Court File Nos.: 30762 , 30929, 31178

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

Court File No. 30762

BETWEEN:

ADIL CHARKAOUI

Appellant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE SOLICITOR GENERAL OF CANADA

Respondents

-and –

Court File No. 31178

AND BETWEEN:

HASSAN ALMREI

Appellant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE SOLICITOR GENERAL OF CANADA

Respondents

- and –

Court File No. 30929

AND BETWEEN:

MOHAMED HARKAT

Appellant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE SOLICITOR GENERAL OF CANADA

Respondents

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO);
UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS WATCH; CANADIAN COUNCIL OF AMERICAN-ISLAMIC RELATIONS AND CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION; CANADIAN ARAB FEDERATION; CANADIAN CIVIL LIBERTIES ASSOCIATION;
CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP AND NATIONAL ANTI-RACISM COUNCIL OF CANADA; AMNESTY INTERNATIONAL CANADA;
CANADIAN BAR ASSOCIATION; FEDERATION OF LAW SOCIETIES OF CANADA;
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENER
Criminal Lawyers' Association (Ontario)

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PART I - THE FACTS

1. On May 4, 2006, Mr. Justice LeBel granted the Criminal Lawyers' Association (Ontario), hereinafter the C.L.A., intervener status in the three within appeals. Leave was granted to file a single consolidated Factum, not to exceed 20 pages in length, in relation to all three appeals. The Court reserved on the C.L.A.'s request to make 20 minutes oral argument until after receipt of the Factum.

- *Order of LeBel J.*, dated May 4, 2006

2. The C.L.A. adopts the facts as set out in the Facta of the parties and in the Judgements below. The C.L.A. takes no position with respect to the facts or the merits of the three appeals.

PART II - POINTS IN ISSUE

3. The C.L.A. sought, and was granted, leave to intervene in relation to only two issues that arise in the within appeals, as follows:

(i) Whether reliance on secret evidence tendered at the judicial hearing of a Ministerial security certificate, pursuant to s. 78 of the *Immigration and Refugee Protection Act* (hereinafter *I.R.P.A.*), violates ss. 7 and 1 of the *Canadian Charter of Rights and Freedom* (hereinafter the *Charter*);

(ii) Whether ss. 82-84 of *I.R.P.A.*, to the extent that they authorize automatic detention without judicial review, pending the s. 78 hearing, violate ss. 7, 9 and 1 of the *Charter*.

PART III - ARGUMENT

A. Does Reliance on Secret Evidence at a Judicial Hearing Violate ss. 7 and 1 of the *Charter*?

4. It is important to accurately identify the principle of fundamental justice that is at stake in relation to this first issue. The C.L.A. submits that the principle at issue is whether a litigant at a judicial hearing is entitled to know the case that is being put against him/her and is entitled to respond to it. The principle is sometimes referred to compendiously as "the right to meet the case."

5. It is submitted that s. 78 of *I.R.P.A.* clearly violates the above principle. Section 78(e) requires the judge to hear certain evidence tendered by the Government in the absence of the opposing litigant. Section 78(h) provides for a summary of the evidence to be given to the opposing litigant that "enables them to be reasonably informed of the circumstances giving rise to the certificate." However, s. 78(g) then derogates from this general principle by exempting the secret evidence heard under s. 78(e) from the s. 78(h) summary. Finally, and most importantly, s. 78(g) expressly provides that the secret evidence exempted from the summary can still be relied on by the Court:

> the information or evidence described in paragraph (e) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable…[Emphasis added.]
>
> - *I.R.P.A.*, S.C. 2001, c. 27, s. 78

6. If it is a principle of fundamental justice that a litigant at a judicial hearing is entitled to know the case being put against him/her and is entitled to respond to it, then s. 78 would appear to violate that principle. The part of the Government's case that is heard in secret pursuant to s. 78(e) cannot be summarized for the litigant pursuant to s. 78(h) and yet it can be relied on by the Court pursuant to s. 78(g). Accordingly, part of the Government's case is never heard or met by the opposing litigant.

