Harkat, Re, 2004 FC 1717 (CanLII)

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DES-4-02

2004 FC 1717

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

AND IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the Act;

AND IN THE MATTER OF Mohamed HARKAT

Indexed as: Harkat (Re) (F.C.)

Federal Court, Dawson J.--Hull, Québec, June 7; Ottawa, December 10, 2004.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Hearing into reasonableness of security certificate issued under Act, s. 77(1) -- Motion for appointment of amicus curiae -- Applicant's argument: case at bar more complicated than Ahani v. Canada in which predecessor legislation held to satisfy fundamental justice principles -- Summary given under Act, s. 78(h) gave inadequate disclosure -- Regime established by Act, ss. 77, 78, 80, role of designated judge, explained -- Appointment of amicus curiae unnecessary for exercise of Court's jurisdiction under Act -- All information sought by applicant's counsel had been provided to Court -- Designated judge reviews Ministers' evidence "with intense scrutiny" -- Amicus curiae not needed for fundamental justice -- Parliament intended evidence to be seen by designated judge only -- Granting motion would cause delay when case, supposed to be dealt with expeditiously, has already dragged on too long.

Judges and Courts -- Motion for appointment of amicus curiae to assist designated judge at hearing into reasonableness of security certificate under Immigration and Refugee Protection Act -- Role of designated judge under statutory scheme -- Has to balance opposing interests: protect national security intelligence while providing person concerned reasonable disclosure of grounds for certificate -- Has access to all information on which Ministers' decision based -- Though Federal Court "superior court of record", not superior court within meaning of expression as applied to provincial superior courts -- Only powers are those conferred by Parliament -- Parliament intended designated judge only to see evidence -- No appeal from decision of designated judge -- Conference speech by Hugessen J. considered -- Origin of designated judge concept discussed.

Federal Court Jurisdiction -- Motion for appointment of amicus curiae to assist Court in immigration security certificate matter -- Court assumed, without deciding, has jurisdiction to appoint amicus curiae -- Federal Court not one of general, inherent jurisdiction though, under Federal Courts Act, s. 3 superior court of record -- Designation as "superior court" in itself conferred no jurisdiction -- Not superior court as expression applies to provincial superior courts -- Power conferred by implication only if necessary for exercise of express

jurisdiction -- Amicus curiae not required to discharge duties under relevant provisions of Immigration and Refugee Protection Act.

Constitutional Law -- Charter of Rights -- Enforcement -- Motion for appointment of amicus curiae to assist designated judge at security certificate reasonableness hearing -- Argument: required to provide fundamental justice, guaranteed by Charter, s. 7 -- Argued that Court having jurisdiction at common law and under Charter, s. 24(1) -- Ministers' argument: applicant putting in question certain sections of Immigration and Refugee Protection Act while failing to give Attorneys General notice of constitutional question, rejected as applicant's position Act, fairly interpreted, permits remedy -- In circumstances, unnecessary to decide whether Court has jurisdiction to appoint amicus curiae -- Court rejecting argument case at bar much more complicated than Ahani v. Canada in which Court held predecessor legislation met fundamental justice principles.

In the context of a hearing into reasonableness of a security certificate, this was a motion for an order: (1) appointing an *amicus curiae* to assist the Court when applicant's counsel is excluded; (2) that the Canadian government pay reasonable expenses of the *amicus curiae*; (3) stating that without an *amicus curiae* Charter, section 7 would be breached in that applicant would be denied fundamental justice; (4) even if there would not be a Charter, section 7 breach, that an *amicus curiae* be appointed pursuant to the Court's common law jurisdiction; (5) costs of this motion, on a solicitor-client basis, in any event of the cause.

In arguing for the Court's common law jurisdiction, applicant referred to Ontario Court of Appeal *dicta* in *R. v. Samra*: "It was not argued, nor could it be, that a superior court has no power to appoint *amicus curiae* at the trial of an unrepresented accused". In opposition to this motion, it was the Ministers' submission that: (1) applicant's Charter argument called into question the constitutional validity of Act, sections 77 and 78 but that applicant had failed to serve notice of constitutional question upon the federal and provincial Attorneys General; (2) the procedures under sections 77 and 78 regarding the reference of security certificates to a designated Federal Court Judge have been held to be consistent with Charter, section 7 fundamental justice principles; (3) the Charter does not confer upon the Federal Court power to appoint an *amicus curiae*; (4) the Court lacks express statutory authority to appoint an *amicus curiae*; (5) the Court lacks any implied jurisdiction to appoint an *amicus curiae* for a section 78 proceeding; and (6) even if it does have such jurisdiction, the Court ought to decline to exercise it in the circumstances of the case at bar.

Held, the motion should be denied.

The Minister's submission as to the necessity for service of notice of constitutional question upon federal and provincial Attorneys General was rejected, as the applicant had not put in question the validity, applicability or operability of Act, section 78.

While it was unnecessary for the Court to determine whether it had jurisdiction to appoint an *amicus curiae*, it was prepared to assume it did have such jurisdiction.

The following points were raised as supporting the need to appoint an *amicus curiae* herein: (1) this was a more complicated situation than that in *Ahani v. Canada*, wherein the Court determined the predecessor legislation to sections 77, 78 and 80 satisfied fundamental justice principles; (2) given the government's unwillingness to answer even such basic questions as to whether it relies upon information obtained from Maher Arar, an *amicus curiae* was needed to enable the Court to consider fully and fairly the allegations against Harkat; (3) having an *amicus curiae* would allow for the hearing of legal representations not otherwise put forward while protecting the national security interest, thereby striking a just balance between competing interests; and (4) the summary with which Harkat had been furnished did not amount to a full, fair and candid disclosure. In particular, it did not fully disclose the political situation in Algeria.

Prior to embarking upon an analysis of the grounds advanced in support of this motion, the statutory regime and the role therein of the designated judge were considered and reference made to the review and exposition of these matters provided by the reasons of Noël J. in *Charkaoui (Re)*. It was there written that "designated judges are the cornerstone of the review procedure . . . the designated judge has access to all the information on which the Ministers' decisions are based . . . the Ministers' representatives are even under a duty to inform the designated judge of any facts that could be prejudicial to the Ministers' case . . . the duty of disclosure is much greater when Parliament has authorized hearings in the absence of a party".

The first step in the analysis was to determine whether the appointment of an *amicus curiae* was necessary or required in order for the Court to exercise its statutory jurisdiction. The Federal Court is not a court of general or inherent jurisdiction although, under *Federal Courts Act*, section 3, it is "a superior court of record having civil and criminal jurisdiction". Still, its designation as a "superior court" has been held, in itself, to confer no jurisdiction: *Commonwealth of Puerto Rico v. Hernandez*. In that case, it was held, by a majority, that it was not a superior court as that expression is applied to provincial superior courts, i.e. having jurisdiction in all cases not excluded from their authority. That decision served to distinguish the *dicta* in *Samra*.

Conferral of a power will be implied only where necessary to permit the exercise of the Court's express jurisdiction: *Canada (Human Rights Commission) v. Canadian Liberty Net*. Thus it was necessary to consider whether the evidence established that appointment of an *amicus curiae* was necessary for the Court to exercise its sections 78 and 80 responsibilities. What made the instant case different from all the other security certificate cases in which the Court was able to discharge its duty unassisted by an *amicus curiae*? The allegations against applicant did not appear so complicated as to require a procedure not contemplated by the Act. The Court's ability to fully and fairly deal with the allegations against Harkat and the reliability of the evidence was illustrated by its decision to make no finding adverse to Harkat on the basis of information which may have been provided by Maher Arar. Information sought by Harkat's counsel in the form of 231 questions has now been provided to the Court in the absence of Harkat. While applicant has argued that intelligence services are not infallible and may even commit abuses, the Court--as pointed out by Blais J. in *Zündel (Re)* --looks at the evidence "with intense scrutiny". Harkat's assertion regarding non-disclosure of the Algerian political situation could not be accepted, as the summary clearly outlined the allegations regarding applicant's involvement with the Front islamique du salut and the Groupe islamique armé, which latter organization seeks to establish an Islamic state in Algeria through the use of terrorist violence.

Mr. Harkat did not establish that the Court could not properly exercise its jurisdiction without the appointment of an *amicus curiae*.

The next stage of the analysis was to determine whether it would be impossible for the Court to provide fundamental justice for Mr. Harkat. The Federal Court of Appeal's recent judgment in *Sogi v. Canada (Minister of Citizenship and Immigration)*, was authority for the proposition that the Immigration and Refugee Board may, in making an admissibility decision, take into account security intelligence information without disclosing it to the individual and does not thereby infringe Charter, section 7. Nothing in the circumstances rendered the Court incapable of properly balancing and protecting applicant's rights so as to conduct a hearing in conformity with fundamental justice. There was no necessity for recourse to the remedial provisions of Charter, subsection 24(1) to appoint an *amicus curiae*.

There were three additional reasons for refusing this application: (1) Parliamentary intent; (2) lateness of request occasioning delay; and (3) powers of a designated judge. Section 78 makes clear Parliament's intent that the responsibility for determining the reasonableness of a security certificate should fall upon the designated judge alone. The Act provides that no appeal lies from the designated judge's decision as to a certificate's reasonableness. The Federal Court of Appeal is not to have access to the evidence disclosed to the designated judge. It would follow that Parliament did not intend that an *amicus curiae* have access to this confidential information. Applicant relied on a speech given by Hugessen J. to a Canadian Institute for the Administration of Justice conference in which he suggested that designated judges do not like having to sit alone, hearing only one party and considering the material put forward by that party. But, in the matter of security certificates, Parliament has chosen not to follow the Security Intelligence Review Committee (SIRC) model, in which independent counsel represent the interest of the complainant with respect to information which could not be disclosed to the complainant. It must be remembered that SIRC appointees are not judges and need not even be legally trained, so the engagement of independent counsel had to be viewed in that context. As noted in *Charkaoui*, the genesis of the concept of designated judge confirms the view that Parliament intended security certificates to be reviewed by a designated judge alone so as to limit access to protected information and thereby safeguard national security and the means of obtaining security information.

