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

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

AND IN THE MATTER OF MOHAMED HARKAT

INDEXED AS: HARKAT (RE) (F.C.)

Federal Court, Noël J.—Ottawa, June 2, 3 and 23, 2009.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Motion for order requiring Canada Border Services Agency (CBSA) to return all items, records seized at Harkat residence without delay — Mr. Harkat named in security certificate as person inadmissible to Canada on grounds of national security, released from detention under strict conditions — Para. 1(c) of terms and condition requiring Harkat give CBSA access to residence to verify presence, ensure conditions of release complied with — CBSA conducting search of almost six hours of Harkat residence — Whether CBSA's actions constituting unreasonable search, seizure contrary to Charter, s. 8 — Harkat consenting to searches for purpose of ensuring compliance with conditions of release — While consent diminishing or extinguishing reasonable expectation of privacy, consent should be narrowly construed — Harkat not consenting to intelligence gathering searches; retaining reasonable expectation of privacy — Search, seizure by CBSA warrantless — Such search unreasonable herein — Order requiring return of all information, equipment, records seized, destruction of copies thereof appropriate remedy — Motion granted.

This was a motion for an order requiring the Canada Border Services Agency (CBSA) to return all items and records seized at Mr. Harkat's residence on May 12, 2009, without delay. Mr. Harkat, named in a security certificate as a person inadmissible to Canada on grounds of national security, was released from detention under strict conditions. Paragraph 1(c) of the terms and conditions (the order) required him to give the CBSA access to his residence to verify his presence and ensure that he and any co-resident were complying with the conditions of release. Upon being granted entry, employees of the CBSA were entitled to search the residence and remove any item. It is the exercise of this power that was the subject of this motion.

On May 12, 2009, the CBSA conducted a search of the Harkat residence. The search was not concluded in a limited and specific manner, but was instead considered as an opportunity to gather information that would not have otherwise been available. The issues were whether the actions of the CBSA constituted an unreasonable search and seizure, thereby infringing Mr. Harkat's rights pursuant to section 8 of the *Canadian Charter of Rights and Freedom* (Charter), and, if so, whether a remedy pursuant to subsection 24(1) of the Charter was warranted.

Held, the motion should be granted.

Mr. Harkat consented to searches of his residence for the purposes of ensuring his compliance with the terms and conditions of his release. While consent to a search may diminish or extinguish a person's reasonable expectation of privacy, where a person's constitutionally guaranteed right to be free from arbitrary search and seizure is at issue, consent to such searches should be narrowly construed. Here, Mr. Harkat did not consent to intelligence-gathering searches of his residence that allowed an indiscriminate and unfocussed seizure of records, items and documents. He retained a reasonable expectation of privacy.

Paragraph 16 of the order, upon which the CBSA relied to conduct the search and seizure, was not specific in time, did not specify an offence and the evidence to be sought, and did not require a reasonable suspicion to be demonstrated before a search was conducted. As such, it did not meet the definition of a warrant, i.e. it was warrantless. Three conditions must be met for a warrantless search to be considered reasonable: the search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner. The broad and liberal interpretation given to paragraph 16 by the CBSA was unacceptable when dealing with privacy rights. The seizure of items which would have little if any use in verifying the Harkats' compliance with the terms and conditions of release and the use of a currency dog when there was no related prohibition indicated a search that far exceeded a verification of the compliance with the terms of the order. This verification was incidental to the primary purpose of the search. Insofar as the search exceeded the authorization set out in paragraph 16, it was unreasonable.

Even if the order authorized the search conducted on May 12, 2009, the evidence led to the conclusion that the manner in which the search was conducted was unreasonable. The participation of 15 law enforcement officers and three canine units, the close to six-hour duration of the search and the seizure of out-of-date agendas, video cassettes, CDs and any document with Arabic writing on it were excessive. The use of male officers to search through Mrs. Harkat's private drawers was unreasonable. Although these measures may have been taken by CBSA in good faith, the delicate balance between the harm caused by the exercise of an intrusive state power and the justifiable and reasonable goal was lost. No consideration was given to the impact of such an obvious law enforcement presence in front of the residence, and little consideration was given to the dignity of the Harkats who were required to witness this excessively intrusive search into the most intimate details of their private life.

An order requiring the return of all information, equipment and records seized from the residence as well as the destruction of any copies made thereof was the appropriate remedy for the infringement of Mr. Harkat's right to be secure from unreasonable search and seizure. The CBSA acted with disregard for the terms of the order and the requirements of section 8 of the Charter. Mr. Harkat may have had a diminished expectation of privacy, but that did not give the state carte blanche to unreasonably intrude on what privacy was left to him.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 8, 24(1).

