

Mohamed Harkat (appellant) v. The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness (respondents)
(A-76-11; 2012 FCA 122; 2012 CAF 122)

Indexed As: Harkat, Re

Federal Court of Appeal
Blais, C.J., Létourneau and Layden-Stevenson, J.J.A.
April 25, 2012.

Summary:

In 2002, Harkat was detained pursuant to a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) as a person inadmissible to Canada on grounds of national security. Numerous security certificate proceedings ensued. In 2006 he was released from detention on stringent conditions, which were substantially modified over time in favour of Harkat. Another security certificate was issued in 2008 when a new security certificate regime was implemented following the Supreme Court of Canada's constitutional rulings in *Re Charkaoui #1* (SCC 2007). Harkat's case was referred to the court to determine the reasonableness of the 2008 certificate. In accordance with the amended legislation, special advocates were appointed to protect Harkat's interests. Also, in accordance with the procedural rulings in *Re Charkaoui #2* (SCC 2008), Harkat became entitled to additional disclosure from the Canadian Security Intelligence Service (CSIS). The special advocates requested access to human sources who provided information to CSIS regarding Harkat. That is, the special advocates wanted to know the identity of the covert human intelligence sources and have them made available for cross-examination in the closed door hearings.

The Federal Court, in a decision reported 339 F.T.R. 65; 2009 FC 204 (i.e., the Privilege Decision), denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception). The reasonableness proceedings proceeded.

The Federal Court, in a decision reported 380 F.T.R. 81; 2010 FC 1241 (the Reasonableness Decision), held that the issuance of the security certificate was reasonable. Therefore, the security certificate issued against Harkat on security grounds was upheld. Harkat brought a motion challenging the constitutionality of a number of provisions of the IRPA relating to the reasonableness review scheme (ss. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d) (e)(h) and (i) (protection of information), s. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates)). Harkat claimed that those provisions violated s. 7 of the Charter in that they did not provide for fair trial standards, failed to grant to the named person the right to know and answer the case made against him and made it impossible for the Court to render a sufficiently informed decision on the basis of the facts and the law.

The Federal Court, in a decision reported 380 F.T.R. 163, 2010 FC 1242 (the Constitutionality Decision), dismissed the motion. The impugned provisions were constitutional. Harkat brought a motion seeking the exclusion of the summaries of conversations as evidence, based on the doctrine of abuse of process (i.e., because the original conversations from which the

summaries were prepared had been destroyed). Alternatively, he sought a stay of proceedings under s. 24(1) of the Charter.

The Federal Court, in a decision reported 380 F.T.R. 255; 2010 FC 1243 (the Abuse of Process Decision), dismissed the motion.

The Federal Court, in a decision reported 382 F.T.R.274; 2011 FC 75, certified the following two questions of general importance for appellate consideration under s. 82.3 of the IRPA:

"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?"

Harkat utilized the certified questions as a chance to advance other grounds of appeal respecting the Privilege Decision, the Reasonableness Decision, the Constitutionality Decision and the Abuse of Process Decision referred to above.

The Federal Court of Appeal answered the certified questions in the negative. The court dismissed the appeal with respect to the Constitutionality Decision. The court allowed the appeal with respect to the Privilege Decision, set it aside and declared that CSIS human sources do not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege. The court allowed the appeal with respect to the Abuse of Process Decision, set it aside and allowed Harkat's motion and ordered that the confidential summaries made of the destroyed originals of the conversations be excluded as evidence, except for the conversations that Harkat was privy to. The court also allowed the appeal with respect to the Reasonableness Decision, set it aside and referred the matter to the designated 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 Harkat was not privy. In light of the exclusion, further submissions on the certificate's reasonableness were necessary and it would be up to the designated judge to determine whether those submissions would be oral, written or both. The court declared as a s. 24(1) remedy that Harkat's s. 7 Charter right of disclosure of the originals of the conversations to which he was privy was violated.

Aliens - Topic 1560

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Evidence - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service (CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer

common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

Aliens - Topic 1560

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Evidence - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in *Charkaoui #2* (SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Aliens - Topic 1560

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Evidence - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Aliens - Topic 1560

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Evidence - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative

amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Aliens - Topic 1560

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Evidence - Harkat was the subject of ministerial security certificate reasonableness proceedings under the Immigration and Refugee Protection Act (IRPA) - Harkat asserted that non-disclosure of hearsay evidence that was subject to the third party rule, coupled with the fact that hearsay evidence could be admitted in security certificate proceedings pursuant to s. 83(1)(h) of the IRPA, severely curtailed and, in many cases, deprived him of his right to cross-examination - The Third Party rule referred 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 - Harkat claimed that this was yet another restriction on disclosure which contributed to the unconstitutionality of the system in place because it deprived him of his right to know and meet the case against him - The Federal Court of Appeal held that the limits on disclosure and the right to cross-examination resulting from the Third Party rule were in accordance with the principles of fundamental justice and did not render unconstitutional the current system as long as adequate substitutes were in place to provide a fair hearing - See paragraphs 106 to 112.

