Federal Court  Cour fédérale

Date: 20101209

Docket: DES-5-08

Citation: 2010 FC 1242

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

IN THE MATTER OF a certificate signed Pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, as amended (the "Act")

IN THE MATTER OF the referral of that Certificate to the Federal Court of Canada Pursuant to subsection 77(1) of the Act;

AND IN THE MATTER OF Mohamed HARKAT

AMENDED REASONS FOR ORDER AND ORDER

1. Introduction

[1] Parliament has designed a security certificate regime that provides a named person such as the Applicant, Mohamed Harkat, with a fair hearing. That regime also protects information which, if disclosed, would harm Canada's national security or the safety of any person. While national security considerations may preclude the disclosure of information, the procedure set out in the *Immigration and Refugee Protection Act ("IRPA")* requires the provision of summaries throughout

the proceeding to the named person to ensure that he is reasonably informed of the case made by the Ministers against him. To compensate for the absence of Mr. Harkat and his counsel during the *in camera* proceeding ("closed hearings"), special advocates are appointed to protect his interests. Mr. Harkat takes the position that such a scheme is unfair and does not enable the named person to be informed of the case that he has to meet, as there is a failure to disclose relevant evidence. It is further submitted that allowing inadmissible evidence and permitting a decision rendered based on evidence not provided to the named person breaches the principles of fundamental justice. He also submits that the use of special advocates and an improper balance of interests for disclosure purposes under the *IRPA* are not consistent with the principles of fundamental justice and section 7 of the *Canadian Charter of Rights and Freedoms* ("the Charter"). Mr. Harkat further argues that such infringement of section 7 cannot be justified under section 1. On the other hand, the Ministers argue that the legislation strikes an appropriate balance between the protection of confidential information and the protection of the rights of the named person, which is not inconsistent with the principles of fundamental justice. In the alternative, the Ministers submit that the provisions at play are saved by section 1 of the Charter. As it will be seen, the security certificate regime is ruled to be in accordance with the principles of fundamental justice and section 7 of the Charter, and, in the alternative, is saved by section 1. The motion challenging the constitutionality of the relevant provisions of the *IRPA* is dismissed.

INDEX (by paragraph numbers)

Appendix A Latest conditions of release of Mr. Harkat

Appendix B List of judgments, orders, communications and summaries issued

2. The constitutional question

[2] Do sections 77(2), 78, 83(1)(c) to (e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the *IRPA* violate section 7 of the Charter in that they do not provide for fair trial standards, fail to grant to the named person the right to know and answer the case made against him and make it impossible for the Court to render a sufficiently informed decision on the basis of the facts and the law?

[3] Sections 1 and 7 of the Charter provisions read as follows:

Rights and freedoms in Canada	Droits et libertés au Canada
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
Life, liberty and security of person	Vie, liberté et sécurité
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[4] The relevant *IRPA* provisions read as follows:

Filing of evidence and summary	Dépôt de la preuve et du résumé
77(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.	77(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.
Determination	Décision
78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.	78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.
Protection of information	Protection des renseignements
83.(1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	83.(1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2:
(c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent	c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres

resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(e) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

e) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

(h) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

h) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

(i) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national; and

i) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

Restrictions on communications — special advocate	Restrictions aux communications — avocat spécial
85.4(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.	85.4(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.
Disclosure and communication prohibited	Divulgations et communications interdites
85.5 (b) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.	85.5 b) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

Brief history of the proceedings

[5] A certificate stating that Mr. Harkat is inadmissible on security grounds (the "2008 Certificate") was signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration and referred to the Federal Court under the new *Immigration and Refugee Protection Act* (the "New *IRPA*" or "*IRPA*") legislation on February 22, 2008. It is alleged that Mr. Harkat is inadmissible on security grounds for engaging in terrorism,

being a danger to the security of Canada, being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism (see paragraphs 34(1)(c), (d) and (f) of the new *IRPA*).

[6] On February 22, 2008, an *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* ("Bill C-3" or the "New *IRPA*"), came into force in response to the rulings of unconstitutionality of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, ("*Charkaoui #1*"). The Court held that the former legislation violated section 7 of the Charter in that it violated the named person's right to know and answer the case against him and that it could not be saved by section 1 of the Charter because it did not minimally impair the rights in question. It also declared that the former subsection 84(2) governing the application for judicial release violated section 9 and paragraph 10(c) of the Charter by not providing timely detention review for foreign nationals. Bill C-3 made substantial modifications to the procedure governing the judicial review of certificates as well as to the applications for detention release in that context. These amendments included a new national security information disclosure process with the addition of special advocates to represent the interests of the named persons in the closed hearings. Bill C-3 also eliminated the distinction between permanent residents and foreign nationals for the purposes of the judicial interim release. Mr. Harkat's 2008 certificate was signed after the enactment of Bill C-3. The Ministers also sought the *status quo* of his conditions of release.

[7] On June 26, 2008, the Supreme Court of Canada rendered a second decision on the security certificate process in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38

("*Charkaoui #2*"). In that appeal, Mr. Charkaoui sought a stay of proceeding given the destruction of original notes taken by the Canadian Security Intelligence Service ("CSIS") during interviews with him. The Supreme Court allowed Mr. Charkaoui's appeal in part. While a stay of proceedings was found to be premature, the Court held that the destruction of operational notes was a serious breach of CSIS's duty to retain and disclose information. Justices Lebel and Fish wrote on behalf of the Court at para. 53:

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

[8] In conformity with this judgment, this Court ordered the Ministers and CSIS on September 24, 2008 to "… file all information and Intelligence related to Mohammed Harkat including, but not limited to, drafts, diagrams, recordings and photographs in CSIS's possession or holdings with the designated proceedings section of the Court."

[9] The special advocates, with Ministers' counsel and the designated judge, reviewed the *Charkaoui #2* disclosure and identified the information which they felt was pertinent to the proceeding. As a result of the *Charkaoui #2* review, informative documents were entered as exhibits (see ex. M13, M15, M17, M18, M25 and M26).

[10] In the fall of 2008, closed hearings were held concerning the *Charkaoui #2* disclosure issue. Also, evidence was presented through a ministerial witness in support of the allegations made against Mr. Harkat and the reasonableness of the certificate. Since the *Charkaoui #2* disclosure was ongoing, the cross-examination of the witness by the special advocates was limited to the issue of the danger associated with Mr. Harkat in relations to the review of his conditions of release. The cross-examination concerning the reasonableness of the certificate was postponed to November 23, 2009. During those closed hearings, the Court dealt with other matters initiated by the special advocates, such as their request to access a CSIS employee file and human sources files. This resulted in the issuance of reasons for judgment in both cases (see *Harkat (Re)*, 2009 FC 203; and *Harkat (Re)*, 2009 FC 1050).

[11] In October 2008, the Ministers consented to a change of residence, and to the removal of a condition that required Mr. Harkat to reside with two supervising sureties. The Ministers' consent was conditional on Mr. Harkat's agreement to a number of conditions, such as the instalment of surveillance cameras by the Canada Border Services Agency ("CBSA"). The Ministers also agreed to the removal of a supervising surety.

[12] In March 2009, this Court conducted a review of conditions of Mr. Harkat in public. Closed hearings were also held to deal with the classified information on danger. It concluded that his release without conditions would be injurious to national security, but confirmed his release under more appropriate conditions. For instance, Mr. Harkat could stay home alone between 8 a.m. and 9 p.m., provided he gave the CBSA a 36-hour notice and called them every hour on the hour (see *Harkat (Re)*, 2009 FC 241).

[13] On April 23, 2009, as a result of the ongoing closed hearings, the Ministers disclosed facts publicly that had not been previously disclosed and on which they relied upon, as well as a summary and further disclosure of *Charkaoui #2* documents (see ex. M15). This was tendered as an exhibit although counsel agreed that only the information dealt with during examination or cross-examination of witnesses could be relied upon by the designated judge. This document remains part of the public record insofar only as it shows the extent of the information disclosed to Mr. Harkat as a consequence of *Charkaoui #2*.

[14] On May 12, 2009, a search of Mr. Harkat's residence took place. The search was reviewed by the Court and was held to be unjustified. All items seized were returned to Mr. Harkat by order of this Court (see *Harkat (Re)*, 2009 FC 659).

[15] On May 26, 2009, a Ministers' letter was delivered to the Court providing new information in relation to the reliability of a human source that had provided information on Mr. Harkat (the "polygraph issue"). As a result, the Court ordered the Ministers to file, on a confidential basis, the human source file, as the Court had evidence that led it to question the completeness of the information provided by the Ministers. In addition, on June 16, 2009, the Court issued a public direction offering three CSIS witnesses the opportunity to explain their testimony and their failure to provide relevant information to the Court. They accepted the Court's invitation.

[16] In their submissions, the special advocates sought the exclusion of all information provided by the human source in question as a remedy pursuant to subsection 24(1) of the Charter. On

October 15, 2009, the Court issued public reasons for order and order (*Harkat (Re)*, 2009 FC 1050). The Court found that there were no intent to filter or conceal the information concerning the human source on the part of the CSIS employees and that there were insufficient grounds to rule that Mr. Harkat's rights as guaranteed by the Charter had been violated. However, the Court ordered that another human source file relied upon by the Ministers be made available to the s`ecial advocates and to the Court, setting aside the human source privilege, to ensure that there were no further concerns in relation to the special advocates' ability to fully test the evidence. This was found to be necessary to remedy the damage brought to the administration of justice and to re-establish a climate of trust and confidence in the proceeding. A new exhibit was filed by the Ministers which properly reflected the content of the human source file related to the polygraph test.

[17] On September 21, 2009, Mr. Harkat filed an application for an order reviewing his conditions of release. In light of a new threat assessment issued by the Ministers, an important number of restrictions were removed. Among others, Mr. Harkat could now go on outings without the presence of his sureties and was allowed to travel outside the Ottawa region under certain conditions (*Harkat (Re)*, 2009 FC 1008). Some restrictions remain, which can be found in Appendix "A" of the present Reasons.

[18] During the closed hearing prior to the beginning of the public hearing on the reasonableness of the certificate, an issue arose as to third party information that the special advocates considered necessary to be transmitted to Mr. Harkat. This information is protected from disclosure by a caveat in the Intelligence world, to the effect that permission must be obtained for disclosure. This sensitive issue was addressed extensively during closed hearings. The special advocates agreed that some of

the information was such that permission should be sought from those specific sources of information. A process was established by the Ministers to seek such permission in specific cases. Some of this information was eventually disclosed to Mr. Harkat through summaries or communications.

[19] The special advocates and public counsel sought to obtain updated information on Zubaydah and Wazir, two individuals alleged to have links with Mr. Harkat. Closed hearings were held and the matter was reviewed at length. When possible, public communications of the information were provided (see for example communication dated May 12, 2010). At the end of the public hearings, the Court informed the parties that any new information concerning these two individuals could be filed with the Court until August 31, 2010, although the matter was under reserve since June 2, 2010. A summary of information was forwarded to Mr. Harkat and public counsel as a result of an exchange of correspondence between the Ministers' counsel, special advocates and the Court (see Oral Communication dated September 1, 2010).

[20] In accordance with the legislation and *Charkaoui #2*, full access to the bank of information in the hands of CSIS with regard to Mr. Harkat and other Intelligence information has been given to those involved in the closed hearings. It gave them access to targets, individuals of concern, methodologies and methods of operation, exchanges of information with foreign agencies, investigative reports, potential names of human sources, etc. It also gave a view of how the Canadian Security Intelligence Service ("CSIS") operates internally when gathering and assessing information. This type of information is very sensitive.

[21] During this proceeding, Mr. Harkat was represented by three public counsel and two special advocates. Five counsels acted on behalf of the Ministers; only three of them were involved in closed hearings. The special advocates were present during all the public hearings and did intervene occasionally on a number of public matters.

4. Brief review of the Reasonableness hearing - summaries, communications and orders

[22] The public hearings on the reasonableness of the certificate of Mr. Harkat were held on November 4, 2008, from January 18 to February 12, 2010 and from March 8 to March 11, 2010. Public and closed oral submissions were heard between May 25 and June 1, 2010. Closed hearings were held on and off from September 2008 to May 2010. Two witnesses testified publicly on behalf of the Ministers in the public hearings. One of them was recognized as an expert witness.

[23] The respondent, Mr. Harkat, testified. In addition, seven witnesses testified on his behalf, out of which five were given standing as expert witnesses on a variety of subject matters. Another expert witness did not testify but his report was entered as an exhibit.

[24] Close to 20 witnesses have been cross-examined in closed hearings on a number of subject matters, such as the reasonableness of the certificate, the polygraph issue, the assessment of danger, *Charkaoui #2* disclosure issues, human sources, etc. As a result, communications and directives have been disclosed to Mr. Harkat in order to inform him of what was discussed *in camera*, without disclosing information that could be injurious. As well, the special advocates requested to communicate with public counsel and other people on 18 occasions. Such requests were granted on

more than 12 occasions. A compilation of all the judgments, orders, communications, directives and summaries is included at Appendix B.

5. Factual allegations made against Mr. Harkat and disclosure of evidence

[25] The security certificate is supported by a Classified Security Intelligence Report ("CSIR" or "TS SIR") from which a Public Security Intelligence Report ("PSIR" – ex. M5) was filed on February 22, 2008, and provided to Mr. Harkat. This document was available at the time the two special advocates were appointed and a period of at least one month was available to allow discussion with Mr. Harkat and his public counsel prior to the period they became privy to the classified information. From then on, the special advocates needed to secure judicial authorization to communicate since they had access to the TS SIR. A Revised Public Security Intelligence Report ("RPSIR" – ex. M7), the result of an ongoing process of reviewing the classified information in closed hearing with all involved, which brought the disclosure of additional information, was provided on February 6, 2009. Generally, the RPSIR alleges that prior to and after arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activity as a member of the terrorist entity known as the Bin Laden Network ("BLN"). The allegations and evidence disclosed by the Ministers are as follows:

(a) Prior to arriving in Canada in October 1995, Harkat was an active member of the Bin Laden Network and was linked to individuals believed to be in this Network. He was untruthful about his occupation in Pakistan as he had concealed from Canadian authorities his activities in support of Islamist extremist organizations;

(b) In Algeria, Harkat was a member of the Front Islamique du Salut ("FIS"), a legal political party at the time. Harkat acknowledged his support for the FIS from 1989. After being outlawed in 1992, the FIS created a military wing, the Armée islamique du salut, which supported a doctrine of political violence, and was linked with the Group islamique armé ("GIA"). The GIA

supported a doctrine of depraved and indiscriminate violence, including against civilians. When the FIS severed its links with the Group islamique armé ("GIA"), Harkat indicated that his loyalties were with the GIA. Harkat's decision to align himself with the GIA is an indication of support for the use of terrorist violence;

(c) Harkat was associated with Ibn Khattab;

(d) The Algerian Mohammad Adnani (a.k.a. Harkat), a former soldier in Afghanistan, was a member of the Egyptian terrorist organization Al Gamaa al Islamiya ("AGAI");

(e) After arriving in Canada, Harkat engaged in activities on behalf of the Bin Laden Network using methodologies typical of sleepers;

(f) In support of clandestine activities, members of the Bin Laden Network use false documents. When Harkat arrived in Canada he was in possession of two passports, a Saudi Arabian passport and an Algerian passport. The Saudi Arabian passport bearing the name Mohammed S. Al Qahtani was declared and was verified as fraudulent. Saudi passports were determined to be the passports of choice for Muslim extremists entering Canada because prior to 2002, Saudi passport holders did not require a visa to travel to Canada;

(g) Harkat used aliases such as Mohammed M. Mohammed S. Al Qahtani Abu Muslim, Abu Muslima, Mohammad Adnani, Mohamed Adnani, Abu Muslim, Mohammed Harkat, and Mohamed – the Tiarti, and concealed them in order to hide his identity and his real activities on behalf of the Bin Laden Network;

(h) Harkat kept a low profile as he needed status in Canada following which he would be "ready". He was a sleeper who entered Canada to establish himself within the community to conduct covert activities in support of Islamist extremism;

(i) Harkat used security techniques and displayed a high level of security consciousness to avoid detection;

(j) Harkat concealed his previous whereabouts, including the period that he spent in Afghanistan. Harkat also concealed his links with Islamist extremists, including his relationship with persons in Canada, in part to disassociate himself from individuals or groups who may have supported terrorism;

(k) Harkat maintained links to the financial structure of the Bin Laden Network and concealed these links. He had access to and received, held or invested money in Canada originating from the Bin Laden Network. He also had a

relationship with Hadje Wazir, a banker Harkat knew from Pakistan, who is believed to be the same individual as Pacha Wazir – an individual involved in terrorist financing through financial transactions for Ibn Khattab and the Bin Laden Network;

(l) Harkat assisted Islamist extremists in Canada and their entry into Canada, and concealed these activities. Harkat counselled Wael (a.k.a. Mohammed Aissa Triki) on his processing through Canadian immigration including denying knowledge of anyone living in Canada, and contacting Harkat once cleared through immigration. Harkat spoke to Abu Messab Al Shehre while he was in London, U.K. Al Shehre was searched upon arrival in Canada and found to be in possession of various documents (i.e. a shopping list of munitions and weapons) and paraphernalia (i.e. weapons or parts thereof), including a head banner usually worn by Islamist extremists when in combat, and believed to be covered with written Koranic verses. Al Shehre was detained and Harkat visited him in jail, but denied any previous contact; and

(m) Harkat had contacts with many international Islamist extremists, including those within the Bin Laden Network, and other numerous Islamist extremists, including Ahmed Said Khadr and Abu Zubaydah.

[26] As part of the RPSIR, the appendices contain a brief description of organizations or individuals such as Al-Qaeda, the Groupe Islamique Armé ("GIA"), Ibn Khattab and Ahmed Said Khadr. It also includes six CSIS summary interviews with Mr. Harkat from May 1, 1997 to September 14, 2001, as well as 13 summaries of conversations (the "K conversations"). These summaries relate to Mr. Harkat, either as a participant or as the subject of the conversation, from September 1996 to September 1998. They are offered by the Ministers as evidence in support of the allegations. The disclosure of such evidentiary information had never been done before. Through careful editing, the content of these conversations was extracted from CSIS's book of information and was set out as exhibits. All counsel involved in the closed hearings made that possible. Finally, the RPSIR also has public information relied upon and immigration documents concerning Mr. Harkat. That type of evidence explains the Ministers' view of Mr. Harkat's situation.

[27] As a result of the ongoing review of the classified information during the closed hearings, more detailed factual allegations and evidence were provided to Mr. Harkat and filed publicly on April 23, 2009 (see ex. M10):

> (a) Harkat operated a "guesthouse" in a suburb of Peshawar, Pakistan. There is information to suggest that the guesthouse may be linked to Ibn Khattab, and was used by mujahideen who were on their way to or from training camps in Afghanistan with the facilitation of Harkat;
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> (b) There is information that demonstrates that Harkat had access to sums of money when he required it. After he arrived in Canada, Harkat received money from contacts abroad; and
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> (c) There is information to the effect that Harkat worked for the same organization (Human Concern International) as Ahmed Said Khadr and was acquainted with Khadr before Harkat came to Canada. Also, there is information to suggest that Harkat was entrusted with specific tasks on behalf of Khadr.

[28] The special advocates took the position that such information had to be disclosed in order to properly inform Mr. Harkat. Documents properly prepared on the basis of sensitive information made that possible. On February 10, 2009, the Ministers filed a Supplementary Classified SIR, from which a Supplementary Public SIR (ex. M11) was extracted, alleging that:

> (a) From 1994 to 1995 Abu Muslim (a.k.a. Harkat) was an active jihadist in Peshawar who was in the service of Ibn Al Khattab, not Al-Qaeda, for whom he ran errands and worked as a chauffeur;
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> (b) From 1994 to 1995 one of HARKAT's friend's was Dahhak. In February 1997, HARKAT contacted an individual in Pakistan whom he addressed as Hadje Wazir. Identifying himself as Muslim from Canada, HARKAT asked Wazir whether he knew Al Dahhak. Wazir advised in the negative. It is believed that Dahhak, Al Dahhak and Abu Dahhak (aka Ali Saleh Husain) are the same person, and that this person is associated to Al Qaeda; and
>
> (c) While in Pakistan, HARKAT was known to have had shoulder length hair and a noticeable limp.

[29] This information became public as a result of numerous requests made by the special advocates and eventually with the collaboration of the Ministers' counsel. As a result of the review of the Intelligence files as dictated by *Charkaoui #2*, more detailed information was disclosed to Mr. Harkat:

> **1996**
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> **Contacts with Mohammed Aissa Triki:**
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> In September 1996. Harkat discussed with acquaintances the upcoming visit to Canada of his Tunisian friend, Wael who used the name of Mohamed Issa for his visit to Canada. (Wael is believed identical to Mohammed Aissa Triki). Harkat counselled "Wael" on his processing through Canadian Immigration. Harkat advised Triki to tell his story as it is and not to lie. Then, Harkat advised Triki to deny knowledge of anyone in Canada and instructed Triki to contact Harkat once he had cleared Canadian immigration. Triki, who claimed to have $45,000.00 dollars when he arrived in Montreal in September 1996, travelled directly to Ottawa, and took up residence with Harkat.
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> Triki left Toronto on October 23, 1996, carrying a false Saudi passport bearing the name Mohamed Sayer Alotaibi. Later, in November 1996, it was learned that Harkat would reimburse an individual for any out standing telephone call bills made by Triki while in Canada.
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> **Immigration process:**
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> In October 1996, it was learned that Harkat did not want to be associated with anybody until he had finished with his Immigration process.
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> **Finance:**
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> In November 1996, during a conversation between Harkat and an individual, the latter asked how much Harkat was willing to pay to purchase a car. Harkat advised that money was not an issue for him. He furthered that he would pay up to $8,000.00 dollars for a car in good shape. In December 1996, Harkat advised an individual that he would pay $7,650.00 for the car. When asked if he had the money ready, Harkat replied that his friend at the school where he learns

English had guaranteed the money for him. Harkat furthered that the money was in the States, and he would be transferring the money.

