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OVERVIEW

1. In the context of security certificates, this appeal will define the constitutional limits of the power of the government executive and judiciary to rely on secret evidence to the prejudice of interests at the core of a non-citizen's right to life, liberty and security. The BCCLA believes that the security certificate deportation apparatus need not be declared of no force and effect, provided the enabling provisions of the *Immigration and Refugee Protection Act* are interpreted to comport with constitutional values that ensure the integrity of our legal process and the public perception thereof.

2. The BCCLA says that a demonstrated threat to national security may justify judicial reliance on secret evidence to deport non-citizens on a case-by-case basis, provided (a) the ministers are unable to deport the non-citizen without recourse to secret evidence, (b) the phrase "would be injurious to national security" is rigorously defined to minimize withholding of information, closed hearings and reliance on confidential information and (c) the phrases "reasonably informed" and "an opportunity to be heard" are defined to require the participation of security cleared lawyers at closed hearings to preserve the integrity of the proceedings by challenging the purported need for confidentiality and testing the evidence supporting deportation.

PART I: STATEMENT OF FACTS

3. Although particular facts may be relevant to determination of some issues on this appeal, the BCCLA declines to make a statement of facts because it is primarily concerned with the interpretation of certain statutory provisions and the compliance of the security certificate process with constitutional norms.

PART II: QUESTIONS IN ISSUE

4. The primary issue in these appeals is whether the procedures set out in ss.78-84 of the IRPA meet the standard of fundamental justice within the meaning of s.7 of the Charter.

PART III: STATEMENT OF ARGUMENT

A: The General Framework

5. It is beyond dispute that Canada as a sovereign nation is entitled to control its territory by deporting non-citizens who are inadmissible to Canada because there are reasonable grounds to believe them to be a threat to the security of Canada. The process of deportation, however, must be compatible with the values and principles which define our constitutional democracy.

6. The security certificate process represents the exceptional deportation, not the rule. In the vast majority of deportation cases, non-citizens are determined inadmissible to Canada under ss.35-42 of the *Immigration and Refugee Protection Act* (the "IRPA") for pedestrian reasons including health reasons, financial reasons, misrepresentation, non-compliance with the Act and common criminality, or for more serious reasons such as human rights violations or violations of international law, and serious or organized criminality. Determinations of admissibility and inadmissibility are made by Immigration members of the Immigration and Refugee Board presiding at open hearings.

7. Section 77 of the IRPA permits a security certificate to issue only on grounds of security, violating human or international rights, serious criminality or organized criminality. Security certificates are not, as suggested by the Respondent in *Harkat*, solely intended to deal with terrorism or threats to Canada that are political or ideological in nature. Section 3 of the IRPA refers to a broad range of objectives with express mention of terrorism. Moreover, security certificates need not in all cases involve closed hearings or confidential information. In brief, security certificate proceedings are not all created equal.

8. Security certificate provisions of the IRPA have four quite separate and distinct procedural aspects, which operate independently and have varying impact on procedural fairness:

    a. The baseline process. The Ministers issue a certificate under s.77 which creates Federal Court (instead of IRB) jurisdiction to make a determination of whether the certificate is reasonable under s.80. The

judge may quash the certificate or determine it to be reasonable, upon which the certificate has the effect of a removal order. The process is intended to facilitate and expedite deportation. The designated judge examines the information and evidence in private within seven days after the referral of the certificate but full disclosure of the information and evidence available to the judge is available to the detainee at this stage. The hearing is *inter partes* in open court. This process might, for example, relate to deportation for serious or organized criminality.

b. Confidential Information. The designated judge is required under s.78(b) to 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, disclosure would be injurious to national security. The designated judge retains discretion as to the determination of whether the information would be injurious to national security but, once it is determined that the disclosure of information would be injurious to national security, the designated judge is required by s.78(b) to withhold the confidential information from the detainee without the need for a ministerial request. Even if the designated judge determines that the disclosure of some information would be injurious to national security, the hearing into the reasonableness of the certificate may remain *inter partes* and be held in open court. Section s.78(b) does not, by itself, authorize the closure of a hearing into the reasonableness of the certificate or judicial reliance on confidential information. It is necessary to the effective functioning of s.78(b) for the designated judge, at the request of one of the Ministers, to make the determination of whether disclosure would be injurious to national security prior to any disclosure to the detainee in a closed courtroom in the absence of the detainee and his counsel and the public at large.

