File No.: 31178

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

BETWEEN:

MOHAMED HARKAT

APPELLANT

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENTS

FACTUM OF THE RESPONDENTS
(Pursuant to R. 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

"We are not trying to negotiate with you, we are trying to destroy you."[1]

1. Parliament has adopted important measures to protect the security of the state and of the public, and to prevent Canada from becoming a safe haven for terrorists. These include a security certificate process in the *Immigration and Refugee Protection Act* ("*IRPA*") which is designed, *inter alia*, to efficiently remove persons who, because of their suspected involvement with terrorism, are unacceptable and inadmissible to Canada.

2. There is no right to an unfettered disclosure of all information on which a security certificate is based. Use of confidential security information is essential in the security certificate proceedings and is a critical component in combating terrorism. Disclosure of security methodology and sources would fatally jeopardize international cooperation in the sharing of vital information and also jeopardize ongoing investigations. The protection of this information is an exceptional state and societal interest, one which must undoubtedly be taken into account in determining what principles of fundamental justice apply and what constitutes a fair proceeding.

3. The legislative provisions in *IRPA* strike an appropriate balance between the right to a fair hearing and the need to protect confidential security information. The Appellant was provided with sufficient disclosure to allow him to clearly understand the circumstances leading to the issuance of the security certificate.

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[1] An Al Qaeda representative cited in Austl., Commonwealth, *Report of the Inquiry into Australian Intelligence Agencies*, by Philip Flood (July 2004) (http://www.fas.org/irp/world/australia/flood.pdf).

B. SUMMARY OF THE FACTS

4. This is an appeal from the Federal Court of Appeal's decision in which the Court held that sections 77 through 80 of the *Immigration and Refugee Protection Act* ("*IRPA*") do not violate s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). In this case, the Federal Court of Appeal applied its decision in *Charkaoui (Re)*[2] holding that the Appellant ("Harkat") had not demonstrated any manifest error which would justify the Court of Appeal departing from its decisions in *Charkaoui* and *Almrei v. Canada (Minister of Citizenship and Immigration)*.[3]

5. Harkat had challenged sections 78 through 80 as being contrary to s. 7. Dawson J., a designated judge of the Federal Court, upheld the constitutionality of these provisions based upon the Court of Appeal's decision in *Charkaoui*.[4]

6. Dawson J., a designated judge of the Federal Court, held that there are reasonable grounds to believe that Harkat has engaged in terrorism by supporting terrorist activity and was, or is, a member of the bin Laden Network which is an organization that there are reasonable grounds to believe has engaged or will engage in terrorism.[5]

7. Harkat was reportedly born August 6, 1968, in Algeria. In his refugee claim, Harkat acknowledged his support for and membership in the Front islamique du salut ("FIS") in Algeria. After the FIS severed its links with the Groupe islamique armé ("GIA"), Harkat indicated he was loyal to the GIA, which seeks to establish an Islamic state in Algeria through the use of terrorist violence.[6]

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[2] *Charkaoui (Re)*, [2005] 2 F.C.R. 299 (C.A.), 2004 FCA 421 [*Charkaoui* cited to F.C.R.].
[3] *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.R. 142 (C.A.), 2005 FCA 54 [*Almrei* cited to F.C.R.].
[4] *Appellant's Record*, at 99–100, at paras. 23–24.
[5] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss.34(1)(c) and 34(1)(f) [*IRPA*]; *Appellant's Record*, at 156.
[6] *Appellant's Record*, at 436, 439, 440.

8. In 1990, Harkat left Algeria and travelled to Pakistan via Saudi Arabia. He remained in Pakistan until 1995.[7] The Bin Laden Network, through Al Qaeda ("the Base") operated and still operates terrorist training camps and guesthouses in Afghanistan, Pakistan and Sudan. The camps provide sanctuary, funds, military and counter-intelligence training including terrorist and guerrilla warfare techniques, as well as the manufacture of explosive devices. In September 2001, it was reported that Al Qaeda was operating a dozen camps in Afghanistan where as many as five thousand militants may have been trained. These militants reportedly have been dispersed to some fifty countries. Before and after arriving in Canada in 1995, Harkat was linked to individuals believed to be in this Network and he is still associated with them.[8]

9. One such individual is Abu Zubaida, one of Osama bin Laden's top lieutenants since the early 1990s until his capture in Pakistan. Dawson J. found that Harkat has associated with Abu Zubaida since the early 1990s.[9]

10. Harkat arrived in Canada in 1995 on a false Saudi Arabian passport and claimed refugee status, which was granted on February 24, 1997. He disclosed to immigration authorities that he had a false Saudi passport and an Algerian passport. He was allowed to leave the Toronto airport, but instructed to return within twenty-one days with a translator. Harkat called an individual known as "Taher", a taxi driver living in Ottawa, who he had met in Pakistan. Harkat later lied to CSIS about ever knowing or seeing Taher before arriving in Canada.[10]

11. According to Harkat, he returned to Toronto from Ottawa by van with Ahmed Khadr, a high-ranking associate of Osama bin Laden.[11] Khadr and Harkat had worked in Pakistan with Islamic charities. Harkat testified that, during this five-hour journey, he had little or almost no discussion with Khadr aside from the advice Khadr proffered that he should be truthful with immigration authorities.[12]

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[7] *Appellant's Record*, at 440.
[8] *Appellant's Record*, at 444–477.
[9] *Appellant's Record*, at 448–449, 457.
[10] *Appellant's Record*, at 115, para. 60.
[11] *Appellant's Record*, at 135, para. 108.
[12] *Appellant's Record*, at 115–116, para. 61.

C. SUMMARY OF PROCEEDINGS IN THE COURTS BELOW

12. In December 2002, the Solicitor General of Canada and the Minister of Citizenship and Immigration signed a certificate pursuant to s. 77 of *IRPA* ("security certificate") in which they stated that they were of the opinion that Harkat is a foreign national who is inadmissible to Canada on security grounds.[13] Specifically, it was alleged that Harkat supported terrorist activity as a member of the terrorist group known as the Bin Laden Network, which includes Al Qaeda.

13. Pursuant to s. 77(1) of *IRPA*, the security certificate was referred to the Federal Court on December 10, 2002, for a determination under s. 80 as to whether the security certificate is reasonable.[14]

14. Having examined the security intelligence report upon which the security certificate was based, within seven days of the referral of the security certificate to the Federal Court, Dawson J. provided Harkat with a summary of the narrative and with the copies of some of the documents contained in the reference indexes that enabled Harkat to be reasonably informed of the circumstances that gave rise to the issuance of the security certificate. These materials comprised six volumes.[15]

15. Harkat made a motion for disclosure of the evidence supporting the allegations against him. In a judgment dated March 7, 2003, Dawson J. denied his motion, stating that any additional disclosure of information would be injurious to national security, or to the safety of any person.[16]

16. In July 2003, Harkat brought an additional motion seeking, *inter alia*, greater disclosure of the facts relied upon to support the summary of the security intelligence report upon which the security certificate was based. Dawson J. allowed his motion in part. Her Ladyship denied Harkat's request for production of a CSIS employee to testify about the summary, but afforded him the opportunity to put

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[13] *Appellant's Record*, at 89, para. 1.
[14] *Appellant's Record*, at 92, para. 5.
[15] *Appellant's Record*, at 92, paras. 5, 6.

questions in writing to the Respondents for the purpose of clarifying any matter set out in the summaries provided. The questions and resultant answers, in their final form, were provided to Harkat and included in the public records.[17]

17. Harkat appealed Dawson J.'s ruling on his motion for greater disclosure and the right to compel an employee of CSIS to testify at the hearing regarding the summary of evidence provided to him to the Court of Appeal. In June 2004, the Court of Appeal dismissed Harkat's appeal.[18]

18. On the Federal Court's own motion in June 2004, Dawson J. sat *in camera* and in the absence of Harkat and his counsel to hear evidence for the purpose of determining if, as a result of the effluxion of time, any further summary of the information or evidence could be provided to Harkat. Ultimately, in October 2004, the Court ordered the provision of an additional summary statement to Harkat related to a person named Odeh who was trained as a terrorist in Afghanistan, and implicated in the bombing of the U.S. Embassy in Nairobi.[19]

19. Harkat filed an additional motion in the Federal Court in June 2004 for an order appointing an *amicus curiae* to assist the Court during portions of the hearing when Harkat's counsel was not permitted to be present. In denying Harkat's motion, Dawson J. held that it was the very responsibility of the Court to fully and fairly consider the allegations and evidence against Harkat without an *amicus curiae*. Moreover, the procedure set out in section 78 of *IRPA* provided the designated judge with the necessary power and flexibility to inquire into the reasonableness of a security certificate while balancing and protecting the rights of the person named in the certificate.[20]

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[16] *Appellant's Record*, at 2–10.
[17] *Appellant's Record*, at 34–36, paras. 10–20.
[18] *Appellant's Record*, at 40–42.
[19] *Appellant's Record*, at 95–96, paras. 13–15.
[20] *Appellant's Record*, at 43–87.

