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A Bismarckian Moment: *Charkaoui* and Bill C-3

Craig Forcese and Lorne Waldman*

I. INTRODUCTION

The German statesman Otto von Bismarck once said that “[i]f you like laws and sausages, you should never watch either one being made.”¹ The recent enactment of Bill C-3² — the government’s response to the Supreme Court’s February 2007 decision in *Charkaoui v. Canada (Citizenship and Immigration)*³ — can best be described as a “Bismarckian moment”. An effort to remedy the core defects of the prior immigration security certificate regime, the new law cobbles together a potentially half-hearted “special advocate” regime and converts immigration law into a *de facto* system of indefinite limits on liberty for foreigners. The new system will generate an inevitable series of new constitutional challenges, some of which may succeed at the Supreme Court unless the deficiencies of Bill C-3 are cured by careful innovation at the Federal Court level.

As discussed more fully in Kent Roach’s article in this volume,⁴ this Bill C-3 experience prompts observations about the true workings of the “dialogue” between courts and political branches on matters of

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¹ Suzy Platt, ed., *Respectfully Quoted: A Dictionary of Quotations* (Washington D.C.: Library of Congress, 1989), online: <<http://www.bartleby.com/73/996.html>>.

² *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate)*, S.C. 2008, c. 3.

³ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

⁴ Kent Roach, “*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures” (2008) 42 S.C.L.R. (2d) 281.

constitutional law,⁵ a concept espoused in the case law most famously in *Vriend v. Alberta*.⁶ In *Vriend*, the Court observed that:

In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. ... By doing this, the legislature responds to the courts; hence the dialogue among the branches.⁷

In principle, the result is greater accountability because the work of each branch is reviewed by the other. This dialogue and enhanced accountability “have the effect of enhancing the democratic process, not denying it”.⁸

Critics have sometimes rejected this assessment. They envisage the so-called dialogue between courts and legislatures as a monologue because judicial opinions give political credence to one policy position on an issue, lending the advantages of political inertia to that group. After courts have spoken, polarized political institutions find it easier to abdicate responsibility than to step to the plate again.⁹

The Bill C-3 experience reflects a more nuanced dialogue than this critique implies. The Supreme Court’s reasoning did colour the response of the political branches of government, but not in the deterministic way envisaged by the dialogue theory critique. *Charkaoui* presented a menu of alternatives, not a fixed road-map leading inexorably to one conclusion. However, political actors construed these options in manners that suited their political needs or preferences, occasionally deploying the time limits imposed by that decision to negate dissent or to create a climate of crisis. The result is a law that while reacting to *Charkaoui* is best described as minimally responsive; that is, it creates a reformed system that does as little as possible (and perhaps too little) to respond to the constitutional complaint animating critiques of the prior regime. Along the way, it undertakes selective revisions of the security certificate regime that set up a next generation of constitutional

⁵ For the exploration of a “dialogue” theory, see, most notably, Peter Hogg & Allison Bushell, “The Charter Dialogue between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 75.

⁶ [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

⁷ *Id.*, at 565.

⁸ *Id.*, at 566.

⁹ F.L. Morton, “Dialogue or Monologue”, in Paul Howe & Peter Russell, eds., *Judicial Power and Canadian Democracy* (Kingston, ON: McGill-Queen’s University Press, 2001).

challenges. Bill C-3 is, in other words, an awkward political concoction that risks new constitutional “train-wrecks” while only nominally cleaning up the last one.

The article that follows explores these contentions. Unusually for an academic paper, it begins with a disclosure. One of the authors was involved in *Charkaoui* as counsel for an intervenor. Both authors then co-wrote a study on comparative “special advocate” models¹⁰ and, on that basis, were actively involved in the legislative process surrounding Bill C-3 as witnesses before parliamentary committees, and through discussions with parliamentarians and parliamentary staff and officials in the executive branch of government. One of us has now been named a special advocate, and both of us remain involved in one capacity or another in the development of the special advocate process. Put another way, we have been analysts, witnesses and protagonists in respect to the matters addressed in this article. In this paper, we assess the outcome of the Bill C-3 experience through an academic lens in order to provide an unofficial “legislative history” of this law-project. The manner in which we proceed is, however, inevitably affected by (and reflects) our proximity to the law-making process.

We undertake this project in four core sections. Part II of this article provides a brief overview of the immigration security certificate regime and the core *Charkaoui* holding on the question of fair hearings. Part III canvasses the various models of “special counsel” the Supreme Court suggested might satisfy constitutional requirements under section 1 of the *Canadian Charter of Rights and Freedoms*.¹¹ Part IV examines the policy and political environment in which Bill C-3 was then developed, the nature of Bill C-3’s response to the core findings of the *Charkaoui* decision and the law-making process in Parliament. Part V then turns to other features of Bill C-3, noting both changes that will likely prove important and other areas that will likely create new controversies.

The article concludes that Bill C-3 represents an unsatisfactory waypoint in — rather than an ultimate culmination of — protracted constitutional debates over security certificates.

¹⁰ Craig Forcese & Lorne 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* (Study commissioned by the Canadian Centre for Intelligence and Security Studies, with the financial support of the Courts Administration Service) (August 2007), online: <<http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>> [hereinafter “*Seeking Justice*”].

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

II. SECURITY CERTIFICATES AND THE *CHARKAOUI* DECISION

1. Security Certificates in Brief

Under the *Immigration and Refugee Protection Act*,¹² the Federal Court of Canada reviews “security certificates” issued by the Minister of Immigration and the Minister of Public Safety. These certificates are linked to the detention and, where adjudged reasonable by a Federal Court judge, the potential removal of a named person.¹³ Where the security concerns are grave enough, IRPA purports to authorize the removal of the named person even if he or she is at risk of torture or other maltreatment in the receiving state, after the government balances the risk to the named person against the risk the person poses to Canada’s national security.¹⁴ In the Federal Court proceeding, the person subject to the certificate receives only a summary of the secret information produced by the government in support of the certificate.

As the section that follows describes, the resulting inability of the named person to know the case to be met and contest the government’s allegations has fuelled substantial controversy in and outside of the courtroom, and ultimately sparked the *Charkaoui* decision of the Supreme Court of Canada.

2. The Opportunity to Meet the Case and Security Certificates

(a) *Practice in the Federal Court*

In March 2002, Hugessen J. of the Federal Court publicly complained that the IRPA security certificate procedures make judges “a little bit like a fig leaf”.

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 to 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 ... is for most of us,

¹² S.C. 2001, c. 27 [hereinafter “IRPA”].

¹³ By “named person”, this article means the person subject to the security certificate.

¹⁴ See discussion on this point below in Part IV.

the real warranty that the outcome of what we do is going to be fair and just.

He proposed “some sort of system somewhat like the public defender system where some lawyers were mandated to have full access to the CSIS files, the underlying files, and to present whatever case they could against the granting of the relief sought”.¹⁵

Justice Hugessen’s views did not, however, affect the jurisprudence of the Federal Court on full answer and defence in security certificate proceedings. For instance, the Federal Court of Appeal, in the *Charkaoui* case, was sympathetic to the difficulties the IRPA *ex parte* process produces, noting “[t]here is no doubt that the system, as it exists, complicates the task of the designated judge who must, in the absence of an applicant and his counsel, concern himself with the latter’s interests in order to give equal treatment to the parties before him”.¹⁶ Yet, the Court of Appeal held that it was for Parliament to set up such a system, not for the courts to demand it as part of minimal constitutional guarantees.¹⁷ Similar views had been expressed by the Federal Court in other IRPA national security certificate cases.¹⁸ Up until 2007, the Federal Court had addressed concerns about the *ex parte* nature of proceedings by adopting a pseudo-inquisitorial style in an effort to probe the government evidence.¹⁹

(b) *The Charkaoui Decision of the Supreme Court of Canada*

The Supreme Court in *Charkaoui* took a very different approach, concluding that this Federal Court’s effort to resuscitate something approximating an adversarial system was inadequate.²⁰ In a passage

¹⁵ Justice Hugessen, at a March 2002 conference held at the Canadian Institute for the Administration of Justice entitled “Terrorism, Law and Democracy”, reproduced in James K. Hugessen, “Watching the Watchers: Democratic Oversight” in D. Daubney *et. al.*, eds., *Terrorism, Law and Democracy: How is Canada changing following September 11?* (Montreal: Canadian Institute for the Administration of Justice, 2002) 381, at 384.

¹⁶ *Re Charkaoui*, [2004] F.C.J. No. 2060, 2004 FCA 421, at para. 124 (F.C.A.).

¹⁷ *Id.*, at paras. 121-26.

¹⁸ *Re Harkat*, [2004] F.C.J. No. 2101, 2004 FC 1717, at para. 43 *et seq.* (F.C.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 173, 2005 FC 156, at para. 62 (F.C.).

¹⁹ See *Re Harkat*, [2005] F.C.J. No. 481, 2005 FC 393, at para. 93 *et seq.*

²⁰ *Charkaoui*, *supra*, note 3, at para. 51 (“The judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the

worthy of citation in full, the Court noted the deficiencies of the IRPA system:

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. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.²¹

For these reasons, the IRPA secrecy rules violated section 7. They also violated section 1; the government had shown no reason why it had failed to adopt some sort of model in which an independent "special counsel" represented the interests of named person in the *ex parte* proceedings. In the absence of such a counsel, the security certificate system could not be viewed as minimally impairing of the section 7 right.

III. A MENU OF MINIMALLY IMPAIRING ALTERNATIVES

This holding on special counsel constituted the single most important finding of the Court, one that would inform most of what followed in Bill C-3. It is important, therefore, to review closely the Supreme Court's deliberations on this issue.

Critically, in the course of its decision, the Court canvassed a number of different special counsel options, but without expressing a

parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture").

²¹ *Id.*, at para. 63.

preference between these alternatives. Indeed, it expressly left it to Parliament to decide “what more should be done”.²² These alternatives were (in the order in which they appeared): the Security Intelligence Review Committee (“SIRC”) process; the Air India trial process; the Arar Commission process; and the United Kingdom system of special advocates. It also discussed the approach taken by the *Canada Evidence Act*²³ in the disclosure of information said to raise national security issues. This Part examines the SIRC and U.K. approaches, the two models with a standing, institutional structure.²⁴

Our discussion of the SIRC and U.K. approaches includes information drawn both from published material, duly cited. In other instances, however, our information is from primary sources; that is, drawn from a series of interviews conducted in the summer of 2007 with Canadian and U.K. barristers involved in the SIRC and special advocate systems.²⁵

1. Security Intelligence Review Committee

SIRC is a body of often prominent individuals appointed by the Governor-in-Council (after consultation with the leaders of official parties in the Commons) to review the Canadian Security and Intelligence Service (“CSIS”), Canada’s security intelligence agency.²⁶ In performing its functions, SIRC has two roles: to review the activities of CSIS and to investigate complaints against CSIS. In relation to the latter function, the most generic complaint concerns “any act or thing done by the Service”.²⁷

²² *Id.*, at para. 87.

²³ R.S.C. 1985, c. C-5.

²⁴ For an excellent discussion of, *inter alia*, the Air India trial and Arar Commission approach, see Roach, *supra*, note 4.

²⁵ These conversations consisted of telephone interviews and two London, U.K. roundtables conducted during the summer of 2007 with over a dozen special advocates, the U.K. Special Advocates Support Office and several United Kingdom defence counsel and civil society organizations as well as persons associated with the SIRC process. The interviews were conducted on the understanding that while the information obtained in them could be used freely, specific views would not be attributed to individuals (except with their consent). For a fuller discussion of the outcome of this research study, please see *Seeking Justice*, *supra*, note 10.

²⁶ *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 38 [hereinafter “CSIS Act”].

