Federal Court of Appeal  Cour d'appel fédérale

Date: 20120425

Docket: A-76-11

Citation: 2012 FCA 122

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

MOHAMED HARKAT

Appellant

and

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

Respondents

Heard at Ottawa, Ontario, on February 21, 22 and 23, 2012.

Judgment delivered at Ottawa, Ontario, on April 25, 2012.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] For ease of consultation and convenience of the reader, I insert the following table of contents.

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Issues on Appeal

[2] This is an appeal by Mohammed Harkat (appellant) against four decisions of Noël J. of the Federal Court sitting as a designated judge (judge) under the *Immigration and Refugee Protection Act* SC 2001, c 27 (Act). The four decisions (*Harkat (Re)*, 2009 FC 204; *Harkat (Re)*, 2010 FC 1241; *Harkat (Re)*, 2010 FC 1242; and *Harkat (Re)*, 2010 FC 1243) relate to the constitutionality of the new process in place under the Act (*Constitutionality Decision*), the reasonableness of the security certificate, (*Reasonableness Decision*), the applicability of the police informer privilege to Canadian Security Intelligence Service (CSIS) human sources (*Privilege Decision*) and a motion by the appellant to stay the proceedings on an account of an abuse of process (*Abuse of Process Decision*).

[3] In *Harkat (Re)*, 2011 FC 75 the judge certified the following two questions of general importance under section 82.3 of the Act:

1. 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 Act breach section 7 of the *Charter of Rights and Freedoms* by denying the person concerned the right to a fair hearing? If so, are the provisions justified under section 1?

2. Do human sources benefit from a class-based privilege? If so, what is the scope of this privilege and was the formulation of a "need to know" exception for the special advocates in *Harkat (Re)*, 2009 FC 204, a correct exception to this privilege?

[4] The certification of a question triggers a wide-ranging appeal. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 25, Bastarache J. wrote that:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

[5] This was reiterated by L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 12:

> The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a "question of general importance" has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

[6] Since then, this Court has on several occasions considered questions that were not among those certified (i.e. *Canadian Council for Refugees v. Canada*, [2009] 3 F.C.R. 136 at paragraph 98 (F.C.A.); *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at paragraph 10; and *Richter v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 73 at paragraphs 9 and 10).

[7] As is his right, the appellant has used the certified questions as a springboard from which to advance other grounds of appeal.

[8] The appellant has raised the following issues which I have reproduced almost verbatim from his memorandum of fact and law:

1. Did the refusal of the Court to permit the special advocates the right to interview and ultimately cross-examine the human sources *in camera* amount to a legal error?

2. Did the Court err in law where it drew pivotal factual conclusions on aged historical matters where the sum total of the information at the disposal of the Court was derived from inconsistent open source materials? Specifically, by way of example, it is asserted that the Court's factual finding with respect to Ibn Khattab was an unreasonable and unsafe one and accordingly not a conclusion available in law to the Court on the record before it?

3. Did the Court err in its definition of terrorism? In particular, to be included within the definition of terrorism is it required that material support include any support or assistance or does it have to be material in the sense that it is done knowingly to aid or abet terrorist activity done with a common purpose?

4. Did the Court err in finding that paragraph 34(1)(*f*) of the Act does not have any temporal requirement? In particular, can a person be found to be a member of a terrorist organization by links or assistance to a person who is not at the time nor at any prior time a terrorist if that person or organization subsequently becomes engaged in terrorism?

5. Does paragraph 34(1)(*d*) of the Act require a finding of a present danger to the Security of Canada including a current serious identifiable threat?

6. Did the Court err in finding that the policy of destruction of the original materials did not constitute a breach of CSIS' duty to disclose?

7. Did the Court err in relying upon the information contained in alleged summarized conversations without first requiring the attendance and subsequent cross-examination of the parties involved in the original recording and summarization of such information?

8. Did the Court err in its formulation of the test for the exclusion of evidence pursuant to subsection 24(1) of the *Charter*, and if so, did the Court err in not excluding the summarized conversations?

9. Did the Court err in finding that the cumulative effect of *Charter* breaches, a breach of candour, and the passage of time did not warrant a stay of proceedings pursuant to subsection 24(1) of the *Charter*?

10. Should the duty of utmost good faith and candour defined in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 be enlarged or interpreted to include an obligation on the part of the Ministers and the Service to update evidence and/or information as the proceedings evolve?

[9] It is not necessary to consider all questions posed by the appellant to dispose of the appeal. I propose to address the following issues:

1. The standard of review.

2. The constitutionality of the system in place, i.e whether the Act violates the appellant's right to life, liberty and security of the person under section 7 of the *Charter*?

3. If so, whether the breach of section 7 can be justified under section 1 of the *Charter*?

4. Whether CSIS' human sources benefit from the police informer class-based privilege?

5. Whether the appellant's section 7 right to know and meet the case against him has been violated by the destruction of the original evidence?

6. If so, what is the appropriate and just remedy under subsection 24(1) of the *Charter*?

7. Whether the appellant was the victim of an abuse of process and is entitled to a stay of proceedings?

8. Whether the judge erred in concluding that the security certificate is reasonable?

[10] I reproduce the legislative provisions relevant to the determination of this appeal.

Immigration and Refugee Protection Act, SC 2001, c. 27	**Loi sur l'immigration et la protection des réfugiés, LC 2001, ch. 27**
Rules of interpretation	Interprétation
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33.** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Marginal note: Security	Note marginale : Sécurité
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

(*b*) engaging in or instigating the subversion by force of any government;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

(*c*) engaging in terrorism;

c) se livrer au terrorisme;

(*d*) being a danger to the security of Canada;

d) constituer un danger pour la sécurité du Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).

Marginal note: Exception

Note marginale : Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

…

[…]

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

77. (2) Le ministre dépose en même temps que le certificat les

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.	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 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;	*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 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;

(*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;

…

(*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;

(*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;

…

Restrictions on communications — special advocate

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,

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) 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) 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) 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 aux communications — avocat spécial

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

communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

…

Disclosure and communication prohibited

85.5 With the exception of communications authorized by a judge, no person shall

…

(*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.

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.

[…]

Divulgations et communications interdites

85.5 Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :

[…]

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.

Canada Evidence Act, RSC 1985, c. C-5

Objection to disclosure of information

37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Loi sur la preuve au Canada, LRC 1985, ch. C-5

Opposition à divulgation

37. (1) Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces renseignements ne

devraient pas être divulgués.

…

[…]

Disclosure order

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

Divulgation modifiée

38.06 (2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

Canadian Security Intelligence Service Act, RSC 1985, c. C-23

Loi sur le service canadien du renseignement de sécurité, LRC 1985, ch. C-23

Collection, analysis and retention

12. The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of

Informations et renseignements

12. Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des

Canada and, in relation thereto, shall report to and advise the Government of Canada.	menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.
Charter of Rights and Freedoms	**Charte canadienne des droits et libertés**
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.
…	[…]
24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[Emphasis added.]

Facts and procedural history giving rise to the appeal

[11] The appellant arrived in Canada on October 6, 1995, on a false Saudi Arabian passport and a legitimate Algerian one, claiming refugee status.

[12] On February 24, 1998, the appellant was granted refugee status by the Immigration and Refugee Board. He has never obtained permanent resident status in Canada.

[13] On December 10, 2002, the Solicitor General of Canada and the Minister of Citizenship and Immigration (Ministers) issued a security certificate against the appellant. The security certificate alleged that the appellant was inadmissible to Canada on security grounds under what was then section 33 (now 34) of the Act.

[14] In March 2005, Dawson J., then of the Federal Court, evaluated the reasonableness of the appellant's security certificate. Relying on this Court's decision in *Charkaoui (Re)*, 2004 FCA 421, she rejected the appellant's constitutional arguments under section 7 of the *Charter*. Further, Dawson J. found that there were reasonable grounds to believe that the appellant had engaged in terrorism. This judgment was reported as *Harkat (Re)*, 2005 FC 393.

[15] The appellant then appealed Dawson J.'s judgment to this court. In *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 285, Chief Justice Richard dismissed the appellant's appeal. In turn, the appellant sought, and was granted, leave to appeal to the Supreme Court of Canada. Along with Messrs. Charkaoui and Almrei, the appellant challenged the constitutionality of the security certificate regime. In reasons reported as *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 [*Charkaoui* #1] Chief Justice McLachlin, writing for a unanimous Supreme Court of Canada, declared that the Act's procedure violated section 7 of the *Charter* by limiting the named person's right to know and answer the case against him. She suspended the declaration for one year and invited Parliament to act. At paragraph 80 of her reasons, Chief Justice McLachlin highlighted the United Kingdom special advocate

system as one that Canada could adopt that would be less minimally impairing of the named person's rights.

[16] In response, Parliament enacted Bill C-3 *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* which came into force on February 22, 2008. Bill C-3 significantly modified the security certificate regime. It imported into Canadian law a special advocate system for security certificate proceedings.

[17] On June 26, 2008, in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 [*Charkaoui* #2] the Supreme Court of Canada spoke again, this time in relation to procedural issues. Under policy OPS-217, CSIS destroyed its original notes of gathered intelligence such as interviews and intercepts. Lebel and Fish JJ., writing for a unanimous court, found that the destruction of these notes breached Mr. Charkaoui's right to know the case against him under section 7 of the *Charter*. Nevertheless, the Court rejected Mr. Charkaoui's application for a stay because it was premature. The remedial aspect was left to the designated judge.

[18] *Charkaoui* #2 entitled the appellant to additional disclosure from CSIS. On September 24, 2008, the judge at paragraph 23 of his *Reasonableness Decision* ordered the Ministers to produce "all information and intelligence related to Mohammed Harkat". CSIS then disclosed thousands of files to the Ministers, who in turn disclosed the records to the judge. The special advocates reviewed the records and additional exhibits were filed. As a result of the closed hearings, the Ministers

disclosed additional information to the appellant and his public counsel. Like in *Charkaoui* #2, however, the original tapes and notes upon which CSIS' file summaries were based had been destroyed under policy OPS-217.