Aliens - Topic 1561

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Reasonableness (incl. role of designated judge) - A ministerial security certificate issued under the Immigration and Refugee Protection Act which named Harkat as a person who was inadmissible to Canada on grounds of national security was referred to the court for a reasonableness hearing - The Federal Court upheld the certificate - Harkat appealed - The Federal Court of Appeal allowed the appeal and referred the matter to the designated judge for a new determination of the reasonableness of the security certificate on the basis of the evidence on the record, but excluding the confidential summaries of the destroyed originals of conversations to which Harkat was not privy - See paragraphs 29 to 37 and 146 to 154 and 159.

Aliens - Topic 1561

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Reasonableness - [See third **Civil Rights - Topic 1560** and first **Aliens - Topic 1561.3**].

Aliens - Topic 1561.3

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Special

advocates - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Aliens - Topic 1561.3

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Special advocates - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Special advocates were appointed to protect his interests - Harkat claimed restrictions imposed on the special advocates' right to communicate with him affected their ability to adequately defend his interests - Under ss. 85.4 and 85.5(b) of the IRPA, the special advocates were prohibited from communicating with the named person or any person after they have received the confidential information given to the judge by the Ministers - The Federal Court of Appeal stated that ss. 85.4 and 85.5 had built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of the person - The judge had the authority to lift the ban on communication and to impose conditions consistent with those objectives - See paragraphs 113 to 116.

Aliens - Topic 1561.3

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Special advocates - [See third and fourth **Aliens - Topic 1560**].

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat, who was the subject of security certificate reasonableness proceedings, argued that in enacting ss. 77(2) and 83(1) of the Immigration and Refugee Protection Act, Parliament failed to implement the fairness threshold established by the Supreme Court in the Charkaoui #1 decision (SCC 2007) (i.e., 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 had to be sufficiently informed of the case put against him so as to be able to meet that case) - The Federal Court of Appeal rejected that argument - The French version of the legislation actually used the very words "'suffisamment informé' (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" - The French version was in that respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of s. 7 of the Charter - Both texts, English and French, had equal

force and the French version was to be preferred - Moreover, the court agreed that the concept of "reasonably informed" was subject to and qualified by s. 7 of the Charter (i.e., the named person had to be informed to the point that he knew the case against him and was able to meet it) - See paragraphs 73 to 77.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat, who was the subject of security certificate reasonableness proceedings, argued that the designated judge applied a more diluted test than the test required by s. 7 of the Charter with respect to disclosure of information - The judge allegedly limited Harkat's knowledge of the case against him to a knowledge that enabled him simply to respond to the case rather than enabling him to challenge the case against him, to contradict the allegations and attack the credibility of informants - The Federal Court of Appeal held that this argument had no merit and stated that it was somewhat unfair to the judge who referred to and applied the test as formulated by the Supreme Court in Charkaoui #1 (i.e., a fair hearing required the affected person be informed of the case against him and be permitted to respond to that case) - Regardless of the language used by the judge, it was obvious throughout his reasoning that he applied the proper test dictated by s. 7 - See paragraphs 78 to 82.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - The Immigration and Refugee Protection Act (IRPA), s. 77(2) provided that when a security certificate was referred to the court for a reasonableness determination, "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"- Pursuant to s. 83(1) the designated judge was to ensure that the summary was provided to the person named in the certificate but that other information was protected from disclosure - The Federal Court of Appeal stated that ss. 77(2) and 83(1)(c) accorded with the principles of fundamental justice (Charter, s. 7) - See paragraphs 70 to 82.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - [See all **Aliens - Topic 1560** and first **Aliens - Topic 1561.3**].

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - [See all **Aliens - Topic 1560**, first and second **Aliens - Topic 1561.3** and first, second and third **Aliens - Topic 1562**].

Aliens - Topic 4069

Practice - Judicial review and appeals - Certification of question of general importance by Federal Court - The Federal Court of Appeal noted that where a question was certified for appellate consideration under s. 82.3 of the Immigration and Refugee Protection Act, the

appeal court was not confined to answering the stated question or issues directly related to it - All issues raised by the appeal could be considered - See paragraphs 3 to 9.

