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Parliament's Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA

David Dunbar and Scott Nesbitt*

Although the constitutionality of the legislative approach to terrorism will ultimately be determined by the judiciary in its role as the arbiter of constitutional disputes for the country, we must not forget that the legislative and executive branches also desire, as democratic agents of the highest rank, to seek solutions and approaches that conform to fundamental rights and freedoms.¹

I. INTRODUCTION

Some commentators have characterized the relationship between the judiciary and legislatures under the *Canadian Charter of Rights and Freedoms*² as a “dialogue”. The metaphor initially was put forward in response to the anti-democratic critique of unelected judges striking down legislation. It emphasizes that judicial decisions in Charter cases rarely represent the final word on any particular legal issue. Such decisions usually do not simply invalidate government action; more typically, they define the broad constitutional parameters in which the government may pursue legitimate policy objectives and give legislatures an opportunity to consider their options. In this way, according to the dialogue metaphor, judicial decisions actually may encourage democratic debate and ensure that legislatures seek to

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¹ *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 5 (S.C.C.).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Constitution Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

accomplish their legitimate legislative objectives in a manner that conforms to constitutionally protected fundamental rights and freedoms.³

Considered together, the Supreme Court of Canada's decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*⁴ and Parliament's enactment of Bill C-3⁵ illustrate how the constitutional dialogue can function effectively, even in the contentious context of national security law.⁶ In *Charkaoui*, the Court accepted that the security certificate regime under the *Immigration and Refugee Protection Act*⁷ was directed at legitimate policy objectives, namely, the removal of non-citizens inadmissible to Canada and the protection of sensitive national security information. However, the Court also found two specific aspects of the statutory scheme to be unconstitutional: the absence of a timely detention review for foreign nationals named in a certificate; and the *in camera*, *ex parte* hearing process. The Court identified a series of options available to Parliament to remedy these constitutional infirmities and suspended its declaration of invalidity for one year to allow Parliament to determine whether, and if so how, to amend the provisions. Parliament, in turn, considered its options and amended the IRPA to include a special advocate regime. The result is a new legislative scheme which ensures that fundamental rights and freedoms are protected while still achieving the legitimate policy objectives underlying the certificate process.

The remainder of the paper is organized into four parts. Part II provides background information on security certificates and explains the statutory regime at issue in *Charkaoui*. Part III reviews the *Charkaoui* decision, noting not only those specific aspects of the certificate regime which the Court found to be unconstitutional, but also

³ P. Hogg & A. Bushell, "The Charter Dialogue between Courts and Legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)" (1997) 35 Osgoode Hall L.J. 75; K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); and P. Hogg, A. Bushell & W. Wright, "Charter Dialogue Revisited — or 'Much ado about metaphors'" (2007) 45 Osgoode Hall L.J. 1.

⁴ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "*Charkaoui*"].

⁵ *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, now S.C. 2008, c. 3 (in force February 22, 2008) [hereinafter "Bill C-3" or the "Bill"].

⁶ See K. Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship", (2007) 45 Osgoode Hall L.J. 169, at 186-89, where the author suggests that "the post 9/11 security context may be a particularly rich site for institutional dialogue".

⁷ S.C. 2001, c. 27 [hereinafter "IRPA"]. For ease of reference, when referring to provisions contained in the former Part 1, Division 9 of IRPA that Bill C-3 repealed, the citation "former IRPA" is used.

the range of permissible action the Court afforded to Parliament for fixing those constitutional deficiencies. Next, Part IV explains the special advocate regime enacted under Bill C-3, its rationale and its subsequent implementation. Finally, Part V offers some brief concluding remarks.

II. BACKGROUND: THE SECURITY CERTIFICATE REGIME UNDER IRPA

Despite the significant attention they have attracted in recent years, security certificates have been a part of Canadian immigration law since 1978.⁸ Although the precise contours of the statutory regime have evolved over time, its objective and basic features have remained fairly consistent. The certificate process is intended to facilitate the removal of non-citizens who endanger Canadian society because they are security risks or serious criminals.⁹ Certificates initiate a special deportation process that permits the government to rely on security or criminal intelligence information which is not disclosed to the permanent resident or foreign national named in the certificate (the “named person”) or their lawyers in order to establish the alleged grounds of inadmissibility. The certificate provisions also authorize detention or release on conditions incidental to the deportation proceedings. Certificates are used in relatively rare and exceptional cases; only 28 certificates have been issued since 1991.¹⁰

The IRPA certificate provisions permit the Minister of Citizenship and Immigration and the Minister of Public Safety (the “Ministers”) to issue a certificate against a permanent or foreign national if they have reasonable grounds to believe the named person is inadmissible on the grounds of security, violating human or international rights, serious criminality or organized criminality.¹¹ In security related matters, the Ministers’ decision usually is based on their review of a security intelligence report (or “SIR”) prepared by the Canadian Security Intelligence Service (“CSIS”). The power to issue a certificate rests with

⁸ *Immigration Act, 1976*, S.C. 1976-77, c. 52, ss. 39-43.

⁹ *Charkaoui*, *supra*, note 4, at para. 4.

¹⁰ Canada, Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act* (Ottawa: February 2007) at 100-101, online at: <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm>> [hereinafter “*Fundamental Justice in Extraordinary Times*”].

¹¹ Former IRPA, *supra*, note 8, at s. 77(1).

the Ministers personally, and cannot be delegated.¹² Once the Ministers issue a certificate, it is referred to a designated judge of the Federal Court together with the SIR. If the judge determines the certificate to be reasonable, it becomes a final removal order.¹³

Under the IRPA provisions in effect when *Charkaoui* was argued before the Supreme Court of Canada, the process for determining the reasonableness of the certificate involved both ordinary open court hearings and *in camera, ex parte* hearings where only counsel for the Ministers appeared before the Court. The judge was required to hold an *in camera, ex parte* hearing on the Ministers' request.¹⁴ If the judge was satisfied that disclosure of the information the Ministers presented at a closed hearing would be injurious to national security or to the safety of any person ("confidential security information"),¹⁵ then that information remained confidential and could not be disclosed to the named person or their counsel.¹⁶ However, the judge could rely on the confidential security information and any other evidence considered appropriate to determine whether the certificate was reasonable.¹⁷ Although the named person did not receive the confidential security information, the provisions required the judge to provide a summary enabling the named person to be reasonably informed of the circumstances giving rise to the certificate.¹⁸ The statute also required the judge to give the named person an opportunity to be heard regarding the alleged inadmissibility.¹⁹ In most cases, this generally permitted named persons to testify, call their own witnesses and cross-examine witnesses the Ministers presented during the open hearing.