7. The Respondent Ministers have obfuscated this simple issue by describing the principle of fundamental justice that is at stake in a different manner. For example, the Respondents' Factum in the *Almrei Case* asserts at para. 64 that "Almrei has not established that it is a principle of fundamental justice that persons have a right to be given complete disclosure of security information." The Factum goes on to assert in a similar vein at para. 77 that this Court's jurisprudence has held that "the public interest in non-disclosure of material that could be injurious to national security can trump the public interest in disclosure." The s. 7 issue is characterized in similar terms in the Respondents' Facta in the other two cases (for example, at paras. 31-41 in the Respondents' Factum in *Harkat Case*).

8. The C.L.A. submits that "the right to disclosure" is <u>not</u> the principle of fundamental justice that is at stake in these appeals. The right to disclosure, as enunciated by this Court, is a right to pre-hearing production of all relevant and non-privileged materials that may assist the litigant in preparing its case (e.g. see: *R. v. Stinchcombe, infra*). Privileged information has never come within the ambit of this right, even in the criminal law context, except in a narrow set of circumstances where it is essential to establishing innocence (e.g. see; *R. v. Leipert, infra*). The relevant and non-privileged materials that are disclosed prior to trial cover a broad array of both inculpatory and exculpatory information. Some of this material, if it is admissible evidence, may eventually be called by one of the parties at trial. Much of this material is discarded or is simply used as background information that assists counsel's preparation. Invariably, the evidence tendered at trial has been disclosed prior to trial.

- *R. v. Stinchcombe*, [1995] 1 S.C.R. 754
- *R. v. Leipert*, [1997] 1 S.C.R. 281

9. What s. 78 of *I.R.P.A.* provides for is not the protection of privileged national security materials <u>from disclosure</u>. It is s. 38 of the *Canada Evidence Act* (hereinafter, the *C.E.A.*) that provides this protection. Rather, s. 78 of *I.R.P.A.* goes much farther by providing that one litigant can call secret evidence at a judicial hearing, to advance its case, <u>and a court of law can rely on that evidence</u> even though the opposing litigant has neither heard nor been able to challenge the secret evidence. This has nothing to do with the right to pre-trial disclosure of all relevant and non-privileged information. Indeed, it could be argued that it is only as a result of

calling the secret evidence at a judicial hearing, and by relying on it, that the proponent of the evidence waives its previously valid claim of privilege (e.g. see: *R. v. Shirose and Campbell, infra*).

- *R. v. Shirose and Campbell*, [1999] 1 S.C.R. 565

10. The C.L.A. adopts the submissions of the Appellant Almrei, at paras. 31-2 of his Factum, as to why s. 7 liberty and security of the person interests are engaged by s. 78 *I.R.P.A.* proceedings. In this regard, the close connection between s. 78 procedures and the ss. 82-84 arrest and detention of the litigant is determinative of the fact that s.7 of the *Charter* is engaged.

11. It is therefore submitted that the important question in relation to the provisions found in s. 78 of *I.R.P.A.* is whether there exists a principle of fundamental justice that bars a party to judicial proceedings from advancing its case on the basis of secret evidence.

12. The C.L.A. accepts the three part test for determining whether an asserted right or rule amounts to a s. 7 "principle of fundamental justice," as set out in the Respondent Ministers' Facta (e.g. at para. 31 of the Respondents' Factum in the *Harkat Case*). It is submitted that the right to know the case being put against a litigant at a judicial hearing, and the right to respond to it, easily satisfies this three part test. It is a right that is based in law, particularly in the long history of the common law. It is a right that accords with broad societal notions of fairness and justice. Finally, it is a rule that can be and has been applied with precision.

13. It is important to note that this principle of fundamental justice is not one that is limited to the criminal law context. Rather, its origins are in the common law and it has always been applied in the administrative law context as a principle of natural justice, as well as in civil and criminal trials. In a pre-*Charter* decision, *Township of Innisfil v. Township of Vespra, infra*, Estey J. gave the unanimous decision of this Court and described how the principle has historically operated in the administrative law context:

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system, founded on cross-examination and the right to meet

> the case being made against the litigant, civil or criminal , is the procedural substructure upon which the common law itself has been built. That is not to say that because our Court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques. Indeed, there are many tribunals in the modern community which do not follow the traditional adversarial road. On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination. [Emphasis added.]