c. Closed Hearings. On the request of either Minister, s.78(e) requires the judge to hear all or part of the information or evidence in the absence of the detainee 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. Again, the designated judge retains discretion as to the determination of whether the information would be injurious to national security but, once it is determined that the disclosure would be injurious to national security, the designated judge is required by s.78(e), upon the request of either minister, to close the courtroom for the hearing of that information. In other words, once the information is determined by the designated judge to be confidential under s.78(b), the Ministers are granted the discretion to close the courtroom under s.78(e). A Ministerial request invoking s.78(e) does not require the designated judge to rely on the information heard in the closed hearing to support a determination of inadmissibility.

d. Reliance on Confidential Information. Section 78(g) states that 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. *This provision authorizes the designated judge to **rely** on confidential information heard in a closed hearing for the purpose of assessing the reasonableness of the certificate*. The authorization is permissive, not mandatory; the designated judge need not rely on the secret evidence.

9. Section 78 creates the following areas of discretion:

    a. The Ministers have discretion to initiate a judicial determination of whether disclosure of information would be injurious to national security or safety of any person. This judicial determination takes place at a closed hearing;

    b. The designated judge has discretion to determine whether disclosure of information would be injurious to national security or safety of any person;

    c. If the judge determines that disclosure of information would be injurious to national security or safety of any person, the Ministers have discretion to close the courtroom to the public, the detainee and his counsel for the hearing of the confidential information;

    d. If the designate judge determines that disclosure of information would be injurious to national security or safety of any person, the designated judge has discretion to consider the confidential information in deciding whether the certificate is reasonable;

    e. The designated judge determines which information will be included in a summary of the evidence, subject to the requirement that the information be sufficient to enable the detainee to be reasonably informed of the circumstances giving rise to the certificate; and

    f. The designated judge also modulates the nature and degree of the detainee's participation in the hearing, subject only to the requirement that the detainee must be given an opportunity to be heard.

10. Key statutory phrases that grant discretionary powers to the Ministers and the designated judge, including that phrases "national security", "safety of any person", "reasonably informed" and "opportunity to be heard", are not defined by the IRPA. The BCCLA submits that these key statutory terms are ambiguous and that this Court is required to rigorously define their scope and meaning in order to ensure that the exercise of discretion is compliant with the *Charter*.

B: Charter Values and Statutory Interpretation

11. Before assessing whether security certificate provisions infringe the Charter, it is necessary to determine the scope and meaning of the provisions. The scope and meaning of critical phrases such as "national security", "safety of any person", "reasonably informed" and "opportunity to be heard" are ambiguous and susceptible of multiple meanings, and, to this extent, the phrases must be interpreted by this Court in accordance with Charter values to constrain and minimize procedural compromises such as closed hearings and reliance on confidential information.

12. The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the Charter. This presumption acknowledges the centrality of constitutional values in the legislative process and in the political and legal culture of Canada.

> *Application under s.83.28 of the Criminal Code (Re)*, 2004 SCC 42; [2004] 2 S.C.R. 248 at paras.34 and 35

13. The BCCLA submits that it is critical for this Court to remain mindful that the Act in its entirety and the security certificate regime in particular are not intended as a remedy tailored to terrorist threats. As with s.83.28 of the *Criminal* Code, security certificates were incorporated into the existing Act governing immigration and refugee matters, and did not make use of exceptional powers, eg. *Emergencies Act*. The characterization of security certificate provisions as "terrorist" or "national security" legislation has the potential to go too far and would have implications that far outstrip legislative intent.

