responsibilities and powers are fixed and there is little flexibility to adjust them according to the circumstances. Moreover, the naming of a special advocate is limited to a list of approved lawyers established by the Minister of Justice, which has dwindled over the years to 11 lawyers mostly based in Toronto or Ottawa. In comparison, the Court, having the discretionary flexibility to do so, has developed and updated over the years a list of security-cleared *amici curiae* to assist it in designated proceedings with an emphasis on diverse, regional, and linguistic representation.

[177] Assisted by the foregoing jurisprudential and legislative background, we can move to the issue at the foreground of this appeal: the role and powers of the *amici curiae*.

(4) Appointment, Role, and Powers of the *Amici Curiae*

[178] With a thorough understanding of my role as a designated judge under the SATA to ensure a fair judicial process that also protects Canada's national security interests, the Supreme Court of Canada's statements concerning third-party counsel in *ex parte* and *in camera* proceedings, and the law applicable to *amici curiae* and how they compare to special advocates under the IRPA, I shall now turn to the role of the *amici curiae* in these appeals under the SATA. I felt that the foregoing points of law needed to first be established before pursuing this analysis as they were of top-of-mind when I appointed the *amici curiae* on October 7, 2019.

[179] In this section I will start by (1) analysing the Court's jurisdiction to appoint the *amici curiae* in these appeals under the SATA; I will then (2) canvass their role in these appeals; and finally I will (3) set out their powers to fulfill this role, which will include an analysis as to whether the *amici curiae* can cross-examine the respondent's witnesses on the merits of the decision under appeal.

(i) Appointment of the *Amici Curiae*

[180] Although no party has yet opposed the October 7, 2019, appointment of the *amici curiae* in these appeals, I find it necessary to briefly analyze my ability to appoint the *amici curiae* seeing as these are the first appeals under the SATA.

[181] As stated in detail above, my ability to appoint an *amicus curiae* is an inherent power grounded in the Court's "authority to control its own process and function as a court of law" (*Criminal Lawyers' Association of Ontario*, at paragraph 46). It is nonetheless limited to "specific and exceptional circumstances" where their assistance is essential to a judge's ability to discharge their judicial functions in the case before them (*Criminal Lawyers' Association of Ontario*, at paragraph 47). In the context of national security, their appointment has become the practice of this Court where no third-party counsel in *ex parte* and *in camera* proceedings is provided for by law and where limits on disclosure and participation have been imposed by the legislative scheme in the interest of national security. Fairness calls for such appointments, loud and clear. Without such appointments, the judicial process would be fundamentally flawed.

[182] With regard to the SATA, it is evident that the appointment of the *amici curiae* is consistent with the statutory duties imposed on the designated judge by the SATA as well as consistent with its object and Parliament's intent.

[183] Indeed, the appointment of an *amicus curiae* under the SATA is consistent with the implied intention of the statutory duties assigned to a designated judge in section 16 of the SATA.

[184] The SATA requires that a judge hear information or other evidence provided by the Minister in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person. See paragraph 16(6)(a). Similarly, the SATA assigns the judge the responsibility of ensuring the confidentiality of this information or evidence. See paragraph 16(6)(b). Yet, the SATA also tasks the judge with ensuring that the appellant and the Minister are both provided with an opportunity to be heard. See paragraph 16(6)(d).

[185] Seeing as the SATA assigns these seemingly conflicting duties to the designated judge, the appointment of an *amicus curiae* is not only consistent with these statutory duties but may be the only way to simultaneously give them effect. This is particularly so given that the designated judge is required to hold *ex parte* and *in camera* hearings and is required to maintain the confidentiality of certain information or evidence to the exclusion of the appellant while also obligated to provide the appellant with an opportunity to be heard. While the *amicus curiae* cannot fully replicate the involvement

of the appellant and their counsel in the *ex parte* and *in camera* proceedings, an *amicus curiae* with a robust mandate gives as much effect as possible under the current statutory scheme to an appellant's right to be heard during *ex parte* and *in camera* hearings while still ensuring the confidentiality of the information.

[186] Moreover, given the role assigned to the designated judge in appeals under the SATA, and the absence of the appellant and their counsel during *ex parte* and *in camera* hearings on the confidential information or evidence, the appointment of an *amicus curiae* is implicitly required to allow the judge to fulfill their duties. For instance, the SATA provides the designated judge at paragraph 16(6)(e) with the power to receive anything into evidence that is reliable and appropriate ("*digne de foi*"), even if it is inadmissible in a court of law as well as the power to base their decision on that information. Similarly, paragraph 16(6)(f) provides that a judge may base their decision on information or evidence regardless of whether it was provided to the appellant or whether a summary of that information was provided.

[187] Therefore, given these powers assigned to the designated judge, an *amicus curiae* is implicitly required to assist the Court in testing the reliability and appropriateness of certain information or evidence not disclosed to the appellant during the *ex parte* and *in camera* portions of the appeal, and to assist the Court in weighing this information or evidence. This is necessary because such evidence or information cannot be summarized to the appellant and would be inadmissible in a court of law. This task requires the *amici curiae* to help not only test the grounds for non-disclosure but also the reliability and appropriateness of the evidence, which goes to the reasonableness of the Minister's decision. It also requires the *amici curiae* to help test the reliability and appropriateness of new confidential information submitted to this Court as well as the impacts of withdrawn information.

[188] To summarize, when read together holistically, the duties and powers assigned to the designated judge in appeals under the SATA are not only consistent with the appointment of an *amicus curiae*, but in many cases require the appointment of an *amicus curiae* in order to give simultaneous effect to the responsibilities assigned to the designated judge as well as to allow the Court to fully meet its assigned adjudicative statutory duties.

[189] Moreover, the appointment of an *amicus curiae* in an appeal under the SATA is not only consistent with a harmonious reading of the statutory procedures for appeals under subsection 16(6) of the SATA, but is also consistent with its object as well as Parliament's intent.

[190] As seen above, the object of the SATA can be summarized as a legislative scheme seeking to ensure a careful balance between the rights and freedoms of individuals while protecting Canada's national security interests and the safety of Canadians relating to air travel.

[191] The appointment of an *amicus curiae* in the context of appeals under the SATA is consistent with this legislative object. The appointment of an *amicus curiae* with a robust mandate provides a certain level of procedural fairness to an appellant in *ex parte* and *in camera* proceedings when their rights and freedoms are at risk. Yet, it still ensures the respect of the confidential nature of information and evidence that would be injurious to national security or endanger the safety of any person if disclosed.

[192] This intent to balance individual rights and freedoms with Canada's national security interests and the protection of Canadians via the possibility of appointing an *amicus curiae* is also clearly expressed in legislative debates pertaining to the SATA.

[193] Notably, this is illustrated in the following exchange between Senator Marilou McPhedran, the Honourable Ralph Goodale (then Minister of Public Safety and Emergency Preparedness), Doug Breithaupt (Director and General Counsel, Criminal Law Policy Section), and Malcolm Brown (then Deputy Minister of Public Safety) on April 10, 2019, before the Senate Standing Committee on National Security and Defence:

> **Senator McPhedran:** Minister, thank you for the courtesy of agreeing to stay a bit longer to answer the question.
>
> My question goes to Part 6 of this bill and to the balancing of security and rights. As we know, we have recourse provisions in the Secure Air Travel Act, a reference in Part 6, and the restrictions to the information that an applicant may be able to receive on the reasons for their listing on the no-fly list. As some of that information can be deemed sensitive and secret, that's absolutely acceptable. Section 16 of the Secure Air Travel Act requires that the presiding judge hear information or evidence without the individual present, with the summary provided to the individual, excluding information that was deemed injurious to national safety or might endanger the safety of any person if disclosed.
>
> Minister, given that we already have a system in the Immigration and Refugee Protection Act that allows for a mediated approach with security-cleared lawyers accessing secret information as special advocates that work in the security certificate regime, why not bring a proven system over to the Secure Air Travel Act as covered in this bill?
>
> **Mr. Goodale:** Senator McPhedran, I will double-check this to make sure that I'm correct. It's my understanding that if a judge in those circumstances feels that the help of some kind of amicus would be appropriate, the judge can require that. I believe that is in existing law.
>
> It would really fall to the presiding justice to determine whether or not the assistance of a special advocate or some other friend of the court would be necessary in order to ensure that the proceeding was, in fact, fair to those who are before the judge.