Contacts with Abu Messab Al Shehre:

In November 1996, Abu Messab Al Shehre spoke to Harkat from London, United Kingdom. Al Shehre addressed Harkat as "Abu Muslim" and asked how the "brothers" were doing. When Al Shehre said that Harkat might remember him as "Abu Messab Al Shehre of Babi", Harkat, who identified himself as Mohamed, quickly said that Abu Muslim was not there. When asked, Harkat told Al Shehre that he did not know where Abu Muslin was, and said he did not know when Abu Muslim would be returning. In concluding, Al Shehre said sorry to bother you, Sheikh Mohamed. Later, in November 1996, Harkat received an apology on behalf of Abu Messab Al Shehre for the use of Harkat's alias, Abu Muslim. Harkat tried to avoid being called Abu Muslim. In December 1996, Harkat revealed to an individual that he knew Al Shehre very well and that Al Shehre was his friend.

On his arrival in Canada in December 1996, Al Shehre's effects were searched by officials of Revenue Canada Customs and Excise (RCCE), now known as the Canada Border Services Agency (CBSA). In his possession were various documents and paraphernalia, including a shopping list of munitions and weapons (for example, Kalashnikov rifle, RPG (rocket propelled grenade)) and instructional documents on how to kill. Among the weapons seized by RCCE during their search were a nanchuk (a prohibited weapon under the *Criminal Code* (of Canada)), a garrotte, and a samurai sword (Wazi). Also found were a shoulder holster (reported to be for a Russian-made gun), a balaclava and a head banner usually worn by Islamist extremists when in combat, believed to be covered with written Koranic verses. As a result, Al Shehre was detained by RCCE.

Throughout this period, Harkat was regularly in contact with certain acquaintances in order to keep abreast of Al Shehre's situation. Harkat urged one of them to find money to pay Al Shehre's lawyer, and suggested that that person contact Al Shrehre's brother abroad and ask him for money. Harkat kept himself abreast of Al Shehre's situation until the latter's deportation on May 29, 1997, to Saudi Arabia, where he was arrested on May 30, 1997.

1997

Immigration process:

In February 1997, Harkat informed some acquaintances that he had been accepted as a refugee, and that he was now able to apply for landed immigrant status.

Contact with Hadje Wazir:

In February 1997, Harkat contacted an individual in Pakistan whom he addressed as Hadje Wazir. Identified himself as "Muslim" from Canada. Harkat proceeded to inquire about "Khattab" (believed to be identical to Ibn Khattab) or any of his "people". Wazir replied that Khattab had not shown up for a long time but his people had. At this point, Harkat asked if Wael (believed to be identical to Mohammed Aissa Triki) was visiting Wazir on a regular basis. Wazir advised in the positive. Harkat furnished his telephone number and asked to be contacted by Wael. Harkat further asked that his telephone number be provided either to Wael or any brother who showed at Wazir's Centre to do transactions. Harkat went on to explain that he also used to do transactions at Wazir's Centre.

In August 1997, Harkat said that he intended to travel to where Hadje Wazir was residing and ask him for money. Harkat added that he could easily get money from Hadje Wazir.

Contacts with Ahmed Said Khadr:

In March 1997, Harkat said he had met Ahmed Said Khadr at the Islamic Information and Education Centre (IIEC) in Ottawa and would meet him again shortly.

Links with Abu Zubaydah:

In March 1997, Harkat discussed financial arrangements with an acquaintance in Ottawa who stated that he contacted Abu Zubaydah, at the "place" where Harkat "used to be". Abu Zubaydah wanted Harkat to help pay Abu Messab Al Shehre's legal fees, and Harkat was asked if he could come up with $1,000.00 dollars. Harkat replied that he was ready to pay that amount if he was contacted by Abu Zubaydah. When asked, Harkat said he did not fear being contacted at home by Abu Zubaydah, and that he knew Abu Zubaydah personally. At one point during the discussion, the acquaintance referred to Abu Zubaydah as Addahak / Aldahak.

Employment:

In March 1997, Harkat discussed with a potential business partner the possibility of getting into a business venture together. Harkat revealed that he would travel and get funds from a mutual friend. Harkat explained that he would open a franchise for their mutual friend's business in Canada. Harkat further said that he would travel to Saudi Arabia to get the money if his future partner was serious about getting into a partnership business. The partner stated that the best business he and Harkat could do was to run a gas station. This business would require $45,000.00 dollars from each partner. Harkat replied that money was not an issue for him.

In October 1997, Harkat began working as a delivery person for a pizzeria in Orleans but quit two days later.

Attending school:

In September 1997, Harkat registered as a full time student at an adult high school located in Ottawa. Harkat wanted to continue his studies in English, physics and chemistry.

Past activities:

In October 1997, Harkat indicated to an acquaintance that CSIS interviewed Mohamed Elbarseigy for six hours, and the latter told CSIS every thing he knew about him, including that he worked in Amanat.

1998 to 1999

Contact with Abu Messab Al Shehre:

In February 1998, in a conversation with Abu Messab Al Shehre, in Saudi Arabia at that time, Al Shehre, who addressed Harkat as our Sheikh, asked Harkat how he viewed his friendship with him. Harkat described it as a kind of brotherhood. Al Shehre replied that it is more than brotherhood. Harkat stated that since he needed status in Canada, he tried to keep a low profile during Al Shehre's detention, but he managed to send an acquaintance of his to prison and provide Al Shehre with all kinds of help. Harkat asked Al Shehre to send $1,500.00 to cover Al Shehre's legal fees. Harkat advised Al Shehre to acquire the funds from the "group" if he could not get it on his own. Harkat openly stated that he had to keep a "low profile" as he needed status in Canada. Further, Harkat told Al Shehre that as soon as he received his "status" he would be "ready".

Plans to get married:

In June 1998, Harkat indicated to an acquaintance that he feared being expelled by Canadian authorities, so he decided to marry a Muslim Canadian woman to avoid deportation.

In February 1999, Harkat advised his girlfriend in Ottawa that he would be coming over to her place the following day to seek her hand in marriage.

In July 1999, Harkat revealed to an acquaintance that his parents had also found him a bride in Algeria. When it was suggested that Harkat bring the bride to Canada, Harkat stated that his current girlfriend in Ottawa would not accept that."

Employment:

In 1998 and 1999, Harkat held jobs at various gas stations and at a pizzeria.

In October 1998, Harkat revealed to an acquaintance that he planned to purchase the lease of a gas station if he was granted status. Harkat revealed that he had no problem finding the money. He only needed $25,000.00 dollars deposit.

In August 1999, Harkat made an appointment with Canada Trust to discuss a potential loan of $30,000.00 dollars to invest in a gas station.

Plans to Visit Algeria and Tunisia:

In December 1998, Harkat revealed that he would be visiting his family in Algeria in the summer of 2001. In August 1999, Harkat told an acquaintance that his family had advised him against returning to Algeria and suggested they meet them in Tunisia. Harkat revealed that if he went to Algeria, he risked being arrested simply because he was someone of importance within the Front.

Taking courses:

In August 1999, Harkat revealed that he would register at an adult high school to take an English as a second language course.

In December 1999, Harkat was looking for someone to pass his taxi driver's test on his behalf. In February 2000, an acquaintance of

Harkat told him that he had found someone to pass Harkat's taxi driver's test on his behalf.

Finance:

In October 1999, Harkat confided to his girlfriend that he had made a mistake in quitting his other job. He added that he could not afford to not have two jobs because he had large bills to pay. He further revealed that he had argued with the owner of the pizza store over a pay increase and over his schedule and the man had let him go. With two jobs, Harkat related, he used to make $2,500.00 dollars a month and now with only one job at the gas station and working seven days a week, he was making $1,5000.00 dollars a month. Harkat further concluded that his situation would be better if he could pass the taxi driver test in November 1999. However, by the end of the same month he was back working at the pizza store doing the same shift as before. He justified his return to work at the pizza store by noting that he had to pay his debts.

2000 to 2002

Immigration process:

From 2000 to 2002, Harkat was very preoccupied with the status of his permanent resident application and often discussed his predicament with his friends. Moreover, during this period, Harkat was in regular contact with Citizenship and Immigration Canada (CIC) to find out the status of his application.

Getting married:

In March 2000, Harkat believed that the only solution to his problems with immigration was to get married. In April 2000, Harkat found a new girlfriend, Sophie Lamarche. Harkat did not want to put pressure on her in order to get married, however, he was thinking of keeping her as an alternative.

In April 2000, Harkat revealed that he talked to Sophie about his situation who in turn told him that she promised to help him at the appropriate time. Harkat revealed that if something happened, he would marry her.

In May 2001, it was learned that Harkat had married Sophie in January 2001. Later in May 2001, Harkat revealed that his marriage with Sophie was not serious and he could leave her at any time.

Plans to travel to Algeria:

In March 2000, Harkat was planning to travel to Algeria in August 2000. In May 2001, Harkat said that once he received his permanent resident status, he would go to Algeria. In June 2001, Harkat indicated that he would like to receive his permanent resident status soon so he could travel to Algeria. In July 2001, Harkat indicated that he was planning to go to Algeria in January 2002.

Taking a course:

In July 2001, Harkat began a truck driving course.

Gambling at the casino:

In December 2001, Harkat revealed that he had been going to the casinos for five years and was still going. From1997 to 2002, Harkat regularly went to the Lac Leamy Casino in Hull (Gatineau), and to a lesser extent the Montreal Casino. During this period, Harkat won and lost large amounts of money. According to Harkat, in June 2001, the casino gave him a pass in the first row of the theatre for all the shows at the casino because they knew that he had lost $100,00.00 dollars while gambling. Thus, over the years, Harkat often had to borrow money from his girlfriend and her brother. During his testimony before the Federal Court on October 27, 2004, Harkat acknowledged that he had a gambling problem.

Employment:

In February 2000, Harkat had three jobs: gas station attendant, pizza delivery man and car parts deliveryman. In March 2000, Harkat resigned from the pizzeria and lost his two other jobs, but found two other jobs, including one at a gas bar.

In December 2001, Harkat was receiving unemployment insurance while working for a pizzeria. Harkat indicated that the manager at the pizzeria had agreed to sign a letter stating Harkat had begun to work on the 15th of that month and if asked, Harkat would claim he had worked at the pizzeria on a voluntary basis when he was bored at home or as a favour when the manager needed some help. Harkat was never paid by cheque therefore they could not prove anything.

> **Previous employment:**
>
> In September 2001, Harkat indicated that he had worked for Human Concern International (HCI) in Saudi Arabia and for the company 'Muslim'.
>
> (See ex. M15 – the underlined portions show what was previously disclosed to Mr. Harkat. This document was part of the *Charkaoui #2* disclosure to Mr. Harkat. Both groups of lawyers agreed that not all the information found in that document could be used judicially as evidence, but only the information that was used in examination and cross-examination of witnesses. It is included here in order to show the extent of the disclosure made to Mr. Harkat)

[30] Further Summaries of conversations he had in May and June of 2001 with members of his family, friends and a fiancée and her mother in Algeria were made available to Mr. Harkat and added to the Public SIR following a decision in *Harkat (Re)*, 2009 FC 167. Those summaries were disclosed to Mr. Harkat and his counsel, who then had ten days to serve and file a motion asking the Court to treat these summaries of conversations confidentially. Since Mr. Harkat did not file such motion, the summaries became part of the public amended security intelligence report (see ex. M7 at Appendix K).

[31] The public hearings produced 51 exhibits for the Ministers and 82 exhibits for Mr. Harkat, as well as 9 witnesses. The public evidence is voluminous and gives good insight into the facts of this case, the history of Islam and the political reality of the time involving countries such as Algeria, Saudi Arabia, Pakistan, Afghanistan and Russia (Chechnya and Dagestan). The evidence also gives an understanding of the Canadian immigration system insofar as it relates to Mr. Harkat. The public evidence is such that Mr. Harkat knows all of the allegations made against him with some valuable supporting factual evidence. The entire factual basis may not be known to him but his knowledge is such that as it was seen during the presentation of his evidence, he was able to

respond to it. The written submissions of public counsel for Mr. Harkat reflect very clearly his knowledge of the case.

[32] The closed hearings also produced an important number of exhibits both from the Ministers and the special advocates. Witnesses were cross-examined. All pertinent avenues were explored. Because of the polygraph issue, human sources files in their full integrity were exceptionally produced, read and reviewed. All participants to such process became fully cognisant and were able to assume their duties accordingly.

[33] The open source material relied upon by the Ministers was challenged by Mr. Harkat through the testimony of Dr. Lisa Given, associate professor in the School of Library and Information Studies of the Faculty of Education at the University of Alberta in Edmonton. She made it clear that the information could not be relied upon in its entirety and has to be scrutinized rigorously.

[34] The public process has been such that Mr. Harkat was able, through expert testimonies, to offer his own open source documentation.

6. Parties' position

Summary of submissions made by Mr. Harkat

[35] The Applicant submits that the security certificate process constitutes a violation of section 7 of the Charter in that the named person is denied the ability to know and answer the case made

against him. More precisely, it is the position of the Applicant that the security certificate process violates section 7 in the following fashions:

- By providing solely for summaries of information or evidence to the Applicant, subsection 77(2) does not provide him with the ability to know and answer the case;
- By automatically denying disclosure to the named person on the basis of national security interests, paragraph 83(1)(e) of the *IRPA* infringes section 7 of the Charter;
- By allowing the judge to base a decision on information or other evidence regardless of whether a summary of that information or evidence has been disclosed to the Applicant, paragraph 83(1)(i) is contrary to the same principles of fundamental justice and therefore violates section 7 of the Charter;
- By prohibiting the special advocates from communicating with anyone about the proceedings after they have received the confidential information without authorization of the Court, subsection 85.4(2) and section 85.5 violate section 7 of the Charter;
- The standard of review of reasonableness, through a combination of sections 33 and 78, if interpreted as mandating a standard less than a balance of probabilities, constitutes a breach of section 7 of the Charter.

[36] In order to make a full answer and defence, the Supreme Court of Canada stated in *Charkaoui #1* that there must be disclosure to the extent that it allows the person not only to present the evidence, but to also make a full legal argument (see para. 52). According to Mr. Harkat, this suggests that the named person not only has to be able to respond to the allegation, but has to be able to make a legal argument regarding the merits of the allegation itself. In spite of the presence of

the special advocates, the Ministers must strictly meet their disclosure duties. The Ministers must apprise the named person of the essence of the evidence they are relying on to make their case, so that the named person can meet that case. This is an essential part of the right to a fair hearing.

[37] Therefore, when a particular allegation is decisively based on evidence called in secret, the Court should be required to balance the national security interests with the public interest in ensuring a fair hearing. The special advocates do not have the ability to rebut the government's case since they cannot discuss the case with the named person. In order to protect the right to a fair hearing, the Court must provide the fullest disclosure of information possible to the named person while ensuring that the information is protected.

[38] Mr. Harkat submits that paragraph 83(1)(e) of the *IRPA* violates section 7 of the Charter. He argues that in the wake of *Charkaoui #1* and *Charkaoui #2*, there is a constitutional duty to strike a balance which calls for the most complete disclosure possible. As a consequence, the designated judge is said to have a duty to require the Ministers to discharge their onus of proving that national security concerns override the right of the named person to a fair hearing. Mr. Harkat argues that national security confidentiality concerns arising in circumstances other than immigration security certificates is governed by subsection 38.06(2) of the *Canada Evidence Act* ("*CEA*"), where the judge is required to strike a balance between the national security interest and other interests, including the public interest in a fair proceeding. Such balancing should therefore be regarded as the constitutionally compliant approach.

[39] Mr. Harkat submits that the special advocates are unable to assist the named person in this process if prevented from communicating with them after reviewing the secret material. As well, subsection 85.4(2) of the *IRPA* provides that once a special advocate has received the confidential information, he may communicate with another person about the proceeding only with the presiding judge's authorization; in Mr. Harkat's submissions, that is a violation of the solicitor-client privilege because the presiding judge will be privy at least to the subject matter of communications between the special advocate and the named person. Mr. Harkat also argues that where the special advocates are not permitted to ask the named person questions about the Ministers' case after reviewing disclosure, it will be impossible to assist the person in properly making a full answer and defence.

[40] The Applicant submits that the violations to section 7 cannot be saved under section 1 of the Charter. He argues that there are no exceptional circumstances warranting any derogation from the disclosure rights of the named person, and that the *IRPA* disclosure regime fails to qualify a national security prohibition that can minimally impair the Applicant's section 7 rights, and therefore cannot be saved under section 1. He accepts, however, that the protection of national security is a sufficiently compelling public interest to justify intruding on solicitor-client privilege. It follows that the legislation may legitimately impose restrictions on the otherwise free flow of information between solicitor and client. However, any such restriction must observe the principle of minimal impairment which, the Applicant submits, is far more than necessary to safeguard national security (see Factum of the Applicant on Disclosure and the Public Interest/Communication with the Special Advocates dated April 26, 2010 at para. 70).

[41] Mr. Harkat expressed an intent to challenge some provisions of the *IRPA*, namely: subsection 77(2) and paragraphs 83(1)(c) to 83(1)(e) insofar as it does not relate to the restrictions on disclosure; paragraph 83(1)(h) on the admissibility of the evidence; and paragraph 83(1)(i) that provides that a decision can be based on information or evidence regardless of whether a summary has been disclosed to the Applicant; however, he never presented any written or oral submissions in that regard. This Court did draw the attention of counsel to this situation. It is Mr. Harkat's opinion that arguments were made to support the constitutional invalidity of these provisions based on the general argument that " … where the legislation automatically limits disclosure to the named person on the basis of national security, let alone where it denies disclosure absolutely, it violates section 7 of the Charter." At best, the general argument submitted applies to those particular provisions insofar as it relates to disclosure issues. However, no arguments were directed at issues relating specifically to each of these provisions. For example, paragraph 83(1)(h) deals with the admissibility of evidence in public and closed hearings. No arguments were made as to the issue of unconstitutionality of this specific section. A court, when dealing with constitutional issues, must have the benefit of complete submissions to support the conclusion sought. Nothing less will do. The right to a fair hearing, to know the case and be able to answer it, to have a sufficiently informed decision based on the facts and law were addressed by all counsel in detail, which was helpful.

[42] The standard of review of reasonableness has also been raised by Mr. Harkat in his written submissions, but this matter has been resolved by consent of the parties, in view of the opinion of Justice Mosley in *Almrei (Re)*, 2009 FC 1263, at para. 101("*Almrei (2009)*"). This Court will briefly address this issue herein.

Summary of the submissions made by the Ministers

[43] The Ministers submit that the Applicant's argument about the unconstitutionality of the scheme reflects largely his preference for other procedures that Parliament declined to adopt. The existence of other possible procedures does not render unconstitutional the one Parliament has implemented. Parliament's choice of procedure for ensuring the fairness of the certificate proceeding, and for protecting sensitive national security information from disclosure, ought to be respected.

[44] The Ministers argue that there is no absolute right to the disclosure of all the information under section 7 of the Charter in the security certificate context. According to the Ministers, Mr. Harkat has misread the Supreme Court's holding in *Charkaoui #1* because the argument is not whether full disclosure is required, but whether the disclosure that has been provided is an adequate substitute. The Ministers submit that the security certificate scheme provides a substantial substitute for full disclosure, and therefore complies with the principles of fundamental justice provided for in section 7 of the Charter. Amongst others, Mr. Harkat has received a summary of the protected information, setting out in some detail the nature of the allegations and information relied on by the Ministers. In addition, the special advocates, acting for the named person, know and answer the case against him. Hence, that procedure ensured that the reasonableness decision was based on all the relevant facts and the law, as Mr. Harkat could communicate information to the special advocates at any point during the hearing. According to the Ministers, the participation of the special advocates in the closed proceeding brings it as close as is possible, under the limitations imposed by the national security concerns, to the adversarial system and guarantees that the proceeding is going to be fair and just.

[45] The Ministers submit that the Applicant has not met the onus of showing that the absence of a balancing requirement in the legislative scheme has adversely affected his right to a fair hearing. Mr. Harkat's preference for the *CEA* model does not make Parliament's choice inappropriate or unconstitutional. The Ministers therefore submit that paragraph 83(1)(e) of the *IRPA* is consistent with the principles of fundamental justice. Parliament has made it clear that it intended not to require any balancing of interests in the security certificate proceedings under subsection 38.06(2) of the *CEA*.

[46] According to the Ministers, the communication provisions found at sections 85.4 and 85.5 of the *IRPA* are fair given the interests at stake and are in accordance with the principles of fundamental justice. The legislation specifies that there is no solicitor-client relation between the special advocate and the person named in the certificate. As well, the legislation limits contacts between the special advocates and the named person after they have seen the confidential information to reduce as much as possible the risk of inadvertent disclosure. Nothing in the record suggests that the scheme has impeded the role of the special advocates, or resulted in any prejudice to Mr. Harkat. The Ministers submit that the legislation has operated in a manner that provides for communication where the Court has found it to be warranted. Judicial discretion exists to authorize communication where justified, and directions and orders have been granted in the present proceeding to allow for communication between the special advocates and public counsel about consequences and implications of ruling including steps to be taken and legal submissions to be made as well as about the scope of the cross-examination.

[47] As stated earlier, the standard of review has been discussed by Mr. Harkat and the Ministers in the written submissions, but the parties consented to the rulings in *Almrei (2009)* and this Court will address this issue briefly herein.

[48] The Ministers submit that should this Court rule that the disclosure regime or limitations on communications infringe on Mr. Harkat's section 7 Charter rights, such infringement is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under section 1 of the Charter.