Estey J. went on to adopt Dean Wigmore's famous pronouncement that cross-examination in both the civil and criminal context is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."

- *Township of Innisfil v. Township of Vespra,* [1981] 2 S.C.R. 145

14. The 1960 *Canadian Bill of Rights* legislated "the right to a fair hearing in accordance with the principles of fundamental justice," pursuant to s. 2(e). This provision clearly applies to "every law of Canada" that determines "rights and obligations" and is not limited to criminal proceedings. In *Duke v. The Queen, infra* this court interpreted s. 2(e) as giving the litigant "the opportunity adequately to state his case." In *R. v. Seaboyer, infra* McLachlin J., as she then was, applied the reasoning in *Duke* to the *Charter* and described the s. 7 right to a fair hearing as "the right to call and challenge evidence." More recently, in *R. v. Lyttle, infra*, this Court unanimously applied McLachlin J.'s reasoning in *Seaboyer* and stressed once again that this particular right is not limited to criminal proceedings:

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be *no other way* to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
> …
>
> In *R. v. Osolin*, [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481, 109 D.L.R. (4th) 478, 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…

> 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. [Italics of Major and Fish JJ. in original; underlining added.]
>
> - *R. v. Lyttle*, [2004] 1 S.C.R. 193
> - *R. v. Seaboyer*, [1991] 2 S.C.R. 577
> - *Duke v. The Queen*, [1972] 2 S.C.R. 917

15. It is therefore submitted that "the right to meet the case," as Estey J. described it in *Township of Innisfil, supra*, is a longstanding principle of fundamental justice in civil, criminal and administrative law proceedings. The real issue on the present appeals is whether limitations on this right can be justified in the national security context. The C.L.A. adopts the submissions of the Appellant Harkat, at paras. 38-42 of his Factum, as to whether this analysis should take place within the context of s. 7 itself or under s. 1 of the *Charter*.

16. The C.L.A. submits that there is a fatal impediment to the Government's argument that the procedure set out in s. 78 of the *I.R.P.A.* is necessary and proportionate in the national security context. This impediment is simply that the Government has chosen the most rights-infringing model available. There are at least five less restrictive models which have a history of working well in the national security context.

17. The first alternative model is s. 38.06(2) of the *C.E.A.* which enacts a judicial discretion to balance the interest in disclosure of national security information against the interest in secrecy, as follows:

> If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of the facts relating to the information.
>
> - *Canada Evidence Act*, R.S.C. 1985, c. C-5 as amended, s. 38.06(2)

18. The *C.E.A.* provisions apply to both civil and criminal proceedings under Parliament's jurisdiction. They provide a less restrictive alternative to s. 78(h) of *I.R.P.A*. which mandates automatic non-disclosure of "anything" that "would be injurious to national security," no matter how important disclosure of some of the information under some conditions might be in a particular case. Under s. 38.06(2) of the *C.E.A.*, a judge must balance the competing interests and may impose conditions on the disclosure of national security information. Examples of conditions that could be imposed under s. 38.06(2) include the release of information to security-cleared counsel for the permanent resident or foreign national on an undertaking not to disclose the information to his or her client. As discussed below, this approach to disclosure of confidential information has proved successful in other proceedings.

19. The importance of judicial discretion in managing national security information is further underscored by the *C.E.A.*'s protection of an accused's right to a fair trial in criminal proceedings where an order is made prohibiting the disclosure of such information. Section 38.14(1) of the *C.E.A.* provides that the person presiding over such a criminal proceeding "may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial." Potential orders include but are not limited to "(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence; (b) an order effecting a stay of the proceedings; and (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited." No such remedies are available under *I.R.P.A.* which provides, in stark contrast, that information or evidence not disclosed on national security grounds "may be considered by the judge in deciding whether the certificate is reasonable."