Senator McPhedran: That's a huge area of discretion. If the existing security certificate with the special advocates was in place, then individuals that are being reviewed and monitored would consistently receive representation as opposed to the potential for inconsistent application in this area of discretion for the judge.

Mr. Goodale: I hear your point, but I would make the counterpoint that in courts of law all across the country, judges are called upon to make judgment calls of that nature almost every day.

Senator McPhedran: But not with so much secrecy.

Mr. Goodale: Do you want to comment on this, Mr. Breithaupt?

Mr. Breithaupt: Just to confirm that the Federal Court has the ability to appoint an amicus curiae or friend of the court to assist in such proceedings if the Federal Court judge considered that such an appointment is warranted. That's the kind of decisions that they make.

Senator McPhedran: My concern is with the "if." That's what I'm highlighting here.

Mr. Goodale: I hear your point, senator.

Mr. Brown: I would add the role of special advocates in the security certificate process is really very unique to a very rarely used process. The more traditional process to address the concerns you raise is the amicus. I think the legal view is — and I'm turning to Doug on this as well — that there are well-established precedent in terms of using amicus to protect the very interest you're concerned about, without having to go to the much more elaborate and complicated process of the special advocates which are linked to the security certificates.

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on National Security and Defence*, 42nd Parl., 1st Sess., Issue No. 40 (10 April 2019).

[194] Therefore, it can be said that the legislative intent of Parliament does not only permit a designated judge to appoint an *amicus curiae* during the appeal process under the SATA, but the legislative debates are demonstrative of a clear intent on Parliament's part to rely on the discretion of a designated judge to appoint an *amicus curiae* to ensure the overarching legislative object of balancing national security and the safety of Canadians with individual rights and freedoms. In other words, it appears that Parliament's intent was to set out a broad appeal procedure in the SATA to permit designated judges the discretion to ensure that procedural fairness is afforded to the appellant, and to decide whether this requires the appointment of an *amicus curiae* with a mandate that is responsive to the circumstances.

(ii) Role of the *Amici Curiae*

[195] Consistent with the general jurisprudence regarding the role of an *amicus curiae*, the *amici curiae*'s role in these appeals under the SATA is to assist the Court in fulfilling

its duties: the review of the reasonableness of the Minister's decision in a manner that ensures the appellants are afforded a fair judicial process within the limits on disclosure and participation that have been imposed by the SATA in the interest of national security. Given these limits on full disclosure and full participation and the alleged Charter rights at play, my role as a designated judge requires me to assign the *amici curiae* a robust mandate in order to ensure the fairest judicial process possible within my statutory and inherent powers.

[196] The role assigned to the *amici curiae* in my order dated October 7, 2019, can be summarized as representing the interests of the appellants before the Court during the *ex parte* and *in camera* portions of the appeals, where the participation of the appellants and their counsel is prohibited by the SATA. This role is essential in assisting the Court in fulfilling its duty to ensure a fair judicial process that provides a substantial substitute to the appellants' right to know and meet the case against them and its duty to decide upon the reasonableness of the Minister's decisions to keep the appellants on the SATA list, based on the facts and the law. Therefore, in accordance with the two principal duties of the designated judge, the *amici curiae*'s roles in representing the interests of the appellants before the Court during the *ex parte* and *in camera* portions of the appeal can be understood in a similar way. This is evidenced in the following passages of the order appointing the *amici curiae*:

> **AND UPON** noting the alleged violations of the *Canadian Charter of Rights and Freedoms* [*Charter*]; noting that the Appellants' right to know and meet the case, including the right to make adequate representation in the closed hearing, are principles of fundamental justice pursuant to section 7 of the *Charter*; and noting that there must be an adequate substantial substitute for the persons concerned in the secret proceedings: *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 27; *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43;
>
> **AND UPON** noting that the appointment of *amici* in such a situation will assist the Court in forming its opinion during the hearing of information or other evidence presented by the Respondent in the absence of the Appellants and the public and in determining whether its disclosure would be injurious to national security or endanger the safety of any person;

[197] This was noted in the order with the understanding that these appeals were, in practice, the appellants' first opportunity to be heard, which is an integral part to the *audi alteram partem* rule (*Telecommunications Workers Union*, at paragraph 29).

[198] First, in accordance with the *amici curiae*'s role to help the Court in ensuring a fair judicial process, notably one that attempts to give the most effect possible to the appellants' right to know and meet the case against them within the limits of the SATA, the *amici curiae* are tasked with representing the interests of the appellants with regard to issues of disclosure of information or evidence under the SATA.

[199] Paragraph 16(6)(b) of the SATA requires that the designated judge ensure the confidentiality of information or other evidence that, in their opinion, “would” be injurious to national security or endanger the safety of any person if disclosed. In deciding whether all or part of the information or other evidence originally redacted by the respondent fits the criteria at paragraph 16(6)(b) or whether it must be disclosed to the appellants, paragraph 16(6)(a) of the SATA requires that, on request of the Minister, all information or other evidence that “could” be injurious to national security or endanger the safety of any person must be heard *ex parte* and *in camera*. This essentially puts the judge in a position where they are forced to decide on the merits of the respondent’s confidentiality claims without the benefit of hearing from the appellants as to why this information should be disclosed. Once the merits of the confidentiality claims are decided, and the confidential information or other evidence is identified, the designated judge faces a similar dilemma as they are tasked with ensuring that the appellants are provided with a summary of the confidential information or other evidence without having the benefit of the appellants’ perspective.

[200] Despite the assumption of an active and interventionist role by the designated judge, the *ex parte* and *in camera* advantage afforded to the respondent places the designated judge in a position where they are exposed to potential systematic overclaiming of confidentiality identified by the Supreme Court of Canada in *Harkat (2014)*, at paragraph 63, given that the interests of the appellants are not heard during this portion of the appeal. The appointment of the *amici curiae* attempts to address this vulnerability, as their role is to assist the Court by representing the interests of the appellants during the disclosure portion of the appeal, thereby allowing the designated judge to fully scrutinize the merits of the confidentiality claims made by the respondent. Should the designated judge ultimately decide that certain information must remain confidential pursuant to paragraph 16(6)(b), the role of the *amici curiae* is to then help the designated judge summarize this information in a manner that provides the appellants with as much information as possible within the confidentiality limits of the SATA.

[201] In assuming this role with regard to disclosure, the *amici curiae* may provide an opposite perspective than that of the respondent to ensure that the principle of full disclosure is given as much effect as possible in the circumstances in order to provide the appellants with the maximum amount of information possible to know and meet the case against them (*Harkat (2014)*, paragraphs 51–63 and 110). For the benefit of the Court, this requires the *amici curiae* to be given a robust mandate to counter the respondent’s *ex parte* and *in camera* advantage; the powers this entails will be discussed in the following section.

[202] Second, should the circumstances require that some information or other evidence remain confidential pursuant to the limits of the SATA, the role of the *amici curiae* is to represent the interests of the appellants with regard to the impact of this

information or other evidence on the reasonableness of the Minister's decision to keep the appellants on the SATA list. The purpose of this role is to help the designated judge make their decision based on the facts and the law and to help the judge ensure that the appellants are provided a substantial substitute to full disclosure and full participation given the confidentiality limits imposed by the SATA. This role is equally pertinent when the respondent decides to file additional confidential information or to withdraw certain confidential information that was before the Minister. The *amici curiae* are called upon to assume a substantial role.

[203] As the appellants will be able to make their case as to why the Minister's decision was unreasonable based on the information and evidence disclosed to them, and the summaries provided concerning the confidential information, their argument is limited given their inability to make full submissions that account for the confidential information and the respondent's submissions during the *ex parte* and *in camera* hearings on the merits of the Minister's decision. The role of the *amici curiae* is to understand the appellants' position and to represent their interests to the Court with regard to this confidential information and evidence in order to avoid a gap in the appeal where the interests of the appellants are not being presented to the Court. In other words, the *amici curiae* are tasked with arguing the unreasonableness of the Minister's decision under appeal, in a manner that is complementary to the appellants' position on the public evidence, based on the confidential information and evidence, during the *ex parte* and *in camera* portions of the appeal. This is essential in permitting the designated judge to ground their decision on the facts and the law.