7. Overview of the new legislative *IRPA* provisions

[49] Under subsection 77(2) of the *IRPA*, the Ministers must provide the Court with all the information on which the security certificate is based. The Ministers give a summary of information and other evidence to the named person to allow him to be reasonably informed of the case against him, but that omits national security information. Under the former system, the designated judge was responsible for the preparation of such summary of information after the filing of the certificate (see paragraph 78(h) of the previous legislation). Under paragraph 83(1)(e) of the new legislation, the designated judge "throughout the proceeding" shall ensure that summaries of information are provided to the individual concerned and to his public counsel. The previous legislation did not provide for this as only one summary was required (see again paragraph 78(h)). It was, however, the practice of designated judges to issue summaries of information throughout the proceeding. In the course of the present proceeding, the reality is that much more information was disclosed to Mr. Harkat than under the previous certificate proceeding because of the ongoing concern of informing

the individual without disclosing national security information. The interaction between the special advocates and the Ministers' counsel was also fruitful.

[50] This new duty of early disclosure allows the named person and his counsel to have the summary available at the beginning of the proceeding. Also, as it will be seen later, it allows the special advocates to meet with the named person to discuss the case. Until the special advocates are apprised of the classified information, they can meet with the named person as often as they need without authorization from the designated judge. In the present case, the special advocates had more than a month to obtain directions from the named person (see Order dated June 4, 2008). One of the special advocates, Mr. Paul Copeland, was Mr. Harkat's public counsel during the first certificate proceeding.

[51] The designated judge must issue summaries "throughout the proceeding." That process is designed to benefit the named person. Subject to the non-disclosure of the classified information, during the course of these proceedings, this Court has issued a great number of summaries of information. It has also been the practice to keep all the people concerned informed during public hearings and hearings held by teleconference calls between all counsel, including the special advocates, by updating the information as the procedure was ongoing (see for examples: Transcripts of Proceedings, September 21, 2009 at 1 and 2; September 25, 2009 at 1 and 2; and January 21, 2010 (Vol. 4) at 1).

[52] Paragraph 83(1)(b) of the *IRPA* provides for the appointment of a special advocate whose name must be on a list established by the Minister of Justice (see subsection 85(1)). In the present

proceeding, two special advocates were appointed at Mr. Harkat's request. The Ministers did not oppose the nomination of the two candidates chosen by Mr. Harkat. Prior to making an appointment, the Court must hear representations from the named person, the Ministers and give "… particular consideration and weight to the preferences …" submitted by public counsel for the named person. Such has been the case in these proceedings. Mr. Harkat chose Mr. Paul Copeland and Mr. Paul Cavalluzzo from the list of candidates for special advocates. Guidance for the Court is offered when making such appointments (see subsection 83(1.2) of *IRPA*).

[53] At paragraph 83(1)(c), the new legislation provides clarification as to section 78 of the previous legislation whereby the Ministers could request a closed hearing (in the absence of the named person and public counsel), but in the presence of the special advocate as long as the information being discussed "could" be injurious to national security or endanger the safety of a person if disclosed. The involvement of the special advocates in these hearings was helpful in ensuring that the closed hearing was justified and that proper summaries were issued to the named person. It was generally the practice that summaries of closed hearings were agreed upon by all concerned, including the special advocates.

[54] Again, as was the case with the previous legislation (see paragraph78(b)), the designated judge ensures that the classified information remains confidential if its release "would" be injurious to national security or endanger the safety of any person (see paragraph 83(1)(d) of the new legislation).

[55] If the Ministers disagree with the eventual disclosure that a designated judge intends to make, they can withdraw the information and the decision shall not include such information and confidentiality of such information shall be ensured by the said judge (see paragraphs 83(1)(j) and 83(1)(f) of the new legislation). These provisions provide for a resolution if a disagreement occurs between the designated judge's view of some of the classified information and the Ministers. This has not occurred in the present proceeding. The Ministers even showed deference to the Court on some occasions.

[56] The new legislation offers an opportunity to be heard to both the named person and the Ministers (see paragraph 83(1)(g)). Under the previous legislation, this opportunity was only offered to the named person (see paragraph 78(i) of the previous legislation). The new section makes it clear that the designated judge must ensure that both parties can argue their case. Both parties can submit new evidence that was not before the Ministers when the certificate was signed (see paragraph 83(1)(c)).

[57] The information received in evidence, in both the public and closed hearings, may be evidence inadmissible in a court of law as long as it is reliable and appropriate (see paragraph 83(1)(h) of the new legislation). The requirement of "reliability" of the information has been added to the previous section (see paragraph 78(j) of the previous legislation). In the intelligence world, information can be obtained from various national and international sources in different forms. Generally, the information does not originate directly from the original source. It may be in the form of summaries, an intelligence analysis or a simple reporting of events, etc. By adding the requirement for reliability with appropriateness, the legislator compels the designated judge, with

the help of the special advocate and Ministers' counsel, to inquire about whether the information relied upon was "reliable and appropriate." That was the practice followed by the designated judges under the previous legislation. To this effect, Justice Dawson (as she then was), in *Harkat (Re)*, 2005 FC 393, clearly describes this search for the reliability of the information as it was done under the previous legislation:

> [98] In summary, the designated judge must inquire into the source of all information contained within the confidential information upon which the Ministers rely to establish the reasonable grounds for their belief that the person concerned is inadmissible to Canada upon security grounds. Once the source of the information is identified, the designated judge should consider what the written record discloses and what any relevant witness can testify to about the reliability of the information and extent to which the information, or other information from that source, is corroborated. Throughout, the judge must remain vigilant and mindful of his or her obligation to probe the reliability of all evidence. The potential for error caused by such things as mis-identification, mistake, deception, incompetence or malevolence must be considered. As stated earlier, it is important that questions be directed to whether there is exculpatory information in the possession of the Service.
>
> [99] It is only through this demanding exercise that the Court can properly assess the evidence tendered on behalf of the Ministers and the person named in the certificate. A rigorous, objective determination is required in order to protect the interests of the person named in the certificate as well as the legitimate interests of the state.

[58] Under the new legislation, reliable and appropriate evidence must not include information that is believed, on reasonable grounds, to have been obtained as a result of the use of torture (see subsection 83(1.1) of the new legislation; and *Mahjoub (Re)*, 2010 FC 787).

[59] The decision rendered by the designated judge may include information not communicated through summaries or otherwise to the named person (see paragraph 83(1)(i) of the new legislation).

There may come a time when the only evidence to justify inadmissibility on security ground originates from a very sensitive source, and that the disclosure of such evidence, even through a summary, would inevitably disclose the source. Then, such a provision may be useful. Surely, in immigration matters, keeping in mind that the objective of the *IRPA* is the maintenance of security in Canada (see paragraph 3(1)(h)), the Ministers must have the tools to do so without jeopardizing such security. However, in the case at hand, all allegations made against Mr. Harkat have been made known to him, some of them in more detail than others. The decision rendered in this proceeding was reached accordingly (see *Harkat (Re)*, 2010 FC 1241).

[60] In *Charkaoui #1*, the Supreme Court of Canada's Chief Justice concluded at paragraph 3 that the previous legislation violated Section 7 of the Charter "(…) by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better perfect the named person's interests." The response of Parliament was to create the special advocate and to ensure that adequate administrative support and resources were provided (see subsection 85(3) of the new legislation).

[61] The role of the special advocate is "to protect the interests of the named person" in closed hearings (see subsection 85.1(1) of the new legislation). This mandate is clear. The special advocate has access to the same classified information that is available to the designated judge (see subsection 85.4(1) of the new legislation). In the present proceeding, the special advocates gained access to the classified documentation on July 7, 2008, a month after their appointment. They had access to secure offices with their own set of documents supplied by the registry of the designated

proceedings of the Federal Court. Those secure premises were accessible to them throughout the proceeding.

[62] The special advocate is not a party to the proceeding and is not under a solicitor-client relationship with the named person (see subsection 85.1(3) of the new legislation). Mr. Harkat has had more than two public counsels during the proceeding. Subsection 85.1(3) was meant to prevent a conflict of interest situation where, in normal circumstances, counsel would reveal all relevant matters to his client. Having said that, communications between the named person, his counsel and the special advocates are deemed subject to the solicitor-client privilege and are therefore protected (see subsection 85.1(4) of the new legislation).

[63] In closed hearings, under the legislation, a special advocate may challenge: 1) restrictions on the disclosure of information made by the Ministers that would be injurious to national security or endanger the safety of any person, and 2) the relevance, reliability and sufficiency of the classified information (see paragraphs 85.1(2)(a) and (b) of the new legislation). Although certificate proceedings raise issues of law, the reasonableness of a certificate is more factual in nature. The designated judge needs to weigh the evidence brought before him on a balance of probabilities once the initial burden of proof has been met by the Ministers. Parliament clearly recognized this when he allocated the responsibility of questioning the restrictions on disclosure and testing the classified information to the special advocate. The special advocates have fulfilled their duty, which resulted in further disclosure such as the summaries of conversations and information related to certain individuals like Mr. Ahmed Said Khadr and Mr. Shehre (see ex. M7, Revised Public Summary of Intelligence Report, Appendix K). The Court has witnessed the active role played by the special

advocates in the closed hearings, which was comparable to the role assumed by public counsel during the public hearings. Both sets of counsel have been actively defending the interests of the named person while, concurrently, ensuring the protection of the confidentiality of national security information.

[64] In the fulfilment of their duties in closed hearings, the special advocates can make written and oral submissions, cross-examine witnesses and make objections to the Ministers' counsel. They may, if they so require, assume other duties with the designated judge's authorization (see section 85.2 of the new legislation). In the course of the present proceeding, the special advocates have intervened, made objections to the Ministers' counsel questions, cross-examined the witnesses called during the closed hearings, made oral submissions on a variety of subject matters (such as for example: restrictions on disclosure, inquiries to access a number of files, the polygraph issue, *Charkaoui #2* disclosure, the redactions made, etc.) and filed written submissions on a number of legal and factual issues (such as for example: disclosure issues, *Charkaoui #2* issues, on certain testimonies heard, on the need to clarify policy issues and on the danger associated to Mr. Harkat, if any, and review of conditions and final submissions on the reasonableness of the certificate, etc.). They have also sought authorization to file specific motions, which were granted, such as motions to access human sources files, employee files and others. Some of these motions have resulted in top secret judgments which were then redacted and made public. The special advocates therefore actively exercised all powers available in order to protect the interests of the named person.

[65] Once the special advocates have seen the classified information, they cannot communicate with the named person, public counsel or any other person about the proceeding, unless they have

obtained the prior authorization of the designated judge. Such authorization may be given subject to appropriate conditions (see subsection 85.4(2) of the new legislation). If the special advocate communicates with another person after the authorization is granted, the designated judge may impose restrictions on communication to the person, with or without conditions (see subsection 85.4(3) of the new legislation). The purpose of those restrictions on communications is to ensure that classified information will not be disclosed inadvertently, albeit innocently. It is possible that a special advocate will inadvertently use a code word protected for intelligence purposes. This must not happen. When presiding over public hearings and knowing both the public and classified evidence at stake, it is a real challenge for the designated judge to speak publicly on the subject matters and to ask questions to witnesses without disclosing classified information. As noted earlier, after all, the designated judge has the ultimate duty to ensure the confidentiality of the information discussed during the closed hearings (see paragraph 83(1)(d) of the new legislation).

[66] In *Almrei (Re)*, 2008 FC 1216 ("*Almrei (2008)*") at para. 15, the Chief Justice of this Court indicates that the prohibition on communication applies to all who have had access to the classified information and that it is permanent unless authorization is obtained from "a judge" ("tout juge"):

> There are two apparent differences between the impugned provisions. Firstly, the prohibition against communications in s. 85.4(2) is directed solely to the special advocates. In contrast, the prohibition in s.85.5 extends to all persons with access to confidential information. Secondly, the prohibition in s. 85.5 is permanent or, in the words of the clause by clause notes "during the proceeding or any time afterwards." Consistent with the apparent permanency of the prohibition is the ability of "a judge" ("tout juge"), not only the presiding judge, to authorize communication of the confidential information.

[67] Communications originating from public counsel to the special advocates were indeed made repeatedly without the need for an authorization in the present proceedings. Only the communications originating from the special advocates require judicial authorization. The special advocates did make close to 18 requests to communicate with Mr. Harkat and public counsel. With a few exceptions, those requests were granted with the appropriate conditions, such as a reporting procedure in some cases. As for these requests, the Court has always been concerned with inadvertent disclobures of classified information that could result from the special advocates' discussion of litigation strategy, opportunity or not to cross-examine, etc. For the purposes of these reasons, Appendix B is included and sets out the number of requests received, granted, granted in part or refused.

[68] No request was made by the special advocates relating to the solicitor-client matters. If that had happened, a resort to "appropriate conditions" might have been the solution to ensure the protection of the privilege claimed. In such a case, the support staff of the special advocates program ("SAP") would have been in a position to ensure that the classified information was protected during the meetings without having to inform the designated judge of the specific facts related to that privilege. The discretion given to the designated judges by the legislation is helpful in such cases in order to find ways to ensure the fairness of the process. As mentioned during oral submissions, in another certificate proceeding, a closed *ex parte* hearing was held only with the special advocates to discuss a sensitive matter (see Transcript of Proceedings, March 31, 2010 (Vol. 26) at 21 and 22). The current system is adaptable to unforeseen circumstances because of the discretion given to the designated judge, and this, in the interest of all parties.

The new detention review provisions

[69] In *Charkaoui #1,* the Supreme Court of Canada stated at paras. 141 and 142 that section 84.2 of the previous *IRPA* denying a prompt hearing to review the detention of foreign nationals by imposing a 120 day embargo after confirmation of the certificate was unconstitutional. Foreign nationals were added into section 83 and "until a determination is made under subsection 80(1)" was taken out of section 83.2. Parliament recognized that reality in the new legislation (see section 81, subsections 82(1) and (2) of the present legislation). Now, both foreign nationals and permanent residents are entitled to a detention review within 48 hours of the detention. As noted by the Chief Justice of the Supreme Court of Canada in *Charkaoui #1* at para. 122, the Federal Court practice of periodic reviews of conditions was recognized and Parliament inserted a review requirement of the conditions of release once a period of six months has expired since the decision on the last review (see section 82(4) of the present legislation). If the detention continues after the certificate is found to be reasonable, a review of the detention shall be initiated if a period of six months has elapsed since the previous one.

[70] While reviewing the conditions of release, the designated judge must take into account the potential consequences to national security and the safety of any person and makes an assessment as to whether or not the named person will appear for a proceeding or for removal (see paragraph 82(5)(a)) of the current legislation). Conditions may vary through time depending on the circumstances (see section 82.1 of the new *IRPA*).

[71] There are new provisions on breaches of conditions, such as power of arrest, appearance before a judge within 48 hours of arrest and modalities of review (see subsections 82.2(1), 82.2(2), and paragraphs 82.3(a)(b) and (c) of the present legislation).

[72] At any time, the Minister may order that the named person be released from detention or from any conditions in order to allow his departure from Canada (see section 82.4 of the present legislation). Under the previous provision (subsection 84(1)), such powers were also available.

The appeal provisions under the new legislation

[73] There are no appeal provisions for interlocutory decisions in the course of the proceeding. As long as a designated judge certifies the existence of a serious question of general importance, there can be an appeal from a decision made concerning the reasonableness of the certificate decision, a review of detention and a review of conditions (see sections 79 and 82.3 of the current legislation). This clarifies the limits of the previous legislation where decisions on the reasonableness of the certificate were final (see subsection 80(3) of the previous legislation).

8. The *IRPA* special advocate system compared to other systems

[74] In *Charkaoui #1*, the Chief Justice reviewed different implications of counsel into national security matters dealing with classified information, such as the Security Intelligence Review Committee ("SIRC") method; the case of *R. v. Malik and Bagri*, 2005 BCSC 350 where defence counsel were given access to national security information as long as no disclosure was made available to anybody, including the accused; the Arar inquiry where an *amicus curiae* assisted the

commissioner; and the Special Immigration Appeals Commission in the United Kingdom ("SIAC UK Special Advocate System").

[75] In *Almrei (2008),* above, the Chief Justice of this Court clarified the SIRC use of the lawyer assisting the panel member in investigating a complaint. The SIRC counsel acts on behalf of the Review Committee. Counsel will only interact on an *ad hoc* basis with the complainant or/and counsel. Counsel for SIRC does not represent the complainant or the named person:

> "44 SIRC counsel, at all times, acts on behalf of the Review Committee: *Khawaja*, para. 56.
>
> 45 In a recent testimony before the Special Senate Committee on Anti-terrorism, the Review Committee's executive director corrected a common misapprehension that SIRC counsel is a special advocate: *Proceedings*, June 2, 2006, Issue No. 7, at 5:
>
> > … I will clarify certain terminology that has been used regarding the SIRC model. There is no special advocate, no special counsel and no independent counsel involved in our process.
> >
> > …
> >
> > … SIRC counsel must be independent of both government as represented by CSIS … and the complainant.
> >
> > For greater clarity, SIRC's counsel is not an advocate for the complainant.
> >
> > [Emphasis added]
>
> SIRC counsel includes legal agents retained from the private sector and in-house counsel.
>
> 46 SIRC counsel, acting for the Review Committee, assists the presiding member in advancing the interests of a complainant in private hearings, much as any decision-maker must be concerned with fairness for each party. Here, my comments focus on the role of SIRC counsel generally, without distinction between ministerial certificate cases and the Review Committee's current workload.

47 SIRC outside counsel receives instructions from the presiding member of the Review Committee and from in-house counsel. Communications between SIRC counsel and the complainant is under the explicit or implicit authority of the Review Committee member. The presiding member's function as the filter or authority for communications is analogous, though not identical, to the supervisory role of the presiding judge under Division 9 of the IPRA. The so-called "free flow" of information between SIRC counsel and the complainant is circumscribed as it has to be.

48 In *Charkaoui*, the Supreme Court called for an independent agent to review objectively confidential information with a view to protecting the interests of the named persons (paras. 3 and 86).

49 The special advocate is independent of the court, unlike the relationship between SIRC counsel and the Review Committee. This independence not only imposes fewer constraints on the special advocates, but charges them with potentially greater obligations in protecting the interests of a named person, without being the latter's solicitor.

50 Neither the legislation creating the Review Committee nor the latter's Rules of Procedure make any mention of the role of SIRC counsel. The functions of counsel have evolved over time. Under Division 9, Parliament has made explicit the role, responsibilities and powers of the special advocates.

51 The special advocate protects the interests of the named person in private hearings. The special advocate challenges the Minister's claim of confidentiality and the reliability of the confidential information. The special advocate makes oral and written submissions concerning the confidential information and may cross-examine witnesses during private hearings. Finally, the special advocate may, with the judge's authorization, "exercise… any other powers that are necessary to protect the interests of the [named person]."

52 The role of the special advocates, like that of SIRC counsel, will evolve based on the rulings of presiding judges.

53 While I need not decide the issue, I have not been convinced that the "SIRC model" would afford more protection to the named person than Division 9 of the *IRPA*.

[76] I agree with the analysis made and the opinions issued on the comparable roles of SIRC counsel and the special advocate. I emphasize the fact that a special advocate protects the interests of the named person and tests the classified information, which is not comparable to the SIRC counsel's role. The innovation in the SIRC model is that the SIRC outside counsel, with the involvement of the in-house SIRC counsel, is a bridge between the SIRC panel member and the complainant for the purpose of closed hearings. Counsel also assume an *ad hoc* role of questioning the closed hearing witnesses on behalf of the complainant and with questions handed in by said counsel in a sealed envelope. This approach leads to a more or less adversarial system. However, the special advocate approach is clearly of an adversarial nature.

[77] The *Malik* system raises issues. It was mentioned by the Chief Justice at paragraph 78 of *Charkaoui #1*. Reliance on defence counsel is problematic, as he or she might not have the required security clearance. In addition, deportation procedures in the immigration context such as security certificate proceedings usually involve many counsel. It is also unclear in the *Malik* proceeding whether defence counsel dealt with closed hearings without the involvement of the accused. This system may raise unforeseen circumstances and can create problems. Very little is known about what went on in that specific case. It is therefore difficult to make a suitable comparison without more information.

[78] The implication of an *amicus curiae* in the Arar inquiry, under the *Canada Evidence Act* was certainly helpful to the Commissioner (see *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar – O'Connor Commission)*, 2007 FC 766 (the "Arar Inquiry"). In that case, the *amicus curiae* was assuming a

role in reviewing the confidential information for the Commissioner. As part of their duties, the special advocates must question the restrictions on disclosure submitted by the Ministers on behalf of the named person according to the *IRPA*. Therefore, it is impossible for the special advocates to assume the role of the *amicus curiae* as in the Arar Inquiry in addition to representing the interests of the named person in the closed hearings.

[79] The SIAC special advocate system in the United Kingdom was the source information that Parliament followed to establish the framework of the Canadian *IRPA*. It is of public knowledge that, in Canada, disclosure of information is much more substantial than in the United Kingdom. It is notable that, under the relevant legislation, the SIAC United Kingdom Special Counsel is not to question the restrictions on disclosure as opposed to the *IRPA* Special Advocate System. In addition, under the Canadian system, authorization must be secured before the special advocate can communicate with others, therefore under less stringent conditions than in the United Kingdom. Also, with an authorization from the designated judge, a special advocate can seek other powers such as calling witnesses, expert witnesses, file documentation, etc. This is not possible in the United Kingdom. In Canada, it is easier to obtain reasonable resources needed by the legal team of special advocates through the Department of Justice's SAP.

[80] The *IRPA* special advocate program is an improvement from the SIAC United Kingdom program. There is more disclosure in Canada. The special advocates have more responsibilities, powers and opportunities to defend and protect the rights of the named person. Both systems are adversarial, but the Canadian program goes further.

9. Section 7 of the *Charter* and the principles of fundamental justice

[81] It is a constitutional requirement of section 7 of the Charter that the right to life, liberty and security of the person must not be interfered with by any laws except in accordance with the principles of fundamental justice. As is suggested by the language of section 7, a two-step analysis must be undertaken. First, it must be verified if there is an infringement to "life, liberty and security of the person". Second, the alleged infringement must not be contrary to the principles of fundamental justice (*Singh v. Canada (Minister of Employment and Immigration),* [1985] 1 S.C.R. 177).