- *C.E.A., supra*, s. 38.14

20. There is no apparent justification for Parliament's limitation of judicial discretion under s. 78(h) of *I.R.P.A*. The Government must be driven to argue that claims of national security privilege are not adequately dealt with under its own legislation, the *C.E.A.*

21. The second alternative model is the procedure in place at the time of *Chiarelli, infra*, that was upheld by this Honourable Court. It was less restrictive than the newly legislated *I.R.P.A.* procedure. In that case, the Court noted that the documentary evidence relied on in support of the Ministerial certificate was disclosed to Chiarelli but that two R.C.M.P. witnesses had testified *in camera.* Sopinka J. gave the unanimous judgement of the Court and described the procedure as follows:

> Although the first day of the hearing was conducted *in camera*, the respondent was provided with a summary of the evidence presented. In my view, these various documents gave the respondent sufficient information to know the substance of the allegations against him, and to be able to respond. …The respondent was also given the opportunity to respond, by calling his own witnesses or by requesting that he be allowed to cross-examine the R.C.M.P. witnesses who testified *in camera*. The chairman of the Review Committee clearly indicated an intention to allow such cross-examination. … I conclude that the procedure followed by the Review Committee in this case did not violate principles of fundamental justice.

In other words, *Chiarelli* is a case where full documentary disclosure was made, a summary of the two RCMP witnesses' *in camera* testimony was provided and, finally, an opportunity to cross-examine the two witnesses on their *in camera* testimony was also provided. Sections 78 (e),(g) and (h) of *I.R.P.A.* now expressly provide that secret evidence can be relied on by the tribunal but is <u>not</u> to be included in the summary disclosed to the opposing litigant. Furthermore, there is no cross-examination on that evidence. It has not been demonstrated why the *Chiarelli* procedure, approved unanimously by this Court, is now unworkable.

- *Chiarelli v. Canada (M.E.I.)*, [1992] 1 S.C.R. 711

22. The third alternative model is the U.K. procedure involving the use of Special Advocates with national security clearance. That model is discussed thoroughly in the Appellant Harkat's Factum at paras. 75-84. The C.L.A. adopts those submissions.

23. The fourth alternative model is the one used by Associate Chief Justice O'Connor at the *Arar Inquiry*. When the Government requests that certain evidence be heard *in camera*, due to national security concerns, and the Commissioner agrees with the necessity of the Government's request, a large number of counsel who are independent of the Government still have access to

the protected information and are allowed to participate at the *in camera* hearing by examining and cross-examining the witnesses. Commission counsel, the Commission's *amicus curiae* and counsel to the witnesses testifying at the *in camera* hearing are all entitled to rights of access and participation at these secret proceedings, provided they receive national security clearance and provided they give undertakings of confidentiality respecting the secret evidence. Senior members of the private bar have participated at the *in camera* hearings in this manner and there is no suggestion that national security has been threatened (contrary to the submission at para. 81 of the Respondent Ministers' Factum in the *Almrei Case* suggesting that such a procedure is too risky).

- *Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar,* Rules of Procedure and Practice, Rules 47-8, 50, 53-4 and 55-6

24. The fifth alternative model is drawn from recent experience in the criminal courts, when dealing with cases that raise national security concerns. Given that Canadian citizens are not subject to *I.R.P.A.* proceedings under s. 78, the criminal law must be used to protect the public from those citizens who are a threat to national security. For example, all of the major suspects who were not charged and all three of the accused who were eventually charged in relation to the 1985 Air India and Narita bombings were Canadian citizens who had immigrated to this country from the Punjab and had become citizens. An extensive CSIS investigation was conducted, both prior to and after this incident which is the most serious threat to national security ever to occur in this country. CSIS officers and a CSIS informant testified at the trial. Many CSIS documents were tendered in evidence at the trial, both by the Crown and the defence. Extensive disclosure of sensitive CSIS information was successfully obtained, prior to trial, due to the trial Judge's ruling that CSIS was to be considered as part of the Crown for *Stinchcombe* disclosure purposes.