[204] Overall, the roles assigned to the *amici curiae*, and the powers assigned to them below, do go beyond the roles assigned to the *amici curiae* in *Telbani* and share many similarities with the role of a special advocate. This is due to the difference in circumstances and notably the absence of a considerable discretionary power to disclose information or other evidence if, in the judge's opinion, the public interest in disclosure outweighs the public interest in non-disclosure. See subsection 38.06(2) of the *Canada Evidence Act* as well as the discussion on this discretionary power as a less intrusive alternative in *Charkaoui I*, at paragraph 77. This more interventionist role in light of the difference in circumstances is consistent with paragraph 31 of *Telbani*:

> That said, the role of the *amicus* in such a proceeding may be modulated by the judge who appoints him or her to take into account the unique nature of an application under section 38 of the *CEA*. The very nature of the information to which the *amicus* will have access, the seriousness of the issues raised by the balancing of national security and the fairness of the proceedings, and the degree of transparency with which the Attorney General as well as the witnesses called in support of the application discharge their duties, are factors that may lead an *amicus* to play a more or less interventionist role depending on the circumstances.

[205] This discretion afforded to the designated judge is once again confirmed by Justice de Montigny in *Huang,* at paragraph 36, this time in his position at the Federal

Court of Appeal, where it is noted that “it is for the court appointing an *amicus* to determine precisely the role and attributions it intends to confer on the *amicus*.”

[206] In other words, *Telbani* and *Huang* teach us that an *amicus curiae* is not analogous to a special advocate but can fulfill a similar function as a substantial substitute if an appointing judge deems that the circumstances require an *amicus curiae* with a robust interventionist mandate to represent the interests of an excluded party and to play a role opposite to the respondent in *ex parte* and *in camera* proceedings.

[207] In addition to the comments made, it must be noted that an application pursuant to section 38 of the *Canada Evidence Act* only deals with disclosure issues while the designated judge in SATA appeals must also determine the reasonableness of the decision under appeal. This difference also accounts for any differences in the *amici curiae*’s mandates.

[208] Moreover, there are many cases where designated judges have found that the circumstances merited the appointment of an a*micus curiae* with a robust role to represent the interests of an excluded party. For instance, keeping in mind the comments above regarding the ability to appoint an *amicus curiae* to act “on behalf” of a party, it is nevertheless worth noting Justice Mosley’s statements at paragraphs 31–32 in *Khadr*:

> Counsel have drawn my attention to a number of cases in which *amici* have been appointed by the courts in diverse circumstances. In *LePage v. Ontario* (2006), 214 C.C.C. (3d) 105, the Ontario Court of Appeal considered the authority of the mental health board to appoint an *amicus* to present submissions on behalf of a person found not criminally responsible by reason of mental disorder. In describing the role of the *amicus* for a unanimous panel, Juriansz J.A. stated the following at paragraph 29:
>
> > I would not adopt an unduly technical approach to the question. Certainly, *amicus curiae* appointed by the court have no solicitor-client relationship with the accused and may be described as counsel to the court. However, the role of *amicus curiae* is not strictly defined and continues to evolve. One of the roles of *amicus curiae* has been recognized as being an assistant to the court when “there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court)”.... In my view *amicus curiae* may be appointed by the Board and assigned the role of presenting the issues favouring the accused which otherwise might not be raised. I am satisfied that an *amicus curiae* who is assigned this role may be said to “act for the accused”. [Authority cited omitted.]
>
> Similarly, I am of the view that in the context of a section 38 application related to a criminal proceeding, such as in the present case, an *amicus* appointed by the Court may present the issues favouring the person seeking disclosure of the information during the *ex parte* portion of the proceedings and may be said in that respect to act for the individual at that stage. But the *amicus* has no solicitor-client relationship with the individual and his or her role will be to assist the Court in arriving at a just determination of the issues.

[209] Indeed, given the important Charter rights at play in the underlying criminal proceedings, the Court in *Khadr* found it necessary to appoint an *amicus curiae* with a robust role and interventionist powers.

[210] Moreover, in *Section 18.1 CSIS Act (Re)*, in the context of a privilege claim under section18.1 of the CSIS Act, Boivin J.A. of the Federal Court of Appeal found [at paragraph 44] that:

> The appropriate course of action in such a case is, in my view, to appoint an *amicus curiae* or a special advocate for the purpose of providing a different perspective than that of the Attorney General on the issue of section 18.1 privilege claims.

[211] In describing the appropriate role and powers a designated judge must assign an *amicus curiae* in this context, the Federal Court of Appeal laid out a mandate that is very similar to the special advocate's. Indeed, the Federal Court of Appeal stated that an *amicus curiae* is necessary to present "a different perspective than that of the government" (*Section 18.1 CSIS Act (Re)*, at paragraph 53) during *ex parte* and *in camera* proceedings, to test the privilege claims of the government, and to keep "the designated judge in a more adjudicative role, rather than inquisitorial role" (*Section 18.1 CSIS Act (Re)*, at paragraph 57). The Federal Court of Appeal reasoned that assigning such a role would, as much as possible, help give effect to the "underlying party's right to full and fair disclosure" (*Section 18.1 CSIS Act (Re)*, at paragraph 54) and stated that it helps designated judges fulfill their role as "'gatekeeper[s]'" (*Section 18.1 CSIS Act (Re)*, at paragraph 47).

[212] Similarly, this Court also appointed an *amicus curiae* and assigned a more interventionist adversarial role in line with that of a special advocate in *CSIS Act (Re) (2008)*, at paragraph 3; the Honourable Ron Atkey was tasked with presenting "the opposite point of view presented by the CSIS to support the application for warrants."

[213] That being said, although it is clear that the overall roles assigned to the *amici curiae* in my order dated October 7, 2019, are more interventionist and have many similarities to the role of a special advocate under the IRPA, notably due to the many similarities between both legislative schemes, as analyzed above, the inherent limits of the *amicus curiae*'s role, as stated in *Telbani*, at paragraphs 27–32 and *Huang*, at paragraphs 35–37, still apply. The role of the *amici curiae* assigned in the order dated October 7, 2019, must not be read as analogous to a special advocate—the *amici curiae* remain friends of the Court and have no solicitor-client relationship privilege with the appellants, except for the extension of the appellants' solicitor-client privilege with their counsel to communications between the *amici curiae* and the appellants and their counsel to foster meaningful and open communication. As such, I must reject the interpretation of the role of the *amici curiae* presented by Mr. Dulai's counsel as one that tasks the *amici curiae* with protecting the interests of the appellants and assuming the

functions of the appellants' counsel during the *ex parte* and *in camera* proceedings. In the circumstances, the distance separating the friend of the court and the special advocate is not nearly as wide as in other circumstances; however, there is a line and it is important that it be defined.

[214] The gap between representing the interests of an individual and protecting the interests of an individual, the latter being the role assigned to special advocates by subsection 85.1(1) of the IRPA, may account for several nuances. For instance, as *amici curiae* are appointed to assist the Court, there may be circumstances where their mandates to represent the interests of a party excluded from the proceedings and their duties of loyalty to the Court conflict; for example, a situation where raising a certain point of law would greatly assist the Court in fulfilling its duties but would not necessarily be favourable to the party whose interests are being represented by the *amicus curiae*. This is contemplated in *Telbani*, at paragraph 29. In sum, although representing the interests of the appellants before this Court during the *ex parte* and *in camera* portions of the appeal is the way in which the *amici curiae* assist the designated judge in fulfilling their duties to ensure a fair judicial process in the circumstances and to decide the reasonableness of the Minister's decision, the *amici curiae* must exercise this role in accordance with their inherent role of assisting the Court; their duty is always to the Court and not the appellants. This is not the case for counsel to the appellants or a special advocate, subject of course, to their duties as officers of the Court. Whether this inherent limit in the role of the *amici curiae* prevents the Court in providing the appellants with an adequate substantial substitute is a question that will be decided when the Court considers the alleged Charter rights violations by the appellants.

(iii) The Mandate of the *Amici Curiae*

[215] As stated above, the *amici curiae* must assume a robust interventionist mandate to represent the interests of the appellants in the *ex parte* and *in camera* portions of the appeals given the important limits on full disclosure and full participation imposed by the SATA and the alleged violations of Charter rights. This is required in order to assist the Court in fulfilling its duty to ensure a fair judicial process and its duty to review the reasonableness of the Minister's decision. As such, my order dated October 7, 2019, assigned the following powers to the *amici curiae*: (a) to meet and communicate with the appellants; (b) to access the confidential information or other evidence; (c) to assist in the preparation of summaries of information; (d) to make oral and written submissions and attend hearings; and (e) to examine the witnesses. I will proceed to specify the breadth of each of these powers, their limits, and why they are essential in assisting this Court in fulfilling its duties.