Granting this application would result in delay since the *amicus curiae* would have to receive a security clearance, familiarize himself with a substantial volume of material and settle the terms of his retainer. Proceedings to determine the reasonableness of security certificates are supposed to be conducted expeditiously.

This matter got under way back in December, 2002 and should be completed without further delay.

The legislation provides the designated judge with sufficient power and flexibility to properly discharge the duties imposed and the rights of one named in a security certificate are capable of protection without the intervention of an *amicus curiae*.

statutes and regulations judicially

considered

Access to Information Act, R.S.C., 1985, c. A-1 , s. 52 (as am. by S.C. 2002, c. 8, s. 112).

Canada Evidence Act, R.S.C., 1985, c. C-5 , ss. 38 (as am. by S.C. 2001, c. 41, ss. 43, 141), 38.01 (as enacted *idem*, s. 43), 38.02 (as enacted *idem*, ss. 43, 141), 38.03 (as enacted *idem*, s. 43), 38.031 (as enacted *idem*, ss. 43, 141), 38.04 (as enacted *idem*), 38.05-38.13 (as enacted *idem*, s. 43), 38.131 (as enacted *idem*; 2004, c. 12, s. 19), 38.14 (as enacted by S.C. 2001, c. 41, s. 43), 38.15 (as enacted *idem*).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 24(1).

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23 , s. 42.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 101.

Criminal Code, R.S.C., 1985, c. C-46 , ss. 83.05 (as enacted by S.C. 2001, c. 41, ss. 4, 143), 83.06 (as enacted *idem*, s. 4).

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 3.

Federal Courts Act, R.S.C., 1985, c. F-7 , ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 3 (as am. *idem*, s. 16), 57 (as am. *idem*, s. 54).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 77 (as am. by S.C. 2002, c. 8, s. 194), 78, 79 (as am. *idem*), 80, 81, 82, 83, 84, 85.

Privacy Act, R.S.C., 1985, c. P-21 , s. 51 (as am. by S.C. 2002, c. 8, s. 159).

cases judicially considered

applied:

Ahani v. Canada, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.R.R. (2d) 95; 100 F.T.R. 261 (T.D.); affd reflex, (1996), 37 C.R.R. (2d) 181; 201 N.R. 233 (F.C.A.); leave to appeal to S.C.C. refused, [1997] 2 S.C.R. v; *Charkaoui (Re)*, 2004 FC 1419 (CanLII), [2004] 3 F.C.R. 32; (2003), 253 F.T.R. 22; 2004 FC 1419; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228; (1973), 41 D.L.R. (3d) 549; 14 C.C.C. (2d) 209; *New Brunswick Electric Power Commission v. Maritime Electric Company Limited*, reflex, [1985] 2 F.C. 13; (1985), 60 N.R. 203 (C.A.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (S.C.C.), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 224 N.R. 241; *Zündel (Re)* 2004 FC 86 (CanLII), (2004), 245 F.T.R. 61; 39 Imm. L.R. (3d) 271; 2004 FC 86; *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005 1 F.C.R. 171; 2004 FCA 212 (CanLII), (2004), 36 Imm. L.R. (3d) 1; 322 N.R. 2; 2004 FCA 212; leave to appeal to S.C.C. denied, [2004] S.C.C.A. No. 354 (QL); *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 407 (CanLII), [2004] 1 F.C.R. 451; (2003), 236 D.L.R. (4th) 91; 315 N.R. 1; 2003 FCA 407.

distinguished:

R. v. Samra 1998 CanLII 7174 (ON C.A.), (1998), 41 O.R. (3d) 434; 129 C.C.C. (3d) 144 (C.A.).

referred to:

Harkat (Re) 2003 FCT 285 (CanLII), (2003), 231 F.T.R. 19; 27 Imm. L.R. (3d) 47; 2003 FCT 285; *Harkat (Re)*

2003 FCT 520 (CanLII), (2003), 238 F.T.R. 201; 2003 FCT 520; *Harkat (Re)*, 2003 FCT 759 (CanLII), [2003] 4 F.C. 1020; (2003), 236 F.T.R. 18; 2003 FCT 759; *Harkat (Re)* 2003 FC 918 (CanLII), (2003), 243 F.T.R. 161; 29 Imm. L.R. (3d) 238; 2003 FC 918.

authors cited

Terrorism, Law and Democracy: How is Canada Changing Following September 11? Canadian Institute for the Administration of Justice. Thémis, 2002.

MOTION for an order appointing an *amicus curiae* to assist the Court in conducting a hearing into the reasonableness of a security certificate issued pursuant to *Immigration and Refugee Protection Act*, subsection 77(1). Motion denied.

appearances:

Bruce Engel and *Paul D. Copeland* for Mohamed Harkat.

James H. Mathieson and *Michael W. Dale* for Solicitor General of Canada.

solicitors of record:

Bruce Engel, Ottawa and *Paul D. Copeland*, Toronto for Mohamed Harkat.

Deputy Attorney General of Canada for Solicitor General of Canada.

The following are the reasons for order rendered in English by

[1]Dawson J.: In the context of a hearing into the reasonableness of a security certificate issued in respect of Mohamed Harkat pursuant to subsection 77(1) [as am. by S.C. 2002, c. 8, s. 194] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), Mr. Harkat moved for an order:

(a) appointing John B. Laskin to assist the Court as *amicus curiae* during those portions of the hearing of this matter when counsel for Mr. Harkat is not permitted to be present;

(b) requiring that reasonable expenses of the *amicus curiae* thereby occasioned be paid by the Government of Canada;

(c) stating that in the absence of the assistance of the *amicus curiae*, in the particularly complicated circumstances of this case, as set out in the statement summarizing the information and evidence pursuant to paragraph 78(*h*) of the Act dated December 2, 2002 (summary) it will be impossible for the Court to provide fundamental justice to the applicant pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter) on the issue of whether the certificate signed by the two Ministers is reasonable;

(d) in the alternative, if the Court determines that section 7 of the Charter is not breached by the procedure to be followed in this case, an order of this Court exercising its common law jurisdiction that *amicus curiae* be appointed to assist the Court in this case;

(e) costs of this motion on the solicitor-client basis in any event of the cause; and

(f) such further and other relief as counsel may advise and this Court deems just.

[2]As to the jurisdiction of this Court to grant such relief, Mr. Harkat argues that the Court has jurisdiction to do so at common law, and also as a remedy available to the Court under subsection 24(1) of the Charter in order to prevent a breach of Mr. Harkat's rights guaranteed under section 7 of the Charter.

[3]In support of the Court's common law jurisdiction, Mr. Harkat relies upon *dicta* of the Ontario Court of Appeal in *R. v. Samra* 1998 CanLII 7174 (ON C.A.), (1998), 41 O.R. (3d) 434. There, in the context of an appeal against

a criminal conviction, it was argued that the lawyer who had been appointed to act as *amicus curiae* was in a conflict of interest, had made legal submissions contrary to the best interests of the accused, and disclosed confidential information obtained from the accused. At page 443 of the Court's reasons, Mr. Justice Rosenberg, writing for the Court, observed that:

It was not argued, nor could it be, that a superior court has no power to appoint *amicus curiae* at the trial of an unrepresented accused. The appellant's argument therefore must be that the court erred in appointing Mr. Black as *amicus curiae* because of a potential or actual conflict of interest.

[4]Mr. Harkat's motion is opposed by counsel for the two Ministers who referred the security certificate to the Court for a determination as to its reasonableness. On the Ministers' behalf, it is argued that:

(i) In asserting that the Charter gives this Court jurisdiction to appoint an *amicus curiae*, Mr. Harkat is calling into question the constitutional validity and the applicability of sections 77 and 78 of the Act, which do not provide for such an appointment. As a result, the Ministers say that Mr. Harkat was required to serve a notice of constitutional question upon the Attorney General of Canada, and the Attorney General of each province.

(ii) In any event, the Ministers argue that the procedures set out in sections 77 and 78 of the Act, by which a security certificate is referred to the Federal Court and a judge designated by the Chief Justice of the Court then proceeds to inquire into, and determine, whether the security certificate is reasonable, has been found to be consistent with the principles of fundamental justice as set out in section 7 of the Charter.

(iii) The Charter does not confer jurisdiction upon the Federal Court to appoint an *amicus curiae*.

(iv) There is no express bestowal of jurisdiction upon the Federal Court by statute to appoint an *amicus curiae*.

(v) There is no implied jurisdiction in the Federal Court to appoint an *amicus curiae* in proceedings conducted pursuant to section 78 of the Act.

(vi) In the alternative, if the Court concludes that it does possess jurisdiction to appoint an *amicus curiae* to assist in proceedings conducted in accordance with section 78 of the Act, the Court should not exercise its discretion to do so in this case.

[5]For ease of reference, sections 77, 78 and 80 of the Act are set out in Appendix A to these reasons.

[6]The issue raised by Mr. Harkat is an important one. The written submissions filed in support of, and in opposition to, his motion are not lengthy. Because it may be of relevance to know what arguments were advanced to the Court on this motion, Mr. Harkat's written submissions and supplemental written submissions are appended to these reasons in Appendix B, while the Ministers' written submissions are appended as Appendix C.

[7]The oral argument did not enlarge these submissions to a significant extent.

[8]The motion was argued orally on September 24, 2004. In view of the fact that the Court was to sit commencing on October 25, 2004 for the purpose of providing a further opportunity to Mr. Harkat to be heard regarding his alleged inadmissibility, it was important for the Court's decision concerning Mr. Harkat's motion to be communicated promptly to him. Accordingly, after reflection and deliberation upon the submissions made in writing and orally by the parties, the Court issued an order on October 6, 2004 dismissing the motion, for reasons to be later delivered in writing. These are those reasons.

THE MATERIAL FILED IN SUPPORT OF THE MOTION

[9]The motion is supported by affidavits sworn by John B. Laskin, William George Horton, and Diana Muñoz. Reliance is also placed by Mr. Harkat upon the summary.