[19] In the fall of 2008, the judge held closed hearings on the *Charkaoui* #2 disclosure. During these hearings the special advocates requested access to the CSIS employee and human source files of one of the Ministers' witnesses. In the *Privilege Decision* the judge rejected this request and extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception.

[20] On May 12, 2009, the Canadian Boarder Services Agency (CBSA) sent sixteen law enforcement officers and three canine units to search the appellant's residence. When the judge learned about the search, he immediately cancelled CBSA's authorization and subjected any further searches to his prior authorization. This decision was reported as *Harkat (Re)*, 2009 FC 659.

[21] On May 26, 2009, the Ministers told the judge that one of their human sources had failed a polygraph test. In *Harkat (Re)*, 2009 FC 1050, the judge found that the Ministers had breached their duty to disclose this to him and to the special advocates. Consequently, he ordered the Ministers to completely disclose the human source file in question. Unsatisfied with this remedy, the special advocates sought to exclude all evidence from the human source in question. The judge denied this remedy. He found that CSIS' breach of the duty to disclose was done without intent to filter or conceal the information. Nevertheless, he ordered that another human source file be made available

to the Court and the special advocates to restore confidence in the proceedings. The two human source files confirmed the evidence filed by the Ministers.

[22] On December 22, 2008, the judge rejected a motion by the appellant's special advocates to identify, interview and cross-examine covert human intelligence sources on the basis that they were protected by a common law class privilege (*Harkat (Re)*, 2009 FC 204, the *Privilege Decision*). A year later, on December 9, 2010, the judge upheld the certificate's reasonableness (*Harkat (Re)* 2010 FC 1241, the *Reasonableness Decision*), confirmed the security certificate regime's constitutionality (*Harkat (Re)*, 2010 FC 1242, the *Constitutionality Decision*), and rejected a motion for either a stay of proceedings or the exclusion of some evidence because of an alleged abuse of process (*Harkat (Re)*, 2010 FC 1243, the *Abuse of Process Decision*).

[23] Some 34 months passed between the enactment of Bill C-3 and the issuance of the judgments under appeal. The judge observed that the amount of disclosure, the procedural matters described above, and scheduling difficulties were responsible for the delay.

Summary of the judge's decisions

[24] As stated, the record contains four sets of reasons written by the judge: the *Privilege Decision*, the *Reasonableness Decision*, the *Constitutionality Decision*, and the *Abuse of Process Decision*. I summarize their contents as follows.

A. The *Privilege Decision*

[25] A number of human sources provided CSIS with information regarding the appellant's activities. To test their credibility, the special advocates sought a court order compelling the Ministers to produce CSIS' human sources for cross-examination in closed proceedings. The judge denied this request by extending police informer privilege to CSIS human sources on a class-wide basis. At the time of the *Privilege Decision*, the judge had yet to ascribe reliability or weight to the information gained from human sources.

[26] The judge concluded that informer privilege has a two-fold objective of protecting informers and encouraging others to come forward with useful information. However, the privilege is subject to an "innocence at stake" exception, whereby it can be set aside if it jeopardizes an accused's right to raise a reasonable doubt regarding the case against him/her.

[27] The judge recognized that, since CSIS is a civilian intelligence agency and certificate proceedings are not criminal proceedings in the traditional sense, informer privilege was not per se applicable. Nevertheless, he held that the policy justifications underlying informer privilege applied with equal or greater force to CSIS intelligence sources. He highlighted the fact that recruiting sources would be difficult if confidentiality could not be maintained and noted that, unlike most criminal investigations, intelligence investigations may extend for long periods of time. Ultimately, he concluded that a class-privilege should protect the relationship between CSIS and its human sources. However, he held that this novel privilege was subject to a "need to know" exception that is

engaged if knowing the human source's identity is necessary to prevent a serious breach of procedural fairness that would impugn the administration of justice.

[28] Having found the privilege to apply on a class-wide basis, the judge further concluded that neither the Act nor *Charkaoui* #2 altered it. Thus, the privilege protected the identity of the human sources in the instant case. Finally, he held that the "need to know" exception did not apply here.

B. The *Reasonableness Decision*

[29] To decide whether the security certificate was reasonable, the judge first had to define the following key terms in the Act:

- "terrorism" (paragraph 34(1)(*c*) of the Act);
- "danger to the security of Canada" (paragraph 34(1)(*d*) of the Act); and
- "member of an organization" (paragraph 34(1)(*f*) of the Act).

[30] The Act does not define "terrorism". The judge relied on the definition chosen by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraphs 97 and 98:

> In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a

> population, or to compel a government or an international organization to do or to abstain from doing any act".

[31] The judge noted that the definition was not exhaustive and could be adapted with time. The Supreme Court's definition also includes materially supporting terrorist activities, such as providing funds, false documents, recruitment and shelter, even though such acts are not directly linked to violence. Material support, said the judge at paragraph 81, "is the *sine qua non* of international terrorism and must be viewed as a form of participation in terrorism".

[32] The next phrase that needed definition was "danger to the security of Canada". Again, the judge relied on *Suresh* and adopted the definition set out there at paragraph 90:

> These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[33] He further held that paragraph 34(1)(*d*) of the Act had to be read together with section 33. Consequently, proof of danger to the security of Canada may include actions that have occurred, are occurring, or will occur. In arriving at this result, the judge rejected Mosley J.'s opinion in *Almrei (Re)*, 2009 FC 1263 at paragraph 504 that paragraph 34(1)(*d*) required actual present danger. Such an interpretation, he reasoned, was inconsistent with section 33. Relying on *Suresh*, the judge recalled that "danger to the security of Canada" must benefit from a large and liberal interpretation.

Further, the concept is highly factual and could be related to distant events that may harm Canadian security.

[34] Membership in a terrorist organization is difficult to define since terrorist organizations do not issue membership cards. Relying on *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paragraph 27, the judge found that the definition of "member" in national security cases must benefit from a broad interpretation.

[35] The judge then turned his attention to the definition of "organization". This term too demands a broad reading since terrorist organizations are loosely structured and extremely secretive. Paragraph 34(1)(*f*) of the Act does not require a temporal nexus between membership in the organization and the period during which the organization engaged in terrorist activity: *Gebreab v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FCA 274.

[36] The judge found that the Ministers proved the following facts on a balance of probabilities:

- Osama Bin Laden and Al-Qaeda have supplied money and resources to the Chechen terrorist cause through Ibn Khattab and the Basayev group.

- The Basayev and Khattab groups were not part of the Al-Qaeda core, but did belong to the broader Bin Laden Network.

- The appellant operated a guesthouse for Ibn Khattab for at least 15 months. Consequently, he was an active member of a group involved in Chechen terrorism.

- The appellant crossed the Afghan border during his stay in Pakistan.

- The appellant had links to Al Gamaa Al Islamiya (AGAI), an Egyptian Islamic extremist group.

- The appellant used "sleeper agent" methods in Canada. He concealed aliases he used in Pakistan and used false documents and anti-surveillance techniques.

- The appellant assisted Abu Messab Al Shehre and Mohammed Aissa Triki, two Islamist extremists, in Canada.

- The appellant, with the assistance of Abu Zubaydah, provided financial assistance to Al Shehre by paying his legal fees.

- The appellant maintained contacts with Islamist extremists in Canada, such as Ahmed Said Khadr and Abu Zubaydah.

- There are reasonable grounds to believe that the appellant belonged to and supported an entity that is part of the Bin Laden Network prior to and after having set foot in Canada.

- Although it has diminished over time, the appellant still poses a danger to Canada.

[37] Based on these factual findings, the judge upheld the certificate as reasonable.

C. The *Constitutionality Decision*

[38] The judge reviewed and summarized the principles underlying section 7 of the *Charter*. At paragraph 97 he framed the issues as follows:

- Were the liberty and security rights of Mr. Harkat violated by the Act?
- In the affirmative, are the protections instituted by the new Act 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?

[39] The judge concluded that, like the old security certificate regime, the revised security certificate regime under the Act also engaged the appellant's life, liberty, and security of the person rights guaranteed under section 7 of the *Charter*. I agree. Further, the certificate process may lead to irreparable harm flowing from the stigma of terrorism allegations and from removal to a country where the named person's life and freedom could be affected.

[40] Having established that the appellant's section 7 rights were engaged, the judge then discussed the principles of fundamental justice. In his view, applying section 7 requires a contextual approach. Invoking the decision of Chief Justice McLachlin in *Charkaoui* #1 at paragraphs 1 and 58, he reiterated that protecting citizens was one of the most fundamental tasks of the state. National security information should be kept confidential: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 50. The challenge, he reasoned, is finding a substitute for complete disclosure that still respects the named person's constitutional rights.

[41] The judge determined that the revised Act meets this challenge. The judge recalled that the principles of fundamental justice include (1) the right to a hearing (2) presided by an independent and impartial magistrate (3) who decides on the facts and the law. The judge found that the revised Act met the first and second requirements. In fact, subsection 83(1) of the revised Act enlarges the designated judge's powers to ensure a fair process.

[42] The prior version of the Act failed the third requirement since it did not disclose sufficient information to the named person to inform him of the case against him. In the judge's view, the revised Act did not suffer from this problem. It fulfills the third requirement because:

- Summaries of information are now provided to the named person throughout the proceedings pursuant to subsection 77(2) and paragraph 83(1)(*g*) of the Act. They provide summaries of top secret information and more than mere allegations. They are

drafted in such a way as to reasonably inform the named person of the case to meet without damaging national security.