[216] As the order so specifies, it may be varied at the request of the parties or the *amici curiae*. At the time this order was issued, the Court had not read any of the information subject to the respondent's confidentiality claims in order to ensure it would

not be influenced by these claims. Eight months have now passed. Therefore, with the participation of all parties and the *amici curiae*, there may be valid reasons to review this order. As we have seen above, an *amicus curiae*'s mandate is contextual. As things change throughout a proceeding, an *amicus curiae*'s mandate must be adapted as well, of course, always in a manner that limits any prejudice or injury to the parties.

a. Meet and Communicate with the Appellants

[217] In my order appointing the *amici curiae*, I ordered the following regarding the *amici curiae*'s power to meet and communicate with the appellants and/or their counsel:

> 3. In a timely manner, and until such time as the *amici* have had access to the confidential information and documents in this application, one of the *amici* (or two if deemed necessary) may meet or communicate with counsel for the Appellants for the purpose of understanding matters of interest to the Appellants in relation to the information and documents to be reviewed, including communicating with the Appellants themselves, in the presence of their counsel, if counsel for the Appellants and the *amici* believe it to be necessary and the Appellants agree;
>
> 4. The Appellants and their counsel may transmit to the *amici* a list of relevant questions or submissions the Appellants would like the *amici* to raise and submit to the Court during the portion of the proceeding of these appeals which will be held in the absence of the public and of the Appellants and their counsel;
>
> …
>
> 6. Once the *amici* have accessed to the confidential information in this application, the *amici* shall not have any communication with the Appellants or their counsel without prior leave of the Court;
>
> 7. For clarity, paragraph 6 of this Order does not prohibit counsel for the Appellants from sending one-way communications to the amicus at any time during the proceeding, the receipt of which the *amici* may acknowledge;
>
> 8. Any communication between the Appellants and their counsel, which is protected by solicitor/client or litigation privilege, will not lose that privilege if it is shared with the *amici*;
>
> …
>
> 12.The Respondent will pay reasonable fees and disbursements, including travelling expenses of each amicus if required and the *amici* will do their utmost to ensure that they shall be reasonable;

[218] Ensuring that the *amici curiae* have the power to meaningfully communicate with the appellants and their counsel is essential to their role in representing the appellants' interests to the Court during the *ex parte* and *in camera* portions of the appeals (*Harkat (2014)*, at paragraph 70). It is also a key component in assisting the Court in its attempt to ensure the fairness of the judicial process. The *amici curiae* cannot assist the Court in representing the interests of the appellants during the *ex parte* and *in camera* portions

of the appeals if they do not possess a thorough understanding of the appellants' concerns, positions, and interests. It is therefore essential that the Court sculpt a mandate that permits such a free-flowing exchange between the appellants, their counsel, and the *amici curiae*. As such, this is why preserving solicitor/client or litigation privilege in communications with the *amici curiae*, authorizing travel for in-person meetings, and ensuring sufficient time for in-depth communication are key elements in the *amici curiae*'s mandate; they provide the *amici curiae* with the tools to assume the robust and interventionist representation of the appellants' interests required to assist the Court in making a knowledgeable determination of the reasonableness of the Minister's decision via a fair judicial process. However, it is important to note that the assigned communication powers do not create or extend solicitor-client privilege to the *amici curiae*, they simply ensure that the *amici curiae* keep confidential any information obtained from the appellants and their counsel that is subject to the solicitor-client privilege between the appellants and their counsel—sharing their perspective with the *amici curiae* so that they may assist the Court must not put at risk the appellants' privilege.

[219] Still, as the SATA imposes limits on full disclosure and a duty on the designated judge to ensure the confidentiality of the information or other evidence that would be injurious to national security or endanger the safety of any person if disclosed, certain limits must be imposed on the communication between the *amici curiae* and the appellants to minimize serious risk of disclosure. These limits are inevitable. As such, this order limits the *amici curiae*'s ability to communicate with the appellants and their counsel after they have been given access to the confidential information or evidence in these appeals (*Harkat (2014)*, at paragraphs 67–72).

[220] However, given the importance of meaningful communication between the appellants and the *amici curiae*, a designated judge must seek to secure the confidential information or other evidence in the least intrusive manner possible. As such, this is why this order makes clear that these limits in no way restrict the appellants and their counsel from sending one-way communication to the *amici curiae* once the latter has been given access to the confidential information—this includes "a list of relevant questions or submissions the Appellants would like the amici to raise and submit to the Court" during the *ex parte* and *in camera* portions of the appeals. This is key in keeping the *amici curiae* abreast of the appellants' interests as they evolve throughout the appeals and according to the summaries being issued.

[221] Moreover, in keeping with this attempt to secure the confidential information or other evidence in the least intrusive manner possible, preserving the designated judge's discretion to permit future two-way communication between the appellants and their counsel with the *amici curiae* following their access to the confidential information or other evidence is essential as is exercising this discretion in a cautious but liberal manner. Rigid limits on two-way communication must not be preferred over the exercise

of thoughtful discretion, notably when one party is not provided with full disclosure and full participation. This is why this discretion is preserved in this order and why I have already authorized further two-way communication between the appellants and their counsel and the *amici curiae*, after the latter were given access to the confidential information and evidence, when the respondent lifted further redactions.

[222] Finally, the importance of these less intrusive means to protect confidential information or other evidence in communications between the appellants and their counsel and the *amici curiae* is supported by *Harkat (2014)*, at paragraphs 68–71 when discussing similar provisions in the IRPA:

> The communications restrictions imposed on special advocates are significant, requiring judicial authorization for *any* communication regarding the proceedings between the special advocates and the named person or a third party, after the special advocates have received confidential materials. However, they do not render the scheme unconstitutional. I come to this conclusion for three reasons.
>
> First, the restrictions on communications by the special advocates are not absolute. They can be lifted with judicial authorization, subject to conditions deemed appropriate by the designated judge: s. 85.4(2), *IRPA*. While this process is less fluid and efficient than the unfettered communications that prevail between a lawyer and his client, it should be remembered that s. 7 of the *Charter* does not guarantee a perfect process. The judicial authorization process gives the designated judge a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties.
>
> The broad discretion conferred by the *IRPA* scheme averts unfairness that might otherwise result from the communications restrictions. The designated judge can ensure that the special advocates function as closely as possible to ordinary counsel in a public hearing. The restrictions on communications are designed to avert *serious* risks of disclosure of information or evidence whose disclosure would be injurious to national security or to the safety of any person. While the *IRPA* scheme requires the judge to minimize risks of inadvertent disclosure of information, the judge must also give special advocates significant latitude. The special advocates are competent and security-cleared lawyers, who take their professional and statutory obligations seriously. They have the ability to distinguish between the public and confidential aspects of their case. The judge should take a liberal approach in authorizing communications and only refuse authorization where the Minister has demonstrated, on a balance of probabilities, a real — as opposed to a speculative — risk of injurious disclosure. As much as possible, the special advocates should be allowed to investigate the case and develop their strategy by communicating with the named person, the named person's public counsel, and third parties who may bring relevant insights and information.
>
> Second, the named person and his public counsel can send an unlimited amount of one-way communications to the special advocates at any time throughout the proceedings. This is significant. As discussed above, the public summaries provided on an ongoing basis to the named person will ensure that he or she is sufficiently informed to provide meaningful guidance and information to the special advocates. These summaries should elicit helpful one-way communications from the named person to the special advocates. And these one-way communications may in turn give rise to requests from the special advocates for judicial permission to communicate with the named person in order to obtain needed clarifications or additional information. [Emphasis in original.]

b. Access to the Confidential Information or Other Evidence

[223] In my order appointing the *amici curiae*, I ordered the following regarding the *amici curiae*'s access to the confidential information and other evidence in these appeals:

> 2. The *amici* shall have access to the confidential information in these appeals as determined by the Court;
>
> …
>
> 9. The *amici* will keep confidential from the Appellants, their counsel, and any other persons not participating in the in camera ex parte hearing, all information and documents to which the *amici* has had access;
>
> 10. In assisting the Court, the *amici* may also:
>
> a. Review the confidential information;

[224] The order appointing the *amici curiae* provides that they have access to the confidential information and other evidence in these appeals, permits them to review this information and other evidence, and requires that they keep confidential this information and other evidence. It goes without saying that this broad access to the confidential information and other evidence is vital in allowing the *amici curiae* to assist the Court by representing the interests of the appellants during the *ex parte* and *in camera* portions of the appeals. Although the designated judge's discretion to restrict access to certain confidential information or other evidence is preserved, this discretion should only be exercised where the designated judge deems it essential to ensure the confidentiality of the information or other evidence in the circumstances. Relying on my experience and knowledge in national security matters, such restrictions have never been ordered. It would likely require extremely exceptional circumstances to justify not permitting an *amicus curiae* to view certain confidential information.

c. Assist in Preparation of the Summaries of Information

[225] As noted in the order appointing the *amici curiae*:

> 10. In assisting the Court, the *amici* may also:
>
> d. Assist in the preparation of summaries of information, if required.