[10]Mr. Laskin is a well-respected and eminent member of the Law Society of Upper Canada. His affidavit exhibits a copy of his *curriculum vitae* and states that, from 1985 to 1986, Mr. Laskin acted as counsel to the Security Intelligence Review Committee (SIRC) with respect to complaints made under section 42 of the

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23 (CSIS Act). SIRC's rules of procedure in relation to its function under the CSIS Act (as adopted on March 9, 1985) are also exhibited to Mr. Laskin's affidavit. Mr. Laskin also advised that he has acted for the Government of Canada on several occasions, including in proceedings arising from objections to the disclosure of information on the ground that the disclosure would be injurious to national security. For his work with SIRC and certain other retainers, Mr. Laskin was granted security clearance to the level "Top Secret". If appointed as *amicus*, Mr. Laskin swore to his belief that he would again be able to be approved for security clearance. Finally, Mr. Laskin advised he would be prepared to take on the task of *amicus curiae* if the Court decided it needed such assistance.

[11]Mr. Horton is another eminent member of the Law Society of Upper Canada. His affidavit also exhibited a brief professional biography and explained that, between 1986 and 1991, he acted as one of SIRC's counsel. During that time, he worked on four or five matters, two of which required him to review CSIS files. Thus, he was required to obtain, and did obtain, a "Top Secret" security classification. Mr. Horton described his duties as one of SIRC's independent counsel in the following terms:

> 4. One of my principal duties as independent counsel was to represent the interests of the complainant with respect to information which could not be disclosed to the complainant and his counsel because of the security classification which had been applied to such information. In the course of performing that function, I did the following:
>
> a) discuss the case with the Chair of the SIRC panel at the outset and review material in the SIRC file regarding the complaint;
>
> b) review the CSIS file;
>
> c) discuss the case with the complainant's counsel and, without revealing any classified information, obtain input as to what issues and concerns the complainant would like to have addressed;
>
> d) conduct in camera cross-examinations of CSIS employees and any informants who testified in whole or in part in camera;
>
> e) make submissions to the SIRC panel with respect to the in camera proceedings;
>
> f) provide editorial assistance with respect to the reasons of the SIRC panel once a decision had been made by the panel.
>
> 5. In the performance of these duties, I attempted to bring out facts and considerations which were favourable to the complainant in a balanced and responsible manner having regard to the fact that I owed duties to both the complainant and to SIRC. However, where I felt in my own independent judgement that it was required, I did not hesitate to conduct an adversarial cross-examination of a witness.
>
> 6. While the role I played as independent counsel to SIRC was a hybrid role in terms of Canadian legal norms, I felt that it was a necessary and effective compromise to ensure that there could be a degree of scrutiny and accountability for state action where classified information is involved.

[12]Diana Muñoz is a legal secretary employed by Mr. Harkat's solicitor. Her affidavit identified a bound volume entitled "Material Relied Upon in Support of the *Amicus Curiae* Motion". The contents of that volume are generally described as the correspondence and a memorandum all relating to various disclosure requests made on Mr. Harkat's behalf.

THE JURISDICTIONAL QUESTION

[13]At the outset, I dismiss the argument advanced on the Ministers' behalf that Mr. Harkat was obliged to serve a notice of constitutional question upon the Attorney General of Canada and the Attorney General of each province. Section 57 [as am. by S.C. 2002, c. 8, s. 54] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)] requires service of such a notice where the "constitutional validity, applicability, or operability of an Act of Parliament" is put into question. I do not understand Mr. Harkat on this motion to put the validity, applicability, or operability of section 78 of the Act in question. Rather, Mr. Harkat states in his notice of motion that "in the absence of the assistance of the *amicus curiae*, in the particularly complicated circumstances of this case . . . it will be impossible for the Court to provide fundamental justice" to him pursuant to section 7 of the Charter on the issue of whether the security certificate is

reasonable. In other words, Mr. Harkat states that his section 7 Charter rights are jeopardized by the current procedure and that the Act, fairly interpreted, allows the Court to remedy that situation. In that circumstance, Mr. Harkat was not, in my view, obliged to serve a notice of constitutional question.

[14]In the circumstances of this case, I do not find it necessary to decide whether the Court has the jurisdiction to appoint an *amicus curiae*. In the absence of fully developed submissions on the point, as reflected in the appended written submissions, I consider it preferable that I do not decide the point. On my assessment of the merits of the motion before me, it is sufficient for me to assume, without deciding, that there is such a jurisdiction.

[15]I now turn to consider the facts and matters urged upon the Court as justifying the appointment of an *amicus curiae* on the assumption that jurisdiction exists in certain circumstances either by implication or as a result of the Court's jurisdiction to provide a remedy for a breach of a Charter right.

THE BASIS OF THE ARGUMENT THAT AN *AMICUS CURIAE* IS REQUIRED

[16]The facts and matters said to render it impossible for the Court to provide fundamental justice to Mr. Harkat or to warrant the exercise of common law jurisdiction to appoint an *amicus curiae* are as follows:

(i) Matters relating to Mr. Harkat are significantly more complicated than the matters relating to Mr. Ahani which were considered by Madam Justice McGillis in *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.); affd reflex, (1996), 37 C.R.R. (2d) 181 (F.C.A.); leave to appeal to the Supreme Court of Canada refused, [1997] 2 S.C.R. v. The simpler allegations in respect of Mr. Ahani were those before the Court when it found the predecessor legislation to sections 77, 78 and 80 of the Act to meet the principles of fundamental justice.

(ii) Given the particularly complicated history and circumstances of this case, "the unwillingness of the government to answer even such basic questions as to whether they are relying on information obtained from Maher Arar, or Ahmed Ressam, an *amicus curiae* is necessary in order to allow the Court to consider fully and fairly the context and substance of the allegations made against" Mr. Harkat.

(iii) Such appointment would greatly assist the Court in assessing the reasonableness of the security certificate. "An *amicus curiae* would allow the Court to benefit from hearing representations of counsel which would not otherwise be put forward, while preserving the government's claim to national security interest". Considering the type of issues the Court will be called upon to decide, "the assistance or input of an *amicus curiae* could prove invaluable" so that Mr. Harkat's interest will be more completely protected. The appointment of an *amicus curiae* is said to strike a just balance between the competing interests inherent in the case.

(iv) The summary provided to Mr. Harkat pursuant to subsection 78(*h*) of the Act fails to meet the standard imposed upon the Ministers of full, fair and candid disclosure of the facts. Particularly, there was not full disclosure of the political situation in Algeria and the Ministers suggested that false Saudi passports were passports of choice only for Islamic extremists wishing to enter Canada.

ANALYSIS OF THE SUFFICIENCY OF THE GROUNDS ASSERTED TO JUSTIFY APPOINTMENT OF AN *AMICUS CURIAE*

[17]I will analyse the facts and matters argued by Mr. Harkat within the following framework:

1. Do those matters establish that the appointment of an *amicus curiae* is necessary or required in order for the Court to exercise the jurisdiction granted to the Court pursuant to the Act so as to establish the asserted implied jurisdiction?

2. Do those matters establish that, unless an *amicus curiae* is appointed, it will be impossible for the Court to provide fundamental justice to Mr. Harkat?

3. Are there additional considerations relevant to the exercise of discretion to appoint an *amicus curiae* in this case?

[18]Before commencing this analysis, it will be helpful to consider the regime established by sections 77, 78 and

80 of the Act and the role in that scheme of the designated judge. These matters were recently reviewed by my colleague, Mr. Justice Noël, in *Charkaoui (Re)*, [2004] 3 F.C.R. 32 (F.C.) and I adopt his explanation as set out in paragraphs 100 through 102 of his reasons:

In my opinion, designated judges are the cornerstone of the review procedure because they have a twofold obligation: to protect criminal or national security intelligence; and to provide the person concerned with a summary of the evidence that reasonably discloses the circumstances giving rise to the certificate and the warrant that resulted in his detention. This constitutes the balance between the opposing interests.

In order to carry out this difficult task, the designated judge has access to all the information on which the Ministers' decisions are based, without exception. The designated judge can even examine additional information if counsel for the Ministers subm it any (paragraph 78(*j*) of the IRPA). The Ministers' representatives are even under a duty to inform the designated judge of any facts that could be prejudicial to the Ministers' case. In *Ruby v. Canada (Solicitor General)* , 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3, Arbour J. notes that the duty of disclosure is much greater when Parliament has authorized hearings in the absence of a party [at paragraph 47]:

> As mentioned before, when making *ex parte* submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest.

Designated judges preside over hearings and hear the Minister's witnesses. They examine witnesses themselves as the need arises. They examine the documents carefully to determine which information is related to security and which information is not. In order to do so, they examine, among other things, the sources of the information, the way in which it was obtained, the reliability of the sources and the method used, and whether it is possible to corroborate the information by other means. Designated judges take account of the fact that the information was obtained in confidence from a source in Canada or a foreign source, or that the information is already in the public domain. They ask the Ministers' representatives about the quality of the investigation and inquire into whether the events can be interpreted differently. They decide which information can be disclosed t o the person concerned and provide a summary of the evidence containing nothing which would, if disclosed, be injurious to national security or to the safety of any person. The summary must enable the person concerned to be reasonably informed of the circumstances giving rise to the signing of the certificate, the issuance of the warrant of arrest and the detention.

After the person concerned receives the summary in question and other relevant documents, the designated judge holds one or more hearings where the person concerned is given the opportunity to be heard. . . . At the hearing, the Ministers and the person concerned have the opportunity to call witnesses, submit documentary evidence and make oral as well as written submissions.

(i) Is the appointment of *amicus curiae* necessary or required in order for the Court to exercise the jurisdiction granted to the Court pursuant to the Act?

[19]The Federal Court is not a court of general or inherent jurisdiction. It is a statutory court constituted pursuant to Parliament's authority under section 101 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1 [R.S.C., 1985, Appendix II, No. 5]] to establish "additional Courts for the better Administration of the Laws of Canada". Section 3 [as am. by S.C. 2002, ch. 8, s. 16] of the *Federal Courts Act* provides that the Court is a "court of law, equity, and admiralty" and "a superior court of record having civil and criminal jurisdiction". The designation of the Federal Court as a superior court has been held to confer no jurisdiction by itself. See: *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, at page 232 where the majority of the Court held that the concluding words of section 3 of the then *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10] and the reference to the Federal Court continuing as a `"superior court of record" did not make the Federal Court a `"superior court' within the same meaning of that expression as applied to the superior courts of the provinces, that is courts having jurisdiction in all cases not excluded from their authority". This authority, in my view, distinguishes the *dicta* of the Ontario Court of Appeal in *Samra*. The Federal Court can only exercise those powers that are given to it by Parliament.