CASES CITED

APPLIED:

Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145, (1984), 55 A.R. 291, 11 D.L.R. (4th) 641; *R. v. Collins*, [1987] 1 S.C.R. 265, (1987), 38 D.L.R. (4th) 508, [1987] 3 W.W.R. 699; *Attorney General of Nova Scotia et al. v. MacIntyre*, [1982] 1 S.C.R. 175, (1982), 49 N.S.R. (2d) 609, 132 D.L.R. (3d) 385; *Lagiorgia v. Canada*, [1987] 3 F.C. 28, (1987), 42 D.L.R. (4th) 764, 35 C.C.C. (3d) 445 (C.A.).

CONSIDERED:

Harkat (Re), 2009 FC 241, 339 F.T.R. 104; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, 245 N.B.R. (2d) 270, 208 D.L.R. (4th) 207; *R. v. Edwards*, [1996] 1 S.C.R. 128, (1996), 26 O.R. (3d) 536, 132 D.L.R. (4th) 31; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, 244 D.L.R. (4th) 541, 189 C.C.C. (3d) 129; *R. v. Wills* (1992), 7 O.R. (3d) 337, 70 C.C.C. (3d) 529, 12 C.R. (4th) 58; *Canada (Minister of Citizenship and Immigration) v. Jaballah*, 2009 FC 33, 187 C.R.R. (2d) 103, 78 Imm. L.R. (3d) 125; *R. v. Smith* (1998), 219 A.R. 309, 161 D.L.R (4th) 331, [1998] 8 W.W.R. 620 (Alta. C.A.).

AUTHORS CITED

Fontana, James A. and David Keeshan. *The Law of Search and Seizure in Canada*, 7th ed. Markham, Ont.: LexisNexis Canada, 2007.

MOTION for an order requiring the Canada Border Services Agency to return all items and records seized at the Harkat residence on May 12, 2009, without delay. Motion granted.

APPEARANCES

David W. Tyndale and *André Séguin* for applicant.

Matthew C. Webber and *Norman D. Boxall* for respondents.

Paul D. Copeland as special advocate.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicant.

Webber Schroeder Goldstein Abergel, Ottawa, and *Bayne, Seller, Boxall*, Ottawa, for respondents.

Paul Copeland, Toronto, as special advocate.

The following are the reasons for order and order rendered in English by

[1] NOËL J.: On December 10, 2002, Mohamed Harkat was named in a security certificate as a person inadmissible to Canada on grounds of national security. He was detained in a correctional facility until his release by this Court, under strict conditions, in 2006.

[2] Paragraph 16 of the terms and conditions required Mr. Harkat to give employees of the Canada Border Services Agency (CBSA) access to his residence in so that they might verify his presence in the residence and ensure that he is complying with the conditions of release. For greater certainty, the order specified that upon being granted entry, employees of the CBSA were entitled to search the residence and remove any item. It is the exercise of this power that is the subject of this motion.

[3] On March 25, 2009, this Court modified the terms and conditions of release applicable to Mr. Harkat (the former order). The terms and conditions of release were amended again on May 14, 2009; the power to enter, search and seize may now be exercised only once CBSA has obtained prior judicial authorization (the amended order).

The May 12, 2009 search and seizure

[4] On May 12, 2009, the CBSA conducted a search of Mr. Harkat's residence, 19 days before the hearings into the reasonableness of the security certificate were scheduled to begin. The search began at 9 a.m. and concluded at 2:45 p.m.

[5] Sixteen law enforcement officers, including three canine units, participated in the search. Several law enforcement vehicles were parked outside the Harkat's residence during the search. A detailed memorandum prepared by the supervising officer, Ms. Jasmine Richard, was filed as Exhibit A to the affidavit of Alana Homeward.

[6] Upon arrival at the Harkat residence, the supervising officer and an Ottawa Police Service constable entered the house and explained that CBSA was conducting a search of the residence to verify his compliance with the terms and conditions of his release. They relied on paragraph 16 of the former order as their authority to enter, search and seize.

[7] Mr. Harkat sought, and was given permission, to contact his counsel. He was unable to reach either Mr. Webber or Mr. Boxall but left a message informing them that CBSA was conducting a search of his residence. Counsel later contacted the supervising officer, and were told that the search was being conducted under the authority of paragraph 16 of the former order.