[226] As stated above, an essential component of the *amici curiae*'s role in the *ex parte* and *in camera* portions of the appeals is to represent the interests of the appellants in obtaining full disclosure. Serving as a strong counterweight to the respondent's claims of confidentiality to ensure as much disclosure as possible within the limits of the SATA

is key in ensuring a fair judicial process as limits on full disclosure and full participation are exceptional in our justice system and great lengths must be taken to ensure that these limits are applied only where essential. Where they are essential, we must seek to intrude as little as possible on the principles of full participation and full disclosure in the interest of an individual's right to know and meet the case against them (*Harkat (2014)*, at paragraphs 50–63).

[227] Paragraph 16(6)(c) of the SATA provides a mechanism to do just that; the designated judge is assigned the duty to provide the appellant with a summary of information and other evidence throughout the proceeding that enables them to be reasonably informed of the Minister's case but that does not include confidential information protected at paragraph 16(6)(b).

[228] This is no easy task. The SATA pushes the designated judge onto a tightrope where they must summarize confidential information in a manner that does not] include the elements of this information that would be injurious to national security or endanger the safety of any person if disclosed. With the respondent's interest in non-disclosure well represented in the *ex parte* and *in camera* portions of the appeals, the *amici curiae*'s representation of the appellants' interest in disclosure provides the counterbalance necessary for the designated judge to move forward with confidence. These summaries are the most powerful tool at the designated judge's disposal in the express provisions in subsection 16(6) of the SATA to ensure that the appellants may directly know the case made against them in the *ex parte* and *in camera* portions of the appeals and respond to such a case both directly and via the *amici curiae*. Consequently, the *amici curiae*'s participation in the creation of these summaries is vital.

d. Make Oral and Written Submissions and Attend Hearings

[229] In my order appointing the *amici curiae*, I note the following:

> 10.In assisting the Court, the *amici* may also:
>
> …
>
> b. Participate in the hearing to be held in private, make oral and written submissions, and examine the witnesses;
>
> c. Attend any public hearing in respect of this application and, with leave of the Court, make submissions; and

[230] The order grants full participation rights to the *amici curiae* during the *ex parte* and *in camera* portions of the appeals, notably the right to make oral and written submissions (the power to examine the witnesses will be discussed below). This is an essential component of the *amici curiae*'s robust mandate to represent the interests of

the appellants where their participation is prohibited under the SATA. To meaningfully assist the Court in fulfilling its duty to decide upon the reasonableness of the Minister's decision and to ensure a fair judicial process, it is expected that their participation will help vigorously probe the confidential evidence from the perspective of the appellants, and help counter the respondent's reliance on this information to support the reasonableness of the Minister's decision. On all these points, their submissions will be of utmost value to the judicial process and will also allow the designated judge to have all the facts and the legal perspectives necessary to render an enlightened decision. As noted by the Supreme Court of Canada in *Charkaoui I* and *Harkat (2014)*, the assumption of a "gatekeeper" role by the designated judge in the *ex parte* and *in camera* portions of a proceeding alone is insufficient.

[231] Moreover, regarding the public portions of these appeals, the attendance of the *amici curiae* is important as it allows them to gain further insight into the appellants' position and interests, notably when the prohibition on two-way communication is in place. Their insight on public issues may be equally important, as is the case regarding these preliminary issues, given that their perspective on certain public issues may be contextualized by knowledge acquired in the *ex parte* and *in camera* portions of these appeals. Of course, as noted in my order appointing the *Amici Curiae*, their ability to make submissions during public hearings is subject to leave from the Court and the confidentiality limits imposed by the SATA.

e. Examine the Witnesses

[232] Finally, one of the most contentious points in the hearing of these preliminary legal issues is the scope of the *amici curiae*'s power to cross-examine the respondent's witnesses.

[233] The respondent holds that the *amici curiae* may cross-examine their witnesses regarding issues concerning whether certain information or other evidence should be disclosed as it would not be injurious to national security or endanger the safety of any person pursuant to paragraph 16(6)(b). However, the respondent states that, notwithstanding new evidence, the *amici curiae* cannot cross-examine their witnesses regarding the merits of the Minister's decision on appeal. On the other hand, the appellants and the *amici curiae* all state that the *amici curiae*'s power to cross-examine the respondent's witnesses should not be limited to issues of disclosure but must extend to issues regarding the merits of the decision on appeal.

[234] In my order appointing the *amici curiae*, it is simply stated:

> 10. In assisting the Court, the *amici* may also:
>
> …

b. Participate in the hearing to be held in private, make oral and written submissions, and examine the witnesses; [Emphasis added.]

[235] Consistent with the role of the designated judge, the alleged Charter rights violations in these appeals, and the role of the *amici curiae*, as canvassed above, it is my position that the *amici curiae* should have the opportunity to cross-examine the witnesses on aspects also relating to the merits of these appeals. This is an essential component of the role that is required of them by this Court. That being said, the Court's role as a "gatekeeper" and its inherent right to control its own process does allow it to impose restrictions on this power to cross-examine should the *amici curiae*'s cross-examination go beyond assisting the Court in fulfilling its duties. Knowing the importance of the opportunity to cross-examine in ensuring the right to know and meet the case against one, I cannot imagine that Parliament intended to rely on the designated judge's discretion to appoint an *amicus curiae* as a means of ensuring a fair judicial process while simultaneously intending to limit the designated judge's discretion to confer a mandate to an *amicus curiae* that includes the ability to fully cross-examine witnesses during *ex parte* and *in camera* hearings on the reasonableness of the decision on appeal. As the *ex parte* and *in camera* proceedings evolve, it is the duty of the *amici curiae* to exercise, when opportune, their power to cross-examine in order to represent the interests of the appellants, the whole subject to objections made by the respondent's counsel and the rulings of this Court.

[236] Cross-examination has been described as "the greatest legal engine ever invented for the discovery of truth" (see *R. v. Howard*, [1989] 1 S.C.R. 1337, at page 1360, (1989), 48 C.C.C. (3d) 38). It is a vital tool that can reveal important credibility issues with certain witnesses, weaken the case against one, and bolster one's own position.

[237] The importance of cross-examination in a fair judicial process is demonstrated by the fact that the Supreme Court of Canada has consistently found that the opportunity for cross-examination is a key principle protected at section 7 and subsection 11(d) of the Charter. See the following paragraphs in *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 (*Lyttle*), at paragraphs 41–44, which discuss this point:

> As mentioned at the outset, the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608, *per* McLachlin J. (as she then was):
>
> > The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution… . In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. [Emphasis added by Major and Fish JJ.]

In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at p. 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though of course not exclusively, in the context of a criminal trial:

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275 (Man. C.A.); *R. v. Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.); *Abel v. The Queen* (1955), 115 C.C.C. 119 (Que. Q.B.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47 (Ont. C.A.).

Commensurate with its importance, the right to cross-examine is now recognized as being protected by ss. 7 and 11 (*d*) of the *Canadian Charter of Rights and Freedoms*. See *Osolin*, *supra*, at p. 665.

The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value. See *R. v. Meddoui*, [1991] 3 S.C.R. 320; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.); *Osolin*, *supra*.