²⁷ *Id.*, s. 41. SIRC also investigates complaints emanating from a denial of a security clearance (s. 42), as well as matters that are referred to it by the Canadian Human Rights Commission under s. 45 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, when the

(a) *SIRC Immigration Role*

Prior to 2002, SIRC also had an important role in immigration proceedings in which the government was seeking to remove a permanent resident (as opposed to a simple foreign national) on, among other things, national security-related grounds.²⁸

Under the *Immigration Act*, as it then was, where the Minister of Immigration and the then-Solicitor General of Canada were of the opinion, based on security or criminal intelligence reports received and considered by them, that a permanent resident was a person inadmissible to Canada on, *inter alia*, security grounds, a report would be issued to SIRC. Once received by SIRC, the chair of the latter would assign one or more members to investigate the report's accuracy. Following its deliberations on this question, SIRC would make a report to the Governor-in-Council containing "its conclusion whether or not a certificate should be issued" by the latter, along with reasons. Subsequently, if it was persuaded that the named person was inadmissible on, *inter alia*, security grounds, the Governor-in-Council could then instruct the immigration minister to issue a certificate to that effect.²⁹ This certificate, in turn, resulted in the issuance of a deportation order, subject to a truncated right of appeal of that deportation order to the Immigration Appeal Division.³⁰ Both the SIRC recommendation and the decision of the Governor-in-Council were reviewable on standard judicial review grounds in Federal Court.³¹

In the course of performing its assessment, SIRC members were provided with the information the government had relied upon in making its findings. In fact, under the CSIS Act, SIRC is entitled "to have access to any information under the control of", *inter alia* CSIS, "that relates to the performance of the duties and functions of the Committee and to receive from [CSIS] such information, reports and explanations as the Committee deems necessary for the performance of its duties and

complaint raises security considerations. As well, SIRC can investigate complaints regarding the *Citizenship Act*, R.S.C. 1985, c. C-29.

²⁸ *Immigration Act*, R.S.C. 1985, c. I-2, s. 39 [hereinafter "*Immigration Act*"], now repealed by IRPA.

²⁹ *Id.*, s. 40.

³⁰ *Id.*, ss. 27, 32 and s. 70(4), now repealed by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

³¹ See, e.g., *Al Yamani v. Canada (Solicitor General)*, [1995] F.C.J. No. 1453, [1996] 1 F.C. 174 (F.C.T.D.); *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] F.C.J. No. 1160, [1999] 4 F.C. 624 (F.C.A.).

functions”.³² Cabinet confidences are exempted from this rule, an exception of limited significance in most of SIRC’s work.³³

Further, under the CSIS Act, as incorporated into the then-existing immigration law, SIRC had (and in relation to its still existing complaints and investigations role, retains) broad powers to subpoena persons and documents.³⁴

(b) *Procedure*

(i) *Disclosure*

Under its rules of procedure for complaints, SIRC members decide how much of the government information is disclosed to the named person, after consultation with the director of CSIS. The SIRC rules employed in immigration cases provided that, subject to the SIRC member’s oath of secrecy,³⁵ “it [was] within the discretion of the assigned members in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine if the facts of the case justif[ied] that the substance of the representations made by one party should be disclosed to one or more of the other parties”.³⁶

Prior to disclosure, SIRC would (and in relation to SIRC’s continuing complaints role, does) consult with the director of CSIS, to determine the extent of disclosure permissible under SIRC’s oath of secrecy. SIRC engages in negotiations with CSIS to arrive at a consensus as to what information can be released to the named person.

³² CSIS Act, *supra*, note 26, s. 39.

³³ Murray Rankin, “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness” (1990) 3 Can. J. Admin. L. & Prac. 173, at 182 (“It must be stressed that the Committee has access to virtually all information, even source reports collected by the Service, and can use this information in reaching its decision. The only exception to this rule of access pertains to Cabinet records in the possession of the Service, but in almost all complaints cases, this statutory exception would be of limited relevance”).

³⁴ CSIS Act, *supra*, note 26, s. 50, referenced in *Immigration Act*, *supra*, note 28, s. 40(5), now repealed by IRPA.

³⁵ Members of SIRC and its employees must comply with all security requirements under the CSIS Act and take an oath of secrecy. *Supra*, note 26, s. 37. They are also “persons permanently bound to secrecy” under the *Security of Information Act*, R.S.C. 1985, c. O-5, and are therefore subject to that statute’s penalties for wrongful disclosure of sensitive information.

³⁶ SIRC, *Rules of Procedure of the Security Intelligence Review Committee in Relation to its Function under Paragraph 38(c) of the Canadian Security Intelligence Service Act*, para. 46(2)(a). See also para. 48(4) (providing for a similar balancing where a party is excluded from *vice voce* testimony).

Where SIRC and the director disagreed firmly, in theory the question of disclosure could be adjudicated by the Federal Court under section 38 of the *Canada Evidence Act*,³⁷ described below.³⁸

In performing its functions, SIRC was and is empowered to hold *ex parte* and *in camera* hearings to receive information that is not disclosed on security grounds. In the *ex parte* hearings, several counsel are present: counsel to CSIS, counsel for any witnesses, counsel for any government departments with an interest in the case, and SIRC's own counsel.³⁹ The latter include inside counsel and/or a SIRC legal agent.

(ii) SIRC Inside Counsel and SIRC Legal Agents

Inside counsel are employees of SIRC and part of its bureaucratic staff and have a close, but still-arm's length, working relationship with CSIS. (Staff from both organizations have regular contact with each other). At the time of this research, SIRC had two in-house counsel.⁴⁰

SIRC counsel are charged with probing the government position, and in so doing further the complainant's interests. In immigration matters, they were (and in relation to SIRC's continuing complaints function, are) charged with challenging decisions on the non-disclosure of the information contained in the closed material, as well as cross-examining government witnesses in *ex parte* proceedings. Describing this counsel's role, a former SIRC legal advisor wrote in 1990:

The Committee's counsel is instructed to cross-examine witnesses for the Service with as much vigour as one would expect from the complainant's counsel. Having been present during the unfolding of the complainant's case, the Committee counsel is able to pursue the same line of questions. In addition, however, since Committee counsel has the requisite security clearance and has had the opportunity to review files not available to the complainant's counsel, he or she is

³⁷ R.S.C. 1985, c. C-5.

³⁸ This eventuality has not yet arisen. However, on occasion SIRC has received letters from Department of Justice counsel acting on behalf of CSIS warning SIRC that if the disclosure of information was not made in accordance with the direction of CSIS, that the Department of Justice counsel would initiate proceedings under the *Canada Evidence Act* to prohibit the disclosure. *Seeking Justice*, *supra*, note 10, at 7.

³⁹ It should be noted that a lawyer holding a Top Secret clearance who represents a department in the case (for instance) of a security clearance denial, and any departmental representative is usually excluded from the hearing while a CSIS witness testifies before the Review Committee *ex parte in camera*. Hence, there are occasions when not only the complainant and the complainant's counsel are excluded from the hearing. *Seeking Justice*, *id.*

⁴⁰ *Id.*

also able to explore issues and particulars that would be unknown to the complainant's counsel.⁴¹

Still, as this same author also noted, "a great deal turns on the ability of Committee counsel to perform effectively in this unfamiliar role".⁴² Outside counsel (or "legal agents") may be retained in some cases where, because of workload issues, inside counsel is not fully capable of acting in the adversarial proceedings. In other cases, legal agents may be retained where inside counsel judge that the case will require particularly aggressive cross-examination of CSIS. Certainly, inside counsel will conduct forceful cross-examination in the cases with which they are charged. However, SIRC inside counsel must strive to remain (and appear to remain) objective and impartial in order to protect SIRC from any real or perceived apprehension of bias. In those cases where a particularly aggressive cross-examination is required, SIRC may retain a legal agent to preclude an apprehension of bias directed towards SIRC or SIRC's counsel. In other cases, where an issue of law is particularly sensitive or complex, SIRC may retain legal agents to provide an expert opinion.⁴³

In practice, the extent to which legal agents are employed has reportedly varied over the years, reflecting the predispositions of changing SIRC administrators and the case load at SIRC. As of the time of this writing, there were four legal agents on the SIRC list, of varying levels of experience. These individuals were selected on a fairly informal basis, without a formal application process, and are security-cleared. At present, whenever a legal agent is retained by SIRC for a case, that retainer must be authorized by the Department of Justice.⁴⁴ Justice generally accommodates SIRC requests for outside counsel and understands the need for SIRC to maintain an arm's length relationship with government.⁴⁵

⁴¹ Rankin, *supra*, note 33, at 184.

⁴² *Id.*

⁴³ *Seeking Justice, supra*, note 10, at 8.

⁴⁴ This authorization is required in accordance with s. 4 of the *Government Contracts Regulations*, SOR/87-402 and the *Treasury Board Common Services Policy*. For a discussion of the government's legal agents rules, see online: <<http://www.justice.gc.ca/eng/dept-min/la-man/index.html>>. Note that rates of pay for legal agents on the government scale are lower than what these individuals likely bill private clients.

⁴⁵ SIRC sought a delegation of authority to contract for legal agents from the Department of Justice on September 21, 2006 to ensure its independence and impartiality. By letter dated October 21, 2006, the Assistant Deputy Attorney General for the Civil Litigation Branch of the Department of Justice informed SIRC that a delegation of authority would not be granted and all

The pool of lawyers across Canada from which SIRC can select legal agents is small. SIRC can only retain outside counsel who are in possession of a top secret clearance, are not in a conflict of interest with either the government or the named person and have expertise in litigation and national security matters. There may also be a language requirement for the contract depending on the first language of the named person or the CSIS witnesses.⁴⁶

(iii) Relationship with Named Person

SIRC in-house and outside counsel are able to maintain contact with the named person and his or her counsel throughout the process. SIRC lawyers or legal agents may, therefore, question the named person even after the former are fully apprised of the secret information against the latter. In so doing, they take special care not to disclose (even involuntarily) secret information.⁴⁷

Even with this restriction, one of SIRC's outside counsel is on record as indicating that this questioning, despite being done in an oblique manner to avoid involuntary disclosures of secret information, is central in unearthing potentially exculpatory information and observed that some cases at least have turned on information obtained from the named person in this manner.⁴⁸

After reviewing the CSIS file, SIRC inside or outside counsel will have contact with the named person and their counsel to converse and to obtain a list of questions that these persons may wish to have asked during the secret proceeding. Likewise SIRC inside or outside counsel may have contact with the named person after a summary of information tabled in the secret proceedings has been provided to the latter. After reviewing the summary, the named person may wish to have additional CSIS witnesses appear before the Committee and hence be cross-examined by SIRC counsel.⁴⁹

agents would continue to be approved for appointment by the Department of Justice on an *ad hoc* basis. *Seeking Justice*, *supra*, note 10, at 8-9.

⁴⁶ *Seeking Justice*, *id.*

⁴⁷ *Id.*, at 9.

⁴⁸ *Id.* See also on this point, testimony of Mr. Gordon Cameron (SIRC outside counsel and now special advocate), Proceedings of the Special Senate Committee on Anti-terrorism, Issue 4 — Evidence — Meeting of February 11, 2008 (“it is sometimes only through continued access that you are able to get the other side of the story, the explanation or the rebuttal of allegations made about a person”).

⁴⁹ *Id.*

No SIRC in-house or outside counsel has ever reportedly received any complaints from the government that this contact with the named person has resulted in an involuntary disclosure injurious to national security.⁵⁰

2. The United Kingdom System of Special Advocates

(a) Overview

Before 1997, a decision to deport an individual from the United Kingdom on national security grounds was strictly an executive decision, made personally by the Home Secretary. The latter based his or her determination on all relevant material, including information that was withheld from the named person on national security grounds. Where the government asserted national security confidentiality, the deportation decision was referred to a panel (dubbed the “Three Wise Men”) who reviewed the Home Secretary’s determination and made recommendations on whether the removal order should stand.⁵¹

This system was challenged successfully by a named person in the European Court of Human Rights. In *Chahal v. U.K.*,⁵² the Court concluded that the U.K. system violated the European Convention on Human Rights because it precluded court review and denied any means for lawyers representing the named persons’ interests to challenge secret information against the latter. In the course of deciding the case, the Court alluded to the system employed by the Federal Court of Canada involving what are now known as special advocates. Since no such system then-existed before the Federal Court, the European Court was probably referring to the SIRC system discussed above.

