PART I: STATEMENT OF FACTS

1. The position of the Federation of Law Societies of Canada (the "Federation") in these three related appeals is that the security certificate and detention review provisions of the *Immigration and Refugee Protection Act* (the "IRPA") violate the constitutional principles of the rule of law and judicial independence and the related required constitutional role for counsel, as well as ss. 7 and 10(b) of the *Charter of Rights*. These violations are not reasonably and demonstrably justified under s. 1 of the *Charter*. The proper remedy is to read into the IRPA a mandatory role for "special counsel" when the Act precludes the security certificate subject's own counsel from providing effective assistance.

> *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, ss. 33, 77-85 [Federation's Factum, Appendix J]
>
> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Federation's Factum, Appendix B]

2. The IRPA requires a designated judge to determine the sufficiency of secret Government evidence which, if accepted, can serve as the basis for the detention and/or deportation of an individual who is suspected of being a threat to national security. The secret evidence is not disclosed to the individual and is never tested by counsel. Instead, the designated judge reviews the secret evidence and examines or cross-examines the Government's witnesses personally, in the absence of the individual's counsel. The Federal Court of Appeal held that these features of security certificate and detention review proceedings "derogate in a significant way from the adversarial process normally adhered to in criminal and civil matters" (emphasis added).

> IRPA, ss. 33 and 77-85 [Federation's Factum, Appendix J]
>
> *Charkaoui (Re) (*2004), [2005] 2 F.C.R. 299 at paras. 74, 75, 80, 82 (C.A.) ["*Charkaoui (Re) (F.C.A.)*"] [Federation's Authorities, Vol. I, Tab 1]

3. The role of a designated judge in security certificate and detention review proceedings was described by Justice Noël of the Federal Court as follows:

> [The designated judge] must verify the human, technical and documentary sources, their reliability and the truth of what they may relate. … Moreover, the designated judge may examine witnesses who can shed light on the protected information and documents. Where necessary, he may question their interpretation

> of the facts and verify whether there are not other possible interpretations that might tend to favour the respondent. In a word, the designated judge must seriously test the protected documentation and information. This is a demanding role, which must be fully performed given the interests at stake. (emphasis added)
>
> *Charkaoui (Re)*, [2004] 3 F.C.R. 32 at para. 118; see also para. 101 (F.C.) ["*Charkaoui (Re) (F.C.)*"] [Federation's Authorities, Vol. I, Tab 2]
>
> See also: *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 327 at paras. 59-60 (F.C.); *Harkat (Re)*, [2005] 261 F.T.R. 52 at paras. 93-101 (F.C.) [Federation's Authorities, Vol. I, Tabs 3-4]

PART II: POINTS IN ISSUE

4. The Federation will focus its submissions on the following three issues:

(a) whether the security certificate process offends the constitutional principles of the rule of law and judicial independence, and the related required constitutional role for counsel;

(b) whether the impugned provisions of the IRPA infringe s. 7 and/or s. 10(b) of the *Charter*; and

(c) if so, whether the remedy should include a required role for "special counsel".

PART III: STATEMENT OF ARGUMENT

A. The process offends the constitutional principles of the rule of law and judicial independence, and the related required constitutional role for counsel

1. Overview

5. The rule of law and the independence of the judiciary are fundamental constitutional principles, as explained by this Court in the *Secession Reference* and the *PEI Judges Reference*. However, these two principles are not self-executing. It is submitted that, by practical necessity, they import a separate principle of a constitutional role for counsel. A judge cannot implement the rule of law impartially unless he or she is independent not only of government, but also of the parties. To do that, the judge cannot descend into the arena. The constitutional principle of judicial independence thus imparts a constitutional role for counsel as part and parcel of judicial impartiality.

> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 33, 51, 53, 70-71 (the "*Secession Reference*") [Federation's Authorities, Vol. I, Tab 5]

> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 at paras. 82-109 (the "*PEI Judges Reference*") [Federation's Authorities, Vol. I, Tab 6]

6. It should be emphasized that the submission here is not that there is an individual constitutional right to counsel, although such a right also exists pursuant to ss. 7 and 10(b) of the *Charter* as discussed below. Instead, the proposition is that the effective participation of counsel is essential to implement the constitutional principles of the rule of law and an independent judiciary. Just as the rule of law cannot be implemented without an independent judiciary, an independent judiciary cannot exist without counsel to adopt the adversarial role necessary to test the evidence upon which the judge will decide the case.

2. The Constitutional Principle of the Rule of Law

7. The preamble to the *Constitution Act, 1982* explicitly describes Canada as being "founded upon principles that recognize ... the rule of law." In *B.C.G.E.U. v. B.C. (A.G.)*, Chief Justice Dickson described the rule of law as "the very foundation of the *Charter*."

> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Federation's Factum, Appendix E]
>
> *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at 229 [Federation's Authorities, Vol. I, Tab 7]
>
> See also: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 250-251 [Federation's Authorities, Vol. I, Tab 8]

8. As this Court stated in the *Secession Reference*:

> In our constitutional tradition, legality and legitimacy are linked.
>
> *Secession Reference*, *supra* at para. 33 [Federation's Authorities, Vol. I, Tab 5]

9. Speaking directly about the rule of law, this Court quoted its earlier decision in the *Manitoba Language Rights Reference* as follows:

> the principle [of the rule of law] is clearly implicit in the very nature of a Constitution.
>
> *Secession Reference*, *supra* at para. 50 [Federation's Authorities, Vol. I, Tab 5]
>
> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750; see also p.748 [Federation's Authorities, Vol. I, Tab 9]

10. The Supreme Court said as well in the *Secession Reference*:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli* v. *Duplessis* [1959] S.C.R. 121 at 142 is 'a fundamental postulate of our constitutional structure'... At its most basic level, the rule of law vouchsafes to the citizens and residents of a country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
>
> ...
>
> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all... Put another way, the relationship between the state and the individual must be regulated by law.
>
> *Secession Reference, supra* at paras. 70-71 [Federation's Authorities, Vol. I, Tab 5]

11. As Justices Iacobucci and Arbour emphasized for the majority in the *Air India Case*, the rule of law must prevail even when national security is at stake:

> … a democracy cannot exist without the rule of law. So, while Cicero long ago wrote: "*inter arma silent leges*" (the laws are silent in battle) …, we, like others, must strongly disagree.
>
> *Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 at para. 5 [the "*Air India Case*"] [Federation's Authorities, Vol. II, Tab 10]
>
> *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142 [Federation's Authorities, Vol. II, Tab 11]

3. The Independence of the Judiciary is a Central Component to the Rule of Law

12. The rule of law is not self-executing. It can only be implemented by an independent and impartial judiciary. As Justice Gonthier stated in *Mackin*, judicial independence "is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law." Similarly, Chief Justice Dickson in

Beauregard described judicial independence as "the lifeblood of constitutionalism in democratic societies."

> *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405 at para. 34; see also para. 71 [Federation's Authorities, Vol. II, Tab 12]
>
> *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70, 72 [Federation's Authorities, Vol. II, Tab 13]
>
> See also: *Ell v. Alberta*, [2003] 1 S.C.R. 857 at paras. 19, 29 [Federation's Authorities, Vol. II, Tab 14]

13. Like the rule of law itself, judicial independence is a fundamental principle of the Canadian Constitution, guaranteed by the preamble and ss. 96-100 of the *Constitution Act, 1867*, as well as sections 7 and 11(d) of the *Charter*.

> *Air India Case*, *supra* at paras. 80-83, 87 [Federation's Authorities, Vol. II, Tab 10]
>
> *PEI Judges Reference*, *supra* at paras. 82-109 [Federation's Authorities, Vol. I, Tab 6]

14. Public confidence in the administration of justice requires that individual judges and the judiciary be seen to be impartial. Accordingly, the judiciary must be independent of government controls, but it must also be independent of the parties themselves. If the process requires judges to play the role that our justice system ordinarily assigns to counsel, that process represents a setback for an independent judiciary. As Lord Greene warned in *Yuill v. Yuill*, if a judge examines witnesses, he or she:

> descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. (emphasis added)
>
> *Yuill v. Yuill* (1944), [1945] 1 All E.R. 183 at 189 (C.A.) [Federation's Authorities, Vol. II, Tab 15]
>
> See also: *R. v. Brouillard*, [1985] 1 S.C.R. 39 at 43; *R. v. Sussex Justices; ex parte McCarthy*, [1924] 1 K.B. 256 at 259; *R. v. Valente*, [1985] 2 S.C.R. 673 at 688 ("Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice."); *R. v. Lippé*, [1991] 2 S.C.R. 114 at paras. 140-42, 145-47 [Federation's Authorities, Vol. II, Tabs 16-19]

15. While a judge may ask witnesses questions of clarification and amplification, he or she must not give the impression of taking on the role of counsel, as "[a] judge who does so necessarily will be seen as having adopted a position in opposition to one of the parties."

> *James v. Canada (Minister of National Revenue—M.N.R.)*, [2000] F.C.J. No. 2135 at para. 52; see also para. 57 (C.A.) (QL) [Federation's Authorities, Vol. III, Tab 20]
>
> See also: *R. v. Brouillard, supra*; *Majcenic v. Natale*, [1968] 1 O.R. 189 at 203-204 (C.A.) [Federation's Authorities, Vol. III, Tab 21]

4. The Constitution Requires a Role for Counsel to Preserve Judicial Independence and the Rule of Law

16. In light of the foregoing, an independent judiciary cannot function in a vacuum. Because the judiciary must be impartial, it cannot take sides and initiate cases. The courts must thus await cases brought by counsel. Further, because judges must be impartial, they cannot lead evidence, cross-examine, or make argument. They must remain above the fray. It is therefore left to counsel to pursue the development and presentation of the case. The effective participation of counsel in proceedings is thus essential to preserve the rule of law and the independence of the judiciary.

