File No. 31597

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

B E T W E E N

ADIL CHARKAOUI

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION,
SOLICITOR GENERAL OF CANADA

Respondents

and

ATTORNEY GENERAL OF ONTARIO,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
CANADIAN BAR ASSOCIATION,
BARREAU DU QUÉBEC,
AMNESTY INTERNATIONAL,
ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL,
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES
EN DROIT DE L'IMMIGRATION

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**FACTUM OF THE INTERVENER,
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PART I

STATEMENT AS TO FACTS

1. The intervener, the Attorney General of Ontario, takes no issue with the facts as set out in the facta of the parties.

PART II

POINTS IN ISSUE

Was the appellant provided with adequate disclosure? Does CSIS's note Retention and Destructioh policy violate the appellant's s.7 rights? Does the Stinchcombe disclosure norm apply to an IRPA. proceeding?

Does CSIS's note Retention and Destruction Policy in a Criminal Law context violate s. 7?

PART III

BRIEF OF ARGUMENT

Was the appellant provided with adequate disclosure? Were his s.7 rights violated?

2. This appeal arises from decisions made during an administrative hearing; in particular, an immigration proceeding. In the circumstances, a determination of the issues in this appeal, including the nature of the appellant's section 7 *Charter Rights*, the Ministers' obligations to disclose and the appropriateness of CSIS's note retention and destruction practices, must necessarily be considered in the context of the legislative regime laid down in Division 9 of the *Immigration and Refugee Protection Act* (*I.R.P.A.*), and having regard to the evidence and circumstances which exist in this case. In this Honourable Court's decision in *Charkaoui v. Canada* 2007 S.C.C. No. 9, at para. 20-31, this Court recognized that section 7 of the *Charter* does not require a particular type of process or one standard of disclosure. What is required is a fair process having regard to the nature of the proceedings and the interests at stake. La Forest J. for the majority in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361 said: "It is... clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another." In *Ruby v. Canada*, [2002] 4 S.C.R. 3, at para. 39 and in *Chiarelli v. Canada* [1992] 1 S.C.R. 711, at p. 743, this Court recognized that in assessing whether a procedure accords with the principles of fundamental justice, it may be necessary to balance the competing interests of the State and individual. In *Ruby v. Canada*, supra, Arbour J. for the Court went on to say at para. 39 that "[i]t is also necessary to consider the statutory framework within which natural justice is to operate. The statutory scheme may necessarily imply a limit on disclosure. The extent of disclosure required by natural justice may be weighed against the prejudice to the scheme of the Act which disclosure may involve." In short, this Court has consistently held that what is fair in a

particular case will depend on the context of the case and in the context of administrative law, some limit on disclosure will not be considered unfair.

3. In the past, this Honourable Court has declined to "transplant" criminal law principles and concepts into areas of civil law, including administrative law. In *Blencoe v. British Columbia* [2000] 2 S.C.R. 307, at para. 88 Bastarache J. for the majority confirmed this approach and said "[t]his Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct." With particular reference to the required standard of disclosure in administrative law cases, this Court in *May v. Ferndale Institution* [2005] 3 S.C.R. 809, at para(s). 91-92 said:

> "it is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet."

4. In *United States of America v. Kwok* [2001] 1 S.C.R. 532, throughout the process of his extradition, the appellant sought disclosure of additional materials with a view to establishing an unjustified violation of his *Charter* rights. It was the appellant's position that the rationale in *R. v. Stinchcombe*, supra imposed on both the Requesting and Requested states an obligation to disclose all relevant information as early as during the judicial extradition hearing. Dismissing his appeal, Arbour J. for this Court at para. 99 held that "*Stinchcombe*, dealt with disclosure in a criminal trial context where the right to make full answer and defence is directly engaged on issues of guilt of innocence. Extradition proceedings are not concerned with the issue of guilt of innocence. Rather, they are in some ways akin to preliminary inquiries." It is respectfully submitted that the type of deprivation of liberty engaged in an extradition (i.e. being removed from the country to face a criminal prosecution elsewhere and perhaps being detained pending the extradition hearing) is not identical but not dissimilar to the consequences of a deportation and in these circumstances, this decision of the Court is instructive on this appeal (see also *United States v. Ferras et al*, [2006] 2 S.C.R. 77 at paras. 13-15).

