COURT FILE NO.: C07-CV 336613PD3
MOTION HEARD: 2009/09/11
DECISION RELEASED: December 11, 2009

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BENAMAR BENATTA

v.

THE ATTORNEY GENERAL OF CANADA et al

BEFORE: Master D. E. Short

COUNSEL:	Nicole Chrolabicius, for the Plaintiff, Moving Party	Fax: 416-533-0050
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REASONS FOR DECISION

Preamble

[1] There are very few people who were in North America on the fateful day of September 11, 2001, who cannot identify the place where they were, when they learned about that day's horrific events.

[2] Benamar Benatta was in solitary confinement in a Canadian Detention Centre, having arrived in this country on September 5, 2001.

[3] The plaintiff, Mr. Benatta apparently presented himself to a Canadian border official at the port-of-entry of Fort Erie, Ontario on September 5, 2001. At that time, he attempted to enter Canada using fraudulent identification documents intended to mislead Canadian authorities into admitting him as an American resident named Halim Kachir.

[4] The Canadian border official detected that the documents were fraudulent, albeit of a very high quality and referred the plaintiff to secondary inspection. That inspection involved a search of his luggage, which unearthed further identification documents, this time under the name Benamar Benatta, an Algerian national.

[5] The plaintiff was charged under section 403 of the Criminal Code with personation. Officials of Citizenship and Immigration Canada determined that the plaintiff should be detained pursuant to Section 103.1 of the *Immigration Act* in force at that time.

[6] The statement of defence alleges that once the fraudulent documents were detected, the plaintiff stated he intended to make a refugee claim.

[7] Later that week, the tragic events of the morning of 9/11 unfolded across the north-eastern United States.

[8] Canadian officials suspected the plaintiff had something to do with the September 11, 2001 terrorist attacks. And, on the evening of September 12, 2001, they drove the plaintiff over the border by way of the Rainbow Bridge and handed him to U.S. authorities for investigation.

[9] The plaintiff was cleared of any involvement in terrorist activity by the United States Federal Bureau of Investigation in November 2001.

[10] The plaintiff was not returned to Canada at that time, but rather he was held for nearly 5 years in prisons in the U.S. where it is alleged he suffered extreme mistreatment and was held in conditions that the United Nations Working Group on Arbitrary Detention found could be described as "torture".

[11] Eventually, the plaintiff was returned to Canada on July 20, 2006, apparently as a result of negotiations between Canadian and U.S. officials.

[12] The plaintiff commenced the present action on July 16, 2007. Mr. Benetta's claim alleges breaches of the *Charter of Rights and Freedoms* as well as breaches of customary international law. The causes of action alleged include negligence, negligent investigation and breach of statutory duty, false imprisonment, assault and battery, complicity to torture, misfeasance in public office, injurious falsehood and defamation.

[13] Sixteen months following his return to Canada the plaintiff was granted refugee status, on November 26, 2007.

[14] The statement of defence filed in November of 2008, was filed on behalf of the defendant the Attorney General of Canada and a number of entities referred to therein collectively as "Canada". Ministries and government entities, falling under "Canada" in the pleading include Citizenship and Immigration Canada, the Canadian Border Services Agency, the Canadian Security

Intelligence Service (CSIS), The Royal Canadian Mounted Police and the Department of Foreign Affairs and International Trade and their respective officials. The defendants admit that they are subject to the provisions of the *Crown Liability and Proceedings Act* of Canada. R.S.C. 1985, c. C-50.

I. Motion

[15] Eight years, to the day, after the events of 9/11, on September 11th, 2009, Mr. Benatta attended in person, with his counsel at the hearing of this motion brought on his behalf seeking an order requiring that the Attorney General of Canada prepare and serve a further and better List of Documents pursuant to Rule 30.06 (b) of the *Rules of Civil Procedure*. In response, the Crown submits that the motion ought to be dismissed.

[16] In Ontario the *Rules* deal with the obligation of parties to produce all documents relating to any matter in issue in the action, for inspection by the other party in litigation. While the Federal Crown has this obligation, special rules and requirements modify the nature of that obligation as outlines later in these reasons.

II. LEGAL ISSUE OVERVIEW

[17] In preparing these reasons I considered a number of cases identified by both counsel. The plaintiff cited the following cases in support of the arguments put to me:

1. *Bow Helicopters v. Textron Canada Ltd.* (1981) 23 C.P.C. 212 (Ont. Master)
2. *Liebmann v. Canada (Minister of National Defence)* (1994) 87 F.T.R. 154 (Fed. Ct.)
3. *Grossman et al v. Toronto General Hospital et al.* (1983) 41 O.R. (2d) 457 (Ont. H.C.)
4. *Havana House Cigar & Tobacco Merchants Ltd. v. Naeini* (1998) 147 F.T.R. 189 (Fed. Ct.)
5. *Apotex Inc. v. Wellcome Foundation Ltd.* (2003) 241 F.T.R. 174 (Fed. Ct.)
6. *Les Caisse Impact Cases Inc. v. Hardigg Cases* (2002), 22 C.P.R. (4th) 244 (Ont. Master)
7. *RCP Inc. v. Wilding* (2002) A.C.W.S. (3d) 33 (Ont. Master)
8. *Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 25 F.T.R. 226 (Fed. Ct.)

[18] Master Sandler in *Bow Helicopters* in 1981 noted that speculation, intuition and guesswork that other documents must exist will not constitute sufficient or persuasive evidence to meet the test for an order for a further and better List of Documents. Rather, as stated in *Apotex* more than 20 years later, an order for a further and better affidavit (or list) of documents will be warranted where the requesting party produces sufficient or persuasive evidence that documents exist and have not been disclosed.

[19] The courts are clear that it is not always appropriate to require the parties to commence examinations for discoveries before moving for further production. Given the importance of documentary discovery in the litigation process, it is only fair for counsel to have a full set of documents to consider in preparing for examinations for discovery. Further, a party's nominees for discovery may know little about the existence of further documents. (see *Havana House Cigar*, at para. 23 and *RCP Inc. v. Wilding* at para. 9) I note that this point would seem particularly to be relevant in this case where the Attorney General of Canada is a named defendant, but is collectively representing several government entities.

[20] The courts are also clear that the test of relevance is not a matter of an exercise of discretion, but is rather a matter of law. The principle for determining whether a document properly relates to the matters in issue in the action is that it must be one which might reasonably be supposed to contain information which may directly *or indirectly* enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences. (see *Apotex Inc.* at para. 16, citing *Reading & Bates* at p. 229)

[21] In the present case, the defendants initially failed to disclose twelve documents on the basis of relevance. The plaintiff says he only became aware of the existence of these documents because he obtained them separately through Access to Information and Privacy Act requests of the various defendant Government agencies, including the Canada Border Services Agency and Citizenship and Immigration Canada. These documents fall into a number of categories which will be examined in more detail as part of my analysis.

[22] The plaintiff submits that all these documents are clearly relevant to matters at issue in the action and should have been produced by the defendants.

[23] Counsel for the Plaintiff's factum on this motion asserts:

> "50. All of these documents mention the plaintiff by name. In fact, each document purports to describe the defendants' understanding of what transpired in and around the time that the plaintiff was transferred to U.S. officials. The plaintiff respectfully submits that this alone is sufficient to meet the test for simple relevance.
>
> 51. Further, these documents contradict the defendants' Statement of Defence in which the defendants allege that the plaintiff was "directed back" under the (then) Immigration Act. All of these documents reference the defendants' earlier explanation that the plaintiff "voluntarily withdrew" his claim for application for admission to Canada"

[24] The Crown submits that the plaintiff's motion ought to be dismissed as the plaintiff has "failed to meet the test to require a further and better 'list' of documents based on the applicable jurisprudence. That test requires him to provide sufficient or persuasive evidence to establish that other documents exist that have not been disclosed."

[25] The analysis of whether or not the test has in fact been met, and if so, what is the appropriate Order to be made, will require extensive examination of a number of elements in order to determine in my view, whether or not as a matter of law I ought to make the order sought by the plaintiff. That examination begins with consideration of the provisions of the applicable *Rule*, keeping in mind that unique modifications apply to these requiements in the case of the production of a "List of Documents" by the Federal Crown.

III. RULE 30: AFFIDAVIT OF DOCUMENTS

[26] Ontario Rule 30.03 reads in part, as follows:

> *Party to Serve Affidavit*
>
> (1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of

> documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.
>
> *Contents*
>
> (2) The affidavit shall list and describe, in separate schedules, all documents *relating to any matter in issue* in the action,
>
> (a) that are in the party's possession, control or power and that the party does not object to producing;
>
> (b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
>
> (c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.
>
> (3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document *relating to any matter in issue* in the action other than those listed in the affidavit. [emphasis added]

[27] Also relevant in the circumstances of this case is Rule 30.05 dealing with disclosure or production not being an admission of relevance:

> 30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

[28] Another rule that needs to be considered by me as a result of the specific facts of this case is Rule 30.07 dealing with documents or errors that are subsequently discovered following the delivery of an affidavit of documents:

> 30.07 Where a party, after serving an affidavit of documents,
> (a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or
> (b) discovers that the affidavit is inaccurate or incomplete, **the party shall forthwith serve a supplementary affidavit** specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. [emphasis added]

While such a Supplementary Affidavit may now be forthcoming, none had been served by the Crown as of the date this motion was argued.