- Paragraph 85.1(2)(*a*) obliges the special advocate to challenge any Ministerial claim that disclosing information would injure national security or endanger the safety of any person.

- Paragraphs 83(1)(*e*) and 85.1(2)(*a*) permit both the Minister and the special advocates to make submissions before the designated judge on the issue of information disclosure.

[43] The judge determined that the appellant understood the case against him. He concluded that the new Act provided adequate protection to the named person, considering the new disclosure regime together with the active role of the special advocates and therefore safeguarded the principles of fundamental justice.

[44] Despite its differences with the *Canada Evidence Act*, RSC 1985, c. C-5, (CEA), the judge found the revised Act to be constitutional. The appellant argued before the judge that paragraphs 83(1)(*c*) to 83(1)(*e*) of the Act were unconstitutional because they lacked the public interest balancing provision found in 38.06(2) of the CEA. The judge rejected this argument. He distinguished the CEA from the Act because the Act provides for special advocates whereas the CEA does not. Parliament chose not to provide for a balancing of interests in the Act when the

information would be injurious to national security. The Act, however, is still constitutional, because it provides sufficient information to the named person to meet the case against him.

[45] The appellant's next argument was that restricting the special advocates' ability to communicate with him was unconstitutional. The judge highlighted Parliament's concern for inadvertent disclosure. To alleviate this danger, after they have seen the confidential information, Parliament only allows the special advocates to communicate with the named person with judicial authorization. In the instant case, the judge pointed out that most communication requests were granted and only an exceptional few were denied. Nor did such requests impinge on the appellant's solicitor-client privilege as none of the requested communication was covered by that privilege.

[46] The appellant argued that a designated judge's ability under paragraph 83(l)(*i*) of the Act to base his decision on evidence not disclosed to the named person was unconstitutional. The judge rejected this argument as theoretical because of his finding that the appellant knew all of the allegations against him.

[47] Although the judge found no breach of section 7 of the *Charter*, he still considered whether such a breach would be justified under section 1. He found that it would be.

D. The *Abuse of Process Decision*

[48] In this set of reasons, the judge evaluated the appellant's claim that his rights under section 7 of the *Charter* were breached and that the proceedings against him should be stayed and that the summaries tendered by CSIS be excluded under subsection 24(1) of the *Charter*.

[49] The judge noted that in *R. v. Bjelland*, 2009 SCC 38 the Supreme Court set out the following test for the exclusion of evidence under subsection 24(1) of the *Charter*:

- the prejudice suffered must affect trial fairness; or
- admitting the evidence must compromise the justice system's integrity; and
- a less intrusive remedy cannot be fashioned to safeguard fairness or integrity.

He recognized that, even if a violation of s. 7 is proven on a balance of probabilities, a stay is available only as a remedy of last resort and in the clearest of cases. This is equally true even when there is no *Charter* breach.

[50] The judge outlined the conversation summaries that the appellant sought to exclude. Under policy OPS-217, CSIS destroyed the original tapes, transcripts and notes of these conversations once analyzed and put in reports. A summary of the CSIS reports is what was ultimately disclosed to the appellant and his public counsel. Based on *R. v. La*, [1997] 2 S.C.R. 680 the judge held that there was no absolute right to original documents and, if relevant documents are destroyed, a proper explanation must be given. The original materials were summarized as part of confidential reports

which were in turn summarized and then disclosed to the appellant. These summaries allowed the appellant to fully know the case against him. Further, the destruction of the originals was not dishonest.

[51] The judge questioned whether any prejudice existed and held that, even if it did, it was not perpetuated or aggravated by continuing the proceedings. If anything, he reasoned, supplementary disclosure has resulted in additional relief for the appellant. He held that remedies such as the *Charkaoui* #2 disclosures had already been issued. Ultimately, he held the destruction of the originals did not constitute a breach of the *Charter*. Consequently, he declined to exclude the summaries.

[52] The judge was of the view that the appellant received a significant amount of disclosure and that the special advocates had adequately represented his rights. The remedy for the destruction of the originals was the provision of the summaries. In other words, the judge held that the *Charkaoui* #2 disclosure and special advocate involvement was sufficient to protect the appellant's section 7 rights.

[53] The appellant argued that the cumulative effect of CSIS' and the Ministers' behaviour led to an abuse of process. The judge rejected this submission. He believed CSIS' duty of candour was fulfilled by providing full disclosure. He held that the time the appellant spent in custody was not sufficient to warrant a stay due to the great number of lawyers involved, the disclosure process, number of witnesses and numerous Supreme Court rulings (which could not be used to support an

abuse of process). Further, the delay did not affect his ability to know the case against him. While solicitor client privileged communications were intercepted, they were never listened to. Although the CBSA unreasonably searched the appellant's residence, a subsequent order ensured that all items seized were returned. Finally, the judge held that the human source and polygraph issues were fully remedied as the special advocates were given access to the human source files. He rejected the "cumulative effect" theory on the basis that the court has acted expeditiously to protect the appellant's rights and there was strong public interest in allowing the case to go forward.

Issues

[54] It is worth reiterating the issues on appeal. Of the numerous questions posed by the appellant, I propose to answer only the following:

1. What is the standard of review?

2. The constitutionality of the system in place, i.e whether the Act violates the appellant's right to life, liberty and security of the person under section 7 of the *Charter*?

3. If so, whether the breach of section 7 can be justified under section 1 of the *Charter*?

4. Whether CSIS' human sources benefit from the police informer class-based privilege?

5. Whether the appellant's section 7 right to know and meet the case against him has been violated by the destruction of the original evidence?

6. If so, what is the appropriate and just remedy under subsection 24(1) of the *Charter*?

7. Whether the appellant was the victim of an abuse of process and is entitled to a stay of proceedings?

8. Whether the judge erred in concluding that the security certificate is reasonable?

The standard of review

[55] On the merits of the certificate, the standard of review is set in section 78 of the Act as reasonableness. However, at issue here are only questions of law such as the definitions of various concepts, the constitutionality of the Act, and what the appropriate remedy is. Questions of law are reviewed on a standard of correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 36.

Some key elements relevant to the constitutionality of the current scheme under the Act

[56] In order to better understand the constitutional arguments raised by the appellant, it is useful to briefly highlight some of the key elements of the system now in place under the Act.

[57] The central feature of the new system is the special advocates. The judge also plays a significant and key role in ensuring and maintaining the fairness of a process which, by necessity, derogates in part from the traditional adversarial process prevailing across Canada. The judge's role is a difficult and very demanding one.

[58] The process begins with the Minister filing with the Court all the information and evidence on which the security certificate is based as well as a summary of information that enables the person named in the certificate to be reasonably informed of the case made by the Minister. However, the summary does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person. The judge must then ensure that a named person such as the appellant will receive sufficient information to know and meet the case against him, subject always to national security concerns. If the Minister's initial claim to confidentiality is overbroad, it will be challenged by the special advocates. Section 83 of the Act imposes on the judge the duty to ensure the confidentiality of any information or 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. This obligation on the judge extends to all information or other evidence that is tendered or withdrawn by the Minister.

[59] As a result of the above restrictions on disclosure, some portions of the hearings must be held in the absence of the named person and his counsel, thereby limiting that person's right and ability to meet the case against him. To counter this limitation, the judge shall appoint, on request, a person to act as special advocate in the proceedings unless the appointment would result in an

unreasonable delay of the proceedings, place the person in a conflict of interest or the person already knows information that cannot be disclosed without injuring national security or endangering the safety of any person and there is a risk of inadvertent disclosure.

[60] The role and powers of special advocates are governed by sections 85.1 and 85.2 of the Act. Broadly stated, their role is to protect the interests of a named person in proceedings such as those the appellant is facing when information or evidence is heard in closed hearings, i.e. in his absence and the absence of his counsel.

[61] Subsection 85.1(2) confers on the special advocates the responsibility to challenge the Minister's claim that disclosure of information or evidence would be injurious to national security or endanger the safety of any person.

[62] In addition, the special advocates bear the responsibility of testing the information or evidence provided by the Minister in closed hearings by challenging its relevancy, reliability, sufficiency and the weight to be given to it: *ibidem*.

[63] In order to allow the special advocates to assume their responsibilities, section 85.4 obliges the Minister to give them a copy of all information and other evidence that is provided to the judge but not disclosed to the named person and his counsel. However, this section does not entitle the special advocates access to privileged information: see *Almrei (Re)*, 2009 FC 314, at paragraph 31 (F.C.).

[64] Section 85.2 grants the special advocates the power to participate in the closed proceedings and cross-examine witnesses who testify therein. They can make oral and written submissions with respect to information or evidence provided by the Minister but not disclosed to the named person or his counsel. Finally, the judge can authorize the special advocates to exercise any other powers that are necessary to protect the interests of the named person.

[65] While the special advocates may request that some witnesses be called for examination and cross-examination in closed proceedings, there are some legal and practical limits to this possibility. For example, it is practically impossible to compel the appearance of a member of a foreign agency which provided the information or evidence sought to be challenged. As we shall see later, access to the identity of a human source and the possibility of cross-examining that source remains a contentious issue for the special advocates. The named person and his counsel are not entitled to obtain any information or evidence that would endanger the safety of any person. His right to disclosure and cross-examination in this respect is exercised by his special advocates.

[66] Prior to receiving a copy of the information that touches on national security, the special advocates can communicate with any person, including the named person and his counsel. However, once they have received this confidential information, subsection 85.4(2) forbids them from communicating with another person about the proceedings without the judge's authorization. The prohibition on communication exists for the duration of the proceedings though the special advocate remains permanently bound to protect the secrecy of the information. In granting an authorization to communicate, the judge may attach any conditions that he considers appropriate.