In direct response to *Chahal*, the U.K. parliament enacted the *Special Immigration Appeals Commission Act 1997*.⁵³ This statute created the Special Immigration Appeals Commission (“SIAC”), a superior court of record sitting in panels comprising a High Court judge

⁵⁰ *Id.*

⁵¹ Treasury Solicitors Department, “Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO)”, online: <http://www.attorneygeneral.gov.U.K./attachments/Special_Advocates.pdf> [hereinafter “Open Manual”], at 4. See also the overview provided by Andrew Boon & Susan Nash, “Special Advocacy: Political Expediency and Legal Roles in the Modern Judicial System” (2006) 9(1) *Legal Ethics* 101.

⁵² *Chahal v. United Kingdom* (1997) 23 E.H.R.R. 413, [1996] Eur. Ct. H.R. 54 (Eur. Ct. H.R.).

⁵³ (U.K.) 1997, c. 68.

(or other holder of high judicial office), an immigration adjudicator and a lay member with security and intelligence expertise. SIAC hears asylum and immigration appeals (and now citizenship revocation cases) involving national security.⁵⁴

(b) *Special Advocates*

The SIAC Act authorizes the appointment of a special advocate — that is, “a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded”.⁵⁵ Once an appeal is lodged with SIAC against a government immigration decision, the U.K. Secretary of State decides whether the appeal is likely to implicate information that will not be disclosed to the named person on national security grounds. In these circumstances, a special advocate may be (and in practice invariably is) appointed by the U.K. Attorney General. In fact, the government may not rely on “closed” — that is secret — information at the hearings if no special advocate is appointed.⁵⁶

While special advocates were once appointed to a specific case by the Attorney-General, named persons now select a special advocate from the roster. In practice, the Special Advocates Support Office (“SASO”), a division of the Treasury Solicitor’s Department working at arm’s length from the rest of the department, informs the named person’s solicitors of the appointment and provides the list of barristers on the special advocate roster. The named person is asked to name his or her preference of lead and junior special advocates, subject to availability and the absence of any conflict of interest.⁵⁷

(i) Key Functions

(A) CHALLENGING THE GOVERNMENT CASE

As noted, the SA acts in the best interest of the named person. SAs are specifically charged in SIAC and control order proceedings with “(a) making submissions to the court at any hearings from which the relevant

⁵⁴ Open Manual, *supra*, note 51, at 5.

⁵⁵ *Special Immigration Appeals Commission Act 1997*, *supra*, note 53, s. 6.

⁵⁶ *The Special Immigration Appeals Commission (Procedure) Rules 2003* (U.K.), S.I. 2003/1034, r. 37(2) [hereinafter “SIAC Rules”].

⁵⁷ Open Manual, *supra*, note 51, at 7.

party and his legal representatives are excluded; (b) cross-examining witnesses at any such hearings; and (c) making written submissions to the court”⁵⁸.

In practice, SAs may present arguments on the admissibility of government information, albeit under rules that are quite permissive on the question of admissibility.⁵⁹ SAs presumably present arguments on the weight information should be given by the tribunal. SAs do also cross-examine government witnesses, exploring inferences drawn from government information or inconsistencies in witnesses’ testimony.⁶⁰

Lord Carlile, the independent examiner of U.K. anti-terrorism laws, has reported that SA “analysis and examination of factual matters” has been rigorous.⁶¹ Further, there have in fact been instances where SAs have challenged successfully at least part of the government’s case by noting discrepancies in the government’s approach between cases. In one circumstance, the government used information in one case that had been discredited in the other. The government was challenged successfully on this practice by the SA, who happened to be the same person in both cases. All told, by summer 2007, there had reportedly been three successful SIAC appeals (and several bail hearings) in which the SA had played a significant role.⁶² In a number of other cases, the SA has pressed the government on matters of consistency and disclosure with significant impact, but without altering the overall outcome of the case.⁶³

⁵⁸ SIAC Rules, S.I. 2003/1034, r. 35.

⁵⁹ Evidence produced via torture or other abusive forms of interrogation would, however, be vulnerable to challenge by the special advocate on admissibility grounds. See discussion in Nicholas Blake, Q.C., *The Role of the Special Advocate* (March 26, 2007) (on file with the authors), at para. 1.10.

⁶⁰ Blake, *id.*, at para. 1.16.

⁶¹ Lord Carlile of Berriew, Q.C., “Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004”, at para. 74.

⁶² By way of example, see *M. v. Secretary of State for the Home Department*, SC/17/2002 (SIAC), at para. 10. Critics of the SA process suggested, however, that in this case the SA’s success came in challenging the security service’s flawed understanding of the operational scale of a given terrorist group (and whether it could properly be considered an international terrorist entity), not in terms of querying the factual minutiae of the named person’s own activities.

⁶³ *Seeking Justice*, *supra*, note 10, at 39.

(B) PRESSING FOR FULLER DISCLOSURE TO THE SPECIAL ADVOCATE
HIMSELF OR HERSELF

The SIAC rules require the government to serve on the SA a copy of the closed material.⁶⁴ The nature of the closed information provided to SAs varies. Sometimes, for instance, SAs do receive actual transcriptions of intercepted communications. In other instances, SAs receive analytical summaries or assessments prepared by the security services that may quote from intercept materials. In the latter instance, SAs worry that the assessment is selective, reflecting the government's position and not necessarily a full or fully contextualized rendition of recorded conversations. Moreover, these summaries sometimes contain "piled" hearsay — that is, second-hand (or perhaps seventh or eighth hand) accounts of inculpatory conversations. Some of these accounts may be supplied by other security services, in summary analytical form. In this manner, subjective analysis is compounded by subjective analysis.⁶⁵

In his 2004 review of the relevant provisions in U.K. anti-terrorism law, Lord Carlile concluded "that there has been meticulous attention to the importance of disclosure in an appropriate way of material adverse to the Secretary of State's case or otherwise of assistance to the Appellant".⁶⁶ There is no consensus on this point, however. Several SAs suggest that while they interpret the rules as obliging disclosure of both inculpatory and exculpatory information, the government sometimes fails to disclose exculpatory information in its possession. SAs have had to rely on the government's own assessment of what information is relevant. For this reason, the material SAs themselves receive is sometimes redacted — that is, portions are blacked out supposedly because they are irrelevant.⁶⁷

The government's assessment of what is relevant reportedly does not always dovetail with SA views. SAs are reportedly aware of cases in which important exculpatory information was not disclosed, but only learned of this fact because the same SA appeared on two different cases. In one of these cases, information pertinent to (and exculpatory in)

⁶⁴ SIAC Rules, S.I. 2003/1034, r. 37.

⁶⁵ *Seeking Justice*, *supra*, note 10, at 40.

⁶⁶ Lord Carlile of Berriew, *supra*, note 61, at para. 86.

⁶⁷ We were told that where the government wishes to redact, it must justify this action before SIAC. *Seeking Justice*, *supra*, note 10, at 41.

another case was disclosed that had not been provided in the original matter.⁶⁸

SAs have, therefore, sometimes pressed the government to disclose to the SAs themselves more than is on the closed record. While their legal right to do so is unclear, SAs obviously see their role as being not simply reactive; that is, to respond to and probe the information already provided by government. Instead, they have taken a proactive approach, asking for more information.⁶⁹ The SA capacity to press for full disclosure will likely be enhanced by recent procedural rule changes. Under these amendments, the government is expressly obligated to disclose both a statement of the information on which it relies and “any exculpatory material” of which it is aware.⁷⁰ The new rules also set out clear standards of how the government is to conduct its search for exculpatory materials.⁷¹

By the time of this research, it remained to be seen how diligently the government would perform these responsibilities. SAs complained that government disclosure of information to the SAs under the original rules had often been very tardy, to the extent that SAs have often not been able to execute effectively their function in pressing for greater disclosure to the named persons themselves, described below.⁷²

SA concerns about government disclosure extend beyond documents. One SA reported that over time, the government and SIAC judges have been more restrictive in terms of the sorts of persons they will allow to be cross-examined by SAs. Whereas previously, SAs could cross-examine “agency-handlers”, the security services no longer permit questioning of persons with close knowledge of sources, and SIAC has backed the government position.⁷³

(C) ENHANCING DISCLOSURE TO THE NAMED PERSONS AND THEIR COUNSEL

SAs clearly see as one of their key (and perhaps principal) roles pressing for greater disclosure to the named persons and their counsel. In performing his or her functions, the SA serves the best interest of the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007, S.I. 2007/1285, s. 9, amending r. 10.*

⁷¹ *Id.*, s. 10, creating r. 10A.

⁷² *Seeking Justice, supra*, note 10, at 42.

⁷³ *Id.*

named person by acting as an impartial assessor of secret information and championing its release where the SA believes it warranted. Thus, having vetted the closed information, SAs may urge the release of innocuous information, and may obtain the consent of the government to this disclosure. Sometimes this release may come in the form of a sanitized summary of closed information. In other instances, it may constitute the actual information in question. For example, the SA may find an alternative, open source for some of the closed information, thereby discrediting the view that this information is non-disclosable to the named person. One SA indicated, for example, that in some cases SAs have been able to force the government to provide fuller disclosure by doing Internet searches to establish that information that was being withheld was readily available over the Internet.⁷⁴ Cross-referencing closed material against public source information available elsewhere is obviously a time-consuming activity, one that SAs have in the past said is difficult for them to undertake.⁷⁵

(D) COMMUNICATING EXISTENCE OF GROUNDS FOR APPEALS

SAs do not themselves have standing to appeal SIAC decisions to the Court of Appeal, a handicap that some SAs believe should be corrected. However, the SA may seek permission from the tribunal to contact the named person and communicate the existence of grounds for appeal. The actual grounds may concern closed information, and may not, therefore, be disclosable. However, the SA would then be able to plead closed grounds before the Court of Appeal.⁷⁶

(c) *Shortcomings of the Special Advocate System*

The single most controversial aspect of the U.K. system is the inability of SAs to communicate with the named person once they are in “closed”. That is, once an SA has been given access to the closed material in the case, she or he may have no communication with the named persons or their solicitor without the permission of the tribunal.

⁷⁴ *Id.*

⁷⁵ See, e.g., United Kingdom, House of Commons, Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC): Written Evidence” (February 7, 2005), HC 323-II, at 19 [hereinafter “Evidence submitted by a number of Special Advocates”].

⁷⁶ Blake, *supra*, note 59, at para. 1.17.

This permission, in turn, can only be provided after the government has a chance to respond to the request.⁷⁷

As several SAs argued before a parliamentary committee in 2005, the fact that questions to named persons during the closed session are vetted by the government — the opponent in the proceedings — “precludes communications even on matters of pure legal strategy”.⁷⁸ The questions asked — passed through the tribunal and security services — could well spark the interest of the security services, in a manner prejudicial to the named person. A subsequent failure of the SA in the proceeding to then rely on whatever answer was provided by the named person would also attract the attention of the security services.⁷⁹

Without question, these strict limitations on communications between named persons and special advocates constitute the most dramatic departure from conventional fair trial standards and the most controversial aspect of the U.K. special advocate system. They also differ from the SIRC approach described above, which permits continued communication.