20. Through the disclosure of three additional summaries,[21] Harkat was made aware of the allegations made against him upon which the security certificate was based. Specifically, he was advised, *inter alia*, of the following relevant facts:

(a) that prior to arriving in Canada, Harkat had engaged in terrorism by supporting terrorist activity, but that he concealed from Canadian authorities the fact that he had supported Islamic extremists and travelled to Afghanistan;

(b) that Harkat supported terrorist activity as a member of the terrorist group known as the Bin Laden Network, which includes Al Qaeda;

(c) that Harkat has assisted Islamic extremists who have come to Canada;

(d) that Abu Zubaida was able to identify Harkat by his physical description and his activities, including that he operated a guest house in Peshawar, Pakistan, in the mid-1990s for mujahedeen travelling to Chechnya;

(e) that a person named Odeh was trained as a terrorist in Afghanistan, and implicated in the bombing of the U.S. Embassy in Nairobi, Kenya; and

(f) that it was alleged that Harkat had been in Afghanistan and that he concealed his travel to Afghanistan.

21. Dawson J. issued a Direction on October 20, 2004, in an attempt to assist Harkat to focus upon the case to be met. Dawson J. advised Harkat that she would make no finding adverse to him on the basis of any information concerning Harkat which may have been provided by Odeh. In addition, in light of the allegations against Harkat, Her Ladyship directed Harkat to "adduce whatever evidence is available to him that touches on whether he was ever in Afghanistan (whether at a training camp or not) and whether he concealed that".[22]

22. On March 22, 2005, and after eleven days of hearing, at which Harkat testified, Dawson J. determined that Harkat was inadmissible to Canada based on the anti-terrorism provisions of *IRPA*, and found the security certificate to be reasonable. Her Ladyship upheld the constitutionality of sections 78 through 80 based on the Court

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[21] *Appellant's Record*, at 433–452, 457, 460–461.

of Appeal's decision in *Charkaoui*. Upon consideration of all the evidence and grounded on evidence found to be credible, Dawson J. further held, *inter alia*, that:[22]

(a) there were reasonable grounds to believe that Harkat has engaged in terrorism by supporting terrorist activity and was, or is, a member of the Bin Laden Network which is an organization there are reasonable grounds to believe has engaged, or will engage, in terrorism;

(b) "It is clear and beyond doubt" that Harkat lied under oath in "several important respects" including his denial that he:

(i) knowingly supported or assisted Islamic extremists;

(ii) assisted Islamic extremists who have come to Canada;

(iii) was associated with Abu Zubaida;

(iv) was in Afghanistan; and

(v) lived in Peshawar;

(c) Harkat had associated with Abu Zubaida since the early 1990s, notwithstanding the fact that the Court gave no weight to the information provided through Abu Zubaida;

(d) Harkat lied to Canadian officials about his:

(i) work for a relief company in Pakistan;

(ii) travel to Afghanistan;

(iii) association with those who support international extremist networks;

(iv) use of the alias Abu Muslima; and

(v) assistance to Islamic extremists;

(e) Harkat's lies to Canadian officials "were for the purpose, at least in part, of distancing himself from those who support terrorism and to mislead Canadian authorities about his involvement in the support of terrorist activities";

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[22] *Appellant's Record*, at 98–99, paras. 21–22.
[23] *Appellant's Record*, at 153–156, paras. 142–143; 134–137, paras. 105–109, 113.

(f) Harkat was a member of the Bin Laden Network, and that, before and after he arrived in Canada, he was linked to individuals believed to be in this Network;

(g) While in Canada, Harkat has been in contact with individuals known to be involved in Islamic extremist activities;

(h) Harkat's support for the GIA was consistent with support for the use of terrorist violence; and

(i) It is implausible that he had little or almost no discussion with Khadr, one of Osama bin Laden's highest ranking authorities, over a five-hour journey.

23. Harkat appealed the decision of the Federal Court to the Court of Appeal. In an unanimous decision, the Court of Appeal dismissed Harkat's appeal on the basis that Harkat had not demonstrated any manifest error which would justify the Court in departing from its decisions in *Charkaoui* and *Almrei* wherein it upheld the constitutionality of the impugned provisions of *IRPA*.[24]

24. Harkat subsequently applied to the Federal Court on September 23, 2005 for judicial release from detention pursuant to s.84(2) of *IRPA*. On December 30, 2005, and after hearing both public and secret evidence, Justice Lemieux denied Harkat's application entirely on the basis of the public record. His Lordship was not satisfied that Harkat had demonstrated that he will not be removed within a reasonable time.[25]

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[24] *Appellant's Record*, at 88–153; *Charkaoui*, *supra* note 2; *Almrei*, *supra* note 3.
[25] *Harkat v. M.C.I. & M.P.S.E.P.C.*, 2005 FC 1740.

PART II – POINTS IN ISSUE

25. By order of the Chief Justice of the Supreme Court of Canada, dated February 13, 2006, the following constitutional questions were stated:

1. Do sections 78 through 80 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, in whole or in part or through their combined effect, infringe s.7 of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstratively justified in a free and democratic society under s.1 of the *Canadian Charter of Rights and Freedoms*?

26. Sections 78 through 80 do not infringe s. 7 of the *Charter*. Alternatively, if the sections violate s. 7 of the *Charter*, the sections are a reasonable limit within s. 1 of the *Charter*.

PART III – ARGUMENT

A. SECTION 7 OF THE *CHARTER*

27. If s. 7 of the *Charter* is engaged in this civil proceeding, sections 78 through 80 comply with the principles of fundamental justice. This Court's jurisprudence as to when s. 7 is engaged in immigration cases is more nuanced than Harkat suggests. In *Medovarski v. Canada (Minister of Citizenship and Immigration)* and *Esteban v. Canada (Minister of Citizenship and Immigration)*, this Court stated "... the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*".[26]

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[26] *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51 at paras. 46–47 [*Medovarski* cited to S.C.R.].

28. Harkat argues that s. 7 is engaged in his case by reason of the fact that he is detained. However, Harkat has only challenged sections 78 through 80 of *IRPA*, which deal with the reasonableness in the certificate, and not sections 82 through 84 under which he has been detained. His detention is not an issue before this Court.

29. Harkat's alternative claim that his s. 7 rights are violated by reason of the substantial risk of torture that would allegedly result upon his removal to Algeria, is also not an issue before this Court. Harkat challenges the constitutional validity of sections 78 through 80 of *IRPA*, which deal with the process by which the reasonableness of a security certificate is determined. The danger opinion, pursuant to s. 115 of *IRPA*, is a separate and distinct process from the certificate process and stands to be determined in accordance with this Court's ruling in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[27]

30. Moreover, the Minister's Delegate s. 115 opinion has not been rendered as to whether Harkat constitutes a danger to the security of Canada, and whether that danger is such that he can be removed to Algeria, notwithstanding any risk that he may face. The submissions made by Harkat to the Minister's Delegate, referred to in paragraph 29 of his factum, are not a substitute for the Delegate's opinion. In addition, they cannot be considered a proper part of the record on this appeal, as they were not in evidence before Dawson J. on the hearing into the reasonableness of the certificate, and therefore are not before this Court.

B. SECTION 78 OF *IRPA* DOES NOT VIOLATE SECTION 7 OF THE *CHARTER*

i. Principles of Fundamental Justice

31. Three criteria must be satisfied for a rule or principle to constitute a s. 7 principle of fundamental justice. First, it must be a legal principle and not simply a policy matter. Second, there must be significant societal consensus that the rule or

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[27] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at 41, para. 66; 35–36, paras. 54–55; 67, para. 127 [*Suresh* cited to S.C.R.].

principle is vital or fundamental to the societal notion of justice. Third, the rule or principle must be capable of being identified with precision and applied to situations in a way that yields predictable results.[28] Applying this test, Harkat has not established that it is a principle of fundamental justice that persons have a right to be given complete disclosure of security information.

32. When s. 78 of *IRPA* is properly interpreted, it cannot reasonably be said that it violates the principles of fundamental justice.[29] Section 78 of *IRPA* is carefully tailored to balance the rights of a person who is the subject of a security certificate to be reasonably informed of the circumstances giving rise to the certificate with the state's right and duty to protect confidential security intelligence information, the release of which would be injurious to national security or the safety of any person.[30] Furthermore, the release of confidential information could have a deleterious effect on international relations.[31]

ii. **No Right to Complete Disclosure of Security Matters**

33. Domestic Canadian law recognizes the need for secrecy in certain circumstances and acknowledges that full disclosure is not necessarily required for a fair process to be had in every case. What is fair depends entirely on the context.[32] In this regard, it is notable that even in the criminal law context, where guilt or innocence is at stake, this Court has specifically endorsed a process whereby materials that are used to justify the use of certain investigatory tools (such as electronic surveillance) can be edited before they are communicated to the accused, to prevent disclosing information

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[28] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at paras. 112–113 [*Malmo-Levine* cited to S.C.R.]; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para. 8 [*Canadian Foundation for Children* cited to S.C.R.]

[29] *R. v. Mills*, [1999] 3 S.C.R. 668 at 690, para. 22; at 711, para. 56 [*Mills* cited to S.C.R.]; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R 1038 at 1078 [*Slaight Communications*].

[30] *IRPA*, *supra* note 5, ss. 78(b),(e).