> *Application under s.83.28 of the Criminal Code (Re)*, 2004 SCC 42; [2004] 2 S.C.R. 248 at para.39

14. It is a settled rule that, in the interpretation of a statute, *Charter* values as an interpretive tool can only play a role when there is a genuine ambiguity in the legislation. Where a statute is not ambiguous, the court must give effect to the

clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para.62, Iaccobuci J., writing for a unanimous court, firmly reiterated this rule:

> … to the extent this Court has recognized a "*Charter* values" imperative principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [emphasis in original]
>
> *Her Majesty the Queen v. Rodgers*, 2006 SCC 15 at paras.18 and 19

15. On the one hand, s.78 requires a detainee to be reasonably informed of evidence and to be given an opportunity to be heard. Section 78(h) requires the judge to provide the permanent resident or 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. Section 78(i) requires that the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility. Sections 78(h) and 78(i) are clearly intended to extend some degree of procedural and substantive fairness to the detainee. The critical phrases require a detainee to be "reasonably informed" and to have "an opportunity to be heard". Neither of these phrases is defined.

16. On the other hand, s.78 prevents the judge from revealing classes of evidence to the detainee and from opening the courtroom. Section 78(b) requires the judge to ensure the confidentiality of 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. Section 78(e) requires that, on each request of the Minister or the Minister of Public Safety and Emergency Preparedness 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. The critical phrases

are “national security” and “safety of any person”; both are undefined by the IRPA.

17. What the IRPA gives in terms of due process it appears to take away with requirements of secrecy. The phrases “national security” and “safety of any person” form the limit of the phrases “reasonably informed” and “an opportunity to be heard”. As the definitions of “national security” and “safety of any person” expand and capture wider fields of information and evidence, the terms “reasonably informed” and “an opportunity to be heard” contract, potentially to the point of meaninglessness. Conversely, the more robust the notion of “reasonably informed” and “opportunity to be heard”, the greater the reduction in effect of the phrases “national security” and “safety of any person”. The normative tension at the intersection of these ambiguous phrases lies at the heart of these appeals.

18. By leaving key phrases undefined by the enabling statute, Parliament has placed reliance on this Court to fill in the gaps by assigning concrete meanings to the vague terms. Charter values must come into play to resolve the ambiguities.

C: The Meaning of “An Opportunity to be Heard” and “Reasonably Informed”

C(i) Section 7 Engaged

19. The interpretation of the phrases “an opportunity to be heard” and “reasonably informed” engages a variety of bedrock *Charter* principles anchored in section 7 of the Charter of Rights and Freedoms. Section 7 guarantees “everyone… the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. The term “everyone” in s.7 includes every person physically present in Canada and by virtue of such presence amenable to Canadian law.

> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 117 at para.35

C(ii) Constitutional Imperatives: What is Truly at Stake

20. The constitutional imperatives of procedural fairness vary with the context of what is truly at stake.

> *Her Majesty the Queen v. Rodgers*, 2006 SCC 15 at para.53
>
> *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paras.45 and 46

21. The interests at stake in security certificate hearings are at the very pinnacle of the interests protected by the *Charter*: reputation, family relationships, freedom from coercion, loss of liberty, loss of human dignity through torture or inhumane conditions of detention, and loss of life itself. A detainee is subject to the following deprivations of life, liberty and security of the person:

    a. The detainee may be detained pending detention review under s.83 or s.84, as the case may be;

    b. The detainee may be detained pending a determination of whether the certificate is reasonable under s.80. This detention may in effect be indefinite in duration;

    c. The detainee may be detained pending a determination on an application for protection under s.112. This detention may in effect be indefinite in duration;

    d. The detainee may be removed from the country in which he has established long-term permanent residency, with attendant family and business connections;

    e. The detainee who is deported may be indelibly branded as a terrorist threat or a threat to national security, notwithstanding the flexible and "liberal" standard for deportation established in *Suresh*; and

    f. The detainee may be deported, in exceptional circumstances, to face persecution, torture or even execution.

22. It is beyond dispute that the risk of imprisonment, detention awaiting a hearing, the risk of deportation, the reputation of a person, and the prospect of persecution, torture and execution engage the right to life, liberty and security of the person.

