SCC File No. 34884

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATIONAND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

APPELLANTS
(Respondents in the Court below)

– and –

MOHAMED HARKAT

RESPONDENT
(Appellant in the Court below)

– and –

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CANADIAN COUNCIL FOR REFUGEES, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP, CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AMNESTY INTERNATIONAL AND CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INTERVENERS

AND BETWEEN:

MOHAMED HARKAT

APPELLANT
(Respondent in the Court below)

– and –

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

RESPONDENT
(Appellant in the Court below)

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PART I: OVERVIEW AND STATEMENT OF THE FACTS

1. The Criminal Lawyers' Association (Ontario) (hereinafter "CLA") adopts and relies on the submissions of the Canadian Association of Refugee Lawyers ("CARL") with respect to the analytical framework to be applied in determining the effect of the destruction of original CSIS evidence on the s. 7 rights of those subject to the security certificate regime. To minimize duplication of argument, the CLA will focus its submissions on the factors to be considered in crafting a meaningful and appropriate remedy where such a *Charter* breach has been made out.

2. The CLA submits that the nature of the remedy to be provided for a breach of s. 7 must reflect and be responsive to 1) the importance of procedural protections at the investigative stage of the security certificate process; and 2) the specific prejudice caused to the named person by the destruction of the original evidence. The CLA makes no submissions on the facts of this appeal.

PART II: POSITION ON QUESTIONS IN ISSUE

3. The CLA submits that the Federal Court of Appeal correctly concluded that the destruction of original evidence resulted in a breach of Mr. Harkat's s. 7 rights which entitled him to a remedy. The CLA respectfully submits, however, that the remedy crafted by the Court of Appeal failed to adequately respond to the prejudice caused by the loss of original evidence. In this case, the appropriate remedy was the exclusion of all of the summaries of the alleged communications. The CLA makes no submissions on the remaining questions in issue.

PART III: STATEMENT OF ARGUMENT

A. The Importance of Procedural Protections at the Investigative Stage

4. Canadian legal history is unfortunately burdened by tragic cases of wrongful convictions resulting from errors made during the investigative process.[1] More recent history has provided

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[1] See, *e.g.*, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), *The Inquiry Regarding Thomas Sophonow* (2001), *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2007) and *Commission of Inquiry into the Wrongful Conviction of David Milgaard* (2008).

similar examples of errors made in the context of national security investigations.[2] Inquiries into these wrongful convictions and wrongful accusations have resulted in many recommendations to improve the quality of the investigative process and the fairness of the court process. Recommendations relating to procedural safeguards for conducting photo lineups, videotaping of suspects interviews, avoiding of tunnel vision, and preserving evidence including police notebooks are all aimed at avoiding wrongful convictions by improving the way investigative agencies gather and retain evidence.

5. Robust protections under s. 7 of the *Charter* at the investigative stage of criminal proceedings recognize the fallibility of the police and help protect against the spectre of wrongful convictions. Those same protections in the security certificate context are necessary because of what this Court has recognized as the increasing convergence of policing and intelligence activities of different state actors, specifically the RCMP and CSIS.[3] Materials generated by CSIS are increasingly being used as evidence in the course of court proceedings that seriously engage the liberty and security interests of those individuals subject to them. If, in this manner, CSIS is going to engage in investigations like a traditional police force, the CLA submits that its corresponding duties and obligations in relation to evidence collection, retention and disclosure must similarly evolve to be consistent with those obligations imposed on police conducting criminal investigations.

6. Since the creation of CSIS following the release of the Report of the *Royal Commission of Inquiry into Certain Activities of the RCMP* in 1981, law enforcement activities, which focus on reacting and responding to the commission of criminal offences, have been kept separate from intelligence activities, which focus on protecting national security by anticipating and preventing threatening events.[4] Under a model that separates these two functions, protecting

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[2] See, *e.g.*, The Honourable Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008) at pp. 349 – 353, 400 – 403, 441 – 443 and Commissioner O'Connor, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, pp. 22-26.