[82] The principles of fundamental justice "necessarily reflect a balancing of societal and individual interests" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para 65). These principles extend beyond the scope of criminal law and encompass administrative proceedings and state action susceptible to have an impact on the rights section 7 aims to protect (See, for example, *New Brunswick (Minister of Health & Community Services) v. G (J.)*, [1999] 3 S.C.R. 46; *Singh v. Canada (Minister of Employment and Immigration),* [1985] 1 S.C.R. 177 and *Gosselin v. Québec (Attorney General)*, 2002 SCC 84). Furthermore, there is sufficient causation between a deprivation of section 7 rights and the Canadian government's participation, the guarantee of fundamental justice applies to deprivations effected by actors other than the Canadian government (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para. 54).

[83] The Supreme Court of Canada has often ruled on what section 7 requires. It can be said that:

a) The principles of fundamental justice do not require a particular type of process, but one that implements a fair process taking into consideration the nature of the

proceedings and the interest at stake (*R. v. Rodgers*, 2006 SCC 15, at para. 47; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 656-57).

b) Procedural requirements needed to ensure compliance with the principles of fundamental justice depend on the context (see *Rodgers*; *R v. Lyons*, [1987] 2 S.C.R. 309, at p. 361; *Chiarelli*, at pp.743-44; *Mont Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, at paras. 20-21). However, the application of section 7 does not depend on "formal distinction between the different areas of law." It depends on the severity of the consequences of the decision on the rights protected. A security certificate confirmation is not an administrative measure, it is a judicial determination (*Charkaoui #2*, at paras. 53-55).

c) Societal interests may be taken into consideration when assessing the content of the applicable principles of fundamental justice (*R. v. Malmo-Levine*, 2003 SCC 74, at para. 98).

d) Determining the applicable principles of fundamental justice must not overlap with the analysis required by section 1 and the *Oakes* test. This determination is not an exercise in inquiring about the justification of the limits imposed (which is a section 1 of the Charter issue), but an exercise in seeing if the limits were imposed in a way that respects the principles of fundamental justice (which is the section 7 Charter approach to follow) (See *Charkaoui #1* at para. 21; *R. v. Malmo-Levine*, at paras 96-97).

e) The greater the effect on the life of an individual by the decision, the greater the need for procedural protection to meet the common law duty of fairness and the

requirements of fundamental justice under section 7 of the Charter (See *Suresh*, at para. 118). The closer the procedure is to criminal proceedings, the greater vigilance is required from the Court (see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077 and *Charkaoui #2* at paras. 53-54).

f) Full disclosure when dealing with national security evidence may not be possible and the procedures required to conform to the principles of fundamental justice must reflect the requirements of the security context, but not to the point of eroding the essence of section 7. The protection may not be as complete as in a conventional procedure, but it must be meaningful and substantial (see *Charkaoui #1*, at paras. 24 and 27). Even in criminal proceedings, there is no absolute right to the production of originals of documents, but there is a duty to disclose imposed on the Crown. If originals are not available, a satisfactory explanation must be given (*R. v. La*, [1997] 2 S.C.R. 680, at para. 18).

10. <u>What are the relevant principles of fundamental justice?</u>

[84] The Supreme Court of Canada has determined three criteria that must be met for a legal principle to be a principle of fundamental justice. It must first be a legal principle that provides meaningful content for the section 7 guarantee, therefore avoiding the inclusion of policy questions. Secondly, there must be significant social consensus that the principle is vital or fundamental to our societal notion of justice. Lastly, it must be a principle that can be identified with precision and applied to situations in a manner that yields predictable results (*R. v. Malmo-Levine*, at para. 113; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4).

[85] Again, the Supreme Court of Canada's case law on this matter is informative:

a) There must be a fair judicial process (*New Brunswick (Minister of Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46). The fairness of such a process must be analyzed with regard to the factors determined by the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras 23-28. These are: 1) the nature of the decision made with regard to its proximity to the judicial process; 2) the role of the particular decision within the statutory scheme; 3) the importance of the decision on the individual affected; 4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; 5) the procedure chosen by the concerned agency. These factors are not exhaustive.

b) A person cannot be deprived of his or her liberty without due process according to the law, which must involve a meaningful judicial process (see *United States of America v. Ferras*, 2006 SCC 33, at para. 19).

c) There are basic principles of fundamental justice:

i. The right to a hearing;

ii. The hearing must be presided by an independent and impartial magistrate;

iii. A decision by the magistrate on the facts and the law, which implies the right to know the case put against one and the right to answer that case (*Charkaoui #1*, at para. 29);

iv. The right not to be sanctioned under statutes that are too vague. However, overbreadth of a statute is not a stand-alone principle of fundamental justice,

as it is an analytical tool in *Charter* analysis (*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606).

d) How these requirements are met will vary according to the context, but at the end, if section 7 has to be satisfied, each requirement must be met in substance (*Charkaoui #1*, at para. 22).

[86] An assessment of the constitutionality of the former security certificate scheme under the *IRPA* was made in *Charkaoui #1*, where the Supreme Court of Canada concluded that the procedure established meets the first two requirements: a right to a hearing presided by an independent and impartial magistrate.

[87] However, the former security certificate scheme failed with regard to the third requirement, i.e. that the decision rendered be based on the facts and law. Decisions made under the former *IRPA* scheme failed to meet section 7 requirements insofar as there was no assurance that the designated judge had been exposed to the relevant facts and that as a consequence the decision to be rendered might not be based on all the facts and the law (see *Charkaoui #1*, at para. 51).

[88] It follows that the former security certificate scheme under the *IRPA* also failed in ensuring that the person affected by the restriction on disclosure was sufficiently informed. Consequently, the rights of the named person to know and meet the case made against him had not been met. Therefore, on these grounds, the Supreme Court of Canada determined that the former security certificate scheme violated section 7 (See *Charkaoui #1*, at para. 64).

[89] However, the Supreme Court of Canada, at paras. 57 and 58 of *Charkaoui #1*, stated that the right to know the case is not absolute and that the Court "… has repeatedly recognized that national security considerations can be a justification to limit the extent of disclosure."

[90] Under the former *IRPA* scheme, the Supreme Court of Canada insisted that no substantive substitute ensured proper protection to the principles of fundamental justice, the fairness of the process being entirely on the shoulders of the designated judge. With those considerations in mind, the Supreme Court of Canada gave Parliament a year to amend the *IRPA* so that it met section 7 requirements, stressing the necessity for the designated judge to have all relevant information or a substantial substitute thereof (*Charkaoui #1*).

[91] In essence, the Chief Justice noted at para. 65 of *Charkaoui #1* that the secrecy requirement when dealing with national security information was such that it denied the named person of the opportunity to know the case to challenge the government's allegations. As a result, the designated judge did not have all the relevant facts and law to render his or her decision.

11. <u>If required, can section 1 of the Charter receive application in such a case?</u>

[92] As noted by Chief Justice McLachlin in *Charkaoui #1* at para. 66, rights associated to life, liberty and security protected by section 7 of the Charter can be limited by Parliament as long as the limitations are demonstrably justifiable in a free and democratic society.

[93] In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 518, Justice Lamer (as he then was) on behalf of the majority, expressed the view that section 1 could exceptionally save violations

of section 7. The examples of exceptional conditions given were natural disasters, war, epidemics and the like. This remark has been reiterated many times and in no case has a section 7 breach been saved by section 1 of the *Charter*.

[94] After having referred to this principle, the Chief Justice noted that any limitations to the right to a fair hearing may be difficult to justify under section 1, but that "… the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenge complex" (see *Charkaoui #1*, at para. 66).

[95] Then, at para. 68, the Chief Justice stated on behalf of all the Court that "the protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. Moreover, the *IRPA*'s provisions regarding the non-disclosure of evidence at certificate hearings are rationally connected to this objective."

[96] In *Charkaoui #2*, while not commenting on the current legislation, the Supreme Court of Canada, based on the factors outlined in *Suresh* (referring to those developed in *Baker*) confirmed "the need for an expanded right to procedural fairness, one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation" (*Charkaoui #2*, at para 58).

12. The issues

[97] In order to address the constitutional issue, the following must be answered:

- Were the liberty and security rights of Mr. Harkat violated by the *IRPA*?

- In the affirmative, are the protections instituted by the new *IRPA* such as disclosure and the special advocate provisions such that they are substantive, meaningful substitutes that satisfy the principles of fundamental justice while protecting national security information?
- In the alternative, can section 1 of the Charter save the legislation insofar as the limits on the rights imposed are such that they are demonstrably justifiable in a free and democratic society?

[98] In order to properly answer these questions, other incidental matters will be addressed. For example, national security information will be defined in order to understand why limits on disclosure are imposed.

13. What is national security information?

[99] At section 76, the *IRPA* defines national security "information" as security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization.

[100] Some of the information classified as national security information must have been obtained in confidence. It is the usual practice of intelligence agencies to transmit information to one another with a caveat specifying that the information provided belongs to the agency providing it and that, unless written permission is obtained from the provider of information, it cannot become public.

This is the third party rule. My colleague, Justice Mosley, made the following detailed comments on this:

> **139** Generally speaking, the third party rule dictates that a Canadian agency in receipt of security intelligence from a foreign government or agency, must obtain their consent prior to disclosing any of the information: *Ahani v. Canada*, [1995] 3 F.C. 669 at para. 11 (T.D.) [*Ahani*]. As was similarly noted by the Federal Court in *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2149, 2005 FC 1740 at para. 63, citing *Harkat (Re)*, [2005] F.C.J. No. 481, 2005 FC 393 at para. 89, one type of information that the state has a legitimate interest in keeping confidential includes "[s]ecrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient".
>
> **140** Most recently the third party rule was described in *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, [2006] F.C.J. No. 1969, 2006 FC 1552 at para. 25 [*Ottawa Citizen*] as concerning "the exchange of information among security intelligence services and other related agencies. Put simply, the receiving agency is **neither to attribute the source of the information or disclose its contents** without the permission of the originating agency".
>
> **141** These cases demonstrate that the third party rule is meant to apply to the exchange of information between foreign states and agencies. As noted by the Court in *Ottawa Citizen*, the rule protects both the contents of the information exchanged and its source. That being said, this principle clearly does not apply to protecting potential sources where no information has been exchanged, as this is outside the scope of its purpose. If for example the Attorney General wishes to keep from disclosing the existence of a relationship, other grounds must be asserted.
>
> **142** In addition, as asserted by the applicant, the third party rule is premised on the originator control principle, which is why the consent of the originating agency or state must be sought before any information exchanged is released. The importance of this principle has in fact been recognized by NATO in setting out the Security System for the North Atlantic Treaty Organization. Brussels: NATO Archives. December 1, 1949. DC 2/1: 4 wherein it is stated:

> • The parties to the North Atlantic Treaty ... will make every effort to ensure that they will maintain the security classifications established by any party with respect to the information of that party's origin; will safeguard accordingly such information; ... and will not disclose such information to another nation without the consent of the originator.
> (emphasis added)
> (see *Canada (Attorney General) v. Khawaja*, 2007 FC 490)

[101] I accept that explanation of the Third Party Rule. This rule is taken very seriously by intelligence agencies. Any breach could seriously affect the flow of information. As noted by Justice Arbour (as she then was) in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, at para. 44, Canada is a net importer of information obtained from outside of Canada and relies heavily on it to ensure proper, efficient, professional intelligence investigations. That was the situation in 2002, which has not changed since then; indeed, things might even be more serious now. Canada cannot afford to breach a caveat since it could cause an interruption in the flow of information, which may be of significance to potential and ongoing intelligence investigations.

[102] The caveat restrictions apply to Canadian and international sources. It is well recognized that authorization to publicly release information provided by a source will only be given in exceptional cases.

[103] National security information is also information that may identify human or technical sources, modes of intelligence investigations, international communications between intelligence agencies and code names used for intelligence matters. This is important information for those institutions. They are sensitive to public disclosures because of the impact it may have on the safety of persons or on future investigations. This type of information is not only of interest to the named

persons involved in security certificate proceedings, but as well to foreign interests for their own internal purposes.

[104] Information in the hands of CSIS could reveal their own internal system of gathering, classifying, analyzing and interpreting intelligence information. Original documents produced by CSIS contain sensitive information such as filing systems, areas of concern, the special vocabulary they use and the analysis made, etc. Also at stake is the method of exchange of information originating from a multitude of sources, the methodology followed to ensure the quality of the information and its veracity, etc. There would not only be personal interests but also international state interests in disclosing such information.

[105] As it was evident from the knowledge gained from the review of the classified information in support of the top secret security intelligence reports, as well as the extensive disclosure produced as a result of *Charkaoui #2*, a document may not be limited to one specific topic. It may contain sensitive information on a variety of subject matters that may not all be related to the topic. The disclosure of originals was not appropriate. Therefore, whenever it was deemed possible, summaries of classified information was the appropriate way of communication.

14. Have the liberty and security rights of Mr. Harkat been deprived by the effects of the legislation?

[106] Mr. Harkat was detained from December 10, 2002 to May 23, 2006, at which point he was released under certain conditions. Subsequently, these conditions have been reviewed and reduced.

Presently, some conditions remain in place and although less rigorous, Mr. Harkat's liberty continues to be affected (see Appendix A).

[107] In *Charkaoui #1*, the Chief Justice of the Supreme Court of Canada concluded that the previous *IRPA* "clearly deprived detainees such as the appellants of their liberty" since the persons involved in certificate proceedings can face a lengthy detention. If released, the named person would have conditions which "seriously limit individual liberty" even though "they are less severe than incarceration" (see paragraphs 13, 103 and 116).

[108] Having now concluded that the certificate was reasonable (see *Harkat (Re)*, 2010 FC 1241), such determination has the effect of a removal order that is in force (see section 80 of the present legislation).

[109] In *Charkaoui #1*, at para. 14, the Chief Justice noted that a certificate process may lead to the removal of the named person from Canada to a country where his life and freedom can be affected. It was also said that, since the accusation is based on terrorism, it could cause irreparable harm to the individual, particularly if deported to his home country. These two elements and the irreparable harm to the individual because of his association to terrorism are essential components that can affect the individual's section 7 rights.

[110] In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, the Chief Justice writing for the Court recognized that, in view of *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at para. 26, non-citizens do not have an

unqualified right to enter or remain in Canada. The most fundamental principle in immigration law is that as a consequence "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the (…)" Charter. The Chief Justice went further and stated that "even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice" (see paras. 46 and 47). As clarified in *Charkaoui #1* at paras. 16 and 17, this does not mean that deportation procedures are immune from section 7 scrutiny since some features associated with deportation such as detention or deportation to torture may do so.

[111] In this case, the judicial process will follow its course; the Ministers will be making decisions eventually. Mr. Harkat has, if necessary, other legal avenues at his disposal to protect his rights.

[112] The Chief Justice in *Charkaoui #1*, at paragraph 16 concluded that:

> The individual interests at stake suggest that section 7 of the Charter, the purpose of which is to protect the life, liberty and security of the person, is engaged and this leads directly to the question whether the *IRPA*'s infringement on these interests conforms to the principles of fundamental justice".

[113] This was the situation under the previous *IRPA* and it still prevails under the present legislation. Mr. Harkat is deprived of his liberty and eventually, depending on future decisions, of his right to security of his person might be as well.

15. Is it acceptable under section 7 of the Charter that national security information requires legal protection?

[114] The Supreme Court of Canada has always recognized that national security information was a valued Canadian asset that required legal protection.

[115] When interpreting section 7, the Supreme Court of Canada has consistently suggested the importance of a contextual approach.

> It is now clear that the Charter is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of Charter rights, as well as to the determination of the balance to be struck between individual rights and the interests of society."
> (*R v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at para. 46, Cory J.)

[116] In this context, national security information and the objectives and rights recognized by the current *IRPA* are elements that are intertwined with the factual circumstances of this case.

[117] As stated in *Chiarelli*, at para. 50, the State has a genuine interest in keeping national security information confidential:

> However, the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and protecting police sources. The need for confidentiality in national security cases was emphasized by Lord Denning in *R. v. Secretary of State for the Home Department, ex parte Hosenball*, [1977] 3 All E.R. 452 (C.A.), at p. 460:
>
> > The information supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is so great that the sources of information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk it

> would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies try to eliminate the source of information.
>
> On the general need to protect the confidentiality of police sources, particularly in the context of drug-related cases: see *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 994-95. See also *Ross v. Kent Inst.* (1987), 57 C.R. (3d) 79, at pp. 85-88 (B.C.C.A.), in which that court held that it is not essential in order to comply with principles of fundamental justice that an inmate know the sources of information before the Parole Board as long as he is informed of the substance of that information.

[118] Although that decision was rendered in the early 1990s, it still applies today. Moreover, the scope of disclosure at the time was not as broad as it is today. At para. 27 of *Charkaoui #1*, the Chief Justice aptly stated as to the need for protection as follows:

> The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the Charter. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be.

[119] The Charter distinguishes between citizens and non-citizens. Only Canadian citizens have the right to enter, remain and leave Canada, but permanent residents (not foreign nationals) have the right to move to, take up residence in, and pursue the gain of livelihood in any province (see subsections 6(1) and 6(2) of the Charter).

[120] Canada has the right to accept or deny the entry to immigration candidates based on legitimate grounds, such as security and serious criminality. The *IRPA* provides norms and conditions for non-citizens to enter and remain in Canada. Division 3 of the *IRPA* addresses the

applicable right of entry for citizens and Indians of Canada as well as for permanent residents (see subsections 19(1) and (2), and subsections 27(1) and (2)) and the obligation on entry for foreign nationals (see section 20). Division 4 provides for inadmissibility grounds (see sections 34 and 36). Division 5 provides for dispositions in case of loss of status and removal.

[121] The *IRPA* specifies that one of its objectives is:

3(1)(*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;	3(1) *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;

[122] It also provides that the purpose of the *IRPA* is:

3(1) (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society	3(1)*h*) de protéger la santé des Canadiens et de garantir leur sécurité;

[123] In *Medovarski*, above, the Chief Justice of the Supreme Court of Canada commented on these objectives and noted that there was "… an intent to prioritize security …" and "communicate a strong desire to treat criminals and security threats less leniently than under the former Act" (see para. 10).

[124] Section 7 of the Charter applies with this contextual background in order to study the principles of fundamental justice when dealing with national security concerns, immigration

policies and human rights issues. Having said that, national security information requires protection from disclosure. This is a valid societal requirement.

[125] There is a genuine need to ensure that this information be protected at all times. This need has always been recognized by the Supreme Court (see *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at para. 10; *Suresh v. Canada (Minister of Citizenship and Immigration)*, at para. 126; and *Chiarelli*, above). It has done so recently in *Charkaoui #1*. The Chief Justice wrote at paragraph 1 that "one of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose …" since "…. national security considerations can limit the extent of disclosure of information to the affected individual" (see para. 58).

[126] Having said that, the legislative challenge is to make sure that proper substitutes to limited disclosure of national security information are found in such "… a way that respects the imperatives both of security and of accountable constitutional governance" (see para. 1 of *Charkaoui #1*). Whether the new *IRPA* provisions meet or exceed that legislative challenge must be determined by the Court.

16. <u>Are the protections found in the new *IRPA* substantive and meaningful substitutes to ensure the safeguard of the principles of fundamental justice while protecting national security information</u>?

[127] As noted earlier, the principles of fundamental justice consist of 1) the right to a hearing which is 2) presided by an independent and impartial magistrate and requires 3) that the decision be

on the facts and the law which includes the right to know the case made against him and to answer it. The legislation must achieve these requirements.

[128] It would certainly be paradoxical to ask the government to ensure a security objective while at the same time disclosing sensitive national security information for the purposes of ongoing litigation. It is important to ensure the fairness of the procedure, to the benefit of the named person.

[129] In *Charkaoui #1*, the Chief Justice did recognize that under the previous legislation, a right to a hearing in the presence of an impartial judge was provided. Under the current legislation, the right to a hearing is also provided since the named person as well as the Minister may make their respective case (see subsection 83(1) of the *IRPA*). To some extent, the judicial role has been enlarged: it must issue summaries of information throughout the proceeding, the designated judge can require closed hearings, the judicial role related to the special advocate, the judicial review of detention and the conditions thereof, etc. Hence, the new legislation meets these two requirements of fundamental justice.

[130] The previous legislation did not satisfy the third requirement of fundamental justice, which is that the decision to be rendered must be on the facts and the law. In order to satisfy this requirement, one must be certain that at the end of the process, the judge has been apprised of all the facts. Without that factual knowledge, all the legal arguments have not been presented.

[131] This third requirement was not met under the previous *IRPA* since it did not provide for sufficient disclosure and adequate representation in closed hearings that would allow the named

person to be properly informed of the case made against him and to be in a position to respond to it. As noted by the Chief Justice in *Charkaoui #1*, the provisions of the previous legislation for the disclosure of evidence were not as substantial and no substitute was provided for the purposes of the closed hearings.

[132] The new legislation shows a clear intent on the part of Parliament for the disclosure of evidence to the named person that enables him to be reasonably informed of the case made. When filing the certificate (at the beginning of the procedure) and throughout the proceeding, summaries of information must be available. Such summaries must enable the individual to be reasonably informed of the case made against him (see subsection 77(2) and paragraph 83(1)(g) of the present *IRPA*). In addition, Parliament imposed on the special advocate a duty to challenge any ministerial claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person (see paragraph 85.1(2)(a) of the *IRPA*). The issue of disclosure therefore concerns not only the Minister (subsection 77(2) of the *IRPA*) but also the designated judge (paragraph 83(1)(e) of the *IRPA*) and the special advocate (paragraph 85.1(2)(a) of the *IRPA*). Under the previous legislation, the disclosure issue rested solely with the judiciary.