[29] Ultimately the order sought is pursuant to Rule 30.06 which deals with the circumstances where an affidavit is incomplete or privilege is improperly claimed:

> 30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,
>
> (a) order cross-examination on the affidavit of documents;
>
> (b) order service of a further and better affidavit of documents;
>
> (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
>
> (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[30] Because of one of the arguments made by counsel for the Attorney General, it is appropriate to note that on January 1, 2010, subrules (2), (3) and (4)(a) will each be amended by striking out the phrase "relating to any matter in issue" and substituting "relevant to any matter in issue".

[31] Significantly in my view , Ontario Rule 30 also provides for the provision of a Lawyer's Certificate regarding information provided to the deponent of an affidavit of documents, prior to the execution of that affidavit:

> *" Lawyer's Certificate*
>
> (4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,
>
> (a) the necessity of making full disclosure of all documents *relating to any matter in issue* in the action; and
>
> (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings." [emphasis added]

IV. Issues arising from Pleadings and Disclosure to Date

[32] There were obviously a number of issues between the parties and both the discovery and trial process is likely to be protracted. One of the key issues raised by the pleadings relates to the basis upon which the defendant justifies the September 12, 2001 transfer of the plaintiff to American authorities.

[33] The defendants' Statement of Defence was served on November 4, 2008. In that document the defendants relied upon a provision of the *Immigration Act*, R.S.C. 1985, C. 1-2 (now repealed), known as the "direct back" provision as a means of arguing that there was a legal basis for the plaintiff's transfer to the U.S. on September 12, 2001.

[34] The plaintiff served a Reply on December 4, 2008, in which he disputes the "direct back" defence on both the facts and on the law. In particular, according to the Reply, the "direct back" defence runs contrary to the defendants' earlier explanation that the plaintiff "voluntarily withdrew" his claim for application for admission to Canada and thus it is asserted that the direct back argument is not credible.

[35] Counsel for the plaintiff argues that both explanations appear to be after-the-fact attempts to justify what happened to the plaintiff, giving rise to an allegation of bad faith against the defendants and further grounding the causes

of action relating to an alleged abuse of process and misfeasance in public office with regard to the treatment of the plaintiff.

[36] Whether or not those allegations will be substantiated, is not for me to decide. However, the existence of documents or lack of existence of documents relating to these issues will clearly be of importance in this case.

[37] Counsel for the Plaintiff, contemporaneously with this litigation, made requests for information under the *Access to Information Act*, R.S., 1985, c. A-1 and the *Privacy Act*, R.S., 1985, c. P-21 from various agencies of the Government of Canada.

[38] Those requests resulted in the production of various documents to the plaintiff. Several of the documents obtained were not contained on the List of Documents provided by the Attorney General of Canada. As described below, the Attorney General's position is that most of these unlisted documents were "not relevant" to the issues in this case.

V. Crown's List of Documents

[39] The Crown delivered its List of Documents on February 4, 2009.

[40] Two days later, counsel for the plaintiff wrote to request a further and better List of Documents. Counsel pointed out that the Crown had listed only 113 documents while the plaintiff had listed over 600 documents. Counsel asserted in that letter that "numerous documents that are listed in Schedule A of the plaintiff's Affidavit of Documents are missing entirely from your clients' List of Documents."

[41] The letter of counsel for the plaintiff continues:

> "Second, with respect to Schedule B, your clients do not list any documents but instead describe the documents as a class. I request that your clients list and properly describe all of the documents in Schedule B, as well as setting out the grounds for each privilege claimed. Without this information, the plaintiff is prevented from determining whether any ground of privilege claimed is outweighed by the interest in disclosure for the administration of justice.
> You note in your letter dated February 4, 2009 that you are continuing in your inquiries to ensure that you have

> obtained all relevant documents. I request that these inquiries happen on an urgent basis. I would appreciate your clients' further and better List of Documents by the end of February 2009, subject to ongoing disclosure requirements, failing which we will have no choice but to review our client's legal options."

[42] While the List of Documents contained 113 items in Schedule A, many of these items included omnibus individual entries such as "US documents-US asylum claim documents, documents relating to our legal proceedings, FBI interviews, other documents and certificates and various media articles" and "Package of RCMP Documents (as redacted)".

[43] Schedule B listed no individual or specific documents that the defendants objected to producing on the grounds of privilege, but rather set out the following general claims to privilege:

> "Solicitor-Client Privilege
>
> The Defendants object to production of all document (or portions thereof) which consist of professional communications of a confidential character passing between officers, servants or employees of the defendants or the defendants personally as the case may be, and their legal advisors, for the sole purpose of seeking, formulating and giving legal advice, or documents summarizing reflecting or directly relating to confidential legal advice given to officers, servants or employees of the defendants or to the defendants personally by their legal advisors.
>
> Litigation Privilege
>
> The Defendants object to producing documents or reports (or portions thereof), including but not limited to those which have been created or acquired in contemplation of or after commencement of this litigation and for the sole or dominant purpose of this litigation. This includes any legal opinion obtained by or on behalf of, the defendants regarding American law.

Other Privilege

The Defendants object to producing any document, or portion thereof, which raises any other privilege, including confidential third-party information or a public interest privilege whether pursuant to the *Canada Evidence Act* or any other applicable law."

[44] This boilerplate, blanket claim for privilege, without any particularity, was the subject of an objection from plaintiff's counsel within two days of the delivery of the List of Documents.

[45] In response to the February 6, 2009 request from Mr. Benatta's lawyer, counsel for the defendants denied that the defendants' List of Documents was in any way deficient, and maintained by way of a letter dated February 20, 2009 that full disclosure of all documents not subject to privilege had been made. The letter read in part:

> "As far as Schedule B is concerned, we note that you have listed no documents that are protected by solicitor and client privilege. In light of that, we assume that you are satisfied by the general language that we have used to protect that information and that no further particulars are needed. We have referred to one expert's report which is indeed privileged and to which you are not entitled particulars until such time as we decide to rely upon it.
>
> As for any other privilege, you already have in your possession the documents that we listed from CSIS and from the RCMP which contain redactions. There are no other documents over which we claim privilege that are otherwise subject to disclosure, apart from the foregoing. Those redactions are privileged by reason of the law including the Canada Evidence Act provisions."

[46] I am not satisfied that the apparent failure of the plaintiff to list specific itemized privileged documents in his Schedule B in any way disentitles the plaintiff to require a detailed schedule from the defendants (or vice versa).

[47] Addressing the issue of why some documents, obtained pursuant to freedom of information requests were not listed. Counsel for the Crown stated:

> While it is possible that you have included some documents that were disclosed to you on ATIP requests, disclosure under the Rules of Civil Procedure is guided by the criterion of relevance to the lawsuit. We consider some of the documents which you obtained in that manner and have listed not to be of *particular* relevance. (emphasis added)

[48] This submission raises questions in my mind, as I would have thought that if a document has any degree of relevance it ought to be produced. Moreover the applicable rules only require that a document *relate* to a matter in issue.

[49] At the request of defendants' counsel, on March 9, 2009, counsel for the plaintiff wrote to counsel for the defendants listing and disclosing certain documents that were missing from the defendants' List of Documents and which should have been produced. These documents had been obtained by the plaintiff through *Access to Information* and / or *Privacy Act* requests.

[50] Counsel for the plaintiff provided a listing of some 18 documents, which she asserted, "confirm that your clients have not made full documentary disclosure in the present action, as required by the Rules of Civil Procedure." She went on to assert that the existence of these documents "suggests that there are many more documents that exist, including those documents which proceed and/or follow from these documents, which our clients have failed to produce in the context of the present litigation."

[51] The March 9 letter also addressed the absence of documentation relating to the events of September 11 and 12, 2001 relating to the transfer of the plaintiff to the American authorities:

> "In addition to failing to list these relevant, non-privileged documents, your clients have also failed to list any documents in any form referencing communication of any kind between Canadian officials and United States' officials on September 11and 12, 2001, respectively, regarding the transfer of Benamar Benatta to the United States of America. In fact, your

> clients do not list any documents referencing any communications between Canada and the United States regarding Benamar Benatta in any capacity whatsoever until October 2002.
> Further, your clients have not listed any documents regarding the actual physical transfer of Mr. Benatta from Canada to the United States on September 12, 2001, including documents referencing the car that completed the transfer and the associated drivers. In fact, your clients have failed to produce any documentation sufficient to identify the various John Doe and Jane Doe defendants named in the present action, despite our repeated requests for undertakings regarding the same."

[52] On March 20, 2009, counsel for the defendants wrote to counsel for the plaintiff indicating that a number of the documents listed had not been produced because they were "not relevant" to the issues raised in the pleadings.

[53] In particular, the plaintiff has identified twelve documents that were obtained through *Access to Information* and / or *Privacy Act* requests by the plaintiff and were not produced by the defendants because the defendants did not consider them to be "relevant".