17. This interdependent relationship between the judiciary and the Bar was highlighted by Lord Denning in *Jones v. National Coal Board* as follows:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C., who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question" (See *Ex p. Lloyd* (1) (1822), Mont. 70, n.) and Lord Greene, M.R., who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations?
>
> *Jones v. National Coal Board*, [1957] 2 All E.R. 155 at 159 (C.A.) [Federation's Authorities, Vol. III, Tab 22]

18. Lord Denning specifically noted that the limits placed on a judge's role, to safeguard his or her neutrality in *Yuill v. Yuill*, *supra*, necessitates the effective participation of counsel:

> If a judge, said Lord Greene, should himself conduct the examination of witnesses,
>
> > "he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."
>
> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales–the "nicely calculated less or more"–but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he things might throw some light on the facts. He must rest content with the witnesses called by the parties. So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; … and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantel of a judge and assumes the robe of an advocate; and the change does not become him well. (emphasis added; citations omitted)
>
> *Jones v. National Coal Board, supra* at 159 (C.A.) [Federation's Authorities, Vol. III, Tab 22]
>
> See also: *R. v. Hamilton* (2004), 72 O.R. (3d) 1 at paras. 70-72 (C.A.) [Federation's Authorities, Vol. III, Tab 23]; R. Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84 Can Bar. Rev. 107; R. Millen, "Unwritten Constitutional Principles and the Enforceability of the Independence of the Bar" (2005) 30 S.C.L.R. 463 at 492-526 [Federation's Authorities, Vol. IX, Tabs 80-81]

19. Justice Gonthier made the same point for this Court in *Fortin v. Chretien*, stating that "advocates ... must perform their professional obligations with integrity and preserve the impartiality and independence of the court" (emphasis added).

> *Fortin v. Chretien*, [2001] 2 S.C.R. 500 at para. 49 [Federation's Authorities, Vol. III, Tab 24]

20. Similarly, in *LaBelle v. Law Society of Upper Canada*, Justice McKinnon said:

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond question (see *Valente v. R.*, [1985] 2 S.C.R. 673; 14 O.A.C. 79), so the independence of the bar must be beyond question... An independent judiciary without an independent bar would be akin to having a frame without a picture. (emphasis added)
>
> *LaBelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398 at 408 (Ont. S.C.J.), aff'd (2001), 56 O.R. (3d) 413 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 137 [Federation's Authorities, Vol. III, Tab 25]
>
> See also: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 at para. 43; *Lavallee, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 209 at paras. 64, 68 [Federation's Authorities, Vol. III, Tabs 26-27]

21. Again, in *Andrews v. Law Society of British Columbia*, Justice McIntyre described the role of legal counsel within the administration of justice as follows:

> It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal and the civil law. ... I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what might be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals... By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community. (emphasis added)
>
> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 187-8 [Federation's Authorities, Vol. III, Tab 28]
>
> See also: *Law Society of British Columbia v. Mangat*, *supra* at paras. 45-46; *Fortin v. Chretien*, *supra* at para. 54 [Federation's Authorities, Vol. III, Tabs 26 and 24]

22. As stated above, this constitutional role for counsel extends beyond individual lawyers and their clients to the public as a whole, as part of the implementation of the constitutional guarantee of the rule of law. As this Court held in *Canada (Attorney General) v. Law Society of*

British Columbia, "The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally."

> *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-336 ["*Law Society of B.C.*"] [Federation's Authorities, Vol. III, Tab 29]
>
> See also: *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 at para. 1; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887; *Law Society of British Columbia v. Canada (Attorney General)* (2001), 98 B.C.L.R. (3d) 282 at para. 64 (S.C.), aff'd [2002] 98 B.C.L.R. (3d) 310 (C.A.) [Federation's Authorities, Vol. III, Tabs 30-32]
>
> Compare: *PEI Judges Reference*, *supra* at paras. 9-10 (judicial independence is afforded constitutional protection as a means to secure important societal goals, not to benefit individual judges) [Federation's Authorities, Vol. I, Tab 6]

23. By preserving the rule of law, effective counsel play a central role in safeguarding all of the rights guaranteed by the *Charter*. As Jack Giles, Q.C., notes in "The Independence of the Bar":

> The principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamentally constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law itself are placed in jeopardy.
>
> It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar. (emphasis added)
>
> J. Giles, Q.C., "The Independence of the Bar" (2001) 59 The Advocate 549 [Federation's Authorities, Vol. IX, Tab 82]
>
> Compare: *B.C.G.E.U. v. B.C. (A.G.)*, *supra* at 230 (there can be no rule of law without access to the courts) [Federation's Authorities, Vol. I, Tab 7]

24. Legislation that places a judge in the position of having sole responsibility for challenging the comprehensiveness and credibility of the very evidence upon which he or she will make a judicial determination, as described by Justice Noël herein, is incompatible with the independence and impartiality that our Constitution imparts into the judicial function. Relying

upon the designated judge to temporarily assume the role of counsel is thus not a constitutionally permissible means of protecting the liberty interest of an individual who is subject to security certificate or detention review proceedings. That role must be fulfilled by counsel, even if it is special counsel rather than counsel for the individual detainee or potential deportee.