[20]Having said that, a power may be conferred by implication to the extent that the existence and exercise of such

a power is necessary for the Court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision. See: *New Brunswick Electric Power Commission v. Maritime Electric Company Limited*, reflex, [1985] 2 F.C. 13 (C.A.) where the Federal Court of Appeal found that it had implied jurisdiction to grant a stay where the failure to stay the operation of the decision under review would render the appeal nugatory. However, conferral of a power will be implied only where that power is necessary or required in order to permit the exercise of the Court's express jurisdiction. See: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (S.C.C.), [1998] 1 S.C.R. 626, at pages 639-644 where the majority of the Court wrote that, in the context of the power to issue an injunction, "power has only been implied where that power is actually necessary for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient".

[21]This is why it is necessary to consider whether the evidence establishes that the appointment of an *amicus curiae* is necessary in order for the Court to exercise its responsibility under sections 78 and 80 of the Act.

[22]Counsel have not cited, nor am I aware of, any prior request for the appointment of an *amicus curiae* in cases where the Court is inquiring into the reasonableness of a security certificate under the Act or under its predecessor legislation. In those previous cases, the Court reached its conclusions concerning the reasonableness of a certificate without the assistance of an *amicus curiae*. What then makes this case different so that the Court cannot exercise its statutory jurisdiction without the appointment of an *amicus curiae*?

[23]First, Mr. Harkat argues that the matters relating to him are significantly more complicated than the matters relating to Mr. Ahani. No evidentiary basis was tendered for this submission, but it was argued orally that the *Ahani* case was simpler because the allegation was simply that Mr. Ahani was a foreign assassin.

[24]Allegations against Mr. Harkat, as contained in the summary and supplementary disclosures, are that:

(i) Prior to arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activities, and he is a member of the Bin Laden Network which includes Al-Qaida.

(ii) He is an Islamic extremist and a supporter of Afghani, Pakistani and Chechen extremists.

(iii) Mr. Harkat's method and route of travel to Canada, untrue statements made to Canadian officials, support for individuals and groups involved in political violence or terrorist activity, alliances with Islamic extremists, and use of security techniques lead CSIS to believe that Mr. Harkat is associated with organizations that support the use of political violence and terrorism.

(iv) With respect to the provision of untrue statements, it is said that Mr. Harkat lied when he:

(a) denied helping Islamic extremists in Pakistan while working for a relief agency;

(b) denied he was involved in supporting Islamic extremists;

(c) failed to reveal that he had been in Afghanistan;

(d) masked his relationships with individuals in Canada; and

(e) denied using aliases in order, in part, to distance himself from associating with individuals or groups who may have participated in the Bin Laden Network.

(v) Mr. Harkat has assisted some Islamic extremists who have come to Canada.

(vi) Mr. Harkat has associated with Abu Zubaida, one of Usama bin Laden's top lieutenants who identified Mr. Harkat from his physical description and his activities, including that he operated a guest house in Peshawar, Pakistan in the mid-1990s for Mujahedin travelling to Chechnya.

(vii) Mr. Harkat denied being known as Abu Muslim or Abu Muslima.

[25]Mr. Harkat is, in my view, able to avail himself of his opportunity to be heard under paragraph 78(*i*) of the Act in response to this disclosure without the involvement of *amicus curiae*. The allegations against him are based

purely on asserted facts and in my view are not so complicated as to require a procedure not contemplated in the Act.

[26]Mr. Harkat points to the fact that he has been unable to obtain answers to all of 231 questions which he put to the Ministers and he says therefore that an *amicus curiae* is necessary. With respect, I appreciate that, without knowledge of the contents of the classified Security Intelligence Report that led to the issuance of the security certificate, it is impossible for Mr. Harkat to know the precise evidence that supports the certificate where I have found that the disclosure of such evidence would be injurious to national security or to the safety of any other person. That does not mean, however, that without an *amicus curiae* the Court cannot fully and fairly consider the context and substance of the allegations made against Mr. Harkat and the nature and the reliability of the evidence supporting it. That is the very responsibility of the Court, and the exercise the Court has, and will, conduct. To illustrate, by direction, the Court has previously advised the parties that:

I have carefully considered the entirety of the evidence presented by the Ministers. On the basis of that review and consideration, I can advise that I will make no finding adverse to Mr. Harkat on the basis of any information concerning Mr. Harkat which may have been provided by Ahmed Ressam or Maher Arar.

[27]To the extent that information was sought by Mr. Harkat in his counsel's 231 questions (and more), any information that was not already before the Court in the classified Security Intelligence Report has now been provided to the Court in Mr. Harkat's absence where the disclosure of the answer would be injurious to national security or the safety of any person. Put more simply, the Court has ensured that all information that Mr. Harkat wished to have before the Court has been placed before the Court.

[28]Counsel for Mr. Harkat argued that intelligence services have been involved with abuses in the past and that intelligence services are not infallible. This, however, is why the Court is obliged to isolate the facts relied upon to support the security certificate and then, in the words of Mr. Justice Blais in *Zündel (Re)* (2004), 245 F.T.R. 61 (F.C.), at paragraph 12, review such evidence "with intense scrutiny" and weigh the evidence "with an eye to the quality and number of sources of information". This will necessarily require the Court to consider the potential for error caused by a number of factors including misidentification, mistake, misdirection, incompetence and malevolence.

[29]Mr. Harkat also argues that the appointment of an *amicus curiae* would greatly assist the Court and that his interest would be better protected with the presence of an *amicus*. However, as the majority of the Supreme Court noted in *Canadian Liberty Net*, the standard for finding an implied power is a stringent one; a power is not to be implied where it is simply logical or desirable.

[30]Mr. Harkat has alleged that an *amicus curiae* is required because the Ministers have failed to make full and fair and candid disclosure of the facts in two material respects. First, Mr. Harkat says there was not full disclosure of the political situation in Algeria. Specifically he says that:

The government failed to advise the Court that the FIS won the first round of the elections in 1992, that the military intervened to take over the government and cancelled the elections. The government failed to advise this Court that the military engaged in indiscriminate killings and disappearances of its political opponents. The government failed to advise the Court that 200,000 people were killed in Algeria as a result of the actions of the army and the response to the actions of the army in canceling [*sic*] the elections and seizing the government.

[31]I believe this to relate to paragraphs 10 and 11 of the summary which are as follows:

10. In his refugee claim, HARKAT acknowledged his support for, and membership in, the Front islamique du salut (FIS) in Algeria. When HARKAT was a supporter of the FIS, it was a legitimate political organization. In 1992, the FIS was outlawed by the Government of Algeria, and in 1993, it created a military wing, the Armée islamique du salut (AIS), which supported a doctrine of politica l violence. HARKAT claims to have joined the FIS in 1989 after losing faith in the Algerian government's ability to solve the social and economic problems facing Algeria. Shortly after joining the FIS, he provided the group with access to a family home in the village of Zmalet Elamir Abdulkadir, Algeria. This residence became the district office for the FIS and was used rent-free for the registration of its members. During this period, he claims to have resided at Oran University, where he was attending classes. In March 1990, Algerian government security officers closed down the residence in Zmalet

Elamir Abdulkadir and arrested all the FIS workers. HARKAT was advised that the authorities were looking for him and went into hiding until his departure for Saudi Arabia on a visitor visa in April 1990. He travelled to Pakistan and remained until September 1995.

11. HARKAT's claims to membership in the FIS are consistent with Service investigation. However, Service investigation revealed that when the FIS severe d its links with the Groupe islamique armé (GIA), HARKAT indicated his loyalties were with the GIA. The GIA seeks to establish an Islamic state in Algeria through the use of terrorist violence and to eliminate Western influences from the country. Although the FIS was at one time politically and ideologically associated with the GIA, in 1997, the FIS distanced itself from the civilian massacres committed by the GIA and publicly denied that the two organizations would join forces. Since the September 11, 2001 attacks on the United States, GIA attacks and massacres in Algeria have continued (see Annex IV). [Footnotes omitted.]

[32]I cannot accept Mr. Harkat's submissions that the Ministers breached their duty to make candid disclosure so as to establish the need for the appointment of an *amicus curiae*. In my opinion, the summary fully and clearly outlines the allegations concerning Mr. Harkat's involvement in the FIS and GIA. If of the view that more information is required in order to historically situate the FIS, Mr. Harkat is free to adduce whatever relevant evidence he wishes.

[33]The second lack of disclosure is said to be the suggestion "that false Saudi passports were passports of choice only for Islamic extremists wishing to enter Canada". This is, I believe, a reference to paragraph 14 of the summary which is as follows:

14. In an interview with the Service in May 1997, HARKAT explained that he used a false Saudi passport so that he would not require a visa to travel to Canada. The Service believes Saudi passports were the document of choice for Islamic extremists wishing to enter Canada, as prior to 2002, Saudi passport holders did not require a visa to enter Canada.

[34]I do not believe, on a fair reading, that the summary says that only Islamic extremists used Saudi passports. Nor does the summary say that Islamic extremists only used Saudi passports. There has not been a breach of the duty to make full and fair and candid disclosure.

[35]To summarize, I have found that Mr. Harkat has failed to establish that the Court cannot properly exercise its jurisdiction without the appointment of an *amicus curiae*.

(ii) Without the appointment of an *amicus curiae*, will it be impossible for the Court to provide fundamental justice to Mr. Harkat?

[36]Subsection 24(1) of the Charter provides that:

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.

[37]Thus, the section allows a "court of competent jurisdiction" to ensure that violations of Charter rights are remedied in an appropriate fashion.