[3] *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 [*Charkaoui #2*] at para. 26

[4] Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society*, November 3, 1983 at para. 14, cited in *Charkaoui #2*, *supra* note 3 at

information and its dissemination is one of the defining principles of intelligence investigations.[5] However, the distinction between policing and intelligence functions has become increasingly blurred. The convergence of policing and intelligence is epitomized by the security certificate regime where "CSIS plays a central role in the decision on the issuance of a security certificate and the consequent removal order."[6] As this Court recognized in *Charkaoui #2*, the consequences of security certificates are often more severe than those of many criminal charges:

> For instance, the possible repercussions of the process range from detention for an indeterminate period to removal from Canada, and sometimes to a risk of persecution, infringement of the right to integrity of the person, or even death. Moreover, as Justice O'Connor observed in his report, "the security certificate process, provides for broader grounds of culpability and lower standards of proof than criminal law" (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, at p. 436).[7]

The Court concluded that severity of the consequences for those subject to the security certificate procedure demands an expanded right to procedural fairness under s. 7 of the *Charter*.[8]

7. It is against this backdrop that the Court must now grapple with the tension that arises when the entitlement to procedural protections pursuant to s. 7 of the *Charter* comes into conflict with the state's interest in secrecy. The CLA recognizes that determining the scope of procedural fairness requirements in the security certificate context, and the appropriate remedy where those requirements are not met, will "require a more nuanced approach than simply importing the model developed by the courts in criminal law."[9] More nuanced does not mean less fair, however. The CLA submits that insofar as CSIS's investigations form part of the certificate scheme under *IPRA*, CSIS has a constitutional obligation to collect and preserve any

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para. 14. See also *Royal Commission of Inquiry into Certain Activities of the RCMP*, known as the MacDonald Commission, which highlighted the problems associated with the RCMP performing police and intelligence work and lead to the creation of CSIS.

[5] Iaccobucci, *supra* note 2 at at p. 69.

[6] *Charkaoui #2*, *supra* note 3 at para. 54.

[7] *Ibid.*

[8] *Ibid.* at paras. 56-58.

[9] *Charkaoui #2*, *supra* note 3 at para. 47.

information that may be relevant to the future right of the named person to challenge the case against him in a manner that accords with the principles of fundamental justice.

8. Put another way, despite the differences traditionally recognized between CSIS and law enforcement agencies, if the information collected by CSIS is to be used to build a case against and justify the removal of individuals from Canada, procedural fairness and the guarantees of s. 7 of the *Charter* demand that CSIS be held to the same – or even higher – standards as the police in terms of the preservation and retention of evidence, avoiding tunnel vision, and collecting and disclosing all evidence, including that which could be used to exculpate the target of the investigation.

9. In light of the serious jeopardy faced by those caught in the security certificate process, where CSIS falls short of its constitutional obligations, the remedy crafted must respond in a meaningful way to the prejudice caused when the named person's ability to know and meet the case against him is impaired by the destruction of evidence.

B. Crafting a Just and Appropriate Remedy

10. Pursuant to s. 24(1), once a violation of the *Charter* has been established, the trial judge must grant "such remedy as [is] appropriate and just in the circumstances." While the existence of actual prejudice is not required to establish a *Charter* breach, it is relevant to fashioning an appropriate remedy under s 24(1).[10] The remedy granted "must vindicate the rights of the claimant."[11]

11. The ambit of remedies available pursuant to s. 24(1) is broad. Crafting a remedy is a case-specific challenge that requires a flexible and contextual approach.[12] Nevertheless, for the reasons set out below, the CLA submits that, in general, where the loss or destruction of original CSIS evidence results in a breach of a named person's s. 7 *Charter* rights, the minimum remedy capable of curing the prejudice to the claimant will be the exclusion of all summaries

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[10] *R. v. Carosella*, [1997] 1 S.C.R. 80 at para. 37.
[11] *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, per Fish J., dissenting in the result.
[12] *Ibid.*at para. 18.

derived from the missing evidence.

i) Defining Prejudice in the Context of Lost CSIS Evidence

12. A central issue of dispute in this case is whether Mr. Harkat suffered prejudice from the destruction of the original records relating to conversations allegedly had by or about him. Justice Noel found he did not. This conclusion rested in large part on Justice Noel's finding that the summaries of the original evidence – the conversations – were accurate.[13] The difficulty with this finding is that it ignores the concern, expressed by this Court in *Charkaoui #2*, that the destruction of original evidence compromises the very function of judicial review.[14] An assessment of the prejudice caused by the destruction of original CSIS evidence cannot begin from the assumption that the summary of the lost evidence is accurate. Absent recordings of the conversations at issue in this case, with access only to the summaries prepared by the state, it would have been "difficult, if not impossible" for Justice Noel to verify the content of the conversations.[15] As the Federal Court of Appeal held, the summaries are "the problem, not the solution."[16] The provision of a summary of destroyed evidence does not cure the prejudice that arises from the loss of the original evidence. Indeed, it is the very fact that the information contained in the summaries cannot be verified or challenged in the absence of the original evidence that creates the prejudice in these cases.

