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Ernst Zundel Sues Canada for \$10 Million: Full Documents



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Imprisoned artist and writer demands compensation for illegal two-year detention without charge in solitary Hellhole.

by Paul Fromm

THE ZUNDEL CASE remains alive in Canada. On November 1, All Saints Day, his lawyer Peter Lindsay filed a \$10 million Statement of Claim in Federal Court for gross violations of Mr. Zundel's Charter Rights. The German publisher seeks an order that the relevant sections of the Immigration and Refugee Protection Act -- secret hearings, anything can be received in evidence, lack of appeal, and unlimited detention in horrific solitary confinement -- are egregious violations of Mr. Zundel's rights under the Charter of Rights and Freedoms and, therefore, these sections of the law are "not saved by section 1 of the Charter and [are] thus of no force or effect pursuant to section 52 of the Constitution Act, 1982."

The indomitable freedom fighter, Ernst Zundel, and his tenacious lawyers are not giving up. We continue to need your help: Please send contributions to help Ernst Zundel's defence to CAFÉ, Box 332, Rexdale, ON., M9W 5L3, Canada or email us your VISA number and expiry date.

A copy of Mr. Zundel's claim follows:

FEDERAL COURT

B E T W E E N: ERNST ZUNDEL Plaintiff - and -

HER MAJESTY THE QUEEN Defendant

CLAIM

1. The Plaintiff claims for:

a) a declaration that the entire legislative scheme in sections 77, 78, 80, 81, 82 and 83 of the Immigration and Refugee Protection Act, S.C. 2001, c.27, as amended (the "Act"), under which the plaintiff was imprisoned without charge and eventually deported to be jailed in Germany based on the allegation by the Minister of Citizenship and Immigration and the Solicitor General of Canada that he was inadmissible to Canada on grounds of security, violates sections 7, 9 and 10(c) of the Charter of Rights and Freedoms, is not saved by section 1 of the Charter and is thus of no force or effect pursuant to section 52 of the Constitution Act, 1982;

b) a declaration that the detention of the plaintiff in solitary confinement at the Toronto West Detention Centre and subsequent deportation pursuant to a security certificate under the Act was both unlawful and unconstitutional;

c) general damages in the amount of \$10,000,000.00;

d) costs of this action; and

e) such further and other relief as this Honourable Court deems just.

2. The plaintiff was a permanent resident of Canada with no history of violence, no criminal record and no outstanding criminal charges against him in Canada. On May 1, 2003, a certificate was issued by the Minister of Citizenship and Immigration (the "Minister") and the Solicitor General of Canada certifying the plaintiff to be a danger to the security of Canada.

As a result, there were proceedings before Mr. Justice Blais of the Federal Court to determine whether the certificate was reasonable. If it was found to be reasonable, the plaintiff was to be deported to Germany and jailed for denying the Holocaust. While the proceedings before Mr. Justice Blais dragged on for many months, the plaintiff was jailed in solitary confinement at the Toronto West Detention Centre. Once the certificate was upheld, Mr. Zundel was forthwith deported to Germany, where he had been jailed since. The plaintiff hereby challenges the constitutionality of sections of the Act, under which (a) the certificate was issued (b) he was arrested, detained and deported and (c) the proceedings before Mr. Justice Blais occurred.

3. The plaintiff was a 65 year old permanent resident of Canada who started living in Canada in 1958. He has faced repeated unsuccessful prosecutions for expressing his unpopular views about the Holocaust. He has received death threats. There have been documented attempts to kill him, including an incident in which his house was largely destroyed by arson and an incident in which a pipe bomb was sent to him by mail.

4. In 2000, Mr. Zundel moved to the United States. Mr. Zundel was later deported back into Canada by the United States on February 19, 2003, on the alleged grounds that he had missed an immigration appointment. In fact, he had not missed an appointment and his American lawyer had been trying to reschedule the appointment due to a scheduling conflict for the lawyer, when Mr. Zundel was arrested. There was no allegation that Mr. Zundel had been involved in any illegal or terrorist activities in the United States or elsewhere. The FBI does not believe that Mr. Zundel is a terrorist.

5. The Minister of Citizenship and Immigration (the "Minister") detained Mr. Zundel in custody from February 19, 2003 until May 1, 2003, when the Solicitor General of Canada (the "Solicitor General") and the Minister signed a certificate (the "Certificate") declaring Mr. Zundel, a permanent resident of Canada, as inadmissible to Canada on grounds of security for reasons described in paragraphs 33 and 34(1) (c), (d), (e) and (f) of the Act. On May 1, 2003, the Solicitor General and the Minister also issued a warrant under section 82(1) of the Act for the arrest and detention of Mr. Zundel.