[238] Overall, what should be retained from *Lyttle* is that cross-examination plays an important role, that this important role is not limited to the criminal context, and that it is an essential element to a fair judicial process, being a fundamental principle of justice under section 7 of the Charter. As such, in these appeals under the SATA, the *amici curiae* must be provided with the opportunity to cross-examine the respondent's witnesses on the merits of the confidentiality claims made as well as on the merits of the Minister's decisions to not remove the appellants' names from the SATA list; imposing limits on their ability to cross-examine witnesses in the *ex parte* and *in camera* portions of the appeals is inconsistent with a fair judicial process. However, the opportunity to cross-examine is not absolute and must be used astutely and professionally; it is therefore subject to the respondent's prerogative to make objections, which then calls for a ruling by the designated judge (*Lyttle*, at paragraph 44).

[239] First, as agreed by all in these appeals, the *amici curiae* must be given the opportunity to cross-examine the respondent's witnesses concerning the information or other evidence presented to support the respondent's confidentiality claims. As seen earlier, this is essential to assist the designated judge in ensuring that only the

information or other evidence that must be kept confidential for national security reasons under the SATA is excluded from disclosure to the appellants (*Harkat (2014)*, at paragraphs 50–63). The task is to test the claims for non-disclosure and to that effect, the involvement of the *amici curiae* is valuable to the process and the designated judge.

[240] The *amici curiae* are not there for symbolic purposes—a fair judicial process is not achieved if they are reduced to wallflowers. They must be given the means to effectively test the respondent's confidentiality claims and the witnesses and evidence adduced to support these claims, from the perspective of the appellants' interests, which they have gained knowledge of via the scope of their communication powers with the appellants. The most important tool in directly testing these claims from the perspective of the appellants' interests is the opportunity for the *amici curiae* to cross-examine. Only then will the designated judge have the necessary information to ensure that they are limiting full disclosure to the appellants by only what is required under the SATA to protect national security interests or the safety of any person. A fair judicial process is one that attempts to give the appellants as much information as possible to know the case against them within the national security limits imposed so that they may directly respond to that case, as opposed to having to rely on a substantial substitute. The reliance on a substantial substitute to ensure the appellants' right to know and meet the case against them must be exceptional in our judicial system and great lengths must be taken to ensure that it is only used where necessary; the *amici curiae*'s opportunity to cross-examine the respondent's witnesses on the merits of their confidentiality claims is key in achieving this balance between the national security interest in secrecy and the rights and freedoms of individuals.

[241] By the same token, the opportunity to cross-examine should be afforded to the *amici curiae* when assisting the designated judge in assessing the reliability and appropriateness of new evidence and also in assessing the reasonableness of the Minister's decision. I have found above that the "gatekeeper" role of the designated judge extends to the Court's review of the merits of the Minister's decision, and I find here that the *amici curiae*'s role as a robust substantial substitute to the appellants' full participation and full disclosure does as well. Ensuring that the *amici curiae* have the opportunity to cross-examine witnesses on the merits of the Minister's decision is essential to assisting the designated judge to fulfill their duty to decide upon the reasonableness of the Minister's decision by means of a fair judicial process.

[242] Yet, despite the clear Charter interests at play, as alleged, by stating that this Court does not have the jurisdiction to assign the *amici curiae* the ability to cross-examine the respondent's witnesses on the merits of their secret evidence against the appellants, the respondent is suggesting that even where secret evidence has not been tested, it should be assumed to be credible and reliable and that the *amici curiae* and the designated judge should only assess whether, based on this evidence, the Minister's decision is reasonable. This flies in the face of *Charkaoui I*, *Harkat (2014)*,

and more than a decade of jurisprudence on what is required for the designated judge to be able to ensure a fair judicial process to a party denied full disclosure and full participation in the interest of national security. Permitting the respondent to shield its evidence from challenge by the *amici curiae* denies the appellants a meaningful opportunity to challenge the case against them, which in turn, prevents the designated judge from fulfilling their duty to decide upon the reasonableness of the Minister's decision based on the facts and the law. This "trust me" approach to the respondent's confidential evidence can only encourage miscarriages of justice. This is surely not what Parliament contemplated when it decided to rely on the judge's discretion to appoint an *amicus curiae* to assume the function of a substantial substitute in the interest of ensuring a fair judicial process.

[243] Indeed, a reading of the SATA that prohibits the designated judge from assigning the ability to cross-examine the respondent's witnesses to the *amici curiae* is inconsistent with the SATA's overall object of balancing the national security interest in secrecy with an individual's rights and freedoms, a legislative scheme that largely relies on its appeal mechanism to achieve this balance. Such limits on cross-examination would render the appeal at section 16 of the SATA hollow seeing as it subtracts the important component of permitting meaningful challenge to the case to meet from a process that does not afford this opportunity at an earlier stage. It would destabilize the fragile equilibrium that the SATA seeks to achieve.

[244] As regards the express appeal provisions in the SATA, imposing such strict limits on the *amici curiae*'s ability to cross-examine would be inconsistent with the designated judge's duty to provide an appellant with an opportunity to be heard at paragraph 16(6)(d) as well as the designated judge's duty to determine whether evidence is relevant at paragraph 16(6)(g). Indeed, it can be said that the requirement to provide the appellant an opportunity to be heard at paragraph 16(6)(d), a key component of the *audi alteram partem* rule, grounds this jurisdiction to assign the *amici curiae* the ability to cross-examine the respondent's witnesses on the merits of the decision seeing as the appellants have no other way of challenging this confidential evidence. Assigning this power to the *amici curiae* is the only way in which the competing interests of security and fairness can be resolved in this appeal process under the SATA. Furthermore, practically speaking, it is the only way in which additional evidence in the interest of the appellants can be adduced pursuant to paragraph 16(6)(e) during the *ex parte* and *in camera* portions of the appeals.

[245] Finally, as previously mentioned, nothing in the SATA indicates a required division of the appeal in separate disclosure and merits stages. Moreover, logistically speaking, often-times disclosure and merits are intertwined—almost impossible to divide. As such, beyond not being reflected in the SATA, establishing such a limit based on this division of appeals under the SATA is not logical.

[246] However, as said before and as specified in *Lyttle,* at paragraph 44, the full opportunity to cross-examine does not equal an unequivocal right to cross-examine without limits (*Harkat (2014)*, at paragraph 88). It must be exercised in a professional manner that is subject to the Court's oversight and that assists the Court. However, given its essential function, it should not be limited in a manner that hollows its effectiveness and its substance.

D. *WITHDRAWAL OF INFORMATION*

[247] In the appeal of Mr. Dulai, the respondent has exercised their right to withdraw information or other evidence pursuant to paragraph 16(6)(g) of the SATA. In addition, the SATA provides that the designated judge "must not base a decision on that information or other evidence and must return it to the Minister" pursuant to paragraph 16(6)(g) and tasks the designated judge with ensuring the confidentiality of this withdrawn information pursuant to 16(6)(h).

[248] Regarding this withdrawal, the Court is asked to determine whether the designated judge and the *amici curiae* are allowed to see the withdrawn information and be given the reasons for which the Minister withdrew this information, whether the Federal Court can retain a copy of the withdrawn information, what step should be taken to ensure that this information is no longer part of the appeal book, and when it should be returned to the Minister.

[249] The respondent, Mr. Dulai, and the *amici curiae*, all agree that the designated judge and the *amici curiae* are allowed to see this withdrawn information and be provided with the reasons for its withdrawal. They also agree that the Federal Court can retain a copy of the withdrawn information and that appropriate steps were taken to ensure that this information is no longer part of the appeal book. Moreover, the information has already been returned to the Minister. This Court nevertheless finds it necessary to address these points, albeit much more briefly than the issues analyzed thus far, given that these are the first appeals under the SATA. That being said, whether this withdrawal of information leads to a situation where there is insufficient evidence before the Court to support the reasonableness of the Minister's decision on appeal is a question that will surely be considered later in these proceedings (*Soltanizadeh v. Canada (Citizenship and Immigration)*, 2020 FC 450, at paragraphs 22–31; and *Charkaoui (Re)*, 2009 FC 1030, [2010] 4 F.C.R. 448, at paragraphs 23–30).

(1) Access to Withdrawn Information and Reasons for Withdrawal

[250] The designated judge cannot base their decision concerning the reasonableness of the Minister's decision on the withdrawn information or other evidence. The SATA makes this clear. Instead, the designated judge is tasked with determining the

reasonableness of the Minister's decision based on the "information available to the judge" [at subsection 16(6)]. That being said, the SATA does not restrict the designated judge, or the *amici curiae*, from seeing this withdrawn information or being informed of its withdrawal; it requires the Court to ensure its confidentiality.