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3

United States v Burns, 2001 SCC 7, [2001] 1 S.C.R. 283

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 117 at para.47

23. It is respectfully submitted that the magnitude of the stakes engaged in security certificate hearings require the very highest level of procedural protection afforded by our constitutional democracy. The BCCLA does not submit that these interests can never be compromised; our point is merely that the procedural safeguards should be at their strongest when the stakes are at their highest.

C(iii) The Right to Disclosure of the Evidence

24. The IRPA requires the designated judge to provide the detainee with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate. Again, the notion of what is "reasonable", by its very nature, must be assessed in the context of the interests at stake.

Her Majesty the Queen v. Rodgers, 2006 SCC 15 at para.26

25. The BCCLA suggests that the interests at stake are akin to and may exceed in importance the interests at stake in the most serious criminal proceedings. In the criminal law context, the Crown has a duty to disclose all relevant and non-privileged evidence, whether favourable or unfavourable. Derogation from this duty may constitute a serious violation of professional ethics. Particularly in the security certificate context, in which, given the low burden for demonstrating ineligibility for admission to Canada, a detainee may bear an evidentiary or tactical burden of proving their *bona fides*, extensive disclosure is appropriate:

> The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material…
>
> Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s.7 of the Canadian

> Charter of Rights and Freedoms as one of the principles of fundamental justice. (See Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, at p.1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person… "anything less that complete disclosure by the Crown falls short of decency and fair play"
>
> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at paras.11, 16 and 17
>
> *R. v. Chaplin*, [1995] 1 S.C.R. 727 at para.21

26. A similar right to disclosure prevails in some immigration contexts when the interests at stake are similar to those in criminal proceedings. In *Singh*, this Court declared the refugee process under the former *Immigration Act* to be of no force and effect on the basis of the inadequacy of the opportunity the scheme provided to refugee claimants to know the case he has to meet. Wilson, J. put the matter as follows:

> The applicant is entitled to submit whatever relevant material he wishes to the Board but he still faces the hurdle of having to establish to the Board that on the balance of probabilities the Minister was wrong. Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim. It is this aspect of the procedures set out in the Act which I find impossible to reconcile with the requirements of "fundamental justice" as set out in s.7 of the Charter.
>
> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at paras.60 and 61

27. In the criminal context, the *sine qua non* of the efficacy and fairness of the adversarial system is disclosure to the accused of information in the control of the government. Disclosure is necessary for the determination of critical issues such as whether to conduct cross-examination, the issues to conduct cross-examination upon, tactical decisions within cross-examination, whether an individual should testify and the issues should testify upon. In this sense, disclosure is inseparable from the detainee's opportunity to be heard.

> *R. v. Swain*, [1991] 1 S.C.R. 933 at 972

C(iv) Proposed Interpretation of Reasonably Informed

28. The BCCLA submits that the phrase "reasonably informed" should be interpreted to include a presumption of full disclosure to the detainee, subject to limitation when disclosure "would be injurious to national security".

C(v) Ex Parte Hearings and the Adversarial System

29. Section 78(i) requires the designated judge to provide the detainee with an opportunity to be heard regarding their inadmissibility. This right is subject to the Minister's discretion to close a hearing upon a judicial determination that disclosure of information would be injurious to national security under s.78(e).

30. The closure of the hearing plainly entails the exclusion of the detainee from the proceeding. *Ex parte* hearings are exceptional and limited in their use to where some harm will result from proceeding otherwise:

> *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is take or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party: *Attorney General of Manitoba v. National Energy Board*, [1974] 2 F.C. 502 (T.D.). The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example)...
>
> It remains to be determined whether the requirement in s.51(3) that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is contrary to the principles of fundamental justice. As I have already noted, the circumstances in which a court will accept *ex parte* submissions are exceptional. The circumstances in which a court will be obliged to hear *ex parte* submissions at the request of one party are even more exceptional.
>
> *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 at paras.25 and 38

31. In this context, the designated judge is obliged by s.78(e) to hear *ex parte* submissions, which is plainly an abridgment of the detainee's opportunity to be heard. Further, and unlike the context of *ex parte* applications to intercept electronic communications, search warrants or DNA warrants, there is no

procedural avenue for *intra partes* review on *certiorari* or at a s.24(2) voir dire. The abridgement of the opportunity to be heard is final and permanent.