[54] The Crown's March 20 letter reads in part :

> "Thank you for yours of March 9, 2009. I wish to assure you that we have made all efforts to provide you with full documentary disclosure in this action. I will attempt to address each of your concerns.
>
> We note that most of the documents you list are briefing notes. It was our view that such notes are not relevant to the issues raised by your client's pleadings. ***Any relevance is marginal at best.*** Further the 'media lines' (documents numbered 9,10, 12,14) are not relevant to your client's lawsuit As all of these documents were produced to you in response to Access to Information requests made to our client departments, there has been no hiding of documents. If there were documents that

> preceded or followed these documents , you would also have received them.
>
> .....
>
> In response to your suggestion of 'missing documents' ..., again, we assure you that there are no such documents, apart from what has been disclosed.
>
> ....
>
> We maintain that our List of Documents is not deficient for any of the reasons you outline in your letter or for any other reason. We are of course under a continuing duty to update our disclosure and are well aware of our obligations in that regard."[emphasis added]

[55] Later in these reasons I will address separately each of the various categories of such documents as described in the affidavit filed in support of the plaintiff's motion:

> "i. Seven Briefing Notes (three apparently in draft form) to the President of the Canada Border Services Agency, variously dated in January 2006, which mention the plaintiff by name and which set out a different explanation of what happened to the plaintiff other than what appears in the defendants' Statement of Defence;
>
> ii. A Canada Border Services Agency Question Period Note, dated July 18, 2006, which mentions the plaintiff by name and which sets out a different explanation of what happened to the plaintiff other than what appears in the defendants' Statement of Defence;
>
> iii. Two Briefing Notes to the Minister by the President of the Canada Border Services Agency, which mentions the plaintiff by name and which set out a different explanation of what happened to the plaintiff other than what appears in the defendants' Statement of Defence;
>
> iv. A Canada Border Services Agency Communications Approach, dated July 25, 2006 (which appears redacted), that mentions the plaintiff

by name and provides that "proper procedures may not have been followed"; and

v. A Declaration of Michelle Hall of the Canada Border Services Agency, dated July 26, 2006, regarding an interview with the plaintiff which, by way of background, sets out a different explanation of what happened to the plaintiff other than what appears in the defendants' Statement of Defence."

[56] Counsel for the plaintiff asserts that the only document which has been disclosed that references any communication between Canadian officials and U.S. officials regarding the plaintiff appears to be an internal Canadian e-mail dated September 13, 2001, referencing a conversation between a Canadian official and a U.S. official. This e-mail was sent the day after the plaintiff was transferred to U.S. officials.

[57] Counsel for the plaintiff asserts that it does not seem reasonable that no contemporaneous documents have been listed or produced by the defendants referencing any communication between Canadian officials and U.S. officials on September 11, 2001 or on September 12, 2001, when the plaintiff was actually physically transferred to the U.S.

[58] Finally, plaintiff's counsel raises the lack of productions concerning an "internal review" previously raised in correspondence between counsel for the parties. In a letter dated August 23, 2007, counsel for the defendants indicates that the internal review into the events of September 2001 concerning Mr. Benamar Benatta is "expected to be concluded in mid-September." Despite reference to such an internal review in this correspondence, there are said to be no documents referencing the internal review in any of Schedules A, B or C of the defendants' List of Documents.

[59] I note that the present Schedule C regarding documents no longer in the Defendants' possession, control or power reads simply:

"Not aware of any such documents at this time."

[60] If such an internal review was conducted, any documents related to the review ought to be disclosed. If they no longer exist that ought to be disclosed in Schedule C. If there was no review ultimately conducted, any documents relating to the decision not to proceed with a review ought to be identified.

[61] Regardless of whether there was a Canadian review, it appears that Mr. Benatta's plight was reviewed by an American court.

VI. U.S. Proceedings

[62] While the plaintiff was being detained in the U.S., he was subject to criminal charges for possession of false documents. On September 12, 2003, the false documents charges against the plaintiff resulted in an opinion by a United States Magistrate's Judge, Magistrate Schroeder, which saw the charges ultimately dismissed. This opinion apparently was not appealed and would seem to establish the present best evidence on the matters it determines.

[63] In the course of his decision, Magistrate Schroeder noted that Canadian authorities passed on information about the plaintiff's "presence and profile" to U.S. authorities and that this communication occurred on September 12, 2001. In particular, the Magistrate found the following as facts:

> "Upon his entry, the defendant [Mr. Benatta] was detained by Canadian authorities apparently for investigatory purposes. As a result of the horrific events of September 11, 2001, **the Canadian authorities alerted United States authorities of [sic] defendant's presence and profile as set forth above and returned him to United States authorities on September 12, 2001** by transporting him across the Rainbow Bridge in Niagara Falls and turning him over to the custody of United States Immigration Officers pursuant to "The Reciprocal Arrangement Between The United States Immigration and Naturalization Service, Department of Justice And The Canada Employment And Immigration Commission For the Exchange of Deportees Between The United States And Canada" dated July 24, 1987 (at page 3 —4 of the decision; page 113 - 114 of the Motion Record). [Emphasis added.]

[64] As well Magistrate Schroeder stated:

> "I am also of the opinion that because of the events of September 11, 2001, the FBI would have been derelict in its duty if it did not pursue an investigation of the defendant after **the Canadian authorities contacted the U.S. officials on September 12, 2001.** However,

> the events of September 11, 2001, notwithstanding the heinous and despicable nature of those events, do not constitute an acceptable basis for abandoning our Constitutional principles and rule of law by adopting an "end justifies the means" philosophy. It is in this context that the rights of the defendant must be evaluated." (at page 20 of the decision; page 129 of the Motion Record). [Emphasis added.]

[65] The plaintiff's counsel questions whether it is reasonable that, despite the finding by Magistrate Schroeder "that Canadian authorities passed on information about the plaintiff's "presence and profile" to U.S. authorities and that this communication occurred on September 12, 2001, the defendants assert that there are no contemporaneous documents evidencing any communication between Canadian authorities and U.S. authorities regarding the plaintiff on September 11 or 12, 2001." Notwithstanding the unprecedented events of those days, is it plausible that virtually no written documentation would be generated or retained regarding an international transfer of a potential suspect?

[66] Similarly the defendants state that they do not have any actual documents passing back and forth between Canada and the U.S. regarding the plaintiff in 2001. Rather, the defendants have disclosed only one document which references communication between Canadian officials and U.S. officials regarding the plaintiff. This document is an internal e-mail amongst Canadian officials dated September 13, 2001, referencing a conversation between a Canadian official and a U.S. official.

[67] The email reads in part :

> "1. Re Benatta
>
> ....The subject was returned to the USA around 2130 last night. A copy of the case file was given to INS who immediately transferred it to the FBI ...."

[68] In these circumstances and in light of the United States Magistrate's findings it is my preliminary inclination to direct the defendants to "look again"; but other factors need to be considered before coming to a final conclusion on this issue.

VII. Analysis

[69] The fact that documents that were made available to the plaintiff in response to a freedom of information request, were not contained in the Crown's original List of Documents, is not comforting. There are at least six Canadian government agencies and ministries involved in this matter.

[70] The carpenter's credo is to measure twice, and cut once. Particularly in light of the un-denied events which occurred following Mr Benatta's transfer to American authorities, this practical wisdom has relevance in this case where the fair treatment of this refugee, ultimately admitted to Canada, is in issue.

[71] At the outset of the Crown's succinct and helpful factum it is asserted that the Plaintiffs motion for an order requiring the Defendant Crown to serve a further and better List of Documents ought to be dismissed, as he has not provided sufficient or persuasive evidence to establish that other documents exist that have not been disclosed. It is asserted that the allegation that the Crown's search for documents has been deficient is based largely on "speculation, intuition, and guesswork", and erroneous assumption:

> "As has been repeatedly communicated to the Plaintiff, the Defendant Crown has at all times proceeded with due diligence and in good faith. Full documentary disclosure has been made. Any suggestion that there has been an intent to conceal documents is unfounded, and only supported by the fact that the majority of the documents relied on by the Plaintiff to make his case on this motion were all previously produced to him in response to his access to information and privacy requests."
>
> .....
>
> Among other things, the Plaintiff was in Canadian custody for a very brief time before he was returned to the United States in the immediate and chaotic aftermath of the September 11, 2001 terrorist attacks; approximately 8 days from September 5 to 12, 2001. As is evident from the Defendant Crown's pleadings, very little transpired which would involve Canadian authorities between the time that the Plaintiff was returned to the United States in

> September 2001, and mid-2005 when a non-governmental organization, the Canadian Council of Refugees, intervened to advocate for the Plaintiff's return to Canada. In fact, Canada had no knowledge of the Plaintiff's alleged mistreatment in U.S. detention, and was unaware of the Plaintiff's immigration and criminal law matters during the time he spent in the United States. Any documentation relating to this relevant 5-year period would be in the Plaintiff's possession, or within his ability to obtain. The Defendant Crown has already listed the few documents that it does possess in relation to this significant period of time."

[72] Regarding the apparent lack of meaningful documentation surrounding the 2001 transfer of the plaintiff to the U.S. (apart from the one email dated September 13, 2001), it is asserted :

> "However, the Plaintiff is merely and unreasonably assuming that there must have been extensive communication between the officials around this time, and that in any event, every communication was either written or reduced to writing. As the pleadings and even the September 13th email reflect, the period following the September 11th terrorist attacks in the U.S. was quite chaotic and CIC officials were dealing with many issues that affected operations at the border, including bomb threats, an ongoing public service strike, and an indefinite shut down of refugee processing at ports of entry in Southern Ontario. In this context, the fact that there is not extensive written notation on the file does not lack credibility..."