Civil Rights - Topic 660.2

Liberty - Limitations on - Immigration (incl. security certificate procedure) - [See first **Aliens - Topic 1561.3**].

Civil Rights - Topic 1325

Security of the person - Immigration - Deportation, removal or exclusion (incl. security certificate procedure) - [See first **Aliens - Topic 1561.3**].

Civil Rights - Topic 3180

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Fair hearing - [See first and second **Aliens - Topic 1561.3** and first and second **Aliens - Topic 1562**].

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - [See all **Aliens - Topic 1560**, first and second **Aliens - Topic 1561.3** and first and second **Aliens - Topic 1562**].

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Procedure not contrary to fundamental justice - [See third, fourth and fifth **Aliens - Topic 1560**, first **Aliens - Topic 1561.3** and third **Aliens - Topic 1562**].

Civil Rights - Topic 8374

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Stay of proceedings - [See second **Aliens - Topic 1560**].

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process - [See second **Aliens - Topic 1560**].

Courts - Topic 4082

Federal Court of Canada - Jurisdiction - Federal Court of Appeal - Appeals from judgments of Federal Court - [See **Aliens - Topic 4069**].

Evidence - Topic 4150.3

Witnesses - Privilege - Privileged topics - Covert human intelligence source privilege (incl. CSIS informers) - [See first **Aliens - Topic 1560**].

National Security - Topic 1008

Canadian Security Intelligence Service (CSIS) - General - Disclosure of information - [See first **Aliens - Topic 1560**].

Statutes - Topic 1802

Interpretation - Intrinsic aids - Bilingual statutes - Reference to one language - When required - [See first **Aliens - Topic 1562**].

Cases Noticed:

- Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, addendum [1998] 1 S.C.R. 1222; 226 N.R. 201, refd to. [para. 4].
- Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; 243 N.R. 22, refd to. [para. 5].
- Canadian Council for Refugees et al. v. Canada, [2009] 3 F.C.R. 136; 385 N.R. 1; 74 Admin. L.R.(4th) 79; 2008 FCA 229, refd to. [para. 6].
- Xie v. Canada (Minister of Citizenship and Immigration), [2005] 1 F.C.R. 304; 325 N.R. 255; 2004 FCA 250, refd to. [para. 6].
- Richter v. Canada (Minister of Citizenship and Immigration) et al., [2009] N.R. Uned. 20; 2009 FCA 73, refd to. [para. 6].
- Ruby v. Royal Canadian Mounted Police et al., [2002] 4 S.C.R. 3; 295 N.R. 353; 2002 SCC 75, refd to. [para. 8].
- Charkaoui, Re, [2007] 1 S.C.R. 350; 358 N.R. 1; 2007 SCC 9, refd to. [para. 15].
- Charkaoui, Re, [2008] 2 S.C.R. 326; 376 N.R. 154; 2008 SCC 38, refd to. [para. 17].
- Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; 281 N.R. 1; 2002 SCC 1, refd to. [para. 30].
- Poshteh v. Canada (Minister of Citizenship and Immigration), [2005] 3 F.C.R. 487; 331 N.R. 129; 2005 FCA 85, [para. 34].
- Gebreab v. Canada (Minister of Public Safety and Emergency Preparedness) (2010), 409 N.R. 196; 2010 FCA 274, refd to. [para. 35].
- Chiarelli v. Minister of Employment and Immigration, [1992] 1 S.C.R. 711; 135 N.R. 161, refd to. [para. 40].
- R. v. Bjelland (J.C.), [2009] 2 S.C.R. 651; 391 N.R. 202; 460 A.R. 230; 462 W.A.C. 230; 2009 SCC 38, refd to. [para. 49].
- R. v. La (H.K.) et al., [1997] 2 S.C.R. 680; 213 N.R. 1; 200 A.R. 81; 146 W.A.C. 81, refd to. [para. 50].
- Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 55].
- Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; 58 N.R. 1, refd to. [para. 80].
- Canada (Attorney General) v. Almalki et al. (2011), 420 N.R. 91; 2011 FCA 199, refd to. [para. 88].
- Solicitor General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario et al., [1981] 2 S.C.R. 494; 38 N.R. 588; 23 C.R.(3d) 338, refd to. [para. 90].
- R. v. Secretary of State for the Home Department, ex parte Hosenball, [1977] 3 All E.R. 452 (Eng. C.A.), refd to. [para. 91].
- R. v. National Post et al., [2010] 1 S.C.R. 477; 401 N.R. 104; 262 O.A.C. 1; 2010 SCC 16, refd to. [para. 95].
- Blood Tribe Department of Health v. Privacy Commissioner (Can.) et al., [2008] 2 S.C.R. 574; 376 N.R. 327; 2008 SCC 44, refd to. [para. 104].