13. The Ministers argue before this Court that Mr. Harkat has not suffered any prejudice, particularly in respect of those conversations to which he was privy, because he was able to

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[13] *Harkat (Re)*, 2010 FC 1243 at para. 66, Appeal Record, Vol II, Tab 11 [*Harkat* Abuse of Process Decision]

[14] The assessment of national security privilege claims pursuant to s. 38 of the *Canada Evidence Act* is another area in which the destruction of evidence will frustrate judicial oversight. Without the original source of the information over which national security privilege is claimed, the Court will be unable to properly assess the validity of the government's claims. This is particularly problematic given that government agencies have, in the past, been criticized for overclaiming the privilege in a manner that "exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that cannot be fully open because of NSC concerns." O'Connor, *supra* note 2 at pp. 301–302; see also *Almalki* v. *Canada (Attorney General)*, 2010 FC 1106 at paras. 108-109 & 169 per Mosley J. (rev'd, on other grounds, 2011 FCA 199, 271 C.C.C. (3d) 63) and *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248.

[15] *Charkaoui #2*, *supra* note 3 at paras. 61-62.

[16] *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 at para. 132, Appeal Record, Vol II, Tab 14 [*Harkat* Appeal Decision].

give evidence as to his version of the conversations.[17] The CLA submits that the Ministers' position mischaracterizes the nature of the prejudice caused to the named person. Lost evidence will rarely result in a named person – or an accused in the criminal law context – being unable to testify in his or her own defence to simply deny the allegations made. Indeed, in the absence of the original records, offering a bald denial is generally the only response a named person is able to make. This restriction on the ability of the named person to test the Minister's case against him is the very prejudice at issue.

14. The Ministers appear to suggest that actual prejudice cannot be made out where the named person knows the allegations against him and could mount an *affirmative* case. This approach disregards the importance of the named person's right to *test* the Ministers' case as well.

15. Actual prejudice will be established where an accused demonstrates that the non-disclosure impairs the right to make full answer and defence,[18] or in terms appropriate to the security certificate context, that the non-disclosure impairs a named person's ability to know and meet the case. The impairment may arise where, because of the loss of evidence, the named person is unable to put forward an affirmative defence. It may also arise where the named person is able to establish a "reasonable possibility" that the non-disclosure affected the overall fairness of the process[19] by foreclosing reasonably possible uses of the lost materials, or reasonably possible avenues of investigation. In short, the CLA submits that a named person will demonstrate actual prejudice where he or she can show a reasonable possibility that if the material had been disclosed, it could have been used to test the Ministers' case.

16. Where the relevant information has been irretrievably lost, as in this case, it is impossible to establish the precise degree to which the named person's ability to know and meet the case has been impaired. In these circumstances, an assessment of prejudice is

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[17] Ministers' Factum on Appeal at para. 104.
[18] *R. v. Bradford* (2001), 151 C.C.C. (3d) 363 (Ont. C.A.) at para. 8.
[19] *R. v. Dixon*, [1998] 1 S.C.R. 244 para. 34.

inevitably problematic and will involve some degree of speculation.[20] The CLA submits, however, that the degree of prejudice will largely depend on two factors: 1) the extent to which, as a result of the loss or destruction of evidence, the named person's ability to test the Ministers' case is impaired; and 2) whether there is a meaningful proxy or substitute for the non-disclosed evidence that would permit the individual to test the Ministers' case in the same or similar manner as would have been possible with the original evidence.

ii) Testing the Minister's Case

17. The manner in which the named person is able to establish that his ability to challenge the Ministers' case is impaired by the loss of evidence will vary in each case. As a general proposition, however, the CLA submits that intercept recordings or transcripts of actual communications, might reasonably be used to test the summaries – and the conclusions the Ministers assert should be drawn from them – in the following ways:

- verifying the accuracy of the summaries
- "discovering, revealing and proving" errors or discrepancies in the summaries relied on by the Ministers which may have resulted from "the translation of their content to English, the making of the summaries themselves or their subsequent entry into the data bank of CSIS"[21]
- reviewing communications not reported on or summarized by CSIS in order to establish the context or meaning of the conversations relied upon and identify potentially exculpatory communications overlooked by CSIS;
- obtaining independent translation of intercepted communications not in English, as was the case here;
- identifying faulty voice identification; and
- listening to the tenor, tone and language choices used in the communications to assist in assessing the true meaning of the words spoken and summarized.