[133] This legislative scheme also provides that the special advocate must be apprised of all the evidence presented in the public and closed hearings, so that he is able to defend the interests of the named person (see subsection 85.1(1) of the *IRPA*). This was not the case with the previous legislation.

[134] The summary of information is issued and is available to all. Summaries of top secret information are sometimes condensed, but can also be more voluminous and provide more than mere allegations. Factual evidence is also included. The initial summary of information issued by the Ministers (see ex. M5) did give informative evidence that was subsequently completed with further disclosure through the form of summaries or otherwise (see for example, ex. M7 to M11). That material would give good insight into the factual evidence put forward by the Ministers. John, an intelligence officer of CSIS, testified for the Ministers and was cross-examined. He only read the public file. His testimony enabled Mr. Harkat to understand the full factual matrix presented publicly against him and to understand the nature of the case made against him.

[135] The purpose of summaries is to make sure that no information will be disclosed which would be prejudicial to national security or endanger the safety of any person. Summaries will be drafted in such a way as to reasonably inform the named person without creating a prejudice to national security. For example, summaries will not contain the name of the originator of the message, the name of the organization, codes and source references, etc. Summaries may be limited if the information emanates from a single source or human sources.

[136] In short, Mr. Harkat has been informed of the case made against him. He has been cognizant of all the allegations made against him, and of some valuable evidence in support of such allegations. Mr. Harkat's testimony does not show otherwise. On the contrary.

[137] The summaries of conversations (Exhibit K) involving Mr. Harkat were not disclosed in the earlier proceedings. Although Mr. Harkat denies participating in many of these conversations, they remain informative.

[138] The *Charkaoui #2* disclosure (ex. M15) also gave Mr. Harkat a better understanding of the information of the Ministers in his case. This disclosure was made at the request of the special advocates who felt it was important for him to know this information.

[139] As the proceeding evolved and new information was disclosed, the special advocates could seek authorization to communicate with Mr. Harkat and his counsel to discuss specific matters. Authorizations were granted in most cases. The Court's concern was aimed at preventing communications that would make possible inadvertent, explicit or implicit disclosure. This is why any communication would not have been granted unless proper parameters were suggested. Public counsel could communicate whenever they wanted with the special advocates without any judicial authorization. The special advocates' response, if required, was subject to judicial authorization. This avenue was followed as well. Appendix B sets out the requests to communicate made by the special advocates and their outcome.

[140] Although not called to decide the constitutional issues arising from the disclosure made in his case because of the determination made to the effect that the certificate issued was unreasonable, my colleague Justice Mosley, in *Almrei (2009)*, was satisfied with the disclosure process and its result (see paras. 484, 487 and 488). The system is such that two designated judges have concluded that the procedure established to disclose information has worked well and, as a result, the

information disclosed in the present proceeding did inform Mr. Harkat about the case to meet and enabled him to respond to it.

[141] The scope of disclosure will vary depending on the circumstances of each case. As seen in the past immigration cases that had espionage or subversion aspects, disclosure may be prejudicial to national security interests. Espionage involves individuals who are acting on behalf of the country for which they operate (see for example: *Miller v. Canada (Solicitor General)*, 2006 FC 912; *Hampel v. Canada*, Amended Order dated December 6, 2006; and *Lambert v. Canada*, Order dated June 5, 1996). In such cases, the disclosure of national security information may be problematic. The new legislation provides for judicial discretion in such situations to respond adequately to this reality.

[142] Mr. Harkat and other witnesses (some as experts) did testify. As a result, the facts of the case were presented and complete submissions were made by public counsel as to the operative facts and law. Those submissions, read in conjunction with the Ministers' submissions, are informative.

[143] The disclosure process established by the new legislation, together with the active role of the special advocates in questioning claims raised by the Ministers, provide adequate protection. The principles of fundamental justice are safeguarded.

16.1 Are the disclosure provisions in the *IRPA* (paragraphs 83(1)(c) to 83(1)(e)) unconstitutional because they do not strike a balance with the public interest as in subsection 38.06(2) of the *Canada Evidence Act*?

[144] In *Jaballah (Re)*, 2009 FC 279 ("*Jaballah* (2009)"), Justice Dawson (as she then was) dealt with this matter in part at paras. 9 and 10:

> It is the Ministers who bear the burden of establishing that disclosure not only could but would be injurious to national security, or endanger the safety of any person. See: *Ahani v. Canada*, [1995] 3 F.C. 669 at paragraphs 18 and 19; aff'd (1996), 201 N.R. 233; application for leave dismissed [1996] S.C.C.A. No. 496 (and see *Harkat (Re)* (2003), 231 F.T.R. 19 at paragraph 10 for the application of this jurisprudence to the current legislative scheme). This conclusion as to the Ministers' onus is consistent with case law that has developed in other contexts. See, for example, *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 31.
>
> Once satisfied that disclosure would be injurious to national security, or endanger the safety of any person, the designated judge must, pursuant to paragraph 83(1)(*d*) of the Act, ensure the confidentiality of the information. The designated judge is given no discretion in this regard. This renders irrelevant the balancing of interests test, described in cases such as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. See: *Named Person v. Vancouver Sun*, cited above, at paragraphs 34-37.

I agree with this approach. However, before making a determination that the disclosure of information would be injurious to national security or endanger the safety of any person, preliminary steps must be followed.

[145] Under the *IRPA*, the named person must be reasonably informed of the case to be met as long as it does not involve, in the judge's opinion, the disclosure of information that would be injurious to national security or endanger the safety of any person. There is a tension between those

two requirements. The legislation provides for the disclosure of information through summaries which, if adequately written, may avoid the risk of a disclosure that may be injurious. If the Ministers disagree with such disclosure, the legislation provides for a mechanism whereby the Ministers may decide to withdraw the information in question. The designated judge must ensure its confidentiality and may not use it in deciding the case.

[146] Under the *CEA*, information can be disclosed if it is not injurious to international relations, national defence or national security. If a judge concludes that the release of information would be injurious, he may consider releasing all or some of the information if, on balance, disclosure will better serve the public interest than nondisclosure. Mr. Harkat argues that this balancing requirement should apply to the *IRPA*. If the public interest prevails, the judge will consider how to release the information to limit the injury. This might be done for all of the information or part of it, or through a summary of information or a written admission of facts.

[147] Mr. Harkat argues that the lack of balancing of the public interest in the *IRPA* violates the right of the named person to know the case and respond to it insofar as it does provide for an automatic ban of the disclosure of information or evidence when there is national security information. He submits that paragraphs 83(1)(c), 83(1)(d) and 83(1)(e) of the *IRPA* are therefore unconstitutional.

[148] The Ministers respond that Parliament made a choice when deciding to incorporate the *IRPA* disclosure provisions, in full knowledge of the options possible, and that choice must stand. It is submitted that the disclosure process provided by the *IRPA* is fair considering the interests at

stake. In light of the disclosure process, the active involvement of special advocates in disclosure issues, the right of the named person to know the case and respond to it, which is not absolute depending on the circumstances, is intact and paragraphs 83(1)(c), 83(1)(d) and 83(1)(e) of the *IRPA* are constitutional.

[149] Mr. Harkat is seeking more disclosure. He considers that the public interest may add to the volume of information that can be disclosed and that some prejudicial national security information could be released.

[150] Parliament chose another avenue. It opted for a disclosure process that enables the named person to be reasonably informed while at the same time not releasing information that would be prejudicial to national security or the safety of a person. Two components interact in order to disclose information in certificate proceedings: the judge must reasonably inform the named person, but at the same time, there must be no disclosure of national security information which would be injurious. The creation of a summary of information or other evidence for disclosure may be the outcome.

[151] This exercise involves the designated judge, as well as the special advocate and Ministers' counsel. The aim is, and has been to inform the named person of all the allegations made against him with proper summarized facts.

[152] In view of Parliament's concern for national security injury, the objective of reasonably informing the named person can be met by drafting proper summaries of information. Thus,

national security information is disclosed to the named person in such a way as not to create a disclosure issue prohibited by the legislation. When discussing disclosure issues in *Chiarelli* at page 29, Justice Sopinka concluded that "sufficient information to know the substance of the allegation against him, and to be able to respond" had been disclosed.

[153] In the case at bar, the disclosure that has been made has certainly made Mr. Harkat reasonably informed. He has received "sufficient information" to know the "substance" of the allegations made against him and be in a position to respond to it (see the initial summary of the security intelligence report (M5) which was followed with a second release with added information (M7), summaries of information (M10 and M11), including summaries of conversations involving Mr. Harkat (M7 at Appendix K), the *Charkaoui #2* disclosure that added substantially to the information already released (M13, M15, M17, M18, M25 and M26)).

[154] The disclosure made contained national security information obtained through intelligence investigations, but did not contain any information that could be injurious to national security or the safety of any person. It protected human sources, caveats of national and foreign agencies, intelligence operational techniques, administrative methods of intelligence agencies, code names, etc. The substance of the allegations was presented to Mr. Harkat.

[155] The *CEA* does not provide for the participation of special advocates who represent the interests of Mr. Harkat under the *IRPA*. In some cases, *amici curiae* are involved in *CEA* proceedings. The interests of the named person are not defended as effectively under this legislation as under the *IRPA* by the special advocate.

[156] In closed hearings, special advocates have full knowledge of all the national security information presented, including elements that would be injurious if released. It is the duty of the special advocate to assess it in the interest of the named person. Parliament chose the special advocate formula: he can challenge the claims of non-disclosure made by the Ministers and act on behalf of the named person.

[157] In *Chiarelli*, page 28, the SIRC Rules were mentioned as including a balancing requirement between preventing threats to the security of Canada and treating with fairness the person affected when deciding whether a person can cross-examine witnesses (Rule 48(2)) or whether, if a party has been excluded from parts of the hearing, the substance of the evidence given or representations made by the other party can be disclosed (Rule 48(4)). The SIRC Rules do not include a balance of public interest which could eventually lead to a disclosure of national security information. As noted earlier, under the *IRPA*, a judge can weigh the need for the named person to be reasonably informed and the need for nondisclosure of national security information. Such an approach appears to be similar to what is provided in the SIRC rules, but, if I may add, it is more explicit.

[158] The right to know the case is not absolute. It can be adapted to the circumstances as long as fairness prevails and the principles of fundamental justice are respected. The *IRPA* disclosure process achieves those aims. Hence, it is constitutional.

[159] It is of public knowledge that the *CEA* option was known to the members of both the House of Commons Committee on Public Safety and National Security and the Senate Committee when

they reviewed proposed amendments to the *IRPA*. Both Houses opted for the *IRPA* disclosure process as it was proposed.

[160] The *CEA* procedure was designed to receive application in different factual scenarios and involves numerous legal matters. The *IRPA* is more specific in that it provides for immigration inadmissibility matters based on grounds such as security, human or international rights violations and serious criminality. When matters of national security are involved, special measures are taken to protect sensitive information: at the same time, the person concerned has the benefit of a fair proceeding.

[161] The Chief Justice in *Charkaoui #1*, at para. 77 did refer to the *CEA* disclosure process, but made it clear that it did not deal with the same issues as the *IRPA* and was therefore of limited assistance. The reference to the *CEA* disclosure process was made to illustrate how Parliament was able to strike a balance between the need for protection of confidential information and the rights of individuals.

[162] As Justice Dawson clearly states in *Jaballah* (2009), once it is determined that the information would be injurious to national security or endanger the safety of any person if released, and that no summary of such information can be disclosed in such a way as to avoid this result, then and only then is the Court deprived of all discretion to disclose the information. No balancing of interests can take place. This absence of discretion at this stage does not make paras. 83(1)(c) to 83(1)(e) of *IRPA* unconstitutional. Parliament has expressed its will with the *IRPA*. Special advocates must defend the interests of the named person. These provisions do strike a proper

balance between the need for protection of confidential information and the rights of the named person.

16.2 Are the *IRPA* provisions requiring the special advocates to seek judicial authorization prior to communicating with anyone too broad?

[163] It is one of Parliament's concerns that if the special advocates are not subject to judicial authorization prior to communicating with anyone, inadvertent disclosure of national security information might occur. Hence, the requirement imposed on the special advocates.

[164] This concern for inadvertent disclosure is recurrent in the *IRPA*. The designated judge has an added burden to ensure the confidentiality of the information (in French: "garantir"). The judicial authorization to communicate is an example of such concern (see paragraphs 83(1)(d), 83(1)(f), and also sections 77(2), 83(1)(c), 83(1)(e), 85.4(2), 85.4(3), 85.5(a) and (b)). Parliament decided that the best practice to ensure confidentiality once access to the classified information has been granted to the special advocate was to allow communications subject to judicial authorization.

[165] Inadvertent disclosure may occur without any malicious intent. In this case, the evidence is voluminous and involves sensitive material.

[166] Section 85.4(2) of the *IRPA* forbids communications between a special advocate and anyone without prior judicial authorization once he has access to the classified material. Section 85.5 prohibits anyone who has had access to the sensitive information to communicate with anyone unless judicial authorization has been given.

[167] Mr. Harkat argues that both provisions are too broad, do not minimally impair his rights and are inconsistent with section 7 of the Charter and cannot be saved by section 1. It is his submission that these provisions do not allow the special advocate to communicate as to the appropriateness of particular avenues of cross-examination, possible evidence to call in response, the appropriateness of filing particular motions or tactical issues. It is his view that a special advocate should be able to communicate without reservation with the named person and public counsel. At most, if the special advocate considers that there may be a possibility of disclosure, then it may be appropriate to resort to the guidance of the court. As well, even though no solicitor-client privilege applies, by law, a special advocate has a detailed knowledge of the named person's evidence protected by the privilege. If he is required to seek judicial authorization to communicate with the named person, he will have to disclose this privileged information to the judge, and that is not acceptable.

[168] The Ministers, in response, submit that the requirement to secure a prior court authorization was the best solution chosen by Parliament (preferable, for instance, to the SIRC counsel involvement), that its legitimate intent was to prevent inadvertent disclosure. It is the Ministers' submission that the process established is fair and meets the requirements of section 7 of the Charter in that the principles of fundamental justice are safeguarded. It is also the opinion of the Ministers that the solicitor-client privilege argument made must be analyzed and considered in view of the legislative scheme and that each provision must be read harmoniously with the scheme. Section 85.1(4) cannot be intended to make sections 85.4(2) and 85.5 of the *IRPA* constitutionally invalid. Surely, when enacting a law, Parliament does not want such a result. It is the Ministers' view that the legislative scheme is such that proper discretion is given to the designated judge to explore

different scenarios and at the same time respect the legislative intent of protecting national security and the rights of the named person.

[169] In *Almrei (2008)*, at paras. 104 and 105, the Chief Justice of this Court noted the importance of judicial authorization to prevent inadvertent disclosure:

> [104] Parliament has mandated that special advocates require judicial authorization for all communications after having received the confidential information. Section 83(1)(d) stipulates that the judge shall ensure the protection of confidential information. The legislation aims to prevent the disclosure of confidential information, intentionally or through inadvertence, through the mechanism of judicial supervision.
>
> [105] In my view, if Parliament's objective is to be met, special advocates cannot communicate with another person about the proceeding, absent judicial authorization, even concerning an order or direction made public by the presiding judge. If special advocates were allowed to determine on their own initiative when they could communicate about the proceeding, even where confidential information is not being discussed, Parliament's attempt to limit inadvertent disclosure would be compromised. Absent a factual context, it is again premature to determine in any definitive way the constitutional validity of these impugned provisions.

[170] The *IRPA* does not forbid communication between the special advocates, the named person and counsel. It only makes them subject to a judicial authorization. In the present case, the designated judge's discretion has been exercised fully and the requests to communicate have been denied only exceptionally.

[171] The *IRPA* makes it clear that special advocates are not a party to the proceeding and their relationship with a named person is not one of solicitor and client (see subsection 85.1(3)). At the

same time, the *IRPA*, at subsection 85.1(4), recognizes a solicitor-client privilege which protects their communications.

[172] The special advocate is not a public counsel. The public counsel represents Mr. Harkat on public matters. The special advocates assumed their duties in the interest of Mr. Harkat during the closed hearings. Initially, they received their instructions before having access to the classified information. In this case, sufficient time was given. As the information was disclosed during the proceeding, the special advocates had the option of seeking judicial authorization to communicate for further instructions if they felt that it was required. They did seek such authorization for that purpose, as well as for other matters. Again, this communication procedure was clearly intended to be in the interest of the named person. Rather than to forbid any communication with the named person once they have seen the classified information, Parliament gave the designated judge the discretion to allow communications if appropriate. The SIAC UK Special Advocate System does not provide for any communication.

[173] In essence, Mr. Harkat would like the special advocate to determine whether there should be a communication or not. That was not the view of Parliament. Giving a supervisory role to the Court to ensure the confidentiality of the classified information and to allow communication with the named person was the solution chosen by Parliament.

[174] Mr. Harkat and his counsel can communicate with the special advocates at any time without judicial authorization. Indeed, this generated requests for judicial authorization from the special advocates to communicate with Mr. Harkat.

[175] This Court has used the discretion granted by the legislation to allow special advocates' communication on a number of issues: review of conditions of release, torture issues, if any, the importance of giving adequate explanation about the allegations made, the summaries of conversations involving Mr. Harkat, the scheduling of expert witnesses, factual evidence such as the guesthouse in Babbi, Pakistan, his contact with Khadr, his relationship with Wael and Al Shehre, his presence in Afghanistan, his relationship with Zubaydah, Bin Laden and his access to large sums of money in Canada (see Appendix B).

[176] It can be seen that communications under conditions were at times made possible on a variety of topics, including evidence directly related to the allegations made against Mr. Harkat. The *IRPA* communication procedure has served his interests. If information pertinent to the strategy of a case or a legal question has to be communicated in order to explain the purpose of the communication, the *IRPA* does allow *ex parte* hearings in the absence of the Ministers' counsel. None has been necessary in this case, unlike what occurred in another certificate proceeding. The *IRPA* gives the designated judge the option of imposing conditions on the communications.

[177] The fact that the designated judge would have access to information that he normally would not have as evidence during a hearing is not out of the ordinary nor is it prejudicial or unfair to the named person. Judges presiding over a *voir dire* will often hear evidence and receive information in the conduct of litigation (see *R. v. Corbett*, [1988] 1 S.C.R. 670). Further, judges routinely rule on the admissibility of evidence. They have the ability not to take into account information that they have heard before excluding it.

[178] The question of assessing solicitor-client information remains theoretical in the case at hand. The requests to communicate presented did not directly or indirectly reveal such information.

[179] In *Almrei (2008)*, the Chief Justice of this Court, at paragraph 60, noted that although important, the solicitor-client privilege is not absolute (see also *R. v. McClure*, 2001 SCC 14, at paras. 34-35).

[180] He suggests at paragraph 61, that the objective of avoiding injury to national security through the risk of inadvertent disclosure "… may constitute a necessity that warrants piercing the privilege in as minimal a way as the circumstances dictate." He adds that such questions should not be decided in a factual vacuum.

[181] The legislation has made it clear that there is no solicitor-client relationship but, at the same time, the information given by the named person to the special advocates is protected by that privilege.

[182] If such a situation occurs where the special advocates obtain judicial authorization and are dealing with information of a solicitor-client nature, an appropriate approach may consist in making the presentation in such a way as not to disclose the information.

[183] If the information is given to the judge in order to obtain the authorization, he or she may use his or her own discretion to inform all counsel that some information should not be

communicated, but that proper conditions can be imposed. For instance the communication can be authorized in the presence of a person such as a representative of the special advocates program (SAP). A proper reporting scheme can be included which will inform the Court of the communication made (without disclosing content) such that no classified information is disclosed. The SAP personnel is constantly present in the closed and public hearings, and they are under a duty not to disclose any classified information. As mentioned earlier, the system is flexible and can be adapted to any circumstances as they arise.

[184] This Court considers that proper measures can be taken within the parameters of the *IRPA* to protect the rights of the named person, including the information that is covered by the solicitor-client privilege. The *IRPA* does balance adequately the imperatives of both national security and the rights of the named person, particularly the communication provisions which clearly exist in the interest and to the benefit of the named individual. I rule that subsection 85.4(2) and paragraph 85.5(b) of the *IRPA* are constitutional. Indeed, they contribute to the fairness of the procedure and uphold the principles of fundamental justice.

17. Other Issues

[185] Mr. Harkat raises additional constitutional issues related to the *IRPA*: the "reasonable grounds to believe standard" (sections 33 and 78), the quality of the evidence admitted (paragraph 83(1)(h)), and the reasons on which a decision is made, including information not disclosed, except through summaries of information (paragraph 83(1)(i)). It is submitted that all of these sections are unconstitutional and should be quashed. Both parties have addressed the first issue at length and

there appears to be some common ground on which the Court may resolve this issue without addressing constitutional issues. Mr. Harkat has not extensively argued the two other issues.

[186] On August 6, 2010, this Court issued a Direction informing the parties that some sections of the *IRPA* raising a constitutional question were not supported by written or oral submissions and that unless told otherwise, the Court did not intend to examine their constitutionality. Such was the case for subsection 77(2), and paragraphs 83(1)(c) to 83(1)(e) insofar as they do not relate to the restrictions on disclosure, paragraph 83(1)(h) on the admissibility of the evidence and paragraph 83(1)(i) on the information on which a decision can be based.

[187] Mr. Harkat responded that the constitutionality of sections 77(2), 83(1)(c) to (e), (h) and (i), was before the Court insofar as they deal with compliance with the principles of fundamental justice and their violation of section 7 of the Charter. I agree to the extent that they relate to restrictions on disclosure of information. No other specific arguments were submitted as to the constitutionality of these sections based on the Charter. The Ministers' response gave proper context to each provision for which a declaration of unconstitutionality is sought (see ex. H84, H85 and M52).

[188] I will therefore deal with the issues of the admissibility of evidence as well as the reasons of decisions that can be based on information not communicated to the named person. This will be done in light of the disclosure process established by the *IRPA*. First, the standard of proof will be discussed.