[38]In *Charkaoui*, at paragraph 107, Mr. Justice Noël concluded that the procedure established by sections 76 to 85 [s. 79 (as am. by S.C. 2002, c. 8, s. 194)] of the Act complies with the principles of fundamental justice guaranteed by section 7 of the Charter. More recently, in *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 171 (F.C.A.); leave to appeal dismissed, [2004] S.C.C.A. No. 354, the Federal Court of Appeal found that the procedure whereby a member of the Immigration Division of the Immigration and Refugee Board may, in making an admissibility decision, take into account security intelligence information without disclosing it to the affected individual, conforms to the principles of fundamental justice so that section 7 of the Charter is not violated.

[39]In both *Charkaoui* and *Sogi*, significant reliance was placed upon the decision of Madam Justice McGillis in

Ahani. In *Ahani*, the constitutional validity of the predecessor legislation was upheld.

[40]It follows from this jurisprudence, at least for the purpose of this motion, that any alleged violation of Mr. Harkat's section 7 Charter rights arises not from the legislative scheme, but from the particular circumstances of this case.

[41]For the reasons set out above, I have not been persuaded that there is anything in the circumstances of this case that renders the Court incapable of properly balancing and protecting Mr. Harkat's rights so as to provide a hearing that conforms with the principles of fundamental justice. It follows, in my view, that there is no need for recourse to the remedial provisions of subsection 24(1) of the Charter in order to appoint an *amicus curiae*.

(iii) Additional Considerations

[42]In my view, the following factors also weigh against the exercise of discretion to appoint an *amicus* in this case at this time:

(i) It would not be in accordance with the intent of Parliament, as expressed in the legislation.

(ii) The request is made late in the proceeding and would result in further delay.

(iii) The procedure set out in section 78 of the Act provides the designated judge with the necessary power and flexibility to inquire into the reasonableness of a security certificate while balancing and protecting the rights of the person named in the security certificate.

Parliamentary Intent

[43]Sections 77, 78 and 80 of the Act do not expressly contemplate the appointment of an *amicus curiae*, and section 78 evinces Parliament's intent that the responsibility for determining the reasonableness of the security certificate is placed upon the designated judge alone. It is the designated judge who is to: (i) hear the matter; (ii) ensure the confidentiality of all information; (iii) deal with all matters as informally and expeditiously as the circumstances and considerations of natural justice permit; (iv) provide the person named in the certificate with a summary of the information or evidence that enables him or her to be reasonably informed of the circumstances giving rise to the certificate; and (v) provide the person concerned with an opportunity to be heard.

[44]In *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 451, at paragraph 18, the Federal Court of Appeal considered the statutory obligation placed upon the designated judge to keep information confidential together with the provision of the Act that no appeal lies from the decision of a designated judge as to the reasonableness of the certificate. The Court of Appeal concluded from these provisions that Parliament intended that the evidence which is necessary to determine the reasonableness of the certificate is to be taken and handled by the designated judge and to go no further. In the view of the Court of Appeal, to recognize a right of appeal on the issue of detention would allow such evidence to go beyond that framework so as to be put before the Court of Appeal. This was said to pose a number of practical problems and raise questions that Parliament had not answered, which indicated to the Court of Appeal that Parliament did not contemplate any appeal from a decision on detention.

[45]It would follow from this reasoning that providing access to the confidential information to an *amicus curiae* would also be contrary to Parliament's intent.

[46]In my view, some singular circumstance would have to arise in order to justify derogation from the scheme set out in section 78 of the Act.

[47]Mr. Harkat placed some reliance upon a speech delivered at a conference organized by the Canadian Institute for the Administration of Justice entitled *Terrorism, Law & Democracy: How is Canada Changing Following September 11*? by my colleague Mr. Justice Hugessen. There, Mr. Justice Hugessen observed that designated judges "do not like the process of having to sit alone hearing only one party, and looking at the material produced by only one party". However, judges are not parliamentarians. Parliament, when dealing with security certificates, has chosen not to follow the SIRC model (where independent counsel performed the functions described by Mr.

Horton). Justice Hugessen's comments I believe reflect the difficulty of the task entrusted to designated judges and the keen awareness with which they face the task of balancing the rights of a person named in a security certificate against Canada's need to preserve the confidentiality of information protected for reasons of national security.

[48]Before moving to the next consideration, it is appropriate to deal with Mr. Harkat's submission that Parliament has eliminated the protections provided for permanent residents in the national security context by having their cases heard before a single judge of the Federal Court and not by SIRC. This asserted diminution of protection flows, as I understand his submissions, from the absence of independent counsel in proceedings before the Federal Court. There are two responses to this. First, and less important, Mr. Harkat is not a permanent resident so that his case would never have been referred to SIRC. Second, it should be remembered that members of SIRC were appointed on a part-time basis and that members of SIRC were appointed from among members of the Privy Council. However, there was no requirement that members of SIRC be legally trained. Members of SIRC are not judges. The fact that SIRC engaged independent counsel must be seen in that context.

[49]In *Charkaoui*, Mr. Justice Noël considered the origin of the designation of Federal Court judges to act in matters of national security. He wrote at paragraphs 35 and 36:

Interestingly, the concept was formulated in the report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: *Second Report: Freedom and Security under the Law* (the Commission). The Commission refers to the notion of "designated judge" in Part V of its 2nd report at paragraph 101 (vol. 2, page 556) where it considers the question of applications for warrants in connection with the *Official Secrets Act* , R.S.C., 1985, c. O-5, stating as follows:

> In a system of responsible Cabinet government operating within the rule of law Ministers are responsible for the effective and proper execution of the powers lawfully available to government, but they do not have the final responsibility for determining what the law is. In our system of government this is normally the function of judges.

At paragraphs 104 and 106 of Part V (vol. 1, pages 557-558), the Commission recommends as follows:

> To ensure the availability of reasonably experienced judges to hear applications for warrants, we propose that five judges from the Trial Division of the Federal Court of Canada be designated by the Chief Justice of the Federal Court to hear applications.
>
> . . .
>
> Hearings before a judge in our proposed system would be *ex parte* proceedings . . . . Submissions have been made to us that the proceedings should be made more adversarial by providing for the appointment of an officer to serve as `a friend of the court'. T his officer would appear before the judge and point out possible weaknesses or inadequacies in applications. While we think such a proposal has considerable merit and have considered it carefully, we have concluded that, on balance, it would not be advisable to adopt such a mechanism. The adversarial element afforded by such a procedure might be rather artificial and would make the process of approving applications unduly complex. Further, we think that an experienced judge is capable of giving adequate consideration to all relevant aspects of an application without the assistance of an adversarial procedure.

At paragraph 6 of Chapter 2 (vol. 2, page 882), the Commission addresses the question of external reviews and states as follows:

> These two sets of recommendations clearly envisage a significant role for the Federal Court of Canada in decisions relating to national security. As we recommended earlier in Part V, this role would best be carried out by a nucleus of judges from the Appeal and Trial Divisions who would be specially designated for the purpose by the Chief Justice of the Court.

See also *Sogi*, at paragraph 45 where the Court of Appeal observed that designated Federal Court judges have expertise in assessing the advisability of disclosing security intelligence information. The Court of Appeal referred not only to the jurisdiction conferred under the Act but also to the provisions of sections 38 to 38.15 [ss. 38 (as

am. by S.C. 2001, c. 41, ss. 43, 141), 38.01 (as enacted *idem*, s. 43), 38.02 (as enacted *idem*, ss. 43, 141), 38.03 (as enacted *idem*, s. 43), 38.031 (as enacted *idem*, ss. 43, 141), 38.04 (as enacted *idem*), 38.05-38.13 (as enacted *idem*, s. 43), 38.131 (as enacted *idem*; 2004, c. 12, s. 19), 38.14 (as enacted by S.C. 2001, c. 41, s. 43), 38.15 (as enacted *idem*)] of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, sections 83.05 [as enacted by S.C. 2001, c. 41, ss. 4, 143] and 83.06 [as enacted *idem*, s. 4] of the *Criminal Code*, R.S.C., 1985, c. C-46, section 52 [as am. by S.C. 2002, c. 8. S. 112] of the *Access to Information Act*, R.S.C., 1985, c. A-1, and section 51 [as am. by S.C. 2002, c. 8, s. 159] of the *Privacy Act*, R.S.C., 1985, c. P-21.

[50]As noted by Justice Noël in *Charkaoui*, the genesis of the concept of a designated judge confirms the view that Parliament intended security certificates to be reviewed by a designated judge alone in order to limit access to protected information and to thereby protect both national security and the means by which information regarding national security is obtained.

The lateness of the request and resultant delay

[51]The appointment of an *amicus curiae* can only result in further delay because Mr. Laskin would be required to obtain the necessary security clearance, the terms and conditions of his retainer would have to be settled, and he would then be obliged to familiarize himself with a substantial volume of material.

[52]Proceedings to determine the reasonableness of a security certificate are to be conducted as expeditiously as conditions of fairness and natural justice permit. The following is a chronology of the steps taken to date in this proceeding:

December 10, 2002:

Certificate referred to the Court with request to examine the evidence supporting the certificate *in camera* and *ex parte*.

December 13, 2002:

Order issued summarizing the information and evidence to be served on Mr. Harkat.

January 10, 2003:

Teleconference with counsel to discuss scheduling of hearing to afford Mr. Harkat the opportunity to be heard (paragraph 78(*i*) hearing). A hearing was set for March 4, 2003 for a motion to be brought on Mr. Harkat's behalf seeking further disclosure.

March 4, 2003:

Motion for disclosure was heard.

March 7, 2003:

Order issued dismissing the motion for further disclosure [*Harkat (Re)* (2003), 231 F.T.R. 19 (F.C.T.D.)].

April 14, 2003:

Order issued scheduling paragraph 78(*i*) hearing for 5 days to commence on April 28, 2003.

April 22, 2003:

Additional disclosure made to Mr. Harkat.

April 28, 2003:

Order issued granting Mr. Harkat's request that the paragraph 78(*i*) hearing be adjourned because his expert witness was not available [*Harkat (Re)* (2003), 238 F.T.R. 201 (F.C.T.D.)].

May 2, 2003:

Paragraph 78(*i*) hearing scheduled for 5 days to commence on July 21, 2003.

May 23, 2003:

Motion brought by Mr. Harkat to suspend this proceeding; the motion to be heard on June 12, 2003.