[31] *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 at 24, para. 40; at 26–28, paras. 43–45; at 30, para. 51 [*Ruby* cited to S.C.R.]; *Suresh*, *supra* note 27 at 31, paras. 45–46.

[32] See *R. v. Rodgers*, 2006 SCC 15 at paras. 47, 49.

that would, for example, reveal the identity of a confidential source.[33] In the same way, this Court has limited the circumstances where solicitor-client communications can be disclosed, even where the information is relevant to the disposition of ongoing judicial proceedings.[34]

34. This Court has also recognized the special need to protect sensitive national security information from disclosure and concluded that, in some circumstances at least, failure to disclose this information does not breach any principle of fundamental justice. Thus, in *Ruby v. Canada (Solicitor General)*, this Court noted that the principle of a fair hearing must include the opportunity for the other side to know the opposing party's case. This general principle is subject to certain exceptions, however, in situations where "a measure of secrecy" is justified.[35] The Court held that the mandatory *ex parte in camera* provisions of s. 51 of the *Privacy Act* did not violate the principles of fundamental justice under s. 7 of the *Charter*, and that the government had a "significant and exceptional state and social interest in the protection of information involved".[36]

35. The provisions of the *Privacy Act*, which required that the entire hearing be held *in camera*, were held to violate s. 2(b) of the *Charter* and they could not be justified under s. 1. This Court read down the section of the *Privacy Act* that required the entire hearing be held *in camera* so that it applied only to the *ex parte* submissions mandated by s. 51(3) of the *Act*.

36. It is clear that a discretion exists in Canadian law to receive confidential security intelligence information *ex parte* and *in camera*. Arbour J., writing for the Court in *Ruby*, stated:

> I agree with the observations of both Simpson J. and the Court of Appeal that if the statutory scheme in s.51 were discretionary as opposed to

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[33] *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1458, 1461; *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343, 2005 SCC 66 at para. 36 [*Pires* cited to SCC].
[34] *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 at 199–200, paras. 27, 29.
[35] *Ruby*, *supra* note 31 at 24, para. 40; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 882–883 [*Dagenais*].
[36] *Ruby*, *ibid.* at 28–29, para. 46; at 30, para. 51.

> mandatory, it is virtually certain that a reviewing court would exercise its discretion to hear the matter *in camera* and accept submissions *ex parte* whenever the government presented appropriate evidence that the undisclosed material was received in confidence from foreign sources or involved national security.[37]

37. More recently, in *Vancouver Sun (Re)*, this Court recognized that significant portions of the judicial investigative hearing held under provisions of the *Criminal Code* may have to be held *ex parte* and *in camera*:

> It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case – to our knowledge – in which it has been used.[38]

38. This Court held in *Malmo-Levine* that the delineation of the principles of fundamental justice must take into account the "social nature of our collective existence".[39] The exceptional state and social interest in the protection of sensitive security intelligence information is one factor that must be considered when assessing the content of the applicable principale of fundamental justice.

39. In *Malmo-Levine*, this Court recognized that, to constitute a principle of fundamental justice, it must be shown that there is a societal consensus that the proposed principle is "vital or fundamental to our societal notion of justice".[40] Harkat has not demonstrated there is a societal consensus that he receive full disclosure of all confidential security information or that the entire security certificate hearing should be held in public.

40. It is not a principle of fundamental justice that suspected terrorists and others who are the subject of security certificates have unfettered disclosure to all available information upon which the certificate is based. In *Chiarelli v. Canada (M.E.I.)*,

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[37] *Ibid.* at para. 49.
[38] *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 at para. 41.
[39] *Malmo-Levine*, *supra* note 28 at 629.
[40] *Ibid.* at 634, para. 113; *Canadian Foundation for Children*, *supra* note 28 at 93.

this Court recognized the need for confidentiality with respect to sources of information in cases involving national security, referring to Lord Denning's decision in *R. v. Secretary of State for the Home Department ex parte Hosenball*. Lord Denning expressed concern in that case that the disclosure of sources of information could result in enemies of the state attempting "to eliminate the source of the information".[41] Lord Denning's concern remains equally germane today, particularly having regard to the cell-like structure of terrorist organizations such as Al Qaeda and the fluid nature of such organizations.[42]

41. More recently, in *Suresh*, this Court held that a person who was the subject of a danger opinion as to whether the person should be returned to a country where he may face a substantial risk of torture should be provided with disclosure of the information.[43] Suresh was entitled to receive information advising him of the reasons for forming the danger opinion subject to "valid reasons for reduced disclosure, such as safeguarding confidential public security documents ...". This Court's determination that Suresh was not entitled to receive confidential public security documents is particularly significant given that the Court allowed Suresh's appeal on the basis that he had not received sufficient disclosure to comply with the *Charter*.[44]

42. Many democratic countries around the world authorise the use of classified material in immigration proceedings and they protect it from disclosure. New Zealand, Australia, United Kingdom and United States all permit the use of classified material in immigration proceedings.[45] Under New Zealand legislation, the Director of

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[41] *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 745 [*Chiarelli*]; *R. v. Secretary of State for the Home Department ex parte Hosenball*, [1977] 3 All E.R. 452 at 460 (C.A.).
[42] See U.N. Security Council Resolution 1267 Committee, *Third Report of the United Nations Security Council Counter-Terrorism Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated Individuals and Entities*, S/2005/572 (September 2005) ("*Third Report of the UN Security Council Committee*") at paras. 1, 3; See also *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, June 22, 2004, Testimony of Jack Hooper, Assistant Director of Operations, Canadian Security Intelligence Service ("CSIS") at 477–478 (online at http://www.stenotran.com/commission/maherarar/2004-06-23%20volume%203.pdf).
[43] *Suresh*, *supra* note 27 at 65, para. 122.
[44] *Ibid.* at 67–68, paras. 127–128.
[45] Austl., Commonwealth, Law Reform Commission, Report 98, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004) at paras. 10.53–10.108, and accompanying footnotes (http://www.austlii.edu.au/au/other/alrc/publications/reports/98/Ch_10.html).

Security of the New Zealand Security Intelligence Service can rely upon classified security information in support of a security risk certificate. The certificate suspends immigration proceedings in the processing of immigration applications.[46] The person who is the subject of the security certificate can have the certificate reviewed by the Inspector General, a former High Court judge with security of tenure. The review is to determine whether it is credible that the information can properly be characterized as classified security information, and whether the certificate has been properly invoked having regard to statutory criteria in the particular circumstances of the person's case.

43. At the review before the Inspector General, the person who is the subject of the security certificate is entitled to be represented by counsel to make representations as to whether they wish to be heard under the provisions of the 1996 statute. The Inspector General conducts the review in private and is entitled to receive evidence which otherwise may be inadmissible in a court of law. Members of the New Zealand Security Intelligence have the opportunity to appear before the Inspector General and the Inspector General's decision can be based on classified information which is not disclosed to the person concerned. The Inspector General must provide reasons for his decision and, if the certificate is confirmed, the person may appeal to the Court of Appeal on a point of law.[47]

44. Under the New Zealand legislation, classified security information may not be disclosed where disclosure of the information would reveal the operational methodology of the New Zealand Security Intelligence Service, would reveal information about past, present or future operations and would endanger the safety of any person. Moreover, information will not be disclosed where the disclosure of the information would likely prejudice the security of the defence of New Zealand or the international relations of the Government of New Zealand, or the information supplied on a

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[46] *Attorney General v. Ahmed Zaoui & Ors*, [2005] N.Z.S.C. 38 at para. 56.
[47] *Ibid.* at paras. 56–61.

confidential basis by a foreign government or agency and the release of such information would likely endanger the receipt of future information.[48]

45. In Australia, classified material may be used to refuse entry to a foreign national to Australia or to revoke the visa of a non-citizen who has previously lawfully resided in Australia.[49] The *Migration Act 1958*, authorizes the use of classified material before the Migration Review Tribunal (MRT). Under the *Act*, the Minister or a 'migration officer' is authorized to use classified material to determine whether an individual is inadmissible on the basis that he is an 'unlawful non-citizen' or on the basis of the 'character power'.[50] The *Migration Act* mandates that the applicant, in respect of a decision under review, be provided with particulars of any information that would justify affirming the decision under review. However, the disclosure requirements do not apply to 'non-disclosable information'.[51] 'Non-disclosable information' is defined as information or a matter:

a. whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:

   (i) prejudice the security, the defence or international relations of Australia; or

   (ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or

b. whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the common laws and judicial proceedings;

c. whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence; and

d. includes any document containing such information or matter or any record thereof.[52]

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[48] See *Immigration Act 1987* (N.Z.), 1987/74, s. 114(B). The Respondents have paraphrased the section.
[49] *Migration Act 1958* (Cth.), s. 359A.
[50] *Ibid.*, ss. 501 and 500 (6F). Once a migration officer knows or reasonably suspects that a person is an unlawful non-citizen, the person must be arrested and detention is mandatory. See *Migration Act 1958* (Cth.), s. 189.
[51] *Ibid.*, s. 359A(4).
[52] *Ibid.*, s. 5.