6. In May, 2003, the Honourable Mr. Justice Blais of the Federal Court thereafter began proceedings reviewing the reasonableness of the Certificate pursuant to sections 77(1), 78 and 80 of the Act. Justice Blais eventually upheld the reasonableness of the certificate.

7. The review of Mr. Zundel's detention pursuant to section 83 of the Act had been considered by Mr. Justice Blais, and had stretched on for almost two years without bail. (It is interesting to note that from about 1985 to 1992, Mr. Zundel was on various bail orders for his "false news" case and followed all of those orders.)

8. The "evidence" presented by the Minister and the Solicitor General at the proceedings before Mr. Justice Blais consisted of 5 volumes mainly of newspaper articles, other articles, website printouts, and similar materials written by people not called by the Minister or the Solicitor General as witnesses. Most of this "evidence" was unsworn hearsay which was not subject to cross-examination. Interestingly, the Minister and Solicitor General successfully objected when Mr. Zundel called an actual witness who referred to hearsay.

9. At times, the source of the documents in the 5 volumes presented by the Minister and the Solicitor General was not even been explained to the Court. For example, on September 23, 2003, counsel for the Minister was cross-examining Mr. Zundel about a document. The Court asked counsel about the source of the document and did not get an answer. Instead, counsel simply continued questioning Mr. Zundel about other matters.

10. The quality of the evidence in the documents sometimes went like this: Mr. Zundel allegedly had "sporadic contacts" with a now-dead U.S. based white supremacist named William Pierce (date, time, place and nature of contacts unspecified). Pierce wrote a book called "The Turner Diaries" (no suggestion that Mr. Zundel had anything to do with writing the book). Timothy McVeigh loved "The Turner Diaries", in which it supposedly describes a bombing similar to the Oklahoma city bombing in 1995, for which McVeigh was convicted (no evidence that Mr. Zundel ever had contact of any kind with Mr. McVeigh).

This supposedly linked Mr. Zundel to violence or terrorism.

11. A significant part of the proceedings before Mr. Justice Blais consisted of a lengthy cross-examination of Mr. Zundel, which could be described as "wide-ranging". That cross-examination took up part or all of six days. Among the many different topics discussed were far-ranging things such as Mr. Zundel's view of Adolf Hitler's view of interracial couples, which Mr. Justice Blais indicated was an important question.

12. No *vive voce* or affidavit evidence was presented by the Minister or the Solicitor General in the public part of the proceedings before Mr. Justice Blais.

13. Information and/or evidence was secretly presented to Mr. Justice Blais in the absence of Mr. Zundel and his counsel, which information and/or evidence was used according to the Act to determine both whether Mr. Zundel should continue to be detained and whether the issuing of the Certificate was reasonable. Where secret information and/or evidence was presented to Mr. Justice Blais, sometimes a summary was given to Mr. Zundel and his counsel. Usually no summary of the information and/or evidence was made available to Mr. Zundel and his counsel, even though the information and/or evidence was used according to the Act both to determine whether Mr. Zundel should have continued to be detained and whether the

issue of the certificate was reasonable. This happened repeatedly, at every stage of the proceedings.

14. On February 24, 2005, Justice Blais upheld the security certificate.

15. Shortly thereafter, Mr. Zundel was deported to Germany where he has since been jailed. The defendant caused Mr. Zundel to be deported despite Mr. Zundel's repeated request that such deportation not take place until the constitutionality of the legislation under which he was being deported had been determined by the highest court of the land, the Supreme Court of Canada.

16. In fact, at every turn of the proceedings, the defendant has deliberately or negligently used every mean to do the following: (a) frustrate all the efforts Mr. Zundel made to seek adjudication on the merits the constitutionality of the legislation at issue by any court of law; and in the meantime, it (b) imposed the effect of such legislation on Mr. Zundel, such as deportation, with undue haste.

17. The defendant did so with full knowledge or with callous disregard that the reasonably foreseeable consequence of their actions above would be to cause Mr. Zundel colossal damages arising from his hasty deportation which can neither be mitigated against nor reversed. The deportation has cost him damages including loss of his freedom and loss of his right to reside in Canada and all the benefits and privileges incidental thereto.