5. Immigration law generally, and the *I.R.P.A.* specifically, differ from the criminal law in a variety of ways. The nature of the decision being made and the statutory scheme and process used to reach the result are different. The *I.R.P.A.* is preventative in nature. Unlike a sentenced criminal, a person detained on a security certificate can put an end to the detention at any time by agreeing to leave the

country. The decision to exclude a permanent resident or foreign national on security grounds is very different from a judicial decision made in a criminal case. It involves the exercise of considerable discretion and is based on the inherently difficult task of predicting the future behaviour of person. This Court held in *Suresh v. Canada* [2002] 1 S.C.R. 3, at para(s). 31-34 and 116 that the nature of the Minister's decision called for neither "particularly strong nor particularly weak procedural safeguards." Immigration proceedings do not engage the same adversarial process between the State and the individual which exists in a criminal trial. The State is only seeking deportation not a finding of guilt and incarceration. Having said this, the Attorney General of Ontario recognizes that deportation engages serious personal financial and emotional consequences. This is especially so when a security certificate will lead to the deportation of a person potentially to a jurisdiction in which he or she could face torture (see also *Re Harkat* [2005] F.C.J. No. 481, at para(s). 81-89; *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56).

6. In *Suresh v. Canada,* supra, at para. 122, this Court held "that a refugee facing the possibility of deportation to torture was entitled to disclosure of all the information on which the Minister was basing his or her decision, subject to privilege or similar valid reasons for reduced disclosure such as safeguarding confidential public security and documents". In a similar vein in *Charkaoui v. Canada*, supra, at para(s). 24-27 and 58, this Court recognized that in the context of the *I.R.P.A.* national security considerations can limit the disclosure of information to the affected individual. The process must reflect the exigencies of the security context and full disclosure of the information relied on may not be possible.

7. It is respectfully submitted that, in *Charkaoui, Chiarelli* and *Suresh*, this Court has implicitly recognized the criminal law *Stinchcombe* standard for disclosure is not appropriate or applicable in immigration proceedings including *I.R.P.A.* hearings. It was because the *Stinchcombe* norm of disclosure was considered not always appropriate or necessary and indeed for security reasons it was sometimes not appropriate to disclose the information (or portions of it) upon which the Minister's decision was based, that this Court concluded in *Charkaoui* that an adequate alternate measure to compensate for this type of non-disclosure was required.

8. In any event, in the instant case the appellant was provided with a summary of the information, which was sufficient to enable him to know the case he was required to meet. The events which remain at issue on this appeal involved meetings with the appellant, which he was well aware of. The respondents have indicated in their factum that we do not know whether there were actually any notes

taken. There was, however, a report of the meetings, and a summary was provided by the designated judge to the appellant. In assessing this issue, Noël J. translated at para. 15 of the FCA judgment [2006] F.C.J. No. 808 concluded that the summaries of the interviews "are not necessary in order to demonstrate directly or indirectly the foundation of the facts and the allegations on which the proceeding is based." The Federal Court of Appeal added at para. 12 of the judgment that "in other words, these interviews had no relationship to the allegations against Mr. Charkaoui... [t]he facts and allegations on which the certificate is based are found elsewhere in the evidence. ... in the summary of the information disclosed to Mr. Charkaoui." In the circumstances CSIS' note retention and destruction policy did not result in a breach of the appellant's s. 7 *Charter* rights. He was provided with the disclosure required in this case (given the context).

CSIS Note Retention and Destruction Policy and the Criminal Law

9. The Criminal Lawyer's Association (Ontario) (CLA) and Association Des Avocats de la Defense de Montreal (AADM) argue that this Court should, in this case, find that because CSIS national security inquiries may, on occasion, give rise to the provision of some information by CSIS to the RCMP, CSIS is under a duty, in all occasions, to preserve its interview notes as well as any other information which they may have, which may be relevant to a possible future criminal proceeding. It is the position of the CLA and the AADM that given that CSIS, in certain circumstances, may provide information to the police, all relevant information which it has which may relate to a possible future criminal investigation is "effectively brought within the Crown's 'control'" and that an accused person's criminal law s. 7 rights requiring disclosure are engaged. According to the CLA, "a consequence of this, the third party in immediate possession of the information comes under a correlative duty to take reasonable steps to preserve the information until it can be shared with the Crown (and, ultimately, disclosed to defence)." The CLA argues that this duty on the Crown to disclose information, which the CLA says is constructively within the Crown's control, exists whenever the information is in the possession of a third party who has an existing "funding" and/or "liaison" agreement with the government. The position adopted by the CLA would make a very wide group of organizations, agents of the State for *Stinchcombe* disclosure purposes. According to the CLA, any form of public funding or any agreement which confirmed or memorialized, what in substance is a moral and ethical duty to assist law enforcement would subject a presumptive third party agency to the same disclosure obligations that bind police services (see *The Criminal Lawyers Associations (Ontario's) factum* para. 3, 7-13; *Association Des Avocats de la Defense de Montreal's factum* para 6, 26-38).

