Federal Court  Cour fédérale

Date: 20110121

Docket: DES-5-08

Citation: 2011 FC 75

Ottawa, Ontario, January 21, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*):

AND IN THE MATTER OF the referral of a Certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF MOHAMAD HARKAT

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] In the course of rendering its decisions in the present matter on December 9, 2010, the Court granted the parties a delay by which they were to submit questions of general importance for certification (see *Harkat (Re)*, 2010 FC 1241, at para 551). The Court also reserved judgment, pending the determination of the questions to be certified. The Court also issued Reasons for Order and Order in the constitutional question (*Harkat (Re)*, 2010 FC 1242) as well as Reasons for Order and Order in the abuse of process motion (*Harkat (Re)*, 2010 FC 1243). In both cases, the parties

were also invited to suggest questions of general importance for certification. By the present Judgment, the Court is addressing the questions of general importance for certification in order for the case to proceed to the Federal Court of Appeal. In addition, the present Judgment also concludes on the reasonableness of the certificate.

[2] A number of questions were proposed for certification by public counsel for Mr. Harkat. Furthermore, the Special Advocates also put forth confidential submissions for questions to be certified. Counsel for the Ministers responded to both sets of questions to be certified. As will be seen, it is essential for the Court to further analyze the proposed questions for certification in order for all the parties, as well as the public, to have insight as to the nature of certified questions and why a number of the suggested questions are inadequate for certification and others are certifiable.

Questions proposed by public counsel for Mr. Harkat

[3] Initially, public counsel for Mr. Harkat submitted sixteen questions for certification. It is essential to cite them extensively and to add that they were accompanied with arguments:

1. Did the Court err in finding that sections 77(2), 78, 83(1)(c)-(e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the IRPA do not violate section 7 of the Charter insofar as the Court concluded that they do provide for fair trial standards; they do grant the named person the right to know and answer the case made against him; and, they do make it possible for the Court to render a sufficiently informed decision on the basis of the facts and the law?

2. Did the Court err in finding in the alternative to the conclusions captured in question number one, that any Charter infringements inherent in the impugned sections of the IRPA are demonstrably justifiable in a free and democratic society and therefore saved by section one of the Charter notwithstanding the Charter violations in question amount to breaches of section 7?

3. Can this judicial process constitute a fair hearing where the Court has made findings based on evidence or information of which the named person has not been informed?

4. Did the Court err in the manner in which it defined the class privilege concerning human sources and further, did the Court's articulation of the rare exception to this privilege as only existing where the special advocates could satisfy a "need to know standard" amounting to no less than a flagrant breach of fundamental justice amount to legal error?

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

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

7. Did the Court err in scrutinizing Mr. Harkat's evidence in detail, particularly given the information/evidence provided by the Ministers was significantly supplied by summary and/or hearsay and not subject nor capable of being scrutinized in similar detail or manner?

8. Did the Court err in examining Mr. Harkat's evidence for plausibility, coherence and logic with insufficient allowance for cultural differences and values, language abilities and the passage of time?

9. Did the Court err in that it did not apply a "searching review" standard of verification to the evidence called by the Ministers?

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

11. Did the Court err in finding that 34(1)(f) of the IRPA does not have any temporal requirement? In particular, can a person be found to be a member of a terrorist organization by links or assistance to a person

> who is not at the time nor at any prior time a terrorist if that person or organization subsequently becomes engaged in terrorism?
>
> 12. Does 34(1)(d) require a finding of a present danger to the Security of Canada including a current serious identifiable substantial threat?
>
> 13. Did the Court err in finding that the policy of destruction of original materials did not constitute a breach of CSIS's duty to disclose?
>
> 14. Did the Court err in relying upon the information contained in alleged summarized conversations without first requiring the attendance and subsequent cross-examination of the parties involved in the original recording and summarization of such information?
>
> 15. Did the Court err in its formulation of the test for the exclusion of evidence pursuant to s.24(1) of the Charter, and if so, did the Court err in not excluding the summarized conversations?
>
> 16. Did the Court err in finding that the cumulative effect of Charter breaches, a breach of candour, and the passage of time did not warrant a stay of proceedings pursuant to s.24(1) of the Charter?