Ruby v. Royal Canadian Mounted Police et al., [2000] 3 F.C. 589; 256 N.R. 278 (F.C.A.),
refd to. [para. 109].
Charkaoui, Re (2009), 368 F.T.R. 156; 179 A.C.W.S.(3d) 301; 2009 FC 476, refd to.
[para. 109].
R. v. Lyttle (M.G.), [2004] 1 S.C.R. 1; 316 N.R. 52; 184 O.A.C. 1; 2004 SCC 5, refd to.
[para. 111].
R. v. Ahmad (F.) et al., [2011] 1 S.C.R. 110; 411 N.R. 320; 2011 SCC 6, refd to. [para.
111].
United Kingdom (Secretary of State for the Home Department) v. A.F. et al., [2009] N.R.
Uned. 194; [2009] UKHL 28, refd to. [para. 115].
Charkaoui, Re, [2005] 2 F.C.R. 299; 328 N.R. 201; 2004 FCA 421, refd to. [para. 117].
R. v. Ahmad, 2009 CanLII 84784 (Ont. S.C.), refd to. [para. 129].
R. v. Carosella (N.), [1997] 1 S.C.R. 80; 207 N.R. 321; 98 O.A.C. 81, refd to. [para. 130].
Khadr v. Canada (Minister of Justice) et al., [2008] 2 S.C.R. 125; 375 N.R. 47; 2008 SCC
28, refd to. [para. 139].
PHS Community Services Society et al. v. Canada (Attorney General) (2011), 421 N.R.
1; 310 B.C.A.C. 1; 526 W.A.C. 1; 2011 SCC 44, refd to. [para. 139].
Khadr v. Prime Minister (Can.) et al., [2010] 1 S.C.R. 44; 397 N.R. 294; 2010 SCC 3,
refd to. [para. 143].
R. v. Harrer (H.M.), [1995] 3 S.C.R. 562; 186 N.R. 329; 64 B.C.A.C. 161; 105 W.A.C.
161, refd to. [para. 144].
Somodi v. Canada (Minister of Citizenship and Immigration) (2009), 393 N.R. 395; 2009
FCA 268, refd to. [para. 148].
Bekker v. Minister of National Revenue (2004), 323 N.R. 195; 2004 FCA 186, refd to.
[para. 148].
Suresh v. Canada (Minister of Citizenship and Immigration), [2000] 2 F.C. 592; 252 N.R.
1 (F.C.A.), refd to. [para. 149].
Ikhlef, Re (2002), 223 F.T.R. 233; 2002 FCT 263, refd to. [para. 149].
Toronto Coalition to Stop the War et al. v. Canada (Minister of Public Safety and
Emergency Preparedness) et al. (2010), 374 F.T.R. 177; 2010 FC 957, refd to.
[para. 149].
Sittampalam v. Canada (Minister of Citizenship and Immigration) et al., [2007] 3 F.C.R.
198; 354 N.R. 34; 2006 FCA 326, refd to. [para. 150].

Statutes Noticed:

Canadian Charter of Rights and Freedoms, 1982, sect. 7, sect. 24(1) [para. 10].
Canada Evidence Act, R.S.C. 1985, c. C-5, sect. 37(1), sect. 38.06(2) [para. 10].
Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, sect. 12 [para. 10].
Immigration and Refugee Protection Act, S.C. 2001, c. 27, sect. 33, sect. 34(1), sect.
34(2), sect. 77(2), sect. 78, sect. 83(1)(c), sect. 83(1)(d), sect. 83(1)(e), sect. 83(1)
(h), sect. 83(1)(i), sect. 85.4(2), sect. 85.5(b) [para. 10].

Counsel:

Matthew Webber, Normal Boxall, Megan Thomas and Leonardo Russomanno, for the
appellant;
David Tyndale, Bernard Assan and André Séguin, for the respondents;
Paul Copeland and Paul Cavalluzzo as Special Advocates.

Solicitors of Record:

Webber, Schroeder, Goldstein, Abergel, Ottawa, Ontario, for the appellant;
Myles J. Kirvan, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondents;
Copeland, Duncan, Toronto, Ontario and Cavalluzzo Hayes Shilton McIntyre & Cornish LLP, Toronto, Ontario as Special Advocates.