[67] Where an authorization to communicate with another person is granted, subsection 85.4(3) empowers the judge to prohibit that person from communicating with anyone else about the proceeding while it is ongoing or to impose conditions with respect to such communication during that period.

[68] This brief review now brings me to an analysis of the judge's decisions and the parties' contentions.

Analysis of the judge's decisions and the parties' contentions

[69] It is appropriate to begin the analysis of the judge's decisions with the issue of the constitutionality of the system in place. It strikes at the core of the legality and legitimacy of the security certificate process. It also subsumes and calls for an analysis of most of the crucial components of that process. Furthermore, there is no need to address the other grounds of appeal if the existing process is found to be unconstitutional.

A. The constitutionality of the current system

[70] The appellant attacks various provisions of the Act on the basis that they violate his rights to life, liberty and security of the person and are not in accordance with the principles of fundamental justice. The section 7 test has been established as follows: 1) are a claimant's life, liberty or security of the person's interests engaged? and 2) if so, are these deprivations in accordance with the

principles of fundamental justice?: see *Charkaoui* #1, at paragraph 12. The judge concluded that the new security certificate regime under the Act engaged the appellant's rights guaranteed under section 7 of the *Charter*. A person named in a security certificate may be detained or released under strict conditions. In addition, as the Supreme Court said in *Charkaoui* #1, at paragraph 14, the security of the named person is engaged. A certificate process may bring with it the accusation that one is a terrorist which could cause irreparable harm to the individual and lead to a removal from the country. These findings apply in the present instance.

[71] The principles of fundamental justice have been discussed by the Supreme Court. In *Charkaoui* #1, the Court "recognized that national security considerations can limit the extent of disclosure of information to the affected individual" and that protection of investigative techniques and police sources as well as the safeguard of confidential public security documents and the maintenance of foreign confidences are "societal concerns [which] formed part of the relevant context for determining the scope of the applicable principles of fundamental justice". Nonetheless, the fundamental principles of justice command that the affected person be given a fair hearing. In other words, the affected person must not only be informed of the case to meet, but also be given an opportunity to meet that case.

[72] Below, I examine whether the various elements of the revised Act allow the appellant to know and meet the case against him and thus whether they are in accordance with the principles of fundamental justice.

a) Legislative and judicial failure to comply with the section 7 fairness test

[73] The appellant's first challenge to the constitutionality of the process is directed at subsection 77(2) and paragraph 83(1)(*e*) of the Act that I reproduce here for convenience.

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.
…	[…]
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 :
…	[…]
(*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	*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

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;	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;

[Emphasis added.]

[74] The argument goes as follows. Parliament failed to implement the fairness threshold established by the Supreme Court in the *Charkaoui* #1 decision by simply requiring that the named person be reasonably informed of the case made by the Minister in the proceeding while the Supreme Court ruled that he be sufficiently informed of the case put against him so as to be able to meet that case (emphasis added).

[75] At first blush, the argument is attractive. However, it does not withstand closer scrutiny. The requirement to be reasonably informed begs the question: how and when is the named person reasonably informed? The answer is found in the French version of subsection 77(2) and paragraph 83(1)(*e*).

[76] As a matter of fact, the French version of the texts uses the very words "suffisamment informé" (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause (emphasis added). The French version is in this respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of section 7 of the *Charter*. Both texts, English and French, have equal force (see section 18 of the *Charter*) and, for the reasons stated above, the French version is to be preferred.

[77] Moreover, I agree with counsel for the respondents that the concept of "reasonably informed" is subject to and qualified by section 7 of the *Charter*: the named person has to be informed to the point that he knows the case against him and is able to meet it.

[78] In this context, although the argument is not one which strikes at the constitutionality of the scheme in place, the appellant argues that the judge applied a more diluted test than the test required by section 7. He is said to have limited the named person's knowledge of the case against him to a knowledge that enables him simply to respond to the case (emphasis added): see paragraph 31 of the *Constitutionality Decision*. It is not enough, the appellant says, that he be allowed to respond. He must be able to challenge the case against him, to contradict the allegations and attack the credibility of informants. It is convenient to address the issue here.

[79] This argument has no merit and is somewhat unfair to the judge who referred to and applied the test as formulated by the Supreme Court in *Charkaoui* #1. At paragraph 53 of that decision, Chief Justice McLachlin writes:

> Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case.
>
> [Emphasis added.]

[80] It is fair to say that the terminology used to describe the obligation imposed by section 7 has varied over time from case to case. Chief Justice McLachlin implicitly points that out in paragraph 53 of her decision when she refers to *Singh v. Minister of Employment and Immigration*, [1985] 1

S.C.R. 177, at page 213 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraph 123. In *Singh*, the Court questioned whether the procedures provide an adequate opportunity for an affected person to state his case and know the case he has to meet. In *Suresh*, the Court held that a person facing deportation must not only be informed of the case to be met, but also be given an opportunity to challenge the information of the Minister.

[81] In any event, it is clear that in the *Constitutionality Decision*, the judge was aware of the test to be applied when he referred to "the rights of the named person to know and meet the case against him" and "the opportunity to know the case to challenge the government's allegations": see paragraphs 88 and 91. In the *Abuse of Process Decision*, *supra*, at paragraph 95, the judge showed his clear understanding of the test to be applied when he wrote that "the Court must assess the effect of the non-disclosure on the named person's capacity to know and meet the case against him".

[82] While the judge referred to the language used by the Supreme Court in the *Charkaoui* #1 case in his summary at paragraph 31 of his reasons, it is obvious throughout his reasoning that he applied the proper test dictated by section 7. At paragraphs 85 and 127 of his reasons, the judge adopts the basic principles of fundamental justice enunciated by the Supreme Court in *Charkaoui* #1, at paragraph 29, namely, in respect of the impugned statement, that the fairness of the hearing "implies the right to know the case put against one and the <u>right to answer that case</u> (emphasis added). At paragraph 88, he recognizes that the former security certificate scheme failed to ensure that the named person was <u>sufficiently informed</u> as a result of the restriction on disclosure (emphasis added). Finally, in his conclusion at paragraph 204, he found that the new disclosure

process reasonably informs the named person of the case to meet and enables him to answer it (emphasis added). On a review of the reasons for his decision, I am satisfied that he applied the proper section 7 test for fairness and that subsection 77(2) and paragraph 83(1)(*e*) of the Act accord with the principles of fundamental justice.

b) The restrictions on disclosure

(i) Whether summaries of confidential information amount to inadequate disclosure

[83] The appellant submits that the new system in place still imposes undue restrictions on disclosure to the point that it is unconstitutional. By being provided with only summaries of the confidential evidence, the appellant argues that he is deprived of the ability to know and answer the case against him. In addition, the actual restrictions on disclosure hamper his right to cross-examination, thereby bereaving him of the ability to meet the case.

[84] While it is true that the named person is not given access to the confidential material, the special advocates who represent him and the judge are provided with this information. The special advocates' role, as previously mentioned, is to ensure that the confidential evidence is challenged on behalf of the named person and that his interests are protected. The judge is vested with the obligation to ensure the fairness of the process. The appellant's argument is in effect a claim for an unlimited right of access to all the information, whether confidential or not, irrespective of national security concerns. This claim has already been rejected by the Supreme Court in *Charkaoui* #1.

[85] The new system provides for much more disclosure than the former one, thereby affording a named person a greater and better opportunity to know and meet the case against him. Paragraphs 25 to 31 of the judge's reasons in support of his *Constitutionality Decision* attest to an extensive disclosure of information, a disclosure quite sufficient to inform him of the case against him and to allow him, his counsel and the special advocates to meet that case. I reproduce as an Annex to these reasons, paragraphs 25 to 31 mentioned above. I agree with the judge's reasons and conclusion that the disclosure provided for in the revised Act, when combined with the procedural safeguard of the special advocate, is in accordance with the principles of fundamental justice.

(ii) Whether the protection of the identity of human sources contributes to render the whole scheme unconstitutional

[86] The appellant's submission on this issue is twofold. A named person is denied access not only to the confidential information provided by human sources, but also to the identity of these sources. Therefore, a named person's right to cross-examination is hampered and truncated to the point that it defeats his ability to know and meet the case against him. In addition, a named person's prejudice is now compounded by the fact that the judge in the *Privilege Decision* extended the police informer privilege to CSIS human sources and, thereby, created a class privilege for these sources.

[87] In response to the first submission, I can say that the special advocates have access to the human sources' confidential information on behalf of a named person. They can challenge the reliability of that information using other pieces of confidential information they are entitled to

receive as well as information provided by the named person or his counsel. I do not believe that the right to cross-examination is so restricted as to make the system unconstitutional.

[88] The appellant submits that the judge erred when he created a class privilege for CSIS human sources. He relies upon our decision in *Canada (Attorney General) v. Almalki*, [2011] F.C.J. No. 872, 2012 FCA 199 in which our Court, in a decision subsequent to the *Privilege Decision*, concluded that police informer privilege does not apply to CSIS human sources.

[89] Counsel for the respondents supports in part the decision of the judge on the basis that a class privilege is necessary to provide sufficient protection for CSIS human sources. He objects, however, to the "need to know" exception devised by the judge to replace the innocence at stake exception which applies to the police informer privilege in criminal proceedings. In his view, the only exception should be and remains one which comes into play where disclosure of the information is necessary to prevent the conviction of an innocent person.

[90] Counsel for the respondents stressed the need for confidentiality in national security cases and the fact that protection against the disclosure of informants' identities has even a greater justification in relation to the protection of national security against violence and terrorism than in police investigation of crimes. He referred us to two early decisions, *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, at page 34 and *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at paragraph 48.