> *Air India Case*, *supra* at paras. 45-49 (giving a broad interpretation to the role of a witness' counsel in a judicial investigative hearing under s. 83.28 of the *Criminal Code*, to accord with the presumption of constitutional validity) [Federation's Authorities, Vol. II, Tab 10]
>
> *Charkaoui (Re) (F.C.)*, *supra* at para. 118; see also para. 101 [Federation's Authorities, Vol. I, Tab 2]

B. The impugned provisions of the IRPA are unconstitutional infringements of ss. 7 and 10(b) of the *Charter*

25. The impugned provisions of the IRPA also violate the individual's right not to be deprived of his or her liberty or security of the person except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the *Charter* and, by way of illustration, s. 10(b) of the *Charter*.

> *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 406 [Federation's Authorities, Vol. IV, Tab 33]
>
> Regarding the right to liberty: *R. v. Rahey*, [1987] 1 S.C.R. 588 at 605; *A v. Secretary of State for the Home Department* (2004), [2005] 3 All E.R. 169 at 258 (H.L.) *per* Baroness Hale ("Executive detention is the antithesis of the right to liberty and security of person.") [Federation's Authorities, Vol. IV, Tabs 34-35]
>
> Regarding the Appellants' detention: IRPA, s. 82 [Federation's Factum, Appendix J]; Factum of the Appellant Adil Charkaoui, paras. 1-7; Factum of the Appellant Hassan Almrei, paras. 3-18; Factum of the Appellant Mohamed Harkat, paras. 2-29; *Charkaoui (Re)* (2005), 261 F.T.R. 11 (F.C.); *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 628 [Federation's Authorities, Vol. IV, Tabs 36-37]
>
> Regarding security of the person: *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 F.C.R. 427 at paras. 52-54 (F.C.) (detaining and labeling a security certificate subject as a terrorist deprives him of the right to security of the person), aff'd without deciding this issue [2005] 1 F.C.R. 171 at para. 15 (C.A.) *per* Rothstein J.A.; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 [Federation's Authorities, Vol. IV, Tabs 38-39]

26. These deprivations of liberty and security of the person are contrary to at least two principles of fundamental justice implicit in s. 7 of the *Charter*: (a) the right to an independent

and impartial tribunal; and (b) the right to the effective assistance of counsel. The Federation's submissions regarding judicial independence are set out above at paragraphs 5 to 24 above and its submissions on the right to effective assistance of counsel follow below.

27. It is significant that, in 2001, Parliament amended the *Criminal Code* to deal specifically with the threat of terrorism, providing for detention under the *Code* for no more than 12 months without charge. Nevertheless, the Government has consistently, in respect of non-citizens, chosen to proceed under the impugned IRPA provisions instead. The Government should not be permitted to avoid the strict procedural safeguards that attach under the criminal law, by resorting to immigration law for national security purposes. Effective procedural protections, such as special counsel where needed, should be required in both circumstances.

> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.01-83.33 as am. by the *Anti-terrorism Act*, R.S.C. 2001, c. 41, Part II.1 [Federation's Factum, Appendix F]
>
> *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1077 [Federation's Authorities, Vol. V, Tab 40]
>
> P.W. Hogg & L. Grover, "Detention of the Suspected Terrorist in Canada, the United Kingdom and the United States" (2006) (presented at the Raoul Wallenberg International Human Rights Symposium, New York University School of Law, January 19-20, 2006) at 1, 10-11, 26-27, 31-32 (noting that the Canadian government, along with the U.S. and U.K. governments, has enacted criminal anti-terrorism measures, but has preferred to use immigration measures that permit the detention of suspected terrorists for extended periods of time, concluding that such immigration measures are quasi-criminal and that, thus far, "the use of immigration law has led to excessive deference to the executive by judges who do not recognize the criminal justice purpose of detaining suspected terrorists.") [Federation's Authorities, Vol. IX, Tab 83]
>
> L. Arbour, UN High Commissioner for Human Rights, Speech at Chatham House and the British Institute of International and Comparative Law (15 February 2006) at 11 ("We know that countries are using various laws at their disposal – asylum, immigration extradition and so on – to remove persons alleged to constitute national security threats. In particular one sees an attempt to avoid the heavy due process requirements of the criminal system by turning instead to the administrative law framework."... In my view, the onus should be squarely on governments to establish that the procedures used in 'standard' criminal investigations... which allow the arrest to be made closer to the charge, are unsuitable to their terrorism efforts." (emphasis added)) [Federation's Authorities, Vol. IX, Tab 84]

28. In light of the interests at stake, the complexity of the proceedings, and the fact that the individual is excluded from seeing and hearing the secret evidence relied upon by the Government, counsel is required to ensure that the individual receives a fair hearing.