46. The United Kingdom legislation also recognizes the necessity of protecting sensitive security intelligence information. The Special Immigration Appeals Commission ("SIAC") is authorized to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him or her. The Special Immigration Appeals Commission Procedure Rules provide that where the Secretary of State wishes to rely upon classified security information ("closed material") a special advocate must be appointed to represent the interests of the appellant. However, a special advocate, who is entitled to see all of the closed material, is not allowed to have contact with the appellant once he has seen the material. The appellant is provided with a redacted summary of the classified information.[53]

47. The U.S. Government may rely on classified evidence to detain aliens pending deportation proceedings.[54] Furthermore, judges of the Alien Terrorist Removal Court ("ATRC") can rely upon classified information in release hearings dealing with permanent resident aliens.[55] The government relies on classified evidence when the Attorney General determines that public disclosure of the evidence would "pose a risk to the national security of the United States or to the security of any person".[56]

48. The United States Supreme Court has underscored the importance of protecting the confidentiality of sensitive security intelligence information. In *C.I.A. v. Sims*, the Court stated:

> The Court of Appeals underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court's approach, the Agency will be forced to disclose the source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied without promising confidentiality. This forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission. "The Government has a compelling interest in protecting both the secrecy of information

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[53] *Special Immigration Appeals Commission Act 1997* (U.K.), ss. 5(3)(b), 5(3)(d), s.6(1), s.6(4); *Special Immigration Appeals Commission (Procedure) Rules 2003* S.I. No. 1034 (U.K.), Rule 37

[54] *United States ex rel Barbour v. I.N.S.*, 491 F.2d 573 at 578 (5th Cir., 1974) Certiorari denied, 419 U.S. 873 (1974).

[55] *Immigration and Nationality Act*, Pub. L. No. 82-414, § 506, 66 Stat. 163 (June 27, 1952)

[56] *Ibid.*, § 504.

> important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3(1980) (per curiam) see *Haig v. Agee*, 453 U.S. 280 307 (1981). Potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.[57]

49. It is beyond peradventure that terrorists attempt to destroy democratic institutions and seek to undermine the rule of law. The European Court of Human Rights has recognized the important role which effective security intelligence plays in a democratic society:

> The Court recognizes that the proper functioning of a democratic society based on the rule of law may call for institutions like the B.V.D. which, in order to be effective must operate in secret and be afforded the necessary protection. In this way a State may protect itself against the activities of individuals and groups attempting to undermine the basic values of a democratic society.[58]

50. In *Murray v. The United Kingdom*, the European Court of Human Rights stated "the Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organized terrorism poses to the lives of citizens and to democratic society as a whole".[59]

51. Section 78 of *IRPA* maintains a delicate balance between the right of the person who is the subject of the security certificate to have a fair hearing and the need to protect confidential security intelligence information. The legislation affords the person who is the subject of the certificate an opportunity to contest the validity of the certificate at a public hearing. Only those portions of the hearing which a designated judge is satisfied involve confidential security intelligence information are held *ex parte* and *in camera*.

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[57] *C.I.A. v. Sims*, 471 U.S. 159 at 175 (1985).
[58] *Vereniging Weekblad Bluf! v. The Netherlands* (1995), 20 E.H.R.R. 189, paras. 35, 40; *Reg. v. Shayler*, [2002] UKHL 11, [2002] 2 All E.R. 477 (H.L.); *Halperin v. C.I.A.*, 629 F.2d 144 at 150 (D.C.Cir. 1980).
[59] *Murray v. The United Kingdom* (1994), 19 E.H.R.R. 193 at para. 58.

52. Measures adopted to ensure the protection of sensitive security intelligence information are entitled to a high degree of deference. One of the goals of s. 78 is to promote reciprocal cooperation between states with respect to the availability of confidential information obtained from foreign governments or institutions. Protection of such information involves the intersection of national security and international relations.

53. Canada is dependent upon security intelligence information obtained from foreign governments and organizations. Canada has third-party agreements with foreign governments and organizations providing for the reciprocal exchange of security intelligence information.[60] International convention and practice mandates that the information is received in confidence unless there is an express authorization for disclosure.[61] An *ex parte in camera* process is essential to protect confidential security intelligence information received from foreign governments and institutions. The release of confidential security intelligence information received from foreign governments and institutions would undermine the reciprocal cooperation between states. In such circumstances, the information would likely "dry up" and damage international relations.[62]

iii. Legislation Promotes the Search for Truth

54. The appellant in *Ruby* argued that the *Privacy Act* violated the principles of fundamental justice by virtue of its failure to authorize judicial summaries.[63] Arbour J., writing for the Court, stated "I accept the respondent's claim that a judicial summary could not provide any further detail without compromising the very integrity of the information".[64] In *IRPA*, Parliament balanced the serious consequences of deportation

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[60] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c.C-23, s.17; Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy* (Ottawa: National Library of Canada, 2004) (http://www.pcobcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf).

[61] *Ruby*, *supra* note 31 at 27–28, para. 45; Ward Elcock's testimony before the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, June 22, 2004, at 284–285 (http://www.stenotran.com/commission/maherarar/2004-06-22%20volume%202.pdf).

[62] *Ruby*, *ibid.* at 25, 27–28, paras. 41, 45.

[63] Failure to provide judicial summaries was, of course, only one aspect of the constitutional challenge brought to the impugned provisions under s. 7 of the *Charter*.

[64] *Ruby*, *supra* note 31 at 22, para. 36.

against the need to protect sensitive security intelligence information. Section 78 of *IRPA* requires the person who is the subject of a security certificate to receive a summary. The summary is intended to enable the person to be reasonably informed of the matters giving rise to the issuance of the certificate.[65]

55. Section 78 is specifically tailored to enable the court to strike a delicate balance between disclosure and the protection of confidential security intelligence information, the release of which would be injurious to national security or the safety of any person.[66] This section is designed to ensure that the subject of a security certificate receives sufficient information to contest the reasonableness of the security certificate. The Federal Court judges are ever vigilant in striking the appropriate balance between disclosure and the protection of confidential security intelligence information. A review of the decision of Dawson J. in the instant case, or the reasons of the judges concerning detention release in *Almrei* or *Jaballah*, reveal a painstaking attempt to ensure a fair process. Their reasons reveal a rigorous analysis in an effort to ensure that the evidence has been critically scrutinized.[67]

56. Furthermore, the designated judges have recognized that they have an ongoing obligation to examine the material adduced on behalf of the Ministers in support of the security certificate to determine whether additional disclosure can be made.[68] Indeed, Dawson J., on her own motion, required the Ministers to review the confidential evidence in order to determine whether, as a result of the passage of time, any further disclosure should be made.[69] In addition, she made three disclosure orders in total after the initial material had been provided to Harkat.[70]

57. Harkat argues that society's interest in employing the best available truth-determining mechanisms is greatly elevated in the tumultuous struggle against terrorism. This Court has recognized that the search for the truth is a core value

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[65] *IRPA*, *supra* note 5, s. 78(h).
[66] *Ibid.* s. 78.
[67] *Appellant's Record*, at 126–134, paras. 93–104.
[68] *Charkaoui (Re)*, [2004] 3 F.C.R. 32, 2003 CF 1419 at 100-102 [cited to F.C.R.]; *Zundel (Re)* (2004), 245 F.T.R. 61 [*Zundel*].
[69] *Appellant's Record*, at 95, para. 13.
[70] *Appellant's Record*, at 93, 94, 96, paras. 8, 9, 14.

protected in the freedom of expression guarantee under s.2(b) of the *Charter*.[71] In *Sierra Club of Canada v. Canada (Minister of Finance)*, this Court determined that the search for truth "may actually be promoted" by the order of confidentiality which was sought in the case.[72]

58. Section 78 of *IRPA* advances the search for truth because it enables the government and the courts to determine the admissibility of suspected terrorists and others who constitute a danger to the security of Canada based upon the best available security intelligence information. In the absence of an *ex parte in camera* process, sensitive security intelligence information would not be relied upon. As a result, the truth would likely be rendered a casualty, as could national security.[73]

iv. Legislation Conforms with Court's Decision in *Chiarelli*

59. Harkat misconstrues the effect and importance of this Court's decision in *Chiarelli*. Chiarelli was a permanent resident of Canada who pleaded guilty to possession for the purpose of trafficking and was ordered deported based upon that conviction.[74] Harkat states that Chiarelli had been ordered deported after receiving a fair hearing at which the full panoply of legal and procedural rights was made available to him. Harkat's description of the procedures that were available to Chiarelli is not in keeping with the provisions of the former *Immigration Act*. In fact, s. 32(2) of the former *Act* required an adjudicator to issue a deportation order in circumstances where a person had been convicted of an offence for which the person could receive a sentence of five years imprisonment or more.[75]

60. Before this Court, Chiarelli argued that the legislation violated s. 7 of the *Charter* since it necessitated that a mandatory deportation order issue without regard to the personal circumstances of the offender.[76]

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[71] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1357–1358, per Wilson J.
[72] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 at 551-552, paras. 76–78 [*Sierra Club* cited to S.C.R.].
[73] *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (C.A.) at paras. 142, 159.
[74] *Chiarelli*, *supra* note 41 at 724.
[75] *Ibid.* at 731.
[76] *Ibid.* at 733.