10. It is respectfully submitted that this is not the case to decide this issue. As detailed above, CSIS's obligations on this appeal are informed by the context, circumstances, and facts of this particular case. What CSIS' obligations, are in other circumstances, including criminal prosecutions, will necessarily be informed by the context, and facts as they exist in those other cases. There was no criminal investigation here. There is no evidence that CSIS has provided the RCMP with any information. There is no outstanding criminal prosecution. There exists no decisions from criminal courts below dealing with the issue. The ruling that the CLA seeks from this Honourable Court on the issue of CSIS's obligations to preserve evidence for use in a criminal prosecution is completely hypothetical and has been raised for the first time in this Court. It is respectfully submitted that as a general rule, a party cannot, on an incomplete record, raise on appeal an entirely new argument which has not been raised in the courts below. The concerns are two-fold. First, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial. Second, a lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue. In *Moysa v. Alberta (Labour Relations Board)* [1989] 1 S.C.R. 1572, at para(s). 16-17, Sopinka, J. for this Court in the context of a "constitutional question" recognized that "if the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so. This policy of the Court not to deal with abstract questions is of particular importance in constitutional matters. (See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 383-65)"...The Attorney General of Ontario submits that this sentiment applies in this case. The issue of CSIS's constitutional responsibility to preserve evidence which might be relevant to a possible future criminal prosecution and validity of the assertion that a correlative duty to ensure that this information is shared with the Crown and ultimately disclosed to the defence, are not issues which this Court needs to answer, now, in this case. To address these questions would require this Court to make 'pronouncements well beyond this appeal.' These are hypothetical questions and the adjudication of the actual dispute here does not require a resolution of these abstract questions. In the event that this Court wishes to consider these issues, the Attorney General of Ontario relies on the following submissions, on the merits (see *Brown v. Deans* [1910] A.C. 373 (H.L.); *Perka v. The Queen* [1984] 2 S.C.R. 323; *R. v. Brown* [1993] 2 S.C.R. 918 at para. 10 (per L'Heureux-Dube, dissenting but not on this point).

11. The Crown must disclose all relevant information in its possession, so long as the material is not privileged. This includes all material it proposes to use at trial and all other evidence in its possession which may assist the accused person in making full answer and defence. The Crown need not disclose that which is clearly irrelevant but should take a generous view of relevance in making disclosure. Once the Crown and police obtain information which they know they are required to disclose, they

must preserve the information so that it may be disclosed. In *R. v. La*, [1997] 2 S.C.R. 689, at para. 20, Sopinka J. put it this way "[t]his obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant, (emphasis added). In *R. v. O'Connor*, *R. v. Stinchcombe* and *R. v. Leipert* (1997) 112 C,C,C, (3d) 385 at p. 389, this Court held the Crown only has an obligation to preserve and disclose that which is in its possession or under its control. The question of whether the Crown "possesses" or "controls" a particular piece of information for the purposes of disclosure, is a difficult one and is an issue which lower courts have often struggled with. This question often involves the consideration of privacy rights of others and is, ultimately, a facts-based determination (see *R. v. Stinchcombe*, (1991) 3 S.C.R. 326, at p. 11-16; *R. v. O'Connor* [1995] 4 S.C.R. 411; *R. v. Chaplin* [1995] 1 S.C.R. 727, at para(s). 20-23; *R. v. Daly* (1992), 57 O.A.C. 70 (C.A.).