[8] Mrs. Harkat was in the shower when the search began. When Mr. Harkat told her that the employees of the CBSA were searching the residence, she got out of the shower. Mrs. Harkat was

visibly upset when she met with Ms. Richard, but gave her the keys to unlock the basement computer room.

[9] At that point, Ms. Richard explained that the RCMP "explosives dog" would be entering the residence and asked Mr. Harkat if he wished to remain inside. According to her evidence, Mr. Harkat consented to the dog entering the residence if it did not approach him. The RCMP "explosives dog" was taken through the house but did not detect any explosive materials.

[10] At 9:31 a.m. the CBSA "weapons dog" entered the residence. After the two dogs completed their searches, Ms. Richard brought in the CBSA search teams and evidence control officer.

[11] At 12:43 p.m. the CBSA "currency dog" was brought into the residence.

[12] None of the three dogs used to search the residence detected anything that contravened the terms and conditions of the former order.

[13] Officers conducting the search seized a number of documents, records and items from the Harkat residence. All documents found with Arabic writing on them were seized, along with computers, several boxes of floppy disks, CDs, and videotapes. The items seized included documents and records which contained information protected by solicitor client and litigation privileges.

[14] Two male officers were tasked with searching the Harkat's bedroom. They searched through Mrs. Harkat's dresser, where they found a spare set of keys for the computer room in the basement in a drawer of the dresser containing personal items of Mrs. Harkat.

[15] CBSA officers also discovered that the door to the garage could be raised approximately one foot using the inside handle.

[16] The search was concluded at 2:45 p.m.

[17] A complete list of all the items seized from the Harkat residence was filed with the Court. Items identified as being privileged have, for the most part, been returned to the Harkats by orders of Prothonotary Tabib (May 14 and 20, 2009).

Events leading up to the search of May 12, 2009

[18] The possibility of conducting a search of the Harkat residence was discussed as early as September 2008. (Evidence of Bessy Agrianotis, June 3, 2009.) CBSA received legal advice that if they did not use the powers granted to it under the terms of release, the power would likely be removed by the Court. The possibility of conducting a search was also discussed when Ms. Richard replaced Mr. Peter Foley, the former CBSA supervisor, in December 2008.

[19] On March 6, 2009, this Court signed reasons for order in relation to the motion for the modification of Mr. Harkat's terms and conditions of release [2009 FC 241, 339 F.T.R. 104]. In paragraph 139, the Court required CBSA to write and file a risk assessment which would assist in determining how the discretion granted to the CBSA supervisor should be exercised.

[20] On April 16, 2009, Bessy Agrianotis (the acting senior program advisor responsible for the national coordination between the regions and litigation management section concerning security certificates) inquired by e-mail about whether the Harkat residence had been the subject of a prior search and, if not, whether it was possible to start planning such a search. After learning that the responsible regional officer (NORO) had never conducted a search, Ms. Agrianotis requested that NORO begin planning one on April 21, 2009. In her e-mail, Ms. Agrianotis wrote: "I need you guys to start planning one. We are preparing to write the risk assessments and we need all the info we can gather lol". As a result of that

request, on her return from leave on April 29, 2009, the supervisor at the NORO, Ms. Richard, began designing a search.

[21] Ms. Richard diligently sought information and advice concerning her proposed operational plan which she designed to be as efficient as possible. When she raised questions concerning the permissible scope of the search, she was told that it was left to her discretion. (Bessy Agrianotis, June 3, 2009, 2 p.m., at pages 4–5.) Ms. Richard was also given advice by the Counter-Terrorism Branch about how to conduct the search and what items should be seized.

[22] Throughout Ms. Richard's consultation with her coordinator and her superiors, the question of the legality of the search and the proposed operational plan was never seriously questioned despite its intrusive nature. CBSA relied on the wording of paragraph 16 of the former order as providing the necessary authority. The operational plan was approved by Ms. Richard's superiors prior to May 12, 2009.

[23] The evidence before this Court in both Exhibit MS-2 and the testimony of Bessy Agrianotis leads to the conclusion that the search was organized for two purposes: to exercise the power to search provided in the order setting out the conditions of Mr. Harkat's release so as to not lose it from lack of use; and, to gather information that would be relevant to the risk assessment being prepared by CBSA in response to paragraph 139 of the reasons for order of this Court dated March 6, 2009.

[24] Paragraph 16 contemplates two purposes: to verify Mr. Harkat's presence in the residence; and, to ensure that Mr. Harkat and any co-resident are complying with the terms of the conditions of release.