61. This Court recognized the qualified right of a permanent resident to remain in Canada and held that a mandatory deportation order was not inherently unjust.[77]

62. Harkat, as a foreign national, is similar to Chiarelli in that he has only a qualified right to remain in Canada. The qualified right of a foreign national or a permanent resident to remain in Canada is consistent with this Court's jurisprudence and s. 6 of the *Charter*.[78] In construing the principles of fundamental justice under s. 7 of the *Charter*, this Court determined that "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".[79]

63. This Court's determination in *Chiarelli* that the *ex parte in camera* hearing before the Security Intelligence Review Committee ("SIRC") conformed with the principles of fundamental justice was not solely dependent upon a finding by this Court that *Chiarelli* was not entitled to an appeal on all the circumstances of the case. In *Chiarelli*, this Court recognized that "the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources".[80]

64. Harkat's reliance upon this Court's judgment in *Singh v. Canada (Minister of Employment and Immigration)*[81] is misplaced. The former *Immigration Act* foreclosed a refugee claimant from having an oral hearing. Under *IRPA*, a person who is the subject of a security certificate is entitled to have a hearing to determine the reasonableness of the security certificate. Furthermore, this Court, in *Singh*, was not dealing with dangerous refugees who were alleged to be inadmissible to Canada on the basis that they were associated with a terrorist organization. The decision in *Suresh*, is more consistent with the purposive and contextual analysis this Court has applied to interpreting *Charter* rights and freedoms.[82]

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[77] *Ibid.* at 734.
[78] *Ibid.* at 733–34; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3 at para 56 [cited to S.C.R.]; *Charter*, s.6(1); *IRPA*, *supra* note 5, ss.19, 45(b),(c), 46(1)(c).
[79] *Chiarelli*, *supra* note 41 at 733; *Medovarski*, supra note 26.
[80] *Ibid.* at 744–746.
[81] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.
[82] *R. v. Jarvis*, [2002] 3 S.C.R. 757, 2002 SCC 73 at paras. 60–61 [cited to S.C.R.].

65. In *Suresh*, this Court contrasted the lack of procedure available under s.53(1)(b) of the former *Immigration Act* with the security certificate process stating:

> The nature of the statutory scheme suggests the need for strong procedural safeguards. While the procedures set-up under s.40.1 of the *Immigration Act* are extensive and aim to ensure that certificates under that section are issued fairly and allow for meaningful participation by the person involved, there is a disturbing lack of parity between these protections and the lack of protections under s.53(1)(b). In the latter case, there is not provision for a hearing, no requirement of written or oral reasons, and no right of appeal – no procedures at all, in fact. As L'Heureux-Dubé stated in *Baker, supra*, "[g]reater procedural protections ... will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted" (para. 24). This is particularly so where, as here, Parliament elsewhere in the *Act* has constructed fair and systematic procedures for similar measures.[83]

66. The Court would not have made favourable comments about s. 40.1 of the former *Immigration Act* if those provisions violated the *Charter*.

67. The Federal Court of Appeal, in *Sogi v. Canada (Minister of Citizenship and Immigration)*[84] held that security certificate provisions in *IRPA* are similar to the provisions in the former *Immigration Act*.[85]

v. <u>Cross-Examination</u>

68. Nothing in s. 78 forecloses Harkat from cross-examining any CSIS intelligence officer who the Ministers call to testify. In circumstances where the Ministers do not tender a witness in the public hearing, it is open to Harkat to subpoena a CSIS officer who can give relevant evidence pertaining to the reasonableness of the

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[83] *Suresh, supra* note 27 at 63, para. 117.
[84] *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 171 (C.A.), 2004 FCA 212 at para. 54 [cited to F.C.R.]. See also *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 487 (C.A.), 2005 FCA 85 at 492, paras. 27–28 [cited to F.C.R.].
[85] *Immigration Act*, R.S.C. 1985, c.I-2, as rep. by *IRPA*, *supra* note 5.

security certificate. The principles of fundamental justice do not require that Harkat be accorded an unrestricted right of cross-examination.[86]

89. The legislation strikes a reasonable balance between the right of the person who is the subject of the security certificate to receive a fair hearing and the protection of sensitive confidential security intelligence information, the release of which would be injurious to national security including the safety of human sources. The designated judges are vigilant in ensuring that information received is credible and corroborated by reliable sources of information. The judges are also vigilant in ensuring that the person who is the subject of the certificate receives sufficient disclosure to contest the validity of the certificate. The judges consider themselves duty-bound to provide for continuing disclosure where the release of information would not be injurious to national security or the safety of any person.

vi. Legislation does not Require a Special Advocate

70. Harkat has not demonstrated a violation of s. 7. Accordingly, there is no need for this Court to consider a special advocate procedure. Moreover, as the principles of fundamental justice do not mandate the most favourable procedures or legislation imaginable,[87] there is no requirement for either an *amicus curiae* to be appointed or for Parliament to create a scheme of special advocates.

71. Although the term *amicus curiae* is used interchangeably in these proceedings together with the term special advocate, the positions are very different. An *amicus curiae* in the traditional sense is a counsel appointed to assist a court in circumstances where there are unrepresented interests, where the court needs to be informed of some facts, or where the court wishes to be advised on a point of law.[88] In

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[86] *Pires*, *supra* note 33 at paras. 37–38; *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5 at paras. 44–45, 50; *Mills*, *supra* note 29 at paras. 74–75.
[87] *Ruby*, *supra* note 31 at 23, para 39; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1142 [*Reference re ss. 193 and 195.1(1)(c)*]; *R. v. Lyons*, [1987] 2 S.C.R. 309 at 362.
[88] Muldoon, P.R. *Law of Intervention: Status and Practice* (Aurora, Ontario: Canada Law Book, 1989) at 111, 112, 123–124; *Attorney General of Canada et al. v. Aluminum Co. of Canada et al.; B.C. Wildlife Federation, Intervenor* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.) at 505.

this sense, the *amicus curiae* is not considered a party to the litigation and is there to assist the court. This Court has described the role of an *amicus curiae* as follows:

> In order to clarify what is frequently misunderstood, such counsel, traditionally called "a Friend of the Court", does not represent a party but is tasked with assisting the Court, and arguing issues or matters on which the Court wishes to hear representations that the parties to the Reference would not otherwise put forward.[89]

72. The special advocate which is being proposed in the certificate process would represent the interests of the person in the *in camera* sessions, and thus would be a party. That counsel, it is suggested, would cross-examine witnesses and would systematically challenge the *ex parte* and *in camera* evidence. This kind of a special advocate is used in Great Britain in proceedings before the Special Immigration Appeals Commission, where security-cleared lawyers are appointed to represent those appearing before the Commission in cases where classified material is involved.[90] A similar role in security proceedings under *IRPA* would clearly require a statutory basis, given the complexity of the security clearances required and the regulation of the solicitor-client relations.[91] This could not be an extension of the courts' jurisdiction to appoint an *amicus curiae* and would be a policy matter for Parliament.

73. Dawson J., in rejecting Harkat's application to have an *amicus curiae* appointed, made the following comments:

> Mr. Harkat points to the fact that he has been unable to obtain answers to all of 231 questions which he put to the Ministers and he says therefore that an amicus curiae is necessary. With respect, I appreciate that, without knowledge of the contents of the classified Security Intelligence Report that lead to the issuance of the security certificate, it is impossible

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[89] *Reference re: Secession of Quebec*, [1996] S.C.C.A. No. 421 (QL) at para. 13. See [1998] 2 S.C.R. 217 for the full text of the judgment.

[90] United Kingdom, House of Commons, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Seventh Report of Session 2004–2005, vol. 1 (Report and Formal Minutes) (London: The Stationary Office Limited, 3 April 2005) at 5, 19–26; United Kingdom, *Government Response to Constitutional Affairs Select Committee's Report Into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor) (London: The Stationary Office Limited, 17 June 2005), at 8–12.

[91] See Cohen, Stanley A. *Privacy, Crime and Terror* (Butterworths, 2005) at 326–333.

> for Mr. Harkat to know the precise evidence that supports the certificate where I found that the disclosure of such evidence would be injurious to national security or to the safety of any other person. That does not mean, however, that without an amicus curiae the Court cannot fully and fairly consider the context and substance of the allegations made against Mr. Harkat and the nature and reliability of the evidence supporting it. That is the very responsibility of the Court, and the exercise the Court has, and will, conduct. To illustrate, by direction, the Court has previously advised the parties that:
>
> > I have carefully considered the entirety of the evidence presented by the Ministers. On the basis of that review in consideration, I can advise that I will make no finding adverse to Mr. Harkat on the basis of any information concerning Mr. Harkat which may have been provided by Ahmed Ressam or Maher Arar.[92]

74. There may be exceptional circumstances in which a Federal Court judge may wish to appoint an *amicus curiae* in order to provide assistance in a certificate case, but Dawson J. did not err in refusing to do so in this case.