The Federal Court judges conducting reasonableness hearings assumed an active role during the *in camera, ex parte* hearings. Their decisions demonstrated a rigorous testing of both the Ministers' claim that certain information could not be disclosed to the named person or their counsel, as well as the reliability and sufficiency of that information in establishing the alleged grounds of inadmissibility. The

¹² *Id.*, at s. 6(3).

¹³ *Id.*, at ss. 80-81.

¹⁴ *Id.*, at s. 78(e).

¹⁵ The types of information protected from non-disclosure are described in *Henrie v. Canada (Security Intelligence Review Committee)*, [1988] F.C.J. No. 965, 53 D.L.R. (4th) 568, at 578-79 (F.C.T.D.), affd [1992] F.C.J. No. 100, 88 D.L.R. (4th) 575 (F.C.A.).

¹⁶ Former IRPA, *supra*, note 8, at s. 78(b).

¹⁷ *Id.*, at ss. 78(j) and 78(g).

¹⁸ *Id.*, at s. 78(h).

¹⁹ *Id.*, at s. 78(i).

judges would, for example, closely examine the information to look for the presence or absence of corroboration, and carefully scrutinize the credibility of human sources.²⁰

The detention provisions under the former IRPA certificate regime differed for permanent residents and foreign nationals. Permanent residents named in a certificate were detained only if the Ministers issued a warrant.²¹ However, foreign nationals were detained without a warrant once the Ministers issued the certificate.²² Permanent residents had an initial detention review within 48 hours of their arrest, and subsequent reviews at least once every six-month period until the judge determined whether the certificate was reasonable.²³ Foreign nationals had no detention reviews before the reasonableness determination. However, if a certificate against either a permanent resident or foreign national was found to be reasonable and that person was not removed within the next 120 days, he or she could then apply for a detention review.²⁴ The same *in camera*, *ex parte* hearing process that applied to the reasonableness determination also applied to detention reviews.²⁵

The determination that a certificate is reasonable does not necessarily result in the named person's immediate removal. If, prior to the certificate being issued, the named person had been granted status as a protected person, they can be removed only if the Minister issues a danger opinion.²⁶ Even if not previously recognized as a protected person, the named person still could apply for a pre-removal risk

²⁰ See, e.g., *Re Harkat*, [2005] F.C.J. No. 481, 2005 FC 393, at paras. 93-101 (F.C.A.); *Re Jaballah*, [2006] F.C.J. No. 1706, 2006 FC 1230, at paras. 24-30 (F.C.A.); *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2005] F.C.J. No. 1948, 2005 FC 1596, at paras. 54-57 (F.C.A.).

²¹ Former IRPA, *supra*, note 8, at s. 82(1).

²² *Id.*, at s. 82(2).

²³ *Id.*, at s. 83. At these pre-reasonableness reviews, the onus was on the Minister to satisfy the judge that the named person continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

²⁴ *Id.*, at s. 84(2). At these post-reasonableness reviews, the onus was on the named person to establish that they would not be removed from Canada within a reasonable time and that release would not pose a danger to national security or to the safety of any person.

²⁵ *Id.*, at s. 83(1).

²⁶ IRPA, *supra*, note 8, at s. 115. Where the inadmissibility is based on serious criminality, the test is "danger to the public in Canada" (s. 115(1)). Where the inadmissibility is based on security, violating human or international rights or organized criminality, the test is whether the person "should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada" (s. 115(2)).

assessment (“PRRA”) after the Ministers issued the certificate.²⁷ The danger opinion and PRRA processes are similar in that they both require a Minister’s delegate to weigh the risk the named person would face if removed from Canada against the danger they would pose if permitted to remain in Canada. In some of the current certificate cases, the named persons’ successfully challenged danger opinion decisions in favour of removal, but have remained subject to detention or release on strict conditions pending re-determination of the decisions.²⁸

III. SETTING THE PARAMETERS: THE DECISION IN *CHARKAOU*

Prior to *Charkaoui*, the validity of the security certificate regime had been upheld on a number of occasions. For example, in *Chiarelli*, the Supreme Court dismissed challenges to the constitutionality of the certificate process brought by a permanent resident inadmissible for his involvement in organized crime. The Court held that the process satisfied the right to a fair hearing because the named person received a summary of the confidential intelligence reports and could cross-examine police witnesses.²⁹ In *Ahani*, the Federal Court of Appeal rejected arguments that the certificate process applicable to foreign nationals violated the Charter.³⁰ And, in *Suresh*, the Supreme Court of Canada contrasted the “extensive” procedural protections available at the reasonableness determination stage against the lack of similar protections at the danger opinion stage.³¹ Based largely on these

²⁷ The reasonableness hearing was suspended pending the outcome of the PRRA application: see former IRPA, *supra*, note 8, at s. 79. The PRRA decision weighs the danger of torture, or risk to life or of cruel and unusual treatment or punishment the named person would face if removed against the danger they pose if permitted to remain in Canada: see IRPA, *supra*, note 8, at ss. 97, 112(3), 113(d) and 114(b). Where the inadmissibility is based on serious criminality, the test is “danger to the public in Canada” (s. 113(d)(i)). Where the inadmissibility is based on security, violating human or international rights or organized criminality, the test is “danger ... to the security of Canada” (s. 113(d)(ii)).

²⁸ See, e.g., *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 437, 2005 FC 355 (F.C.A.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 173, 2005 FC 156 (F.C.A.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1862, 2006 FC 1503 (F.C.A.).

²⁹ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711 (S.C.C.).