12. At paragraph 8 of the Criminal Lawyers' Association factum, they submit that in a criminal case, CSIS has a duty to preserve "relevant material it has gathered during the course of its own (national security investigation), including an obligation to preserve their interview notes." The C.L.A. argues that this obligation is rooted in section 19 of the *CSIS Act*, which authorizes CSIS to release information to the police and/or the Crown, where it may be used in the investigation or prosecution of an alleged offence in Canada. By way of response, the Attorney General of Ontario respectfully submits that the C.L.A. has not properly interpreted section 19 of the *CSIS Act* or section 6 of the O.P.S.-602 (Disclosure of Security Information or Intelligence). All these things do, is expressly authorize CSIS to provide information which they may come into possession of, which may be pertinent to a criminal investigation or prosecution. The C.L.A. ignores the fact that CSIS was created to separate the national security function from the police's responsibility to investigate the commission of criminal offences. The respondents have admirably detailed the differences between CSIS and the police and their respective roles at paras 58 to 94 of their factum. They have also explained the historical reasons for the present framework. The Attorney General of Ontario relies on these submissions and will not repeat them here, save and except to observe that CSIS is a presumptive third party when it comes to criminal investigations. All O.P.S.-602 does is authorize CSIS to provide information to the R.C.M.P. In doing so, CSIS is not in any different situation than any other organization in Canada or any other person who might have pertinent information and who, quite properly, recognizes a moral and ethical responsibility to assist law enforcement and to provide that information to the police. Notwithstanding the C.L.A.'s submission to the contrary, it is not the potential ability to provide information to the police which may convert a presumptive third-party into a "state agent." It is not simply the ability to

provide information to the Crown which will result in a conclusion of constructive possession of that information by the Crown. Control, possession and/or constructive possession by the Crown of what would otherwise be considered third-party information requires the actual provision of information and the actual direct involvement of the organization or person in the criminal investigation. The test is not whether the organization could provide information. The test is that they did directly provide information. (emphasis added)

13. Provincial Appellate Courts have held in the context of individual cases that the "Crown" includes other government agencies, for the purposes of disclosure, when those agencies have been involved in the investigation or prosecution of the alleged offence. In these circumstances, information known to be relevant to the prosecution before the Court, should be preserved and provided to the Crown to be disclosed to the accused persons subject to claims of privilege. In *R. v. W.* (D.D.) (1997), 114 C.C.C. (3d) 506, at pp. 530-31, aff'd 129 C.C.C. (3d) 226, the British Columbia Court of Appeal said "I accept the proposition that Crown agents or departments which are involved in the investigation of a criminal case with respect to a particular accused should disclose documents relating to that investigation to Crown counsel and, as a corollary, that Crown counsel should take steps to obtain all such documents from those investigating agents or departments of which it is aware. In this case, however, the Ministry of Social Services was not involved in the investigation of the accused."

14. The issue of whether the Federal and Provincial government are indivisible in the context of disclosue was addressed by the Alberta Court of Appeal in *R. v. Gingras* (1992), 71 C.C.C. (3d) (Alta. C.A.); leave to appeal to the S.C.C. denied [1992] S.C.C.A. 348. The Alberta Court of Appeal concluded there that the Crown's obligations to disclose as a result of the "*Stinchcombe* decision" did not extend to the files in question which were held by a federal civil servant in another province. The Court of Appeal also noted that "if the *Stinchcombe* decision, supported production of these files, than it would presumably support production of files in the income tax department, the telephone company, a bank or private hospital." The Alberta Court of Appeal in *Gingras* said that this was not the case. The rationale in *Gingras* has been applied in a number of cases. See *R. v. François,* [2005] O.J. No. 1813 (S.C.J.) at para(s). 15-16, 21-22 and 24; *R. v. Styles,* [2003] O.J. No. 5824 (S.C.J.) at para. 17; *R. v. Hankey,* [2000] O.J. No. 5490 (S.C.J.) at para(s). 16-25; *R. v. Toms*, [2003] O.J. No. 952 (C.A.) at para(s). 10-11; affirming [2000] O.J. No. 5612 (S.C.J.) at para(s). 3-20, 14-28; *R. v. Innocente* [2003] N.S.J. No. 379 (S.C.) at para(s). 12-18, 23-24; *R. v. Fitch;* and, *R. v. O'Carroll* [2000] O.J. No. 3173 (S.C.J.) at para(s). 23-24. At paragraph 5 of the Intervener CLA's Factum, reference has been made to the New Brunswick Court of Appeal decisions in *R. v. Arsenault* (1994), 93 C.C.C (3d) 111 (NBCA)

at pp. 116-117 and *R. v. Blyth* (1996) 105 C.C.C. (3d) 378 at pp. 380 (NBCA). The Attorney General of Ontario respectfully observes that in both these cases the "other" government department was directly and actively involved in the criminal investigation which distinguished them from the case in *R. v. Gingras*, supra.

