

Court File No. 30672

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

ADIL CHARKAOUI

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

RESPONDENT

Court File No. 30929

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

HASSAN ALMREI

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

RESPONDENTS

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

MOHAMED HARKAT

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

RESPONDENTS

**AFFIDAVIT OF MURRAY MOLLARD
(APPLICATION OF THE BCCLA FOR LEAVE TO INTERVENE)**

I, MURRAY MOLLARD, Barrister and Solicitor, of 550-1188 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Executive Director of the British Columbia Civil Liberties Association (“BCCLA”) and accordingly have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be on information and belief, and, as to such facts, I verily believe the same to be true.
2. The BCCLA is a non-profit non-partisan advocacy group incorporated on February 27, 1963 under the British Columbia *Societies Act*. The purpose of the BCCLA is to promote, defend, sustain, and enhance civil liberties throughout British Columbia and Canada. The BCCLA has at

present approximately 950 members and contributors involved in various professions, trades and callings.

3. The BCCLA has demonstrated a long-standing and continuing concern with the rights of the citizens in British Columbia and in Canada to liberty and freedom. We speak out on the principles which promote individual rights and freedoms, including freedom of thought, belief, conscience, religion, opinion and expression, equality rights, and autonomy rights generally. The BCCLA advocates as a watchdog, educator, lobbyist, and community resource.
4. Although the BCCLA is one of an extremely small number of civil liberties organizations with a full-time staff devoted exclusively to civil liberties work, it remains very much a board-driven organization. The BCCLA is distinguished by having a committed volunteer board of directors that directs the BCCLA's policy and agenda. It has been able to tap the expertise and energies of a wide range of academics, professionals, and lay persons with expertise in civil liberties work. This has given the BCCLA a unique status in this country as the only truly grass-roots citizens' organization with the resources of a full time staff devoted exclusively to civil liberties.
5. The BCCLA has played an important and prominent role on almost every significant national civil liberties issue for over 40 years. Nowhere is the BCCLA's national presence and expertise more evident than in the roles it has played in the development of policy and in assisting individual complainants on security-intelligence and policing matters.
6. The BCCLA has a long history and involvement with national security and intelligence issues, anti-terrorism legislation and police accountability in Canada. The positions taken by the BCCLA are based on the guiding principle that restrictions on basic rights and freedoms can only be justified if they are necessary ultimately for the sake of those very same rights and freedoms. Highlights from the BCCLA's involvement in these issues include:

- (a) In 1978 and 1979 the BCCLA made submissions to the McDonald Commission on Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police specifically regarding the role of the Secret Service in Canada. The BCCLA argued that security must include security in our basic democratic rights and freedoms. One aspect of the BCCLA submission was that, so far as possible, the security service should be integrated into the regular force of the RCMP. This would put security threats in their proper context in relation to other threats of criminal activity and would negate the accountability problems created by unique lines of authority. A copy of the BCCLA's 1978 written submission is attached to this affidavit as Exhibit "A" and a copy of the BCCLA's 1979 written submission is attached to this affidavit as Exhibit "B".
- (b) In 1980, the BCCLA made submissions to and was invited to appear before the Joint Senate-Commons Committee reviewing proposals for the Canadian Charter of Rights and Freedoms.
- (c) In 1983 the BCCLA made submissions on the proposed *Canadian Security Intelligence Service Act*. The BCCLA was concerned that the Bill gave the Canadian Security Intelligence Service ("CSIS) an overly broad mandate and overly intrusive powers in the absence of adequate democratic safeguards and controls.
- (d) The government responded to these criticisms with a new Bill in 1984. The BCCLA again made submissions, acknowledging the improvement in the second Bill but raising concerns regarding routine monitoring of "domestic subversion"; the relationship between CSIS as a civilian agency and other intelligence agencies including the RCMP; and the continued breadth of the CSIS mandate. A copy of the BCCLA's 1983 written submission is attached to this affidavit as Exhibit "C" and a copy of the BCCLA's 1984 written submission is attached to this affidavit as Exhibit "D".
- (e) In 1988, the BCCLA made submissions to the government regarding Bill C-77, a proposed *Emergencies Act* which would replace the *War Measures Act*. Though the BCCLA did not oppose in principle the creation of legislation that would temporarily suspend some civil liberties in times of true national emergency, the BCCLA, among other criticisms, expressed concerns that the bill had no clear definition of "emergency" nor provided adequate

parliamentary oversight of invocation of extraordinary state powers at the expense of civil liberties. The BCCLA's submission, which is attached to this affidavit as Exhibit "E", followed correspondence between the BCCLA and the Minister responsible, a copy of which is attached as Exhibit "F".