³⁰ *Ahani v. Canada (Minister of Employment and Immigration)*, [1996] F.C.J. No. 937, 119 F.T.R. 80 (F.C.A.), affg [1995] F.C.J. No. 1190, [1995] 3 F.C. 669 (F.C.T.D.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 496, [1997] 2 S.C.R. v (S.C.C.).

³¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at para. 117 (S.C.C.), stating the certificate provisions “allow for meaningful participation”.

decisions, lower courts had consistently ruled that the IRPA certificate regime was constitutional.³²

The decision in *Charkaoui*, of course, departed from this previous case law on the constitutionality of the security certificate process and established a new starting point in the constitutional dialogue between the judiciary and Parliament on the issue. However, in considering how that dialogue set the parameters for future legislative action, it is important to identify not only the specific constitutional deficiencies the Court found in the certificate process, but also to recognize those aspects of the regime which the Court found to comply with the Charter and the scope of permissible action which the Court left open to Parliament.

In this respect, it is significant that the Court endorsed the general objectives of the IRPA security certificate scheme. The Court accepted that it is legitimate for Parliament to use immigration law to deport and detain non-citizens who pose a threat to national security.³³ The Court also affirmed its earlier decision in *Chiarelli* that a deportation scheme that applies to non-citizens but not to citizens does not, for that reason alone, violate section 15 of the Charter.³⁴ In doing so, the Court impliedly rejected the suggestion that the state is somehow obligated to prosecute under the criminal law instead of seeking deportation under immigration law when faced with non-citizens suspected of involvement in terrorist activities.³⁵ The Court also expressly noted that so long as detention pursuant to a certificate remains linked to an immigration purpose, it does not amount to discrimination.³⁶

The Court also held that detention or release on conditions pending deportation pursuant to the certificate provisions violates neither sections 7 nor 12 of the Charter, even where that detention or release on conditions might continue for extended or indeterminate periods of time. In doing so, the Court clarified that detention under immigration law is not unconstitutional where it is reasonably necessary for deportation

³² In the three cases at issue in *Charkaoui*, the courts below had dismissed all the constitutional challenges to various aspects of the certificate regime: see *Re Charkaoui*, [2003] F.C.J. No. 1815, 2003 FC 1418 (F.C.A.), affd [2004] F.C.J. No. 2060, 2004 FCA 421 (F.C.A.); *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 509, 2004 FC 420 (F.C.A.), affd [2005] F.C.J. No. 213, 2005 FCA 54 (F.C.A.); and *Re Harkat*, [2005] F.C.J. No. 481, 2005 FC 393 (F.C.A.), affd [2005] F.C.J. No. 1467, 2005 FCA 285 (F.C.A.).

³³ *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at paras. 68-69 (S.C.C.).

³⁴ *Id.*, at para. 129.

³⁵ A number of intervenors before the Supreme Court of Canada, including the Canadian Council for Refugees, had made this argument.

³⁶ *Charkaoui*, *supra*, note 33, at paras. 130-32.

purposes and a meaningful detention review process offers relief against the possibility of indefinite detention. The Court was satisfied that, properly interpreted, the IRPA contained a robust process for periodic judicial review of detention or release on conditions which permitted the courts to assess the relevant context and circumstances of the individual case, including: the reasons for detention; length of detention; reasons for delay in deportation; anticipated future length of detention; and the availability of alternatives to detention.³⁷

In addition, the Court dismissed a variety of other constitutional challenges to the IRPA certificate scheme. For example, the Court held that the “reasonable grounds to believe” standard for establishing inadmissibility or grounds for detention did not violate section 7 of the Charter. Similarly, the Court took no issue with the IRPA provision directing the judge to determine the reasonableness of the certificate rather than its correctness. The Court was satisfied that these standards required a searching review of the evidence, and therefore did not detract from the right to a fair hearing.³⁸ The Court also held that unwritten constitutional principles relating to the rule of law neither require a full right of appeal from the reasonableness determination, nor prohibit the Ministers from issuing warrants for arrest and detention if they have reasonable grounds to believe that a named person is inadmissible on specified grounds.³⁹

Although the Court endorsed the general objectives of the IRPA certificate process and found some of its features to be consistent with the Constitution, it also found that two specific aspects of the former statutory regime violated the Charter. First, the Court held that the absence of a timely detention review process for foreign nationals resulted in arbitrary detention and violated sections 9 and 10(c) of the Charter.⁴⁰ The Court afforded Parliament no flexibility in determining how to address this shortcoming and, through a combination of striking down and reading in, ensured that both foreign nationals and permanent residents had access to timely and periodic detention reviews.⁴¹

³⁷ *Id.*, at paras. 95-128. The Court distinguished the decision of the House of Lords in *A. v. Secretary of State for the Home Department*, [2004] UKHL 56 (H.L.) which struck down the control order regime as incompatible with art. 14 of the *European Convention on Human Rights*.

³⁸ *Id.*, at paras. 38-42.

³⁹ *Id.*, at paras. 133-37.

⁴⁰ *Id.*, at paras. 3, 90-94.

⁴¹ *Id.*, at paras. 141-42.

More significantly, the Court held that the *in camera, ex parte* hearing process and ability of the Ministers to rely on confidential security information not disclosed to the named person or their lawyer violated section 7 of the Charter. The Court found that this process was inconsistent with the principles of fundamental justice because it lacked two features required to ensure a fair hearing. First, because the provisions limited the operation of the adversarial system but failed to extend to judges all the powers associated with an inquisitorial system, the Court was concerned that it may have resulted in judicial determinations not based on all relevant facts or legal arguments.⁴² Chief Justice McLachlin, for the unanimous Court, explained:

The designated judge under the IRPA does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged — perhaps unknowingly — to make the required decision based on only part of the relevant evidence.⁴³

Second, the Court found that non-disclosure of the confidential security information which formed the basis for the certificate deprived named persons of the right to know and answer the case against them.⁴⁴ On this point, the Court drew a connection between the named person's right to know the case to meet and the judge's ability to protect the integrity of the judicial process:

The fairness of the *IRPA* procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing.⁴⁵

While the Court therefore concluded that the certificate process violated the right to a fair hearing, the Court was cautious not to suggest

⁴² *Id.*, at paras. 48-52.