C. SECTION 79 OF *IRPA* DOES NOT VIOLATE SECTION 7 OF THE *CHARTER*

75. Section 79 of *IRPA* enables a person, other than a Convention refugee or protected person, to have a Pre-Removal Risk Assessment, under s. 112(1), to determine whether the risk to the applicant is so great that the applicant should not be removed from Canada.[93] As a result of a separate process, Convention refugees or protected persons who are alleged to constitute a danger to the security of Canada obtain a risk assessment pursuant to s.115(2) of *IRPA*. The risk assessment balances the risk to the Convention refugee of being deported against the danger that the refugee allegedly constitutes to the security of Canada. The assessment is done in accordance with this Court's judgment in *Suresh*.

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[92] *Appellant's Record*, at 54, para. 26.
[93] *IRPA*, *supra* note 5, s. 97(1).

76. Section 79 has no application to Harkat's case since, on the basis of sections 112 and 115, a Convention refugee is not entitled to make an application for suspension of the Federal Court's consideration of the certificate.[94] Ignoring the statutory scheme, Harkat attempted to make such an application. After a careful consideration of the statutory scheme, Dawson J. determined that he was not entitled to make such an application. Dawson J.'s decision was upheld by the Federal Court of Appeal. The Court determined that, as a Convention refugee, Harkat was already a protected person. Accordingly, he was not entitled to apply for protection pursuant to s.112(1). Furthermore, there was no benefit for *Harkat* to make such an application.[95] Harkat did not seek leave to appeal the Federal Court of Appeal's decision that as a protected person he was not entitled to apply for protection under s. 112(1) of *IRPA*.

77. Harkat has not been prejudiced by his inability to make an application for protection under s. 112(1) of *IRPA*. As a Convention refugee, he already has the status of a protected person as a result of the statutory scheme.[96]

78. Section 79 of *IRPA* has no application to Harkat's case and, accordingly, this Court is being asked to decide the constitutionality of s.79 in the abstract. This Court should continue to follow its jurisprudence that indicates the Court will not decide constitutional issues which only arise in the abstract.[97]

D. SECTION 80 OF *IRPA* DOES NOT VIOLATE SECTION 7 OF THE *CHARTER*

79. Under s. 80, the designated judge must determine the reasonableness of the security certificate and whether the decision on the application for protection is lawfully made. In *Suresh*, this Court determined that a standard of reasonable grounds to believe under the former *Immigration Act* was not vague or overly broad.

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[94] *Ibid.* ss. 79, 112(1), 115(1).
[95] *Ibid.* ss. 95(2), 112(1), 113(d), 115(1), *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 174; Appellant's Record, at 41, paras. 2–3.
[96] *IRPA*, *supra* note 5, ss. 95(2), 97(1).
[97] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at 595, para. 59 [cited to S.C.R.]; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 at 1580.

Furthermore, this Court recently affirmed a reasonable grounds to believe standard for persons who are alleged to be inadmissible to Canada based on the fact that they have committed war crimes or crimes against humanity.[98]

80. The judge's determination as to whether the decision on the application for protection is lawful is based upon the factors set out in s. 18.1(4) of the *Federal Courts Act*.[99] Brown and Evans, in their seminal book, *Judicial Review of Administrative Action*, point out that the *Federal Courts Act*, by the language used in s. 18.1(4), has expanded the traditional scope of judicial review.[100]

81. The designated judge conducts a review of the security certificate to determine whether it is reasonable. In the event that it is not reasonable, the certificate is quashed.[101] Federal Court judges have held that the judge's determination as to the reasonableness of the certificate is a form of judicial review.[102] Section 80(3) of *IRPA* contains a privative clause precluding any appeal or further judicial review. This Court has held that appeals are statutory and it is not a principle of fundamental justice that a decision is subject to an appeal.[103]

82. The principles of fundamental justice do not decree that Harkat receive more than one judicial review. In *Ahani v. Canada*, Madam Justice McGillis held that the principles of fundamental justice were not violated by the fact that Ahani did not receive more than one judicial review.[104] Justice McGillis' decision was adopted in its entirety by the Federal Court of Appeal. This Court denied leave to appeal.

83. Harkat has not demonstrated that s. 80 of *IRPA* violates s. 7 of the *Charter*. The principles of fundamental justice do not dictate that Harkat receive a

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[98] *Suresh*, *supra* note 27 at 51, para. 90; 56, para. 99; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40 at para. 115 [cited to S.C.R.].
[99] *IRPA*, *supra* note 5, ss. 79(2), 80.
[100] Donald J. M. Brown and the Hon. J. M. Evans, *Judicial Review of Administrative Action* (Toronto: Canvasback Publishing, 2004), at Chapter 15, p. 5.
[101] *IRPA*, *supra* note 5, s. 80(2).
[102] *Jaballah (Re)*, 2001 FCT 1287 at para. 40.
[103] *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at 412, para. 48; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at 70–71; *R. v. Meltzer*, [1989] 1 S.C.R. 1764 at 1773.
[104] *Ahani v. Canada*, (1995), 100 F.T.R. 261 at 276, paras. 45–46; (1996), affirmed 201 N.R. 233 (F.C.A.), leave to appeal to S.C.C. dismissed, [1997] 2 S.C.R. v.

judicial review apart from the designated judge's determination as to the reasonableness of the security certificate. Moreover, Parliament intended the security certificate process to be expeditious and was entitled, in furtherance of that goal, to provide that the designated judge's determination as to the validity of the security certificate is not subject to appeal. In *Chiarelli*, this Court stated that "it was open to Parliament not to provide for an appeal in cases involving serious security interests".[105]

E. SECTION 1 OF THE *CHARTER*

84. This Court has noted that it will be rare for a violation of the principles of fundamental justice to be justified under s. 1 of the *Charter*.[106] In *Re B.C. Motor Vehicle Act*, Lamer J. stated that a breach of s. 7 will be saved under s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like".[107] The examples given by Justice Lamer are not determinative of all the circumstances when a s. 7 breach will be saved under s. 1, but rather, are illustrative of the stringent standard which this Court will apply in determining whether a breach of s. 7 can be saved.

85. In *R. v. Sharpe*,[108] McLachlin C.J.C. stated, "Section 1 of the *Charter* belies the suggestion that any *Charter* right is so absolute that limits on it can never be justified." In *Dagenais*,[109] this Court said that the *Charter* interpretation must avoid "a hierarchical approach to rights which places some over others".

86. This Court's jurisprudence has indicated that societal interests are not a free-standing right under s. 7 of the *Charter*.[110] If a breach of s. 7 can only be justified in circumstances tantamount to a natural disaster, war or epidemic, this approach will sound the death knell for a consideration of societal interests. In such circumstances, the delicate balance between s. 7 and s.1 will have been fundamentally altered.

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[105] *Chiarelli*, *supra* note 41 at 741.
[106] *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 at 357, para.133 [cited to S.C.R.]
[107] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at 92, para. 99.
[108] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 at 95, para. 80 [cited to S.C.R.].
[109] *Dagenais*, *supra* note 35 at 877.
[110] *Malmo-Levine*, *supra* note 28 at para. 96.

87. Harkat refers to the fact that, in some cases, claims of a national security interest have been improperly used as a cloak to protect governments from the court examining illegal activity. This Court dealt with a similar argument in *R. v. Keegstra*, where Dickson C.J.C., writing for the majority of the Court, stated:

> In this regard, a number of incidents are cited where authorities appear to have been over-zealous in their interpretation of the law, including the arrest of individuals distributing pamphlets admonishing Americans to leave the country and the temporary hold-up at the border of a film entitled *Nelson Mandela* and Salmon Rushdie's novel *Satanic Verses*....
>
> ...The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives and hence argument based on such harassment can be rejected.[111]

88. A consideration of whether sections 78 through 80 are demonstratively justified under s. 1 of the *Charter* must take into account the different objectives between *IRPA* and the former *Immigration Act*. Section 3(1) of *IRPA* provides that the objectives of the *Act* with respect to immigration are (h) to protect the health and safety of Canadians and to maintain the security of Canadian society. Similarly, s. 3(1)(i) provides that one of the objectives of the *Act* is 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.

89. In *Medovarski*, this Court indicated that "the objectives as expressed in the *IRPA* indicate an intent to prioritize security", saying "this marks a change from the focus in the predecessor statute which emphasized the successful integration of applicants more than security...".[112]

90. Section 1 is to be applied flexibly having regard to the policy considerations inherent in the factual and social context of each case. In this case, the State is not the single antagonist of the individual. Rather, the Court is required to

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[111] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 783 [*Keegstra*]; *Appellant's Record*, at 54–55, para.28. See also *Zündel*, *supra* note 68 at para. 12.
[112] *Medovarski*, *supra* note 26 at para. 10.

balance the competing claims of Harkat against the interest of individuals to be free against threat of assassination and terrorist activity.[113]

i. **Pressing and Substantial Objectives**

91. Section 78 promotes the following goals:

(i) to foster reciprocal co-operation between States with respect to the availability of information obtained in confidence from foreign governments or institutions;

(ii) to ensure that Canada continues to receive information from foreign governments and institutions which it would otherwise not receive if such information was disclosed to counsel or persons who are the subject of a security certificate;[114]

(iii) to protect against the inadvertent disclosure of information the release of which would be detrimental to national security or the safety of any person;

(iv) to prevent terrorists or persons who are otherwise a danger to the security of Canada from taking steps to frustrate ongoing intelligence investigations realizing they are under surveillance[115];

(v) to prevent an "informed reader", that is, members of an organization under investigation from gleaning information about the subjects of the investigation, methodology of investigation and sources of information;

(vi) to prevent such an "informed reader" from ascertaining what is or is not under investigation at any given time;[116]

(vii) to ensure that information pertaining to the admissibility of terrorists or others who pose a danger to the security of Canada is based on the best evidentiary record available so as to maximize the search for the truth;[117]

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[113] *Malmo-Levine*, *supra* note 28 at 627, para. 96; *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 330, para. 132 [*R.J.R.-MacDonald*].
[114] *Ruby*, *supra* at note 31.
[115] Appellant's Record, at 124, para. 85.
[116] Appellant's Record, at 124, paras. 86–87; *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (T.D.) at 242-243, paras. 28–31.
[117] *Sierra Club*, *supra* note 72 at para. 77.