This appeal was heard in Ottawa, Ontario, on February 21-23, 2012, before Blais, C.J., Létourneau and Layden-Stevenson, J.J.A., of the Federal Court of Appeal. The following decision was delivered in Ottawa, Ontario, on April 4, 2012, for the court, by Létourneau, J.A.

Order accordingly

Editor: Elizabeth M.A. Turgeon

Aliens - Topic 1561

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Reasonableness - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Aliens - Topic 1561

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Reasonableness - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person

to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Aliens - Topic 1561.3

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Special advocates - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Aliens - Topic 1561.3

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Special advocates - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service (CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed

the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in *Charkaoui #2* (SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his

ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat was the subject of ministerial security certificate reasonableness proceedings under the Immigration and Refugee Protection Act (IRPA) - Harkat asserted that non-disclosure of hearsay evidence that was subject to the third party rule, coupled with the fact that hearsay evidence could be admitted in security certificate proceedings pursuant to s. 83(1)(h) of the IRPA, severely curtailed and, in many cases, deprived him of his right to cross-examination - The Third Party rule referred 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 - Harkat claimed that this was yet another restriction on disclosure which contributed to the unconstitutionality of the system in place because it deprived him of his right to know and meet the case against him - The Federal Court of Appeal held that the limits on disclosure and the right to cross-examination resulting from the Third Party rule were in accordance with the principles of fundamental justice and did not render unconstitutional the current system as long as adequate substitutes were in place to provide a fair hearing - See paragraphs 106 to 112.

Aliens - Topic 1562

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Summary of information - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service

(CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in *Charkaoui #2* (SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review -

Disclosure - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat was the subject of ministerial security certificate reasonableness proceedings under the Immigration and Refugee Protection Act (IRPA) - Harkat asserted that non-disclosure of hearsay evidence that was subject to the third party rule, coupled with the fact that hearsay evidence could be admitted in security certificate proceedings pursuant to s. 83(1)(h) of the IRPA, severely curtailed and, in many cases, deprived him of his right to cross-examination - The Third Party rule referred 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 - Harkat claimed that this was yet another restriction on disclosure which contributed to the unconstitutionality of the system in place because it deprived him of his right to know and meet the case against him - The Federal Court of Appeal held that the limits on disclosure and the right to cross-examination resulting from the Third Party rule were in accordance with the principles of fundamental justice and did not render unconstitutional the current system as long as adequate substitutes were in place to provide a fair hearing - See paragraphs 106 to 112.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - The Immigration and Refugee Protection Act (IRPA), s. 77(2) provided that when a security certificate was referred to the court for a reasonableness determination, "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"- Pursuant to s. 83(1) the designated judge was to ensure that the summary was provided to the person named in the certificate but that other information was protected from disclosure - The Federal Court of Appeal stated that ss. 77(2) and 83(1)(c) accorded with the principles of fundamental justice (Charter, s. 7) - See paragraphs 70 to 82.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Special advocates were appointed to protect his interests - Harkat claimed restrictions imposed on the special advocates' right to communicate with him affected their ability to adequately defend his interests - Under ss. 85.4 and 85.5(b) of the IRPA, the special advocates were prohibited from communicating with the named person or any person after they have received the confidential information given to the judge by the Ministers - - The Federal Court of Appeal stated that ss. 85.4 and 85.5 had built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of the person - The judge had the authority to lift the ban on communication and to impose conditions consistent with those objectives - See paragraphs 113 to 116.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat, who was the subject of security certificate reasonableness proceedings, argued that in enacting ss. 77(2) and 83(1) of the Immigration and Refugee Protection Act, Parliament failed to implement the fairness threshold established by the Supreme Court in the Charkaoui #1 decision (SCC 2007) (i.e., 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 had to be sufficiently informed of the case put against him so as to be able to meet that case) - The Federal Court of Appeal rejected that argument - The French version of the legislation actually used the very words "'suffisamment informé' (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" - The French version was in that respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of s. 7 of the Charter - Both texts, English and French, had equal force and the French version was to be preferred - Moreover, the court agreed that the concept of "reasonably informed" was subject to and qualified by s. 7 of the Charter (i.e., the named person had to be informed to the point that he knew the case against him and

was able to meet it) - See paragraphs 73 to 77.