> Compare: *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46 at paras. 2, 75-81; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 68 Alta. L.R. (3d) 371 (Alta. C.A.), leave to appeal to S.C.C. denied (1998), 239 N.R. 197 (S.C.C.) [Federation's Authorities, Vol. V, Tabs 41-43]
>
> *Dehghani*, *supra* at 1076 (noting that the right to counsel under s. 7 may apply in cases other than those encompassed by s. 10(b)) [Federation's Authorities, Vol. V, Tab 40]

29. As such, it is submitted that the subject of a security certificate has a right pursuant to ss. 7 and 10(b) of the *Charter* to the *effective assistance* of counsel. Although the cases dealing with the right to the effective assistance of counsel arise primarily in situations where counsel has acted inappropriately or is incompetent, the same constitutional principle applies here, where the state is effectively excluding counsel from important parts of the case and leaving the protection of the individual's rights and interests to the judge alone.

> See e.g. *Lavallee, Rackel & Heintz v. Canada*, *supra* at para. 65 [Federation's Authorities, Vol. III, Tab 27]; *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at para. 24; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 at 56 (Ont. C.A.); *D.B. v. British Columbia (Director of Child, Family and Community Service)* (2002), 99 B.C.L.R. (3d) 231 (C.A.) (applying the right to effective assistance of counsel outside of the criminal law context); *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.) (accepting that the right to effective counsel applies in the immigration law context) [Federation's Authorities, Vol. V, Tabs 44-47]
>
> *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para. 14; *R. v. MacCallen* (1999), 43 O.R. (3d) 56 (C.A.); *R. v. Speid* (1983), 43 O.R. (2d) 596 (C.A.) (s. 10(b) protects right to counsel of choice) [Federation's Authorities, Vol. V, Tabs 48-50]

30. If secret evidence cannot be disclosed to the individual's counsel, special counsel must be appointed to represent his or her interests and receive this evidence. This Court has repeatedly emphasized, in both the criminal and administrative law contexts, that the disclosure of all relevant information is essential to a fair hearing. The affected party should not be forced to operate "in an informational deficit." The security certificate and detention review provisions of the IRPA undermine this essential procedural safeguard, as they require the designated judge to reach a decision wholly or partially on the basis of secret evidence that is not disclosed to the security certificate subject or his or her counsel.

> *Ruby v. Canada*, [2004] 4 S.C.R. 3 at para. 40 ["*Ruby*"] [Federation's Authorities, Vol. VI, Tab 51]

> See also: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *May v. Ferndale Institution*, 2005 SCC 82 ("In the administrative context, the duty of procedural fairness requires that the decision-maker discloses the information he or she relied upon," even though *Stinchcombe* does not apply outside the criminal law context); *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 5, 70-71 (noting the difficulty of making submissions regarding undisclosed evidence, a concern that is "particularly acute" where the records form part of the case to meet) [Federation's Authorities, Vol. VI, Tab 52-54]

31. As this Court held in *Ruby*, exclusion from parts of the opposing party's case amounts to an "exceptional departure" from the general rule that "a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position." The security certificate and detention review process abrogates this essential procedural safeguard, as important portions of the hearings are conducted *in camera* and *ex parte*.

> *Ruby, supra* at para. 40 [Federation's Authorities, Vol. VI, Tab 51]
>
> See also: *Kane v. University of B.C.*, [1980] 1 S.C.R. 1105 at 1113-14 [Federation's Authorities, Vol. VI, Tab 55]; D.P. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004) at 263 [Federation's Authorities, Vol. IX, Tab 85]; IRPA, *supra*, s. 78(i) ("the judge shall provide the permanent resident or the foreign national with an <u>opportunity to be heard</u> regarding their inadmissibility" (emphasis added)) [Federation's Factum, Appendix J]

32. This Court has also repeatedly emphasised the importance of the right to cross-examine witnesses, in both the criminal law and administrative law contexts. In *R. v. Lyttle*, Justices Major and Fish noted on behalf of a unanimous Supreme Court: "At times, there will be <u>no other way</u> to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed" (emphasis added). Here, neither the individual nor counsel can cross-examine the Government's witnesses, even though those witnesses may provide information that is fundamental to the Government's case.