[4] In their supplementary submissions, public counsel for Mr. Harkat submitted the following additional question for certification, which arose from the disclosure of redacted components of the Top Secret footnotes of *Harkat (Re)*, 2010 FC 1241, as well as the redacted Top Secret Annex to *Harkat (Re)*, 2010 FC 1243:

> Should the duty of utmost good faith and candour as defined in *Ruby* be enlarged or interpreted to include an obligation on the part of the Ministers and the Service to update evidence and/or information as the proceedings evolve?

The Special Advocates' Questions for Certification

[5] The Special Advocates have submitted two sets of questions on a Top Secret basis. The first set of questions pertain to the scope and nature of the human-source privilege. The second set relates to CSIS' duty to inquire and how it was acted upon in the present case. Due to national security concerns, it is not adequate for the Court to comment further on these submissions.

However, the Special Advocates' submissions have been considered by the Court in its analysis of questions for certification, as it will be seen later.

The Ministers' Response

[6] The Ministers submitted that the questions pertaining to the constitutionality of the IRPA regime of security certificates should be certified, but rephrased them as follows:

> Do sections 77(2), 83(1)(c)-(e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the IRPA breach section 7 of the Charter of Rights and Freedoms by denying the person concerned the right to a fair hearing? If so, are the provisions justified under section 1?

[7] The Ministers responded to all of the questions submitted. Generally, they submitted that the proposed questions, other than the constitutional one, either did not meet the test for certification, did not arise from the case, were not dispositive of the appeal or do not transcend the interests of the parties involved in the litigation.

The Law on the Certification of Questions

[8] Before stating which questions should be certified for consideration by the Federal Court of Appeal, it is relevant to analyze how case law has defined what a proper question for certification is.

[9] In *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at para 11, the Federal Court of Appeal framed the question as follows: is there a serious question of general importance which would be determinative of the appeal? Hence, there are two aspects to be considered: 1) whether the question is serious and of general importance; and 2) is this question determinative of the appeal? An important question was determined to be one that transcends the

immediate interests of the parties involved in the litigation in order to contemplate issues of "broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 N.R. 4 (F.C.A.), at para 4). Not only do these factors arise from case law, they are also couched in the very terms of section 82.3 of the IRPA.

[10] As a "necessary corollary" of these factors, the Federal Court of Appeal stated the following, in *Zazai*, at para 12:

> The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[11] As was later determined by the Federal Court of Appeal in *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, at para 29, a serious question of general importance arises from the issues of the case, and not from the judge's reasons. In that sense, the process of certification is different than that of the "normal" appellate process.

[12] In any event, the certification of questions is an important step, one where the Court must assess the case on which it ruled, detach itself from its particulars and how it evolved, in order to properly address the questions that are both dispositive and of general importance. However, the appellate Court's analysis is not to be confined by the certified questions, and may consider all issues raised in the appeal (see *Pushpanathan v Canada (Minister of Citizenship and Immigration)*,

[1998] 1 S.C.R. 982 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[13] Even if the Federal Court of Appeal, or even the Supreme Court, dispose of much leeway to address the questions raised, the Court will not proceed to simply validate the certified questions suggested by the parties: further analysis is required if the "gatekeeper function", as qualified in *Varela*, at para 43, is to be taken seriously. Such is the role of this Court in determining certified questions. The Court will now analyze each question submitted by public counsel in order to address whether or not they meet the requirements for certification. Summarily, the applicable case law is clear in regards to what cannot be certified as questions for the appeal process:

- Questions that are not of general importance. More precisely, questions that do not transcend the interests of the parties involved in litigation;
- Questions that are not determinative of the appeal;
- Questions that were not before the Court; and
- Questions that the Court did not deem necessary to deal with.