- (f) In 1989, the BCCLA participated in the five year parliamentary review of the *Canadian Security Intelligence Service Act*. The essence of the BCCLA submission was that there needed to be greater oversight, control and accountability of the security-intelligence activities of CSIS and of other agencies and that the mandate of CSIS should be narrowed and clarified. In this regard the BCCLA made a number of specific recommendations for creating a balance between security-intelligence activities and the fundamental democratic rights and freedoms of Canadians. A copy of that submission is attached as Exhibit "G".
- (g) In 1991, the BCCLA submitted a complaint to the Security Intelligence Review Committee ("SIRC") regarding CSIS questioning of members of the Arab and Iraqi communities in Canada during the Gulf War. A copy of our letter to CSIS dated April 15, 1991 is attached as Exhibit "H", and a copy of a letter of response dated May 27, 1991 is attached as Exhibit "I". A copy of a follow-up letter to SIRC dated June 20, 1991 is attached as Exhibit "J".
- (h) The BCCLA has been influential in the creation of a civilian oversight mechanism for the Canadian Security Establishment ("CSE"). CSE was formerly a part of the Department of National Defence and has a mandate to gather signals intelligence regarding the capacity of foreign states, corporations or persons in support of Canada's foreign and defence policies. CSE also provides advice to government regarding federal government telecommunications security and data processing. In its work, CSE will intercept communications of Canadian citizens and landed immigrants. A copy of our submission, dated December 1995, is attached as Exhibit "K", and a copy of the response from Hon. D.M. Collenette, then Minister of National Defence dated June 30, 1996 is attached as Exhibit "L".
- (i) The BCCLA was a principal complainant before the Commission for Public Complaints Against the RCMP (the "CPC") during its public hearing into complaints about the RCMP's conduct before, during and after the 1997 Asia-Pacific Economic Cooperation ("APEC") conference. The BCCLA was represented by counsel at every day of the APEC hearings,

which took almost two years to complete, including both the initial hearings chaired by Commissioner Gerald Morin (as he then was) and the subsequent hearings conducted by Ted Hughes, Q.C. The BCCLA played an important role in those hearings including cross-examining witnesses, participating in judicial review proceedings arising from preliminary matters, and providing both written and oral final argument. I am advised by our counsel, Michael Doherty, that the final report issued by the CPC closely reflected the recommendations made by the BCCLA, and included numerous direct quotes from the BCCLA argument.

- (j) Following the events of September 11, 2001, the BCCLA made both oral and written submissions to the House of Commons Standing Committee on Justice and Human Rights on Bill C-36 (the *Anti-Terrorism Act*). In those submissions, the BCCLA recognized that a re-balancing of security interests with privacy and other civil rights and liberties may be necessary when confronting extraordinary threats. In our submission, the guiding principle should be that any restrictions on basic rights and freedoms can only be justified if they are necessary ultimately for the sake of those rights and freedoms. In our submission this principle required that the restrictions be as limited as possible and that they be accompanied by a commitment that they would come to an end. We recommended a sunset clause of 5 years, pointing out the possibility of mistakes:

...The likely effect of these proposals on the Canadian Muslim community affords another compelling reason for a sunset clause. For the main burden of this legislation is going to fall almost exclusively on Muslim Canadians, particularly on those of Arab descent. ...

Thus, as the Muslim Canadian community becomes the main locus of investigation, and as genuine controversies arise and mistakes are made, it is practically inevitable that Muslim Canadians will ask questions about their government's commitment to respect their rights to fundamental freedom and equality alongside their Canadian brothers and sisters. These are social costs that we must do all in our power to avoid...

A copy of the speaking notes of John Russell, Past President of the BCCLA, dated October 30, 2001 is attached as Exhibit "M" and a copy of the BCCLA written submissions is attached as Exhibit "N".

- (k) On November 22, 2001, the BCCLA wrote to Prime Minister Jean Chrétien to express its concerns about the breadth of the definition of terrorist activity contained in the *Anti-Terrorism Act*. In that letter we expressed our concern that failure to find the appropriate balance between the proposed security measures and respect for fundamental rights and freedoms would threaten and undermine the legitimacy of the fight against terrorism. A copy of that letter is attached as Exhibit "O".
- (l) The BCCLA has a positive and constructive relationship with SIRC. The BCCLA meets and corresponds regularly with SIRC, often at SIRC's invitation, to discuss matters of general and specific concern regarding the conduct, oversight and accountability of CSIS. Meetings between the BCCLA and SIRC have occurred in 1989, 1991, 1993, 1998, and 2002. SIRC has expressed its appreciation of the BCCLA's expertise in the area of security-intelligence and the utility of these meetings for SIRC. A copy of a letter of appreciation from SIRC dated August 24, 1998 is attached as Exhibit "P".
- (m) In 2002, the BCCLA wrote to then Solicitor General Lawrence MacAulay in regards to the powers granted to SIRC under the *Security of Information Act* in relation to the "public interest defence". It is an offence under that *Act* for a person permanently bound to secrecy to communicate or confirm "special operational information", or information that would be "special operational information" if it were true. However, it is a defence if a person establishes that he or she acted in the "public interest". The BCCLA was concerned that the

legislation did not give SIRC the explicit power to authorize an individual to divulge information in the “public interest”. A copy of the letter to the Honourable Minister MacAuley dated August 27, 2002 is attached as Exhibit “Q” and of the response, dated November 8, 2002, as Exhibit “R”.