> *R. v. Lyttle*, [2004] 1 S.C.R. 193 at para. 1; see also paras. 2, 41, 43-44 [Federation's Authorities, Vol. VII, Tab 56]
>
> See also: *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663 ("Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony."); *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 at 166-167, var'd [1982] 1 S.C.R. 1107 [Federation's Authorities, Vol. VII, Tabs 57-58]

C. The remedy should include a required role for 'special counsel'

33. It is submitted that the proper remedy is to read into the IRPA two alternative options that will provide effective counsel to security certificate subjects where the Government relies upon secret evidence.

34. The first option is for the individual's own counsel to see all of the evidence before the designated judge and participate in any closed proceedings, subject to: (a) obtaining any necessary security clearance and (b) undertaking not to disclose any secret evidence to his or her client.

35. Alternatively, if the designated judge believes that the first option is unworkable, the individual must be permitted to choose special counsel from a roster of lawyers who have security clearances. That special counsel would be privy to all of the evidence put before the designated judge, represent the individual in any "*ex parte*" proceedings, and work with the individual and his or her counsel to test the Government's evidence. Special counsel would undertake not to disclose any secret evidence to the individual or his or her counsel.

36. Applying the factors established by this Court in *Schachter v. Canada*, this remedy is appropriate. First, enabling counsel to test the evidence is consistent with Parliament's objective that the IRPA protect Canadian security and that the security certificate regime be applied in a manner that is "consistent with the *Canadian Charter of Rights and Freedoms*." Second, the only way to cure the constitutional defects here is to permit an effective role for counsel. Although Parliament may decide to go further, an enhanced role for counsel is the bare minimum that is constitutionally required. Third, this remedy is less intrusive than striking down the offending provisions. A declaration of invalidity would involve completely discarding a legislative scheme that Parliament has enacted for the protection of national security.

> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 718 [Federation's Authorities, Vol. VII, Tab 59]
>
> IRPA, *supra*, ss. 3(1)(h), 3(2)(g), 3(3)(d), 78(c) ("the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit" (s. 78(c)) (emphasis added)) [Federation's Factum, Appendix J]

1. First Option: Disclosure to the Individual's Counsel

37. In *A.M. v. Ryan*, this Court confirmed that a court can order that confidential or privileged materials be disclosed to a party's counsel, but not his or her client. Lower courts have ordered that information be provided to counsel on an undertaking not to disclose it to anyone, including his or her client, in a variety of contexts. This practice has evolved because disclosure is essential to counsel's ability to represent his or her client effectively, even when there are valid reasons for precluding disclosure to the client.

> *A.M. v. Ryan*, [1997] 1 S.C.R. 157 at para. 41 [Federation's Authorities, Vol. VII, Tab 60]
>
> See e.g. *R. v. Guess* (2000), 148 C.C.C. (3d) 321 at 329-337 (B.C.C.A.), leave to appeal denied [2000] S.C.C.A. No. 628 (QL) (criminal prosecution; defence counsel permitted to review log entries of intercepted private communications); *Re Egglestone and Mousseau and Advisory Review Board* (1983), 42 O.R. (2d) 268 at 276-277 (Div. Ct.) (proceedings before Medical Advisory Review Board); *Bland v. Canada (National Capital Commission)* (1988), 20 F.T.R. 236 (T.D.) (access to information); *Fuda v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.) (access to information; requester's counsel granted access to police intelligence records) [Federation's Authorities, Vol. VII, Tabs 61-64]

38. Significantly, this practice has been adopted even where there were national security concerns, including the Air India trial and related proceedings.

> M. Code, "Problems of Process in Litigating Privilege Claims under the Flexible Wigmore Model" in *Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) at 269-273 [Federation's Authorities, Vol. IX, Tab 86]; *R. v. Malik*, [2003] B.C.J. No. 3177 at paras. 219-224, 229 (S.C.) (QL) [Federation's Authorities, Vol. VII, Tab 65]
>
> *Air India Case, supra* at para. 18 [Federation's Authorities, Vol. II, Tab 10]
>
> Compare: U.S., *Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba*, 344 F. Supp. 2d 174 at paras. 17-34 (D.D.C. 2004) [Federation's Authorities, Vol. VII, Tab 66] (ordering that information be disclosed to a detainee's counsel, after receiving the appropriate security clearance and provided the information is not disclosed to the detainee, in *habeus corpus* cases filed on behalf of various Guantanamo Bay detainees); but see: *Detainee Treatment Act of 2005*, Title XIV of the *National Defense Authorization Act for Fiscal Year 2006*, H.R. 1815, s. 1405(e), amending 28 U.S.C. § 2241 (removing the right of all Guantanamo Bay detainees to apply for a writ of habeas corpus) [Federation's Factum, Appendix G]

39. However, if the subject of a security certificate refuses to consent to such a procedure, counsel cannot obtain the necessary security clearance, or the designated judge believes that disclosure to the individual's counsel is unworkable for some other reason, special counsel must be appointed.