[73] The crown also notes that there are other documents that "briefly reference contact with U.S. officials", these apparently include "a short handwritten note on file with the phone number for a person named "Mike" at the USINS, and instruction that the file needs to go back to the Peace Bridge for examination."

[74] Concerning the findings of the American Judge the Defendant's factum asserts with respect to the United States Magistrate's judgment,

> "...wherein he states that Canadian authorities 'alerted United States authorities of defendant's presence and profile and returned him to the United States authorities on September 12, 2001 by transporting him across Rainbow Bridge...' The Plaintiff suggests that this is further evidence that the Defendants have failed to disclose relevant documentation. While the Defendant Crown cannot possibly know what Magistrate Schroeder is specifically referring to, his statements are actually consistent with what is reflected in the documents disclosed by the Defendants. Moreover, the Plaintiff is again assuming that all contact between officials was written or reduced to writing. He also ignores the possibility that such documentation may be in the hands of the American authorities, not Canadian authorities."

[75] While it is conceivable that no paper record was retained, in the confusion and uncertainty of the 9/11 environment, I find that the overall circumstances described throughout these reasons raise real doubts in my mind which I feel justify my requiring a "further and better" search by the Crown entities and the delivery of a more complete List of Documents.

VIII. The Freedom of Information Documents

[76] The Crown argues in its factum that with respect to the 12 documents obtained through information and privacy requests from client departments, the Defendant Crown has provided the Plaintiff with reasonable explanations as to why these documents were not included in the Defendants' List of Documents. The defendant's position is summarized as:

> "When all is considered,... the omission of these documents do not constitute sufficient or persuasive evidence that other documents exist that have not been disclosed by the Defendant Crown."

(a) The Accidental Omissions

[77] With respect to two of these documents the Defendants have conceded that these were inadvertently omitted from the Defendants' List of Documents. Once the Plaintiff brought these two documents to the Defendants' attention inquiries were made to ascertain why they had not been disclosed. It appeared that they had not been put back on the file after the privacy representative had made copies in respect of the earlier request made by Plaintiff. Accordingly, when the file in question was copied for the purpose of disclosure in this litigation, the two documents were not included.

[78] Furthermore, the Crown reports that these two documents were from the file of a CBSA representative in Ottawa, and therefore, exercising due diligence, the Defendant Crown revisited that file and assured the Plaintiff that no further documentation had been omitted. It is thus argued that there is no reason to believe that there are other documents that have been similarly omitted, "particularly since the Plaintiff would have caught this in their review of the documents obtained through information and privacy requests."

[79] On April 24, 2009, counsel for the defendants wrote to counsel for the plaintiff explaining why these two documents which admittedly were relevant and non-privileged were omitted from the defendants' List of Documents and advised that counsel "could only assume" that they did not make their way back into the file when sent for counsel's review.

[80] Were these the only Documents omitted I might have accepted the Crown's position that adequate steps to ensure complete production had been taken. Although the fact that the documents were available through a Freedom of Information request obviously does not in any way relieve the defendant from its normal production of documents obligations

(b) The Declaration of Michelle Hall

[81] The non-inclusion of the July 2006 "Declaration of Michelle Hall" is troubling. Michelle Hall is a Regional Intelligence Officer with CBSA. The Crown's counsel advises that her Declaration was not considered relevant as it is a document prepared for the sole purpose of determining whether the Minister should intervene at the Plaintiff's refugee hearing before the IRB, which the Minister ultimately declined to do. The submission to me continues:

> "This is an entirely different process and has no bearing on the events underlying the Plaintiff's lawsuit.

> Moreover, the factual information in the declaration is taken from the port of entry interview conducted by Officer M. Saarinen, when the Plaintiff returned to Canada in July of 2006. Officer Saarinen's Declaration and Notes are disclosed at Tab 69 of the Defendants' List of Documents."

[82] I am not satisfied that the entirety of Mr. Benatta's dealings with the Canadian government are not "under the microscope" having regard to the claims including breach of statutory duty, misfeasance in public office, injurious falsehood and defamation. In the circumstances, I feel the Declaration and any similar documents ought to have been listed.

[83] While the 2006 Re-entry may not be the main subject matter of the plaintiff's action, his claims do relate to an alleged ongoing failure of the government to provide full details on how he came to be removed from Canada in 2001. I see such documents as "relating to any matter in issue in the action".

(c) The Briefing Notes

[84] The next group of previously unproduced documents causes me an even greater concern. The Crown's written submissions in this respect read:

> "16. Nine of the 12 documents obtained through information requests are *Briefing Notes* to the President of the CBSA (some in draft form), variously dated January of 2006. As indicated to the Plaintiffs Counsel in previous correspondence, **the Defendant Crown is of the view that such notes are not relevant to this lawsuit; any relevance is marginal at best**. Moreover, it was not a matter of concealing documents from the Plaintiff because these documents had already been produced to the Plaintiff by the Crown. In any event, contrary to the Plaintiff's submission these documents do not enable him to advance his case or to damage the case of the Defendants in the manner he suggests.
>
> 17. Briefing notes are internal summary documents produced for the sole purpose of keeping the President or the Minister informed of select cases.

> Staff who draft these notes have no direct involvement in, or knowledge of, the events that form the basis of the Plaintiff's lawsuit. These notes were not prepared contemporaneously with the plaintiff's return to the U.S., but years later upon his return to Canada, dealing at that time with historical facts. Their information is strictly derived from file documentation, which has already been disclosed to the Plaintiff in the Crown's List of Documents. **In any event, these documents represent each drafter's interpretation of the information on file, and their accuracy cannot in any way be guaranteed; particularly when one is looking at a "draft" marked for discussion.**" [emphasis added]

[85] I find both of the above factum extracts troubling. The test is not whether a party finds a document "relevant". Rather the question is "does it *relate* to a matter in issue"? Moreover, if the test for production in any way involves a filter for accuracy that can not "in any way be guaranteed", there would appear to be a fundamental misapprehension of the appropriate criteria for production.

[86] The Crown's factum addresses the plaintiff's assertions concerning the contents of these notes:

> "18. The Plaintiff further suggests that the briefing notes are relevant because they "contradict" the Statement of Defence in which the Crown pleads that there was legal authority for the Plaintiff's return to the United States in 2001, namely the "direct back" provision under the former *Immigration Act*. Specifically, the notes reference the Defendants' earlier explanation that he "voluntarily withdrew" his refugee claim. The briefing notes indicating that the Plaintiff was allowed to withdraw are based on information which has already been disclosed to the Plaintiff in the Defendants' List of Documents. Specifically, this refers to a September 21, 2001 email by Tim Seburn, the Enforcement Manager that was on duty the evening that Mr. Benatta was returned to the United States....

Mr. Seburn states in part:

> **On the evening of the 12th of September a decision was made to allow the subject to withdraw his application for admission under paragraph 20(1)(b) of the Act.** Niagara Detention Centre staff advised the subject had been on suicide watch since the 6th of September as he was antisocial and had refused to eat. On searching the subject prior to departing NDC it was found he had a pocket-size map of the area surrounding the World Trade Centre in his wallet. He also had an image of a scorpion on his left shoulder created by scar tissue. He was returned to the United States via the Rainbow Bridge as Queenston Bridge and the Peace Bridge were closed due to bomb threats." [emphasis added in factum]

(d) Communications Strategy / Question Period Notes

[87] The Crown's factum submissions continue:

19. However, as further indicated in the briefing notes, "there is no documentation to support this [voluntary withdrawal], such as a copy of the "Allowed to Leave" form as would normally be the case". Moreover, Tim Seburn's information in an October 8, 2002 email (disclosed at tab 33 of the Defendants' List of Documents), supports the conclusion that this actually was a legal direct back in that he indicates that the Applicant was never formally admitted to Canada and he was returned to the United States "while still under examination". The debate and confusion regarding the authority, or lack thereof, for the Plaintiffs return to the United States in 2001 is further evidenced in discussions among officials involved at the time when Mr. Benatta's return to Canada was being contemplated. [e.g. 2005 email chains].

> 20. Similar to the briefing notes, internal business documents dealing with media lines, communications strategies or question period notes are simply not probative of what transpired years earlier, and therefore are not relevant.
>
> 21. The Plaintiff is effectively seeking any document ever produced by the relevant government departments that reference him, regardless of who drafted the document and for what purpose, and its probative value to the case.

[88] In effect the Crown's position appears to be that documents summarizing information elsewhere in the files are not "documents relating to any matter in issue in the action". I disagree with this interpretation of the applicable rules and case law. Particularly where it is asserted that there are no contemporaneous documents in existence, I feel all summaries of what was available at any point in time, regardless of the present assessment of the Crown of the accuracy of such summaries, should be produced. The assessment of the probative value of such documents is for a much later stage of this proceeding.