- (n) In December 2002, the BCCLA made submissions to the Department of Justice in response to its consultation document on access by law enforcement and national security agencies to information and communications in the face of new technologies. The consultation document proposed an expansion of the government’s ability to carry out electronic surveillance. The BCCLA raised a number of privacy concerns as well as raising doubts as to whether the proposed measures would actually be effective in preventing organized crime or terrorism. A copy of those submissions is attached as Exhibit “S”.
- (o) On January 30, 2003, the BCCLA made both oral and written submissions to the House of Commons Legislative Committee on Bill C-17 (the *Public Safety Act, 2002*). The BCCLA made a number of specific recommendations in accord with the guiding principle that restrictions to established basic rights and freedoms can be justified only if they are necessary ultimately for the sake of those very same rights and freedoms. A copy of the written submissions is attached as Exhibit “T”. Bill C-17 was reintroduced as Bill C-7 essentially unchanged and is now before the Senate of Parliament. The BCCLA made a further submission to the Senate essentially repeating our concerns in our prior submission to the House of Commons Committee. A true copy of that letter, dated March 29, 2004, is attached as Exhibit “U”.
- (p) The BCCLA is an Intervenor in the Factual Inquiry before the Commission of Inquiry into Actions of Canadian Officials in Relation to Maher Arar (The Honourable Justice Dennis O’Connor, Commissioner). As Intervenor, the BCCLA has made various submissions regarding government claims to national security confidentiality. The BCCLA has also made extensive submissions regarding the Arar Inquiry’s Policy Review which is examining options for an appropriate mechanism for an independent civilian review agency for the national security activities of the RCMP and other government organizations including CSIS, DFAIT, CBSA, and Immigration Canada.

- (q) As part of Parliament's three year legislative review of the *Anti-Terrorism Act* ("ATA"), the BCCLA prepared an extensive brief for submission to the Senate Special Committee on the *Anti-Terrorism Act* and the House of Commons Subcommittee on Public Safety and National Security in October 2005. The BCCLA testified before the Senate and House committees with respect to security certificates at issue in this appeal. Among other topics relating to national security, the brief includes submissions relating to section 38 of the *Canada Evidence Act* and security certificates relevant in this Appeal. A copy of an excerpt of the BCCLA brief including an Executive Summary and segments with respect to section 38 and security certificates and is attached as Exhibit "V".
- (r) The BCCLA has expertise and experience in matters relating to the issue of disclosure of documents where objections to disclosure are made by government based on national security. For example, in addition to the BCCLA's direct participation at the APEC PCC hearings, the BCCLA was also a party to an action in the Federal Court of Canada (*Singh et al. v. Canada (Attorney General)* (23 June 2000), Ottawa DES-2-99, DES-3-99, DES-4-99, DES-5-99 Federal Court of Canada, Trial Division) to obtain documents relevant to the APEC hearing over which privilege was claimed by the federal government under then sections 37 and 38 of the *Canada Evidence Act* which dealt with objections to the disclosure of documents on the grounds of harm to international relations and national defence or security.

7. Aside from appearing at trials, before tribunals, and before the British Columbia Court of Appeal, the BCCLA is a regular intervenor and party before the Supreme Court of Canada in cases having a national scope. Examples of the latter include the following:

- (a) *May v. Ferndale Institution* 2005 SCC 82,
- (b) *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698,
- (c) *R. v. Malmo-Levine, R. v. Caine*, [2003] 3 S.C.R. 571; *R. v. Clay* [2003] 3 S.C.R. 735 (challenge to validity of marijuana prohibition),

- (d) *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 71 (banning of books depicting same sex couples),
- (e) *Babcock v. Attorney General (Canada)*, [2002] 3 S.C.R. 3 (challenge to validity of section 39 of the Canada Evidence Act (Crown Privilege provision)),
- (f) *Sauve v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (prisoner voting rights),
- (g) *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 (religious freedom in private college),
- (h) *R. v. Sharpe*, [2001] 1 S.C.R. 45 (challenge to validity of child pornography provisions of the *Criminal Code of Canada*),
- (i) *R. v. O.N.E.*, [2001] 3 S.C.R. 478 (publication bans on operational methods of the RCMP),
- (j) *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (customs power to ban expressive material),
- (k) *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (fraud in failing to disclose HIV status vitiating consent in assault), and
- (l) *R. v. Butler*, [1992] 1 S.C.R. 452 (obscenity).

8. I make this affidavit in support of an application for leave to intervene and for no other purpose.

SWORN BEFORE ME at the City)
of Vancouver, in the Province of British)
Columbia, this day of April, 2006)
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A Commissioner for taking Affidavits)
in and for the Province of British Columbia)

MURRAY MOLLARD