32. The detainee's opportunity to be heard is not solely for the benefit of the detainee. The integrity of the truth finding process is dependent on the participation of the detainee; the proper functioning of the adversarial process requires concerted and sustained opposition to the position taken by the Ministers. The competence of the Canadian judiciary to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

    R. v. Swain, [1991] 1 S.C.R. 933 at 971

33. The designated judge, who is required by law to show deference to the Minister on the issue of whether a person is a danger to the security of Canada, is unable to play an active role in the adversarial structure. This is especially true when investigative authorities engage in selective presentation of information to the Ministers.

    Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3 at paras.39, 41 and 85

34. Moreover, the appearance of fair play and decency in the context of the adversarial process is necessary to uphold the reputation of the administration of justice. The publicity surrounding security certificates shows that this concern is more than simply speculative.

C(vi) The Proposed Definition of "An Opportunity to be Heard"

35. The BCCLA submits that the phrase "an opportunity to be heard" requires the participation of a security cleared lawyer whenever information is withheld from the detainee or the hearing into the reasonableness of the certificate is closed to the detainee or the public.

36. A system of security cleared lawyers would not be perfect or ideal: neither will the detainee be in a position to give full instruction to the lawyer, nor will the

public hear the evidence. However, faith in the security cleared lawyer is constitutionally preferable to faith in a judiciary operating *ex parte* and *in camera*. Assurances of rigorous judicial inquisition and scrutiny, such as appears in paragraphs 93 to 101 of the *Harkat* decision, will not satisfy the reasonable observer.

> *Harkat (Re)*, [2005] F.C.J. No. 481 (F.T.D.) at paras.93 to 101
>
> *Canada (Attorney General) v. Ribic*, [2003] 1 F.C.J. No. 1964 (F.C.A.) at paras.43-45

37. The nature of the proceedings and the significance of the interests at stake suggest that the common law tradition of affording a person at the mercy of the state the safeguards of the adversarial system should be maintained in the security certificate context. The presence of security cleared counsel is necessary to ensure the integrity of the fact-finding process and to protect perception and reputation of the administration of justice.

> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras.113 to 123

38. Where the preservation of national security requires information to be held in confidence or courtrooms to be closed, the requirement that the detainee be given an opportunity to be heard does not necessarily mean that the detainee must be personally present at the hearing or instruct counsel in the traditional sense of legal advocacy, but instead requires that the interests of the detainee will heard or advanced at the hearing.

39. The security cleared lawyers would have the role of representing the interests of the detainee by arguing for the disclosure of information said by the Ministers to be confidential and by advocating for the admissibility of the detainee to Canada. The BCCLA says that the presence of security cleared lawyers is necessary to minimize the derogation from Charter values and to assure that the security certificate process complies with the Charter.

40. Parliament may ultimately wish to enact regulations or legislation to provide an institutional framework for security clearance and the participation of lawyers in circumstances such as these, but it is sufficient for the moment to demonstrate the

jurisdiction for and necessity of the presence of such lawyers in security certificate hearings. Both jurisdiction and necessity arise from the phrase "an opportunity to be heard".

D: The Meaning of "National Security"

41. A determination that the disclosure of information would be injurious to national security prevents the disclosure of information to the detainee, authorizes the Ministers to close the hearing at their discretion, and authorizes the designated judge to rely on confidential information. The BCCLA submits that the interpretation of the phrase "national security" should be guided by its potential effect on Charter guarantees.