[251] The power afforded to the respondent to unilaterally withdraw information or other evidence is not unique to the SATA but the advantage it conveys to the respondent cannot be underestimated. In a field where secrecy is required, the ability to withdraw information without restriction is a significant power. As such, a fair judicial process requires that a designated judge be able to see this withdrawn information or other evidence as well as be provided with the reasons for its withdrawal, at the very least in order to understand how it relates to the other information and evidence that remains before the designated judge.

[252] For instance, the reasonableness of the Minister's decision might be difficult to meaningfully review without knowing the information or evidence withdrawn and how its absence affects the other information or evidence the designated judge must use to make their decision. In reality, it is much more difficult to withdraw a certain factual element grounding the Minister's decision without it having an impact on the other information or evidence—this is rarely a surgical exercise—it is akin to subtracting an ingredient from an already baked cake. Moreover, this withdrawn information or other evidence, as well as the reasons for its withdrawal, might reveal certain vulnerabilities or credibility issues in the remaining information or other evidence. For example, as suggested by the *amici curiae* as a theoretical example, a situation where the reasons for the withdrawal reveal credibility issues with a confidential source that is associated with other information or evidence relied on by the respondent. In essence, although the designated judge cannot ground their decision on this withdrawn information, this information, along with the reasons for its withdrawal, might expose a thread that, when pulled on, unravels the remainder of the respondent's case.

[253] It is therefore essential that the designated judge be provided with the withdrawn information and the reasons for its withdrawal in order to permit the designated judge to assume their role as a "gatekeeper." The designated judge must understand the entire context in order to not only ensure that the record supports the reasonableness of the Minister's decision, but also that the overall process is fair. Consistent with fulfilling this duty, the *amici curiae*, with the designated judge's leave, can also have access to this withdrawn information, as well as the reasons for its withdrawal, to ensure that its impact on the remaining record is properly analyzed, and communicated to the designated judge, according to the interests of the appellants.

[254] Moreover, the disclosure of this withdrawn information as well as the reasons for its withdrawal to the designated judge, and by extension the *amici curiae*, is consistent

with the respondent's duty of candour in *ex parte* and *in camera* proceedings. Citing *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 and *Almrei (Re)*, the Supreme Court of Canada stated the following regarding the duty of candour in *ex parte* and *in camera* proceedings in *Harkat (2014)*, at paragraph 101:

> In *Ruby*, this Court recognized that duties of candour and utmost good faith apply when a party relies upon evidence in *ex parte* proceedings: "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld" (para. 27). The Federal Court added, in *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163, at para. 500, that "[t]he duties of utmost good faith and candour imply that the party relying upon the presentation of *ex parte* evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case."

[255] As such, it can also be said that a failure to disclose the reasons for the withdrawal of information or evidence as well as the information or evidence itself, notably if it is adverse to the interests of the respondent, may be inconsistent with the duty of candour.

(2) Retention of Copy of Withdrawn Information

[256] As stated in section 4 of the *Federal Courts Act*, R.S.C.,1985, c. F-7, the Federal Court is a "superior court of record." Although undefined in the *Federal Courts Act*, this entails that the Court has an obligation to preserve records of proceedings, which act as its judicial memory, to ensure a historical record and to ensure that precedent is followed. For instance, the term "court of record" is defined by the *Oxford Dictionary of Law* as "a court whose acts and judicial proceedings are permanently maintained and recorded" and by *Osborn's Concise Law Dictionary* as "a court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony" (*Oxford Dictionary of Law*, 5th ed. (Oxford: Oxford University Press, 2002), at page 126 and *Osborn's Concise Dictionary,* 12th ed .(Sweet & Maxwell: Thomson Reuters, 2013), at page 124).

[257] This Court must therefore seek to preserve an accurate historical record of these appeals, notably given that they are the first appeals under the SATA. This includes any withdrawn information or evidence seeing as it could have an impact on the other information or evidence relied upon in these appeals, as discussed above. Of course, the retention of this information would need to be done in a manner that is consistent with the SATA, notably the duty imposed on the designated judge in paragraph 16(6)(h) to "ensure the confidentiality of all information or other evidence that the Minister withdraws."

(3) Steps to Be Taken to Secure the Withdrawn Information

[258] To ensure that the confidentiality of the information withdrawn by the Minister is not compromised by the retention of a copy by the Court and to ensure that it is no longer part of the appeal book and safely returned to the Minister, the Court ordered on January 24, 2020, as follows:

> 1. The AGC is authorized to withdraw information from the classified Appeal Book.
>
> 2. The AGC has been authorized to provide new pages of the classified Appeal Book that are affected by the withdrawal and the Registry of the Federal Court has replaced the pages affected by the withdrawal, including the copies provided to the *amici curiae*.
>
> 3. The withdrawn information in the classified Appeal Book will be redacted in black and identified as "withdrawn information."
>
> 4. The AGC has been authorized to provide redacted copies of the CSIS classified affidavit to the *amici curiae*.
>
> 5. The Court will keep three copies of the classified Appeal Book containing the withdrawn information (original classified Appeal Books). The original classified Appeal Books will be sealed and kept in a separate location at the Designated Registry.
>
> 6. A copy of this Order will be placed on each of the sealed copies of the original classified Appeal Books.
>
> 7. This Order continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceedings and after final judgment.

[259] The respondent, the appellants, and the *amici curiae* all agree that these measures were sufficient. Moreover, the procedure outlined above has already been undertaken without issue.

E. EX PARTE *HEARING ON THE MERITS*

[260] Finally, I am tasked with deciding whether the SATA allows for *ex parte* and *in camera* hearings on the merits, deciding the purpose of such hearing, and deciding whether one will be required in these appeals.

[261] First, it is my position that an *ex parte* and *in camera* hearing on the merits is permitted under the SATA. Paragraph 16(6)(a) of the SATA is clear that an *ex parte* and *in camera* hearing is required "at any time during a proceeding" on request of the Minister where the disclosure of information or other evidence "could be injurious to national security or endanger the safety of any person." This is not limited to any "disclosure phase" of an appeal, should a designated judge choose to separate the SATA appeal in such a fashion. I have already made myself clear on this point. Depending on the circumstances of an appeal, there may be one or many *ex parte* and *in camera* hearings that deal with the Minister's confidentiality claims or the

reasonableness of the decision on appeal. There may also be one or more public hearings.

[262] Second, it is my position that the purpose of an *ex parte* and *in camera* hearing on the merits is to permit the designated judge to hear and actively probe confidential information that cannot be disclosed to an appellant, as well as submissions on this information, in order to determine whether the Minister's decision was reasonable.

VI. CONCLUSION

[263] To conclude, my answer to each one of the preliminary questions is as follows: (1) the role of the designated judge in SATA appeals is that of a robust and interventionist "gatekeeper," as described in both *Charkaoui I* and *Harkat (2014)*; (2) the role of the *amici curiae* is to assist the Court by representing the interests of the appellants during the *ex parte* and *in camera* portions of the appeals and their mandate is a robust and interventionist one but one that does not go as far as have them assume the role of counsel for the appellants; (3) the withdrawn information, and the reasons for its withdrawal, must be provided to the designated judge and the *amici curiae*; and (4) an *ex parte* and *in camera* hearing on the merits is called for in appeals under the SATA. Consistent with the present reasons, the order dated October 7, 2019, will be amended accordingly. To that purpose, a public case management conference will be held in order to receive the input of all parties and the *amici curiae* on the amendments to be made and to discuss further matters essential to moving these proceedings forward.