Aliens - Topic 1564

Exclusion and expulsion - Power to detain and deport - Minister's certificate - Review - Disclosure - Harkat, who was the subject of security certificate reasonableness proceedings, argued that the designated judge applied a more diluted test than the test required by s. 7 of the Charter with respect to disclosure of information - The judge allegedly limited Harkat's knowledge of the case against him to a knowledge that enabled him simply to respond to the case rather than enabling him to challenge the case against him, to contradict the allegations and attack the credibility of informants - The Federal Court of Appeal held that this argument had no merit and stated that it was somewhat unfair to the judge who referred to and applied the test as formulated by the Supreme Court in Charkaoui #1 (i.e., a fair hearing required the affected person be informed of the case against him and be permitted to respond to that case) - Regardless of the language used by the judge, it was obvious throughout his reasoning that he applied the proper test dictated by s. 7 - See paragraphs 78 to 82.

Civil Rights - Topic 660.2

Liberty - Limitations on - Immigration (incl. security certificate procedure) - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Civil Rights - Topic 1325

Security of the person - Immigration - Deportation, removal or exclusion (incl. security certificate procedure) - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the

individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Civil Rights - Topic 3180

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Fair hearing - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Civil Rights - Topic 3180

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Fair hearing - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Special advocates were appointed to protect his interests - Harkat claimed restrictions imposed on the special advocates' right to communicate with him affected their ability to adequately defend his interests - Under ss. 85.4 and 85.5(b) of the IRPA, the special advocates were prohibited from communicating with the named person or any person after they have received the confidential information given to the judge by the Ministers - The Federal Court of Appeal stated that ss. 85.4 and 85.5 had built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of the person - The judge had the authority to lift the ban on communication and to impose conditions consistent with those objectives - See paragraphs 113 to 116.

Civil Rights - Topic 3180

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Fair hearing - Harkat, who was the subject of security certificate reasonableness proceedings, argued that in enacting ss. 77(2) and 83(1) of the Immigration and Refugee Protection Act, Parliament failed to implement the fairness threshold established by the Supreme Court in the Charkaoui #1 decision (SCC 2007) (i.e., 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 had to be sufficiently informed of the case put against him so as to be able to meet that case) - The Federal Court of Appeal rejected that argument - The French version of the legislation actually used the very words "'suffisamment informé' (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" - The French version was in that respect more

precise than the English version, more favourable to the named person and more compliant with the fairness requirement of s. 7 of the Charter - Both texts, English and French, had equal force and the French version was to be preferred - Moreover, the court agreed that the concept of "reasonably informed" was subject to and qualified by s. 7 of the Charter (i.e., the named person had to be informed to the point that he knew the case against him and was able to meet it) - See paragraphs 73 to 77.

Civil Rights - Topic 3180

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Fair hearing - Harkat, who was the subject of security certificate reasonableness proceedings, argued that the designated judge applied a more diluted test than the test required by s. 7 of the Charter with respect to disclosure of information - The judge allegedly limited Harkat's knowledge of the case against him to a knowledge that enabled him simply to respond to the case rather than enabling him to challenge the case against him, to contradict the allegations and attack the credibility of informants - The Federal Court of Appeal held that this argument had no merit and stated that it was somewhat unfair to the judge who referred to and applied the test as formulated by the Supreme Court in Charkaoui #1 (i.e., a fair hearing required the affected person be informed of the case against him and be permitted to respond to that case) - Regardless of the language used by the judge, it was obvious throughout his reasoning that he applied the proper test dictated by s. 7 - See paragraphs 78 to 82.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service (CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in Charkaoui #2

(SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues)

- Harkat was the subject of ministerial security certificate reasonableness proceedings under the Immigration and Refugee Protection Act (IRPA) - Harkat asserted that non-disclosure of hearsay evidence that was subject to the third party rule, coupled with the fact that hearsay evidence could be admitted in security certificate proceedings pursuant to s. 83(1)(h) of the IRPA, severely curtailed and, in many cases, deprived him of his right to cross-examination - The Third Party rule referred 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 - Harkat claimed that this was yet another restriction on disclosure which contributed to the unconstitutionality of the system in place because it deprived him of his right to know and meet the case against him - The Federal Court of Appeal held that the limits on disclosure and the right to cross-examination resulting from the Third Party rule were in accordance with the principles of fundamental justice and did not render unconstitutional the current system as long as adequate substitutes were in place to provide a fair hearing - See paragraphs 106 to 112.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Special advocates were appointed to protect his interests - Harkat claimed restrictions imposed on the special advocates' right to communicate with him affected their ability to adequately defend his interests - Under ss. 85.4 and 85.5(b) of the IRPA, the special advocates were prohibited from communicating with the named person or any person after they have received the confidential information given to the judge by the Ministers - - The Federal Court of Appeal stated that ss. 85.4 and 85.5 had built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of the person - The judge had the authority to lift the ban on communication and to impose