The Standard of Proof

[189] In both sections 33 and 78, the *IRPA* requires the Court to decide whether or not the certificate issued against Mr. Harkat is reasonable. This standard is found in the *IRPA* Rules of Interpretation at section 33, which provides that inadmissibility is to be proven on the "reasonable grounds to believe" standard. The Ministers have signed a certificate which concludes that they have reasonable grounds to believe that, based on security grounds, Mr. Harkat is inadmissible to Canada. This Court is required to review the facts of this case as they were presented with new facts presented by the Ministers throughout the proceeding, in conjunction with the evidence presented by the named person who was not before the Ministers, and decide whether or not the certificate is found to be reasonable.

[190] The reasonableness standard requires more than mere suspicion, but is less demanding than the criminal standard of "beyond a reasonable doubt." Initially, the burden of proof is on the Ministers. Then, depending on the Ministerial evidence presented, that burden might shift. As a result, conflicting evidence is assessed on a balance of probabilities. Overall, some findings of facts are made. At the end of this lengthy process, some facts might remain and others not. Then, the Court is to assess the factual evidence on a balance of probabilities and decide whether or not the certificate is reasonable. I agree with my colleague, Justice Mosley, in *Almrei (2009)*, at para. 101:

> "I am of the view that "reasonable grounds to believe" in s. 33 implies a threshold or test for establishing the facts for an inadmissibility determination which the Ministers' evidence must meet at a minimum, as discussed by Robertson, J.A. in *Moreno*, above. When there has been extensive evidence from both parties and there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted. A certificate can not be held to

> be reasonable if the Court is satisfied that the preponderance of the evidence is to the contrary of that proffered by the Ministers."

Justice Dawson (as she then was) also agreed with this approach in *Jaballah (Re)*, 2010 FC 79, where she wrote that:

> [45] Further, notwithstanding the interpretive rule contained in section 33 of the Act, where there is conflicting evidence on a point, the Court must resolve such conflict by deciding which version of events is more likely to have occurred. A security certificate cannot be found to be reasonable if the Court is satisfied that the preponderance of credible evidence is contrary to the allegations of the Ministers.

[191] In their submissions, both counsel for Mr. Harkat and counsel for the Ministers agreed with this view (see Transcript of Proceedings, March 30, 2010 (Vol. 25) at 101; and at 129). There is no need to further comment on this issue).

The Admissibility of the Evidence

[192] Section 83(1)(h) provides for the admission of evidence even if it is inadmissible in a court of law, if in the judge's opinion such evidence is both reliable and appropriate ("digne de foi et utile"). The information gathered can be used in the judgment. The previous legislation provided for the same standard of admissibility. However, the notion of reliability ("digne de foi") was added in the new *IRPA* (see subsection 78(j) of the old *IRPA*). It is therefore not required to follow the best evidence rule and hearsay evidence originating from human sources or a national or foreign agency is admissible as long as it is both reliable and appropriate.

[193] As aptly noted by my colleague, Justice Mosley, in *Almrei (2009)* at para. 84, a comparison of the French and English versions shows that the evidence required more than mere relevance. I agree when he says:

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

The new *IRPA* contains a major change on the admissibility of evidence that strengthens the requirement for trustworthy evidence.

[194] This court is of the view that the disclosure of national security information that did occur has been substantial and informative. If Mr. Harkat challenges the constitutionality of paragraph 83(1)(h) because he is unsatisfied by the disclosure made, as it appears to be the case from counsel's response letter dated August 11, 2010, that is not a valid argument.

[195] Therefore, paragraph 83(1)(h) of the *IRPA* provides that the evidence must be "reliable and appropriate". Counsel for Mr. Harkat did not submit additional constitutional arguments. I will therefore not address that question any further.

The decision on the reasonableness of the certificate may be based on information unknown to the named person or included in summaries of information

[196] Paragraph 83(1)(i) of the *IRPA* allows the judge to base his decision on information or other evidence even if a summary of that information or other evidence has not been provided to the named person.

[197] Mr. Harkat is cognizant of all the allegations made against him and he has also been informed, through summaries of information and other exhibits, about valuable factual evidence in support of these allegations. What has not been disclosed to him was withheld to prevent injury to national security.

[198] The decision on the reasonableness of the certificate shows that a substantial amount of evidence has been made public. It is true that some of the factual information is not known to Mr. Harkat, but that remains negligible when compared to what has been disclosed. In *Almrei (2009)*, this appears to have been also the case.

[199] The *IRPA*, as to undisclosed national security information, provides for the full participation of the special advocate who has the duty to defend the interests of the named person in closed hearings. Through a special advocate, the named person's interests are protected. That is an added protection to ensure the safeguard of the principles of fundamental justice.

[200] This Court has always been anxious to ensure that Mr. Harkat was reasonably informed of the case made against him. However, each case is unique. There may be a case where very little can be disclosed for reasons of national security such as an inadmissibility based on grounds of espionage or information originating in large part from a human source which, if disclosed, would threaten the safety of this informer. Any decision in such cases would have to be limited.

[201] Discretion is given to the judge when sensitive issues arise. This is what paragraph 83(1)(i) does. The judge decides the information on which his conclusion will be based. There may be a public and confidential judgment depending on the circumstances. Discretion is given to the judge to adapt reasons to the particular circumstances of the case.

[202] Except for the disclosure process argument made, no specific constitutional arguments were presented by Mr. Harkat in relation to paragraph 83(1)(i). I have addressed this issue in relation to the disclosure process and therefore no declaration of unconstitutionality will be made as to this provision.

18. Conclusions in response to the first question

[203] This Court rules that the new *IRPA* amendments which contain a new disclosure process with the active participation of special advocates provide for a substantial and adequate protection of the named person, and safeguard the principles of fundamental justice, while protecting national security information.

[204] This new disclosure process reasonably informs the named person of the case to meet and enables him to answer it. The special advocate actively defends the interests of the named person in closed hearings at all times; at the same time, national security is protected. The end result is that the designated judge has the facts presented by both parties. The designated judge is in a position to render a decision based on all the relevant facts and law.

19. Section 1

[205] In the alternative, as suggested by both parties in their respective submissions, it is in the interest of justice to address the application of section 1 of the Charter to this case.

[206] When pursuing an analysis under section 1, one needs to decide whether or not the limit on life, liberty or security imposed by the legislation is justifiable (see *Charkaoui #1*, para. 21). Under section 7, the Court must determine whether or not the limits imposed satisfy the principles of fundamental justice. Under section 1, the same facts are examined from a different angle. Every effort will be made to avoid an overlap with the preceding analysis under section 7.

[207] As provided by section 1 of the *Charter* and reiterated in *Charkaoui #1* at paras. 66 to 69, the rights protected by the Charter are not absolute, Parliament can limit the rights to liberty, life and security as long as it can be demonstrated that the limits imposed are justified in a free and democratic society.

[208] The Supreme Court of Canada's approach as to violations of section 7 rights has been that only exceptional circumstances such as natural disasters, outbreak of war, epidemics, etc. could for reasons of "administrative expediency" save a violation to life, liberty and security (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 518). The reason is that section 7 rights are key values of our free and democratic society. Having noted that a violation of the right to a fair hearing was difficult to justify under section 1, the Chief Justice went further and said that "… the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenge complex" (*Charkaoui #1*, at para 61).

19.1 The Oakes test

[209] The Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103 developed a test to determine if a violation can be justified under section 1 of the Charter. It is commonly referred to as the Oakes test. In order to justify a violation of a *Charter* protected right under section 1, the following conditions apply:

- A requirement of a pressing and substantial objective with proportional means to address this objective;
- A finding of proportionality based on the following:
    i. the legislative provisions are nationally connected to the pressing and substantial objectives;
    ii. a minimal impairment of the rights;
    iii. proportionality between the effects of the infringement and the importance of the objective.

19.1.1 A pressing and substantial objective

[210] One of the most pressing, fundamental requirement and responsibility of a government is to provide security for its citizens. The objectives set out at paragraphs 3(1)(h) and 3(1)(i) of the *IRPA* clearly reflect this. It is the duty of the government not to admit to Canada persons who raise concerns on security or criminal grounds which could eventually impact on the security of Canadians. One of the objectives of the *IRPA* is that security must be maintained ("garantit") (paragraph 3(1)(h)) and that the inadmissibility of someone on security or criminal grounds is related to the fact that they are security risks ("… un danger pour la sécurité") (paragraph 3(1)(i)).

[211] The *IRPA* also provides that non-citizens do not have the same rights of entry and to remain in Canada as Canadian citizens and Indians under the *Indian Act* (see subsection 19(1) and also subsection 27(1) for permanent residents). The Charter gives Canadians the right to enter, remain in and leave Canada (see subsection 6(1) of the Charter). Different rights apply to non-citizens. Justice Sopinka in *Chiarelli* at page 21, mentioned that:

> "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada. At common law an alien has no right to enter or remain in the country."

[212] This is not a criminal procedure. An immigration procedure deals with inadmissibility based on security grounds. The impact and consequences of the legislation are important for the individuals concerned, but they have to be put in proper perspective, especially in light of the importance of the preservation and the protection of Canadian society.

[213] The security of all Canadians is at the core of what constitutes a free and democratic society. Without proper security for its citizens, a free and democratic society would undoubtedly be in peril. The *IRPA* legislative objective concerning security for all is a proper foundation to such society. Furthermore, the underlying security concern can be derived from the definition of "threats to the security of Canada" in the *CSIS Act* at section 2. One of the central objectives of maintaining security is to protect the constitutionally established system of government in Canada and elsewhere:

"threats to the security of Canada" means	«menaces envers la sécurité du Canada» Constituent des menaces envers la sécurité du Canada les activités suivantes :
(a) espionage or sabotage that is	a) l'espionnage ou le sabotage

against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

b) les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

c) les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un objectif politique, religieux ou idéologique au Canada ou dans un État étranger;

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

d) les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.

La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d).

[214] In order to strike a balance between the security of Canadians and the rights of the named person, Parliament chose a limited disclosure process with the participation of special advocates who defend the interests of the named person in order to ensure that no information of a national security nature that could cause an injury will be disclosed.

[215] Intelligence investigations are such that they identify threats to the security of Canada. Threats are such that they may involve individuals located in different areas of the world, but who have a common interest in a specific geographical area. Cooperation between states is essential. Intelligence information comes from a multitude of police or intelligence agencies located in Canada and around the world. When information is sent from an agency to another, it is understood that it is limited to its internal use for intelligence purposes, unless permission is given. Intelligence agencies value their information. Such information can be gathered by intelligence agencies through human sources; it may contain not only the information first hand, but also analysis of particular situations, internal administrative methods, etc. If future intelligence investigations are to be efficiently conducted, such information has to be protected.

[216] As noted by Justice Arbour in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, that kind of information is necessary if Canadian authorities are to conduct intelligence investigations with success. Human sources also need protection. Their identity must remain anonymous. Otherwise, their life may be in danger. Their protection must be analogous to that received by informers in criminal investigations, who have strict, far-reaching privilege of protection (*Named person v. Vancouver Sun*, 2007 SCC 43). The informer privilege is aimed at protecting the identity and security of the source as well as the ongoing trial or investigation. These concerns apply equally in

security certificate proceedings, maybe even more so (see also *Harkat (Re)*, 2009 FC 204 on covert intelligence source privilege). Furthermore, the relationships and efforts needed to develop reliable, credible and adequate national security information need to be preserved, both for a current case and potential future cases. Consequently, in order to maximize the security of Canadians, national security information must be protected.

[217] In *Charkaoui #1*, the Chief Justice did recognize that "… Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective" (see para. 68). The Chief Justice also noted that the previous *IRPA* provisions regarding non-disclosure of evidence were protected under national security. Therefore, the security of all Canadians through national security is a pressing and substantial objective.

19.1.2 Are the legislative provisions in issue rationally connected to this pressing and substantial objective?

[218] Sections 33, 77(2), 78, 83(1)(c) to 83(1)(e), 83(1)(i), 85.4(2) and 85.5(b) of the *IRPA* are rationally connected to the protection of national security and intelligence sources. Sections 77(2), 83(1)(c) to 83(1)(e) and 83(1)(i) provide for a disclosure process, while preserving the importance of national security. Sections 85.4(2) and 85.5(b) provide for a communication procedure for special advocates which require a judicial authorization. This again is to ensure that no inadvertent disclosure of national security information will occur. Sections 33 and 78 provide for the standard of proof that has already been agreed upon by the parties.

[219] The *IRPA* disclosure process has become an issue only because the disclosure, deliberate or inadvertent, of national security information is an important concern. There is a rational connection between the measures taken and the objective sought, as recognized by the Supreme Court at paragraph 68 of *Charkaoui #1*:

> "The protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. Moreover, the *IRPA*'s provisions regarding the non‑disclosure of evidence at certificate hearings are rationally connected to this objective. The facts on this point are undisputed. Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality: see *Ruby*."

[220] The risk of inadvertent disclosure by the special advocates is not merely potential. Errors or slips may occur without intent. Without judicial screening, it is more likely than not that there will be inadvertent disclosure. As attentive as a person may be, it is possible that, while discussing with someone, that person may disclose something. In the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, et al., Justice Iacobucci stated that such situations may occur:

> "Even something as innocuous as a request for a document or for clarification of a fact could trigger questions from colleagues and clients that might result in disclosure of information subject to national security confidentiality."
>
> (see Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, et al., Ruling on terms of reference and procedure, May 31, 2007 at para. 58)

[221] Therefore, the legislative provisions referred to in the constitutional question, are all rationally designed to ensure that no information that would imperil national security will be disclosed.

19.1.3 Is there a minimal impairment of the rights?

[222] In *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at paras. 83-84, Justice Binnie recognized that some leeway must be given to governments and legislatures when they choose a proper process to solve difficult issues:

> "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 reasonably alternatives, and the Court acknowledged in M.V.A. 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"."

[223] In response to *Charkaoui #1*, the government proposed a new process for disclosure when dealing with national security information in immigration matters that would provide for an active role for the special advocate in the interests of the named person. Parliament was fully aware of the human rights issues at stake and Canada's interest in protecting national security. Parliament chose what it viewed as the best approach.

[224] Different possibilities were discussed: the U.K. special advocate program, the SIRC process and the involvement of SIRC's counsel, the *CEA* procedure as to national security information, lessons drawn from the Air India prosecution experience and the conclusion of the Arar Commission. The new *IRPA* disclosure process and the role and powers given to the special advocate go further in ensuring a more complete disclosure and involving legal officials in closed hearings who fully defend the interests of the named person.

[225] It is also important to note that the prohibition of communication from the special advocates to the named person is not absolute: judicial discretion may be exerted to authorize it under the designated judge's guidelines (s. 85.4 of the *IRPA*). This discretion is presumed to be used adequately in order to properly meet, among other considerations, the requirements of section 7 of the *Charter*. Also, it is important to highlight the fact that the named person can, at any time, and without judicial authorization, communicate any facts and points of view to his special advocates. Communications between the special advocates and the named person before the special advocates have had access to the privileged information is completely unfettered. These elements go a long way in proving the minimal impairment of the named person's rights.

[226] The end result was the creation of a new disclosure process with the participation of a special advocate. National security information is now disclosed in the form of summaries, without being prejudicial to national security and giving the named person substantive information on all the allegations. As for the information not specifically communicated, the special advocate, in the interest of the named person, tests and challenges such information to his benefit. This adversarial system goes a long way in ensuring a confrontation of opposite views to the benefit of the judicial determination process.

[227] When information is not disclosed, it is only for national security reasons. The special advocates are cognizant of that information, they test and challenge it in closed hearings. The rights of the named person are affected in a minimal way and inadvertent disclosure can be avoided under the *IRPA*.

19.1.4 Are the effects of the infringement proportional to the importance of the objective?

[228] One of the *IRPA* objectives is to prevent the entry of people who may pose a threat to Canada, in order to ensure the safety of Canadians. It is a legislative tool to ensure "a free and democratic society." The certificate proceeding is the remedy Parliament has developed to achieve this goal and, at the same time, to protect the national security information. Since 1976, security certificates have been used approximately 30 times. It has therefore only been applied sporadically.

[229] Considering the national security protection objective, a fair process has been created for the named persons in security certificates. At the same time, a procedure exists to ensure that Canada controls its immigration processes and properly assesses, and acts upon, security threats.

[230] The communication provisions have given the designated judge sufficient discretion to deal with multiple scenarios, including solicitor-client information (see paragraphs 176 and following of these Reasons).

[231] There is proportionality: in view of the importance of the protection of national security information, the procedure of immigration inadmissibility on security grounds in that the disclosure of information process reasonably informs the named person of the case to meet, and the special advocate is able to intervene effectively. There is limited infringement of the named person's rights. The importance of this objective is no longer in doubt, as clear statements from the Supreme Court in *Charkaoui #1* and *Charkaoui #2* show it. Parliament is not required to choose an ideal and perfect legislative formula and deference must be shown to its choices (*Charkaoui #1*, at para 85, citing *R.*

v. *Chaulk*, [1990] 3 S.C.R. 1303). Considering that Parliament's modifications to the *IRPA* were adopted in response to the constitutional rulings of the Supreme Court in *Charkaoui #1*, it is useful to cite Chief Justice Lamer's (as he then was) comments in *R. v*. *Mills*, [1999] 3 S.C.R. 668, at para 55:

> "Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy."

[232] Such a result is acceptable in a free and democratic society. The values expressed by Parliament when it identified such objectives reflect some of the needs of the Canadian society. It identifies some of the core values of this country, while at the same time reasonably informing the named person and ensuring proper legal representation during closed hearings. Considering the importance of the objective, there is a valid proportionality in regards to the effects of the infringement.

19.1.5 Conclusion on section 1

[233] The *IRPA* provisions that impose limits on the rights protected by the Charter in section 7 are such that they are demonstrably justified in a free and democratic society. The protection of the safety of Canadians and national security information objective in the *IRPA* is such that it is valid, pressing and substantial. The legislative provisions are related to this objective; they minimally impair the rights in question and are proportional to the effects of the infringement and the importance of the objective sought. The provisions dealing with the disclosure process of national

security information and the communication procedures for special advocates are saved by section 1 of the Charter.

20. Conclusion

[234] I rule that all provisions of the *IRPA* pertaining to the disclosure process of the national security information (subsection 77(2), and paragraphs 83(1)(c), 83(1)(d), 83(1)(e), 83(1)(i)) and the communication procedure requiring judicial authorization (subsection 85.4(2) and paragraph 85.5(b)) are constitutional in that they provide for a fair process where the information communicated does not pose a risk of injury to national security. At the same time, the *IRPA* protects the named person's rights (through the special advocates' participation in closed hearings) and informs him of the case to meet so that he is in a position to answer it. The provisions in issue are not in conflict with principles of fundamental justice.

[235] In the alternative, the said limits imposed on the rights are such that they are demonstrably justifiable in a free and democratic society and are therefore saved by section 1 of the Charter.

21. Certified questions

[236] The parties are invited to submit serious questions of general importance pursuant to section 82.3 of the *IRPA*. They shall have fifteen (15) days to do so and an additional five (5) days to comment on the questions submitted, if any.

22. The Order

[237] The motion challenging the constitutionality of provisions 77(2), 78, 83(1)(c) to (e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the *IRPA* is dismissed.

"Simon Noël"

Judge

APPENDIX A

1. Mr. Harkat is to be released from incarceration on terms that he sign a document, to be prepared by his counsel and to be approved by counsel for the Ministers, in which he agrees to comply strictly with each of the following terms and conditions.

2. Mr. Harkat shall be fitted with a Global Positioning System ("GPS") electronic monitoring device as determined by the Canada Border Services Agency ("CBSA"). Mr. Harkat shall thereafter at all times wear the monitoring device and at no time shall he tamper with the monitoring device or allow it to be tampered with by any person. Mr. Harkat shall agree to wear a one piece electronic bracelet and shall agree to use it as instructed by the CBSA, including charging the battery (using the cord provided with the unit and the extension cord (32 ft) which can be plugged into an electrical outlet) for a period of no less than two (2) continuous hours each day. The CBSA has the sole discretion and reserves the right to modify, change or replace the electronic monitoring device and/or replacement causes Mr. Harkat discomfort, he may complain to the CBSA, if the matter cannot be resolved Mr. Harkat may make a motion to the Federal Court for resolution of the matter.

3. Prior to Mr. Harkat's release from incarceration, the sum of $35,000.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules*. In the event that any term of the order releasing Mr. Harkat is breached, an order may be sought by the Ministers that the full amount, plus any accrued interest, be paid to the Attorney General of Canada.

4. Prior to Mr. Harkat's release from incarceration, the following eight individuals shall execute performance bonds by which they agree to be bound to Her Majesty the Queen in Right of Canada in the amounts specific below. The condition of each performance bond shall be that if Mr. Harkat breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited to Her Majesty. The terms and conditions of the performance bonds shall be provided to counsel for Mr. Harkat by counsel for the Ministers and shall be in accordance with the terms and conditions of guarantees provided pursuant to section 56 of the *Immigration and Refugee Protection Act* ("*IRPA*"). Each surety shall acknowledge in writing having reviewed the terms and conditions contained in this order.

a.	Pierrette Brunette	$ 50,000.00
b.	Sophie Harkat	$ 5,000.00
c.	Kevin Skerritt	$ 10,000.00
d.	Leonard Bush	$ 10,000.00
e.	Jessica Squires	$ 1,500.00

f.	Josephine Wood	$ 1,500.00
g.	William Baldwin	$ 5,000.00
h.	Philippe Parent	$ 50,000.00

5. Mr. Harkat shall reside at, _____ in the City of Ottawa, Ontario (residence) with Sophie Harkat. In order to protect the privacy of those individuals, the address of the residence shall not be published within the public record of this proceeding.

6. Mr. Harkat shall inform the Court, the Ministers and the CBSA of any change of address at least 72 hours prior to the change taking effect. No other persons may occupy the residence without the approval of the CBSA.