Annex A

ORDER

UPON conducting a case management conference by teleconference on September 24, 2019, in the presence of counsel for the parties to discuss matters of interest in both files which included, among others, the appointment of *amicus(ci) curiae*;

AND UPON acknowledging that these appeals are governed by the provisions set out in subsection 16(6) of the *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11 (SATA);

AND UPON noting on a *prima facie* basis that the appeal books contain redacted information regarding the decision to maintain the appellants' status as listed persons under section 15 of the SATA which may not be disclosed to them, the whole subject to the decision to be made on the appropriateness of each redacted information;

AND UPON noting that the appellants and their counsel will be excluded from part of the appeals, if a request is made by the respondent under paragraph 16(6)(a) of the SATA, that this Court hear submissions on the information or other evidence in the absence of the public and the appellants and their counsel in order to prevent an injury to national security or to protect the safety of any person;

AND UPON the Court raising the possibility of appointing an *amicus curiae* or two *amici curiae* in order to ensure procedural fairness to the appellants and noting that there are two appeals which relate to different facts and may raise different issues;

AND UPON receiving written submissions from counsel for the parties on this point;

AND UPON considering that the appointment of two *amici curiae* (*amici*) will assist the Court in performing its statutory obligations under the SATA;

AND UPON noting the alleged violations of the *Canadian Charter of Rights and Freedoms* (Charter); noting that the appellants' right to know and meet the case, including the right to make adequate representation in the closed hearing, are principles of fundamental justice pursuant to section 7 of the Charter; and noting that there must be an adequate substantial substitute for the persons concerned in the secret proceedings: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 [cited above], at paragraph 27; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 [cited above], at paragraph 43;

AND UPON noting that the appointment of *amici* in such a situation will assist the Court in forming its opinion during the hearing of information or other evidence

presented by the respondent in the absence of the appellants and the public and in determining whether its disclosure would be injurious to national security or endanger the safety of any person;

AND UPON noting that the appointment of an *amicus curiae* is at the discretion of the Court and that Designated Judges involved in similar matters have appointed *amicus(ci) curiae* to assure such a mandate;

CONSIDERING that the ***amici's*** mandate will include meeting and communicating with the appellants and their counsel to discuss the matters at hand and, to that purpose, such meetings may be held in Vancouver if not by telephone in accordance with the mandate established below;

CONSIDERING that the *amici* will organise their mandate in such a way as to ensure that there will not be undue duplication of the work but also will do their utmost to divide the said work in order to meet the established timetable provided for in this order;

CONSIDERING that once one of the *amici curiae* or both of them have met or communicated with the appellants and their counsel and then reviewed the confidential information, the Court will then consider proceeding with a closed case management hearing in the presence of counsel for the respondent and the *amici* and this hearing would then be held before the public case management hearing scheduled for November 14, 2019;

THIS COURT ORDERS that:

1. Mr. Colin Baxter, of Conway Baxter Wilson LLP in Ottawa, Ontario and Mr. Gib van Ert of GIB VAN ERT LAW in Ottawa, Ontario and in Vancouver, British Columbia be appointed as *amici* in this matter and shall assist the Court in performing its statutory obligations under the SATA in a manner coherent with this order and should seek guidance from the presiding judge in this proceeding on a need-to basis and in any circumstances not provided for within the current order;

2. The *amici* shall have access to the confidential information in these appeals as determined by the Court;

3. In a timely manner, and until such time as the *amici* have had access to the confidential information and documents in this application, one of the *amici* (or two if deemed necessary) may meet or communicate with counsel for the appellants for the purpose of understanding matters of interest to the appellants in relation to the information and documents to be reviewed, including communicating with the appellants themselves, in the presence of their counsel, if counsel for the appellants and the *amici* believe it to be necessary and the appellants agree;

4. The appellants and their counsel may transmit to the *amici* a list of relevant questions or submissions the appellants would like the *amici* to raise and submit to the Court during the portion of the proceeding of these appeals which will be held in the absence of the public and of the appellants and their counsel;

5. The *amici* shall then inform the Court and counsel in writing that he is ready to proceed with the review of the confidential material. The *amici* will also inform the Court and counsel once they have finished reviewing the confidential materials. Subsequently, if required, a closed case management hearing will be scheduled before November 14, 2019;

6. Once the *amici* have access to the confidential information in this application, the *amici* shall not have any communication with the appellants or their counsel without prior leave of the Court;

7. For clarity, paragraph 6 of this order does not prohibit counsel for the appellants from sending one-way communications to the *amicus* at any time during the proceeding, the receipt of which the *amici* may acknowledge;

8. Any communication between the appellants and their counsel, which is protected by solicitor/client or litigation privilege, will not lose that privilege if it is shared with the *amici*;

9. The *amici* will keep confidential from the appellants, their counsel, and any other persons not participating in the *in camera ex parte* hearing, all information and documents to which the *amici* has had access;

10. In assisting the Court, the *amici* may also:

    a. Review the confidential information;

    b. Participate in the hearing to be held in private, make oral and written submissions, and examine the witnesses;

    c. Attend any public hearing in respect of this application and, with leave of the Court, make submissions; and

    d. Assist in the preparation of summaries of information, if required.

11. The respondent will have a right of reply to any submission made by the *amici*;

12. The respondent will pay reasonable fees and disbursements, including travelling expenses of each *amicus* if required and the *amici* will do their utmost to ensure that they shall be reasonable;

13. The respondent and the *amici* may address the Court should there be any disagreements or misunderstandings on the reimbursement of the reasonable fees and disbursements of the *amici*;

14. The parties or the *amici* may apply to the presiding judge in this proceeding, on notice to the other participants, to vary the terms of this order.

Annex B

ORDER

UPON convening a public case management conference by teleconference on February 13, 2020, to discuss the preliminary legal issues arising out of the appeals as well as to discuss scheduling matters;

WHEREAS it is this Court's duty to ensure that the open court principle is respected as much as possible according to the circumstances and that the appellants are given an opportunity to be heard and reasonably informed throughout these proceedings;

WHEREAS it is this Court's duty to minimize the delay in which this appeal is decided;

HAVING heard from all counsel regarding the list of preliminary legal issues to be decided before moving forward to the next steps in the proceedings;

HAVING heard from all counsel regarding scheduling and concerns with regard to delay; and

UPON noting that an agreement was reached by all counsel with respect to the list of preliminary legal issues to be heard in this case and to the timing for the filing of written submissions:

THE COURT ORDERS that:

1. The appellants, the respondent, and the *amici curiae* shall provide written representations in response to the following legal issues:

    i. Considering the role of the judge in an appeal pursuant to the *Secure Air Travel Act*, S.C. 2015, c. 20 s. 11 (SATA) and the fact that paragraph 16(6)(g) of the SATA provides that the judge must not base a decision on the information or evidence withdrawn by the Minister in File T-670-19:

        (a) Should the designated judge and the *amici curiae* be allowed to see the withdrawn information?

        (b) Should the designated judge and *amici curiae* be allowed to be informed of the reasons for which the Minister withdrew the information?

ii. Considering that paragraph 16(6)(g) of the SATA provides that the judge must return the withdrawn information to the Minister, should the Federal Court, as a superior court of record, retain a copy of the withdrawn information? If so, what steps should be taken by the registry to ensure that the withdrawn information is no longer part of the appeal book? When should the withdrawn information be returned to the Minister?

iii. Does the scheme under section 16 of the SATA allow for an *ex parte* hearing on the merits of the appeal? If so, what is the purpose of the *ex parte* hearing on the merits? What is the role of the *amicus curiae* in the *ex parte* hearing, and does it include the possibility of cross-examining witnesses?

iv. Is an *ex parte* hearing on the merits required in these appeals?

2. The respondent's submissions shall be provided on or before February 28, 2020;

3. The appellants and the *amici curiae* shall provide their submissions on or before March 20, 2020;

4. Counsel for the appellants shall make best efforts to share their submissions, or a draft version of such, to the *amici curiae* on or before March 16, 2020, in the interest of avoiding redundancy and to provide the *amici curiae* with the ability to better complement the submissions of the appellants in order to assist the Court in fulfilling its duties;

5. Pursuant to this Court's orders dated January 6, 2020, November 15, 2019, and October 7, 2019, the appellants may communicate their submissions to the *amici curiae*. However, the *amici curiae* may not communicate with the appellants nor their counsel, but to acknowledge receipt. Should the appellants or the *amici curiae* be of the opinion that communication between the *amici curiae* and the appellants or their counsel would be preferable, they may then seek prior leave of the Court;

6. The respondent shall provide a reply to the submissions of the appellants and the *amici curiae*, if required, by March 27, 2020;

7. Before April 3, 2020, the parties shall inform the Court in writing if a public hearing is required regarding these preliminary legal issues;

8. Should the submissions to the preliminary legal issues contain sensitive information, the respondent, the *amici curiae*, and/or the Court may request an *ex parte* hearing;

9. The scheduling of the *ex parte* cross-examination is postponed until a final decision is issued with respect to the list of preliminary legal issues;

10. In the interest of limiting delay in this matter, the *amici curiae* and respondent will report to the Court about their discussions regarding the redactions in this case, in writing, on or before February 20, 2020.