June 19, 2003:

Order issued dismissing Mr. Harkat's motion to suspend this proceeding [*Harkat (Re)*, 2003 FCT 759 (CanLII), [2003] 4 F.C. 1020 (T.D.)].

July 17, 2003:

Appeal filed by Mr. Harkat with respect to the June 19, 2003 order.

July 21, 2003:

Additional disclosure made to Mr. Harkat and the paragraph 78(*i*) hearing begins. During this week, Mr. Harkat made two motions, the first seeking production of a knowledgeable CSIS employee, the second seeking an order quashing the security certificate. The Court also heard the evidence of Mrs. Harkat. This was the only evidence adduced by Mr. Harkat during the week. At the conclusion of the week, on July 25, the Court allowed the first motion in part so as to allow Mr. Harkat to obtain further particulars and dismissed the motion for an order quashing the certificate [*Harkat (Re)* (2003), 243 F.T.R. 161 (F.C.)].

July 29, 2003:

Order issued setting the schedule to be followed whereby Mr. Harkat was to serve and file questions requesting clarification of facts and matters set forth in the statement provided to him. His questions were to be served and filed on or before August 8, 2003.

August 8, 2003:

Mr. Harkat filed a notice of appeal of the orders of July 25, 2003.

October 28, 2003:

Not having heard from counsel, the Court issued a direction with respect to a teleconference to schedule the paragraph 78(*i*) hearing.

November 3, 2003:

Counsel not having responded to the Court's direction of October 28, 2003, a direction was issued with respect to a case management teleconference.

November 14, 2003:

Case management conference held and Mr. Galati, then counsel for Mr. Harkat, advised that no steps had been taken as required by July 29 scheduling order because of the pending appeal from the orders of July 25, 2003. Mr. Galati advised he would expedite the two pending appeals.

November 16, 2003:

The following direction issued: "In consequence of the advice received from counsel for Mr. Harkat today that no steps have been taken in response to the Court's order of July 29, 2003, and advice that Mr. Harkat does not wish to proceed in this matter pending the appeal of the Court's orders, it is directed that:

(1) Counsel for Mr. Harkat should forthwith confirm this request in writing, including confirmation that Mr. Harkat understands the effect this request has on his continued detention.

(2) Counsel for Mr. Harkat shall move forthwith to expedite appeals brought on Mr. Harkat's behalf.

(3) Counsel for Mr. Harkat shall advise the Court forthwith as to the result of such motions to expedite."

November 24, 2003:

Mr. Engel, co-counsel for Mr. Harkat, writes advising that: "Further to the Honourable Judge Dawson's Order of November 18, 2003, please be advised that I have sought and obtained clear instruction on behalf of my client, who is prepared to wait in custody pending the outcome of any interlocutory appeals before resuming his hearing on the reasonableness of the Security Certificate. I trust that the above is satisfactory."

January 20, 2004:

Having heard nothing further, the Court issued a direction to set up a further case management conference.

February 10, 2004:

At that case management conference, Mr. Engel advised that Mr. Galati was no longer acting for Mr. Harkat; that no motion had been brought to expedite the two pending appeals; and that the Court of Appeal had issued an order on status review requiring Mr. Harkat to show cause why the appeals should not be dismissed for delay.

February 11, 2004:

Order issued setting June 21 to 25 and 29, 30 and July 2, 2004 for the continuation of paragraph 78(*i*) hearing. Shortly thereafter, on consent, the dates were changed to August 3 through 6 and August 9 through 13, 2004.

June 7, 2004:

Mr. Engel withdraws as counsel.

June 22, 2004:

The two pending appeals were heard and dismissed by the Federal Court of Appeal.

June 30, 2004:

New counsel for Mr. Harkat, Mr. Copeland, advises Court that "he is not in a position to proceed with the matter on August 3, 2004" and requests that the hearing be adjourned to allow him to familiarize himself with the file.

The Court granted that request, and after allowing Mr. Copeland some opportunity to familiarize himself with the case and to provide the questions contemplated by the Court's orders of July 25 and July 29, the Court set further hearing dates to commence on October 25, 2004.

[53]This chronology shows that every consideration has been afforded to Mr. Harkat in order to allow his counsel to properly represent him. However, until Mr. Copeland was appointed, Mr. Harkat did not even avail himself of the rights afforded by the Court's orders of July 25 and 29, 2003.

[54]The delays which have been permitted out of consideration of fairness now militate in favour of requiring Mr. Harkat to avail himself of his paragraph 78(*i*) right without further delay where the Court has concluded that the

absence of an *amicus curiae* will not impact on the fairness of the hearing.

The flexibility and power provided to the designated judge

[55]As discussed above, the procedure set out in section 78 of the Act permits the designated judge to examine all of the information which supported the issuance of the security certificate. Each fact said to support the reasonableness of the certificate is examined and the designated judge inquires into and weighs the total reliability of the evidence said to support each fact. The presence or absence of corroborating information is considered. The potential for error and misinterpretation is assessed. The designated judge may receive as evidence anything that, in the opinion of the judge, is appropriate.

[56]In my view, the legislation provides the designated judge with sufficient power and flexibility to properly discharge the duties placed upon the judge. With that power and flexibility, the rights of the person named in a security certificate are capable of being protected without the need for the appointment of an *amicus curiae*.

[57]For all of these reasons, the motion was dismissed.

APPENDIX A

Sections 77, 78 and 80 of the Act:

77. (1) The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.

(2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.

78. The following provisions govern the determination:

(*a*) the judge shall hear the matter;

(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*c*) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(*d*) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;

(*e*) on each request of the Minister or the Solicitor General of Canada made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Solicitor General of Canada and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

(*g*) the information or evidence described in paragraph (*e*) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

(*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and

(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

. . .

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.

(2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.

(3) The determination of the judge is final and may not be appealed or judicially reviewed.

APPENDIX B

Court File No. DES-04-02

FEDERAL COURT--TRIAL DIVISION

IN THE MATTER OF a certificate signed pursuant

to subsection 77(1) of the *Immigration and*

Refugee Protection Act, S.C. 2001, c. 27

AND IN THE MATTER OF the referral

of that certificate to the Federal Court

of Canada pursuant to subsection 77(1), sections 78

and 80 of the *Act*.

IN RELATION TO **Mohammed HARKAT**

OUTLINE OF ARGUMENT

ON MOTION TO APPOINT *AMICUS CURIAE*

1. The aspect of the need for confidentiality in national security cases was set out in the Hosenball case. That case was cited with approval by the Supreme Court of Canada in the Chiarelli case.

R. v. Secretary of State for the Home Department, ex parte Hosenball [1977] 3 All ER 452 (CA) at page 60

Canada (Minister of Employment and Immigration) v. Chiarelli 1992 CanLII 87 (S.C.C.), [1992] 1 SCR 711.

2. The government of Canada, when creating *Section 38.1 and Section 40.1* of the *Immigration Act*, chose not to follow the Hosenball model but to provide a form of review of the Ministerial decision, either before the Security Intelligence Review Committee or before a single Judge of the Federal Court.

3. Mr. Harkat as a person who has been granted refugee status in Canada, has a limited right to remain in Canada.

4. As to the nature of Lord Denning's decision in Hosenball reference is made to Tab 2, pages 67-74 of the Material Relied Upon in Support of the *Amicus Curiae* Motion.

5. In Chiarelli the Supreme Court ruled at paragraph 42 that the absence of an appeal on wider grounds than those on which the initial decision was based does not violate *Section 7*. Justice Sopinka went on to say that "Parliament could have simply provided that a certifi cate could issue without any hearing".

6. Justice Sopinka went on to review the procedure available at the Security Intelligence Review Committee and concluded "that the procedure followed by the Review Committee in this case did not violate principles of fundamental justice".

7. Both the Chiarelli case and the Moumdjian case were dealt with by the Security Intelligence Review Committee, since Moumdjian and Chiarelli were permanent residents of Canada.

R. v. Moumdjian, 1999 CanLII 9364 (F.C.A.), [1999] 4 FC 624

8. *Section 40.1* of the *Immigration Act* (since replaced by the *Immigration and Refugee Protection Act*) provided a different procedure for persons who were not permanent residents of Canada. Those cases were dealt with by a Judge of the Federal Court.

9. In Ahani Justice McGillis held at paragraph 38 that the procedure under *Section 40.1* of the *Immigration Act* met the principles of fundamental justice. At paragraph 44 she found that the Summary of Evidence and Information together with any other material disclosed either by the state or the designated judge provides the individual with the substance of the allegations and thereby permits him to respond to the case against him.

R. v. Ahani 1995 CanLII 3528 (F.C.), [1995] 3 FC 669

10. The Federal Court of Appeal upheld the reasoning of Justice McGillis in the Ahani case.

Ahani v. Canada [1996] FCJ 937

11. With the passage of the *Immigration and Refugee Protection Act* Parliament decided to eliminate whatever little protections were provided for permanent residen[ts] in the national security context in having their cases heard before the Security Intelligence Review Committee. Under the Immigration and Refugee Protection Act, all national security matters are now dealt with by a single Judge of the Federal Court.

Immigration and Refugee Protection Act, Section 77-80

12. It is respectfully submitted that the matters relating to Mr. Harkat are significantly more complicated than the matters relating to Mr. Ahani as set out in the decision of Madam Justice McGillis.

Ahani v. Canada (TD) supra

13. It is respectfully submitted that in order to comply with the requirements of fundamental justice and procedural fairness to which the applicant is entitled under *Section 7* of the *Charter* the Court must appoint an *amicus curiae* to assist it in considering whether the certificate signed by the two ministers is reasonable. Given the particularly complicated history and circumstances of this case, the unwillingness of the government to answer even such basic questions as to whether they are relying on information obtained from Maher Arar, or Ahmed Ressam, an *amicus curiae* is necessary in order to allow the Court to consider fully and fairly the context and substance of the allegations made against the applicant.

14. It is respectfully submitted, that quite apart from the jurisdiction to appoint *amicus curiae* pursuant to the *Canadian Charter of Rights and Freedoms*, this Honourable Court also has the jurisdiction to do so at common law. *Section 4* of the *Federal Courts Act* defines in part, the Federal Court as a ". . . superior court of record having civil and criminal jurisdiction." In R. v. Samra, Justice Rosenberg, of the Ontario Court of Appeal held at

paragraph 18:

"It was not argued, nor could it be, that a superio r court has no power to appoint *amicus curiae* at the trial of an unrepresented accused."