[91] I do not quarrel with the need to protect informants' identities. To say that, however, merely begs the question with respect to CSIS human sources: how and by what means should the protection be granted? The two cases cited to us provide no answer to the question. In the first case, the need for protection against the disclosure of informants was discussed in the traditional context of the police investigating national security matters. CSIS officials and employees are not police officers or peace officers: see *Almalki*, *supra*, at paragraph 20. In the second case, reference is made to a 1977 decision of the English Court of Appeal, *R. v. Secretary of State for the Home Department, ex parte Hosenball*, [1977] 3 All E.R. 452, at page 460 where Lord Denning merely states the need for protection against disclosure in national security matters.

[92] In any event, interesting as these early cases can be, the fact is that Division 9 of the Act – *Certificates and Protection of Information* – contains a series of measures enacted by Parliament to ensure both protection against disclosure of information and the right to a fair hearing guaranteed by section 7 of the *Charter*. It is to these measures that I should turn to see whether they contain a class privilege for CSIS human sources and, if not, whether the judicial creation of one would fit with the legislative scheme in place.

[93] The class privilege sought by the respondents would create a new and absolute privilege in civil and administrative matters since the innocence at stake exception only applies in criminal proceedings. A person like the appellant, who is not accused of a crime, yet initially detained and now released on conditions, would find himself in a worse position than an accused charged with a serious crime. After a considerate review of this Court's decision in the *Almalki* case, I remain

convinced for the following additional reasons that the police informer privilege does not apply to CSIS human sources and that the judiciary should neither create nor extend a class privilege for these sources.

[94] First, the judicial creation of the class privilege envisaged by the respondents would run afoul of Parliament's intention expressed in subsection 77(2) and paragraphs 83(1) (*c*), (*d*) and (*e*) of the Act. These provisions preclude communication to a named person of information that would endanger the safety of any person if disclosed. This would include of course human sources of information.

[95] The preclusion of disclosure, however, is conditional on the judge being of the opinion that there exists a danger to the safety of the source if the information is disclosed. If there is no such danger and no danger of injury to national security, the information must be disclosed to the named person and his counsel pursuant to subsection 77(2) and paragraph 83(1)(*e*) of the Act. A class privilege of the nature sought by the respondent presupposes and assumes the existence of a danger to the safety of the informant. Its application is a legal rule of public order by which the judge is bound: see *Almalki*, *supra*, at paragraph 15. Police informer privilege is an automatic blanket protection, subject only to the innocence at stake exception. If this Court were to judicially create a class informer privilege for CSIS human sources, it would abolish the task expressly conferred by the Act upon the judge to determine with respect to every piece of source information the appropriateness of disclosing it or not to the named person. This Court would be amending the Act, thereby usurping Parliament's function and substituting its views for Parliament's views as to what

protection should be afforded to human sources under the Act. As Justice Binnie stated in *R. v. National Post*, 2010 SCC 16, at paragraph 42:

> It is likely that in future such "class" privileges will be created, if at all, only by legislative action.

[96] In the *Almalki* case, *supra*, the respondents invoked unsuccessfully sections 18 and 19 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 in support of their claim for a class privilege. They now refer us to section 39 of the CSIS Act as additional evidence that the privilege always has existed for CSIS human sources. I reproduce it with section 31.

Access to information	Accès aux informations
31. (1) Notwithstanding any other Act of Parliament but subject to subsection (2), the Inspector General is entitled to have access to any information under the control of the Service that relates to the performance of the duties and functions of the Inspector General and is also entitled to receive from the Director and employees such information, reports and explanations as the Inspector General deems necessary for the performance of those duties and functions.	**31.** (1) Par dérogation à toute autre loi fédérale mais sous réserve du paragraphe (2), l'inspecteur général est autorisé à avoir accès aux informations qui se rattachent à l'exercice de ses fonctions et qui relèvent du Service; à cette fin, il est aussi autorisé à recevoir du directeur et des employés les informations, rapports et explications dont il juge avoir besoin dans cet exercice.
Marginal note: Compelling production of information	Note marginale : Production obligatoire
(2) No information described in subsection (1), other than a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the *Canada Evidence Act*	(2) À l'exception des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 39(1) de la *Loi sur la preuve au Canada*, aucune des

applies, may be withheld from the Inspector General on any grounds.

…

Committee procedures

39. (1) Subject to this Act, the Review Committee may determine the procedure to be followed in the performance of any of its duties or functions.

Marginal note: Access to information

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, but subject to subsection (3), the Review Committee is entitled

(*a*) to have access to any information under the control of the Service or of the Inspector General that relates to the performance of the duties and functions of the Committee and to receive from the Inspector General, Director and employees such information, reports and explanations as the Committee deems necessary for the performance of its duties and functions; and

(*b*) during any investigation referred to in paragraph 38(*c*), to have access to any information under the control of the deputy head concerned that is relevant to the investigation.

Marginal note: Idem

informations visées au paragraphe (1) ne peut, pour quelque motif que ce soit, être refusée à l'inspecteur général.

[…]

Procédure

39. (1) Sous réserve des autres dispositions de la présente loi, le comité de surveillance peut déterminer la procédure à suivre dans l'exercice de ses fonctions.

Note marginale : Accès aux informations

(2) Par dérogation à toute autre loi fédérale ou toute immunité reconnue par le droit de la preuve, mais sous réserve du paragraphe (3), le comité de surveillance :

a) est autorisé à avoir accès aux informations qui se rattachent à l'exercice de ses fonctions et qui relèvent du Service ou de l'inspecteur général et à recevoir de l'inspecteur général, du directeur et des employés les informations, rapports et explications dont il juge avoir besoin dans cet exercice;

b) au cours des enquêtes visées à l'alinéa 38*c*), est autorisé à avoir accès aux informations qui se rapportent à ces enquêtes et qui relèvent de l'administrateur général concerné.

Note marginale : Idem

(3) No information described in subsection (2), other than a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the *Canada Evidence Act* applies, may be withheld from the Committee on any grounds.	(3) À l'exception des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 39(1) de la *Loi sur la preuve au Canada*, aucune des informations visées au paragraphe (2) ne peut, pour quelque motif que ce soit, être refusée au comité.

[97] I do not think that section 39 is of any assistance in this debate. On the contrary, if anything, this section would give the Review Committee statutory access to privileged human source information, including the name of the source, while the judge mandated under the Act to ensure the fairness of the proceeding the named person faces would be denied access by the privilege. Moreover, pursuant to subsection 31(2), the Inspector General would also have access to the same information. Not only would this alter the nature of the police informer privilege, it would also be inconsistent with the disclosure policy enacted by Parliament in sections 77 and 83 of the Act.

[98] Finally, sections 31 and 39 of the CSIS Act are inconsistent with the respondents' claim and position that the informer privilege applicable to CSIS human sources has been and should be absolute with only one exception, the innocence at stake exception, not applicable to them. In addition, these two sections would cut against any promise of absolute confidentiality made by CSIS to a source.

[99] Of course, in the closed proceedings, the question of injury to national security does not arise since the special advocate has access to the same information as the judge. To deny the special

advocate disclosure with respect to a human source, the Ministers must satisfy the judge that such disclosure would be injurious to the safety of a person.

[100] For these additional reasons, I believe the *Almalki* decision was sound. If we were to judicially create an absolute informer class privilege for CSIS human sources as claimed by the respondents or extend to them the police informer class privilege, I fear that adding this restriction to the other restrictions applicable to security certificate proceedings and the secretive nature of these proceedings would go a long way towards tipping the scale of justice on the unconstitutionality side.

[101] In the first instance, as well as on appeal, the appellant contended that there should be a balancing of interests similar to the one provided for in section 38 of the CEA. Section 38.06 of the CEA empowers a judge to order in a proceeding disclosure of information injurious to international relations or national defence or national security when the public interest in disclosure outweighs in importance the public interest in non-disclosure. In such an instance, the judge may make the disclosure order subject to any conditions that he or she considers appropriate. This process, the appellant says, would provide greater fairness in the proceeding he faces. It would be a step towards the constitutionality of the present scheme as it would provide better compliance with the named person's section 7 *Charter* right to know and meet the case against him.

[102] I confess that I am somewhat at a loss to see the merit of the appellant's contention for the following reasons. The system in place arguably offers the named person better and greater

disclosure of information than section 38 of the CEA in that his special advocates have full access on his behalf to all the confidential information that the judge receives. There are no special advocates in place under a section 38 proceeding.

[103] In addition, the Minister's obligation to file information with the Court and the judge's obligation to disclose said information to the named person and his counsel are governed by the more demanding test of fairness required by section 7 of the *Charter* rather than the concept of public interest. While it may not be in the public interest to disclose a given piece of information, disclosure of that information may still be required under section 7 to ensure the fairness of the proceeding against the named person. To put it differently, the disclosure process under the Act is devised to ensure to a named person the fairness of the security certificate proceeding he faces. The focus is not on the public interest to know the information, but rather on the named person's right and need to know the information in order to be able to instruct counsel and his special advocates and meet the case against him.

[104] Finally, it has been suggested by counsel for the appellant that there is no reason to craft a class privilege that will be universally unreviewable since the balancing can be effected on a case-by-case basis like it is done with the Wigmore type of privileges. Whether the claim is made under section 38 of the CEA or is a Wigmore type of privilege claim, disclosure has to be effected in conformity with the Act, subject however to overriding privileges such as solicitor-client privilege which, in the words of the Supreme Court, "commands a unique status within the legal system"…

and "is integral to the workings of the legal system itself": see *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, at paragraph 30.

[105] Counsel for the respondents contends that he is not creating a new informer privilege: he says he is merely extending the one existing in criminal law to CSIS human sources. From the perspective of CSIS human sources, these sources obtain a new privilege, one they did not have before. The whole domain of civil and administrative law would enjoy an absolute class privilege it did not have in the past. I cannot see how it does not amount in effect to the creation of a new privilege for those who did not have it.