Analysis

Questions that do not meet the requirements for certification

> *Question 5 - "Did the refusal of the Court to permit the special advocates the right to interview and ultimately cross-examine the human sources in camera, amount to legal error?"*

[14] Question 5 arises from a particular factual context, due to the publication of the Court's Reasons for Order and Order in October 2009 (*Harkat (Re)*, 2009 FC 1050). By way of a Confidential Letter to the Court, the Special Advocates did address the question raised by Question 5. The Court dealt with this question during closed hearings. The scope of the request was more

limited than what is contained in Question 5, as the transcripts of the closed hearings of November 9 and November 10, 2009 illustrate.

[15] This limited request by the Special Advocates is not determinative of the totality of the issues at play and would not change the findings made. The credibility of the human sources was assessed by the Court (see Redacted Footnotes 1 and 2 of *Harkat (Re)*, 2010 FC 1241). One of the sources was found to be credible by all involved in the closed hearings. The Court refers Ministers' counsel and the Special Advocates to the transcripts of the closed hearings held on November 9 and 10, 2009, as well as to the Redacted Annex to *Harkat (Re)*, 2010 FC 1243.

[16] As can be seen in the present Judgment, a question relating to the human source privilege and its scope is certified. In any event, Question 5 is not determinative of the case and does not address issues of general importance.

> *Question 6 – "Did this Court err in law where it drew pivotal factual conclusions on aged historical matters, where the sum total of the information at the disposal of the Court was derived from inconsistent open source materials? Specifically, by way of example, it is asserted that this Court's factual finding with respect to Ibn Khattab was unreasonable and unsafe one and accordingly not a conclusion available in law to this Court on the record before it."*

[17] Question 6 is devoid of any grounds on which it could be certified. This question was not submitted to the Court. Summarily, it is clear that public counsel is taking issue with how part of the evidence, namely the open-source material, was assessed by the Court. As noted at paragraph 74 of *Harkat (Re)*, 2010 FC 1241, "The public process has been such that Mr. Harkat was able, through expert testimony, to produce his own open source documentation. Hence, any concerns that might

have arisen from open source information relied upon by the Ministers were neutralized keeping in mind the testimony of Dr. Given". As the issue arises from the judgment, and not from the issues of the case itself, it is not suitable for certification.

[18] The Court's conclusion on Ibn Khattab was based on the evidence before the Court, including elements put forth by Mr. Harkat's own experts. Also, factually speaking, Mr. Harkat arrived in Canada in early October 1995, a period at which Ibn Khattab and Shamil Basayev were established as "co-commanders" in Chechnya. The appellation of "co-commanders" comes from Mr. Harkat's own expert, Mr. Quiggin. During the period at which Mr. Harkat operated a guesthouse, i.e. for a good part of 1995, Ibn Khattab was established, or at the very least was establishing, himself in Chechnya and cooperated with Basayev, who at that point had committed terrorist acts involving civilian targets in 1993, 1994 and 1995 (see *Harkat (Re)*, 2010 FC 1241, at para 381). This question is thus factual in nature and does not meet the threshold of "general importance" for certification.

> *Question 7 – "Did the Court err in scrutinizing Mr. Harkat's evidence in detail, particularly given the information/evidence provided by the Ministers was significantly supplied by summary and/or hearsay and not subject nor capable of being scrutinized in similar detail or manner?"*
>
> *FC/CFQuestion 8 – "Did the Court err in examining Mr. Harkat's evidence for plausibility, coherence and logic with insufficient allowance for cultural differences and values, language abilities and the passage of time?"*
>
> *Question 9 – "Did the Court err in that it did not apply a "searching review" standard of verification to the evidence called by the Ministers?"*

[19] As indicated by public counsel for Mr. Harkat, questions 7 and 8 “address the procedure, process and test to be applied by the Court in considering the evidence of a named person in a security certificate proceeding. In addition, they address whether the process used by the Court in this case, (…), is fundamentally unfair to the named person” (Public Counsel’s Supplementary Submissions on Questions for Certification, p.6, January 17, 2011). Mr. Harkat’s own submissions are to the effect that these questions essentially relate to the process and procedure of the proceeding and if it is fair. These questions may be linked to the constitutional question, which is to be certified by the present.