18. The defendant could have co-operated procedurally and expedited the determination of the constitutionality of the legislation at issue. It did the reverse.

19. Even now, after the Supreme Court of Canada has determined that the constitutionality of the legislation at issue is a matter of public importance and has granted leave to hear Adil Charkaoui's challenge thereof, the defendant accelerates its tortious conduct by attempting to foreclose the plaintiff's claim herein based on the very Charkaoui decision by the Federal Court of Appeal which the Supreme Court of Canada wishes to review, and perhaps reverse. The defendant is attempting to have this claim frustrated or somehow buried before the Supreme Court of Canada decision in Charkaoui in fear that such decision may be unfavourable to the defendant.

The defendant will suffer no prejudice if it waits for Supreme Court of Canada's determination on the validity of the security certificate legislation on or about June, 2005 before having this claim adjudicated. A basic sense of fairness requires no less.

20. The issues in Charkaoui that are before the Supreme Court of Canada are identical to the issues herein, ie, the constitutionality of the security certificate legislation. The Supreme Court of Canada's decision in Charkaoui will be a complete answer to this claim. The defendant now attempts to never allow this answer to be revealed and then this claim adjudicated based on properly constituted laws of Canada, as determined by the Supreme Court of Canada.

21. When the plaintiff attempted to bring his constitutional challenge before Justice Blais or any other courts, including the Ontario Superior Court, Ontario Court of Appeal and the Supreme Court of Canada, the defendant opposed them as all improper. The defendant claimed that a federal court action is the only proper route. As a result of the defendant's position, the plaintiff's constitutional challenge herein had never been dealt with on its merits by any courts.

22. Once the plaintiff started this action, being the course the defendant insisted as the proper forum, the defendant changed its position and again attacked the action as improper. Before Justice Blais rendered his decision, the defendant characterized this claim as a collateral attack on the security certificate review process. After Justice Blais rendered his decision, the defendant now say that the this claim is moot, an attempt to relitigate and an abuse of process. Thus, the defendant insisted on the action to the exclusion of all other forums and then tried to frustrate the action as inappropriate once it started.

23. The defendant owes Mr. Zundel a duty of care and good faith. Such duties have

been breached. The defendant's actions are a blatant, abusive and improper use of its powers and office. Mr. Zundel is entitled to and indeed seeks damages pursuant to common law and s. 24 of the Charter.

(A) The Statutory Scheme Under the Act and How It Works

24. The Act, S.C. 2001, C.27, which primarily came into force on June 28, 2002, represents the first complete revision of immigration legislation in Canada since 1978. It replaces the Immigration Act, R.S.C. 1985, C. 1-2, as amended. Section 3(3) (d) of the Act provides that the Act must be construed to ensure that decisions under the Act are consistent with the Charter.

25. Section 77 of the Act, which can lead to the removal of a person from Canada, is triggered by the Minister and the Solicitor General signing a certificate stating that someone, who is either a permanent resident or a foreign national, is inadmissible on grounds of (a) security, (b) violating human or international rights, (c) serious criminality, or (d) organized criminality. The certificate is required to be referred to the Federal Court for determination of whether it is reasonable. Section 78 of the Act sets out the following provisions which "govern" the judge's determination.

26. The judge shall, on the basis of the information and evidence available, determine, inter alia, whether the certificate is reasonable. The judge shall quash a certificate if the judge is of the opinion that it is not reasonable (section 80 of the Act).

27. The determination of the judge is final and may not be appealed or judicially reviewed. If a certificate is determined to be reasonable under section 80(1), it is conclusive proof that the permanent resident or foreign national in it is inadmissible and it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing (see section 81).

(B) Relevant Provisions of the Act - Fairness and Natural Justice

28. Section 78(c) of the Act purports to inject "fairness" and "natural justice" into the Certificate review and detention review proceedings. It provides that "the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit".

(C) Secret Proceedings Allowed by the Act

29. The principles of fairness and natural justice include the principle that one party should not be allowed to give evidence to the decision maker in the absence of the other party. The Supreme Court of Canada strongly so held in the pre-Charter *Kane v. University of British Columbia*. It is worth noting that the interests at stake for Kane (a 3 month suspension from his job) are clearly less than those at stake for Mr. Zundel - deportation. (*Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 at pages 6-8)

30. The principles of "fundamental justice" contained in section 7 of the Charter clearly include principles of natural justice plus more, as found by the Supreme Court of Canada. (Reference re Section 94(2) of the Motor Vehicle Act [1985] 2 S.C.R. 486 at pages 10-12.)