The U.K. communication rules reflect the government’s preoccupation with inadvertent disclosure; that is, information conveyed to the named person through the questions asked. This concern with inadvertent disclosure does not, however, extend to government counsel or the security services. The latter are not restricted in their communications once they have accessed secret material and do question the named person before or during the proceedings. This inconsistent approach on inadvertent disclosure may reflect an expectation (unwarranted, in the eyes of SAs) that those prosecuting the case are less likely to ask the sorts of questions that unintentionally convey secret information.⁸⁰

⁷⁷ See SIAC Rules, S.I. 2003/1034, r. 36: “After the Secretary of State serves material on the special advocate ... the special advocate must not communicate with any person [other than, e.g., the government, the tribunal] [except at the] direction of the Commission.” Where the SA requests directions from SIAC authorizing communication, “(a) the Commission must notify the Secretary of State of the request; and (b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made”. The named person may unilaterally communicate with the SA.

⁷⁸ *Supra*, note 75, at 19.

⁷⁹ However, some SAs had occasionally sought (and received) permission to communicate in writing. The information imparted in these letters was reportedly of an undeniably unproblematic sort. Occasionally, this information concerned procedural matters; in other instances, the information was more substantive. At least one SA has communicated, for example, his belief that grounds for appeal existed in a case and is trying to communicate the actual grounds. SAs who had made these queries have not, however, sought information from the named person. *Seeking Justice*, *supra*, note 10, at 36.

⁸⁰ *Id.*, at 36.

In our research, SAs consistently acknowledged that their inability to communicate (other than in the narrowest circumstances) with the named persons or their solicitors after receiving closed material impairs their effectiveness.⁸¹ SAs are obviously ill positioned to challenge the credibility of government information in the same way they might do so in a regular proceeding; that is, by offering an exculpatory explanation (of the sort that can only be derived from the named person him or herself) for superficially incriminating information. For example, a named person impugned by a secret government informer might be able to cast doubt on the information provided by the informer in a way that no SA could (*e.g.*, the informer and the named person have a history of animosity that might drive the former to lie about the latter).

SAs are technically permitted to call witnesses on behalf of the named person, but one SA has written that “this is a practical impossibility because even if one knew what witnesses were available, calling them to address issues of fact would alert them to the nature of the issues that have to be kept closed in the first place. Expert witnesses will be unable to comment on a secret assessment without themselves being security-cleared and having authorized access to the resources of the security service on which the assessment is based.”⁸² Moreover, if SAs put forward a positive case in the closed sessions, “that positive case is inevitably based on conjecture. They have no way of knowing whether it is the case that the appellant himself would wish to advance.”⁸³

All told, SAs indicated that they were usually ill equipped to undermine the government’s theory of the case — as noted, only a few cases have collapsed when probed by the SA. Some SAs indicated that in circumstances where the government’s case cannot be challenged effectively on the basis of the information available to the SA, they sometimes are obliged to take a more passive role in the hearings, declining for example to pursue lines of cross-examination that may lead in unexpected (and, for the named person, potentially) prejudicial directions.⁸⁴

⁸¹ *Id.*, at 39. Lord Bingham, dissenting in *Roberts v. Parole Board*, [2005] U.K.H.L. 45, [2005] 2 A.C. 738, at para. 18 (U.K.H.L.), described the special advocate as inevitably “taking blind shots at a hidden target”.

⁸² Blake, *supra*, note 59, at para. 1.8.

⁸³ *Supra*, note 75, at 16.

⁸⁴ *Seeking Justice*, *supra*, note 10, at 40.

The defence lawyers to whom we spoke emphasized quite pointedly that the SAs' ability to offer a full answer and defence is non-existent, given the constraints on communication between the SA and the named person. They cautioned against overstating the utility of SAs in challenging the government case. Critics of the SA system urge that a system in which named persons do not know the case against them cannot be fair. It contaminates the system of justice and breeds cynicism on the part of named persons.⁸⁵ SAs "give a veneer of legality" to this fundamentally unfair system.⁸⁶ One former SA who resigned in protest writes that his "role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial".⁸⁷

These complaints have been echoed by parliamentary committees. In July 2007, the U.K. Parliament Joint Committee on Human Rights issued a strongly worded report describing the special advocate system as "'Kafkaesque' or like the Star Chamber".⁸⁸ On the specific issue of special advocates and communication with named persons, it made the following recommendation:

In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person. ... With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.⁸⁹

The Committee also criticized the level of disclosure made by the government to the named person — concluding that secrecy is

⁸⁵ *Id.*, at 44.

⁸⁶ Amnesty International, "Justice perverted under the Anti-terrorism, Crime and Security Act 2001", AI Index: EUR 45/029/2003 (December 11, 2003).

⁸⁷ Ian Macdonald, Q.C., "The Role and Experiences of a Special Advocate in Suspected Terrorist Detentions" (June 19, 2007 version) (on file with the authors), at para. 24.

⁸⁸ United Kingdom, House of Commons and House of Lords, "Joint Committee On Human Rights — Nineteenth Report" (July 16, 2007) online: <<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm>> [hereinafter "Joint Committee On Human Rights"].

⁸⁹ *Id.*

sometimes excessive — and the low burden of proof the government must satisfy to make-out its SIAC case.

IV. BILL C-3 AND SPECIAL ADVOCATES

This article now turns to reviewing Bill C-3 and the aftermath of the *Charkaoui* decision.

1. Post-*Charkaoui* Policy Focus

The Supreme Court released the *Charkaoui* decision on February 23, 2007. Critically, it suspended its declaration of constitutional invalidity for one year, until February 23, 2008. Upon the expiry of this deadline, those named persons subject to a certificate deemed reasonable under the prior system could “apply to have the certificates quashed”.⁹⁰ Put another way, individuals who the government claimed were grave threats to national security would no longer be subject to the security certificate process, unless Parliament enacted a replacement system curing the constitutional deficiencies of the IRPA by late February 2008.

Not surprisingly, in the immediate aftermath of the *Charkaoui* decision, the policy focus was on special counsel. For instance, a month after *Charkaoui*, a special senate committee recommended that a special counsel process be extended to all proceedings where “information is withheld from a party in the interest of national security and he or she is therefore not in a position to make full answer and defence”, including under the IRPA, the *Criminal Code* terrorist group listing process, the *Charities Registration (Security Information) Act*⁹¹ and the *Canada Evidence Act*.⁹² Moreover, the committee urged that the special counsel be empowered to communicate with the affected parties after receiving confidential information, subject to guidelines designed to bar the release of secret information. The counterpart Commons committee also recommended a comprehensive “panel of special counsel” for national

⁹⁰ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 140 (S.C.C.).

⁹¹ S.C. 2001, c. 41, s. 113.

⁹² R.S.C. 1985, c. C-5. See also, Special Senate Committee on the *Anti-terrorism Act, Fundamental Justice in Extraordinary Times* (February 2007), at 42.

security cases,⁹³ but without weighing in on the precise design of this system.

The government, for its part, remained silent on its response to *Charkaoui* through the winter, spring, summer and early Fall of 2007. Its only pronouncement on the issue came on July 18, 2007, when the government responded to the above-noted Commons committee recommendations. The government affirmed the need to address the Supreme Court's February ruling within one year, and simply indicated that it was studying "the possibility of establishing a special advocate role in the security certificate process".⁹⁴

Despite the notoriety of the security certificate system and the controversy and public attention sparked by it, no public consultations were held and no formal notice was given of the government's approach to the special counsel issue until Bill C-3 was tabled in the House of Commons and received first reading on October 22, 2007, fully eight months after the *Charkaoui* decision and four months prior to the expiry of the one-year suspension of the declaration of invalidity.

2. The Bill C-3 Model

As noted above, the Supreme Court of Canada canvassed a number of special counsel options in *Charkaoui* without mandating a particular model. The government was, therefore, presented with a choice in the crafting of Bill C-3, including the choice of building on Canada's indigenous experience with SIRC in immigration and other matters. In comparison, a U.K.-style model — with its strict restrictions on continued contact between special advocate and named person once the former had reviewed the secret information and concerns about full disclosure — would constitute a departure from the SIRC approach. Indeed, the Supreme Court itself was alive to criticisms of the U.K. system, including those concerning restrictions on contact between named person and special advocate.⁹⁵

⁹³ House of Commons Subcommittee on the Review of the Anti-terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (March 2007), at 81.

⁹⁴ Canada, *Response of the Government of Canada to The Final Report of the Standing Committee on Public Safety and National Security Subcommittee on the Review of the Anti-Terrorism Act* (released July 18, 2007), at 23.

⁹⁵ *Charkaoui*, *supra*, note 90, at para. 83.

Nevertheless, for reasons that have never been satisfactorily explained to these authors, Bill C-3 drew its clear inspiration from the United Kingdom.⁹⁶ As Roach observes, in so doing the government selected, and Parliament ratified, “the only alternative that the [Supreme] Court recognized [in *Charkaoui*] had been subject to criticism and the one alternative that arguably achieves the worst job of all the alternatives in ensuring fair treatment of the affected person”.⁹⁷

(a) *Features of Bill C-3 Special Advocate Model*

Pursuant to Bill C-3, the Minister of Justice is instructed to “establish a list of persons who may act as special advocates”.⁹⁸ Although not in a solicitor-client relationship with the named person,⁹⁹ the “special advocate’s role is to protect the interests of the permanent resident or foreign national in a [security certificate] proceeding ... when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel”.¹⁰⁰ To this end, the special advocate “may challenge (a) the Minister’s claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and (b) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it”.¹⁰¹

In terms of his or her specific methods, the special advocate may:

⁹⁶ At the Commons committee hearing on Bill C-3, the government asserted a preference for the U.K. model because “the Supreme Court mandate was to make sure that the special advocate represents the interests of the individual. The only living example of this was the U.K. special advocate system, so that was essentially how we got to the U.K. model as the starting point.” Mr. Daniel Therrien (Acting Assistant Deputy Attorney General, Citizenship, Immigration and Public Safety Portfolio, Department of Justice), *Evidence*, 39th Parl., 2nd Sess., Tuesday, November 27, 2007. On a technical level, it is true that in the SIRC process, SIRC counsel represents the interests of SIRC, which tend also then to dovetail with the complaint to the extent that both have an interest in the truth. The government’s explanation for its reliance on the U.K. model does not, however, answer the question of why they did not graft onto that model the more rights-protecting aspects of the SIRC approach, not least in terms of continued access to the named person and robust full disclosure powers.

⁹⁷ Roach, *supra*, note 4.

⁹⁸ IRPA, s. 85(1).

⁹⁹ *Id.*, s. 85.1(3).

¹⁰⁰ *Id.*, s. 85.1(1).

¹⁰¹ *Id.*, s. 85.1(2).

- (a) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;
- (b) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and
- (c) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.¹⁰²

There are, however, serious restrictions on the special advocate's ability to communicate. The government is obliged to, *inter alia*, "file with the Court the information and other evidence on which the certificate is based" once the matter is referred to the Federal Court.¹⁰³ The special advocate is entitled to receive this information.¹⁰⁴ However, upon receipt of the secret information to which the named person is denied access, "the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate".¹⁰⁵

(b) Shortcomings of the Bill C-3 Model

Following the tabling of Bill C-3, the bill was welcomed by some¹⁰⁶ and critiqued by others.¹⁰⁷ For their part, these authors joined others in critiquing the special advocate model on several grounds.¹⁰⁸

¹⁰² *Id.*, s. 85.2.

¹⁰³ *Id.*, s. 77(2).

¹⁰⁴ *Id.*, s. 85.4(1).

¹⁰⁵ *Id.*, s. 85.4(2).

¹⁰⁶ See, e.g., "Detaining suspects in security's name" *The Globe and Mail*, October 24, 2007.

¹⁰⁷ See, e.g., Janet Cleveland, Sharryn J. Aiken & Francois Crepeau, "The rights of non-citizens; The recent addition of special advocates to the security certificate process does little to protect the accused" *Ottawa Citizen*, October 31, 2007.

¹⁰⁸ See, e.g., Craig Forcese, "Is Bill C-3 the Security Way to Go?" *The Globe and Mail*, February 6, 2008 and Craig Forcese & Lorne Waldman, "Canada doesn't need a star chamber" *The National Post*, October 25, 2007.