D(i) The Presumption of Open Courtrooms

42. The open court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice. The principle is inextricably tied to the right to free expression guaranteed by s.2(b) of the *Charter*, as it catalyzes public awareness and informed criticism of public institutions. Closed courtrooms degrade the quality of justice, undermine public confidence in the judiciary and foster misunderstanding of the administration of justice:

> It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has a place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity."
>
> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)(Re R. v. Carson)*, [1996] 3 S.C.R. 480 at paras.18 to 26

43. The presumption of open courtrooms is not absolute; it may be displaced by overriding factors of sufficient importance to the administration of justice, considered broadly. The presumption of open courtrooms guides the judicial discretion to determining whether courtrooms should be closed to the public and to the media. The discretion must also be guided by values that are intended to

reflect the substance of the Oakes test, requiring the presiding judge to consider the rationality and proportionality of the proposed course of action. Section 78(e) removes the judge's discretion to close the hearing upon a determination that the disclosure of information would be injurious to national security. The Charter values that inform the exercise of that discretion, therefore, must be brought to bear on this Court's interpretation of the phrase "would be injurious to national security".

R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442 at paras.31-33

44. Even in the context of terrorist offences and threats to national security, there is a presumption that judicial hearings are open to the public and a duty to assess the rationality and proportionality of closing the courtroom. For security certificate cases in which the admissibility of persons who are alleged to be a danger to national security is centrally at issue it may well be that key evidence will frequently be heard *in camera*. Nonetheless, a proportionality analysis is required on a case by case basis.

Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332 at paras.25 and 31

D(ii) The Duty to Give Reasons

45. At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Reasoned judgments, particularly directed at the resolution of troublesome, confused or contradictory evidence, are required to assist counsel in advising on the merits of a potential appeal and in permitting Courts of Appeal to determine the nature and extent of any errors of fact or law. The requirement to give reasons may be more vital to the legitimacy of a decision when the decision is final and when avenues of appeal are foreclosed by statute. To the extent that judges rely on confidential information but can give no reasons in relation to that evidence, the reputation of and confidence in the administration of justice will suffer.

R. v. Sheppard, [2002] 1 S.C.R. 869 at paras.5 and 55

46. The transparency of adjudication is a constitutional imperative. In order to ensure that s.78(g) does not undermine that imperative, the BCCLA submits that the phrase "would be injurious to national security" must be closely tailored and confined only to what is demonstrated to be necessary on a case by case basis.

D(iii) The Independence of the Judiciary

47. Judicial independence is integral to the promotion and preservation of the rule of law and it serves as a means to the end of ensuring a reasonable perception of impartiality. Like the context of investigative hearings under the *Criminal Code*, the concern with judicial independence in security certificate hearings stems largely from the potential that they will be held predominantly *in camera*. In general, neither should counsel for one party discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case, nor should a judge accede to the demands of one party without giving counsel for the other parties a chance to present their views.

> *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paras.74 and 75

48. Unlike investigative hearings, the lack of openness in security certificate hearings is a reality rather than a future possibility. In the view of the BCCLA, the presumption that security certificate hearings will be open to the public is not adequate to ensure public perception of judicial independence because the presumption of openness is so routinely rebutted in Federal Court.

> *Application under s.83.28 of the Criminal Code*, [2004] S.C.R. 248 at paras.80 and 91

D(iv) Survey of Definitions of "National Security"

49. The phrase "national security" is subject to a variety of definitions in other contexts. A brief review of some of these definitions is helpful in differentiating the procedural matters at issue in these appeals from other contexts in which different interests are engaged.

RCMP Operational Definition

50. The widest definition of "national security" known to the BCCLA is the operational definition employed by the RCMP in its Operational and Policy manual under documents disclosed to the Arar Inquiry during the testimony of Garry Loeppky, RCMP Deputy Commissioner of Operations. According to the RCMP, "national security" is defined as "the defence and maintenance of the social, political and economic stability of Canada" (the "RCMP Definition"). In the submission of the BCCLA, applying the RCMP Definition to s.78 of the IRPA would fatally abridge constitutional norms.

RCMP Operational Manual IV.10 National Security Investigations

51. The RCMP Definition illustrates the conservative propensity of investigative agencies such as the RCMP to classify matters as relating to national security. Rightly or wrongly, "national security" is employed in a very precautionary manner, allowing investigative agencies wide latitude to invoke national security powers and cloak information in a shroud of secrecy. Given the role of the RCMP and similar agencies in assembling dossiers and analysing and classifying information before it reaches the Minister, this broad definition of "national security" may well inform the Minister's submissions at as to what constitutes "national security" in the security certificate arena. The operational use of this broad definition suggests that claims of national security in support of confidentiality and closed *ex parte* hearings should be subject to close scrutiny to ensure adherence to the standard set by this Court.