7. Mr. Harkat shall report once per week to the CBSA on a day and at a time as determined by a representative of the CBSA.

8. Mr. Harkat shall not travel to any location outside the National Capital Region (Ottawa, Orleans, Kanata, and Gatineau) without the approval of the CBSA. The following terms and conditions apply to any request by Mr. Harkat to travel outside the National Capital Region:

   (i) Mr. Harkat must provide 48 hours advanced notice (2 clear business days) of any request to travel outside the National Capital Region as defined above. Advanced notice must be received in writing between the hours of 8:00 am and 4 pm and must include details that outline the times and dates of travel, the proposed destination(s), the route and mode of travel;

   (ii) Mr. Harkat must continuously wear the GPS unit;

   (iii) Mr. Harkat must be accompanied by a bonds person as described in paragraph 4 of this order;

   (iv) Mr. Harkat must report as directed by CBSA;

   (v) CBSA is authorized to deny travel if all of the above noted conditions are not met or if the proposed travel makes reporting and monitoring of Mr. Harkat unworkable.

9. Mr. Harkat shall not, at any time or in any way, associate or communicate directly or indirectly with:

   (i) any person whom Mr. Harkat knows, or ought to know, supports terrorism or violent Jihad or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad;

(ii) any person Mr. Harkat knows, or ought to know, has a criminal record or who poses a threat to national security; or

(iii) any person the Court may in the future specify in an order amending this order.

10. Except as provided herein, Mr. Harkat shall not possess, have access to or use, directly or indirectly, any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that contains a modem or that can access the internet or a component thereof; any page; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry. No computer with wireless internet access and no cellular telephone shall be permitted in the residence. Any computer in the residence with internet connectivity must be kept in a locked portion of the residence that Mr. Harkat does not have access to.

11. Mr. Harkat shall allow employees of the CBSA, any person designated by the CBSA and/or any peace officer access to the residence at any time (upon the production of identification) for the purposes of

(i) installing, service and/or maintaining such equipment as may be required in connection with the electronic monitoring equipment; or

(ii) ensuring that Mr. Harkat and/or any other persons are complying with the terms and conditions of this order.

Prior to Mr. Harkat's release from incarceration, all other occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by these terms. Prior to occupying the residence, any new occupant shall similarly agree to abide by these terms.

12. The CBSA shall notify the Court and obtain judicial authorization for any entry made pursuant to paragraph 11(ii) of this Order.

13. Mr. Harkat shall surrender his passport and all travel documents to a representative of the CBSA. The Ministers shall provide Mr. Harkat with the name of the officer.

14. If Mr. Harkat is ordered to be removed from Canada, he shall report as directed for removal. He shall also report to the Court as it may require from time to time.

15. Mr. Harkat shall appear at all Court hearings and any proceeding or process under the *IRPA*.

16. Mr. Harkat shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof.

17. Mr. Harkat shall keep the peace and be of good conduct.

18. Any officer of the CBSA or any peace officer, if they have reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Harkat without warrant and cause him to be detained. Within 48 hours of such detention, a Judge of this Court, designated by the Chief Justice, shall forthwith determine whether there has been a breach of any term or condition of this order, whether the terms of this order should be amended and whether Mr. Harkat should be incarcerated.

19. If Mr. Harkat does not strictly observe each of the terms and conditions of this order, he will be liable to incarceration upon further order by this Court.

20. A breach of this order shall constitute an offence pursuant to section 127 of the *Criminal Code* and shall constitute an offence pursuant to paragraph 124(1)(a) of the *IRPA*.

21. The terms and conditions of this Order may be amended in accordance with section 82 of *IRPA*.

APPENDIX B

JUDGMENTS

Date	Judge	Content
November 28, 2008	Justice Simon Noël	Expurgated Public Reasons for Judgment and Judgment: special advocates seeking access to the employment records of T.S., a former CSIS employee who was an intelligence officer involved in the investigation of Mr. Harkat. The request is denied. Copies of the report(s) into the reliability and veracity of any information are to be filed with the Court.
December 22, 2008	Justice Simon Noël	Expurgated Public Reasons for Judgment and Judgment: Police informer privilege is applicable in the context of this certificate proceeding and therefore the request by the special advocates to interview and cross-examine covert human source(s) is denied.
January 22, 2009*	Justice Simon Noël	Reasons for Judgment and Judgment: Special advocates' request to communicate. They may communicate with other special advocates to discuss common issues in meetings organized by the support resources group for special advocates.
March 6, 2009	Justice Simon Noël	Reasons for Judgment: review of the reasons for continuing the conditions. Certain changes are made to Mr. Harkat's conditions.
March 31, 2009	Justice Simon Noël	Expurgated Reasons for Judgment and Judgment: Whether the disclosure obligation set out in *Charkaoui II* requires the Ministers to comply with the further requests for disclosure set out by the special advocates. The request is denied.
October 7, 2009	Justice Simon Noël	Mr. Harkat contested a number of the conditions remaining in the Order as part of the six-month review of conditions provided for by section 82(4) of IRPA. Requests made to cancel, amend or change the conditions of release are dismissed. The Court will amend the conditions when the

* Requests to communicate made by the special advocates and public counsel

		parties submit a paragraph in writing permitting Mr. Harkat to travel outside the National Capital Regions.

ORDERS

Date	Judge	Content
February 25, 2008	Chief Justice Allan Lutfy	Specially managed proceeding. Chief Justice Allan Lutfy and Justice Simon Noël are assigned as case management judges.
March 7, 2008	Chief Justice Allan Lutfy	Mr. Harkat is authorized to attend the case management meeting in Ottawa on certain conditions.
March 17, 2008	Justice Simon Noël	Mr. Harkat is authorized to attend all future common case management conferences on certain conditions. Mr. Harkat is authorized to attend the Free Tax Clinic on certain conditions.
March 26, 2008	Justice Edmond Blanchard	Ms. Nancy Brooks is appointed as special advocate for Mr. Harkat to protect his interests in the conflict proceedings, which will be heard *in camera*. Next case management conference scheduled.
March 28, 2008	Justice Simon Noël	Addition made to the geographic boundaries of the original Release Order of Justice Dawson.
March 31, 2008	Justice Simon Noël	Mr. Harkat is authorized to leave his home for more than four hours to assist his sister-in-law to move.
April 4, 2008	Justice Edmond Blanchard	Public summary annexed to the order is approved to reasonably inform Mr. Harkat of the case made by the Ministers in the conflict proceedings. Special advocates authorized to communicate with Mr. Harkat under certain conditions.
April 10, 2008 and April 11, 2008*	Justice Edmond Blanchard	Mr. Copeland is authorized to communicate with Mr. Harkat under certain conditions. The special advocates for Mr. Jaballah and Mr. Mahjoub are authorized to communicate with them and their counsel under certain conditions.

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April 14, 2008	Justice Edmond Blanchard	The Court makes no findings with respect to the alleged conflict of interest concerning the request that Mr. Copeland be appointed as special advocate for Mr. Harkat. The matter of the appointment of the special advocates is reserved to be decided by the designated judge.
April 25, 2008	Justice Eleanor Dawson	The Court will sit to hear Mr. Harkat's motion for an order allowing him to move his place of residence.
May 5, 2008	Justice Eleanor Dawson	Two exhibits tendered in evidence are sealed and kept separate from the public record as they reveal the location of Mr. Harkat's residence.
May 5, 2008	Justice Eleanor Dawson	William Baldwin to execute a performance bond of $5,000 to become a supervising surety.
May 12, 2008	Justice Eleanor Dawson	Motion for an order allowing Mr. Harkat to move to a new residence is dismissed.
May 28, 2008	Chief Justice Allan Lutfy	Dates for filing the funding motions.
June 4, 2008	Justice Simon Noël	Paul Copeland and Paul Cavalluzzo are appointed to act as special advocates for Mr. Harkat.
June 25, 2008	Justice Simon Noël	Ministers to inform if a mediation is necessary concerning the funding motions.
July 4, 2008	Justice Eleanor Dawson	Philip Parent to execute a performance bond in the amount of $50,000.
July 9, 2008	Justice James Hugessen	Respondent's motion seeking increased funding in excess of legal aid rates is dismissed.
July 14, 2008*	Justice Carolyn Layden-Stevenson	As a result of a request sent by Mr. Harkat on June 26, 2008 to be allowed to meet with the special advocates and public counsel on July 15 and 16, 2008 from 8AM to 10PM, the Ministers consent to such request. Release order varied to facilitate meetings with Mr. Harkat counsel and special advocates.
August 7, 2008	Justice Simon Noël	CBSA authorized to intercept all incoming and outgoing written communications addressed to Mr. Harkat or any other person living at his home address.
August 7, 2008	Justice Simon Noël	The order which contains specific home street address is kept

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		under seal by the Court because of privacy reasons.
August 18, 2008	Justice Simon Noël	The special advocates are given access to the confidential decisions filed with the Court relating to the previous reasonableness hearing, detention hearings and variations of conditions of release and the classified material from the reasonableness hearing held before Justice Dawson in 2004, the classified material filed in relation to the detention review held before Justice Lemieux and the Ministers' answers filed in response to the 231 questions posed by Paul Copeland.
September 10, 2008	Justice Simon Noël	Mr. Harkat can attend the Ottawa Mosque on specific conditions.
September 24, 2008	Justice Simon Noël	Upon considering the effect of *Charkaoui II*, the Ministers and CSIS have to file all information and intelligence related to Mr. Harkat in CSIS's possession or holdings to the Court.
October 10, 2008	Justice Simon Noël	Mr. Harkat is permitted to move residence on certain conditions. Alois Weidemann is removed as a supervising surety.
October 30, 2008*	Justice Simon Noël	Special advocates may communicate in writing with counsel for Mr. Harkat with respect to certain matters: review of conditions, possibility of proceedings with the public portion of hearings into the reasonableness of the certificate prior to the disclosure ordered by the Court on September 24, 2008.
November 3, 2008	Justice Simon Noël	Reasons for Order and Order: The motion to adjourn the public hearings is dismissed.
November 28, 2008	Justice Simon Noël	Terms and conditions of Mr. Harkat's release are consolidated in Appendix "A" of this order.
December 5, 2008	Justice Simon Noël	Amended Order: Terms and conditions of Mr. Harkat's release are consolidated in Appendix "A" of this order.
December 22, 2008	Justice Simon Noël	Mr. Harkat can leave the house from 4 to midnight on December 24 and 25, 2008.
December 23, 2008	Justice Simon Noël	The Order dated December 5, 2008 is amended to add paragraph 13.1 – when the analyst identifies a communication as one between solicitor and client, he shall cease monitoring

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		the communication and delete the interception.
January 2, 2009	Chief Justice Allan Lutfy	Justice Dawson is assigned to hear oral submissions concerning the role of the designated judge with respect to the additional information disclosed by the ministers pursuant to *Charkaoui II*, and if the information disclosed to the named persons and their counsel be placed on the Court's public files in these proceedings.
February 12, 2009*	Justice Simon Noël	Ms. Robin Parker appointed to act as an administrative support person to the special advocates. Her duties are limited and restricted. The special advocates are permitted to communicate with her.
February 18, 2009	Justice Simon Noël	Reasons for Order and Order: 3 summaries of conversations are kept confidential on an interim basis, but are given to Mr. Harkat and his counsel. He has 10 days to serve and file a motion asking the Court to continue treating the 3 summaries of conversation confidentially. If not, it will become part of the public amended SIR.
February 18, 2009	Justice Simon Noël	Reasons for Order: for appointing Ms. Robin Parker as administrative support person.
February 25, 2009	Justice Simon Noël	Philippe Parent is a fourth supervising surety.
February 25, 2009	Justice Simon Noël	The interim confidentiality order of the summaries of conversations is extended. The special advocates, counsel for the Ministers and counsel for Mr. Harkat can meet and communicate about procedural issues.
February 26, 2009	Justice Simon Noël	The special advocates' request to allow the attendance of Ms. Parker at a meeting of special advocates is denied.
March 5, 2009	Justice Eleanor Dawson	Reasons for Order: Information disclosed to the named person pursuant to *Charkaoui II* should be disclosed directly to counsel for the named person and not be placed on the Court's public file. It would only become public if it is relied upon by a party and placed into evidence.
March 11, 2009	Justice Simon Noël	Special advocates are invited to participate in any further hearings required to review the redactions made to the

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		information disclosed.
March 12, 2009	Justice Simon Noël	Expurgated Order: Counsel for the Ministers and the witness shall review the redactions made to all of the documents filed. Counsel for the Ministers shall reconsider the redactions made and lift any redaction that pertains to certain individuals or groups (subject to any legal privilege claimed).
March 25, 2009	Justice Simon Noël	Mr. Harkat's terms and conditions of release are consolidated in Appendix "A" of this Order.
April 21, 2009	Justice Simon Noël	Counsel for the Ministers shall provide a summary of information, including number and type of original records found therein.
May 6, 2009*	Justice Simon Noël	Special advocates are authorized to communicate with counsel for Mr. Harkat in relation to: - The importance of allegations relating to torture and cruel, inhuman, or degrading treatment or punishment in these proceedings; - The reasons why the special advocates discontinued their request for the disclosure of 10 documents referred to in Mr. Boxall's letter of April 28, 2009; - The importance of the lack of disclosure of the fourth allegation referred to in Mr. Boxall's letter of April 28, 2009; - The importance of providing an adequate explanation about the three allegations disclosed in the communication issued on April 22, 2009 and the relationships disclosed in the summaries of communications found at Tab K of the Revised SIR dated February 5, 2009, and Tab C of the Green Summary dated April 23, 2009.
May 8, 2009	Justice Simon Noël	Litigation plan set out in a previous direction is replaced by a new schedule.
May 12, 2009	Justice Simon Noël	Mr. Harkat's terms and conditions of release are consolidated in Appendix "A" of this Order.

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May 13, 2009*	Justice Simon Noël	Motion for communication between the special advocates and counsel for Mr. Harkat is dismissed.
May 14, 2009	Justice Simon Noël	Prothonotary Tabib to hear and determine all issues relating to the assertion of solicitor-client privilege in relation to records seized by CBSA. Counsels to file submissions on the legality of the search of Mr. Harkat's home. Counsel for the Ministers to file a danger assessment in relation to Mr. Harkat.
May 14, 2009	Justice Simon Noël	Mr. Harkat's consolidated terms and conditions of release as set out in para. 16 are replaced, and para. 16.1 is added where the CBSA shall notify the Court and obtain judicial authorization for any entry.
May 15, 2009	Prothonotary Mireille Tabib	Hearing adjourned for the purpose of determining all issues relating to any assertion of solicitor-client privilege which may be specifically made by counsel for Mr. Harkat in relation to records seized by CBSA.
May 21, 2009	Prothonotary Mireille Tabib	Some documents on record are privileged. Some other documents are not covered by privilege.
May 21, 2009	Justice Simon Noël	Deadline for counsel for the Ministers and Mr. Harkat to file submissions on the legality of the search is extended.
May 25, 2009	Justice Simon Noël	Deadline for counsel for Mr. Harkat to file omnibus motion is extended.
May 27, 2009	Justice Simon Noël	Reasons for Order: The Ministers to file unredacted copies of a human source file with the Court. Hearing to determine the legality of the search will be held. The hearing to determine the reasonableness of the certificate is temporarily adjourned.
June 11, 2009*	Justice Simon Noël	Special advocates authorized to communicate with counsel for Mr. Harkat about the possible scheduling of expert witness testimony in June and July 2009.
June 23, 2009	Justice Simon Noël	Reasons for Order and Order: Seizure at Mr. Harkat's residence. All information, items and records seized by CBSA to be returned to Mr. Harkat without delay. Any copies of such information, items and records to be destroyed by CBSA.
June 25, 2009	Justice Simon Noël	Counsel for the witnesses in the polygraph issue are granted

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		standing in this proceeding for the purposes. Court grants counsel for the Attorney General of Canada authorization to give counsel for the witnesses access to Top Secret documents.
June 29, 2009*	Justice Simon Noël	Litigation plan. Special advocates are authorized to communicate with counsel for Mr. Harkat for the purpose of finalizing the details of this litigation plan.
July 7, 2009	Justice Simon Noël	Counsel for the Attorney General to file copies of a memo with 2 emails. Mr. Shore's client is invited to identify any information from the human source file that he feels is relevant to the issues dealt with in his testimony. Written submissions shall be filed by counsel for the Attorney General and the witnesses on 3 matters.
July 16, 2009	Chief Justice Allan Lutfy	Mr. Harkat will be allowed to attend the funeral of Mrs. Harkat's relative in Cornwall on specific terms and conditions.
July 27, 2009	Justice Simon Noël	Extension of time granted for counsel to file submissions on the issue of the possible prevarication by 3 CSIS witnesses. The Court was not informed of Mr. Colin Baxter's involvement in this matter, and this raises some concern.
August 4, 2009	Justice Simon Noël	Litigation plan for a review of the conditions of Mr. Harkat's release.
September 21, 2009	Justice Simon Noël	Mr. Harkat's terms and conditions of release are consolidated in Appendix "A" of this Order.
September 22, 2009	Justice Simon Noël	Amended Order: Mr. Harkat's terms and conditions of release are consolidated in Appendix "A" of this Order.
October 15, 2009	Justice Simon Noël	Public Reasons for Order and Order: Polygraph issue. Human source file concerning another covert human intelligence source whose information is relied on to support the allegations made against Mr. Harkat will be filed with the Court.
October 29, 2009	Justice Simon Noël	Appendix "A" para. 8 amended so Mr. Harkat can travel outside the National Capital Region on certain conditions.
November 10, 2009*	Justice Simon Noël	Special advocates authorized to communicate with Mr. Harkat subject to conditions on topics limited to:

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		- guesthouse in Babi - relationship with Khattab - contact with Khadr - relationship with Triki (wael) and Al Shehri - presence in Afghanistan and activities there - relationship with Zubaydah - relationship with Bin Laden and any contacts with him - access to large sums of money in Canada
December 11, 2009	Justice Simon Noël	Reasons for order in relation to the motion for disclosure filed by Mr. Harkat. Where possible, summaries of the information have been provided to Mr. Harkat. The other information requested by Mr. Harkat is not information which falls within the obligation to disclose set out in *Charkaoui II*.
March 3, 2010*	Justice Simon Noël	The Court received an email from Mr. Copeland asking permission to discuss with Mr. Harkat's counsel about an exchange of correspondence he had with third parties concerning Pacha Haji Wazir, which was unauthorized by the Court. Mr. Copeland made a retroactive request to communicate the information, which was denied. The Court informs Mr. Harkat that Pacha Haji Wazir would have been recently released from prison in Bagram.
March 15, 2010	Justice Simon Noël	Amended Order: Schedule for the filing of written submissions on the reasonableness of the certificate, a review of the conditions of release and the notice of stay of the proceedings.
March 26, 2010	Justice Simon Noël	Public hearing dates changed due to unfortunate circumstances regarding one of the counsels' family member.
March 31, 2010	Justice Simon Noël	Schedule for the filing of closed written submissions.
April 9, 2010	Justice Simon Noël	Amended Amended Order: Schedule for the filing of written submissions on the reasonableness of the certificate, a review of the conditions of release, the notice of stay of the proceedings and the constitutional question.