IX. RELEVANCY

[89] The Crown cites the oft quoted words of my colleague, Master Brott in *Les Caisse Impact Cases Inc. v. Hardigg Cases*, [2002] O.J. No. 4197; 22 C.P.C. (4th) 244 :

> "[11] The parties are required to produce all documents that have a "semblance of relevancy" to the issues raised in the pleadings. The extent of "semblance of relevancy" has been discussed in numerous cases which outline that although it is a wide test, certain limitations must be imposed so as to prevent abuse of the production process.
>
> > 'At discovery a wide latitude should be permitted, but even there, there are limits. I do not interpret semblance of relevancy" as an open door to harass a party by exploring all dealings that he may be involved in. The questions must relate to relevant issues. It will be

> necessary to rule on individual questions or groups thereof because there is a limit to "semblance".' [*Kay v. Posluns*, (1989) 71 O.R. (2d) 238 (H.C.J.), per Steele J.; [1989] O.J. No. 914 (Quicklaw version)]"

[90] However it is important in my view to distinguish between the test for proper questions on discovery and the test for disclosure of documentary evidence. I envisage a narrowing funnel that is designed to permit full disclosure of what might bear on relevance at an early stage while aiming for only truly relevant evidence by the time a case reaches the trial stage. It is from this perspective that I consider Justice Steele's comments later in his reasons in *Kay v. Posluns* :

> "Relevancy
>
> Obviously, every question or line of questioning must be looked at on its own to determine if it is relevant. However, how wide should relevancy be interpreted?
>
> In *Toronto Board of Education Staff Credit Union v. Skinner* (1984), 46 C.P.C. 292 (Ont. H.C.J.), at p. 296, Griffiths J., in dealing with production of documents, stated that if the documents had a "semblance of relevancy" they should be produced. He referred to a similar test in *Re Lubotta v. Lubotta*, [1959] O.W.N. 322 (Master's Ch.), dealing with cross-examination on an affidavit filed on an originating application.
>
> It was submitted that the term "semblance of relevancy" opens the door to totally indiscriminate questions rather than what the rule allows -- namely questions "relating to any matter in issue". It was suggested that the rule permits only questions "reasonably" relevant. In so far as the scope of questioning, I believe that "semblance of relevancy" is the proper test, just as in other cross-examinations. The ultimate reasonableness of the relevant issues is for the trial judge. At discovery a wide latitude should be permitted, but even there there are limits. I do not interpret "semblance of relevancy" as an open door to harass a party by exploring all dealings

> that he may be involved in. The questions must relate to relevant issues. It will be necessary to rule on individual questions or groups thereof because there is a limit to "semblance".

[91] The *Wiktionary* (http://en.wiktionary.org/wiki/semblance) defines "semblance" as a noun meaning :

> 1. likeness, similarity; the quality of being similar.
>
> 2. Seeming; appearance; show; figure; form.

[92] I find that whether there is an "appearance" or a "similarity" to relevance, must be assessed in light of all the circumstances of a case. Here where documents were not initially produced for a variety of reasons I am not satisfied that the initial review prior to the production of the List of Documents applied an appropriately broad test, having regard to the totality of the causes of action asserted.

X. The "New" Rules

[93] As of January 1, 2010 a differently worded test for inclusion of documents in an affidavit of documents will come into force. This case was commenced under the existing Rules in 2007 and I do no believe the Crown ought to be entitled to delay matters until the new Rule comes into force in order to perhaps take advantage of what some regard as a narrower test for production for cases commenced in 2010.

[94] As noted earlier in these reasons the thrust of the change is to replace the phrase "relating to a matter in issue" with the phrase "relevant to a matter in issue". The Crown asserts that the difference between "relating to" and the narrower concept of "relevance" is captured by Mr. Justice Matlow in *Trans-Freight Systems Ltd. v. Nacora Insurance Brokers Inc.*, at para. 16 [2009] O.J. No. 3363 (Ont. H.C.), in the following example:

> "[16] This reasoning assumes that there is a difference, albeit subtle, in substance, between relating to any matter in issue in the action and relevant to any matter in issue in the action. For example, a letter might refer to some underlying fact in issue (and thereby relate to

> them) without being of any probative value to the determination of the facts (and thereby being not relevant)."

[95] How often has a court formed a judgment because an email or letter conflicted with oral testimony? If a draft letter could clearly be used in this way on a cross examination at trial, can it be said to be without "any probative value to the determination of the facts" ? Can counsel at the outset of a case properly elect not to disclose the existence of such material? I would hope not.

[96] The above quotation from Justice Matlow, I believe, needs to be considered in the context of the surrounding paragraphs in his judgment:

> **"12** Although I agree with the Master's disposition of the various issues raised and with the final result of the motion, I respectfully disagree with her statement about "the starting point for the production of documents is whether they have a semblance of relevance".
>
> **13** In my respectful view, the starting point, in the context of this case, is rule 30.04(1) which provides, in part, that a party has the right to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents. The obligation of the other party, pursuant to rule 30.03(1), includes the obligation to disclose all documents *relating to any matter in issue in the action* that are or have been in the party's possession, control or power.
>
> 14 This means that any document disclosed in an affidavit of documents as *relating* is subject to being produced for inspection. It does not matter, therefore, whether or not the document is *relevant to any matter in issue in the action*. Its inclusion in the affidavit of documents, as *relating*, is all that is required.
>
> 15 Nor, for the same reason, does rule 30.05 which provides, in part, that disclosure in an affidavit of documents "shall not be taken as an admission of its relevance or admissibility" have any impact on the outcome of the present case. *Relevance,* at this point, [is] not required. *Relating* is all that is required.

> 16 This reasoning assumes that there is a difference, albeit subtle, in substance, between *relating to any matter in issue in the action* and *relevant to any matter in issue in the action*. For example, a letter might refer to some underlying facts in issue (and thereby *relate* to them) without being of any probative value to the determination of the facts (and thereby being not *relevant*).
>
> 17 In the alternative, I would agree with the Master's view that the inclusion of the documents in issue in the appellant's affidavit of documents acknowledges that they are relevant to matters in issue in the action and I would interpret rule 30.05 to mean that the inclusion or production of such documents should not be taken as an admission of their relevance only at subsequent stages of the proceeding. Rule 30.05, by its terms, refers only to the period after disclosure or production of a document is made." [i.e. " **30.05** *The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.*"] [emphasis added].

[97] I am concerned that in the future, the rule changes in this area may be seen as a licence by some counsel to tailor their productions so as to exclude documents clearly relating to matters in the dispute but which they regard as inaccurate or not reliable and thus in their view not required to be disclosed as such documents are viewed from their perspective as not "relevant".

[98] In this case Crown counsel has been frank and forthright before me and I do not intend to impugn their conduct in any way by the foregoing observation.

[99] In my view, while patently extraneous material can be ignored, full, true and plain disclosure of documents having any bearing on issues in a case ought to continue to be the court's expectation.

[100] The Crown also points to the comments of Master MacLeod in *Filanovsky v. Filanovsky,* [2009] O.J. No. 919 in which he recently discussed related policy issues (particularly with respect to discovery *questions*) in the following terms:

"Public Policy

> **17** Unless a question is relevant, the court should not order it to be answered. The spiralling costs of uncontrolled discovery have been examined in recent years by two separate studies. The Discovery Task Force chaired by Hon. Mr. Justice Colin Campbell was followed more recently by the Civil Justice Reform Project chaired by the former Associate Chief Justice of Ontario, the Hon. Coulter Osborne. The recommendations have now been given form in rule amendments that will come into force at the beginning of next year. One of those amendments will change the wording of Rule 31.06(1) from "relating to any matter in issue" to "relevant to any matter in issue". The purpose of that is to make clear that the test is relevance and not a remote possibility of relevance. This will be combined with other discovery reforms such as specific introduction of proportionality as a criterion in making discovery orders, a presumptive cap on the time allowed for discovery and the need for counsel to agree on a discovery plan. I am not of course suggesting that specific rule amendments be given effect before they come into force nor do I intend to interpret those amendments in advance. My point is simply that two task forces and now the Rules Committee have stated that unnecessary discovery should be avoided. This very clear direction should inform the exercise of discretion with or without the rule amendments.
>
> **18** If the proposed discovery questions are not supported by allegations in the pleadings and appear to be only a fishing expedition, the court ought not to order the questions be answered."

[101] Fishing expeditions will continue to depend on the viewpoint of the beholder. This metaphor is more than somewhat overworked. In the British Columbia Supreme Court in 2000, Thackray J. noted in *College of Opticians of British Columbia v. Moss*, [2000] B.C.J. No. 1825; 2000 BCSC 1343; 99 A.C.W.S. (3d) 505:

> "7 The College says that this application by the respondents is "inappropriate, frivolous and unnecessary." It also says that it "is a documentary fishing expedition." In reply, the College submits that the respondents "should not be given a license to fish, since there is no evidence that there are any fish in the College's pond."
>
> 8 It has become tiresome to hear about fishing expeditions, what bait is used and what is or is not in the pond. Further, there is nothing legally or inherently wrong with a fishing expedition. Every attempt by a party to obtain evidence, whether oral or documentary, can be described as a fishing expedition. The fishing expedition analogy has run its course and should be assigned to the depths.
>
> ....
>
> **11 ...Even if the issue is one of statutory interpretation, it might be that the documents in question will be relevant to that interpretation."** [emphasis added]

[102] On an examination for discovery a greater degree of an evidentiary foundation for lines on questioning may well be required in the new environment. Counsel required to consider and advise on documentary evidence at the early stages of litigation, in my view should err on the side of disclosure until or unless developing case law establishes a different direction.