⁴³ *Id.*, at para. 50.

⁴⁴ *Id.*, at paras. 53-65.

⁴⁵ *Id.*, at para. 63.

that section 7 of the Charter mandated full disclosure of all confidential security information to the named person and his or her lawyer. Indeed, the Court clearly stated that the right to know the case to be met is not absolute, that national security considerations can limit the extent of disclosure that must be provided to an affected individual and that societal concerns form part of the relevant context for determining the scope of the applicable principles of fundamental justice.⁴⁶ In addition, in its conclusion on the section 7 issue, the Court indicated that the right to a fair hearing could be satisfied either by giving the named person the information required to know the case to meet, or a “substantial substitute” for that information.⁴⁷

The Court went on to find that the *prima facie* violation of section 7 could not be justified as a reasonable limit prescribed by law. Although satisfied that the certificate process had a pressing and substantial objective and that the non-disclosure of confidential security information was rationally connected to that objective, the Court found that the process was not minimally impairing of the named person’s Charter rights.⁴⁸ In this respect, the Court identified several less intrusive alternatives which use a more adversarial process to ensure that an independent party — other than the designated judge — tests the confidential security information with a view to protecting the named person’s interests.⁴⁹ These alternatives included: the use of independent counsel before the Security Intelligence Review Committee (the “SIRC”);⁵⁰ the use of special advocates in the United Kingdom before the Special Immigration Appeals Commission (the “SIAC”);⁵¹ the *Canada Evidence Act* process;⁵² the *Air India* trial example of disclosure to defence counsel based on undertakings;⁵³ and the role of commission counsel in the Arar Inquiry.⁵⁴ The Court concluded that the availability of these less intrusive alternatives to the IRPA certificate process demonstrated that it could not be justified under section 1.

⁴⁶ *Id.*, at paras. 57-58.

⁴⁷ *Id.*, at para. 61.

⁴⁸ *Id.*, at para. 68.

⁴⁹ *Id.*, at paras. 69-70.

⁵⁰ *Id.*, at paras. 71-76.

⁵¹ *Id.*, at paras. 80-84.

⁵² *Id.*, at para. 77.

⁵³ *Id.*, at para. 78.

⁵⁴ *Id.*, at para. 79.

However, at the section 1 stage the Court again gave Parliament considerable latitude to design a new process which would better protect the named person's section 7 interests without compromising security. The Court recognized that Parliament is not required to use the perfect or least restrictive alternative to achieve its objective.⁵⁵ The Court suggested that section 1 could be satisfied by providing some form of special counsel to "objectively review the material with a view to protecting the named person's interest", but expressed no strong preference for any of the particular alternatives it had identified.⁵⁶ In its conclusion on the section 1 issue, the Court expressly stated that while more must be done for the certificate process to meet the requirements of a free and democratic society, "[p]recisely what more should be done is a matter for Parliament to decide".⁵⁷ The Court also suspended its declaration of unconstitutionality for a period of one year, citing only the need to give Parliament time to amend the law.⁵⁸

IV. PARLIAMENT'S RESPONSE: BILL C-3 AND THE SPECIAL ADVOCATE REGIME

Government officials and Parliament used the one-year suspension period to study the *Charkaoui* decision and carefully consider the options available for responding to it. Those considerations were informed not only by the Court's ruling, but also the broader public debate surrounding the security certificate process — including the comments of the House of Commons and Senate committees who reviewed the *Anti-terrorism Act*,⁵⁹ the House of Commons Standing Committee on Citizenship and Immigration's report on security certificates and detention,⁶⁰ and the work of various academics and

⁵⁵ *Id.*, at para. 85.

⁵⁶ *Id.*, at para. 86.

⁵⁷ *Id.*, at para. 87.

⁵⁸ *Id.*, at para. 140.

⁵⁹ *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act* (Ottawa: February, 2007), at 30-42, 100-113, online at: <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07.htm>> and House Standing Committee on Public Safety and National Security, Subcommittee on the Review of the Anti-terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and related Issues* (Ottawa: March 2007), at 67-81, online at: <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?CDN=10804&Lang=1&SourceId=199086>> [hereinafter "*Rights, Limits, Security*"].

⁶⁰ Twelfth Report of the House Standing Committee on Citizenship and Immigration, "Detention Centres and Security Certificates", adopted by the Committee on March 27, 2007,

private sector lawyers on these issues.⁶¹ Consultations with SIRC officials regarding their independent counsel process, as well as with officials in the United Kingdom about their SIAC special advocate regime, also contributed to the development of policy options.

Bill C-3 is the result of these efforts. It was tabled in the House of Commons on October 22, 2007. Beginning on November 27, 2007, the Standing Committee on Public Safety and National Security heard from over 20 witnesses during eight days of committee hearings, and then reported the Bill back to the House of Commons with amendments on December 10, 2007. The Senate passed the Bill without amendment and it received royal assent on February 14, 2008. It came into force by order of the Governor in Council on February 22, 2008 — one day before the Supreme Court of Canada's declaration of invalidity would have expired.

The amendments Bill C-3 makes to the IRPA certificate process demonstrate the different levels at which the dialogue between the judiciary and Parliament may take place. In those areas where the Court held that the Charter mandates a specific result, Parliament responded accordingly. For example, the provisions for detention and release on conditions now ensure that both permanent residents and foreign nationals named in a certificate have detention reviews within 48 hours of arrest. They also establish a system for regular six-month reviews of detention or conditions of release which applies both before and after the certificate is determined to be reasonable.⁶²

Conversely, even in some areas where the Court upheld the constitutionality of the previous certificate regime, Parliament elected to address some issues that continued to affect the perceived fairness of the process. In this regard, Bill C-3 provides a right of appeal from a decision on reasonableness or detention review where the judge certifies

presented to the House on April 16, 2007, online at: <<http://cmtc.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2829796/cimmrp12/cimmrp12-e.pdf>>.