(iii) The Third Party rule, the admissibility of hearsay evidence and the right to cross-examination

[106] The Third Party rule refers to information received from a third party, usually a foreign agency, under the seal of confidentiality and with an undertaking not to disclose its contents and the source without the consent of that Third Party.

[107] The appellant asserts that non-disclosure of this hearsay evidence, coupled with the fact that hearsay evidence can be admitted in security certificate proceedings pursuant to paragraph 83(1)(*h*) of the Act, severely curtails and, in many cases, deprives him of his right to cross-examination. In the appellant's view, this is yet another restriction on disclosure which contributes to the unconstitutionality of the system in place because it deprives him of his right to know and meet the case against him.

[108] It is true that the appellant and his counsel do not have full access to the third party information and the source of that information. They will be given a summary of that information. However, his special advocates and the judge do have full access. It is also true that he, his counsel and his special advocates can rarely cross-examine, if at all, a representative of the third party. However, protection of national security is in part ensured by an exchange of intelligence information among states. Canada heavily depends on foreign sources of information and must be able to rely on that information to assess a threat to its security. It must be left to the judge to determine its admissibility in a given security certificate proceeding and, if received, the weight to be given to it. The Act requires that hearsay evidence be reliable and appropriate. Submissions can be made orally or in writing to the judge by the appellant's special advocates as to the reliability and appropriateness of that evidence. In addition, the special advocates can argue that no weight or very little weight should be given to that evidence in view of the fact that it was not subjected to cross-examination. Other adduced evidence from different sources of information can guide the judge in determining the question of admissibility and assessing the credibility of that evidence.

[109] Finally, the Government must make reasonable efforts to seek the consent of the third party that provided the information to its disclosure or provide evidence that a request would be refused if consent to disclosure was sought: *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589, at paragraph 110 (F.C.A.) appealed to the Supreme Court, but not on this issue, [2002] 4 S.C.R. 3; *Charkaoui (Re)*, 2009 FC 476 at paragraph 21 (C.F.).

[110] The appellant strenuously argues that the government fell short of its duty in this case. The judge, however, made a factual finding (*Abuse of Process Decision*) that the attempts of the Ministers and CSIS were sufficient to discharge the duty. I see no palpable and overriding error in the judge's determination.

[111] While information obtained from a third party does pose a challenge to a named person's right to cross-examination, the fact is that this right is not without limits and the right of a named person to know the case against him is not absolute: see *R v. Lyttle*, [2004] 1 S.C.R. 1, at paragraph 45; *R. v. Ahmad*, [2011] 1 S.C.R. 110. In the *Ahmad* case, at paragraph 7, the Supreme Court reiterated that it "has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual". Thus restrictions on disclosure in this context and, as a result, on the right to cross-examination does not necessarily entail the denial of the right to make a full answer and defence to the allegations made thereby resulting in an unfair trial or proceeding: *ibidem*, at paragraph 30. The Supreme Court added that "there will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised in the absence of full disclosure".

[112] In sum, the limits on disclosure and the right to cross-examination resulting from the Third Party rule are in accordance with the principles of fundamental justice and do not render unconstitutional the current system as long as adequate substitutes are in place to provide a fair hearing. To put it differently, the constitutionality or unconstitutionality of the regime does not

depend upon whether, in a given instance, the system yielded or failed to yield a fair process. It may be, however, that, in an instance where the substitutes for disclosure cannot achieve the fairness required by section 7 of the *Charter*, the Minister will have to choose between disclosing the information, withdrawing it or putting an end to the proceeding: *ibidem*, at paragraph 7.

(iv) The restrictions on the special advocates' right to communicate with the appellant

[113] The appellant's criticism of the restrictions imposed on the special advocates' right to communicate with him is in effect a complaint that the special advocates who act on his behalf, as a result, suffer limitations which affect their ability to adequately defend his interests.

[114] Under section 85.4 and paragraph 85.5(*b*) of the Act, the special advocates are prohibited from communicating with the named person or any person after they have received the confidential information given to the judge. They are not authorized to talk to other witnesses because they cannot communicate about the proceedings. Unlike counsel for the named person, they cannot gather evidence. They cannot get together to discuss issues common to their roles as special advocates and to the proceedings.

[115] I can see for example the need for communications between the special advocates and counsel for the named person or the named person as new evidence is gathered and introduced in the proceeding. The named person must be able to give effective instructions to the special advocates in relation to this new evidence or the allegations therein contained: see for example

Secretary of State for the Home Department v. AF (No. 3) and related appeals, [2009] UKHL 28, at paragraph 59.

[116] However, I believe that paragraph 85.4(2) and section 85.5 of the Act have built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of any person. The judge is given the authority to lift the ban on communication and to impose conditions consistent with the above objectives. In fact, in the present instance, twelve (12) of the eighteen (18) requests for an authorization to communicate with the named person were authorized by the judge. Appellant's counsel could communicate whenever he wanted with the special advocates without judicial authorization: see paragraph 139 of the *Constitutionality Decision*. The fact that a given request may have been erroneously denied does not compromise the constitutionality of the system in place.

c) Conclusion

[117] I am satisfied that the judge did not err when he concluded that the current security certificate regime is in accordance with the principles of fundamental justice because it allows a named person to sufficiently know and meet the case against him. There is no magic solution where such a fundamental right as the right to liberty and security of the person is on a collision course with a nation's fundamental right and duty to ensure its security and its order. As this Court said in *Charkaoui v. Canada*, [2005] 2 F.C.R. 299, at paragraph 100, in such circumstances, the choice is not between liberty and order. It is between liberty with order and anarchy without either. The

former security certificate system was found to fall short of providing sufficient protection to the right to life, liberty and security of the person. The new system was designed to remedy the deficiencies of the former and ensure, within the existing constitutional order, respect of the individual right to life, liberty and security of the person.

[118] I agree with counsel for the appellant that the fact that the disclosure process in place in the new system has worked well is not determinative of its constitutionality: see paragraph 149 of the *Constitutionality Decision* where the judge mentioned that Mosley J. sitting in the *Almrei (2009)* case was also satisfied with the disclosure process and its result. It is, however, a significant consideration to take into account when determining whether the constitutionality appearing on paper materializes in practice.

[119] The revised Act provides the judge with the necessary tools to ensure a fair process. With the assistance of the special advocates acting on behalf of the appellant, the judge is vested with the necessary powers at common law and under the *Charter* and the Act to satisfy the fairness requirement of section 7 of the *Charter*. He possesses the power to order disclosure of information, authorize additional communications, remedy a failure to disclose and grant a just and appropriate remedy under subsection 24(1) of the *Charter* where a breach of procedural fairness has occurred. He can take preemptive action to prevent a violation of a named person's right to liberty and security of the person. All of these factors, coupled with the *Charkaoui* #2 disclosure, are a sufficient substitute for full disclosure.

[120] Although the appellant through his counsel and the special advocates' submissions has shown his preference for an alternative system, he has not convinced me that the security certificate system in place is unconstitutional.

B. Whether subsections 77(2), paragraphs 83(1)(*c*), (*d*), (*e*) and (*i*), subsection 85.4(2) and paragraph 85.5(*b*) of the Act are saved by section 1 of the *Charter*

[121] In view of my conclusion as to their constitutionality, there is no need to address the section 1 issue.

C. The destruction of the original notes of conversations and the appropriate remedy under subsection 24(1) of the *Charter*

[122] The appellant complains that his right to disclosure has been breached by the destruction of the original tapes and notes of the conversations used to support allegations made against him. He and his special advocates say the summaries made by CSIS of these conversations do not allow him to meet the case against him and render the hearing constitutionally unfair. To the extent that all or part of the original information contained in the conversations was or could be prejudicial to national security or endanger the safety of a person, the appellant would not have been allowed to see it. A summary of the original information would have been given to him pursuant to paragraph 83(1)(*e*) of the Act. What he was given instead was a summary of the summaries. However, absent destruction, his special advocates and the judge would have had access to the originals. They would then have been in a better position to verify the accuracy of the summaries. The special advocates'

right to cross-examination might have been enhanced. However, the special advocates, like the judge, were left to work with the CSIS' confidential summaries of the original conversations. It is these confidential summaries that the appellant seeks to exclude as evidence.

a) The prejudicial effect of the destruction

[123] Pursuant to its OPS-217 policy, CSIS destroyed the original records of interviews with the appellant as well as conversations about the appellant or to which the appellant was a privy. However, it made a summary of the contents of these interviews and conversations which was entered in CSIS data bank by a CSIS analyst. A number of these conversations were not originally in English and the summary was made from an English translation of their content. The three human interventions generated a possibility of errors, inaccuracies or distortions.

[124] In *Charkaoui* #2, the Supreme Court found that CSIS was under a duty to retain raw intelligence in accordance with section 12 of the *CSIS Act*. Failure to do so was found to be a serious breach of that duty. Following the Supreme Court decision, the appellant sought the exclusion of the summaries of conversations from the evidence. In the alternative, he sought a stay of the proceedings. He did not seek, however, the exclusion of the summaries of six interviews he had with intelligence officers: see the *Abuse of Process Decision*, at paragraph 60.