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DIRECTIONS

Date	Judge	Content
February 15, 2008	Chief Justice Allan Lutfy	Common case management scheduled in each of the proceedings.
March 12, 2008	Chief Justice Allan Lutfy	Conflict of interest issue concerning the appointment of Paul Copeland as special advocate for Mr. Harkat. The eventual appointment of special advocates shall be made by the designated judge presiding each proceeding.
March 13, 2008	Chief Justice Allan Lutfy	Requested closed hearing concerning the Ministers' objection to the appointment of Paul Copeland as special advocate for Mr. Harkat and common case management conference scheduled.
March 20, 2008	Justice Edmond Blanchard	Ministers to inform the Court on the request to have Ms. Nancy Brooks appointed as special advocate for Mr. Harkat for the purpose of the conflict of interest hearing. Case management conference is scheduled.
March 28, 2008	Justice Simon Noël	Ministers to file and serve a point of contact to answer questions related to the "administrative support and resources" referred to in section 85(3) of IRPA. Case management conference scheduled.
April 7, 2008	Chief Justice Allan Lutfy	Paul Copeland's letter will be spoken to at the common case management conference. Counsel for both parties encouraged to agree to a proposed schedule.
April 29, 2008	Chief Justice Allan Lutfy and Justice Simon Noël	Parties to file litigation plan. Each proceeding remaining under case management. Common case management scheduled.
May 6, 2008	Chief Justice Allan Lutfy	Designated judge assigned to each proceeding.
June 4, 2008	Justice Simon Noël	Special advocates have one month to be briefed by public counsel and Mr. Harkat before they get access to the closed materials.
June 20, 2008	Justice Eleanor Dawson	Case management hearing adjourned.
July 2, 2008	Justice James Hugessen	Motions to be heard in Toronto and Montreal are adjourned

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		sine die.
August 21, 2008*	Justice Simon Noël	The Court will accept a request of public counsels for Mr. Harkat to communicate information to the special advocates for the *in camera* hearings, subject to the submissions of the Ministers.
August 21, 2008*	Justice Simon Noël	Special advocates and counsel for CSIS are authorized to communicate between themselves in regard to this proceeding if such communications are done in a secure fashion.
September 2, 2008	Chief Justice Allan Lutfy	Timeline for hearing oral submissions concerning the constitutional motion in Toronto.
September 5, 2008	Chief Justice Allan Lutfy	If none of the intervening parties file written submissions, the Court still is prepared to receive oral submissions concerning the constitutional motion. Common case management scheduled.
September 9, 2008	Chief Justice Allan Lutfy (oral direction)	Common case management conference will proceed as scheduled with respect to the constitutional question and other issues.
October 10, 2008	Justice Simon Noël	Teleconference will be held to discuss timelines for an early hearing to review Mr. Harkat's conditions of release.
October 24, 2008	Chief Justice Allan Lutfy	Common case management scheduled.
October 30, 2008	Justice Simon Noël	The Court will hear oral arguments on the motion to adjourn the public hearings of the reasonableness of the certificate.
November 6, 2008*	Justice Simon Noël	Public hearing – Counsel for Mr. Harkat made a request to communicate with the special advocates about legal issues. The Court refuses the request. If counsel wants to make such a request, it has to be done by motion.
November 18, 2008	Justice Simon Noël	Oral direction: the Court will allow Mr. Foley to re-testify at the public hearing on a limited issue.
November 27, 2008	Justice Simon Noël	Mr. Copeland informed the Court that any additional disclosure to open counsel should initially only be made available to counsel for Mr. Harkat and not the public. The Court asks all parties to submit written submissions on this

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		matter.
November 27, 2008	Justice Simon Noël	The Court agrees with the expurgated version of the testimony of the CBSA witness and it shall be communicated to Mr. Harkat's counsel.
November 28, 2008	Justice Simon Noël	Counsel for the Ministers and special advocates are asked to review the reasons and judgment issued today to determine if it can be made public.
November 28, 2008	Justice Simon Noël	The Court will hear oral submissions on the issue of communication between special advocates in all proceedings.
January 8, 2009	Justice Eleanor Dawson	Counsel for the 4 individuals will select one counsel to make lead submission on issues with regards to *Charkaoui II*. Special advocates can make submissions as well.
January 9, 2009	Justice Simon Noël	Further dates reserved to permit additional scheduling of closed hearings for review of *Charkaoui II* disclosure, to finalize a summary and to hear counsel for the Ministers and special advocates on the issue of the reasonableness of the certificate.
January 9, 2009	Justice Eleanor Dawson	Change of date for counsel for the named individuals and special advocates to serve and file written submissions.
January 9, 2009	Justice Simon Noël	Before proceeding, counsel for the Ministers should wait for a response from the special advocates on the issue.
January 14, 2009	Justice Eleanor Dawson	Counsel are requested to make submissions on para. 83(1)(e) of IRPA.
January 16, 2009	Justice Simon Noël	Closed and public hearings scheduled for the reasonableness of the certificate.
February 17, 2009	Justice Simon Noël	When seeking an Order of this Court, counsel and special advocates shall comply with the *Federal Court Rules*.
March 4, 2009	Justice Eleanor Dawson	"It is possible that in one case, redactions premised on determinations of 'clear irrelevance' are being made by the Ministers' counsel" is an insufficient basis upon which to request a hearing.
March 27, 2009	Justice Simon Noël	If it is the intention of the parties to call expert evidence

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		during the hearings, they are required to inform the Court in writing.
April 3, 2009	Justice Simon Noël	Should counsel wish to make a request regarding disclosure of information in the holdings of CSIS, they shall comply with the *Federal Court Rules*.
April 28, 2009*	Justice Simon Noël	Mr. Boxall made a request to communicate with the special advocates. Counsel should file a motion record seeking an order.
April 29, 2009*	Justice Simon Noël	Counsel for Mr. Harkat are directed to provide the name and cv of any expert witness they intend to call during the public hearings. Both parties are to file and serve their expert reports. The Court directed counsel to file a motion record seeking to communicate with the special advocates regarding a motion regarding access to a human source file.
May 5, 2009	Justice Simon Noël	Counsel and the special advocates are directed to be prepared to discuss and argue the motion regarding the constitutionality of section 83.1(e) of IRPA.
May 20, 2009	Justice Simon Noël	Paragraphs that were previously redacted are to be inserted into Foreign Agency Waiver submissions of the special advocates.
June 16, 2009	Justice Simon Noël	Court offers the opportunity to 3 CSIS witnesses to explain their testimony and the failure to provide important information to the Court in the human source matrix.
June 17, 2009*	Justice Simon Noël	Public hearing – permission is granted for the special advocates to discuss with counsel for Mr. Harkat on the dates for the litigation plan.
July 7, 2009	Justice Simon Noël	Counsel for the Ministers to update the Court on the progress of the requests made to foreign agencies to release certain information to Mr. Harkat.
September 25, 2009*	Justice Simon Noël	Public hearing – the Court did authorize a communication between the special advocates and public counsel on the sum of the remaining conditions.
October 15, 2009	Justice Simon Noël	Counsel for the Ministers to update the information on the

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		requests forwarded to foreign agencies. Special advocates asked to finalize their requests of *Charkaoui II* disclosure. Counsel for the Ministers to respond to all of the requests made by the special advocates.
October 15, 2009	Justice Simon Noël	Reasons are issued confidentially to the Ministers, the Attorney General, counsel for the witnesses and the special advocates. The reasons are written to be made public.
January 20, 2010	Justice Simon Noël	For the duration of the public reasonableness hearing, Mr. Harkat's attendance at the Court satisfies the reporting requirement contained in para. 7 of the current terms and conditions of release.
March 30, 2010*	Justice Simon Noël	Public hearing – public counsel had opened up channels to communicate with the special advocates about a newspaper article that would refer to Mr. Al Shehre and a lawyer. After hearing arguments from the special advocates and Ministers' counsel, the Court dismissed the request.
April 7, 2010	Justice Simon Noël	Counsel for the Ministers and Mr. Harkat are being asked to update their written submissions on the constitutional question in light of the oral submissions made.

COMMUNICATIONS

Date	**Judge**	**Content**
September 24, 2008	Justice Simon Noël	The hearing lasted 8 days and 4 witnesses were heard *in camera* in support of the reasonableness of the certificate, dangerousness, and the scope of disclosure to be made to Mr. Harkat.
September 30, 2008	Justice Simon Noël	Teleconference – Two witnesses testified, and the special advocates, the Ministers' counsel and the judge discussed at length the scope of disclosure in line with the evidence presented in-camera. Two finite issues are still litigated in camera.
October 7, 2008	Justice Simon Noël	Hearing on the detention review – the Court had in camera

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		hearings that lasted eight days, and 4 witnesses were heard. They presented the case for the Ministers on the reasonableness of the certificate, the danger associated with Mr. Harkat and the scope of disclosure to be made to Mr. Harkat. The Special advocates cross-examined on the issues of the scope of disclosure to Mr. Harkat and the danger in respect to a variation of the release order. They reserved their rights to resume the cross-examination depending on further disclosure. The Court signed an order ordering the Ministers and CSIS to file all remaining records that they would have on Mr. Harkat as part of Charkaoui #2. Two witnesses were heard on that topic. There will be another set of disclosure made. Some work is being done on it now.
October 16, 2008	Justice Simon Noël	Teleconference – There has been a request to prolong some deadlines on disclosure and that was granted. The Court is expecting something later this week, and then will be in a position to deal with the matters presented.
November 3, 2008	Justice Simon Noël	Public hearing – Counsel met in chamber over lunch to discuss pictures for privacy reasons. Mr. Boxall will be addressing the topic with the witness.
December 4, 2008	Justice Simon Noël	Teleconference – Nothing has come out on the disclosure issue because it is still being worked on in camera.
December 15, 2008	Justice Simon Noël	Public hearing – Elizabeth Snow and another witness testified in camera. CSIS does the actual interception of the calls as an agent for CBSA. CBSA analysts listen to the intercepted conversations. Once the analyst realizes that a communication is subject to solicitor-client privilege, the analyst disengages. The CBSA adopts a broad definition of solicitor-client privilege communication. CSIS contacted the Northern Ontario Regional Office (NORO) directly about one conversation between Mr. Harkat and his counsel which raised urgent issues regarding the safety of persons. It was a private matter. The urgent situation ultimately resolved itself.

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		Apart from that phone call, the CBSA has not been made aware of the content or any other solicitor-client telephone call.
December 16, 2008	Justice Simon Noël	Public hearing – senior member of CSIS who has knowledge of the monitoring of the telecommunications in regard to Mr. Harkat testified. CSIS does not retain the logs of calls. No email messages were intercepted between Mr. Harkat's lawyers and any person in the Harkat's residence. If the release order was varied to prevent the interception of solicitor-client communications, CSIS as an agent of CBSA would comply with the order.
February 2, 2009	Justice Simon Noël	The request for access to support staff should be directed to SAP. If need be, the Court will deal with any corollary issues that may arise.
February 9, 2009	Justice Simon Noël	Teleconference – Public counsel will receive a Revised SIR as a result of the closed hearings. Some documents were of public nature but kept away from public disclosure. Some information was not public but authorization was granted to release from Canadian partners. Some summaries of conversations between Mr. Harkat and others were not communicated in the past. They are also working in camera on 3 other summaries because of privacy issues. They are still working on 2 judgments that are of top secret nature. They will be releasing a log of solicitor-client privilege conversations, as a result of the work of the special advocates with Ministers' counsel. The Charkaoui 2 material is in and the special advocates have begun their review of it.
February 12, 2009	Justice Simon Noël	Public hearing – A request was made by the special advocates in closed hearings about having administrative support which would help them in assuming their duties. This should be dealt in public.
February 18, 2009	Justice Simon Noël	Teleconference – the judge is reviewing the Charkaoui 2 disclosure asking himself if the exclusions are made properly

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		and based on valid reasons. Counsel are working through the disclosure issues and hope to complete it within a month or so. The judge is expected to get back to CSIS counsel with what he identifies as questionable exclusions early in March so that they can produce something for the special advocates.
February 24, 2009	Justice Simon Noël	4 summaries of conversations are kept confidential on an interim basis, but are given to Mr. Harkat and his counsel. He has 10 days to serve and file a motion asking the Court to continue treating the 4 summaries of conversation confidentially. If not, it will become part of the public amended SIR.
February 25, 2009	Justice Simon Noël	Public hearing – a closed hearing was held to discuss the disclosure to be made in relation to the security report, and to discuss the Charkaoui 2 disclosure. There was also a discussion on what this exercise was all about. They also reviewed the litigation plan. There was an ex parte hearing in the presence of CSIS counsel and a witness to review redactions of a document. A new document was produced to the Court where redactions had been taken out substantially. It was agreed that the Court would review the remaining redactions in the presence of a witness and CSIS counsel and report back to the special advocates. A closed hearing was held where the Court was asked to certify a question. There was another closed hearing on numerous requests from Mr. Copeland concerning outstanding issues in relation to the SIR, redactions or the exchange of correspondence by the special advocates and Ministers' counsel as to the redactions to be made to two top secret judgments that will be released publicly later this week. The Court is still waiting for some last moment submissions on this matter. They also discussed an update on the Charkaoui 2 disclosure. There was also another closed hearing moments before the present public hearing on a specific issue.

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February 26, 2009	Justice Simon Noël	Ex parte hearing will be held to review the redactions made to certain documents resulting from *Charkaoui II* disclosure.
March 11, 2009	Justice Simon Noël	Public hearing – Disclosure has been done, and there are thousands and thousands of documents. In these documents, there is information that does not pertain or is not relevant to Mr. Harkat. There is still an outstanding issue about 3 communications. The judge prepared a document that listed more than 67 documents in which redactions were questionable.
March 17, 2009	Justice Simon Noël	Counsel for the Ministers must reconsider redactions made and file them with the Court.
March 26, 2009	Justice Simon Noël	Counsel for the Ministers are reviewing 36 documents identified by the special advocates as documents that should be summarized for release to Mr. Harkat.
April 15, 2009	Justice Simon Noël	Public hearing – 4 days were reserved for closed hearings on the reasonableness of the certificate, but were not used. Instead, a witness for the Ministers testified to the effect that the Charkaoui 2 disclosure has been done in accordance with the order. A few documents will still be filed. There was as well a review of the redactions. A transcript of proceedings of the ex parte hearing where the special advocates were not present was remitted to the special advocates. There is an agreement that 18 documents will be summarized. The Court has received a request from the special advocates to access a human source file. The Court will hear submissions on that matter.
April 16, 2009	Justice Simon Noël	Public hearing – the special advocates are asking to access a human source file. Documents have been filed on this matter. The Ministers have responded and the Court will hear them in the afternoon. The Special advocates also made a request for further disclosure emanating from the SIR, in relations to 3 factual allegations to be communicated to counsel. As for foreign agencies, the Court is in the process of hearing a

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		witness.
April 22, 2009	Justice Simon Noël	Submissions were made in relation to a motion brought by the special advocates regarding access to a human source file. Witness cross-examined regarding CSIS's position on foreign agency information. Further disclosure to be made to Mr. Harkat.
May 13, 2009	Justice Simon Noël	Seizure of records from Mr. Harkat's home; updated on the progress of the subpoena issued to Lac Leamy Casino; draft document summarizing the evidence of the CSIS witness on the foreign agency issue was reviewed; 11 new documents filed as an update of *Charkaoui II*; Mr. Webber requested that CSIS update the Abu Zubaydah information. The Court would not issue an order granting the request but referred the Ministers to the relevant case law which sets out an obligation of utmost good faith in the context of ex parte hearings.
May 22, 2009	Justice Simon Noël	Teleconference – the Court sat in a closed hearing and dealt with different outstanding issues. A communication will be issued shortly.
May 22, 2009	Justice Simon Noël	The Court requested CSIS to review their positions regarding seeking consent from foreign agencies.
June 5, 2009	Justice Simon Noël	Senior CSIS employee will be conducting an internal inquiry into the issue of the polygraph. The Ministers have directed CSIS to seek consent from certain foreign agencies to release information to Mr. Harkat. Top secret letter of counsel for the Ministers in its redacted form is attached to the communication.
June 8, 2009	Justice Simon Noël	Teleconference – the review of the human source matrix is going on. CSIS counsel will push his client for a quick filing of that source matrix. The court has asked the investigator to look into the situation, and then, witnesses will be called in order to seek clarification and understanding. The court has made a wish in the closed hearing to have an interim report,

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		and the investigator is considering it.
June 11, 2009	Justice Simon Noël	Teleconference – the Court is reviewing the testimonies of witnesses and orders. It is preparing a binder that will become available to the special advocates and Ministers' counsel in a closed hearing, and is still waiting for some documents before finalizing the set. There will be a hearing on the 15th about the approach and procedure to follow in order to fulfill what can be done with regards to the omission of information. Then the Court will be addressing the opportunity given to the witnesses to come to the Court in a closed hearing to explain their position. The Court has reviewed a witness in particular which was heard recently and an undertaking was made to clarify dates of polygraphs. This brought the witness and CSIS counsel to realize that maybe not everything was disclosed.
June 17, 2009	Justice Simon Noël	Teleconference – the court is looking at whether or not it can rely on the testimony of two individuals. There is a third witness that dealt with an investigation report. He was brought to the Court to explain why some redactions were made to the investigative report.
June 25, 2009	Justice Simon Noël	The Court received final investigative report prepared by CSIS and has authorized counsel for the Attorney General to provide copies to the special advocates and counsel for the witnesses.
June 29, 2009	Justice Simon Noël	One witness was examined.
July 3, 2009	Justice Simon Noël	Final report resulting from the internal investigation by CSIS into the matter was filed. First and second witnesses were examined. Another witness was called to explain the polygraph result document and the circumstances surrounding the quality control of the polygraph results.
September 3, 2009	Justice Simon Noël	The special advocates have raised subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in their written submissions, and are seeking an order

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		excluding all the information provided by the human source whose polygraph results were not fully disclosed.
September 18, 2009	Justice Simon Noël	Teleconference – a letter was received from CBSA, and it is a major turn of events in relation to the conditions that Mr. Harkat is subjected to. It is a new threat assessment done by the Ministers and CSIS that will smooth things out.
September 21, 2009	Justice Simon Noël	Public hearing – there was a teleconference before the public hearing with counsel for the Ministers and Mr. Cavalluzzo. The purpose was to see to what extent the Court could disclose the new events that occurred. The situation is such that the details of the new events cannot be disclosed but will be sufficient for Mr. Harkat to understand what is happening. Counsel for the Ministers, the special advocates and the Court are working on a public document to be released. A new risk assessment has been done. The threat is believed to have been mitigated.
September 25, 2009	Justice Simon Noël	Public hearing – one witness on behalf of the Ministers testified in closed hearing on the new threat assessment done which was filed with the court. It was a consensual agreement to come to the public summary that was forwarded to public counsel.
November 17, 2009	Justice Simon Noël	To insure that the closed hearing of 2 weeks be efficient and productive for the purpose of all counsel, counsel are to identify the documents on which they intend to rely and forward them to the registrar.
November 18, 2009	Justice Simon Noël	All counsel to identify top secret documents pertinent to the reasonableness of the certificate which has not been filed as an exhibit during the past closed hearings.
December 11, 2009	Justice Simon Noël	Information transmitted to public counsel: no update on Abu Zubaydah; Loto Québec information; the Court will not identify specifically which information originates from a foreign agency; no original records of any intercepted communications prior to 2002; not possible to distinguish

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		between evidence based on intercepts versus human sources without endangering national security. Documents are being disclosed to Mr. Harkat.
January 19, 2010	Justice Simon Noël	Public hearing - Dahhak is mentioned in the classified documentation. The special advocates strongly wanted this information to be made public. A summary was prepared.
January 20, 2010	Justice Simon Noël	Public hearing – The February 2009 supplementary SIR contains further information that was not initially disclosed and was the working product of the special advocates. There was discussion on it, the result being for example footnote number 1 (aliases).
January 21, 2010	Justice Simon Noël	Public hearing – counsel for the Ministers and the special advocates met with the judge to discuss closed hearing material and the Dahhak situation. There is still some work to be done.
March 3, 2010	Justice Simon Noël	The purpose of the hearing was to address various disclosure requests and other matters raised by the Court and the special advocates.
March 4, 2010	Justice Simon Noël	Teleconference – There is not more information on the Order dated March 3, 2010 on Wazir. Some written material was exchanged between Mr. Copeland and Ms. Foster, and the substance of it is in the order. There is some discussion amongst the special advocates, Ministers' counsel and the court on M11. They are looking at getting more information out on Dahak. Information is being dealt with in the closed hearing on Dhahak. A response was given by the Ministers with regards to the Marzouk/Adnan issue raised by public counsel. Nothing came out of it and nothing further can be done.
March 30, 2010	Justice Simon Noël	Public hearing – there are still ongoing issues. The special advocates and Ministers' counsel are still reviewing the documents on Dahhak. The special advocates, at the request of public counsel, asked the Court to grant leave to talk with

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		public counsel. It was refused, as it is a public matter.
May 5, 2010	Justice Simon Noël	Abu Zubaydah and Hadje Wazir issues were discussed and will be addressed in final closed submissions; Dahak issue was discussed; correspondence from the special advocates and Ministers' counsel were filed; leave was not granted to Mr. Copeland to file public documents; emails from Mr. Boxall regarding emails received from Douglas Baum were discussed.
May 12, 2010	Justice Simon Noël	Content of an email message received by Mr. Séguin from Mr. James C. Luh is transmitted to public counsel.
September 1, 2010	Justice Noël	Oral Communication – The Court had advised all parties that it would accept further information up to August 31, 2010. The Ministers advised the Court that they had no further information to provide.

SUMMARIES

Date	**Judge**	**Content**
April 4, 2008	Justice Edmond Blanchard	Attached to Order dated April 4, 2008. Summary of information in relation to the appointment of special advocates.
May 7, 2009*	Justice Simon Noël	Public hearing – a senior member of CSIS who had full access to a human source file testified. The request of the special advocates was granted as a whole to communicate with public counsel about 4 matters. They did discuss making the foreign agencies information public. The gist of it was given to the public counsel at the beginning of the hearing. There is a joint effort by the special advocates and the Ministers on the disclosure of Charkaoui 2.
May 13, 2009	Justice Simon Noël	Summary of the testimony of a CSIS witness given April 14 & 17, 2009: third-party rule.
June 2, 2009	Justice Simon Noël	Public hearing – The Ministers have filed a risk assessment with the Court. They have also complied with the order of

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		the Court whereby the human source files have been filed. The Court will be sitting in a closed hearing to discuss the procedure to follow about the concerns that have been addressed in the reasons issued. The Court's reading of Judge Dawson on the danger findings (top secret) allows the Court to tell public counsel that the information that is at play as a follow-up to the communication of the Ministers (on the polygraph issue) was not used by Judge Dawson in any way in her reasons. She used other evidence to come to her conclusion.
November 17, 2009	Justice Simon Noël	Public summary of in camera hearing in the Harkat security certificate proceedings: outstanding disclosure issues and other matters discussed. Some responses from foreign agencies provided to the Court. 12 letters from the special advocates were reviewed. Court heard submissions from all counsel on the request of the special advocates to meet with Mr. Harkat's counsel.
November 30, 2009	Justice Simon Noël	Amended public summary of closed hearings: Witness examined. Number of undertakings and requests taken by the witness will be reviewed.
December 3, 2009	Justice Simon Noël	Public Summary of closed hearings: number of issues discussed. Witness examined on the allegations found in the classified SIR and the reliability of some of the evidence, and reliability and credibility of the evidence obtained from human sources.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-08	
STYLE OF CAUSE:	In the matter of a Certificate pursuant to Section 77(1) of the *Immigration and Refugee Protection Act* and In the matter of Mohamed Harkat	
PLACE OF HEARING:	Ottawa, Ontario	
DATE OF HEARING:	Public hearings:	November 3, 4, 5, 6, 2008 January 18, 19, 20, 21, 22, 2010 January 25, 26, 27, 28, 29, 2010 February 1, 2, 3, 4, 5, 2010 February 8, 9, 10, 11, 12, 2010 March 8, 9, 10, 11, 2010 March 30, 31, 2010 May 31, 2010 June 1, 2, 2010
	Closed hearings:	September 10, 11, 12, 15, 16, 17, 18, 19, 2008 November 23, 24, 25, 26, 2009 December 1, 2, 2009 March 30, 2010 May 26, 27, 2010
REASONS FOR JUDGMENT:	SIMON NOËL	
DATED:	December 9, 2010	

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