Summary of arguments in Charkaoui, Harkat and Almrei appeals by the intervener composed of a coalition of the Canadian Council for Refugees, the African Canadian Legal Clinic, the International Civil Liberties Monitoring Group, and the National Anti-Racism Council of Canada

Section 15 – right to equality

Discrimination on the ground of citizenship - Non-citizens, including racialized non-citizens, have historically suffered disadvantage and vulnerability, as courts have recognized. Non-citizens have been particularly susceptible to repressive measures in times of insecurity. The security certificate provisions in the immigration legislation, with their low procedural standards, apply only to non-citizens. There is no justification for this distinction between citizens and non-citizens in addressing security threats.

While non-citizens do not have a right to enter and remain in Canada as citizens do, they have the protection of other Charter rights, including the right to fair treatment when their life, liberty or security of the person is threatened.

Application of security certificates provisions is discriminatory

The security certificates are used in a context where there are prevailing stereotypes about certain religious and racialized groups, specifically Muslims and Arabs. As a result there is a disproportionate impact on Arabs and Muslims and the use of the certificates perpetuates the stereotypes. The three appellants are all Arab Muslims.

Applying an equality lens to other Charter rights

In analyzing other Charter rights, it is essential to apply an equality lens. This means ensuring that there is one law for all and that we take account of the reality of racism in Canada.

Section 7 – right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

Fundamental justice requires procedural fairness. The kind of procedures required must take into account the potential consequences of being subject to a security certificate, including prolonged detention and the threat of deportation to a risk of torture.

The right to fundamental justice must be applied in a non-discriminatory way and in respect of international human rights law. This means taking into account the reality of racial stereotyping.

Section 12 – Right not to be subjected to cruel and unusual treatment or punishment

The detention provisions related to security certificates impose a treatment that is grossly disproportionate, in violation of s. 12. The measures impose on a disadvantaged and vulnerable minority prolonged detention, sometimes in isolation, of indefinite duration. Those subject to this detention have not been convicted of any offence.

Section 1 – Rights subject only to limits demonstrably justifiable in a free and democratic society

Recourse to criminal law should constitute the preferred law enforcement response to national security concerns. The rights violations involved in the use of security certificates cannot be justified. The

rights infringements are not rationally connected to the goal of protecting security: the law is so broad in scope that certificates can be issued where there are not even any allegations of security threat. Where there is a risk, the severity of the rights infringements is disproportionate to the gravity of the risk. It is not rational to target measures at non-citizens when citizens can also represent a security threat.

Alternatives
There are viable alternatives to security certificate provisions that the government could use:

i) Criminal prosecutions
A wide range of offences exist under the *Criminal Code*, including a wide range of incompleted crimes (such as threats and conspiracies) and crimes committed outside Canada The *Anti-Terrorism Act* added in 2001 a further preventative focus to the law. Criminal prosecutions provide for much better protections of individual rights than security certificates, including right to presumptive release, standard of proof of "beyond a reasonable doubt" and right of appeal. Most importantly, the right of the accused to a fair trial severely restricts the use of undisclosed evidence.

In relying primarily on immigration measures rather than prosecutions to address suspicions of terrorism, Canada is failing in its international obligations and is not pursuing a rational strategy given the global nature of security threats.

ii) Special advocate "plus" for immigration security procedures
If there continue to be immigration procedures for addressing national security concerns, such procedures should be strictly limited to cases involving allegations of actual threats to Canada's national security interests and should be designed to accord with natural justice, the requirements of the *Charter* and international law.

Such mechanisms would include five key elements: (i) a prohibition on the use of *in camera, ex parte* procedures except in circumstances where the government has clearly demonstrated a legitimate national security interest; (ii) the right to effective legal representation including measures, carefully tailored on a case-by-case basis, to protect to the greatest extent possible, the client's right to respond to the government's case; (iii) the substitution of the current "reasonable grounds to believe" standard used in the review of immigration security certificates with a more rigorous standard that is the equivalent of the civil balance of probabilities; (iv) presumptive release with clear restrictions on the use and length of detention; and (v) access to judicial review and a further right of appeal consistent with the general rules for judicial review in *IRPA*.

Regarding legal representation, special advocate procedures in the United Kingdom have been the subject of significant criticism. Once the special advocates have reviewed the privileged material, they can no longer communicate with the person affected, thereby limiting the person's ability to effectively challenge the government's evidence. There are other models, such as procedures adopted in the Federal Court rules and in the recent "Air India" trial which suggest that a "special advocate plus" model can be designed allowing the individual's own counsel to review the privileged evidence based on an undertaking not to disclose its contents to the client or anyone else.