> *R. v. Guess* (2000), *supra* at 336-337; *R. v. Fisk* (1996), 108 C.C.C. (3d) 63 at 78 (B.C.C.A.); *Re Egglestone and Mousseau and Advisory Review Board, supra* at 276-277 [Federation's Authorities, Vol. VII, Tabs 61, 67 and 62]

2. Alternative Option: Disclosure to Special Counsel

40. Special counsel have frequently been used in Canada, the United Kingdom and the United States where national security issues have been raised. Appointment of special counsel is thus clearly a workable solution to the need to balance individual rights and national security.

(i) Special counsel in Canada

41. In *Canada (Attorney General) v. Ribic*, a criminal case involving national security information, a security-cleared lawyer was permitted to serve as special counsel. Similarly, the Arar Inquiry has appointed an *amicus curiae* to test the Government's requests for *in camera* and *ex parte* hearings on grounds of national security.

> *Canada (Attorney General) v. Ribic* (2003), [2005] 1 F.C.R. 33 at paras. 42-45 (C.A.), leave to appeal to S.C.C. denied 22 October 2003 (File No. 29868) [Federation's Authorities, Vol. VIII, Tab 68]
>
> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Commission"), Ruling prescribing Rules of Procedure and Practice (15 June 2004) at 1-2, online: Arar Commission Homepage <www.ararcommission.ca>; see also: Ruling on Process and Procedural Issues (9 May 2005) at 10-13 [Federation's Authorities, Vol. VIII, Tabs 69-70]

42. Most significantly, "independent counsel" played a key role in security certificate proceedings before the Security Intelligence Review Committee ("SIRC"), a civilian oversight body comprised of a non-parliamentary committee of Privy Councillors. Before the IRPA was enacted in 2002, SIRC reviewed ministerial decisions to issue security certificates based on concerns about national security. Independent counsel are still used in the proceedings that remain under SIRC's jurisdiction, which include complaints about the Canadian Security Intelligence Service ("CSIS"), refusals of security clearances brought by government employees, and denials or revocations of citizenship on national security grounds.

> *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23, ss. 38(c)(ii), 39(1), as am. by IRPA, *supra*, s. 225 [Federation's Factum, Appendices C and J]
>
> *Immigration Act*, R.S.C. 1985, c. I-2, ss. 39, 81, repealed by IRPA, *supra*, s. 274 [Federation's Factum, Appendices H and J]

43. In hearings before SIRC, the Government's evidence is presented *ex parte* and *in camera*. However, a process has been developed whereby independent counsel is appointed to represent the affected person's interests at these portions of the hearing. Although the independent counsel cannot reveal any secret evidence to the affected person or his or her counsel, there are no other restrictions on the independent counsel's ability to communicate with them. This is in contrast with the limitations in the United Kingdom model, discussed below.

> See *Harkat (Re)*, [2005] 2 F.C.R. 416 at para. 11 (F.C.) (description of the role of "independent counsel" before SIRC) [Federation's Authorities, Vol. VIII, Tab 71]; I. Leigh, "Secret Proceedings in Canada" (1996) Osgoode Hall L.J. 113 at 159-164; M. Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1989-1990) 3 Can. J. Admin. Law and Prac. 173 at 179, 183-185 [Federation's Authorities, Vol. IX, Tabs 87-88]

(ii) "Special advocates" in the United Kingdom

44. "Special advocates" are also used in the United Kingdom. The U.K. began using special advocates in the national security context in 1997, following the European Court of Human Rights' decision in *Chahal v. United Kingdom.* The Court was critical of a process that denied Chahal any legal representation before a panel that was considering his deportation on national security grounds, and allowed him to receive only an outline of the grounds for the notice of intention to deport. The Court praised Canada's use of independent counsel in similar cases:

> The Court attaches significance to the fact that [...] in Canada a more effective form of judicial control has been developed in cases of this type. <u>This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice</u> (emphasis added)
>
> *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413 at paras. 131, 144 [Federation's Authorities, Vol. VIII, Tab 72]

45. As a result of *Chahal*, special advocates are now used in hearings before the Special Immigration Appeals Commission ("SIAC"). SIAC is a statutory court of record that hears

appeals from immigration decisions of the Home Office, including whether non-nationals should be deported. Special advocates also appear before the High Court in proceedings relating to control orders made under the *Prevention of Terrorism Act 2005*, which impose conditions such as house arrest, curfews, and tagging on the liberty of individuals suspected of involvement in terrorism.