[103] In any event, in this case the existing rules apply and I am holding that with respect to documentary production those rules ought to continue to apply through to the completion of trial unless a higher court rules otherwise in the future.

[104] In its factum the Crown concludes:

> "24. The plaintiff is essentially looking for documents and information that simply do not exist based on his unsubstantiated theory of what occurred and what evidence there should be, based on his own theory of the case. Moreover, there is absolutely nothing to establish an

> intent on the part of the Defendant Crown to hide documents. This is only supported by the fact that the documents relied on by the Plaintiff to make his case on this motion were all previously produced to him in response to his access to information and privacy requests."

[105] I again wish to make it explicitly clear that I am not finding any intent by the Crown to "hide" documents. This is a complex and difficult matter and I simply want to ensure that no stone has been left unturned.

[106] I see no reason why the crown out not to be obliged to have some representative attest to the completeness of the documentation and to the instructions given to the various clients to ensure that they will undertake the disclosure of all documents in their possession, control or power that relate to any issues in this litigation.

XI. *Re Harkat*

[107] Because of the importance of the issues in this case I have taken a protracted period to reflect on the arguments put by both sides. During that time, developments in other cases took place which caused me further concern. In particular the Judgment of the Associate Chief Justice of the Federal Court was released October 15, 2009 in *Harkat (Re),* [2009] F.C.J. No. 1242; 2009 FC 1050.

[108] Chief Justice Noel delivered an Order and Reasons in relation to a proceeding which took place at the initiative of the Court to review the circumstances that apparently "led to a failure by the Ministers to disclose information concerning the reliability of a human source to the Court and to the special advocates" relating to polygraph information regarding the evidence of a covert government source.

[109] I recently provided counsel with an opportunity to comment on the relevance of this decision which was released subsequent to the argument of this motion.

[110] The Crown's supplementary submissions regarding *Harkat* address the significant differences in the facts of these two proceedings:

> "In contrast, the matter presently before the Court involves a civil action for damages by Mr. Benatta against the Attorney General, particularly in relation to the department of Citizenship and Immigration. The Attorney General's obligation to provide disclosure is governed by the Rules of Civil Procedure and applicable jurisprudence, not by the security certificate regime. In further contrast to *Harkat* and as reflected in our pleadings and list of documents CSIS (and the RCMP) had limited involvement with Mr. Benatta, largely consisting of background checks conducted after Mr. Benatta's return to the United States....
> Unlike in *Harkat* there is nothing to suggest that documents have been withheld or "filtered". With respect, reliance on the Crown's failure to produce relevant documents in *Harkat;* in order to conclude that relevant evidence has not been produced by the federal Crown in the present litigation would constitute impermissible speculation, which is not a basis for ordering a further and better list of documents."

[111] With respect, the fact that documents such as the Briefing Notes were deemed to not be required to be produced suggests to me that at least some filtering took place. While I do not suggest that there has been any wrongful failure to produce any relevant evidence, I do think that it is not unreasonable to raise a concern that some further producible documents may well exist.

[112] In my mind, in light of the case law and the facts in this case, I have concluded that there is in fact, a basis for ordering a further and better list of documents.

[113] My conclusion in this regard is admittedly at least slightly driven by the concerns raised in *Harkat.*

[114] In that case, Justice Noel's stated objective was to address the concerns that the Court had in relation to each witness, and to include some comment on the role played by CSIS as an institution. Because of the importance of the issues raised in the proceeding before him, his reasons were written without reference to any sensitive information. The reasons thus have received broad public exposure and I believe need to be considered in the particular circumstances of this case.

[115] The substance of his findings and conclusions are contained in the following paragraphs:

> "44 What is clear from the evidence of the three witnesses and from the documents filed as exhibits to this hearing is that witnesses A, C and R should not bear all of the blame for what appears to be, on the facts before me, in part, an institutional failure of CSIS. Individuals asked to testify on behalf of CSIS in support of the reasonableness of the certificate must continue to cope with their daily workload. They are not accustomed to testifying as witnesses and they come to the Court with all of their professional baggage. *Most importantly, their counsel was not given access to information which would have enabled him to provide them with appropriate legal advice.*"[emphasis added]
>
> 45 This situation is unacceptable. CSIS must ensure that the witnesses they call to testify are properly educated about the function they are being asked to undertake; they must be thoroughly prepared by legal counsel; they, and their counsel, must have all the necessary factual information available to them; and, they must have the consent and backing of CSIS when they are asked to make important decisions about the proceeding.
>
> 46 From the evidence presented to this Court in June and July 2009, it appears that a handful of CSIS employees were asked to make important decisions for the purposes of this proceeding (such as deciding on the content of a human source matrix) without proper advice or support.
>
> 47 This lack of support and the institutional concern over releasing human source information, even to its legal counsel and persons asked to testify in support of certificate proceedings, led, in part, to the non-disclosure of information that goes to the reliability of a human source relied on by CSIS to support its case against Mr. Harkat."

XII. Responsibility of Counsel

[116] In *Harkat* Justice Noel addresses the difficulties faced by counsel in cases such as the one before him. Admittedly, I am not dealing with a case with the same complexities of those faced in Mr Harkat's case but many of the same agencies have involvement in both cases.

[117] The court notes:

> "48 This Court has, in an earlier order, recognized the importance of human source information to Canada's national security and the need to protect the identity of sources (see *Re Harkat* 2009 FC 204 par. 24). The importance of human sources to intelligence gathering is not in question. However, when human source information is used to support serious allegations against an individual, the Court and the special advocates must be able to effectively test the credibility and reliability of that information. This is consistent with the decision of the Supreme Court of Canada in the *Charkaoui* decisions (see: *Charkaoui* v. *Canada* [2007] 1 S.C.R. 350 ("*Charkaoui 1*") and *Charkaoui* v. *Canada* 2008 SCC 38 ("*Charkaoui 2*")) and with the legislative purpose underpinning the amendments providing for the appointment of special advocates. To conform to the law, CSIS and the Ministers must give the Court all of the information necessary to test the credibility of the source and not just the information that a witness, trained as an intelligence officer, considers operationally necessary.
>
> 49 CSIS must also ensure that nothing prevents its legal counsel from fulfilling his role as legal advisor to CSIS or his ability to act as officer of the Court. A lawyer has an obligation to represent his client to the utmost subject to an overriding duty to the Court and to the administration of justice. Without access to all the information available, counsel is unable to effectively advise his or her client and is unable to ensure that the administration of justice is being served. It is also clear that despite his best efforts, counsel for CSIS has been

overwhelmed by the magnitude of this file. Adequate administrative and legal resources must be dedicated to these complex and time consuming files.

50 The evolution of the security certificate proceeding post *Charkaoui 1* and *Charkaoui 2* requires the Ministers to adapt to the requirements of the law as propounded by the Supreme Court of Canada and as set out by Parliament. Counsel representing the Ministers must thoroughly understand the evolving jurisprudence and law and be able to adequately prepare CSIS employees who have been asked to appear as witnesses before the Court. The rule of law cannot be set aside because of a lack of time, resources or institutional resistance to the evolving context of security certificate proceedings. CSIS employees must now testify in Court in the presence of special advocates. This is the new reality. The evidence of these witnesses must be given keeping in mind the rule of law, the judicial process, the role of special advocates and the obligation to ensure that their testimony is frank and transparent.

51 The Ministers' decision in relation to what evidence must be adduced should not be left in the hands of a legally inexperienced witness. A process must be put in place to insure that decisions are made after a proper consultation with all stakeholders and upon receipt of legal advice. Such a process must be followed by the institution and its employees." [emphasis added]

XIII. Dealing with Terror

[118] The new Director of CSIS took office was while my decision was under reserve. His publicly reported comments remind us all of the need to protect against terrorist threats. However, the liberty that we are seeking to protect needs, as well, to ensure that the rights of every individual are appropriately protected.

[119] A press story by Ian MacLeod, published in *The Ottawa Citizen* on October 30, 2009 under the headline, "*Canada oblivious to terror danger: CSIS boss*", reported that in his first public speech since becoming the Director of CSIS, Richard B. Fadden criticized "those he believes ignore, minimize and even applaud terrorism and the people caught up in it, while portraying government efforts to combat extremism as assaults on liberty."

http://www.ottawacitizen.com/news/Canada+oblivious+terror+danger+CSIS+boss/2159557/story.html

[120] The article reports that Mr.Fadden spoke at an Ottawa conference of about 300 security and intelligence specialists and contains statements ascribed to Mr. Fadden including:

> "Almost any attempt to fight terrorism by the government is portrayed as an overreaction or an assault on liberty. It is a peculiar position, given that terrorism is the ultimate attack on liberties,"
>
> "Why ... are those accused of terrorist offences often portrayed in media as quasi-folk heroes, despite the harsh statements of numerous judges?"
>
> "I ... am not arguing that those accused of offences should be portrayed as guilty," Fadden added. "In fact, a more balanced presentation is what I am hoping for."

[121] There are no allegations of any terrorist act done by the plaintiff. Nevertheless, CSIS is one of the parties represented by the Crown in this action. Each Crown agency must deal with its portion of the required disclosure. A fair and balanced consideration of the concerns and obligations of each defendant agency and ministry is what I am seeking by this judgment. With that goal in mind, I believe that this court must consider the societal context in which these procedural matters must be addressed.