[20] Furthermore, the cultural differences, values and language abilities were never brought up during the hearings. Public counsel’s submissions in this respect are silent, indicating that this argument is unsubstantiated. Furthermore, to make such an important argument in order to justify a certified question, without proper foundation, is just not acceptable. Such sensitive issues have to be dealt with carefully.

[21] As for Question 9, Public Counsel submits an excerpt of *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (“*Charkaoui #1”)* to consolidate their position. However, the excerpt refers to the state of the law as it was before the changes in IRPA and the creation of the function of Special Advocates. It can be said that this question was confronted by this Court in *Harkat (Re)*, 2010 FC 1242. In this judgment, at para 129, it was said that “to some extent, the judicial role has been enlarged: it must issue summaries of information throughout the proceeding, the designated judge can require closed hearings, the judicial role related to the special advocate, the judicial review of detention and the conditions thereof, etc .” Also, Question 9 refers to the standard

of proof required in these proceedings. Thus, Question 9 may be subsumed in the constitutional question that is to be certified by the present.

> *Question 10 – "Did the Court err in its definition of terrorism? In particular, to be included within the definition of terrorism is it required that material support include any support or assistance or does it have to be material in the sense that it is done knowingly to aid or abet terrorist activity or done with a common purpose?"*

[22] The definition of terrorism relied upon by the Court was established by case law. The second component of the proposed question is simply not supported by the case itself. Firstly, the component of "knowingly aided or abetting terrorist activity or done with a common purpose" was not put forward at any stage during the hearings. Mr. Harkat simply denied any material support, and denied knowing the individuals. One cannot change tack and introduce new arguments couched in terms of suggested questions for certification.

> *Question 11 – "Did the Court err in finding that 34(1)(f) of the IRPA does not have any temporal requirement? In particular, can a person be found to be a member of a terrorist organization by links or assistance to a person, who is not at the time nor at any prior time a terrorist if that person or organization subsequently becomes engaged in terrorism?"*

[23] Quite simply, Public Counsel has misinterpreted the case of *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274. It is stated quite clearly at paragraph 3 that "it is not a requirement for inadmissibility under s. 34(1)(f) of the IRPA that the dates of an individual's membership in the organization correspond with the dates on which that organization committed acts of terrorism or subversion by force." Thus, this question has already been certified and determined some three months ago.

[24] Moreover, there is no factual basis for alleging “innocent association or membership” as a determinative question: it was not submitted before the Court and at no time did Mr. Harkat conceded having even “innocently” associated with Ibn Khattab or the other individuals described in the Reasons for Judgment. The Court also refers to paragraph 18 of the present Judgment for a factual outline.

[25] Thus, this question was never put before the Court during the proceedings. It ignores the evidence and simply attempts to drive a wedge between the Court’s conclusions in the present matter and in *Almrei (Re)*, 2010 FC 1263 while ignoring the other allegations found to be reasonable against Mr. Harkat in regards to his support of known terrorists. Again, the Court addressed the divergent conclusions in *Harkat (Re)*, 2010 FC 1241 and *Almrei (Re)*, 2010 FC 1263 in this respect by noting that additional evidence had been submitted to the Court (see *Harkat (Re)*, 2010 FC 1241, at para 410). This question is not to be certified as it was not put before the Court and it clearly arises from the Reasons for Judgment, not the case itself.

> *Question 12 – “Does 34(1)(d) require a finding of a present danger to the Security of Canada including a current serious identifiable substantial threat?”*

[26] The Court assessed the evidence and concluded that a risk does exist at paragraph 545 of *Harkat (Re)*, 2010 FC 1241, where the evidence was highlighted and the Court concluded that:

> “on a balance of probabilities that there are reasonable grounds to believe that, in view of his past activities he had become a significant source of danger to the security of Canada; that risk still exists, but it is much lower today. Hence, this question arises from the reasons of the Judgment, not of the case itself, which establishes an element of risk that the Court found to be reasonable.”