16. Mr. Harkat shall allow employees of the CBSA, any person designated by the CBSA and/or any peace officer access to the residence at any time (upon the production of identification) for the purposes of verifying Mr. Harkat's presence in the residence and/or to ensure that Mr. Harkat and/or any other persons are complying with the terms and conditions of this order. For greater certainty, Mr. Harkat shall permit such individual(s) to search the residence, remove any item, and/or install, service and/or maintain such equipment as may be required in connection with the electronic monitoring equipment. Prior to Mr. Harkat's release from incarceration all other occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new occupant shall similarly agree to abide by this term. [Emphasis added.]

[25] During her testimony, Ms. Richard noted that the search was conducted with the intent of verifying compliance with several specific conditions, in particular, she referred to paragraphs 7(x), 12, 13, 17, and 19 which prohibit Mr. Harkat from:

- Having access to the computer in the residence when he is home alone,
- Associating or communicating with persons who support violent jihad or terrorism or have a criminal record,
- Possessing or having access to communication devices capable of connecting to the Internet, cellular telephones, public telephones etc.,
- Possessing a passport or other travel document,
- Buying or obtaining a train, plane or bus ticket, or
- Possessing any weapon, imitation weapon, noxious substance or explosive or any component thereof.

[26] Ms. Richard also interpreted the terms of paragraph 12 of the former order as extending to a right to search for currency. She based her interpretation on her background knowledge of the allegations made by the ministers that Mr. Harkat handled money for terrorist groups. It was this interpretation of the order that led her to request the assistance of a currency dog and handler.

[27] In her evidence Ms. Richard acknowledged that there is no provision in the former order which specifically precludes Mr. Harkat from possessing currency. She testified in chief as follows:

Q. Same questions with respect to the dog who is trained to look for currency. Why use that dog?

A. The currency, again it's from my knowledge of the background of the case, access to big amounts of money and the condition in the Court Order. What I was trying to monitor there was criminal activity and maybe a large amount of money, knowing the clients are on social assistance. It could have been reasonable to believe that it could be seen as proceed of crimes. That's why I welcomed the currency dog on the day of the search.

On cross-examination, Ms. Richard said:

Q. The last one, currency. You have the same answer? You don't have to repeat it. That would be your answer, right?

A. Correct.

Q. Except we do agree, of course, that there is no condition in his bail that he is not allowed to possess currency or, for that matter, large amounts of currency. Agreed?

A. Yes, it is not written there.

Q. It is not written anywhere, is it?

A. No.

Q. Okay.

A. But the section that I referred to when I made that decision was the one we spoke about a little while ago, about directly or indirectly with criminal matters and—

Q. Right. So you somehow believe that despite your lack of grounds to search for currency, that you were justified in searching for currency because it was somehow potentially related to the condition that he not associate directly or indirectly with criminals or jihadists. Right?

A. That is correct.

[28] Ms. Richard was only entitled to verify compliance with the terms of the former order. The use of the currency dog indicates that the search was not conducted in a limited and specific manner, but was instead considered as an opportunity for CBSA to gather information that would not have otherwise been available.

[29] A review of the testimony of the witnesses from the CBSA leads to the conclusion that the supervising officer was left to perform her important function, namely supervising compliance with this Court's order, without sufficient support or coordination from either management or headquarters. This is a subject of great concern to this Court which has, to date, vested a significant amount of discretion in the front line officers of the CBSA.

The position of the parties

[30] At a hearing held on June 2–3, 2009, Mr. Harkat claimed that the search of his residence was conducted without warrant and amounted to an "egregious violation" of his constitutional right to be free from unreasonable search and seizure as guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter).

[31] Mr. Harkat relies on *Hunter et al. v. Southam Inc.*, [1984] 2. S.C.R. 145, for the proposition that the absence of a search warrant shifts the burden onto the state to justify the reasonableness of the search in accordance with the three criteria set out in *R. v. Collins*, [1987] 1 S.C.R. 265.

[32] Although Mr. Harkat concedes for the purposes of this motion that paragraph 16 of the former order, which gives CBSA the right to search his residence, is not unreasonable or unlawful, he asserts that the search conducted on May 12, 2009, exceeded the scope of the authority to search set out in paragraph 16. In particular, he submits that paragraph 16 requires the search be conducted to "ensure contemporaneous compliance with the release conditions". Mr. Harkat submits that the scope of the May 12, 2009 search exceeded the authorization in the Court order insofar as it was used to gather intelligence information. Similarly, the authorization would not be reasonable if it was interpreted as permitting the seizure of items for which there was no reasonable grounds to conclude that they would afford evidence of a breach of the conditions.