[125] Even though CSIS was acting in good faith in accordance with the policy in place when it destroyed the originals, the breach of its duty to retain the information and disclose it under the Act

impacted on the appellant's right to know the case and his ability to meet it. The destruction also compromised the very function of judicial review. At paragraphs 39 to 42 and 61 and 62 of its reasons for judgment in *Charkaoui* #2, the Supreme Court reiterates in the following terms the importance of keeping the original notes in security certificates proceedings:

> [39] In our view, the retention of notes must serve a practical purpose. It follows that the meaning of the word "intelligence" in s. 12 of the *CSIS Act* should not be limited to the summaries prepared by officers. The original operational notes will be a better source of information, and of evidence, when they are submitted to the ministers responsible for issuing a security certificate and to the designated judge who will determine whether the certificate is reasonable. Retention of the notes will make it easier to verify the disclosed summaries and information based on those notes. Similarly, it is important that CSIS officers retain access to their operational notes (drafts, diagrams, recordings, photographs) in order to refresh their memories should they have to testify in a proceeding to determine whether a security certificate is reasonable — a proceeding that is not mentioned in OPS-217.
>
> [40] The difficulties caused by OPS-217 are illustrated by a case concerning a complaint filed against the Department of Foreign Affairs and CSIS that was decided by the Chair of the Security Intelligence Review Committee ("SIRC"). In that case, the Department had denied the complainant Liddar a "Top Secret" security clearance. The notes submitted to SIRC by CSIS were not supported by sufficient evidence. SIRC concluded that the report submitted to it in support of the Department's position was inaccurate and misleading because the information provided by CSIS, which had destroyed its operational notes, was inaccurate and incomplete. SIRC criticized this policy of destroying such notes:
>
> > The inability of the investigator who interviewed Mr. Liddar to provide me with the answers that Mr. Liddar gave to important questions highlights a long-running concern of the Review Committee with respect to the CSIS practice of destroying the notes that investigators take of security screening investigations. The issue of what was said during security screening interviews is a perennial source of argument in the course of the Review Committee's investigation of complaints. Complainants frequently allege that the investigator's report of their interview is not accurate: that their answers are incomplete, or have been distorted or taken out of context. Even if there were a security concern with allowing a complainant to review notes of questions that were asked and

> answers given at the interview, there is no reason why such notes could not be preserved for a reasonable period so that they are available to the Review Committee in the event of a complaint in respect of the security screening activity in question. [Emphasis added.]
>
> (*Liddar v. Deputy Head of the Department of Foreign Affairs and International Trade*, File No. 1170/LIDD/04, June 7, 2005, at para. 72)

[41] In his report, Commissioner O'Connor stressed that accuracy is crucial where reported information is concerned and that access to information obtained in a manner that is reliable and did not involve coercion is of critical importance:

> The need to be precise and accurate when providing information is obvious. Inaccurate information or mislabeling, even by degree, either alone or taken together with other information, can result in a seriously distorted picture. It can fuel tunnel vision… . The need for accuracy and precision when sharing information, particularly written information in terrorist investigations, cannot be overstated. [Emphasis added.]
>
> (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), at p. 114)

[42] Where the assessment of the reasonableness of a security certificate is concerned, the ability of the ministers and of the designated judge to properly perform their respective duties regarding the issuance and review of security certificates, and the review of the detention of persons named in such certificates, may be compromised by the destruction of original documents. The submission of operational notes to the ministers and to the designated judge may be necessary to ensure that a complete and objective version of the facts is available to those responsible for issuing and reviewing the certificate. The retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence because of problems connected with the handling of information by intelligence agencies. In addition, the destruction of information may sometimes hinder the ability of designated judges to effectively perform the critical role, delegated to them by law, of assessing the reasonableness of security certificates, reviewing applications for release by named persons and protecting their fundamental rights. We therefore conclude that there is a duty to retain information. We must now define the terms and scope of this duty.

…

> [61] The destruction of the original documents exacerbates these difficulties. If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations. In criminal law matters, this Court has noted that access to original documents is useful to ensure that the probative value of certain evidence can be assessed effectively. In *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, at para. 46, the Court mentioned that viewing a videotape of a police interrogation can assist judges in monitoring interrogation practices, and that interview notes cannot reflect the tone of what was said and any body language that may have been employed.
>
> [62] As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr. Charkaoui's position, CSIS should be required to retain all the information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given. If, as we suggest, the ministers have access to all the undestroyed "original" evidence, they will be better positioned to make appropriate decisions on issuing a certificate. The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence — which he or she will have been able to check for accuracy and reliability — for the named person.

b) The judge's finding that the destruction of the original conversations did not cause a prejudice to the appellant

[126] At paragraph 76 of his reasons in support of the *Abuse of Process Decision*, the judge concluded that the destruction of the original conversations did not cause the appellant a prejudice constituting a *Charter* breach calling for a section 24 remedy. He wrote:

> [76] Therefore, in order to assume this duty, the Court will not exclude the summaries of conversations as evidence for the reasons mentioned above. It is also in the best interest of justice which includes the best interest of society that this certificate case be decided on all the evidence adduced. With the disclosure of these

> summaries of conversations, Mr. Harkat was in a better position to understand the case made against him and respond to it. The destruction of originals of conversations replaced by summaries of conversations has not caused a prejudice
>
> constituting a *Charter* breach based on an abuse of process theory. No section 24 *Charter* remedy is called for.
>
> [Emphasis added.]

[127] The judge came to the conclusion that no prejudice amounting to a *Charter* breach occurred for the following reasons. First, he appears to have seen the summaries as part of the remedy because he found them accurate and reliable. He found them accurate and reliable because of the process followed by CSIS personnel to ensure the quality of the summaries of audio recording and because some of them were corroborated by other pieces of evidence: *ibidem*, at paragraphs 65 and 66.

[128] Second, he explained the lack of prejudice by the fact that the appellant benefited from more disclosure than he would have otherwise obtained as a result of the destruction of the original conversations and the scope of disclosure required by the *Charkaoui* #2 decision. I shall address the issue by first determining whether the failure to preserve the original conversations resulted in a violation of section 7 of the *Charter*.

(i) Whether there was a violation of section 7 of the *Charter*

[129] There is no doubt that in *Charkaoui* #2 the Supreme Court recognized under section 7 of the *Charter* the existence of a duty to disclose and that the destruction of the original records constituted a breach of that duty and, therefore, section 7. This is how it was interpreted by the Ontario Superior Court in *R. v. Ahmad*, 2009 CanLII 84784 at paragraph 168: see also the respondents' Memorandum of Fact and Law at paragraphs 108 and 109.

[130] The nature and extent of the prejudice resulting from the breach may vary, but minimal prejudice or an absence thereof does not erase the breach. In *R. v. Carosella*, [1997] 1 S.C.R. 80, Sopinka J. reminded us that a breach of a *Charter* right to disclosure entitles one to a remedy under subsection 24(1) of the *Charter* and that the issue of prejudice is to be addressed at the remedy stage. At paragraphs 26 and 27, he wrote:

> [26] … The entitlement of an accused person to production either from the Crown or third parties is a constitutional right. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and *R. v. O'Connor*, [1995] 4 S.C.R. 411. Breach of this right entitles the accused person to a remedy under s. 24(1) of the *Charter*. Remedies range from one or several adjournments to a stay of proceedings. To require the accused to show that the conduct of his or her defence was prejudiced would foredoom any application for even the most modest remedy where the material has not been produced. It would require the accused to show how the defence would be affected by the absence of material which the accused has not seen.
>
> [27] This Court has consistently taken the position that the question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis. …

[131] This brings me to a review of the judge's decision that the appellant suffered no remediable prejudice.

(ii) Review of the judge's finding of lack of prejudice

[132] With respect, I do not think that disclosure of CSIS' summaries to the special advocates can be a remedy for the destruction of the originals. The summaries are the remnants of the destroyed originals. They are the problem, not the solution. In terms of the appellant's section 7 *Charter* right, the summaries are the result of the violation of that right, not its remedy.

[133] The fact that the summaries were disclosed to the special advocates does not expunge from them possible errors, discrepancies or distortions which may have resulted from the translation of their content to English, the making of the summaries themselves or their subsequent entry into the data bank of CSIS. Nor do they provide the special advocates and the appellant with the possibility of discovering, revealing and proving these errors or discrepancies and their importance in assuming his burden to meet the case against him. Indeed, even the judge tasked with the duty of ensuring the fairness of the hearing is not himself in a position to verify with the originals the accuracy of the summaries.

[134] With respect to the reliability of the summaries, the judge found comfort in the testimony of John, a CSIS employee, who testified about the policies and procedure followed by CSIS when

preparing these summaries of the original. The judge cited the following passage of John's testimony at paragraph 116 of the *Reasonableness Decision*:

> Q. They don't take verbatim notes of what was said on these calls normally, do they, sir?
>
> A. It's been a long time since I was in the region talking to them. I think there's different techniques. Some might. In some cases, they will if there's a particular reason, but generally they produce a summary report, a summary of the call.
>
> Q. Because the purpose of gathering is not for an evidentiary hearing; it's not for some lawyer to be sitting and challenging every word. It's generally for advice of predicting trends and so on.
>
> A. It's to bring forward the key elements of the conversations that are relevant to the investigation so that we can carry forward, but you're right, it's not for an evidentiary purpose usually.
>
> Q. So the person who is listening will be instructed to look for certain names or certain words. That would be a technique; if you hear this name or you hear this person, record it, but we don't really need to hear about a lot of other things that may be going on?
>
> A. That's true. They would listen to every conversation, but they would only write a report on the ones and on the parts of the conversations they thought were [of] significance.

[135] The evidence the judge relied upon to confirm the summaries' veracity and accuracy was presented only in the most general terms. The witness John had not talked to CSIS analysts about their operational methods in a long time. He had no personal involvement in the appellant's case. The closed testimony of another witness, C.M., is similarly vague. No specific examples of steps taken to ensure the summaries' accuracy were provided.

[136] Further, it is not clear whether all of the conversations were intercepts, i.e. electronic intercepts, or a mix of intercepts and reports of a conversation. The distinction is significant given that some of the conversations' summaries involve a questionable human source referred to as XXX. The judge concluded that the information from XXX could be used only when corroborated: see footnote 1 in the judge's reasons for the *Reasonableness Decision*.