conditions consistent with those objectives - See paragraphs 113 to 116.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat, who was the subject of security certificate reasonableness proceedings, argued that in enacting ss. 77(2) and 83(1) of the Immigration and Refugee Protection Act, Parliament failed to implement the fairness threshold established by the Supreme Court in the Charkaoui #1 decision (SCC 2007) (i.e., 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 had to be sufficiently informed of the case put against him so as to be able to meet that case) - The Federal Court of Appeal rejected that argument - The French version of the legislation actually used the very words "'suffisamment informé' (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" - The French version was in that respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of s. 7 of the Charter - Both texts, English and French, had equal force and the French version was to be preferred - Moreover, the court agreed that the concept of "reasonably informed" was subject to and qualified by s. 7 of the Charter (i.e., the named person had to be informed to the point that he knew the case against him and was able to meet it) - See paragraphs 73 to 77.

Civil Rights - Topic 3188

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Right to make full answer and defence (incl. disclosure issues) - Harkat, who was the subject of security certificate reasonableness proceedings, argued that the designated judge applied a more diluted test than the test required by s. 7 of the Charter with respect to disclosure of information - The judge allegedly limited Harkat's knowledge of the case against him to a knowledge that enabled him simply to respond to the case rather than enabling him to challenge the case against him, to contradict the allegations and attack the credibility of informants - The Federal Court of Appeal held that this argument had no merit and stated that it was somewhat unfair to the judge who referred to and applied the test as formulated by the Supreme Court in Charkaoui #1 (i.e., a fair hearing required the affected person be informed of the case against him and be permitted to respond to that case) - Regardless of the language used by the judge, it was obvious throughout his reasoning that he applied the proper test dictated by s. 7 - See paragraphs 78 to 82.

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Procedure not contrary to fundamental justice - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following Re Charkaoui #2 (SCC 2008), only summaries of confidential information relied on by the Ministers were provided to Harkat but special advocates, who were appointed to represent Harkat's interests, were given access to the confidential material - Harkat

claimed that the new system imposed undue restrictions on disclosure to the point that it was unconstitutional - By being provided with just summaries, Harkat claimed that he was deprived of the ability to know and answer the case against him - In addition, the actual restrictions on disclosure hampered his right to cross-examination, thereby bereaving him of the ability to meet the case - The Federal Court of Appeal rejected Harkat's argument - The court stated that the disclosure provided for in the revised IRPA, when combined with the procedural safeguard of special advocates was in accordance with the principles of fundamental justice - See paragraphs 83 to 85.

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Procedure not contrary to fundamental justice - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act (IRPA) on the grounds of national security - In accordance with the legislative amendments following *Re Charkaoui #2* (SCC 2008), summaries of confidential information provided by human sources were provided to Harkat - Harkat claimed that his right to cross-examination was hampered and truncated to the point that it defeated his ability to know and meet the case against him - The Federal Court of Appeal noted that the special advocates, who were appointed to protect Harkat's interests, had access to the human sources' confidential information on behalf of a named person - They could challenge the reliability of that information using other pieces of confidential information they were entitled to receive as well as information provided by the named person or his counsel - The court did not believe that the right to cross-examination was so restricted as to make the system unconstitutional - See paragraphs 86 and 87.

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Procedure not contrary to fundamental justice - Harkat was the subject of ministerial security certificate reasonableness proceedings under the Immigration and Refugee Protection Act (IRPA) - Harkat asserted that non-disclosure of hearsay evidence that was subject to the third party rule, coupled with the fact that hearsay evidence could be admitted in security certificate proceedings pursuant to s. 83(1)(h) of the IRPA, severely curtailed and, in many cases, deprived him of his right to cross-examination - The Third Party rule referred 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 - Harkat claimed that this was yet another restriction on disclosure which contributed to the unconstitutionality of the system in place because it deprived him of his right to know and meet the case against him - The Federal Court of Appeal held that the limits on disclosure and the right to cross-examination resulting from the Third Party rule were in accordance with the principles of fundamental justice and did not render unconstitutional the current system as long as adequate substitutes were in place to provide a fair hearing - See paragraphs 106 to 112.

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and

noncriminal proceedings - Procedure not contrary to fundamental justice - Harkat was the subject of a ministerial security certificate on the grounds of national security issued under the Immigration and Refugee Protection Act (IRPA) - Harkat claimed that a number of provisions of the IRPA relating to the security certificate reasonableness review scheme were contrary to s. 7 of the Charter (s. 77(2) (filing of evidence and summary), ss. 83(1)(c)(d)(e)(h) and (i) (restrictions on disclosure) and ss. 85.4(2) and 85.5(b) (restrictions on communications involving special advocates, including preauthorization requirements)) - The Federal Court (Constitutionality Decision) found that the provisions were constitutional - Harkat appealed - The Federal Court of Appeal dismissed the appeal respecting the Constitutionality Decision - The judge did not err when he concluded that the current security certificate regime was in accordance with the principles of fundamental justice because it allowed a named person to sufficiently know and meet the case against him - The new scheme respected the individuals right to life, liberty and security of the person - See paragraphs 38 to 47 and 70 to 120 and 157.