[27] Hence, this question does not arise from the case, as the finding is clear and relies upon the evidence placed before the Court.

> *Question 13 – "Did the Court err in finding that the policy of destruction of original materials did not constitute a breach of CSIS's duty to disclose?"*

[28] With respect, nothing indicates that this Court strayed from the Supreme Court's decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, where the conclusions were clear: the destruction of original materials did constitute a breach. This question omits to recognize the fact that considerable disclosure resulted from this judgment of the Supreme Court. It also omits the important finding of the Supreme Court in *Charkaoui #2*, where it was made clear that the designated judge was to be responsible for analyzing the impact of the destruction of original notes on the rights of the named person (see *Charkaoui #2*, at para 77).

[29] In any event, the submission of questions for certification is not the proper forum in which to relitigate issues that have already been addressed by this country's highest court.

> *Question 14 – "Did the Court err in relying upon the information contained in alleged summarized conversations without first requiring the attendance and subsequent cross-examination of the parties involved in the original recording and summarization of such information?"*

[30] Public counsel for Mr. Harkat submit that "each of these questions relate to the assessment of prejudice arising from destroyed original materials". Consequently, the conclusions applicable to Question 13 equally apply in this case. Moreover, the Court refers to the Redacted Footnotes to *Harkat (Re)*, 2010 FC 1241, where it is manifest that the Court was presented with evidence in regards to the recording and summarization of the information. While public counsel may disagree

with the Court's assessment of this evidence, it is not a proper question for certification, as it does not transcend the interests of the parties involved in the case at bar.

> *Question 15 – "Did the Court err in its formulation of the test for the exclusion of evidence pursuant to s.24(1) of the Charter, and if so, did the Court err in not excluding the summarized conversations?"*

[31] This question is an important question of law, one upon which the Court drew from extensive case law to resolve. The formulation of a clear test for the remedy under section 24(1) is a question that is settled in law and is not suitable for certification. The Court's analysis of this question relied upon the parties' submissions and did not stray from the applicable law. Globally, the decision in *Harkat (Re)*, 2010 FC 1243 did not misconstrue the appropriate test for exclusion of evidence pursuant to section 24(1) of the Charter, as argued by counsel for Mr. Harkat.

[32] Hence, the submissions for certification address how this test was acted upon by the Court. It does not transcend the immediate interest of the parties involved in the litigation. Also, it may not even be determinative of the Appeal. For example, the summaries of interviews with CSIS agents prior to the proceedings were left on the table for the Court to consider: counsel for Mr. Harkat only contested a limited aspect of these summaries. While the exclusion of all summaries of conversations was sought, the content of some of these was conceded by Mr. Harkat, including all the conversations that relate to his fiancée and his family in Algeria. Furthermore, the Court found all of these summaries to be reliable as they were supported by the evidence as presented. This approach was consistent with section 83(1)(h) of the IRPA.

[33] Pursuant to *Charkaoui #2*, it was the Court's role to assess the prejudice suffered by the destruction of operational notes and the reliability of the summaries provided. Mr. Harkat takes

issue with how this was done, but clearly, this arises from the decision, not the material facts of the case.

> *Question 16 – "Did the Court err in finding that the cumulative effect of Charter breaches, a breach of candour, and the passage of time did not warrant a stay of proceedings pursuant to s.24(1) of the Charter?*

[34] This question clearly emerges from the decision itself, and not by issues of the case. While this question could be determinative of the appeal, it is clear that it is fact-based and does not transcend the immediate interest of the parties in the litigation.