15. Where another government agency is directly and actively involved in a criminal investigation, the fruits of their participation in that "criminal" investigation may be properly considered under the Crown's control and should be preserved, provided to the Crown and then disclosed to the defence. *R. v. Malik* [2002] B.C.J. No. 3219 [Erasure of wiretap recordings] and *R. v. Malik* [2004] B.C.J. No. 842 [Destruction of CSIS notes,] audiotapes, and transcripts] are examples of this situation. Where, however, the other department is not, in fact, directly involved in the criminal investigation, they continue to properly be treated as a third party, even if they have evidence which may be relevant to the prosecution before the Court. It is respectfully submitted that, notwithstanding the CLA and AADM's submissions to the contrary, third parties do not have a freestanding obligation to preserve records which may (or may not) be pertinent to some future possible criminal prosecution. As third parties they are not subject to the full panoply of disclosure obligations imposed on the Crown and the police. Having said this, the Attorney General of Ontario recognizes that third parties cannot deliberately for an improper purpose destroy records in order to deprive an accused person and the Court of evidence. There is a distinction between a good faith third party record retention and destruction policy and a deliberate attempt to destroy records for the purpose of depriving an accused and the Court of evidence. The later represents an attack on the integrity of the judicial system and will result in a breach of section 7. This may be the case whether the information is in the possession of the Crown or a third party. The deliberate destruction of records in order to deprive an accused and the Court of evidence can amount to an abusive process such that the continuation of the prosecution would undermine the integrity of the justice system. This was the case in *R. v. Carosella* [1997] 1 S.C.R. 80 and it was this circumstance in that case which resulted in the majority of this Court concluding that a stay was an appropriate remedy. (See *R. v. Buric* [1997] S.C.J. No. 38; *R. v. Wicksted* (1997) 113 C.C.C. (3d) 318 (S.C.C.); *R. v. MacDonnell* (1997) 114 C.C.C.(3d) 145 (S. C.C.); *R. v. Dulude* (2004) 189 C.C.C. (3d) 18 (Ont. C.A.)

16. It is respectfully submitted that CSIS's administrative policy OPS-217 requires that all relevant information from notes must be preserved in a report and where information in notes cannot be transcribed into a report, the relevant portion of the notes should be retained and where information is considered material to the investigation of an unlawful act of a serious nature, notes should be

retained. This is not a policy which can be considered a blatant attempt to undermine the administration of justice. It is not unacceptable negligence. Again, it is the Attorney General of Ontario's position that if CSIS was directly involved in an investigation, they should preserve their notes and the information of the fruits of their participation in the investigation. On its face, administrative policy OPS-217 encourages the preservation of notes of pertinent information where there is direct involvement in a criminal investigation. The Attorney General of Ontario's point here is that whether information in the possession of CSIS is under the "control of a Crown" in a criminal case or whether CSIS is a third party will necessarily depend on the facts and circumstances of that case. It will depend on the nature of CSIS's involvement in the particular criminal investigation in question. This is necessarily a fact specific inquiry and a determination of the obligations of the Crown and CSIS in any particular criminal case to preserve and disclose information will depend on the facts of the case and require a case-by-case assessment (see *R. v. Mills* [1999] 3 S.C.R. 668; *R. v. O'Connor*, supra).