> *Special Immigration Appeals Commission Act 1997* (U.K.), 1997, c. 68, s. 6 [Federation's Factum, Appendix L]; *The Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2, Sch. para. 7 [Federation's Factum, Appendix N]; U.K., H.C., Constitutional Affairs Committee, "The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates," Seventh Report of Session 2004-05, Vol. 1 [Federation's Authorities, Vol. IX, Tab 89]
>
> See also: *R. v. H*, [2004] 1 All. E.R. 1269 at para. 21 (H.L.) [Federation's Authorities, Vol. VIII, Tab 73]

46. Like SIRC's independent counsel, special advocates before SIAC and the High Court make oral and written submissions and cross-examine witnesses at hearings from which the individual concerned and his or her counsel are excluded. However, special advocates can only interview the suspect before reviewing the security-sensitive information. Upon seeing that information, the special advocate is not permitted to communicate with the suspect or his or her counsel, a limitation which has not previously been imposed in Canada and which the Federation does not recommend be adopted here.

> *Special Immigration Appeals Commission Act 1997* (U.K.), *supra* at s. 6(4); *Special Immigration Appeals Commission (Procedure) Rules 2003,* S.I. 2003/1034, Rules 34-38; *The Civil Procedure (Amendment No. 2) Rules 2005*, S.I. 2005/656 (L. 16), Sch., s. 5, Parts 76.23-76.25; see also *Explanatory Memorandum to the Civil Procedure (Amendment No. 2) Rules 2005*, 2005 No. 656 (L. 16) at para. 7 [Federation's Factum, Appendices L, M, O]

47. The English Court of Appeal, noting the "grave disadvantage" that is suffered by a person who is excluded from a hearing before SIAC, has described some of the benefits of using special advocates as follows:

> The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. ... As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can

> object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, insofar as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant. (emphasis added)
>
> *Secretary of State for the Home Department v. "M"*, [2004] 2 All E.R. 863 at para. 13 (C.A.); see also paras. 32-34 [Federation's Authorities, Vol. VIII, Tab 74]
>
> See also: *A v. Secretary of State*, (2005), [2006] All E.R. 575 at paras. 6-7, 58, 142 (H.L.) (describing the role of special advocates, and noting problems with the limitations placed on their role in the U.K.); *Huang v. Secretary of State for the Home Department*, [2005] 3 W.L.R. 488 at para. 52 (C.A.); *Home Department v. Rehman*, [2000] 3 All E.R. 778 at 785 (C.A.); *R. v. Shayler*, [2002] 2 All E.R. 477 at para. 34 (H.L.); *Roberts v. Parole Board*, [2005] 2 W.L.R. 54 (H.L.) [Federation's Authorities, Vol. VIII, Tabs 75-79]

(iii) "Special attorneys" in the United States

48. The United States also makes provision for the use of "special attorneys" in "alien terrorist removal proceedings" in which the U.S. government presents "classified information" at an *in camera* and *ex parte* hearing before a special court of five federal court judges. The special attorney can review the classified information and challenge its veracity at the *in camera* and *ex parte* hearing, but is not permitted to disclose the information to the alien or the alien's counsel. However, the U.S. government has never invoked these procedures. Instead, deportation proceedings involving alleged terrorists are regularly conducted as "removal proceedings" under the *Immigration and Nationality Act*.

> See *Antiterrorism and Effective Death Penalty Act of 1996*, 8 U.S.C. § 1531-1537 (in particular § 1532(e), 1534(e)(3)(F)); *Classified Information Procedures Act*, 18 U.S.C. app. § 1 (2005); see also: *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, 32 C.F.R. Part 9, *Department of Defence Military Commission Order No. 1* § 6(B)(3), 6(D)(5)(b) (allowing for a form of special counsel in proceedings before the military commission established to deal with charges against "enemy combatants") [Federation's Factum, Appendices A, D, K]
>
> See *Immigration and Nationality Act of 1952*, 8 U.S.C. § 1225(b)-(c), 1229a [Federation's Factum, Appendix I]; Submission of S.W. Yale-Loehr & J.C. O'Neill, "The Legality of Maher Arar's Treatment Under U.S. Immigration Law," Arar Commission (16 May 2005) at 9, online: Arar Commission Homepage <www.ararcommission.ca> [Federation's Authorities, Vol. IX, Tab 90]

D. Conclusion

49. At a minimum, the Constitution requires that special counsel, as opposed to the designated judge, test the Government's secret evidence. The designated judge would then not have to descend into the arena, and the individual would receive a fair hearing without compromising national security. As William Horton, a former SIRC independent counsel, noted in his evidence in *Harkat*, while the role of special counsel "is a hybrid role in terms of Canadian legal norms ... it was a necessary and effective compromise to ensure that there could be a degree of scrutiny and accountability for state action where classified information is involved."

> *Harkat, supra* at para. 11 (F.C.), quoting Affidavit of William Horton [Federation's Authorities, Vol. VIII, Tab 71]

PART IV: ORDER REQUESTED

50. The Federation asks that these three related appeals be allowed in a manner consistent with these submissions.

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

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

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L. *Special Immigration Appeals Commission (Procedure) Rules 2003*, S.I. 2003/1034

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