It is respectfully submitted such appointment would greatly assist the Court in assessing the reasonableness of the certificate signed by the two ministers. An *amicus curiae* would allow the Court to benefit from hearing representations of counsel which would not otherwise be put forward, while preserving the government's claim to national security interest in non-disclosure of information to the applicant and his couns el.

R. v. Samra 1998 CanLII 7174 (ON C.A.), [1998] O.J. No. 3755, at p. 8, 41 O.R. (3d) 434

15. In Ruby v. Canada (Solicitor General) the Supreme Court of Canada upheld the procedure whereby Mr. Ruby was not allowed to participate in ex parte in camera proceedings (Paragraph 46). In so holding, the Supreme Court found at paragraph 47 that "when making ex parte submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of fac ts, including those that may be adverse to its interest."

Ruby v. Canada (Solicitor General) 2002 SCC 75 (CanLII), [2002] 4 SCR 3

16. It is respectfully submitted that the background facts concerning the FIS in Algeria as set out in paragraph 10 of the Statement Summarizing the Information and Evidence fail to meet the standard of full, fair and candid disclosure of facts. The government failed to advise the Court that the FIS won the first round of the elections in 1992, that the military intervened to take over the government and cancelled the elections. The government failed to advise this Court that the military engaged in indiscriminate killings and disappearances of its political opponents. The government failed to advise the Court that 200,000 people were killed in Algeria as a result of the actions of the army and the response to the actions of the army in canceling [*sic*] the elections and seizing the government.

17. It is respectfully submitted that the government failed to meet the standard of full, fair and candid disclosure of facts in paragraph 14 of the Statement Summarizing the Information and Evidence by suggesting that false Saudi passports were passports of choice only for Islamic extremists wishing to enter Canada.

18. In addition to the above-noted specific concerns, it is respectfully submitted that this Court will in all likelihood, be required to draw innumerable distinct conclusions throughout the course of this litigation. When one considers the types of issues that this Court is called upon to decide, pursuant to *Section 78* of the *Immigration and Refugee Protection Act*, it is submitted the assistance or input of an *amicus curiae* could prove invaluable.

19. Mr. Justice Hugessen speaking at the Canadian Institute for the Administration of Justice Conference "Terrorism, Law and Democracy" held in Montreal on March 25 and 26, 2002, said:

This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function. Often, when I speak in public I make the customary disavowal that I am not speaking for the Court and I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon. I can tell you because we talked about it, we hate it We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us.

We greatly miss, in short, our security blanket which is the adversary system that we were all brought up with and that, as I said at the outset, is for most of us, the real warranty that the outcome of what we do is going to be fair and just it might be helpful if we created some sort of system somewhat like the public defender system where some lawyers were mandated to have full access to the CSIS files, the underlying files, and to present whatever case they could against the granting of the relief sought . . . I am not sure what the judges of the Federal Court are doing in this picture and if I may be forgiven for using the expression, I sometimes feel a little bit like a fig leaf.

Material Relied Upon in Support of the *Amicus Curiae* Motion Tab 1, page 4

20. For the sake of this argument, it is accepted that issues have and potentially will arise that are of a sufficiently sensitive nature that *Sections 78(e)* and *(h)*, for example, will be invoked. This does not detract from

the fact that the presence of an *amicus curiae*, with the same security clearances as Crown counsel, can only further the end of fairness by ensuring that both or all sides of an issue are explored. The appointment of an *amicus* will go some distance to remedying the malady identified by Justice Hugessen, that is that at present the Court only hears one party. As well, the applicant's interests will be more completely protected. Finally, both of these significant interests will be furthered while at the same time the security concerns of the state will be preserved. The appointment of an *amicus curiae*, pursuant to the terms of reference being proposed in this application, will strike a just balance between the competing interests inherent in this case.

21. In the Arar Inquiry, Ron Atkey has been appointed *amicus curiae* in respect of government requests for in camera hearings.

The *Amicus Curiae* will act as counsel, independent from government, and his mandate will be to test government requests on the ground of National Security Confidentiality.

www.ararcommission.ca/eng/13.htm

22. In the Ribic case a counsel was appointed to conduct a cross examination of two witnesses when the answers given by those witnesses were relevant to issues pursuant to *Section 38* of the *Canada Evidence Act*.

Canada (Attorney General) v. Ribic [2003] FCJ No. 1964 at par. 6

23. In the Reference re Secession of Quebec case the Supreme Court of Canada appointed *amicus curiae* "in view of the complexity of the issues raised and the fac t that some aspects of these issues were [*sic*] not otherwise be argued by the parties who have intervened in the Reference. In order to clarify what is frequently misunderstood, such counsel, traditionally called `A Friend of the Court' does not represent a party but is tasked with assisting the Court in arguing issues or matters in which the Court wishes to hear representations that the parties to the Reference would not otherwise put forward".

Reference re Secession of Quebec [1996] SCCA 421 paragraph 23

24. If the Court decides it is appropriate to order an *amicus curiae* be appointed, whether under *Section 7* of the *Charter*, or otherwise, it is respectfully submitted that this Court has inherent jurisdiction to order the payment of costs for the services of the counsel appointed as *amicus curiae*.

25. As to the issue of the costs of this motion, it is respectfully submitted that this Application deals with a matter of fundamental public importance concerning the administration of justice in this country.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this day of September 2004

_____

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Court File No. DES-04-02

FEDERAL COURT--TRIAL DIVISION

IN THE MATTER OF a certificate signed pursuant

to subsection 77(1) of the *Immigration and*

Refugee Protection Act, S.C. 2001, c. 27

AND IN THE MATTER OF the referral

of that certificate to the Federal Court

of Canada pursuant to subsection 77(1),

sections 78 and 80 of the *Act*.

IN RELATION TO **Mohammed HARKAT**

SUPPLEMENTAL

OUTLINE OF ARGUMENT

ON MOTION TO APPOINT *AMICUS CURIAE*

1. I apologize to the Court and to counsel for CSIS for the lateness of this submission. On September 7th, 2004 I received an e-mail from Rayner Thwaites, which had attached to it his Master's thesis for the University of Toronto Law School.

Deportation on National Security Grounds within a Culture of Legal Justification by Rayner Thwaites. Master's thesis submitted to the University of Toronto, Faculty of Law. 2004 (a copy of this will be provided in the Book of Authorities on this issue)

2. I first had an opportunity of reviewing that thesis on September 13th, 2004. I forwarded a copy of the thesis to Mr. Mathieson late on September 14th, 2004. What follows are my additional submissions as a result of the information I located in that thesis:

3. As described below, in the United Kingdom there has been created a Special Immigration Appeals Commission (SIAC) to deal with national security concerns. It is respectfully submitted that the United Kingdom has benefitted from its use of a "special advocate" when co nsidering information that may not be disclosed for reasons of national security.

4. In Chahal v. The United Kingdom, the European Court of Human Rights held unanimously that the United Kingdom had violated the *Convention for the Protection of Human Rights and Fundamental Freedoms* by failing to provide a competent national authority to deal with the substance of the relevant complaint under the Convention.

Chahal v. The United Kingdom [1996] 23 E.H.R.R. 413.

5. *Convention for the Protection of Human Rights and Fundamental Freedoms* signed at Rome on 4 November 1950.

6. That Court partially based its decision in Chahal, at paragraphs 131 and 144, on the existence of the so-called `Canadian Model', in which a secur ity-cleared counsel is provided access to confidential evidence, and is allowed to cross-examine witnesses and generally assist the court in testing the strength of the government case. While the Court's understanding of the Canadian process for deportatio n in matters of national security was clearly erroneous, it stated that the above process was an example of "techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and y et accord the individual a substantial measure of procedural justice."

7. In response to the decision in Chahal v. United Kingdom, the United Kingdom created the Special Immigration Appeals Commission ("SIAC") and gave it jurisdiction i n section 2 of *The Special Immigration Appeals Commission Act* to hear appeals from decisions of the Home Secretary regarding deportation.

The Special Immigration Appeals Commission Act (U.K.) 1997, c. 68 [SIAC Act].

8. Under s. 6 of the SIAC Act, a `spec ial advocate' must be appointed to represent the interests of the appellant in any closed hearing from which the appellant and his or her legal representative is excluded. This special advocate is selected from a list of security cleared immigration and hu man rights barristers.

9. The benefit to the court of such a `special advocate' was noted by the Court of Appeal while hearing an appeal of an SIAC decision in Secretary of State for the Home Department v. "M". SIAC allowed the appeal against certificatio n and cancelled the certificate. The Secretary of State for the Home Department had appealed. The Court quoted from the SIAC judgment, at paragraphs 27 and 28, where it was held that "as a result of . . . [the special advocate's] rigorous cross-examination s in the closed session", it was found that "the assertions made in statements provided by the respondent [the Home Secretary] are not supported by the evidence . . . "Too often assessments have been based on material which does not on analysis support the m." The Court further stated, at paragraph 27, that "assertions [made by the Home Secretary were] found to be misleading when the source documents were looked at. In other cases there had been insufficient effort made to ensure that they were accurate."

Secretary of State for the Home Department v "M" [2004] EWCA Civ 324.

10. It is respectfully submitted that the process now followed in the United Kingdom should guide this Court in dealing with our request that *amicus curiae* be appointed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 16th day of September 2004

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APPENDIX C

Court File No. DES-04-02

FEDERAL COURT

IN THE MATTER OF a certificate signed pursuant

to subsection 77(1) of the *Immigration and*

Refugee Protection Act, S.C. 2001. C. 27

AND IN THE MATTER OF the referral

of that certificate to the Federal Court

of Canada pursuant to subsection 77(1),

and section 78 and 80 of the *Act*

AND IN THE MATTER OF Mohammed Harkat

MINISTERS' RECORD

(RESPONSE TO MOTION TO APPOINT

AMICUS CURIAE)

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Court File No. DES-04-02

FEDERAL COURT

IN THE MATTER OF a certificate signed

pursuant to subsection 77(1) of the *Immigration*

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Court File No. DES-04-02

FEDERAL COURT

IN THE MATTER OF a certificate signed pursuant

to subsection 77(1) of the *Immigration and*

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pursuant to subsection 77(1), and section 78

and 80 of the *Act*

AND IN THE MATTER OF Mohammed HARKAT

OUTLINE OF ARGUMENT IN RESPONSE

TO MOTION TO APPOINT AMICUS CURIAE

What is an *amicus curiae*?