⁶¹ See, e.g., C. Forcese & L. Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the use of "Special Advocates" in National Security Proceedings* (Ottawa: Canadian Centre for Intelligence and Security Studies and Courts Administration Service, August 2007), online at: <<http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>> [hereinafter "*Seeking Justice*"]; M. Code & K. Roach, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 Crim. L.Q. 85; M. Cappe, K. Roach & W. Wark, "Debate Surrounding Security Certificates and Bill C-3", podcast (Ottawa: Institute for Research on Public Policy, December 2007), online at: <<http://www.irpp.org/index.htm>>.

⁶² IRPA, as amended by Bill C-3, ss. 81-82.4 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

a serious question of general importance.⁶³ Named persons therefore now have the same rights of appeal as other litigants in immigration matters.⁶⁴ Similarly, foreign nationals named in a certificate are no longer subject to automatic detention when the certificate is issued. Instead, as with permanent residents, the Ministers must decide whether to issue a warrant for arrest.⁶⁵ In addition, and although it was not in issue before the Court in *Charkaoui*, Bill C-3 codifies earlier Federal Court decisions and expressly states that evidence obtained by torture or cruel, inhuman or degrading treatment or punishment is inadmissible in certificate proceedings.⁶⁶

Finally, on the major issue of the right to a fair hearing where the Court indicated that the Charter required greater procedural protections but did not stipulate precisely what more should be done, Parliament studied the options available and adopted the solution it considered most appropriate: a special advocate regime.

In general, special advocates are security-cleared lawyers who are independent from both government and the courts. They are granted access to the confidential security information on the condition they not disclose it to anybody else, including the named person and their lawyer. The Bill requires the Court to appoint special advocates to protect the interests of the named person at hearings from which the public, the named person and their lawyer are excluded. They can challenge both the government's claim that information should remain confidential, as well as the merits of the case against the named person presented in closed hearings. In this way, special advocates will add an adversarial context to the closed hearings and thereby help to ensure that the named person's right to a fair hearing is respected. At the same time, Bill C-3 also includes measures to minimize the risk that confidential security information might be improperly disclosed as a result of the new special advocate regime. In this manner, Bill C-3 resolves the tension between respecting the named person's Charter-protected right to a fair hearing and the interest in protecting confidential security information.

⁶³ *Id.*, at ss. 79 and 82.3 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁶⁴ *Id.*, at s. 74(d).

⁶⁵ *Id.*, at s. 81 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁶⁶ *Id.*, at ss. 83(1)(h) and 83(1.1) [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008]. See, e.g., the decisions in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1862, 2006 FC 1503 at paras. 36-36 (F.C.A.) and *Re Harkat*, [2005] F.C.J. No. 481, 2005 FC 393 at para. 115 (F.C.A.).

While *Charkaoui* addressed only the security certificate process, the new special advocate provisions also apply, with the necessary modifications, to admissibility hearings and detention reviews before the Immigration and Refugee Board where the Minister seeks to rely on confidential security information.⁶⁷ Bill C-3 also gives the Federal Court the discretion to determine whether the considerations of fairness and natural justice require that a special advocate be appointed for the judicial review of other decisions made under IRPA where the decision-maker relied on confidential security information which cannot be disclosed.⁶⁸

The basic premise underlying the IRPA special advocate scheme, its various features, their rationale and subsequent implementation are discussed briefly under separate subheadings below.

1. Special Advocate Role and Powers

Section 85.1(1) states the role of the special advocate is to “protect the interests” of the named person during the closed hearings. Section 85.1(2) empowers special advocates to fulfil this role in two ways. First, they may challenge the Ministers’ claim that information must remain confidential because disclosure to the public and the named person or that person’s counsel would be injurious to national security or endanger the safety of any person. Second, they may challenge the relevance, reliability and sufficiency of the information and other evidence the Ministers adduce at the closed hearings to make their case. Section 85.2 allows special advocates to make oral and written submissions with respect to the information the Ministers present at closed hearings, to cross-examine any witnesses who testify during the closed hearings and to exercise any other powers that the judge considers necessary to protect the interests of the named person.

This wording of the special advocate’s role in section 85.1(1) is significant. It is not simply an element of the IRPA special advocate regime; it is the model’s defining principle. The special advocate does not “represent” the named person in the same sense that a lawyer represents a client. Indeed, section 85.1(3) expressly states that the special advocate is not in a solicitor-client relationship with the named person. This limitation avoids creating a potential conflict between the

⁶⁷ *Id.*, at s. 86 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁶⁸ *Id.*, at ss. 87-87.1 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

duties of loyalty and candour lawyers owe to clients and the special advocate's obligation not to disclose the confidential security information. In this way, the core premise underlying the special advocate model avoids some of the thorny ethical and practical difficulties inherent in the *Air India* model, which the Supreme Court itself acknowledged in *Charkaoui*.⁶⁹

However, and notwithstanding the absence of a solicitor-client relationship with the named person, special advocates are not just an objective third party added to the closed hearing process. Instead, they are directly aligned with the interests of the named person and play an adversarial function *vis-à-vis* the government. This is consistent with the suggestion in *Charkaoui* that the closed hearing process requires some form of special counsel to objectively test the government's case "with a view to protecting the named person's interests", and the recommendations of the Senate *Anti-terrorism Act* review committee.⁷⁰ It also distinguishes the basic premise underlying the IRPA special advocate model from that underlying the SIRC independent counsel model or the Arar Inquiry commission counsel model.

Lawyers acting as SIRC counsel or commission counsel are independent in the sense that they are counsel to SIRC or the commission and independent from government. They are not, however, independent from the tribunal which they serve. Indeed, the basic premise underlying these independent counsel models is the need to extend the tribunal's own ability to ensure a fair hearing: the overriding duty of independent counsel is to the tribunal, not to individual complainants; and their role is to protect the integrity of the tribunal's process, not the interests of the individual excluded from the closed hearings. While those interests often may be aligned, that will not necessarily always be the case. In contrast, Bill C-3 expressly assigns special advocates a more adversarial role directly aligned with the named person's interests. In this way, the core premise of the IRPA special

⁶⁹ See *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 78 (S.C.C.), where the Court stated: "Disclosure in a specific trial, to a select group of counsel on undertakings, may not provide a working model for general deportation legislation that must deal with a wide variety of counsel in a host of cases". See also *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332, at para. 49 (S.C.C.) where, although not ruling directly on the validity of the order granting defence counsel access to confidential information based on his undertaking, the Court nonetheless expressed some concern and noted that it was "difficult to anticipate all the difficulties that such an order may pose".