31. Section 78(b) of the Act, which allows the judge to "hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person", allows for secret proceedings.

Section 78(b) thereby denies the person named in a certificate even the most basic entitlement to fairness, natural justice and thus, based on the Reference re Section 94(2) of the Motor Vehicle Act case, "fundamental justice".

32. Section 78(b) of the Act further allows the secret proceedings to happen repeatedly, "on each request of the Minister or the Solicitor General of Canada". This provision exacerbates the denial of fairness, natural justice and thus fundamental justice. Such repeated secret proceedings took place in this case.

33. Section 78(b) of the Act further allows the repeated secret proceedings to occur "at any time during the proceedings", thereby further exacerbating the denial of fairness, natural justice and fundamental justice. It is a fundamental principle of our adversarial judicial system that one party presents its case fully and then the other party responds, knowing the case it has to meet. What has happened in this case is that after the Minister and Solicitor General presented their case and while Mr. Zundel was in the middle of presenting his response, the Minister and Solicitor General have secretly presented more of a case against Mr. Zundel. The additional case being presented is not limited to reply evidence. It is not limited at all. The case can secretly change in any way while being responded to. Mr. Zundel and his counsel do not know if it has changed in this case. Neither does this Honourable Court. It is not an overstatement to say that this is completely contrary to the fundamental principles of our judicial system.

34. To the extent that summaries of secret proceedings may be provided to the person named in the certificate and his or her counsel, the chance to have a mere summary after the fact does not undo the unfairness and denial of natural justice and fundamental justice caused by proceeding in the absence of the person and his or her counsel in the first place. Moreover, such summaries were not provided in relation to most of the secret proceedings in the Zundel security certificate case.

35. Section 78(i) of the Act provides that "the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility". The right to be heard in section 78(i) is an illusory right, taken in the context of a process which allows for information and/or evidence to be used which is introduced in the absence of the person named in a certificate and of his or her counsel throughout the proceedings.

36. There is another different way to look at the significance of the repeated secret proceedings permitted by the Act. In particular, the Act raises the issue of whether the inequality between the parties created by the secret proceedings destroys the appearance of independence and impartiality of the designated judge. It is inconsistent with the appearance of independence and impartiality of a judge for that judge to have ex parte communication with one party and to make decisions on materials which are not disclosed to the other party, while appearing at the same time maintaining the appearance of independence and impartiality and of doing justice between the parties.

37. The effect of ex parte relations between one party and the bench has already been explored in Canada and such relations have been treated seriously. For example, in *Canada v. Tobiass*, two judges of the Federal Court had had ex parte communication with a representative of the Attorney General of Canada in a hearing about revoking Tobiass' Canadian citizenship. The communication was about the slow pace of the proceedings.

The Supreme Court of Canada held that the contact caused damage to the appearance of judicial independence and directed that the two judges have nothing more to do with the case. By contrast, the Act allows the designated judge to have ex parte communication with the representatives of the Minister and Solicitor General about not the pace of proceedings, but rather about the far more important fact of introducing secret evidence.

The designated judge then determines the reasonableness of the certificate based in part on the secret evidence. The Act flies in the face of the principles enunciated in *Canada v. Tobiass*. (*Tobiass v. Canada* [1997] 3 S.C.R. 391)

(D) "Anything" Can Be Evidence

38. Section 78(j) of the Act allows the judge to "receive into evidence anything that,

in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence".

39. Section 78(j) of the Act apparently allows anything to be used - articles, hearsay, double hearsay, triple hearsay. The evidence does not have to be given under oath or solemn affirmation. It does not have to be subject to cross-examination in order to test it. There are no meaningful limits.

40. As a result, in the proceedings before Mr. Justice Blais, Mr. Zundel faced mountains of hearsay "evidence" which is not sworn and not subject to challenge through cross-examination, thereby denying him any basic entitlement to principles of fairness and fundamental justice.

(E) Low and Uncertain Standards of Proof

41. Section 80 of the Act does not require the judge to determine whether the person is actually a danger to national security, but simply whether the Certificate is reasonable (a clearly lower standard). For example, if the judge concludes that the person is not a danger to national security but that others (such as the Minister and Solicitor General) could disagree (and have disagreed) with that conclusion, the judge is required to find the Certificate reasonable and the Certificate becomes a removal order, which is not subject to appeal.