The Suresh Definition

52. In *Suresh*, This Court addressed the meaning of a similar phrase in s.34(1)(d) of the IRPA, "being a danger to the security of Canada". In responding to the appellant's challenge that the phrase was unconstitutionally vague, this Court assigned the phrase a very broad "liberal" meaning. This Court recognized that "danger to the security of Canada" is difficult to define, and that the determination of the meaning of the phrase is highly fact-based and political in a general sense, suggesting a "broad and flexible" approach to national security and a deferential standard of judicial review. The phrase was defined as follows:

a. There must be a real and serious possibility of adverse effect to Canada (para.88);

b. The threat need not be direct – it may be grounded in distant events that indirectly have a real possibility of harming Canadian society (para.88);

c. The potentially serious threat must be grounded on objectively reasonable suspicion passed on evidence (paras.89-90);

d. The threat must be "serious" in the sense that the threatened harm must be substantial rather than negligible (para.90).

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3

53. It is submitted that the *Suresh* definition, while it may be appropriate for setting the standard for determining who is inadmissible to Canada, is not appropriate for determining whether a court should derogate from procedural fairness and other *Charter* values.

54. It is imperative to distinguish between a threat to national security sufficient to justify deportation and a threat to national security sufficient to justify a closed hearing and reliance on confidential evidence. The threshold for inadmissibility and deportation is and should be precautionary and tailored to the limited right of a non-citizen to remain in Canada. The threshold for setting aside critical procedural and substantive interests afforded strong protection by the *Charter* should be much higher. The BCCLA submits the phrase "being a danger to the security of Canada" in s.34(1)(d) and the phrase "injurious to national security" in s.78(b), (e) and (h) of the IRPA should be assigned different meanings.

D(v) The Definition of "National Security" Proposed by the BCCLA

55. The meaning of the phrase "would be injurious to national security" is central to these appeals. The phrase sets the scope of the detainee's opportunity to be heard and their right to be informed of the relevant evidence. The meaning of the phrase also circumscribes the challenge to open courtrooms, the duty to give reasons and the extent of judicial independence. A constitutionally precise definition of the phrase "would be injurious to national security" is critical to ensuring that the imperatives of secrecy will impair Charter values procedural and substantive fairness as minimally as possible.

56. The BCCLA proposes that the phrase "disclosure would be injurious to national security" in s.78(b), (e) and (h) should embrace only information or evidence for which it is (1) proven by objectively reliable evidence (2) that there is a reasonable probability that it will result in (3) substantial and tangible harm to (4) the existence of the state, its territorial integrity or its fundamental institutions.

57. The inclusion of the phrase "would be" rather than "could be" is reflective of the intention of Parliament to require a burden of proof beyond objective suspicion and a likelihood of harm greater than a mere possibility.

58. This Court should also provide general directions to the courts below to engage in close scrutiny of any claim to national security that has the effect of curtailing procedural and substantive protections. On matters effecting procedural and substantive fairness, the position of the Minister should be accorded little deference.

E: Indefinite Detention

59. The IRPA does not provide for the situation when a person is inadmissible to Canada but cannot be deported due to a risk that he or she will be tortured or executed upon deportation. The BCCLA will argue that, in those circumstances, indefinite detention demands procedural protections and evidentiary standards commensurate with the degree of deprivation of liberty. In the absence of a legislative framework, the Court would be required to fashion an appropriate remedy to fill the legislative vacuum.

PART IV: SUBMISSIONS IN SUPPORT OF ORDER CONCERNING COSTS

60. The BCCLA makes no submissions as to costs.

PART V: ORDERS SOUGHT

61. The BCCLA seeks no orders in these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of May, 2006.

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PART VI: TABLE OF AUTHORITIES

Secondary Materials

PART VII: LEGISLATION