(i) Full Disclosure

First, the law specifically authorizes the special advocate to review secret information provided by the government to the judge in the security certificate process. However, it includes no express procedures for the special advocate to reach beyond this information and seek and obtain government records not already disclosed to the court (other than simply to ask the judge to oblige this disclosure). A special advocate will be hard pressed to persuade a judge to allow this access: He or she will be reduced to arguing that he or she suspects that there might be further relevant material, but not having access to it, will have difficulty making this case.

Certainly, the Federal Court currently demands that all relevant information be disclosed to the court itself.¹⁰⁹ Yet, what the government considers “relevant” and what a special advocate charged with defending the best interests of the detained person considers “relevant” will not always correspond. That is a lesson we extracted from the United Kingdom experience described above. It is also consistent with the phenomena of tunnel vision described by Kent Roach; that is

... a process in which authorities, often with the noblest of intentions, fixate on a person’s purported guilt, discount or ignore information that points to the person’s innocence and interpret ambiguous and even innocent information as evidence of a person’s guilt. Tunnel vision is not necessarily the product of deliberate misconduct by officials, but can be the product of institutional pressures that increase as the state has invested much time and resources in focusing on a suspect.¹¹⁰

The risk of tunnel vision is arguably more acute in relation to processes reliant on security intelligence rather than evidence. First, evidence marshalled in the criminal context is variable, but generally falls within an expected range of forensic and witness information, notes taken contemporaneously by police officers and the like. Police agencies have

¹⁰⁹ See, e.g., *Re Charkaoui*, [2006] F.C.J. No. 868, 2006 FCA 206, at para. 24 (F.C.A.), on appeal to the Supreme Court at the time of this writing. In that same case, however, the court also focused on the fact that security certificates are administrative and not criminal proceedings, and tailored its position on disclosure accordingly, denying that *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.), rules apply in the security certificate context. It should be noted that the outcome of security certificate processes may be more serious than anything the *Criminal Code*, R.S.C. 1985, c. C-46 could impose — indefinite detention without charge and removal to torture. In these circumstances, the nominal invocation of criminal versus administrative to define the scope of disclosure rules is utterly unpersuasive and inconsistent with the notion that “fundamental justice” in s. 7 varies with the circumstances, not least the gravity of consequences to the interested party.

¹¹⁰ Roach, *supra*, note 4.

established rules and procedures on chain of custody and the entire process is hemmed by rigorous rules of evidence governing admissibility (not least, rules barring hearsay, for the most part).

In comparison, as discussed further below, security certificate proceedings are constrained by virtually none of these rules and the information on which they turn may include direct evidence of culpability (such as transcripts of intercepts) but (as we understand it) is often more circumstantial, involving risk assessments and analysts reports far removed from direct evidence of conduct. The product ultimately tabled in court may be a Canadian analyst report, drawing on the analyst report of allied agencies. Analysts report piled on analyst report compounds subjectivity with subjectivity, and information is shifted and discarded by many hands before being presented in its refined form in court. In these circumstances, the prospect that relevant (and indeed exculpatory) information might go missing seems enormous.

Second, it cannot be forgotten that security certificate processes are *ex parte*. Unlike in conventional criminal trials, the interested party is not present, and therefore is in no position to query unfamiliar government interpretations of events that the person may have been part of. Nor can they identify gaps in the record they know must exist because of their familiarity with these events. The special advocate is left to operate without these insights.

Under these circumstances, disclosure rules cannot rely simply on the good faith of government without risking serious miscarriages of justice. We took the view that Bill C-3 should integrate an independent third party into the process, able to examine the full government files and certify full disclosure. Given its long-standing familiarity with security intelligence and its expertise in reviewing files of this nature, we urged that SIRC be authorized to conduct such a process, when asked to do so by a special advocate.

(ii) Continued Contact between Special Advocate and Named Person

Second, the law does not close the door on continued contact between the special advocate and the interested party subject to the certificate. Nor, however, does it affirmatively guard this right. Instead, this is a matter left to the discretion of the judge. Given the uncontroversial practice of allowing continued access in the SIRC context, and the vital nature of that continued contact to the effectiveness of the SIRC counsel in at least some cases, we urged that language of the

bill be reversed, creating a presumption of continued access, subject only to reasonable limitations necessary to protect the integrity of the secret information.

(iii) Range of Complaints Concerning Bill C-3

The statistical frequency and nature of these and other issues commentators raised with parliamentarians during deliberations over the bill is estimated in Table 1:

Table 1: Range and Statistical Frequency of Issues Raised by Non-governmental Witnesses in Parliamentary Proceedings¹¹¹

Issue	Commons (% out of 20)	Senate (% out of 22)
Security certificate regime restricts communication between advocate and named person once former has seen secret evidence	55%	59%
Security certificate regime still does not allow full answer and defence by named person	45%	59%
No explicit (or an insufficient) rejection of evidence derived from torture or cruel, inhuman or degrading treatment and/or other concerns about the reliability of information used in security certificate proceedings	40%	50%
“Reasonableness” standard of proof required of government too low	40%	36%
Nature of the relationship between special advocate and named person is unclear and/or no (or insufficient) guarantee of confidentiality in relation to information provided by named person to special advocate	40%	9%
Creation of special advocate roster not independent from government and selection process opaque/lack of choice of special advocate by individual	35%	13%
Potential that not all relevant information will be disclosed to the judge and special advocate	35%	45%
Security certificate regime creates a system of unequal treatment between citizens and non-citizens	30%	32%
No (or insufficient) assurances of resources, staff for special advocates	30%	5%

¹¹¹ Data drawn from transcripts of Commons and Senate committee proceedings, available through <<http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=15&Type=0&Scope=I&query=5278&List=stat>>.

Issue	Commons (% out of 20)	Senate (% out of 22)
Potential for process to lead to indefinite detention	30%	23%
Law has not addressed removal to torture	25%	23%
Limited appeal rights	20%	18%
Security certificate regime unduly augments the power of the security services	5%	—
Power of special advocate to call witnesses and present documentary evidence unclear	5%	9%
No periodic review of the workings of the law	—	5%
Legislation includes no anti-discrimination clause	—	9%
Legislation fails to define sufficiently concepts such as national security	—	5%

3. Parliamentary Proceedings

As noted, Bill C-3 was tabled in Parliament in October 2007, only months before the February 2008 deadline imposed by the Supreme Court for the expiry of the old system. Notably, the period between October 22, 2007 and February 23, 2008 contained only 49 scheduled sitting days in the House of Commons (seven weeks) and 54 sitting days in the Senate (eight weeks). To the best of our knowledge, at no point was serious consideration given by the government or by named persons to asking the Supreme Court to extend its deadline, thereby allowing careful consideration of Bill C-3.

The parliamentary proceedings reviewing Bill C-3 were, therefore, conducted under pressure.¹¹² These authors spent a number of hours

¹¹² See Mr. Dave MacKenzie (Parliamentary Secretary to the Minister of Public Safety, CPC), 39th Parl., 2nd Sess., *Hansard*, No 019 (Monday, November 19, 2007):

The Supreme Court has given the government an opportunity to amend the legislation, but has set February 23, 2008 as the deadline. Let me be clear on this point. If we do not pass this bill by February 2008, all current security certificates would be quashed. The certificate process could no longer be used to detain these individuals or impose conditions of release. Nor could it form the basis for their inadmissibility to Canada. This would pose a serious threat to the safety of the Canadian public and the security of Canada. ... The passage of Bill C-3 is essential to the continued operation and use of the security certificate process contained within the *Immigration and Refugee Protection Act*.

Hon. Stockwell Day (Minister of Public Safety), Standing Committee on Public Safety and National Security, *Evidence*, 39th Parl., 2nd Sess., Tuesday, November 27, 2007:

discussing Bill C-3 with parliamentarians in Fall 2007 and early winter 2008. In these conversations it became clear that at least some parliamentarians inclined to tinker substantially with the bill were deterred by the prospect that the clock would run out, prompting the release of individuals the government characterized as dangerous terrorists. There was also serious concern that Bill C-3 would be declared a confidence matter by the government, and carried amendments might precipitate an election. The Liberal official opposition, in particular, did not relish the prospect of fighting an election on a terrorism-related theme. There is no doubt in these authors' minds that this political environment affected the willingness of parliamentarians to consider seriously amendments to Bill C-3.

When referred to committee after second reading in the Commons, the initial witness list was thin, and largely (although not entirely) excluded groups and individuals who opposed security certificates *writ* large in favour of witnesses (like these authors) who proposed refinement to the Bill C-3 model. Only after some controversy over this roster was the list broadened — at the eleventh hour — to include groups such as Amnesty International, Human Rights Watch and the “support” groups for several of the named persons.¹¹³ In sum total, the bill spent 107 calendar days in the House of Commons. During that time, it was debated on seven days in the House of Commons and studied during six days in committee. Put another way, the ratio of days on which the bill received parliamentary attention to calendar days in the Commons was (a modest) 1/8.

During debate over Bill C-3, commentators occasionally justified their positions with doubtful construals of *Charkaoui*. The government, for example, objected (properly) to assertions that the Supreme Court had declared security certificates *per se* unconstitutional.¹¹⁴ On the other hand, the government itself occasionally defended parts of its Bill C-3

I would ask members — we're not asking for undue haste nor asking people to be imprudent in terms of how quickly you move on this — to keep in mind that we need this done. This has to be passed before February 23. Otherwise, not only will the provision be quashed, but people who are presently under detention who have been deemed by the Federal Court to be under detention would in fact not be in that case. There is not a rash urgency, but there is a compelling time constraint here, and I would ask that you respectfully consider that also.

¹¹³ On this point, see discussion among parliamentarians at Standing Committee on Public Safety and National Security, *Evidence*, 39th Parl., 2nd Sess., Tuesday, December 4, 2007.

¹¹⁴ See, e.g., Hon. Stockwell Day, *id.*

approach with opaque invocations of *Charkaoui* that arguably overstated the holding of that case.¹¹⁵

Ultimately, the Commons committee focused its amendments on four substantive issues: creating a species of confidentiality obligation for information obtained by the special advocate during private conversations with the interested party; giving some priority to the choice of the interested party in identifying who will serve as the special advocate; obliging the government to provide appropriate resources to the special advocate; and, excluding the prospect of information produced by torture or cruel, inhuman and degrading treatment from being used as evidence in the proceeding.¹¹⁶

The last change may prove quite important, as discussed below. However, none of these changes addressed the core preoccupations about special advocates animating the debate in the United Kingdom; specifically, continued access between special advocate and named person or full disclosure to the special advocate. Nor did they harmonize the special advocate model with that associated with SIRC proceedings.

The Senate committee proceeding was even more perfunctory. The bill only arrived in the Senate on February 6 — quite literally days before the expiry of the Supreme Court’s deadline. In sum total, the bill was before the Senate for six calendar days. There was little real prospect of close Senate scrutiny. Indeed, the government side warned against close scrutiny:

Bill C-3 was introduced in the House on October 22, 2007 and spent three and a half months there. It has been thoroughly studied and if we in the Senate fail to act in a timely fashion it will have serious implications for Canada’s security. If the deadline expires, upon application, persons subject to a security certificate could have their certificates quashed. This means they could no longer be held in detention and could not be subject to any condition of release. This could be disastrous given the nature of the threats these persons represent.¹¹⁷

¹¹⁵ See Hon. Stockwell Day, *id.*, responding to a question about limitations on continued contact between special advocate and named person by asserting that the “Supreme Court realized that such a provision was sometimes necessary”.

¹¹⁶ House of Commons, Standing Committee on Public Safety and National Security, 1st Report, 39th Parl., 2nd Sess. (December 7, 2007), available online: <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=13205&Lang=1&SourceId=221244>>.