42. Section 80 of the Act does not even specify the standard of proof with respect to whether the certificate is reasonable, that is, whether proof is on the balance of probabilities, or, perhaps more appropriately, given the severe consequences if the Certificate is found to be reasonable, beyond a reasonable doubt. Section 80 also does not clearly state who has the onus of proof.

43. In making a decision under section 80 of the Act, the judge must (in a security grounds case) consider section 34 of the Act, which defines the circumstances in which a permanent resident is inadmissible on security grounds. The criteria in section 34 of the Act are very broad. For example, a person who has assaulted his wife and child by slapping them is caught by section 34(e) for "engaging in acts of violence that would or might endanger the...safety of persons in Canada".

[Note that Mr. Zundel is not saying that "being a danger to the security of Canada" is unconstitutionally vague - The Supreme Court of Canada held that it was not in relation to the former Immigration Act in *Suresh v. Canada* [2002] S.C.J. No. 3 at page 29]

44. Section 33 of the Act then expands section 34 to provide that facts underpinning a finding of inadmissibility under section 34 may "include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur". Section 33 thus allows for speculation about things that might happen to be a basis for a finding of reasonableness (not correctness) under section 80, leading to deportation of a person.

(F) No Reasonable Bail

45. Section 82(1) of the Act provides that the Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal. Section 83(1) of the Act provides that not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 of the Act applies with respect to the review, with any modifications that the circumstances require. Section 83(2) of the Act provides that the permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize. It does not, however, require that the first detention review be concluded within the six months

time limit. In this case, the first detention order was issued on January 21, 2004, more than eight (8) months after the plaintiff's s. 82 detention began.

(G) No Appeal or Judicial Review

46. Section 80 of the Act provides that "the determination of the judge [as to the Reasonableness of the Certificate] is final and may not be appealed or judicially reviewed". Section 81 of the Act provides that a determination that the Certificate is reasonable is conclusive proof that the person named is inadmissible and is a removal order not subject to appeal. As well, the person may not apply for protection, such as the protection offered to a convention refugee (see section 96 of the Act). So the person may be deported to a place where the person has a "well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion".

47. If a certificate is found to be reasonable after the fundamentally flawed and unfair process which includes secret proceedings and "anything" in the way of "evidence", then the plaintiff is completely denied the most basic right of appeal to a higher court (or even judicial review).

48. The lack of a right of appeal or judicial review heightens the appropriate concern about the other previously-described failings in the Act (secret proceedings, "anything" as "evidence" etc). The Supreme Court of Canada has held that greater procedural protections will be required where, as here, no appeal procedure is provided within the Statute, or when the decision is determinative of the issue and further requests cannot be submitted. (*Suresh v. Canada* [2002] S.C.J. No. 3 at page 34)

49. While the person named in a certificate found to be reasonable has no appeal or review rights, if a certificate is quashed as being unreasonable, the Crown can (and has in the past) issued a new certificate and started the entire unfair process again. For example, Mahmoud Jaballah came to Canada from Egypt. A certificate was issued in 1999 and was found to be unreasonable: see *Jaballah v. Canada* [1999] F.C.J. No. 1681 (T.D.). A second certificate was issued in 2001, based on additional evidence, some of which supposedly contradicted evidence given in the hearing with respect to the first certificate: see *Jaballah, Re* [2003] F.C.J. No. 822 (T.D.) The second certificate was held to be reasonable. By contrast, there is no mechanism for the person named in a certificate to have a second "kick at the can" if that person later obtains evidence to contradict evidence given in a hearing in relation to a certificate found to be reasonable.

(H) Applicability of Charter Protection to Proceedings Under the Act

50. There is a threshold question as to whether and to what extent section 7 (and other sections of the Charter) apply to proceedings under the Act. The current solitary confinement of Mr. Zundel in the Toronto West Detention Centre pursuant to the Act clearly engages his "liberty" interest as protected by section 7. The potential removal of Mr. Zundel, a permanent resident, from Canada against his will clearly engages his "liberty" and "security of the person" interests as protected by section 7.

51. The engagement of section 7 is also affected by the impact of deportation on the particular individual. Therefore, the fact that there was an outstanding warrant for Mr. Zundel in Germany and that, he was jailed in Germany for acts of denying the Holocaust, which acts have not been successfully prosecuted in Canada because of Mr. Zundel's right to freedom of expression, militates in favour of engaging section 7 in this case.

52. For the above reasons, the process against Mr. Zundel under the Act engaged his rights under section 7 (and other sections) of the Charter, and had to therefore comply with the principles of fundamental justice.