(viii) to prevent Canada from becoming a safe haven for terrorists and others who constitute a danger to the security of Canada;[118]

(ix) to maintain public confidence in the integrity of the immigration system by ensuring that it does not afford access to terrorists and others who are a danger to national security.[119]

92. The protection of confidential security intelligence information and human sources of information is necessary given the ever-present terrorist threat and the adaptability of terrorist organizations. In this regard, the Report of the Inquiry into Australian Intelligence Agencies states:

> Australia's intelligence needs are dynamic, reflecting rapid global transformation. Just as economic globalisation was a feature of the last decade, this decade has seen the globalisation of security threats, particularly from non-state actors. Fast-paced technological change has been diffusing power and empowering individuals and groups to play roles in world politics. Political and military threats to Australia's security and prosperity – the focus of previous decades – have been supplanted by the new threats of global terrorism and transnational crime, with an increased focus of the proliferation of weapons of mass destruction.
>
> The numerous recent attacks on western targets underline the emergence of Islamic extremist terrorism as the major threat to Australia's security in the first decade of the twenty-first century. The threat is serious and enduring. The level of organization and support for Islamic terrorist networks, and the deeply rooted socioeconomic factors that underpin them, suggest that they will be a major feature of the security environment for at least a generation.
>
> This terrorist phenomenon is new in scale, method and ambition. Al Qaida and similar networks have demonstrated both the willingness and the capability to inflict massive casualties on civilian targets, and display no concern for the loss of innocent life. They have an active interest in obtaining chemical, biological or radiological weapons. Unlike the terrorist groups of the last century, the extremist Muslim terrorism embodied by Al Qaida is uncompromising. ...[120]

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[118] *Burns*, *supra* note 106 at 314, para. 43; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 834 [*Kindler*]; *Suresh v. M.C.I.*, [2000] 2 F.C. 592 (C.A.) at 661, para. 109.

[119] *IRPA*, *supra* note 5, ss. 3(1)(h), (i), 3(2)(g), (h); *Suresh v. M.C.I.*, *ibid.* at 661, para. 109.

[120] *Report of the Inquiry into Australian Intelligence Agencies*, *supra* note 1, at 10–11; See also *Third Report of the UN Security Council Committee*, *supra* note 42.

93. Canada has been named as a terrorist target by Osama bin Laden.[121] Jack Hooper, the Assistant Director of Operations, the Canadian Security Intelligence Service, outlined the threat Canada faces before the Arar Commission:

> Any country that doesn't accept the al-Qaeda ideology is considered an enemy. I think with that template it should come as no surprise to anybody that al-Qaeda represents the number one security threat that my service is currently dealing with.
>
> To this point in time, Canadians have been killed or injured in terrorist attacks by virtue of their being in the wrong place at the wrong time. But since al-Qaeda has directly threatened Canada, as Mr. Elcock has said, it is likely a question of not if, but when Canadians and Canadian interests are directly targeted by al-Qaeda.
>
> Canada, by virtue of its aggressive legal actions against al-Qaeda operatives and its commitment of forces to Afghanistan has also been directly cited by Osama bin Laden on behalf of al-Qaeda as a target for terrorists attacks.
>
> If you consider all of the nations listed there, Canada is the only nation that to this point has not been attacked by al-Qaeda. One of the things that those of us who have worked in the organization for some time say that al-Qaeda is an organization that keeps its promises. It does not make idle threats. When it threatens, it tends to execute.
>
> By conclusion, I would state that while there is no specific threat to Canadian interests at this time, al-Qaeda has a current and demonstrated capacity to mount a wide range of terrorist operations, including mass casualty attacks with improvised explosive devices, airline hijackings, kidnappings, assassinations and armed assault operations.
>
> Al-Qaeda elements have been dispersed around the globe and they are here in Canada. They remain difficult to identify, and their structures are really difficult to penetrate.
>
> Again, in my service's assessment the threat environment that we currently confront has never been more sinister. This has direct implications for how we satisfy our mandate as it relates to public safety and security.[122]

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[121] Anne McLellan, "Bin Laden tape singling out Canada redistributed", *The National Post*, (July 14, 2005), A16.

[122] *The Commission of Inquiry into the Actions of the Canadian Officials in Relation to Maher Arar*, June 22, 2004, at 479–45; See also *Third Report of the UN Security Council Committee*, *supra* note 42 at 4.

94. These pressing and substantial objectives are sufficiently important to justify a limitation of s. 7 rights, are rationally related to the objective and are consistent with the values of a "free and democratic society". This Court has held that the rational connection test is not "particularly onerous" and is met when there is "a link or nexus based on and in accordance with reason, between the measures enacted and the legislative objective".[123] Section 78 advances the legislative objectives and meets the rationality test.

95. This Court in *Slaight Communications* held that the principles of international law can be used to justify restrictions on a *Charter* right or freedom.[124] The *International Covenant on Civil and Political Rights* ("*ICCPR*") provides for two instances of a limitation of a right for reasons of national security. Articles 13 and 14 of the *ICCPR* both confer specific rights which may be departed from where compelling reasons of national security exist. For example, Article 13 is designed to protect lawful aliens against arbitrary expulsions from the territory of a state party. Lawful aliens however may be denied an opportunity to appeal their expulsion and an entitlement to review by a competent authority where there are compelling reasons of national security. Similarly, Article 14 ensures the proper administration of justice and upholds a series of individual rights including, *inter alia*, the right to equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal. At the same time, Article 14 also acknowledges that courts have the power to exclude the public for certain reasons including, *inter alia*, reasons of morals, public order or national security in a democratic society.[125]

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[123] *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, 2003 SCC 34 at 850, para. 34; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at 1238, per Iacobucci J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra* note 87 at 1195.

[124] *Slaight Communications*, *supra*, note 29 at 1056–1057.

[125] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 13-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

ii. Rational Connection

96. Sections 78 through 80 of *IRPA* have a rational connection to these compelling objectives. It is reasonable to conclude that these provisions prevent great harm to Canada's security.

97. This Court has recognized that the courts must allow Parliament "a margin of appreciation" in tailoring the objective. In *Newfoundland (Treasury Board) v. N.A.P.E.*, Binnie J., writing for the Court, stated:

> Thirdly, the *Oakes*' test recognizes that in certain types of decisions there may be no obviously correct or obviously wrong solution, but a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives, and the Court acknowledged in *M. v. H, supra*, at para. 78, that "the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make".[126]

98. In certain cases, the s. 1 test can be demonstrated by applying common sense and logic. This Court has acknowledged that the subject matter may be sufficiently complex that it is difficult to measure the effectiveness of Parliament's objective. The effectiveness of legislation dealing with protection of confidential security information is sufficiently complex that it does not lead to a precise evaluation.[127]

iii. Minimal Impairment

99. Harkat acknowledges that the objectives of sections 78 through 80 of *IRPA* are sufficiently important to warrant overriding a constitutionally protected right or freedom and that the provisions rationally advance the objectives Parliament seeks to achieve. Harkat argues that the legislation cannot be reasonably characterized as a minimal impairment of *Charter* rights or freedoms.

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[126] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 at paras. 83–84 [*Newfoundland (Treasury Board)* cited to S.C.R.]; *RJR-MacDonald, supra* note 113 at 330–332; *Irwin Toy Limited v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 999.

[127] *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 at para. 78 [*Harper* cited to S.C.R.]; *R.J.R.-MacDonald, supra* note 111 at 333, para. 137.

100. Parliament is not required to use the least restrictive alternative to achieve its objective. Legislation is not unconstitutional merely because the Court can conceive of a less intrusive measure which will permit the government to "achieve its objective with fewer detrimental effects on the freedom".[128]

vi. Proportionality of Effects

101. The salutary effects of s. 78 exceed the harmful effects of the legislation.[129] Canada has a vital interest in promoting reciprocal cooperation between countries to reduce the manifest evil of terrorism. Section 78 furthers the crucial goal of maintaining the security of Canadian society and has a salutary purpose of assisting the government in denying access to persons who constitute a danger to national security.[130] Section 78 helps to ensure that Canada does not become a safe haven for terrorists who could operate more freely if the state did not have access to credible sensitive security intelligence information. *The Report of the Special Senate Committee on Security and Intelligence* noted the increasing cooperation between terrorists and drug traffickers. Similar concerns were expressed by Justice Cory in *Pushpanathan v. Canada (M.C.I.)*.[131]

v. Sections 79 and 80 are Demonstratively Justified in a Free and Democratic Society

102. The Respondents rely upon the objectives set out in paragraph 91 of their factum. The provisions are carefully tailored to provide a fair procedure, while ensuring that persons who are a danger to the security of Canada do not find refuge in Canada. The provisions also promote finality by ensuring that persons who constitute a danger to

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[128] *Reference re ss.193 and 195.1(1)(c)*, *supra* note 87 at 1196; *R.J.R.-MacDonald*, *supra* note 113 at 342, para. 160, per McLachlin J.; *Harper*, *ibid.* at para. 110; *R. v. Butler*, [1992] 1 S.C.R. 452 at 508 [*Butler*].