¹¹⁷ Hon. David Tkachuk, *Debates of the Senate (Hansard)*, 2nd Sess., 39th Parl., Vol. 144, Issue 31, Thursday, February 7, 2008.

The real time constraints under which the Senate operated raised the ire of senators.¹¹⁸ Their concern is understandable. The Senate Special Committee on Anti-terrorism to which the bill was referred has an institutional knowledge on security certificates and other anti-terrorism issues not shared by its Commons counterpart.¹¹⁹

Despite a marathon session in which the Senate heard from 24 witnesses in a single day,¹²⁰ and despite the committee members' obvious expertise and familiarity with the issue, the Senate made no amendments to the bill. Based again on our personal communications with senators, the political backdrop was prominent in their thinking. Although dominant in the Senate, the Liberal Party was not prepared to pass amendments, then requiring reconsideration of the bill by the Commons. This delay would take the legislative process past the February 23 deadline and allow the government to pin blame for the expiry of the security certificate system on the unelected upper chamber.¹²¹ By the committee member's own reckoning, their desultory review reflected the imminence of the *Charkaoui* deadline. In its report back to the Senate, the committee wrote:

Recognizing the impending February 23, 2008 deadline imposed by the Supreme Court of Canada for Parliament to rectify the unconstitutionality of the existing security certificate procedure, the Special Senate Committee on Anti-terrorism is adopting Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, without amendment.

The Committee would have appreciated more time to reflect upon all aspects of this bill and the views of those concerned, given the life-altering effects that security certificates have on those named in them, and the reflection the process has on Canadian society and values.

¹¹⁸ See, e.g., Hon. George Baker & Hon. Serge Joyal, *Debates of the Senate (Hansard)*, 2nd Sess., 39th Parl., Vol. 144, Issue 31, Thursday, February 7, 2008.

¹¹⁹ See discussion in Craig Forcese, "Fixing the Deficiencies of Parliament Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia" (2008) 14:4 IRPP Choices 2.

¹²⁰ See Proceedings of the Special Senate Committee on Anti-terrorism, *Issue 4 — Minutes of Proceedings*, Monday, February 11, 2008.

¹²¹ Bill C-3 was being considered at about the same time that pressure was being mounted on the Senate to pass the government's omnibus crime bill. That pressure came, in part, in the form of a motion in the Commons calling on the Senate to move expeditiously on this crime bill that the government declared a confidence measure. Based again on our personal communications, the politics of this event clearly infused the Bill C-3 proceedings. See the motion described in House of Commons, *Journals*, No. 49, 39th Parl., 2nd Sess., Tuesday, February 12, 2008.

Because of the tight timeline for examining Bill C-3, the Committee was not able to hear from all parties who requested to appear.¹²²

When the committee report was debated in the Senate, even Conservative senators expressed concern at its content and the process that had been followed: “Sometimes we hold our noses when it comes time to adopt bills, and we have done so in the past with other legislation, knowing that in the near future we will correct the errors we have agreed to let through. That is the sort of legislation we have before us now.”¹²³

4. Implications

In personal communications with these authors, counsel for those subject to security certificates have already indicated that they will challenge the special advocate regime on constitutional grounds. Inevitably, the Bill C-3 regime will be juxtaposed with the SIRC system, raising serious questions as to whether the C-3 regime will be sustained. The bill creates an architecture in which Federal Court judges may approximate the benefits of the SIRC approach. For example, they may authorize SIRC-like continued contact between the special advocate and named person and pursue aggressively concerns about the scope of disclosure to the Court and special advocate themselves. Absent these careful innovations, however, the chances of a successful constitutional challenge become more acute.

It is true that in its section 1 analysis in *Charkaoui*, the Supreme Court indicated that the government need not come up with the perfect system.¹²⁴ It remains to be seen, however, whether the Court will take the same approach where those with no constitutional right at stake (for example, a government employee complaining to SIRC about security clearance denied on a recommendation from CSIS) have a better system than those detained and potentially removed to torture under a security certificate.

¹²² Special Senate Committee on the Anti-terrorism Act, *Second Report*, 39th Parl., 2nd Sess., Tuesday, February 12, 2008.

¹²³ Hon. Pierre Claude Nolin, *Debates of the Senate (Hansard)*, 2nd Sess., 39th Parl., Vol. 144, Issue 32, Tuesday, February 12, 2008. In direct response to the scant time available to it when Bill C-3 was promulgated, the Special Senate Committee on Anti-terrorism is now engaged in an extensive, supplemental study on the security certificate process.

¹²⁴ *Charkaoui*, *supra*, note 90, at para. 85.

V. OTHER FEATURES OF BILL C-3

Bill C-3's obvious focus is on the new special advocate system. The law also includes, however, a number of other changes and makes several omissions with potentially significant implications for the security certificate regime. In our view, these features include both improvements and missed opportunities.

1. Improvements in the Exclusion of Coerced Information

As noted above, one of the amendments made to Bill C-3 during the parliamentary process was the inclusion of emphatic language rejecting the use of information in security certificate proceedings "that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture".¹²⁵

(a) *Information and Interrogation Post-9/11*

The change may reflect past controversies over the sorts of information allegedly deployed in security certificate proceedings. As government officials have repeatedly underscored, Canada depends heavily on intelligence supplied by allied agencies.¹²⁶ However, according to testimony in Federal Court, CSIS analysts supplying intelligence used to support security certificates have not asked even suspect foreign agencies producing this information if it is the product of torture.¹²⁷

If true, this is a significant omission, given the notorious record on torture of many front-line states in the "war on terror" and even close Canadian allies. Much of the controversy over post-9/11 interrogation tactics has focused on whether the so-called stress or alternative interrogation techniques employed by the U.S. military or CIA cross the line of CID treatment or even torture. Various U.S. government memos

¹²⁵ IRPA, s. 83(1.1).

¹²⁶ For a discussion on security intelligence information-sharing, see Craig Forcese, *National Security Law* (Toronto: Irwin Law, 2008), at c. 12.

¹²⁷ *Harkat v. Canada*, Court File DES-4-02, Extract Of Proceedings, vol. 2, Evidence of P.G. (November 3, 2005). See also description in Andrew Duffy, "CSIS Agent Didn't Ask If Informant Was Tortured" *Ottawa Citizen*, November 4, 2005, at F.1.

describe interrogation “stress” techniques approved for use in overseas military interrogations.¹²⁸ News stories, meanwhile, have reported on CIA interrogation strategies. The latter reportedly include: forceful shaking, an open-handed slap “aimed at causing pain and triggering fear”, a “hard open-handed slap to the stomach” designed “to cause pain, but not internal injury”; forcing detainees “to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours”, producing “exhaustion and sleep deprivation”; chilling the detainee by leaving them to “stand naked in a cell kept near 50 degrees” and dousing them with cold water; and, water-boarding, a process by which a detainee is “bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him”, triggering powerful gag reflexes.¹²⁹

Reports on happenings at Abu Ghraib prison in Iraq disclose even more extreme measures. At Abu Ghraib, concludes a U.S. military report, unauthorized, but intentional violent and sexual abuses included “acts causing bodily harm using unlawful force as well as sexual offenses including, but not limited to rape, sodomy and indecent assault”.¹³⁰ Media reports have pointed to the use of extreme (and occasionally deadly) interrogation techniques at places like Bagram, Afghanistan and Guantanamo Bay, Cuba.¹³¹

Summarizing the U.S. record extracted from 100,000 government documents disclosed under U.S. information laws, the American Civil Liberties Association reported in 2006

... a systemic pattern of torture and abuse of detainees in U.S. custody in Afghanistan, the U.S. Naval Base Station at Guantánamo Bay, Cuba, Iraq, and other locations outside the United States. In many instances

¹²⁸ See Karen Greenberg & Joshua Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge, U.K.: Cambridge University Press, 2005).

¹²⁹ Brian Ross & Richard Esposito, “CIA’s Harsh Interrogation Techniques Described” ABC News (November 18, 2005). See also Walter Pincus, “Waterboarding Historically Controversial” *Washington Post*, October 5, 2006, at A17. For a discussion of the background to CIA interrogations in the “war on terror”, see David Johnston, “At a Secret Interrogation, Dispute Flared Over Tactics” *New York Times*, September 9, 2006. The CIA director denied in 2007 that any of the stress techniques employed at “black sites” constituted torture. See Walter Pincus, “CIA Chief Complains About Agency’s Critics in Europe” *Washington Post*, April 17, 2007, at A12.

¹³⁰ Fay-Jones Report (August 2004) in Greenberg & Dratel, *Torture Papers*, *supra*, note 128, at 993.

¹³¹ See, e.g., Tim Golden, “In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths” *New York Times*, May 20, 2005; David Johnston, “More of F.B.I. Memo Criticizing Guantánamo Methods Is Released” *New York Times*, March 22, 2005 at A-17. See also Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004).

the harsh treatment was ordered as part of an approved list of interrogation methods to “soften up” detainees. . . . Reported methods of torture and abuse used against detainees include prolonged incommunicado detention; disappearances; beatings; death threats; painful stress positions; sexual humiliation; forced nudity; exposure to extreme heat and cold; denial of food and water; sensory deprivation such as hooding and blindfolding; sleep deprivation; water-boarding; use of dogs to inspire fear; and racial and religious insults. In addition, around one hundred detainees in U.S. custody in Afghanistan and Iraq have died. The government has acknowledged that 27 deaths in U.S. custody were homicide, some caused due to “strangulation,” “hypothermia,” “asphyxiation,” and “blunt force injuries.”¹³²

Interrogation techniques employed by other allied states in the campaign against terrorism have also generated controversy, especially where detainees are placed in the custody of these nations via “extraordinary rendition” by the United States or another nation. Rendition — covert removals without formal extradition or deportation — is not a new practice in the United States. The procedure was employed by U.S. officials pre-9/11 to remove expeditiously persons wanted abroad for suspected involvement in terrorism.¹³³ It is now conducted on a much vaster scale, and its focus has shifted from rendition to “justice” to rendition to interrogation (often in circumstances where torture is likely).¹³⁴ Estimates made in 2005 suggested that 150 people had been rendered by the United States since September 11, 2001.¹³⁵ News reports name several states — all of whom have been accused by the U.S. State Department of employing torture¹³⁶ — as the countries to which individuals have been rendered. These nations

¹³² ACLU, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (April 2006), at 4.

¹³³ Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard Against Torture* (April 2005); Committee on International Human Rights of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (October 2004).

¹³⁴ Committee on International Human Rights of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy, id.*, at 5.

¹³⁵ Jane Mayer, “Outsourcing Torture” *The New Yorker*, February 5, 2005. In 2007, CIA director Michael Hayden claimed that the number of rendered persons is closer to 100. See Walter Pincus, “CIA Chief Complains About Agency’s Critics in Europe” *Washington Post*, April 17, 2007, at A12.

¹³⁶ See, e.g., U.S. State Department, *Human Rights Country Reports* (2005) (under the headings “Morocco”, “Egypt”, “Jordan” and “Syria”).

include Egypt, Jordan, Morocco and Syria.¹³⁷ These actions have fuelled particular controversy in Europe¹³⁸ and, after the Arar matter, in Canada.

U.S. actions have been supported by a well-publicized rethink of the laws governing torture, proffered by Bush administration lawyers. In an August 1, 2002 memorandum (since repudiated by the U.S. government), then U.S. assistant attorney general Jay Bybee confined the definition of torture to only the most egregious of acts, producing lasting psychological damage such as post-traumatic stress syndrome or physical pain of an “intensity akin to that which accompanies serious physical injury such as death or organ failure”.¹³⁹ “Because the acts inflicting torture are extreme”, wrote Bybee, “there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.”¹⁴⁰ The Bush administration further urged that international cruel, inhuman and degrading treatment standards did not extend to the treatment by U.S. personnel of foreign nationals overseas.¹⁴¹ This position has also been repudiated, this time by Congress in the *Detainee Protection Act of 2005*.¹⁴²

Even so, in the United States’ controversial military commission system, information obtained by harsh methods short of torture may be admissible, if adjudged reliable and of sufficient probative value and its admission would be in the interest of justice. For the period prior to the enactment of the *Detainee Treatment Act of 2005* (December 30, 2005),

¹³⁷ Jane Mayer, *supra*, note 135.