1. Generally an *amicus curiae* or "friend of the court" is a disinterested or neutral person appointed to assist the court, at its request. Three situations ar ise in which an *amicus curiae* is appointed: a) where there is a matter of public interest in which the court invites the Attorney-General or some other capable individual to intervene; b) to address the court to prevent an injustice, for example, to make submissions on points of law that may have been overlooked; and c) to represent the unrepresented. It is submitted that an *amicus curiae* will not be appointed merely because the case is factually difficult or it raises complicated legal issues.

Attorney General of Canada et. al. v. Aluminum Co. of Canada et. al; B.C. Wildlife Federation, Intervener, 1987 CanLII 162 (BC C.A.), **(1987) 35 DLR (4th) 495 (B.C.C.A.)**

Grice v. The Queen Ex Rel. Press (1957) 11 DLR (2d) 699 (Ont.H.C.)

What is the Jurisdiction of the Federal Court to appoint an *amicus curiae*?

2. With the introduction of the section 78 *Immigration and Refugee Protection Act* ("*IRPA*") procedure, of a review of a security certificate by a single judge of the Federal Court, designated by the Chief Justice, there has be en no reduction in the rights of a refugee to a fair hearing. The procedure has not changed substantially from what was in place in 1996 under the former section 40.1 of the *Immigration Act* when *Ahani* was decided by Madam Justice McGillis. Recognizing the parallels between what was in place then and now, this Honourable Court

denied the Applicant Mohammed Harkat's application for further disclosure under *IRPA*.

In addition, the procedure as set out in sections 77 and 78 of IRPA has been found to be consistent with the principles of fundamental justice as set out in section 7 of the Charter of Rights and Freedoms.

Section 40.1*Immigration Act*; sections 78 to 80 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended

Re: Harkat (2003) 231 FTR 19 at p 24

Re: Charkaoui unreported 2003 FC 1419 (CanLII), **2003 FC 1419 at page 29, para. 185**

3. In asserting that the *Charter of Rights and Freedoms* gives this Court the jurisdiction to appoint an *amicus curiae*, Counsel for the Applicant is calling into question the constitutional validity and applicability of the provisions of ss. 77 and 78 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 as amended, which do not provide for such an appointment. As a result, he should be required to serve a Notice of Constitutional Question upon the Attorney General of Canada, and the Attorney General of each Province. Counsel for the Applicant has not served the required Notice of Constitutional Question on either the Attorney General of Canada, or any of the Attorneys General of any of the Provinces of Canada. In not following the process set forth in the *Federal Court Act* R.S.C. 1985 c. F-7, as amended for such a Notice of Constitutional Question, Counsel for the Applicant has prevented any of the Attorneys General of any of the Provinces of Canada, from making submissions in respect of this issue.

***Federal Court Act*, R.S.C. 1985, c. F-7, as amended, s. 57 thereof *Federal Court Rules, 1998*, R. 69**

4. The *Canadian Charter of Rights and Freedoms* does not confer jurisdiction upon the Federal Court to appoint an *amicus curiae*. Nor does the Federal Court have "inherent jurisdiction" to do so, as would a provincial superior court. However, as a creature of statute, the Federal Court has control over its own process and discretion as to h ow to best implement, by necessary implication, what jurisdiction has been expressly bestowed upon it by statute.

Canada (Minister of Citizenship and Immigration) v. Tobiass 1997 CanLII 322 (S.C.C.), ***(1997) 3 SCR 391***
Nu-Pharm Inc. v. Canada (Attorney General) 1999 CanLII 9369 (F.C.A.), ***(2000) 179 DLR (4th) 531 (FCA)***
Chavali v Canada et. al. (2001) 202 FTR 166

Is jurisdiction to appoint an *amicus curiae* bestowed expressly upon the Federal Court by statute?

4. [*sic*] The Federal Court has the power to set rules which regulate and control access to its files (Rule 26), and in the absence of specific legislation, such as sections 78(b), (d) or (e) of *IRPA*, it has the discretion, under Federal Court Rule 29, to exclude the public from its hearings. However, the jurisdiction of this Honourable Court to carry out its responsibilities under *IRPA* must be examined within the context of that specific legislation. Sections 78(b) and (h) of *IRPA* mandate that the designated judge safeguard, by non-disclosure, national security and the safety of informants while section 78(j) confers upon the designated judge a broad discretion in relation to the evidence that may be received and considered. However, there is no express power to appoint an *amicus curiae* to assist this Honourable Court in determining whether the security certificate is reasonable in either the *Federal Court Act* and its procedural rules or in sections 77 to 80 of the *IRPA*or in any regulations passed under *IRPA*. It is submitted that Parliament deemed it fit that a Federal Court Judge sitting alone could and should bear the responsibility of testing the Ministers' case.

Federal Court Rules, 1998, rules 26 and 29; sections 78 to 80 *IRPA*
The Federal Courts Act, R.S.C. 1985, c. F-7, as amended.

Is there an implied jurisdiction to appoint an *amicus curiae* in section 78 *IRPA* proceedings?

5. [*sic*] It is further submitted that there is no procedural necessity to appoint an *amicus curiae* in section 78 *IRPA* hearings. A designated judge is amply qualified to review and test the material presented *in camera* no matter how complicated and onerous the task may appear to be. While a positive duty is imposed upon the judge by s. 78(c) to

deal with all matters as informally and expeditiously as considerations of natural justice and fairness permit, it is submitted that to introduce an *amicus curiae* into section 78 proceedings would be neither expeditious nor fair. Moreover, an element of uncertainty would be introduced, were an *amicus curiae* to be appointed who subsequently disagreed with the judge about the nature and scope of testing the *in camera* information or, ultimately, about the determination of the reasonableness of the certificate, which decision cannot be appealed. It is further submitted that the prolongation of the section 78 proceedings and pre-removal detention, (without review, in the case of a refugee) occasioned by the introduction of an *amicus curiae* would, as well, be neither expeditious nor fair. Finally, the time lines set by section 78(d) of *IRPA* to examine in private all the information and evidence presented by the Ministers upon referral of the certificate are inconsistent with the appointment of an *amicus curiae*.

6. [*sic*] The examples cited by Counsel for the Applicant, of assistance by appointed counsel, to the Arar Commission of Inquiry, to the Security Review Intelligence Committee, to the Supreme Court of Canada in the *Quebec Succession Reference* case, to the Ontario Court (General Division) for an unrepresented accused in *Samra*, and to the Federal Court, by the *Canada Evidence Act* procedure adopted on the consent of the parties in the unique and urgent circumstances presented by *Ribic*, are distinguishable from the situation presented by a security certificate confirmation hearing under section 78 of the *IRPA*.

Terms of Reference for the Commission of Inquiry into the Action of Canadian Officials in relation to Maher Arar

Re: Ribic 2003 FCA 246 (CanLII), **(2003) FCA 246**

7. [*sic*] In contrast to Mr. Justice Hugessen, who expressed his discomfort with his role in *ex parte* hearings, Mr. Justice Blanchard, ruling on a detention review in *Almrei*, accepted without reservation his obligation to challenge and question the evidence presented in camera "in the context of the legislative scheme" he recognised it was his task to work within.

Almrei v. Minister of Citizenship and Immigration 2004 FC 420 (CanLII), **(2004 FC 420) at paragraphs 56 to 62**

An *amicus curiae* should not be appointed in the Applicant's section 78 *IRPA* proceedings.

8. [*sic*] In the alternative, if this Honourable Court concludes that it does possess jurisdiction to appoint an *amicus curiae* for section 78 *IRPA* proceedings, it should not exercise its discretion in favour of appointing an *amicus curiae* in the Applicant's section 78 proceedings. The Applicant is currently a refugee with no right to remain in Canada and only a limited right to non-refoulement. He is neither a permanent resident nor a Canadian Citizen. Nor is he an accused per son facing jail upon conviction for a serious criminal offence.

***Immigration and Refugee Protection Act* ("*IRPA*") sections 19, 20, 21 and 115**

Ahani(1996) FCJ 937 at 939; aff'd 1996 201 NR 233 (Fed CA) at 235

9. [*sic*] It is submitted that neither of these three situations described in paragraph 1 (*supra*) arise in the Applicant's case, which, despite the Applicant's change of counsel and lengthy demands for disclosure, it is submitted, is no more complicated than that of Mr. Ahani or of any other refugee sub ject to section 78 *IRPA* proceedings. The Applicant has always been represented by at least one counsel, and while he may have a private interest in the outcome of these proceedings, his case presents no public interest that needs to be represented and protected by an *amicus curiae*.

10. [*sic*] This Honourable Court is eminently capable of examining and exploring whatever issues are raised by Counsel for the Applicant. The Applicant is under no disability for lack of representation during *in camera* and *ex parte* hearings because this Honourable Court has vigorously challenged the accuracy of the information which supports the Ministers' case against him and the basis for its non-disclosure. Any concerns over the accuracy of background material about the FIS and use of Saudi passports which was disclosed to the Applicant's Counsel are capable of being addressed by an agreed statement of facts. The testing of any unclassified material can be made without recourse to an *amicus curiae* .

Re: (2003) Harkat243 FTR 161 at 164

11. [*sic*] If this Honourable Court should determine that it appoint an *amicus curiae* for the Applicant, then the Respondents wish to reserve the right to make further submissions on the issues of the suitability of Mr. Laskin to be appointed as an *amicus curiae*, the terms and conditions of the retainer of any *amicus curiae*, and the source of funding for the *amicus curiae*.

ORDER SOUGHT

12. [*sic*] For the reasons set out above, it is respectfully submitted that the Applicant Mohammed Harkat's motion ought to be denied with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Ottawa this 22nd day of September 2004

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