[122] The following extracts from the *Citizen* article and quotations reflect the concerns of many Canadians:

> "But I have to ask bluntly: can those who downplay the seriousness of terrorism claim to be protecting our civil liberties? Judges presiding in the trials of

terrorism suspects have not followed this reasoning at all.

"Terrorist offences are the most vile form of criminal conduct. They are abnormal crimes ... They attack the very fabric of Canada's democratic ideals ... Their object is to strike fear and terror into citizens in a way not seen in other criminal offences."

"I would argue, however, that security is a human right. Security and rights are not in opposition, but are intertwined like DNA strands. Together they form part of the genetic code of modern citizenship. People around the world yearn for both civil liberties and security, and have a right to both. People come to Canada to enjoy a high level of political, economic and religious freedom. They also come to Canada to avoid the impunity and arbitrary limits on those freedoms that are, sadly, commonplace in many parts of the globe. Security and human rights are not matter and anti-matter. They are compatible, and inseparable."

[123] I am concerned about the need to be able to effectively fight terrorists who ignore any rules that get in their way while still protecting the way of life and the Rule of Law we seek to defend.

[124] Mr Fadden's reported comments highlight these issues and their consequences:

"Switching issues, Fadden said Canada's "turbulent legal environment," with increased emphasis in individual rights and freedoms through legislation, legal trends and evolving jurisprudence was changing the way CSIS operated.

"The legal ground has shifted under our feet, and this tenuous new environment has had profound implications on how we work at every level."

When the service was created in 1984, it had a single legal counsel. Today, there are 26 counsel and 18

> support staff. In all, 80 CSIS employees are focused on legal issues.
>
> On a related front, Fadden recalled the service's dilemma in the recent security certificate case of suspected terrorist Adil Charkaoui. A Federal Court this month killed the government's case against the Montreal man after government lawyers refused to reveal their detailed evidence against him, citing national security concerns.
>
> The disclosure demand, "pushed us beyond what we could accept," Fadden said. "We were faced with a pretty fundamental dilemma: to disclose information that would have given would-be terrorists a virtual road map to our tradecraft and sources; or to withdraw that information from the case, causing a security certificate to collapse.
>
> "We chose the path that would cause the least long-term damage to Canada and withdrew the information. We did this because an intelligence agency that cannot protect its sources and tradecraft cannot be credible or effective."

[125] The purpose of my order is to ensure proper disclosure of all relevant documents. The provisions of the *Canada Evidence Act* provide the legislatively established means for any of the defendants in this case to protect their sources and tradecraft. But the grounds need to be stated, if they are relied upon.

XIV. Reflection and Analysis

[126] My concern in the circumstances of this case is to ultimately ensure a fair trial for both sides. I want to avoid the dilemma described by Noel, A.C.J. regarding the Court's need to be able to rely upon all parties to have done their utmost to ensure a full and proper record of all relevant evidence is presented:

> "65 To proceed as though this situation had not occurred is impossible. Evidence of a failure to disclose relevant evidence which may negatively affect the Court's determination of the reliability of a

> human source has been put before the Court. The explanations provided by the three witnesses have not convinced the Court that all of the relevant evidence is before it. Indeed, the evidence before the Court leads to the conclusion that the information filed in support of the certificate by the Ministers has been "filtered" and that undertakings made to the Court have not been fulfilled.
>
> 66 Filtering evidence, even with the best of intentions, is unacceptable. Failing to properly fulfill undertakings made to a Court of law is equally unacceptable.
>
> 67 And so, the Court is currently faced with a situation in which the integrity of its processes has been undermined."

[127] I have carefully considered the circumstances of this case and the arguments put forward by counsel for the Crown in endeavouring to justify the "completeness" of the existing List of Documents. In my view, there are sufficient doubts in my mind raised by the entirety of the matters discussed in these reasons, to require a further and better, and a more complete List to be delivered. That being the case, an analysis of the manner of preparation of that new document now needs to be addressed.

XV. *Crown Liability and Proceedings Act*

[128] The applicability of Section 21 of the *Crown Liability and Proceedings Act* needs to be considered at the outset:

> *Concurrent jurisdiction of provincial court*
>
> 21. (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

Where proceedings pending in Federal Court

(2) No court in a province has jurisdiction to entertain any proceedings taken by a person if proceedings taken by that person in the Federal Court in respect of the same cause of action, whether taken before or after the proceedings are taken in the court, are pending. *R.S.C. 1985, c. C-50, s. 21; R.S.C. 1985, c. 40 (4th Supp.), s. 2; S.C. 1990, c. 8, s. 28; S.C 2001, c. 4, s. 45.*

[129] It is my understanding that there are no proceedings in the Federal Court pending with regard to the claims of Mr. Benatta. As a consequence, the Superior Court of Ontario has jurisdiction with regard to the subject matter of this claim.

[130] A 1991 regulation, which continues in force deals with the delivery of a "List of Documents". In particular, the *Crown Liability and Proceedings Act, Crown Liability and Proceedings (Provincial Court) Regulations,* SOR/91-604 (P.C. 1991-2030 24 October, 1991) provides as follows in section 8:

"8. (1) Subject to sections 37 to 39 of the Canada Evidence Act, where the Attorney General or an agency of the Crown would, if the Crown were a private person, be required under the provincial rules to file or serve a list or an affidavit of documents, the Deputy Attorney General shall, *subject to the same conditions as apply between subject and subject,* file or serve a list of the documents relating to the matter of which the Crown has knowledge within 60 days after the event that under the provincial rules gives rise to the obligation to file or serve the list or affidavit, or within such further time as may be allowed by the court. [emphasis added]

(2) Where, under provincial rules, a party would be entitled to obtain production for inspection of any document or a copy of any document as against or from the Crown, if the Crown were a private person, such production for inspection or copy may be had, subject to

> sections 37 to 39 of the Canada Evidence Act, under order of the court after consideration has been given to any objection that would be available to the Crown if the Crown were a private person.

[131] Thus, apart from the special rules of these Acts or the Regulations, the federal Crown has, by statute, subjected itself to the ordinary procedure of the Court. Master Beaudoin, as he then was, came to this conclusion in *Proctor v. Canada*, [2000] O.J.No.658.

[132] Master MacLeod also addressed this issue in his decision in *Logan v. Harper* , [2003] O.J. No. 4098. In that case, he noted that Mr. Justice Nordheimer had referred to the *Proctor* decision (without overruling it or deciding the issue) in a case dealing with the obligations of the Crown in the Right of Ontario regarding production of documents. In *Mazumder v. Ontario* [2000] 0.J. No. 4793, he determined that the provincial legislation governing proceedings against the Crown in the Right of Ontario has more specific language permitting a list of documents to be "signed by the Deputy Attorney General" to be provided rather than a sworn Affidavit of Documents.

[133] In Ontario, the seriousness of the duty to produce a meaningful list of documents is reflected in this requirements of Section 8 (c) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c.- P.27 :

> Discovery
>
> 8. In a proceeding against the Crown, the rules of court as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,
>
> (a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;
>
> (b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Attorney General; and

> (c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, **but a list of the documents that the Crown may be required to produce, signed by the Deputy Attorney General, shall be delivered.** [emphasis added]

[134] In *Logan*, Master MacLeod noted that while he was not bound by Master Beaudoin's decision of three years earlier, that decision was not appealed and the federal government had not amended the regulations in response. Similarly, the decision of Master MacLeod requiring a sworn affidavit was not appealed.

[135] As noted above, under the *Rules of Civil Procedure* of Ontario, a party is obliged to serve on every other party an affidavit of documents. The required form of such an affidavit is provided for in the Forms mandated by the rules.

[136] At paragraph 20 of his reasons in *Logan* Master MacLeod notes:

> "Even had I reached the conclusion that the Deputy Attorney General need not provide a sworn list of documents, I would still conclude that the list of documents must be certified as complete and be accompanied by the certificate of the solicitor of record. I would also hold that the list of documents must comprise a properly particularized schedule A, B & C. There is nothing in the legislation that modifies the requirement "subject to the same conditions apply between subject and subject" of disclosing all relevant documents in the government's possession, power or control over which it does not claim privilege, the documents over which privilege is claimed and the nature the privilege; and relevant documents which were in its possession, power or control but are no longer. Whatever the form of the document certifying disclosure, subject to the special statutory privileges, the requirement of production is the same as for any litigant."

[137] It does not appear that the decisions in *Logan*, were the subject of comment in many subsequent cases. However, Mr. Justice Carnwath did deal with a similar issue in a case before him in 2004. In *Hallstone Products Ltd. v. Canada (Customs and Revenue Agency)*; 71 O.R. (3d) 373, he addressed a number of issues including:

> "Did the Master err in ordering a sworn affidavit of documents, as well as a certificate of solicitor in compliance with rule 30.03 (4) and Form 30 B?"

[138] He canvasses the decisions of Master Beaudoin and Master MacLeod referred to above, and notes that in his view Master Beaudoin "seized" on the words "subject to the same conditions as apply between subject and subject" in support of the Master's conclusion that the Federal Crown had to comply with the provincial procedure, that is, the furnishing of an affidavit of documents.