[137] Corroboration coming from persons named in the summaries cannot be of much assistance in determining the accuracy and veracity of these summaries. It would have to come from an independent source such as an external source or a third party like a foreign agency. There again, caution is necessary because what appears to be corroborative information coming from, say, two or three different third parties or sources may in fact be the same information coming from an unreliable source relayed to these third parties or other sources.

[138] In the present instance, the judge did not address whether the value of these summaries should be lower if source XXX was involved. For example, in some instances, the corroborating evidence only partly addresses the primary fact. Consequently, some of the corroborating evidence is significantly more limited than XXX's information had been. Moreover, as previously mentioned, it is not clear if some of the conversations were summaries of specific conversations relayed by a source. If, for example, a specific conversation was relayed to CSIS by XXX or a source which obtained it from XXX, the problem with using this specific conversation to corroborate information XXX previously provided to CSIS becomes readily apparent.

[139] In any event, whether or not the summaries were corroborated, the appellant suffered a breach of his *Charter* section 7 right to disclosure and is entitled to a just and appropriate remedy: see *Canada (Justice) v. Khadr*, 2008 SCC 28, at paragraph 33; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at paragraphs 141 and 142. By definition, a just and appropriate remedy is one which addresses the injury suffered and provides adequate relief.

(iii) The appropriate remedy

[140] The problem the appellant faces is the accuracy of the summaries and his inability to challenge the information they contain. One avenue could have been to allow him whenever possible, and his special advocates, to cross-examine the different persons who translated the conversations, made the summaries and entered the information in CSIS' system. However, many of the conversations date back to a period between 1994 and 1997. There is no guarantee that these persons can still be reached and summoned to testify. Moreover, the likelihood of these persons remembering in a useful way the content of the destroyed originals is next to nothing. I do not think that cross-examination of these persons, to the extent that it is feasible in the circumstances, would be an appropriate remedy.

[141] It seems to me that exclusion of the summaries would be the appropriate remedy. I would exclude all summaries of conversations except those conversations to which the appellant was privy. Let me explain the exclusion and its exception.

[142] I considered the possibility of not excluding the summaries of the conversations which were corroborated. However, if I were to do that, no remedy would be provided for the destruction of the originals of these conversations while one would be given for the conversations that remained uncorroborated. Yet, in both cases, there has been a serious breach of the appellant's constitutional right to disclosure under section 7 of the *Charter*. Also, in both cases, the appellant is deprived of the opportunity to contrast the summaries with the originals. Further, if anything, it is even more important for the appellant to be able to have access to the originals when there appears to be corroboration of the summary from another source. Corroboration of an erroneous, deficient, misleading or inadequate summary merely compounds the prejudice resulting from the destruction of the original.

[143] I would except from the exclusion those conversations to which the appellant was privy. He is in a position to determine the accuracy and reliability of the summaries. While still objectionable, the destruction of the originals is not as prejudicial to the appellant as it is when the originals destroyed are originals of conversations about him and to which he was not privy. He can, by his testimony and other specific evidence, raise any error, inconsistency or inaccuracy contained in these summaries which affect their accuracy and reliability: see *Charkaoui* #2, at paragraph 67. I would simply issue as an appropriate and sufficient remedy with respect to these conversations a declaration that his right to disclosure under section 7 of the *Charter* has been violated: see *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, *Charkaoui* #2, at paragraph 46.

c) Conclusion

[144] In conclusion, the exclusion of the summaries of the conversations, subject to the exception mentioned above, is the appropriate remedy in the circumstances. Disclosure of the originals is an impossibility and exclusion is necessary to safeguard the fairness of the certificate process in this case as well as the integrity of the justice system: *R. v. Bjelland*, [2009] 2 S.C.R. 651, at paragraph 19. Exclusion does not bring unfairness to the respondents because there remains on the record a substantial body of evidence to be assessed by the judge. To paraphrase and adapt the statement of McLachlin J. as she then was in *R. v. Harrer*, [1995] 3 S.C.R. 562, at paragraph 45, "a fair hearing in a security certificate proceeding is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the named person".

D. Whether the appellant was the victim of an abuse of process and is entitled to a stay of proceedings

[145] I agree with the judge that the appellant has not made out a case for a stay of the proceedings based on an abuse of process, especially in view of the fact that he is awarded the primary remedy he sought for the destruction of the originals of the conversations, i.e. the exclusion of the summaries, and that the stay of proceedings was an alternate remedy.

E. Whether the judge erred in concluding that the security certificate is reasonable

[146] The judge found on a balance of probabilities that the appellant engaged in terrorism, is a danger to the security of Canada and is a member of the Bin Laden Network. The appellant contends that the judge erred in his interpretation and application of the terms "terrorism", "danger to the security of Canada", "member" and "organization" by giving them a broad and unrestricted meaning.

a) Definition of terrorism

[147] The judge relied on the definition of terrorism chosen by the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at paragraphs 97 and 98. The appellant complains that the definition adopted by the Supreme Court is overly vague, fails to give a fair notice of what conduct is unacceptable and is contrary to section 7 of the *Charter*.

[148] This *Charter* argument is raised for the first time on appeal. This Court has no intention of entertaining it because we are deprived of the benefit of the judge's reasoning and analysis on the arguments: see *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268; *Bekker v. Canada*, 2004 FCA 186. In any event, the judge was bound by the decision of the Supreme Court and cannot be faulted for having followed the *stare decisis* rule, especially when the alleged unconstitutionality of the Supreme Court's chosen definition was not argued before him.

[149] I see no merit in the appellant's argument that the judge erred in concluding that the definition of terrorism includes materially supporting terrorist activities such as providing funds, false documents, recruitment and shelter even though such acts are not directly linked to violence. There is abundant jurisprudence supporting the judge's conclusion: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592 (FCA); *Ikhlef (Re)*, 2002 FCT 263, at paragraph 54; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, at paragraphs 127-130.

b) Definition of organization

[150] I see no error in the judge's conclusion that the term "organization" has to be given a broad interpretation in view of the loose structure and the fluid and extremely secretive nature of criminal or terrorist organizations: see *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at paragraphs 38 and 39; *Ikhlef (Re)*, *supra*, at paragraph 64.

c) Membership

[151] Here again this Court will not entertain an argument made for the first time before us that the absence of a temporal nexus between membership and the terrorist nature of the organization leads to an interpretation which offends sections 2 and 7 of the *Charter*.

d) Danger to the security of Canada

[152] I agree with the judge's conclusion on the issue of security under section 34 of the Act. The scope of application of this section is governed by the rules of interpretation found in section 33. Unless otherwise provided, the facts that constitute inadmissibility include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur. Section 33 covers past, present and future facts. Therefore, there is no requirement under the combined effect of sections 33 and 34 that the danger to the security of Canada be current in order to be inadmissible on security grounds.

e) The impact of the exclusion of the confidential summaries of the original conversations on the reasonableness of the certificate

[153] The exclusion of the confidential summaries of the original conversations calls for a reassessment of the remaining evidence on the record and a reevaluation of the reasonableness of the certificate. This Court is not in a position to make such reassessment and reevaluation. In fairness to all the parties, this task would be better performed by the judge.

f) Conclusion

[154] For this reason, the appeal with respect to the *Reasonableness Decision* should be allowed.

Conclusion

[155] I do not want to conclude these reasons without first praising the judge for the enormous, toilsome and very demanding task he skillfully assumed in this case under difficult conditions. It is not easy to work in five different locations (home, office, closed office, public court room and closed court room) with two sets of voluminous documents (one public and a confidential set kept in closed office) and bench books (one that the judge may bring to his office and one confidential also kept in closed office). A judge has to live through the logistics of that to really understand the pressures and personally taxing demands the process generates. The judge built a very good record which facilitated meaningful appellate review.

[156] Coming to the disposition of the appeal, I would answer in the negative these two certified questions:

1. 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 Act breach section 7 of the *Charter of Rights and Freedoms* by denying the person concerned the right to a fair hearing? If so, are the provisions justified under section 1?

2. Do human sources benefit from a class-based privilege? If so, what is the scope of this privilege and was the formulation of a "need to know" exception for the special advocates in *Harkat (Re)*, 2009 FC 204, a correct exception to this privilege?

[157] I would dismiss the appeal with respect to the *Constitutionality Decision*.

[158] I would allow the appeal with respect to the *Privilege Decision*, set it aside and declare that CSIS human sources do not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege.

[159] I would allow the appeal with respect to the *Abuse of Process Decision*, set it aside and, proceeding to render the judgment that should have been rendered, I would allow the appellant's motion and order that the confidential summaries made of the destroyed originals of the conversations be excluded as evidence, except for the conversations the appellant was privy to.

[160] I would allow the appeal with respect to the *Reasonableness Decision*, set it aside and I would refer the matter back to the judge for a new determination of the reasonableness of the security certificate on the basis of the evidence on the record, excluding the confidential summaries made of the destroyed originals of the conversations to which the appellant was not privy. In light of the exclusion, further submissions on the certificate's reasonableness are necessary. I would leave it to the judge to determine whether these submissions will be oral, written or both.

[161] I would declare as a section 24(1) remedy that the appellant's section 7 *Charter* right of disclosure of the originals of the conversations to which he was privy was violated.

"Gilles Létourneau"
J.A.

"I agree
Pierre Blais C.J."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-76-11
STYLE OF CAUSE:	MOHAMED HARKAT v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION et al.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 21, 22 and 23, 2012
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	BLAIS C.J. LAYDEN-STEVENSON J.A.
DATED:	April 25, 2012

APPEARANCES:

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ANNEX

[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’ 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;

(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

(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;

(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**
>
> **Contacts with Mohammed Aissa Triki:**
>
> 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.
>
> 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.
>
> **Immigration process:**
>
> In October 1996, it was learned that Harkat did not want to be associated with anybody until he had finished with his Immigration process.
>
> **Finance:**
>
> 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.