⁷⁰ *Charkaoui*, *id.*, at paras. 69, 86; *Fundamental Justice in Extraordinary Times*, *supra*, note 59, at 33-35.

advocate model goes further than the SIRC independent counsel model to protect the interests of the named person and make the process more truly adversarial in nature.

2. Communications with Named Person

The IRPA special advocate provisions contemplate two phases in the communication between the special advocate and the named person during certificate proceedings. The first phase occurs before the special advocate is given access to the confidential security information. During this phase, communication between the named person and special advocate is unrestricted. The second phase begins once the special advocate is given access to the confidential security information. During this phase, the special advocate cannot communicate with the named person unless and except as authorized by the judge.⁷¹

The first phase provides the special advocate an opportunity to learn as much as possible about the named person's case in response to the allegations. Once the judge appoints the special advocate, he or she receives the same summary of confidential security information and any other public evidence which is provided to the named person and his or her lawyer to ensure this special advocate is reasonably informed of the Ministers' case.⁷² Based on this open information, the special advocate can meet with the named person and his or her lawyer to discuss the case without restriction. Although they are not in a solicitor-client relationship, section 85.1(4) provides that communications between the named person and special advocate are subject to the same privilege that would attach as if a solicitor-client relationship did exist. In addition, special advocates cannot be compelled to give testimony in any proceeding about communications with a named person.⁷³ Named persons therefore can provide any and all potentially relevant information to the special advocates during the first phase, without fear that providing information which may prove to be inculpatory would somehow disadvantage the named person's position in the closed certificate hearings or any other proceedings.

The IRPA regime does not bar all communication between the special advocate and the named person during the second phase. Instead,

⁷¹ IRPA, s. 85.4 [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁷² *Id.*, at s. 77(2) [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁷³ *Id.*, at s. 85.1(4) [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

it seeks to balance the special advocate's ability to effectively perform his or her function with the need to protect against the risk that special advocates might inadvertently disclose confidential security information to the named persons or their lawyers. This is consistent with the Senate *Anti-terrorism Act* review committee's recommendations, which not only encouraged a scheme that permitted ongoing communication between the special advocate and named person, but also recommended that Parliament adopt appropriate safeguards as a part of any such scheme to ensure that matters of national security remain secret.⁷⁴ The process for balancing these two objectives under Bill C-3 requires the designated judge — not the government — to determine how best to reconcile, in the particular circumstances of any given case, the potential benefits of further communication between the named person and special advocate with the potential risks of inadvertent disclosure of confidential security information that any such communications may raise.

Criticisms of this aspect of Bill C-3 typically emphasize that the special advocate's ability to effectively perform his or her role may, in some cases, require him or her to go back to the named person for information only after seeing the confidential security information.⁷⁵ However, Bill C-3 does allow for this possibility if the judge is satisfied that the scope and form of the communications are appropriate. What Bill C-3 also requires the judge to take into account — and what the criticisms frequently ignore or understate — is the countervailing and legitimate state interest in preventing inadvertent disclosure of the confidential security information. The very nature of this information means that the stakes are high if inadvertent disclosure occurs: confidential informers may be identified and their lives or security thereby placed in jeopardy; an ongoing investigation may be compromised and years of valuable intelligence-gathering rendered useless. The need to protect confidential informers from the risk of possible retribution is particularly sensitive in the national security context. Bill C-3 therefore provides a reasonable oversight mechanism which aims to prevent the inadvertent disclosure of any such information. Proposed alternatives — like the suggestion that an independent third party, such as a member of SIRC, be present during any communications between the named person and special advocate

⁷⁴ *Fundamental Justice in Extraordinary Times*, *supra*, note 59, at 36.

⁷⁵ *Seeking Justice*, *supra*, note 61, at 36-38, 63-64.

during the closed phase⁷⁶ — may help identify inadvertent disclosure after it happens, but would not necessarily help prevent it before it occurs in the same way as does Bill C-3.

In the United Kingdom, the need for special advocates to obtain judicial authorization to communicate with the named person during the “closed” phase of proceedings has attracted criticism from parliamentary committees.⁷⁷ Special advocates themselves reportedly are reluctant to seek judicial authorization in part because the relevant statutory provisions require proposed communications to be reviewed not only by the judge but also by the government.⁷⁸ However, notwithstanding those criticisms, the British government has maintained its position that this requirement is an appropriate safeguard, and declined to amend the relevant statutory provisions.⁷⁹ Moreover, the House of Lords declined to seize upon these criticisms in its October 2007 ruling that proceedings involving special advocates generally will not fail to comply with the right to a fair hearing protected under Article 6 of the European Convention.⁸⁰ Indeed, at least one of the Law Lords encouraged all parties involved in the cases to consider whether special advocates should be given leave to ask specific and carefully tailored questions of the named person so as to preserve the fairness of the trial.⁸¹ The comments imply not only that the statutory provision itself is reasonable, but also that those involved in the process — including not only the judge, but also the special advocate and government counsel — have some responsibility to use it appropriately.

⁷⁶ *Id.*, at 63.

⁷⁷ See United Kingdom, House of Commons Constitutional Affairs Committee, Seventh Report of Session 2004-05, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (London: The Stationery Office, March 2005), Vol. 1, at 32-33, online at: <<http://www.parliament.the-stationery-office.com/pa/cm200405/cmselect/cmconst/323/323i.pdf>>; and United Kingdom, House of Commons and House of Lords Joint Committee on Human Rights, 19th Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-charge Questioning* (London: The Stationery Office, July 2007), at 52-54, online at: <<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf>>.

⁷⁸ See, e.g., *Civil Procedure (Amendment No. 2) Rules 2005*, 2005 No. 656 (L. 16), s. 76.25(4) and (5); and the *Special Immigration Appeals Commission (Procedure) Rules 2003*, 2003 No. 1034, s. 36(4) and (5).