> *Question 17 – "Should the duty of utmost good faith and candour as defined in Ruby be enlarged or interpreted to include an obligation on the part of the Ministers and the Service to update evidence and/or information as the proceedings evolve?"*

[35] The Special Advocates also submitted a question of similar breadth. However, as the appellate court shall be able to review the unredacted version of the Annex to *Harkat (Re)*, 2010 FC 1243, it is clear that this Court did not find that this issue arose in these proceedings. This conclusion is public, even if the underlying facts to justify it are to not to be divulged for reasons of national security. Hence, as this Court did not find it necessary to deal with this question, it is not a proper question for certification. Again, this is the state of the law as considered by the Federal Court of Appeal in *Zazai*, at para 12: "If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or *if the judge decides that it need not be dealt with*, it is not an appropriate question for certification." (emphasis added)

Questions that are to be certified

> *Question 1 – "Did the Court err in finding that sections 77(2), 78, 83(1)(c)-(e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the IRPA do not violate section 7 of*

> *the Charter insofar as the Court concluded that they do provide for fair trial standards; they do grant the named person the right to know and answer the case made against him; and, they do make it possible for the Court to render a sufficiently informed decision on the basis of the facts and the law?"*
>
> *Question 2 – "Did the Court err in finding in the alternative to the conclusions captured in question number one, that any Charter infringements inherent in the impugned sections of the IRPA are demonstrably justifiable in a free and democratic society and therefore saved by section one of the Charter notwithstanding the Charter violations in question amount to breaches of section 7?"*
>
> *Question 3 – "Can this judicial process constitute a fair hearing where the Court has made findings based on evidence or information of which the named person has not been informed?"*

[36] Evidently, these are important questions of a constitutional nature. No appellate authority has ruled on the modifications to IRPA after *Charkaoui #1*. These constitutional questions definitely transcend the interests of the parties and are potentially determinative of the appeal.

[37] However, there is no need to certify this question in the manner public counsel for Mr. Harkat has suggested. Rather, this question will be framed in keeping with the usual framing of constitutional questions in the Charter context.

> *Question 4 – "Did the Court err in the manner in which it defined the class privilege concerning human sources and further, did the Court's articulation of the rare exception to this privilege as only existing where the special advocates could satisfy a "need to know standard" amounting to no less than a flagrant breach of fundamental justice amount to legal error?"*

[38] This question arises from this Court's decisions in *Harkat (Re)*, 2009 FC 204; *Harkat (Re)*, 2009 FC 553; and *Harkat (Re)*, 2009 FC 1050. Although section 82.3 of IRPA bars appeals from interlocutory decisions of the Court, this question is undoubtedly linked to the constitutional question as it relates to the fairness and aspects of fundamental justice inherent to these proceedings.

Also, the Special Advocates also made submissions in this respect. By the present, they are granted the permission to participate in further debate of this question, as per paragraph 85.2(c) of the IRPA.

[39] While this Court has reticence in declaring that the determination of this issue is determinative of the appeal as complete human source files were released, it is indeed an important question on which appellate guidance is required. Also, this determination will impact how similar cases evolve. Consequently, these questions are to be certified, albeit with reformulation.

Conclusion

[40] This Court will certify two questions, as outlined below. The present analysis of all the questions put forth for certification is not usual, as typically immigration cases will only identify a few key issues and this often occurs by consent of the parties. In this case, the submissions for certification were considerable and involved questions related to the facts of the case. As the "gatekeeper function" of this Court in certifying questions is clear, the present Reasons may also be of assistance to the Federal Court of Appeal in assessing which legal issues, in addition to the certified questions, should be dealt with in keeping with the powers of appellate courts pursuant to *Baker*, above and *Pushpanathan*, above, in deciding which legal issues should be dealt with.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The certificate signed pursuant to subsection 77(1) against Mohamed Harkat is reasonable.

2. The following questions be certified in this proceeding:

   a. Do sections 77(2), 78, 83(1)(c)-(e), 83(1)(h), 83(1)(i), 85.4(2) and 85.5(b) of the IRPA breach section 7 of the Charter of Rights and Freedoms by denying the person concerned the right to a fair hearing? If so, are the provisions justified under section 1?

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

3. Pursuant to paragraph 85.2(c) of the IRPA, the Special Advocates are granted the permission to participate in the proceedings in regards to the question certified above at 2.b. of this Judgment, namely, the human source privilege question.

"Simon Noël"

Judge