(I) Constitutional Violations In This Case

53. The entire above described process, with its provisions for secret evidence,

"anything" being used as evidence, low and uncertain standards of proof, no reasonable bail and no appeal or judicial review violates the principles of section 7 of the Charter, which guarantees everyone the "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". The proceedings under the Act were completely contrary to the principles of natural justice, which is part of fundamental justice.

54. The legal rights contained in section 8-14 of the Charter are examples of the principles of fundamental justice referred to in section 7. Thus, in considering section 7 in this case, the Court may consider the principle in section 11(e) of the Charter that a person is "not to be denied reasonable bail without just cause", notwithstanding that section 11 itself does not directly apply to Mr. Zundel because he is not "charged with an offence". The above - described problems with the detention review process and the fact that it has taken more than six months to complete a detention review both violate the right not to be denied reasonable bail without just cause. The above described process also violated the protection in section 9 of the Charter against "arbitrary detention", for the reasons already discussed. Mr. Zundel also relies on his right under section 10(c) of the Charter which provides that "everyone has the right on arrest or detention...to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful". Mr. Zundel's detention was unlawful both under the Charter as discussed and also under the Act because of the lengthy delay of over six months in completing an initial detention review.

55. The process set out by the Immigration And Refugee Protection Act for determining whether the allegation that Mr. Zundel was inadmissible to Canada on grounds of security was reasonable violated Mr. Zundel's rights under sections 7, 9, and 10(c) of the Charter. It allowed (a) the Crown to repeatedly introduce secret evidence against Mr. Zundel at any time in the absence of Mr. Zundel and his lawyers, (b) "anything" (literally "anything" under the Act) to be used as evidence against Mr. Zundel - sworn or not, hearsay, double hearsay, triple hearsay - "anything" without limits, (c) low and uncertain standards of proof, (d) no reasonable bail and (e) no appeal or review of the court's decision.

56. The Federal Court has dealt with a constitutional challenge to the provisions in section 40.1 of the former Immigration Act, which are somewhat similar to the provisions in section 77 and following. The case is *Ahani v. Canada* [1995] F.C.J. No. 1190 (T.D.), *affd* [1996] F.C.J. No. 937 (C.A.), application for leave to appeal to S.C.C. dismissed. The decision in *Ahani* is a) distinguishable; b) wrong; and c) not binding on this Court.

57. The decision in *Ahani* is distinguishable from the *Zundel* case for a number of reasons, including the following:

a. Mr. *Ahani* was not a permanent resident like Mr. *Zundel* (let alone a resident for over 40 years). Mr. *Ahani* was a refugee. This distinction is critical because of the constitutional rights given to permanent residents facing deportation (see paragraph 63 hereof). It was also critical in the mind of the trial judge in *Ahani*, as referred in paragraph 16 of the judgment in *Ahani*.

b. The judge in *Ahani* was dealing with a statute where permanent residents had a greater entitlement to disclosure than foreign nationals. That is no longer the case. Section 77 and 78 do not distinguish between permanent residents and foreign nationals on the issue of disclosure of evidence, which means that the procedural rights of permanent residents have now been decreased.

c. The judge in *Ahani* found that *Ahani*, unlike *Zundel*, was deliberately not pursuing a hearing on the reasonableness of the certificate because he did not want to be deported. *Ahani's* complaints about detention and delay were seen in that context. (see paragraph 20 of the judgment)

d. The Court in *Ahani* dealt with an expectation that the detention of the person will not be lengthy. It was not the case. *Ahani* was detained for over two years. Mr.

Zundel had been detained for over nine months at the time of the habeas corpus application.

e. There were additional steps after the certificate against Mr. Ahani was found to be reasonable before he could be deported. There were also a number of appeal rights. By contrast, in the case of Mr. Zundel, pursuant to section 81(b) of the Act, a finding that the Certificate is reasonable becomes a removal order. Without a right of appeal, the extra step required and appeal rights given to Ahani are important because the Supreme Court of Canada has said that the finality of the decision and lack of rights of appeal or judicial review in a matter increases the procedural protections which are required (see paragraph 61 of this factum).

f. Evidence was called on behalf of the government in Ahani which was relied on in considering the Charter issue (see paragraph 11). There was no such evidence in this case.

g. There was no issue raised in Ahani about the right not to be denied reasonable bail without just cause under section 11(e) of the Charter. That section is in issue in the case of Mr. Zundel.