- *R. v. Malik, Bagri and Reyat,* 2002 B.C.S.C. 864

25. Notwithstanding this substantial involvement of a national security investigation in the "Air India" case, every single disclosure dispute concerning CSIS documents was resolved by counsel, out of court, without the necessity of any s. 38 privilege claims. The procedure used successfully in the "Air India" trial was for the Crown to provide defence counsel with access to

the relevant CSIS files on an undertaking of confidentiality, somewhat like the procedure now being used at the *Arar Inquiry*. The use of such undertakings had been approved by the B.C. Court of Appeal in two earlier cases, *R. v. Fisk, infra* and *R. v. Guess, infra*, where disclosure of potentially privileged information had been sought (informant privilege in *Fisk* and third party wiretaps in *Guess*). The *Guess/Fisk* procedure was recently adopted in the Ontario Superior Court in *R. v. Stucky, infra*, a case that also involved disclosure disputes about a large number of potentially privileged documents. The Respondent Ministers submit, at para. 81 of their Factum in the *Almrei Case*, that this procedure impairs the solicitor-client relationship because counsel is given access to confidential material, and to *in camera* proceedings, while the client is denied such access. This submission ignores the simple solution emphasized by Chief Justice McEachern in *R. v. Fisk, infra*, namely, that counsel should only accept access to disclosure on an undertaking of confidentiality "with the consent of his client." This is precisely what counsel did in the "Air India" trial, on repeated occasions, and there is no suggestion that the solicitor-client relationship was impaired in that very lengthy and difficult case. Counsel's role is more than a mere agent for the client as counsel have broad public interest duties to the administration of justice, as officers of the Court, which require independence from the client (e.g. see: *Rondel v. Worsley, infra*).

- *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.)
- *R. v. Fisk* (1996), 108 C.C.C.(3d) 63 (B.C.C.A.)
- *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C.C.A.)
- *R. v. Stucky*, [2005] O.J. No. 5120 (S.C.)
- Michael Code, "Problems of Process in Litigating Privilege Claims Under the Flexible Wigmore Model," LSUC Special Lectures 2003: The Law of Evidence, Irwin Law 2004, pp. 267-273

26. It is therefore submitted that the procedural regime enacted by s. 78 of *I.R.P.A.* is demonstrably over-broad and unnecessary. A number of less restrictive models exist which have been shown to work well in the exact same context of national security privilege.

B. Does Automatic and Non-Reviewable Detention by the Executive Violate ss. 7, 9 and 1 of the *Charter*?

27. Section 82(2) of *I.R.P.A.* provides for the warrantless arrest and detention of a foreign national who is named in a Ministerial security certificate. Section 83(1) provides for judicial review of the detention of permanent residents, within 48 hours of their arrest on a security certificate, but not for judicial review of the detention of foreign nationals. Finally, s. 84(2) provides for an eventual judicial review of the detention of a foreign national but only after the security certificate has been found to be reasonable by a Federal Court judge at a s. 78 hearing.

28. In other words, the effect of the legislative scheme is to provide for automatic detention of foreign nationals, without any prior judicial authorization and without any subsequent judicial review, pending completion of the s. 78 hearing. The sole authority for the foreign national's detention pending the hearing of the merits of the case is an Executive fiat. Furthermore, the Executive fiat is based on the Executive's own untested allegations. The analogy, in the criminal law context, would be a provision requiring the detention before trial of an accused, pursuant to a warrantless arrest and without any bail hearing, until after the accused had been convicted at his/her trial.

29. The irony of these provisions is that they provide for a judicial review of the detention at a time when it is less justified, namely, after the security certificate has been found to be reasonable by a judge at a s. 78 hearing. It is prior to the s. 78 hearing that a judicial detention review is most important. One simply has to imagine a reasonable hypothetical case where the Ministers have a weak basis for the security certificate, that is unlikely to succeed at the eventual s. 78 hearing, and where the foreign national has reasonably strong ties to Canada and reliable sureties who can properly supervise him/her pending the s. 78 hearing. In such a case it would be grossly unjust to deny bail and yet there is no provision for a timely judicial review of the Ministerial detention order.