[33] In summary, the May 12, 2009 search is characterized by Mr. Harkat as a "whole-scale fishing expedition" which had a significant impact on his reasonable expectation of privacy.

[34] Mr. Harkat also asserts that the manner in which the search was executed violated his right to be secure from unreasonable search and seizure. He is seeking the return of all property seized by the CBSA without delay. (See paragraph 3 of Mr. Harkat's written submissions dated May 22, 2009.)

[35] The ministers rely on paragraph 16 of the former order and plead that a search done on consent does not violate section 8 of the Charter. Nothing in the former order, which in their opinion constitutes a valid prior judicial authorization, requires CBSA to show reasonable grounds to believe a breach of the conditions has been committed before conducting a search.

[36] The ministers note that the primary purpose of the search was to ensure compliance with the terms and conditions of release; they conceded that a secondary purpose of the search was to gather information for a Court ordered risk assessment. They also take the position that the search was conducted in a reasonable manner and was connected to the "lawful purpose of monitoring compliance with the terms and conditions of release" which, in their submission, includes the writing of a risk assessment.

[37] Thus, the ministers take the position that the search should not be declared unlawful. They note, however, that even if the search infringed Mr. Harkat's section 8 rights, the appropriate remedy would be to allow CBSA to conduct its investigation, make copies of relevant seized information, and return the seized material to the Harkats.

Issues before this Court

[38] There are two questions before this Court: did the actions of the CBSA on May 12, 2009, constitute an unreasonable search and seizure thereby infringing Mr. Harkat's rights pursuant to section 8 of the Charter and, if so, should this Court exercise its discretion to grant a remedy pursuant to subsection 24(1) of the Charter?

Analysis

[39] Section 8 of the Charter protects an individual's right to be secure against unreasonable search and seizure.

[40] In *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, Justice Bastarache, writing for the Supreme Court of Canada, observed at paragraph 15:

> It has long been held that the principal purpose of s. 8 of the *Charter* is to protect an accused's privacy interests against unreasonable intrusion by the State. Accordingly, police conduct interfering with a reasonable expectation of privacy is said to constitute a "search" within the meaning of the provision.… Such conduct may

also be characterized as a "seizure", the essence of which is the "taking of a thing from a person by a public authority without that person's consent".

[41] It has been held that any section 8 analysis must answer two questions: first, did the subject of the search have a reasonable expectation of privacy? If so, was the search an unreasonable intrusion on that right to privacy? (*R. v. Edwards*, [1996] 1 S.C.R. 128, at paragraph 33.)

Mr. Harkat's reasonable expectation of privacy

[42] At paragraph 45 of *Edwards*, Cory J. observed "a reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances."

[43] The May 12, 2009 search took place at Mr. Harkat's residence. Apart from one's physical integrity, it is in one's house that one has the greatest subjective and objective expectation of privacy (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paragraph 21). As noted by Binnie J., at paragraph 22 of *Tessling*:

> The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress": *Semayne's Case* … developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place. … "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'".

[44] In *R. v. Tessling*, Binnie J. concluded [at paragraph 38]:

> … in my view it may be presumed unless the contrary is shown in a particular case that information about what happens *inside* the home is regarded by the occupants as private. Such an expectation is rooted in the ancient law of trespass and finds its modern justification in the intimacies of personal and family life.

[45] The ministers note that the terms of paragraph 16 of the former order required Mr. Harkat and any co-resident(s) to grant the CBSA access to the Harkat's residence for the purposes of ensuring that Mr. Harkat and any other person was complying with the terms and conditions of the order. Mr. Harkat consented to this term on his release from detention. Clearly, the existence of the consent impacts on the subjective expectation of privacy.

[46] Consent to a search may diminish or extinguish a person's reasonable expectation of privacy. The conditions which must be met before a consent will constitute an effective waiver of section 8 Charter rights were set out by the Ontario Court of Appeal in *R. v. Wills* (1992), 7 O.R. (3d) 337. Mactavish J. summarized those criteria as follows in *Canada (Minister of Citizenship and Immigration) v. Jaballah*, 2009 FC 33, 187 C.R.R. (2d) 103, at paragraph 76:

> (i) there was a consent, express or implied;
>
> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary … and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent. (*Wills* at para. 69)

[47] In *Jaballah*, Mactavish J. concluded that the use of information obtained by CBSA through mail intercepts would be unauthorized and violate Mr. Jaballah's section 8 rights if the information was being used for purposes "beyond the monitoring of the threat that [he] poses to national security, or [his] compliance with the terms and conditions of their release" (*Jaballah*, at paragraph 88).