58. The decision in Ahani is wrong for a number of reasons, including the following:

a) The Court in Ahani held that relaxed evidentiary standards benefitted the parties (paragraph 21). In our adversarial system, the litigants should have some input into the decision of what benefits them. Mr. Zundel is not benefitted by the unacceptably loose standards of evidence being applied in his case.

b) The Court in Ahani mistakenly concluded that the parties had the right to make submissions as to what should be disclosed (paragraph 20).

c) The Court in Ahani effectively presumed that the Ministers are right and says bail is never appropriate (paragraph 23). Even the Act now provides for bail, at least for permanent residents.

59. In *Suresh v. Canada* [2002] S.C.R. No.3, the issue was the constitutionality of the process by which a Minister issued an opinion under section 53(1)(b) of the former Immigration Act that Suresh was a danger to the security of Canada. Section 53(1)(b) of the Act was upheld. However, it was found that Suresh was, in the circumstances of his case, entitled to a new deportation hearing. There are a number of important points about Suresh, including the following:

- Prior to the ministerial decision, Suresh had already had 50 days of hearings on the reasonableness of a certificate under section 40.1 of the former Immigration Act (paragraph 13). That was followed by a second deportation hearing, which led to the conclusion that Suresh would be deported on grounds of membership in a terrorist organization. (paragraph 14). The ministerial decision in issue then followed.

- The section 53(1)(b) opinion could be appealed to the Federal Court, Trial Division with leave (paragraph 31). Mr. Zundel has no such appeal rights.

- For section 7 purposes, a deprivation of liberty which is foreseeable and can only occur after deportation occurs engages section 7 Charter rights (paragraph 54). This is relevant to the German arrest warrant for Mr. Zundel.

- The greater the effect in the life of an individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under section 7 of the Charter (paragraph 118). Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this fact militates in favour of heightened procedures under section 53(1)(b). This is helpful to Mr. Zundel.

- The Court held that "fundamental justice requires that an opportunity be provided to respond to the case presented by the Minister" (paragraphs 121-122). This is very helpful to Mr. Zundel, since it directly references what has been denied him.

The Suresh case is thus readily distinguishable from the case at bar.

60. In *Canada v. Chiarelli* [1992] S.C.J. No., the Supreme Court of Canada upheld the constitutionality of the statutory scheme providing for the deportation of a permanent resident on conviction of a serious criminal offence. A number of points should be made about Chiarelli:

- It dealt with a fundamentally different issue - the deportation of a permanent resident convicted of a criminal offence for which a term of imprisonment of five years or more may be imposed. Mr. Chiarelli had been convicted of uttering threats to cause injury and possession of a narcotic for the purpose of trafficking. There was also evidence that he "was a member of a criminal organization which engaged in extortion and drug related activities, and further that the respondent personally took part in the extortion and drug related activities of the organization."

- There was also a question about whether a hearing before the then Review Committee, which was partly ex parte, was in accordance with the principles of fundamental justice. Chiarelli received summaries of all ex parte evidence and an opportunity to cross-examine in camera witnesses.

Mr. Zundel has received neither. Chiarelli case is also readily distinguishable from the case at bar.

61. In *Ruby v. Canada* [2002] S.C.R. No. 73, the issue was secrecy in the context of proceedings about disclosure of files maintained about Ruby by CSIS and the RCMP, among others. That is nothing like the deportation of a long term permanent resident under the Act. Mr. Ruby was not facing the prospect of deportation from Canada. In *Ahani v. Canada* (2002) 208 D.L.R. (4th) 57 (S.C.C.), a non-permanent-resident was challenging different provisions in the repealed Immigration Act. This decision was thus readily distinguishable. Neither of these cases speak to the applicability of s. 7 to a long term permanent resident.

62. A comparison of the above cases with the one herein is annexed hereto as Schedule "A".

(J) Can Any Charter Violations be Justified Under Section 1 of the Charter?

63. If Charter violations exist with respect to the statutory framework complained of, then the defendant must meet the onus of justifying the violations under section 1 of the Charter. The section 1 test is set out as follows in the leading case of *R. v. Oakes*. The test is set out in *R v. Oakes* (1986) 24 C.C.C. (3d) 321 at pages 24-25 (S.C.C.) and *R.J.R. MacDonald Inc. v. Canada* [1995] S.C.J. No. 68 at page 84.