18. Without the original evidence, these lines of investigation are foreclosed. The CLA further submits that the limitations on the named person to pursue these lines of attack and investigation are equally imperiled whether or not the named person was an alleged participant

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[20] *R. v. Bero* (2000), 151 CCC (3d) 545 (Ont. C.A.) at para. 49; *R. v. Sheng* (2010), 254 C.C.C. (3d) 153 (Ont. C.A.) at para. 46.

[21] *Harkat* Appeal Decision, *supra* note 16 at para. 133.

in the communications at issue.

iii) Summaries are an Inadequate Substitute for Original Evidence

19. To determine whether actual prejudice has occurred, "consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration."[22] A lesser remedy for destruction of evidence will be appropriate where a meaningful proxy or substitute for lost evidence exists, providing it permits the named person to test the Ministers' case in a manner that is consistent with the original evidence. Depending on the circumstances, such proxies may include transcripts of the communications or comprehensive and contemporaneous notes of the communication in the original language. Such substitutes can be used as the basis for further investigations, to construct a probing cross-examination, or to otherwise challenge the Minister's case.

20. In determining how the substitute or remaining evidence affects the assessment of prejudice, the relevant question is whether it contains the same information as that which has been destroyed and whether it could be used in the same, or a comparable, manner to test the Minsters' case. The CLA takes the position that a named person's own recollection of communications does not serve as a reasonable proxy or substitute and is incapable of curing the prejudice occasioned by the destruction of the original evidence for three reasons.

21. First, reliance on the named person's recollection of the communication presumes that the summary is accurate, at least to the extent that it has correctly identifies the named person as a participant in the communication.

22. Second, characterizing a named person's own recollection as a proxy for the loss evidence improperly sets up a credibility contest between the summary, the veracity of which cannot be meaningfully challenged, and the bald assertions of the named person. More importantly, since none of the traditional indicia used to assess credibility are available to the

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[22] *Bradford, supra* note 18 at para. 8.

reviewing judge, there is no way to meaningfully assess the relative credibility of the conflicting versions. In this way, the destruction of evidence impairs the overall fairness of the proceedings and interferes with the truth-seeking function of the judicial process.

23. Third, no matter how powerful an individual's memory, personal recollection is simply not akin to an independent, reliable and objective recording of the communication. It does not share the characteristics of those proxies identified above. Moreover, this Court can take judicial notice of the fact that memories fade over time. An individual may reasonably have no recollection of a particular call or conversation made months or years earlier. Without the original communication to refresh his memory, the named person may well have no useful evidence to offer.

24. In the instant case, the Federal Court of Appeal held that Mr. Harkat was "in a position to determine the accuracy and reliability of the summaries" to which he was a party and could "by his testimony and other specific evidence, raise any error, inconsistency or inaccuracy contained in these summaries which affect their accuracy and reliability."[23] The difficulty with this finding is demonstrated by Mr. Harkat's evidence. He testified and denied being a participant in six of the conversations he was alleged to be a party to. While he could not exclude the possibility of having participating in another four, he had no recollection of the content of the discussions or even if they occurred. In these circumstances, Mr. Harkat's recollections in no way permit him to challenge the content of the summaries in the kind of meaningful way a transcript of the communications would allow.

C. Conclusion

25. Whether a breach of s. 7 of the *Charter* entitles the accused to a stay of proceedings or some lesser remedy, such as the exclusion of evidence, depends on the extent of the actual prejudice caused by the loss or destruction of the evidence.[24] The remedy that is granted must be responsive to the nature of the prejudice. Where there are no transcripts or recordings of a

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[23] *Harkat* Appeal Decision, *supra* note 16 at para. 143.
[24] *R. v. Sheng*, *supra* note 20 at para. 34.

communication on which the Minister intends to rely in making its case against a named person, that individual is necessarily impaired in challenging the validity of the alleged contents of the communication. The only way in which to vindicate the right of the named person to meet the case against him or her is to exclude the summary of the lost evidence.

PART IV: SUBMISSIONS ON COSTS

31. Costs of this Intervention are provided for in the order of Justice Cromwell dated July 17, 2013.

PART V: ORDER REQUESTED

32. The CLA respectfully requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 11th day of September 2013.

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PART VI: TABLE OF AUTHORITIES

Secondary Sources