[48] This conclusion is consistent with observations that the case law "attests to the strict construction to be placed on assertions of consent search" by public authorities. (See James A. Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 7th ed. (Markham, Ont.: LexisNexis Canada, 2007), at page 527.) Where a person's constitutionally guaranteed right to be free from arbitrary search and seizure is at issue, consent to such searches should be narrowly construed.

[49] It follows from the application of a rule of strict construction that a consent may be valid for one purpose but may not be valid for another. (See *R. v. Smith* (1998), 219 A.R. 109 (Alta. C.A.)). In *R. v. Smith*, an accused invited officers into his home to verify the well-being of a person who had made a 911 call. The Alberta Court of Appeal found that the consent did not extend to a search of the other areas of the house for investigative purposes. The Court stated, at paragraph 8:

> Even if the entry onto the premises was legal, consent to entry was for a limited purpose, namely, to ensure the safety of the telephone complainant. This does not imply that a search of those premises for other purposes is allowable. No consent to enter the basement where the marijuana was found was given, yet Constable Leggatt proceeded down to the basement. In doing so he was conducting a search, and his actions went beyond what was authorized by Mr. Smith's invitation to enter the house.

[50] In agreeing to the terms and conditions of his release, Mr. Harkat consented to searches of his residence for the purposes of ensuring his compliance with the terms and conditions of his release. He consented to the precise terms of the judicially authorized search and seizure. There is no claim before this Court that Mr. Harkat's consent to the terms and conditions of his release was involuntary or uninformed. That said, the terms of the order, and Mr. Harkat's consent thereto, must be narrowly construed. Mr. Harkat did not consent to intelligence-gathering searches of his residence that allowed an indiscriminate and unfocussed seizure of records, items, and documents.

[51] I conclude that Mr. Harkat retained a reasonable expectation of privacy, which was diminished by his consent to the intrusion authorized by paragraph 16 of the former order.

Was the search conducted by CBSA unreasonable?

[52] When an individual has established that he or she had a reasonable expectation of privacy, a search conducted without a warrant will be presumptively unreasonable. The Supreme Court has held that the burden of proving that a warrantless search was not unreasonable rests with the state (*Hunter et al. v. Southam Inc.*, at page 146).

[53] The ministers do not concede that the search conducted on May 12, 2009 was warrantless or unreasonable.

[54] In *Attorney General of Nova Scotia et al. v. MacIntyre*, [1982] 1 S.C.R. 175, the Supreme Court defined a search warrant as follows [at page 179]:

> ... an order issued by a Justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime.

[55] In *Hunter et al. v. Southam Inc.*, Dickson J. enumerated several criteria that must be met before a warrant will be found to comply with section 8, above: there must be prior authorization by a neutral and impartial decision maker capable of acting judicially who has satisfied himself on the basis of sworn evidence that there are "reasonable and probable grounds … to believe that an offence

has been committed and that there is evidence to be found at the place of the search" (at pages 161–162, 168).

[56] Paragraph 16 of the former order does not meet the definition of a warrant in either *Macintyre* or *Hunter*. It is not specific in time, nor does it specify an offence and the evidence to be sought, nor does it require a reasonable suspicion to be demonstrated before the search is conducted. Although it provides judicial authorization to enter the Harkat residence for the purposes of verifying compliance with the conditions and terms of release set out in the former order, it does not otherwise comply with the criteria set out in *Hunter*, above. I therefore conclude that the search and seizure conducted by the CBSA was warrantless. As a result, the burden of demonstrating that the search was reasonable rests on the ministers.

[57] In *R. v. Collins*, at page 278 the Supreme Court of Canada set out three conditions which must be met before a warrantless search will be considered reasonable:

- the search must be authorized by law;
- the law itself must be reasonable;
- the search must be carried out in a reasonable manner.

[58] For the purposes of this motion, counsel for Mr. Harkat have conceded that paragraph 16 of the former order, which gives the CBSA the right to enter and search Mr. Harkat's residence, is not unreasonable if it is interpreted in a manner that is consistent with the requirements of section 8 of the Charter. It is their position, despite this concession, that the search and seizure conducted on May 12, 2009, was neither authorized by paragraph 16 nor done in a reasonable manner. Had Mr. Harkat attacked the reasonableness of the power granted to the CBSA in paragraph 16 it would have been necessary to examine whether the context in which it was drafted required that it meet all of the criteria set out in *Hunter*, above. Given Mr. Harkat's concession that the order itself is not unreasonable, I need not deal with this issue for the purposes of this motion.