[129] *Newfoundland (Treasury Board)*, *supra* note 126 at para. 99.

[130] *IRPA*, *supra* note 5, ss. 3(1)(h), 3(2)(h); *Suresh*, *supra* note 27 at 12, para. 3; *Burns*, *supra* note 106 para. 37; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at paras. 27–28; *Kindler*, *supra* note 118 at paras. 158, 160.

[131] *Pushpanathan v. Canada (Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982 at 1064; as amended [1998] 1 S.C.R. 1222; *The Report of the Special Senate Committee on Security and Intelligence*, 36th Leg. (January 1999), at 5.

the security of Canada cannot pursue a multiplicity of appeals. The provisions are rational and the means chosen to achieve the object are proportional to the objective and effect of the law. The provisions do not go beyond what is necessary to protect individuals and organizations against terrorists and others who constitute a danger to the security of Canada.[132]

103. This Court has held that the values embodied in a "free and democratic society" are the ultimate touchstone against which limits on *Charter* rights and freedoms are measured. Respect for the inherent dignity of the human person, commitment to social justice and equality are an essential component of the core values of a free and democratic society.[133] Terrorists and members of terrorist organizations target individuals and groups for persecution and murder and undermine the rule of law. This Court has recognized that the rule of law is "a fundamental postulate of our constitutional structure" that lies at "the root of our system of government".[134]

104. Terrorists violate the values reflected in the *Charter*. Parliament's decision as to what is necessary to combat the manifest evil of terrorism is, as this Court noted in *Suresh*, entitled to a high degree of deference.[135] Deference is particularly appropriate when measuring a final justification for limits on rights and freedoms on the basis of values embodied in a free and democratic society.

F. REMEDY

105. In the event, this Court finds that the legislation is unconstitutional, the appropriate remedy would be for the Court to grant a suspended declaration of invalidity for a period of 12 months.[136]

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[132] *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792–793.
[133] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136; *Keegstra*, *supra* note 111 at 755–757; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 543; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R 569 at 607.
[134] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 142; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 475, 2005 SCC 49 at para.57.
[135] *Suresh*, *supra* note 27 at 25–26, paras. 32–33.
[136] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 700–708.

PART IV – COSTS

106. The Respondents request costs of this appeal if it is dismissed. The order granting leave to appeal awarded Harkat costs of the application for leave in any event of the cause, not as Harkat suggests, costs of the appeal itself in any event. Even if Harkat is successful on this appeal, solicitor-client costs are inappropriate.[137]

PART V – NATURE OF ORDERS SOUGHT

107. The Respondents request that the first stated constitutional question be answered as "no" and, if necessary, that the second question regarding section 1 be answered as "yes".

108. The Respondents request that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 3rd day of May 2006.

per:

Bernard Laprade	Urszula Kaczmarczyk	Donald MacIntosh
Counsel for the Respondents	Counsel for the Respondents	Counsel for the Respondents

[137] *Appellant's Record*, at 168; *Young v. Young*, [1993] 4 S.C.R. 3 at 134; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13 at paras. 86–87; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 77; *Suresh, supra* note 27 at para. 131.

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PART VII – STATUTES RELIED ON

***Canadian Charter of Rights and Freedoms*, Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11, ss. 6(1)**

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.	**6.** (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

***Immigration and Refugee Protection Act*, S.C. 2001, c.27, ss. 3(1)(h), 3(1)(i), 3(2)(g), 3(2)(h), 19, 34(1)(c), 34(1)(f), 45(b), 45(c), 46(1)(c), 78, 79, 80, 95(2), 97(1), 112(1), 113(d), 115(1)**

3. (1) The objectives of this Act with respect to immigration are ... (*h*) to protect the health and safety of Canadians 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 ...	**3.** (1) En matière d'immigration, la présente loi a pour objet : ... *h*) de protéger la santé des Canadiens et de garantir leur sécurité; *i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité; ...

3. (2) The objectives of this Act with respect to refugees are	**3.** (2) S'agissant des réfugiés, la présente loi a pour objet :
...	...
(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and	*g*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*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.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

19. (1) Every Canadian citizen within the meaning of the *Citizenship Act* and every person registered as an Indian under the *Indian Act* has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen or registered Indian.	**19.** (1) Tout citoyen canadien, au sens de la *Loi sur la citoyenneté*, et toute personne inscrite comme Indien, en vertu de la *Loi sur les Indiens*, a le droit d'entrer au Canada et d'y séjourner conformément à la présente loi; l'agent le laisse entrer sur preuve, à la suite d'un contrôle fait à son arrivée, de sa qualité.
(2) An officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status.	(2) L'agent laisse entrer au Canada le résident permanent sur preuve, à la suite d'un contrôle fait à son arrivée, qu'il a ce statut.

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
...	...

(*c*) engaging in terrorism; ... (*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).	*c*) se livrer au terrorisme; ... *f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions: ... (*b*) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act; (*c*) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or ...	**45.** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes : ... *b*) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi; *c*) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire; ...

46. (1) A person loses permanent resident status ... (*c*) when a removal order made against them comes into force; or	**46.** (1) Emportent perte du statut de résident permanent les faits suivants : ... *c*) la prise d'effet de la mesure de renvoi;

78. The following provisions govern the determination:	**78.** Les règles suivantes s'appliquent à l'affaire :
(a) the judge shall hear the matter;	*a*) le juge entend l'affaire;
(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;	*b*) le juge est tenu de garantir la confidentialité des renseignements justifiant le certificat et des autres éléments de preuve qui pourraient lui être communiqués et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(*c*) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;	*c*) il procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;
(*d*) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;	*d*) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve;
(*e*) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;	*e*) à chaque demande d'un ministre, il examine, en l'absence du résident permanent ou de l'étranger et de son conseil, tout ou partie des renseignements ou autres éléments de preuve dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the	*f*) ces renseignements ou éléments de preuve doivent être remis aux ministres et ne peuvent servir de fondement à l'affaire soit si le juge décide qu'ils ne sont pas pertinents ou, l'étant, devraient faire partie du résumé, soit en cas de retrait de la demande;

Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;	*g*) si le juge décide qu'ils sont pertinents, mais que leur divulgation porterait atteinte à la sécurité nationale ou à celle d'autrui, ils ne peuvent faire partie du résumé, mais peuvent servir de fondement à l'affaire;
(*g*) 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 if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;	*h*) le juge fournit au résident permanent ou à l'étranger, afin de lui permettre d'être suffisamment informé des circonstances ayant donné lieu au certificat, un résumé de la preuve ne comportant aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;	*i*) il donne au résident permanent ou à l'étranger la possibilité d'être entendu sur l'interdiction de territoire le visant;
(*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and	*j*) il peut recevoir et admettre en preuve tout élément qu'il estime utile — même inadmissible en justice — et peut fonder sa décision sur celui-ci.
(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.	

79. (1) On the request of the Minister, the permanent resident or the foreign national, a judge shall suspend a proceeding with respect to a certificate in order for the Minister to decide an application for protection made under subsection 112(1).	**79.** (1) Le juge suspend l'affaire, à la demande du résident permanent, de l'étranger ou du ministre, pour permettre à ce dernier de disposer d'une demande de protection visée au paragraphe 112(1).
(2) If a proceeding is suspended under subsection (1) and the application for protection is decided, the Minister shall give notice of the decision to the permanent resident or the foreign national and to the judge, the judge shall resume the proceeding and the judge shall review the lawfulness of the decision of the Minister, taking into account the grounds referred to in subsection 18.1(4) of the *Federal Courts Act*.	(2) Le ministre notifie sa décision sur la demande de protection au résident permanent ou à l'étranger et au juge, lequel reprend l'affaire et contrôle la légalité de la décision, compte tenu des motifs visés au paragraphe 18.1(4) de la *Loi sur les Cours fédérales*.

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.	**80.** (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose.
(2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.	(2) Il annule le certificat dont il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci.
(3) The determination of the judge is final and may not be appealed or judicially reviewed.	(3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.

95. (2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	**95.** (2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée: *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant: (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(*iv*) the risk is not caused by the inability of that country to provide adequate health or medical care.	(*iv*) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
...	...
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

***Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 174**

174. On request, an applicant shall be given a copy of the file notes that record the justification for the decision on their application for protection.	**174.** Copie des notes au dossier étayant les motifs de la décision sur la demande de protection est fournie au demandeur sur demande.