⁷⁹ See United Kingdom, Secretary of State for Constitutional Affairs, *Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (London: The Stationery Office, June 2005), at 8-9, online at: <<http://www.official-documents.gov.uk/document/cm65/6596/6596.pdf>>.

⁸⁰ *Secretary of State for the Home Department v. MB*, [2007] U.K.H.L. 46 (H.L.).

⁸¹ *Id.*, at para. 66, *per* Baroness Hale of Richmond.

3. The Special Advocate List

Subsection 85(1) requires the Minister of Justice to establish and publish a list of persons who may act as special advocates. The creation of a list ensures that there is a qualified pool of security-cleared lawyers eligible to be appointed to specific cases as required and without delay. The Minister also must ensure that special advocates are provided with “adequate administrative support and resources”.⁸² These responsibilities are consistent with the Minister of Justice’s statutory responsibility for matters relating to the administration of justice under the *Department of Justice Act*.⁸³ They also reflect the importance of the special advocate in not only protecting the interests of the named person, but also preserving the fairness, integrity and efficiency of the justice system.

While the Bill makes the Minister of Justice responsible for establishing the special advocate list, the Minister has established an independent selection committee to assist with this process. The selection committee is comprised of retired Federal Court judge Andrew MacKay and one representative from each of the Federation of Canadian Law Societies (the “FLSC”) and the Canadian Bar Association (“CBA”). The Department of Justice first invited expressions of interest from candidates wishing to be named to the special advocate list on December 22, 2007, and extended the initial deadline from January 15, 2008 to February 1, 2008 in order to ensure that interested individuals had sufficient time to apply. The selection committee reviewed all applications received, and recommended that the Minister of Justice name some of the best qualified candidates to the special advocate list. To date, the Minister has named 27 candidates who the selection committee recommended and who then obtained the requisite security clearance.⁸⁴

⁸² IRPA, as amended by Bill C-3, s. 85(3) [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁸³ R.S.C. 1985, c. J-2, s. 4. On the significance of the distinction between the Minister of Justice’s responsibility for the administration of justice and the Attorney General’s responsibility for the conduct of litigation on behalf of the federal government, see *R. v. H.*, [2004] U.K.H.L. 3, at paras. 45-46 (H.L.).

⁸⁴ Online at: <<http://www.canada.justice.gc.ca/eng/dept-min/sa-as/list-liste.html>>.

4. Special Advocate Qualifications

Section 87.2(2) requires that special advocates be members in good standing of a provincial bar and not be employed in the federal public administration or otherwise associated with the federal public administration in a way that would impair their ability to protect the interests of the named person. This confirms that the special advocate must be independent of the government.

The Minister of Justice established a number of other qualifications for the selection committee to consider when appointing special advocates to the initial list. Those qualifications required that special advocates have a minimum of 10 years' good standing in a provincial bar, and litigation experience that demonstrates skill in the examination of witnesses and in oral and written advocacy. In addition, although not a mandatory requirement, experience in the fields of immigration law, criminal law, national security law or human rights law was considered an asset. These qualifications were developed in consultation with representatives from the FLSC and the CBA. They are intended to ensure that special advocates have the requisite skills and experience to effectively fulfil their statutory role and responsibilities.⁸⁵

In addition to these qualifications, special advocates also must obtain Top Secret security clearance from CSIS before they can be named to the list. This is widely acknowledged as an essential minimum qualification for special advocates.⁸⁶ Under both the SIRC and SIAC models, special counsel's access to confidential security information and participation in closed hearings is contingent on obtaining appropriate security clearance. Special advocates therefore have to go through the same security screening measures that CSIS uses to determine whether government officials are sufficiently reliable and trustworthy to be granted access to sensitive security information.⁸⁷ In addition, as has been the case with lawyers employed as commission counsel for recent federal commissions of inquiry involving confidential security

⁸⁵ *Fundamental Justice in Extraordinary Times*, *supra*, note 59, at 37; *Rights, Limits, Security*, *supra*, note 59, at 80-81; *Seeking Justice*, *supra*, note 61, at 64-65.

⁸⁶ *Fundamental Justice in Extraordinary Times*, *id.*, at 36; *Rights, Limits, Security*, *id.*, at 80.

⁸⁷ See online backgrounders at: <<http://www.csis-scrs.gc.ca/prts/scrtscrnng-eng.asp>> and <<http://www.csis-scrs.gc.ca/nwsrm/bckgrndrs/bckgrndr09-eng.asp>> for more details on the CSIS security screening process.

information, special advocates are permanently bound to secrecy under the *Security of Information Act*.⁸⁸

5. Choosing the Special Advocate for a Particular Case

While the Minister of Justice is responsible for establishing the special advocate list, the judge who hears a certificate case is responsible for appointing a lawyer from the list to act as special advocate in a particular case. Subsection 83(1)(b) requires that the judge make this appointment after hearing representations both from the government and the named person, and after giving “particular consideration and weight to the preferences” of the named person. Subsection 83(1.2) elaborates on this point and requires the judge to appoint the named person’s choice of special advocate from the list, unless the judge is satisfied that the appointment would unreasonably delay the proceedings or result in a conflict of interest or risk of inadvertent disclosure of the confidential security information.⁸⁹ The weight given to the named person’s choice of special advocate under the IRPA scheme addresses concerns which had previously been raised about the SIAC model where the named person had little or no say in who would be appointed as special advocate, and is consistent with the recommendations of the Senate *Anti-terrorism Act* review committee.⁹⁰

These provisions aim to balance the named person’s interest in selecting the special advocate the named person feels will best protect his or her interests in the closed hearings with the need to avoid putting special advocates in situations that are incompatible with their ethical obligations as lawyers or that present an increased risk of inadvertent disclosure. The judge’s power to decline to appoint the named person’s choice of special advocate to a particular case due to a conflict of interest applies familiar conflict concepts to the unique situation of lawyers acting as special advocates.⁹¹ In this context, the conflicting duties may

⁸⁸ R.S.C. 1985, c. O-5. The schedule to the *Security of Information Act* expressly includes the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar; Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin; and the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.