30. It is submitted that this Court's decision in *R. v. Swain, infra* is dispositive of this issue. In that case the Court struck down the old provisions of the *Criminal Code* that had provided for the automatic detention, without a hearing, of those accused who had been acquitted of an

offence on the basis of a s. 16 insanity defence. Although these accused were not guilty of any offence, as a matter of criminal law, they were still potentially dangerous in some cases on mental health grounds. The Court held that preventive detention of insane acquittees could be justified in some cases but only after a hearing where rational criteria were applied. It was the automatic and non-discriminating detention of all insane acquittees, without a hearing, that violated ss. 7 and 9 of the *Charter* and that was overbroad and disproportionate within the meaning of s. 1 of the *Charter*.

- *R. v. Swain*, [1991] 1 S.C.R. 933

31. The insane acquittees who were detained under the pre-*Swain* provisions of the *Criminal Code* had been found to have committed the *actus reus* of a serious criminal offence, usually a homicide. Section 16 insanity defences were rarely raised in cases other than murder because of the harsh remedy, namely, automatic and indefinite detention. In other words, there were good reasons to detain many of these individuals, after their trial was concluded, in order to protect the public from an ongoing and dangerous mental disorder. These individuals had all had access to a bail hearing prior to trial and the effect of this Court's decision in *Swain* was simply to provide them with a detention review after the trial. At the post-trial hearing the Court would decide which individuals were still dangerous, and should not be released, and which individuals did not require ongoing detention.

- *R. v. Swain, supra*

32. There is simply no justification or explanation for why foreign nationals, who are the subject of a Ministerial security certificate, should not be subject to the same analysis and treatment as the insane acquittees in *Swain*. Indeed, there was arguably a stronger justification for automatic detention of someone found at trial to have already committed the *actus reus* of a serious crime, like a homicide. The Government's argument in the present cases must be that its decisions are always infallible, because two Ministers sign a security certificate, or that the judiciary cannot be trusted to separate and discriminate between those foreign nationals who should be detained and those who should be released. Neither argument is acceptable as a matter of constitutional law. In *Hunter v. Southam, infra*, this Court's seminal decision concerning s. 8

of the *Charter*, it was held that searches and seizures by the Executive presumptively require prior judicial authorization. It is submitted that Executive seizures of the person under *I.R.P.A.,* without a warrant, must require judicial review of the detention within a short time after it occurs in order to comply with ss. 7 and 9 of the *Charter*.

- *Hunter et al v. Southam Inc.*, [1984] 2 S.C.R. 145

33. It is therefore submitted that the legislative scheme in *I.R.P.A.* violates ss. 7, 9 and 1 of the *Charter* by providing for the automatic non-reviewable detention of foreign nationals, named in a Ministerial security certificate, prior to their s. 78 hearing.

PART IV - SUBMISSIONS IN RELATIONS TO COSTS

34. The Intervener is not seeking costs.

PART V - NATURE OF THE ORDER REQUESTED

35. The Intervener submits that s. 78 of *I.R.P.A*. violates s. 7 of the *Charter* and cannot be justified pursuant to s. 1 of the *Charter* and that the Constitutional Questions stated in the appeals ought to be answered in this manner.

36. The Intervener further submits that ss. 82-84 of *I.R.P.A.* violate ss. 7 and 9 of the *Charter* and cannot be justified pursuant to s. 1 of the *Charter* and that the Constitutional Questions stated in the appeals ought to be answered in this manner.

The estimated total length of time for the Intervener's oral argument, if permitted, is 20 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

July 2, 2009

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PART VI - AUTHORITIES

PART VII - STATUTORY PROVISIONS OR REGULATIONS

I.R.P.A., S.C. 2001, c. 27, s. 78

Canada Evidence Act, R.S.C. 1985, c. C-5 as amended, s. 38.06(2); 38.14