64. It is conceded that the objective of the impugned provisions of the Act is of sufficient importance to meet the first point of the Oakes test. The second part of the Oakes test, however, is not met, especially the requirement that the means chosen to protect "national security" should impair "as little as reasonably possible" the rights or freedoms in question. Put bluntly, the court must not get carried away, in difficult times, with the buzzword "national security" and thereby countenance broad and overreaching infringements of rights.

65. Examples of smaller infringements which would be very possible, some of which were adopted in similar anti-terrorism legislation in the U.K., include the following:

a) Eliminate secret proceedings. b) If there are to be secret proceedings, they could be limited to one occasion. Presumably the evidence exists at the start of the proceedings, when the certificate is issued. Any secret proceedings could be required to take place at that time, rather than allowing repeatedly secret proceedings. c) In the further alternative, the secret proceedings could all take place before the person named in the certificate is required to start responding to the evidence against him. d) In the further alternative, any secret proceedings after the person named in the certificate starts to respond could be limited to proper reply evidence, rather than being completely open-ended. e) Summaries could be provided to the object of the

certificate and his or her counsel. It is interesting to note that section 39(6) of the Immigration Act, which governed permanent residents named in security certificates until 2002, did require that a summary be made available to the person and his/her counsel. f) Alternatively, withholding of summaries should only be permitted if "its disclosure would be injurious to national security" and not also "to the safety of any person". Witnesses testify every day in open court before accused persons in criminal cases where safety could be an issue. What about witnesses in an infamous case such as the murder trial of Hell Angels' leader "Mom" Boucher? Such witnesses must testify in court before the accused. g) Have a system where some lawyers have full access to the CSIS files and can present a case against the secret evidence. This was advocated by Justice James K. Hugessen of the Federal Court of Canada in a speech, where His Lordship said the following about secret proceedings: Often, when I speak in public, I make the customary disavowal that I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon. I can tell you because we talked about it, we hate it. We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try and figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined... We greatly miss, in short, our security blanket which is the adversary system that we were all brought up with and that, as I said at the outset, is for most of us, the real warranty that the outcome of what we do is going to be fair and just.

The Honourable Justice James K. Hugessen, "Watching the Watchers: Democratic Oversight" at pages 384-385

h) Evidence must be given under oath or solemn affirmation. i) Evidence must come from live witnesses who can be cross-examined.

j) Evidence must at least be admissible in court. k) Evidence must not be hearsay. l) Evidence must be, at least, be "credible and trustworthy". (a term used in some statutes such as section 515 of the Criminal Code with respect to bail hearings). m) The Designated Judge must determine that the person is actually a danger to national security. n) Facts must be proven on the balance of probabilities, rather than the lower standard of reasonable ground for belief in the facts. o) Alternatively, with respect at least to facts which "may occur", such facts must be proven on the balance of probabilities rather than just on reasonable grounds of belief. p) A right of appeal could be allowed. q) Alternatively, at least a right of judicial review could be allowed.

66. The Charter violations cannot be justified under section 1 of the Charter, especially since they do not impair rights as little as reasonably possible. The relevant provisions of the Act are thus of no force and effect pursuant to section 52 of the Constitution Act. The entire legislative scheme in Sections 77, 78, 80, 81, 82 and 83 of the Act is thus of no force and effect.

The plaintiff proposes that this action be tried at Toronto.

Date: November 24, 2004

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rearguard writes: *"I have a better idea, Ernst should be suing the assholes that illegal arrested him and messed his life up.*

The Canadian people should not have to pay for the crimes committed by government officials when they break the law.



Zundel deserves to get justice and compensation, but it should come in the form of arrests and fines of the individuals who actually harmed Ernst. There's plenty of people to collect a debt from, which includes the Prime Minister, his associates in the justice and immigration departments, Justice Blais who presided over an illegal star chamber court, as well as the prison officials and police officers that carried out the illegal orders. Last but not least, are the conspiring special interest groups that bribed corrupt government officials into carrying out their dirty work."

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(agent provocateur)
11/21/05 09:45 PM



 **Re: Ernst Zundel Sues Canada for \$10 Million: Full Documents**  [To: [kreplach](#) | Post [294165435](#), reply to [294165404](#)] (Score: 2)

Yes Zundel is in Germany. Meanwhile Zundel's lawyer is in Canada seeking damages on his client's behalf.

My only problem with this, is that the Canadian people should not be forced to pay the bill for the illegal activities caused by government officials. The individuals who broke the law and harmed Zundel should be made to answer for their crimes and should be forced to pay damages out of their own pockets.

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