[139] Justice Carnwath, determined that,

> "With respect, I find *Proctor* and *Logan* to be wrongly decided. The section makes it clear the Crown is to file or serve a list of documents relating to the matter of which the Crown has knowledge within 60 days. If the intention was to require the Crown to file or serve an affidavit of documents, it would have been simple enough to say so. However, the sentence continues to make it clear that the obligations of the Crown are restricted to filing or serving a list of documents which, "under the provincial rules give rise to the obligation to file or serve the list or affidavit".

[140] Justice Carnwath goes on to hold that:

> "This reference to the provincial rules makes it clear, I find, there is a difference between the obligation on the Crown and on others."

[141] While admittedly the phrase "affidavit of documents" is omitted from the requirement of the document to be delivered by the Crown, nevertheless, without the guidance of this binding authority it would have seemed to me that such a determination would mean that the same conditions do

not apply as between subject and subject, with the non-governmental party being placed at somewhat of a disadvantage. In any event, my responsibility is to follow the guidance of the higher court.

[142] The disadvantage of which I was concerned was somewhat ameliorated by the direction of Justice Carnwarh that the Schedule B to be delivered by the Crown was to contain a disclosure of the public interest protection, which applied to each specific document.

[143] In its supplementary submissions on this point the Crown argues:

> "In our respectful submission the decision of Mr. Justice Carnwath in *Hallstone* is binding, and the Attorney General's List as produced in this litigation is entirely consistent with the Justice's interpretation of the Regulation. A sworn affidavit from the federal Crown is not required, nor is a Lawyer's certificate that he or she explained the necessity of making full disclosure, as otherwise required by the Rules."

[144] With respect this is not in accordance with my reading of the *Hallstone* decision.

[145] In particular Justice Carnwath held:

> "I agree with the Master that the document should be properly described so the court can make a determination whether the interest of disclosure for the administration of justice is outweighed by the specific public interest in nondisclosure. The Master found that no such determination could be made with the vague descriptions provided in support of the public interest privilege. He found, and I agree, that the defendants asserted their claim for public interest protection as a class. The statement in *Carey v. Ontario* [1986] S.C.R. 637, [1986] S.C.J. No.784 at p.655 S.C.R., that "generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success" should be applied in the circumstances of this case."

[146] Having made that determination earlier in his reasons, Justice Carnwath directed that a new Schedule B prepared by the Crown in accordance with the direction contained in the Masters reasons. Importantly, he then directed that the solicitor for the Attorney General shall certify the Schedule B as follows:

> "I certify I have listed in Schedule "B" those documents that are or were in the possession, control or power of the Attorney General of Canada and the Canadian Customs and Revenue Agency, and that they object to producing because they claim they are privilege, and I have stated in Schedule "B" the grounds for each such claim."

[147] Form 30B provides the required text of an affidavit of documents. While a sworn affidavit apparently is not required from the Crown, I believe the text applicable in a normal commercial case is a useful guide for cases such as this. In the case of a corporation, the deponent is to state their position and to confirm that they have conducted a diligent search of the corporation's records and made appropriate inquiries of others in order to make the affidavit. The affiant is required to confirm that the listed documents disclose, "to the full extent of my knowledge, information and belief, all documents relating to any matter in issue in this action that are or have been in the possession, control or power of the corporation."

[148] As noted above, the affidavit in Form 30B contemplates as well a Lawyer's Certificate in which counsel certifies that they have explained to the deponent:

> (a) the necessity of making full disclosure of all documents relating to any matters in issue in the action; and
>
> (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

[149] It is my view that the court should strive, subject to the direction contained in the decision of Justice Carnwath, to place the plaintiff in this case it as nearly an equal position as would be the case in a "subject to subject" litigation.

[150] That being the case, I think that it is reasonable to require counsel to provide a certificate in the form contemplated by Justice Carnwath, but for all of Schedules A, B and C.

[151] I see no reason why a similar certificate should not be provided with regard to the totality of Schedule A documents for each "client" ministry and agency represented by the Department of Justice in this case. As well, a completed Schedule C with respect to any documents that are no longer in a possession, control or power of the Attorney General's defended parties, again would be of probative value.

[152] In the federal system, each department will have a deputy minister or other individual with similar overall responsibilities for the administration of each ministry or agency.

[153] The Deputy Minister is the person responsible for the administration of each department of government as a consequence each relevant department or ministry in whose name or on whose behalf the Attorney General of Canada has appeared in this matter will need to have the responsible Deputy Minister or his or her designate consult with counsel for the Attorney General of Canada to provide appropriate assurances to permit counsel to deliver the requite certificate(s).

[154] In my view, the essential core of the solicitor's certificate is that the solicitor advised each responsible senior official of their responsibilities with respect to the disclosure of all appropriate documents: Justice Carnwath's decision, by which I am bound, deletes the requirement of an affiant, but in my view maintains a requirement of both comprehensive and detailed lists and a solicitor' certificate. Where there is no affiant, the solicitor must therefore certify that she or he has properly advised the relevant Deputy Minister or the person a Deputy Minister has appointed to bc responsible for delivery of all relevant documents in any particular case.

XVI Conclusion

[155] There may well be not one further document to be disclosed by the Crown Defendants. The process I am directing will give both the Court and the Plaintiff the comfort of knowing that the entire universe of existing documents regarding Mr Harkatt's claims has been identified.

[156] In its recent supplementary submissions responding to my request for submissions regarding this issue the Crown stated:

> "Finally, as part of its continuing obligation to search out and disclose documents, the Attorney General has determined **that it will be filing a 'further and better' list of documents for the following reason**. It has been determined that documents in addition to the 'Greg Modler e-mail' that were disclosed to the plaintiff pursuant to one of his Access to Information requests and listed in Schedule A of **his** Affidavit of Documents were not listed in the Attorney General's list of Documents and should have been. **We stress that these documents (roughly *150)* are not new or additional to those already produced by the plaintiff. [emphasis added]**

[157] The Crown's supplementary submissions conclude:

> "We emphasize that this acknowledgement of our continuing obligation, consistent with our position at the motion, does not alter our position that the plaintiff failed to meet the test to require a further and better 'list' of documents based on the applicable jurisprudence. That test requires him to provide sufficient or persuasive evidence to establish that other documents exist that have not been disclosed."

[158] Counsel for the plaintiff seeks a more complete list of all properly producible documents and concludes its supplementary submissions :

> "The plaintiff respectfully submits that his case provides the model for why the rule of law must be followed by the Government, particularly in the face of crisis. While it is a human reaction to panic in the face of a horrific event like the events of September 11, 2001, our Governments cannot give in to the panic but must instead ensure compliance with the rule of law. To entirely disregard the laws of the land in a time of crisis has most drastic consequences for innocent people, innocent people like the plaintiff in the within action who was swept up in the panic, driven over the U.S. border in the night and handed over to U.S. officials on September 12, 2001 with dire results."

[159] This case arose out of difficult times and my decision has not been an easy one. I wish to stress that in no way am I critical of the actions of Crown counsel throughout this matter. Counsel for both sides addressed the issues in a highly competent and professional manner as skilled officers of the Court. To a degree these remain uncharted waters. I hope these reasons will be of assistance to those who have to address similar questions in the future.

[160] Ultimately, it is my conclusion that the totality of the circumstances in this litigation, at this point in Canada's history, establish "sufficient" and "persuasive" grounds to find that the List of Documents as originally delivered was deficient in form and substance. A further and better List of Documents addressing the concerns raised in these reasons needs to be prepared and delivered.

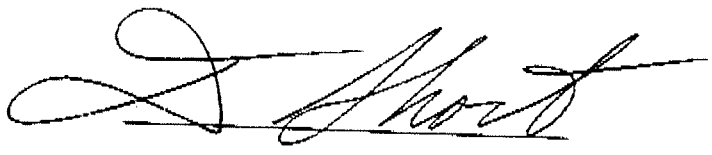
[161] The parties submissions regarding costs should be in accordance with the annexed schedule to these reasons.

[162] For the above reasons I am requiring that the Attorney General of Canada prepare and serve a further and better List of Documents pursuant to rule 30.06 (b) of the *Rules of Civil Procedure,* which document shall be served by on or before, February 1, 2010.

[163] In making the order for service of a further and better List of Documents, the Court directs that the List of Documents must be certified as complete, accompanied by a certificate of the solicitor of record as described in these reasons with respect to the compliance of all three Schedules with the normal requirements for Affidavits of Documents in Ontario.

DATE: December 11, 2009

DS/15



Master Donald E. Short

COSTS SCHEDULE:

If the issue of costs cannot be resolved on agreement between the parties, I order the following timetable for the delivery of written costs submissions:

1. from the plaintiff, a costs outline, maximum three pages in length inclusive of schedules and appendices, shall be delivered by not later than Monday December 21, 2009.

2. responding costs submissions, maximum three pages in length inclusive of schedules and appendices, shall be delivered within 20 days of receipt of the costs outline; and

3. a reply, if needed, maximum two pages in length inclusive of schedules and appendices, shall be delivered within 7 days of receipt of the responding submissions.

The plaintiff shall deliver all written costs submissions in one complete package within 10 days following the delivery of the responding costs submissions, and in any event by no later _Monday February 8, 2010, directly to my registrar, Heather Strange in the Case Management Office, 393 University Avenue, 6th Floor, Toronto, Ontario.

In the event that I do not receive costs submission in accordance with the above timetable by February 22 .2010, there shall be no costs of the motion to either party.