⁸⁹ IRPA, ss. 83(1)(b) and 83(1.2) [am. S.C. 2008, c. 3, s. 4, in force February 22, 2008].

⁹⁰ *The Operation of SIAC and use of Special Advocates*, *supra*, note 77, at 27; see also *Fundamental Justice in Extraordinary Times*, *supra*, note 59, at 37.

⁹¹ See, e.g., Law Society of Upper Canada, *Rules of Professional Conduct* (June 2000) at Rule 2.04, “Avoidance of Conflicts of Interest”, online at: <<http://www.lsuc.on.ca/media/rpc.pdf>>.

not be between different past or present clients, but rather between duties owed as a lawyer to a client and their duties as a special advocate not to disclose confidential security information. The judge's power to refuse an appointment where it would give rise to a risk of inadvertent disclosure resembles the concept of "tainting" under the SIAC scheme, and is based on a similar rationale.⁹² The provision is not intended to allow the judge to reassess the reliability of a lawyer who already has obtained security clearance from CSIS and been named to the special advocate list by the Minister of Justice, but rather requires the judge to examine whether a risk of inadvertent disclosure may result if a special advocate acts in two or more cases that involve overlapping or related confidential security information.

The government accepts that, depending on the complexity of the case and the volume of confidential security information at issue and any other relevant factors, the Court may determine that two special advocates should be appointed to protect the interests of the named person in a security certificate case. This is consistent with practice in the United Kingdom, where two special advocates generally are appointed for at least the more complex SIAC cases. The Federal Court has appointed two special advocates for each of the five current certificate cases.

6. Support and Resources

As mentioned, section 85(3) makes the Minister of Justice responsible for ensuring that special advocates are provided with "adequate administrative support and resources". In the United Kingdom, a lack of administrative support and resources for special advocates previously attracted criticism, and resulted in the creation of the Special Advocate Support Office ("SASO") within the Treasury Board Solicitors' Department of the Attorney General's Office to provide a range of support services.⁹³ Based largely on these

See also *Macdonald Estate v. Martin*, [1990] S.C.J. No. 41, [1990] 3 S.C.R. 1235 (S.C.C.) (*sub nom Grey v. Martin*).

⁹² United Kingdom, Treasury Solicitors' Department, *Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO) — Open Manual* (November 2006), at 33 [hereinafter "*SASO — Open Manual*"], online at: <http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf>.

⁹³ *Id.*, at 25-27. See also *Government Response to the Constitutional Affairs Select Committee's Report*, *supra*, note 79, at 11-12.

developments in the United Kingdom, commentators have emphasized the importance of ensuring that special advocates have an appropriate support apparatus under the IRPA regime.⁹⁴

At this time, the Minister of Justice has arranged to provide special advocates with various administrative and resource support through a combination of the Department of Justice (the “DOJ”), the Federal Courts Administration Service (the “CAS”) and the Immigration and Refugee Board (the “IRB”). Under these arrangements, the Programs Branch within DOJ’s Policy Sector — a section of the DOJ separate from that responsible for conduct of litigation in security certificate cases — is responsible for coordinating the work of the selection committee, publishing the special advocate list, and some of the more routine administrative matters such as paying special advocate accounts. In addition, the CAS will ensure that special advocates are provided with secure facilities for consultation of the confidential security information and some administrative support when they are working on the secure site premises. The Minister has made similar arrangements with the IRB for special advocates assigned to section 86 cases. Representatives from DOJ, CAS and the IRB will be consulting directly with special advocates to discuss further support and resources they may require.

In addition, and as part of fulfilling the Minister’s responsibilities under section 85(3), the DOJ has organized week-long training sessions for the lawyers named to the special advocate list. The instructors for the training sessions have included senior federal government officials, leading academics on national security law issues, prominent private sector immigration lawyers and barristers who have acted as special advocates in the United Kingdom. The subjects have included: specific legal principles and processes relevant to certificate cases; general background on immigration law; and the role of the special advocate. The training also included presentations by CSIS officials on how to read confidential security information, as well as the protocols for handling such information.

V. CONCLUDING REMARKS

The decision in *Charkaoui* and legislative response in Bill C-3 demonstrate how the Charter dialogue between the judiciary and legislatures can enhance the protection of constitutionally entrenched

⁹⁴ *Seeking Justice*, *supra*, note 61, at 65.

rights and freedoms while preserving the ability of elected officials to pursue legitimate policy objectives. In *Charkaoui*, the Supreme Court of Canada challenged Parliament to devise a new hearing process for certificate cases which would resolve the tension between accountable constitutional governance and national security.⁹⁵ In doing so, the Court clearly accepted that more than one solution was available to resolve that tension, and that Parliament was better positioned to decide on which solution should be adopted. Parliament, after considering the various options left open to it by the Court, decided to meet the challenge by adding a special advocate to the certificate process.

The various features of the special advocate regime — including the role and powers of special advocates, the provisions relating to communications, the special advocate selection process and qualifications, and the support and resources available to special advocates — all are designed to ensure that the interests of the named person in a fair hearing are adequately protected, while also minimizing the risk that confidential security information might be disclosed. Of course, not everybody agrees that the constitutional dialogue has resulted in a process which now complies with the Charter. Indeed, counsel for at least some of the named persons in the current certificate cases already have filed challenges to the constitutionality of Bill C-3. However, as the Supreme Court itself reiterated in *Charkaoui*, Parliament is not required to use the perfect or least restrictive alternative to achieve its legislative objective. In our respectful view, the IRPA special advocate regime does undoubtedly better protect the named person's right to a fair hearing while still ensuring that national security is not compromised. It is difficult to see how — particularly in light of the Court's deference to Parliament's legislative choices and the rational explanations available to justify the various aspects of the special advocate regime which have attracted criticism — the new balance between protecting fundamental rights and freedoms and safeguarding national security which Parliament has achieved under Bill C-3 would fail to pass constitutional scrutiny.

⁹⁵ *Charkaoui*, *supra*, note 69, at para. 1.