¹³⁸ Indeed, it would appear that European intelligence services at least tacitly assisted in some renditions. See, e.g., Holger Stark, “Berlin ‘Helped CIA’ With Rendition of German Citizen” *Der Spiegel*, January 11, 2007; Craig Whitlock, “German Lawmakers Fault Abduction Probe” *Washington Post*, October 4, 2006, at A18; Tracy Wilkinson, “Details Emerge in Italian Abduction” *Los Angeles Times*, January 10, 2007.

¹³⁹ Memo 15 (August 1, 2002) in Karen Greenberg & Joshua Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge, U.K.: Cambridge University Press, 2005), at 214-15. The U.S. government has since distanced itself from this interpretation. See Daniel Levin, *Memorandum for James B. Coney, Deputy Attorney General* (December 30, 2005), available online: <<http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf>>.

¹⁴⁰ Memo 14 (August 1, 2002) in Karen Greenberg & Joshua Dratel, *supra*, note 139, at 214.

¹⁴¹ Statement of Senator Dianne Feinstein, “Nomination of Alberto Gonzales to be Attorney General of the United States” 151 *Congressional Record* 8 (February 1, 2005), reading a letter from U.S. Attorney General Alberto Gonzales in the follow-up of his Senate confirmation hearings in which Gonzales asserted squarely that “[t]here is no legal prohibition under the Convention Against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas.”

¹⁴² Pub. L. No. 109-148, 119 Stat. 2739.

this potentially admissible information includes that obtained through cruel, inhuman and degrading treatment.¹⁴³

(b) *Coerced Information as Evidence*

(i) Admissibility of Torture Information

In Canada, it is abundantly clear that information generated through torture is inadmissible in judicial proceedings. First, torture is strictly prohibited in international law. The *International Covenant on Civil and Political Rights*¹⁴⁴ provides in article 7 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Under the ICCPR, torture (and cruel, inhuman and degrading treatment and punishment) are among the rights for which no derogation is permitted, even in times of emergency that threaten the life of the nation.¹⁴⁵ The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*¹⁴⁶ replicates this prohibition in more detailed form.

Further, that same U.N. Torture Convention provides in article 15 that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. This is a sweeping prohibition. As the United Kingdom House of Lords ruled in *A v. Secretary of State*, the article “cannot possibly be read ... as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture.”¹⁴⁷

For its part, section 7 of the Charter protects against deprivation of life, liberty and security of the person in violation of “fundamental justice”. Section 11(d), meanwhile, guarantees those accused of an

¹⁴³ *Military Commissions Act of 2006*, 10 U.S.C § 948r.

¹⁴⁴ 999 U.N.T.S. 171, entered into force in 1976 [hereinafter “ICCPR”].

¹⁴⁵ ICCPR, 999 U.N.T.S. 171, entered into force in 1976, art. 4.

¹⁴⁶ A/RES/39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 [hereinafter “Torture Convention”].

¹⁴⁷ *A v. Secretary of State for the Home Department*, [2005] U.K.H.L. 71, [2006] 2 A.C. 221, at para. 35 (U.K.H.L.), Lord Nicholls of Birkenhead.

offence a “fair” trial. In *Hape*, the Supreme Court signalled clearly that torture evidence would violate these constitutional standards:

The circumstances in which the evidence was gathered must be considered in their entirety to determine whether admission of the evidence would render a Canadian trial unfair. The way in which the evidence was obtained may make it unreliable, as would be true of conscriptive evidence, for example. The evidence may have been gathered through means, such as torture, that are contrary to fundamental *Charter* values. Such abusive conduct would taint the fairness of any trial in which the evidence was admitted.¹⁴⁸

Moreover, use of evidence obtained by torture is expressly prohibited under Canada’s criminal law. Section 269.1 of the *Criminal Code* implements Canada’s obligations under the Torture Convention and prohibits the use of torture evidence in Canada. This bar should apply regardless of whether the torture evidence was obtained in Canada or overseas, an approach adopted in *India v. Singh*, a decision of the B.C. Supreme Court applying section 269.1’s evidentiary rule.¹⁴⁹

(ii) Information Produced by Techniques Short of Torture

The absolute bar on torture and its use in producing information deployed in legal proceedings is indisputable. The rules for coercion short of torture are more complex.

(A) COMMON LAW

In the Canadian law of evidence, coerced information of whatever sort is generally inadmissible. At common law, for instance, the courts have developed a “confessions rule” designed to minimize the prospect of false confessions by seeking to ensure that a confession is voluntary.¹⁵⁰ Interrogation tactics violating this rule will render a confession inadmissible. Such techniques include “outright violence”¹⁵¹ and “imminent threats of torture”,¹⁵² the suggestion of leniency from the

¹⁴⁸ *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, at para. 109 (S.C.C.).

¹⁴⁹ [1996] B.C.J. No. 2792, 108 C.C.C. (3d) 274 (B.C.S.C.).

¹⁵⁰ See discussion in *R. v. Oickle*, [2002] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 47 (S.C.C.) (“The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable”).

¹⁵¹ *Id.*, at para. 53.

¹⁵² *Id.*, at para. 48.

authorities and courts in exchange for an admission,¹⁵³ or other threats or inducements of a sort that “raise a reasonable doubt about whether the will of the subject has been overborne”.¹⁵⁴

Oppressive conduct may also violate the common law standard, including “depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; ... excessively aggressive, intimidating questioning for a prolonged period of time” and possibly use by the police of false evidence to induce a confession.¹⁵⁵ Likewise, police trickery substantial enough to “shock the conscience of the community” may trigger application of the confessions rule.¹⁵⁶

(B) SECURITY CERTIFICATE STANDARD

Notably, however, between 2002 and 2008, the security certificate regime permitted 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”.¹⁵⁷ The net effect of this provision was to negate common law rules of evidence, potentially replacing well-understood rules of evidence with the more ambiguous standing of “appropriate”.

Nevertheless, a suspicion in IRPA proceedings that intelligence was generated by torture should have triggered consideration of section 269.1 or at least an assessment of reliability. Federal Courts seem to have adopted the latter approach, declining to give weight to evidence obtained via torture.¹⁵⁸ Less certain is the approach that would be taken for actions, that while not torture, are also precluded by international law; specifically, information that is the product of cruel, inhuman or degrading treatment or punishment (“CID treatment”).

In its original iteration, Bill C-3 indicated that information could only be used in security certificate proceedings if “reliable” in addition to being appropriate. The House of Commons Standing Committee on Public Safety and National Security opted to amplify whatever guarantees this language might provide by specifying that reliable

¹⁵³ *Id.*, at para. 49.

¹⁵⁴ *Id.*, at para. 57.

¹⁵⁵ *Id.*, at para. 60.

¹⁵⁶ *Id.*, at paras. 65-66.

¹⁵⁷ IRPA, *supra*, note 12, s. 78(j), repealed by S.C. 2008, c. 3.

¹⁵⁸ *Lai v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 584, 2005 FCA 125 (F.C.A.); *Re Harket*, [2005] F.C.J. No. 481, 2005 FC 393 (F.C.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1862, 2006 FC 1503 (F.C.).

information could not include information believed “on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture”.

(C) MEANING OF CID TREATMENT

A key question will now be what CID treatment is “within the meaning of the Convention Against Torture” — that is, the *United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.¹⁵⁹ That Convention specifies that

... each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁶⁰

In practice, CID treatment is commonly viewed as egregious treatment that falls short of outright torture.¹⁶¹ However, it is not defined in the Torture Convention, and no clear standard determines how outrageous this conduct must be to constitute CID treatment. The U.N. General Assembly has urged that the term be “interpreted so as to extend the widest possible protection against abuses, whether physical or mental”.¹⁶² For its part, the U.N. Human Rights Committee — the treaty body established by the ICCPR — has declined to “draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment [barred by Article 7 of the ICCPR]; the distinctions depend on the nature, purpose and severity of the treatment

¹⁵⁹ A/RES/39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

¹⁶⁰ *Id.*, art. 16.

¹⁶¹ See, e.g., *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/3452, 30 U.N. GAOR, Supp. No. 34, at 91, art. 1, U.N. Doc. A/10034 (1975) (“Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”); *Restatement (Third) of Foreign Relations Law of the United States*, § 702, Reporters’ Note 5 (1987) (citing *Ireland v. United Kingdom*, 25 Eur. Ct. Hum. Rts., ser. A. para. 167 (1978) for the proposition that “[t]he difference between torture and cruel, inhuman, or degrading treatment or punishment ‘derives principally from a difference in the intensity of the suffering inflicted’”).

¹⁶² *Code of Conduct for Law Enforcement Officials*, adopted by A/RES/34/169 of December 17, 1979, art. 5, Commentary (c).

applied”.¹⁶³ It has further observed that “what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.¹⁶⁴

In at least one instance, the committee has accepted that the rationale for the treatment may be relevant in determining its legal character. In a case against Australia, it held that a state’s legitimate fear of the flight risk posed by prisoners warranted the shackling of those individuals and rendered this act something other than CID treatment.¹⁶⁵ The committee has been reluctant, however, to take this line of reasoning too far. It appears, therefore, to reject state justifications for certain forms of treatment, including corporal punishment,¹⁶⁶ a state action the committee readily declares to be CID treatment.¹⁶⁷ It has also indicated that where an act does, in fact, constitute CID treatment, no justification exonerates the injuring state. As noted, there is no derogation from article 7 even in times of national emergencies, presumably the most potent public interest motivation imaginable.¹⁶⁸

Despite an unwillingness to define *ex ante* the exact contours of the CID treatment standard, both the Human Rights Committee and its counterpart under the Torture Convention — the U.N. Committee

¹⁶³ UN Human Rights Committee, *General Comment 20, Art. 7*, U.N. Doc. HRI/GEN/1/Rev.1 (1994), at para. 4.

¹⁶⁴ *Vuolanne v. Finland*, U.N. Human Rights Committee File 265/87.

¹⁶⁵ *Bertran v. Australia*, U.N. Human Rights Committee File 1020/01, at para. 8.2.

¹⁶⁶ *Osbourne v. Jamaica*, U.N. Human Rights Committee File 759/97, at para. 9.1 (“Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant”).

¹⁶⁷ U.N. Human Rights Committee, *General Comment 20, Art. 7*, U.N. Doc. HRI/GEN/1/Rev.1 (1994), at para. 5.

¹⁶⁸ *Id.*, at para. 3:

The text of article 7 allows no limitation. The Committee reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provision must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

See also J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* (Boston: M. Nijhoff, 1988), at 150 (“Unlike in the definition of torture ... the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment”); Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004), at 212 *et seq.*

Against Torture — have identified specific state practices they view as constituting CID treatment. For instance, the particular acts declared CID treatment by the Committee Against Torture include:

- substandard detention facilities lacking basic amenities such as water, electricity and heating in cold temperatures;¹⁶⁹
- long periods of pre-trial detention and delays in judicial procedure coupled with incarceration in facilities ill equipped for prolonged detention;¹⁷⁰
- beating prisoners who are also denied medical treatment and are deprived of food and proper places of detention;¹⁷¹
- virtual isolation of detainees for a period of a year;¹⁷²
- use of electro-shock belts and restraint chairs as means of constraint;¹⁷³
- acts of police brutality that may lead to serious injury or death;¹⁷⁴ and
- deliberate torching of houses.¹⁷⁵

Commenting specifically on interrogation techniques, the committee has also identified the following as CID treatment: “(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill”.¹⁷⁶ The committee’s list is roughly analogous to similar lists of techniques found to be inhuman and degrading by the European Court of Human Rights under the European Convention on Human Rights¹⁷⁷ and improper by the Israeli Supreme Court.¹⁷⁸

¹⁶⁹ Report of the Committee against Torture, U.N. Doc. A/56/44 (2001), at para. 183.