17. It is respectfully submitted that the CLA places considerable weight on the Court's judgment in *R. v. Carosella* [1997] 1 S.C.R. 80 and it would seem appropriate to review that decision of this Court. *R. v. Carosella*, supra, is a third party production (*O'Connor*) case not a disclosure (*Stinchcombe)* decision. In *Carosella*, Justice L'Heureux-Dubé, in dissent expressly noted that the information in issue was not in possession of the Crown. The majority appears to have accepted as much in that they approached the cases as one involving the constitutional right to production from third parties. In *R. v. La* [1997] 2 S.C.R. 680, at para. 26, Sopinka J. who wrote the majority decision in *R. v. Carosella*, supra, expressly acknowledged that *Carosella* was on *O'Connor* production case. He said "[t]he appellants sought to draw a parallel between this case (*La*) and *Carosella* which was released immediately before the hearing of this appeal. The two cases, however, are clearly distinguishable. In *Carosella*, the documents which were destroyed were relevant and subject to disclosure under the test in *O'Connor* supra. The conduct of the Sexual Assault Crisis centre destroyed the accused's right under the *Charter* to that have the documents produced. That amounted to a serious breach of the accused's constitutional rights and a stay was in the particular circumstances, the only appropriate remedy."

18. At para. 7 of the intervener CLA's factum, they argue that *R. v. Carosella*, supra, recognizes that when the Crown has the practical ability to obtain relevant information from a third party through existing "funding" and "liaison" agreements, the information is effectively brought within the Crown's control and an accused's s. 7 right to disclosure is engaged. As a consequence, the CLA argues that the

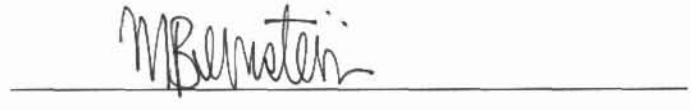
"funded" organization is under a correlative duty to take reasonable steps to preserve the information until it is shared with the Crown (and, ultimately, disclosed to the defence). The CLA's submission is far reaching and if adopted, any group that has a "funding" or "liaison" agreement with the state would no longer be a third party but would become an agent to the state and would have the same disclosure responsibilities that bind police services and the Crown. Hospitals, universities, rape crisis centers, women's shelters, children's aid societies, ethnic and charitable organizations, community centers, state-sponsored athletics, and the countless other entities that receive some form of social funding would now become state agents for the purposes of gathering and preserving evidence for possible criminal proceedings whether or not they participated in the criminal investigation. This is not a reasonable submission. The Criminal Lawyers' Association's position blurs the distinction between those engaged in criminal investigations who are duty-bound to preserve and disclose the fruits of those investigations and those who are not but who may (or may not) come upon information which may (or may not) be pertinent to a possible future criminal case. In any event, the CLA's reliance on *Carosella* in support of this position is misplaced. Justice Sopinka's reference to government funding of the centre in issue in *Carosella* was part of the facts portion of the judgment. The Court detailed the evidence on the *voir dire* establishing the nature of the centre and the requirement to maintain as confidential and secure all material within its control. This was relevant to the majority's assessment of the damage to the image of the administration of justice caused by the deliberate destruction of the material, done in order to deprive the court and the accused of relevant evidence. The materiality of the existence of government funding and the close relationship with justice agencies were circumstances considered by Sopinka, J. at para. 56 in connection with the majority of this Court's assessment of "the appropriate remedy" - (i.e. whether a stay was appropriate;) not its assessment of whether centre's records were third party records or within the control of the Crown." When the court said at para. 41 of the judgment in *R. v.* Carosella, supra that given the circumstances it is clear the file would have been disclosed to the Crown, the Court was referring to the complainant and Crown's consent on an *O'Connor* application.

PART IV and V

ORDER REQUESTED

19. The Intervener makes no submission on costs and takes no position with respect to the disposition of this appeal.

ALL of which is respectfully submitted by



Michael Bernstein
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PART VI

Schedule A

AUTHORITIES CITED

File No. 31597

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF
THE FEDERAL COURT OF APPEAL)

BETWEEN

ADIL CHARKAOUI

Appellant

and

MINISTER OF CITIZENSHIP AND
IMMIGRATION,
SOLICITOR GENERAL OF CANADA

Respondent

and

ATTORNEY GENERAL OF ONTARIO,
CRIMINAL LAWYERS' ASSOCIATION
(ONTARIO),
CANADIAN BAR ASSOCIATION,
BARREAU DU QUÉBEC,
AMNESTY INTERNATIONAL,
ASSOCIATION DES AVOCATS DE LA
DÉFENSE DE MONTRÉAL,
ASSOCIATION QUÉBÉCOISE DES
AVOCATS ET AVOCATES
EN DROIT DE L'IMMIGRATION

Interveners

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