[59] On reviewing the evidence before the Court, I conclude that paragraph 16 of the former order did not authorize the intrusive and overbroad nature of the search and seizure undertaken by CBSA on May 12, 2009. A judicial authorization to search must be interpreted reasonably, using common sense, in light of the obligations of all state actors to comply with the Charter. The broad and liberal interpretation given to paragraph 16 by the CBSA, as evidenced in the testimony of the witnesses, is unacceptable when dealing with the privacy rights of persons living in Canada.

[60] The evidence reveals that the primary purpose of the search conducted on May 12, 2009 was twofold: to use the search power so as to demonstrate to the Court that it had not been abandoned by the CBSA; and, to gather intelligence and information to be used in the preparation of the risk assessment ordered by the Court on March 6, 2009. Neither of these purposes is found in paragraph 16 of the former order which is limited to entry to verify that the Harkats "are complying" with the terms and conditions of release.

[61] Consequently, I conclude that the actions of the CBSA on May 12, 2009, exceeded the authorization granted to it by paragraph 16 of the former order. The evidence indicates that the seizure of information was conducted in accordance with the list of relevant items provided by the Counter-Terrorism Branch to Ms. Richard. Items which could have little if any use in verifying Mr. and Mrs. Harkat's compliance with the terms and conditions of release were seized, for example CDs, diskettes, and aged agendas, a currency dog was used where there was no prohibition relating to the possession of currency. All of this indicates a search that far exceeded a verification of the compliance with the terms of the order. I therefore conclude that the verification of the Harkats' compliance with the former order was incidental to the primary purposes of the search.

[62] Insofar as the search exceeded the authorization set out in paragraph 16 it was unreasonable.

[63] Even if the former order authorized the search conducted on May 12, 2009, this Court must examine whether the manner in which the search was conducted was reasonable. This is the third factor set out at page 278 of C*ollins*, above.

[64] Evidence adduced concerning the manner in which the search was conducted leads inevitably to the conclusion that it was not done in a reasonable manner. The participation of 16 peace officers and three dogs was excessive. The close to six-hour duration of the search was excessive. The seizure of out-of-date agendas, video cassettes, CDs and any document with Arabic writing on it was excessive. The use of male officers to search through Mrs. Harkat's private drawers was unreasonable and surely not minimally intrusive.

[65] Although these measures may have been taken by CBSA in good faith, the delicate balance between the harm caused by the exercise of an intrusive state power and the justifiable and reasonable goal of the intrusion was lost. No consideration was given to the impact on the Harkats of such an obvious law enforcement presence in front of their residence for almost six hours. Indeed, the CBSA search resulted in a letter from the legal representative of the condominium board threatening legal action if the residents were found to have engaged in any illegal activities (affidavit of Clare McKennirey, May 22, 2009, Exhibit B). Little consideration was given to the dignity of the Harkats who were required to witness this excessively intrusive search into the most intimate details of their private life.

[66] Having found that Mr. Harkat was subjected to an unreasonable search, the Court must consider what, if any, remedy is appropriate in the circumstances.

Remedy

[67] Where a person's rights have been infringed or denied, subsection 24(1) of the Charter gives a court of competent jurisdiction the discretion to fashion an appropriate remedy and exclude evidence obtained as a result of the breach if the admission of the evidence would bring the administration of justice into disrepute:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[68] This Court must determine what, if any, remedy pursuant to subsection 24(1) of the Charter is owed to Mr. Harkat.

Amendment of paragraph 16 of the consolidated order setting the terms and conditions of Mr. Harkat's release

[69] In view of the nature of the search noted earlier, this Court concluded on May 14, 2009, that an immediate amendment to paragraph 16 of the consolidated order was required. Thus, as an initial response to the events of May 12, 2009, paragraph 16 was replaced and a new paragraph 16.1 was added. The amended conditions now provide:

> 16. Mr. Harkat shall allow employees of the CBSA, any
>
> person designated by the CBSA and/or any peace officer access to the residence (upon the production of identification) for the purposes of:
>
> a. verifying Mr. Harkat's presence in the residence;

b. installing, service and/or maintain such equipment as may be required in connection with the electronic monitoring equipment; or

c. ensuring that Mr. Harkat or any other person is complying with the terms and conditions of this order.

Prior to Mr. Harkat's release from incarceration all other occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new occupant shall similarly agree to abide by this term.

16.1 The CBSA shall notify the Court and obtain judicial

authorization for any entry made pursuant to paragraph 16. c) of this Order.