Civil Rights - Topic 3193

Trials - Due process, fundamental justice and fair hearings - Administrative and noncriminal proceedings - Procedure not contrary to fundamental justice - The Immigration and Refugee Protection Act (IRPA), s. 77(2) provided that when a security certificate was referred to the court for a reasonableness determination, "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"- Pursuant to s. 83(1) the designated judge was to ensure that the summary was provided to the person named in the certificate but that other information was protected from disclosure - The Federal Court of Appeal stated that ss. 77(2) and 83(1)(c) accorded with the principles of fundamental justice (Charter, s. 7) - See paragraphs 70 to 82.

Civil Rights - Topic 8374

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Stay of proceedings - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in Charkaoui #2 (SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process - Harkat was the subject of proceedings to determine the reasonableness of a ministerial security certificate issued under the Immigration and Refugee Protection Act on the grounds of national security - The evidence filed by the Ministers included summaries of interviews between Harkat and intelligence officers and other conversations involving Harkat - The originals of the conversations had been destroyed pursuant to a Canadian Security Intelligence Service (CSIS) policy (a policy since struck down in Charkaoui #2 (SCC 2008)) - Harkat sought to have the summaries of evidence excluded based on the doctrine of abuse of process or a remedy under s. 24(1) of the Charter, claiming that his right to disclosure (Charter, s. 7) was breached - The Federal Court of Appeal held that the destruction of the original records constituted a breach of the duty to disclose - Disclosure to the special advocates was not a sufficient remedy for the destruction of the originals - Rather, the court ordered that all the summaries be excluded except those conversations to which Harkat was privy - The court rejected the abuse of process argument - See paragraphs 48 to 52 and 122 to 147 and 159.

Courts - Topic 4082

Federal Court of Canada - Jurisdiction - Federal Court of Appeal - Appeals from judgments of Federal Court - The Federal Court of Appeal noted that where a question was certified for appellate consideration under s. 82.3 of the Immigration and Refugee Protection Act, the appeal court was not confined to answering the stated question or issues directly related to it - All issues raised by the appeal could be considered - See paragraphs 3 to 9.

Evidence - Topic 4150.3

Witnesses - Privilege - Privileged topics - Covert human intelligence source privilege (incl. CSIS informers) - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service (CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

National Security - Topic 1008

Canadian Security Intelligence Service (CSIS) - General - Disclosure of information - During ministerial security certificate proceedings respecting Harkat, the special advocates wanted to know the identity of Canadian Security Intelligence Service (CSIS) covert human intelligence sources and cross-examine them in the closed door proceedings - The designated judge denied the special advocates' requests on the basis of "covert human intelligence source privilege" (i.e., the judge extended the police informer

common law privilege to covert human intelligence sources, subject to a "need to know" exception) - Harkat appealed, claiming that the restrictions on cross-examination defeated his ability to know and meet the case against him - The Federal Court of Appeal allowed the appeal and declared that CSIS human sources did not benefit from the police informer class privilege or a class privilege analogous to the police informer class privilege and that the judiciary should neither create nor extend a class privilege for those sources - See paragraphs 25 to 28, and 88 to 105 and 158.

Statutes - Topic 1802

Interpretation - Intrinsic aids - Bilingual statutes - Reference to one language - When required - Harkat, who was the subject of security certificate reasonableness proceedings, argued that in enacting ss. 77(2) and 83(1) of the Immigration and Refugee Protection Act, Parliament failed to implement the fairness threshold established by the Supreme Court in the Charkaoui #1 decision (SCC 2007) (i.e., 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 had to be sufficiently informed of the case put against him so as to be able to meet that case) - The Federal Court of Appeal rejected that argument - The French version of the legislation actually used the very words "'suffisamment informé' (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" - The French version was in that respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of s. 7 of the Charter - Both texts, English and French, had equal force and the French version was to be preferred - Moreover, the court agreed that the concept of "reasonably informed" was subject to and qualified by s. 7 of the Charter (i.e., the named person had to be informed to the point that he knew the case against him and was able to meet it) - See paragraphs 73 to 77.