[70] Paragraph 16.1, in force as of May 14, 2009, requires the CBSA to apply to this Court before conducting any search of Mr. Harkat's residence. All future searches will be authorized, circumscribed, and supervised by a designated judge of the Federal Court after hearing the submissions of both the CBSA and any special advocates appointed to protect Mr. Harkat's interests in closed hearings.

Return of items seized by the CBSA

[71] Mr. Harkat is seeking an order of this Court requiring CBSA to return all items and records seized on May 12, 2009, without delay.

[72] At the hearing of the motion on June 3, 2009, counsel for the ministers sought an order permitting the CBSA to carry out investigations in relation to the material seized on May 12, 2009, before returning the material, or in the alternative, to make copies of the material (subject to privilege) and return the originals as soon as possible.

[73] In *Lagiorgia v. Canada*, [1987] 2 F.C. 28 (C.A.), a case in which documents had been seized in breach of section 8 of the Charter, Hugessen J.A., as he then was, writing for the Court stated (at pages 32 and 33):

In our view, it would be difficult to think of any more appropriate remedy for the unreasonable and therefore illegal seizure of property than to order its immediate return to its rightful owner and lawful possessor. Anything less negates the right and denies the remedy. The only circumstances which suggest themselves to us as justifying a court in refusing such an order would be where the initial possession by the person from whom the things were seized was itself illicit, e.g. in the case of prohibited drugs or weapons. While there may be other cases, there can be no doubt in our minds that when the Crown seeks, as in effect it does here, to profit from a Charter-barred seizure it bears a very heavy burden indeed (see *Re Chapman and the Queen* (1984), 46 O.R. (2d) 65; 9 D.L.R. (4th) 244; [1984] 12 C.C.C. (3d) 1 (C.A.); *Lefebvre v. Morin*, No. 200-10-000-174-83, Que. C.A., 4 February 1985, digested at J.E. 85-366). With due respect to those who appear to hold the opposite view (*Re Dobney Foundry Ltd. v. A.G. Can.*, [1985] 3 W.W.R. 626; [1985] 19 C.C.C. (3rd) 465 (B.C.C.A.); *Re Mandel et al. and The Queen*, [1986] 25 C.C.C. (3rd) 461 (Ont. H.C.)), we do not think that burden can be satisfied today by a simple assertion that the things seized are needed for a prosecution.

It is common ground here that the Charter, the supreme law of the land, has been breached. We cannot read subsection 24(1) as giving a discretion to hold that such breach may be overlooked in order to facilitate a simple prosecution for tax evasion or price maintenance.

We emphasize once again that our decision today deals only with the appropriate civil remedy for the acknowledged invasion of Charter-guaranteed rights. Nothing we say should be read as bearing in any way on whether the Crown can or should be allowed to re-seize the subject documents or to use them or the information they contain as evidence.

[74] I agree. An order requiring the return of all information, equipment and records seized from the Harkat residence as well as the destruction of any copies made thereof is the appropriate remedy for the infringement of Mr. Harkat's right to be secure from unreasonable search and seizure.

[75] The breach of Mr. Harkat's Charter rights was significant. While the CBSA may not have acted in bad faith, they acted with disregard for the terms of the former order and the requirements of section 8 of the Charter.

[76] This Court cannot condone the type of intrusive search undertaken by the CBSA. Mr. Harkat may have a diminished expectation of privacy, but that does not give the state a carte blanche to unreasonably intrude on what privacy is left to him.

[77] If the CBSA has a valid concern about Mr. Harkat's compliance with the terms and conditions of his release (for example, the report which indicates that Mrs. Harkat failed to arm the alarm system while Mr. Harkat was alone in the residence) it should seek authorization of this Court to execute an authorized and minimally intrusive search.

[78] Some of the evidence adduced concerning the Harkats' compliance with the terms and conditions of Mr. Harkat's release gives rise to a concern, on the part of this Court that the conditions are not being fully complied with. The Court wishes to remind Mr. and Mrs. Harkat of the seriousness of their situation. The conditions of release must be respected at all times. We are all human, but when one has undertaken to abide by the terms of a Court order, one must remain ever vigilant that inattention does not lead to a breach.

[79] Finally, this Court recommends that the CBSA carefully review the discretion granted to them by this Court with a view to ensuring that any interpretation they may be using is based in common sense and a respect for the privacy rights, diminished though they may be, of Mr. Harkat.

THEREFORE, THIS COURT ORDERS:

- That all information, items and records seized by the Canada Border Services Agency be returned to Mr. Harkat without delay.

- Any copies of such information, items and records are to be destroyed by the CBSA forthwith.