¹⁷⁰ *Id.*, at para. 119.

¹⁷¹ Report of the Committee Against Torture, U.N. Doc. A/53/44 (1998), at para. 175.

¹⁷² *Supra*, note 169, at paras. 58 and 61.

¹⁷³ *Id.*, at paras. 179 and 180.

¹⁷⁴ *Supra*, note 171, at para. 64.

¹⁷⁵ *Dzemajl v. Yugoslavia*, U.N. Committee Against Torture File 161/00.

¹⁷⁶ Report of the Committee Against Torture, U.N. Doc. A/52/44 (1997), at para. 257.

¹⁷⁷ *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B), at 3 (1976) (discussing protracted standing on the tip of the toes; covering of the head for the duration of the detention; exposure to loud noise for a prolonged period and deprivation of sleep, food and water).

¹⁷⁸ *Public Committee Against Torture in Israel v. Israel*, HCJ 5100/94, at para. 29 (Israeli Supreme Court, 1999) (declaring improper the “Shabach” method, composed of several components: the cuffing of the suspect, seating him on a low chair, covering his head with a sack, and playing loud music in the area).

Specific acts identified by the Human Rights Committee as constituting CID treatment do not differ greatly from those invoked by the Committee Against Torture. They include abduction of an individual and then detention without contact with family members;¹⁷⁹ denial of food and water;¹⁸⁰ denial of medical assistance after ill-treatment;¹⁸¹ death threats;¹⁸² mock executions;¹⁸³ whipping and corporal punishment;¹⁸⁴ failure to notify a family of the fate of an executed prisoner;¹⁸⁵ prolonged detention on death row when coupled with “further compelling circumstances relating to the detention”;¹⁸⁶ and detention in substandard facilities¹⁸⁷ or conditions.¹⁸⁸ Examples of CID treatment stemming from the conditions of detention include:

- incarceration for 50 hours in an overcrowded facility, resulting in prisoners being soiled with excrement, coupled with denial of food and water for a day;¹⁸⁹
- incarceration in circumstances falling below the standards set in the U.N. Standard Minimum Rules for the Treatment of Prisoners,¹⁹⁰ coupled with detention *incommunicado*, death and torture threats, deprivation of food and water and denial of recreational relief;¹⁹¹
- solitary incarceration for 10 years in a tiny cell, with minimal recreational opportunities;¹⁹²

¹⁷⁹ *N’Goya v. Zaire*, U.N. Human Rights Committee File 542/1993, at para. 5.6; *Basilio Laureano Atachahua v. Peru*, U.N. Human Rights Committee File 540/1993, at para. 8.5.

¹⁸⁰ *Miha v. Equatorial Guinea*, U.N. Human Rights Committee File 414/1990, at para. 6.4.

¹⁸¹ *Id.* See also *Bailey v. Jamaica*, U.N. Human Rights Committee File 334/1988, at para. 9.3.

¹⁸² *Hylton v. Jamaica*, U.N. Human Rights Committee File 407/1990, at para. 9.3.

¹⁸³ *Linton v. Jamaica*, U.N. Human Rights Committee File 255/1987, at para. 8.5.

¹⁸⁴ *Higginson v. Jamaica*, U.N. Human Rights Committee File 792/1998, at para. 4.6; *Sooklal v. Trinidad and Tobago*, U.N. Human Rights Committee File 928/2000, at para. 4.6.

¹⁸⁵ *Schedko v. Belarus*, U.N. Human Rights Committee File 886/1999, at para. 10.2.

¹⁸⁶ *Bickaroo v. Trinidad and Tobago*, U.N. Human Rights Committee File 553/1993, at para. 5.6.

¹⁸⁷ *Adams v. Jamaica*, U.N. Human Rights Committee File 607/1994, (views of October 30, 1996).

¹⁸⁸ *Deidrick v. Jamaica*, U.N. Human Rights Committee File 619/1995, at para. 9.3.

¹⁸⁹ *Protoreal v. Dominican Republic*, U.N. Human Rights Committee File 188/1984, at paras. 9.2 and 11.

¹⁹⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

¹⁹¹ *Mukong v. Cameroon*, U.N. Human Rights Committee File 458/1991, at paras. 9.3 and 9.4.

¹⁹² *Edwards v. Jamaica*, U.N. Human Rights Committee File 529/1993, at para. 8.3.

- solitary incarceration *incommunicado* for various periods;¹⁹³ and
- incarceration with limited recreational opportunities, no mattress or bedding, no adequate sanitation, ventilation or electric lighting, and denial of exercise, medical treatment, nutrition and clean drinking water.¹⁹⁴

(iii) Reasonable Grounds Standard

If the description of interrogation techniques used by the United States and other countries discussed above is any indication, a substantial amount of information stemming from these sources should be excluded from security certificate proceedings on the basis, at the very least, of the CID treatment standard. There need not be any debate, for example, as to whether waterboarding is torture, a bizarre controversy that has arisen in the United States recently. Even if it is not, it is certainly CID treatment.

In the past, an issue has arisen as to which party bears the burden of proof in demonstrating the methods via which the information was produced.¹⁹⁵ The onus and burden of proof issue is simplified in the Bill C-3 context by two variables. First, unlike in other cases in which named persons not privy to the information used against them are asked to make the case that that information is the product of coercive interrogation, the special advocate in security certificate cases will (hopefully) be in a reasonable position to query and challenge the provenance of information deployed by the government. In this circumstance, asking the special advocate to bear the onus may not be unusually onerous. This conclusion does not, of course, apply where the special advocate is given access to only the most processed information, the provenance of which is unclear. In these circumstances, courts should be very demanding of the government and insist that information on the source of the data be provided.

Second, the threshold of proof articulated in Bill C-3 is belief on reasonable grounds. Almost identical language appears elsewhere in the

¹⁹³ *Campos v. Peru*, U.N. Human Rights Committee File 577/1994, at para. 8.7 (detention *incommunicado* for one year); *Shaw v. Jamaica*, U.N. Human Rights Committee File 704/1996, at para. 7.1 (detention *incommunicado* for eight months in overcrowded and damp conditions).

¹⁹⁴ *Brown v. Jamaica*, U.N. Human Rights Committee File 775/1997, at para. 6.13.

¹⁹⁵ See, e.g., the discussion on onus of proof in torture information cases in *A v. Secretary of State of the Home Department*, [2005] U.K.H.L. 71, [2006] 2 A.C. 221 (U.K.H.L.) and *India v. Singh*, [1996] B.C.J. No. 2792, 108 C.C.C. (3d) 274 (B.C.S.C.).

IRPA, not least in the provisions discussed further below allowing a named person to be detained on “reasonable grounds to believe” that they are a security risk. This same language was part of the IRPA under the pre-Bill C-3 regime for security certificate detentions, as well as many other immigration-related matters. Assessing its meaning in *Charkaoui*, the Supreme Court has concluded that such a belief depends on whether “there is an objective basis [that the person is a danger] ... which is based on compelling and credible information”.¹⁹⁶ It has repeated this observation in relation to other IRPA provisions using the same language.¹⁹⁷ Notably, this is a standard that falls short of the civil balance of probabilities standard.¹⁹⁸

Since reasonable grounds to believe is prescribed in relation to the exclusion of torture and CID treatment information, the only plausible interpretation is that, to make out grounds for excluding this information, the named person or the special advocate will have to justify their case on an objective basis, based on compelling and credible information. They will not, however, be obliged to prove their case on a balance of probabilities, creating a potentially expansive scope for exclusions.

2. Missed Opportunities

While the inclusion of CID treatment language can be regarded as an improvement, Bill C-3 failed to address other concerns. First, Bill C-3 persists in applying stricter controls on disclosure to named persons than would be applied in other Canadian judicial proceedings. Second, Bill C-3 did not cure provisions in the IRPA that allow the government to remove named persons to torture. Third, Bill C-3 reinforced the likelihood that security certificates will evolve into a system of indefinite constraints on liberty for foreigners more stringent than anything applicable to Canadian citizens.

¹⁹⁶ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 39 (S.C.C.).

¹⁹⁷ See, e.g., *Canada (Minister of Citizenship and Immigration) v. Mugesera*, [2005] S.C.J. No. 39, [2005] 2 S.C.R. 100, at para. 114 (S.C.C.).

¹⁹⁸ *Id.* “[T]he ‘reasonable grounds to believe’ standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”).

(a) *Disclosure to the Named Person*

In *Charkaoui*, the Supreme Court clearly concluded that the limitations on disclosure to the named person violated section 7 of the Charter. Special advocates might save the procedure under section 1, but there should be no misapprehension that they restore a fair hearing — as noted, their capacity to rebut government cases can never be as full as would counsel fully able to discuss the government’s complete case with their client. Accordingly, a core priority will continue to be the fullest possible disclosure of information to the named person. On this issue, Bill C-3 falls short of standards developed in Canadian law in other contexts and what may be the emerging practice in the United Kingdom.

The IRPA now provides that throughout the security certificate proceeding, “the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed”.¹⁹⁹

This disclosure regime under the immigration law is quite different from the more general system for protecting national security confidentiality created by section 38 of the *Canada Evidence Act*.²⁰⁰ In the *Canada Evidence Act*, the judge is able to balance the national security interest against other interests, including the public interest in a fair proceeding. Put another way, if the national security implications of releasing the information is outweighed by the fair hearing interest, the judge may order disclosure.

This balancing approach may well be adopted in the United Kingdom in the wake of the House of Lords’ recent decision of *Secretary of State v. MB*.²⁰¹ In that decision, the House of Lords examined the compatibility of the U.K. system of “control orders” — limitations on liberty imposed on the basis that a person is suspected of posing a terrorist threat — with the European Convention on Human Rights. Control orders proceedings include the use of secret evidence and special advocates. While generally comfortable with the special advocate approach to reconciling *bona fide* needs for secrecy with

¹⁹⁹ IRPA, s. 83(1)(e).

²⁰⁰ R.S.C. 1985, c. C-5, s. 38.

²⁰¹ [2007] U.K.H.L. 46, [2008] 1 All E.R. 657 (U.K.H.L.).

fairness, the House of Lords noted that there were limits on the extent that special advocates could resuscitate fair trial rights. Although somewhat less than emphatic on this point, the law lords reasoning suggests that a residual discretion should rest with the judge to determine whether the level of disclosure to the named person was sufficient to meet fair trial standards. Where the proceeding falls short of a fair hearing, the matter might come to an end, unless the government is prepared to make fuller disclosure.

Bill C-3 might usefully have incorporated this balancing approach. This balancing would allow the judge to permit disclosure if the damage to the national security from disclosure was relatively small but the importance of the disclosure of the evidence to the fairness of the proceeding was very high.

(b) Indefinite Detention or Other Limits on Liberty

Even a special advocate and disclosure model that met all of the objections and addressed all the concerns set out above would not cure certain fundamental difficulties with the present IRPA system. The IRPA permits deprivations of liberty on a standard slightly more demanding than suspicion. As noted, the information offered by the government in support of the reasonableness of a security certificate is assessed on the basis of a “reasonable ground to believe” standard, a threshold much lower than the accepted criminal or civil law standards of proof. Further, a person may be removed to face persecution where the government considers the security risk presented by that person so justifies, and these decisions are reviewed by courts applying highly deferential standards of review.²⁰²

Taken together, this regime imposes relatively undemanding burdens on a government committed to restricting liberty for prolonged — and potentially indefinite — periods, pending deportation which may result

²⁰² See, e.g., *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 173, 2005 FC 156, at para. 42 (F.C.)

[T]he Court must adopt a deferential approach to these questions, and intervene to set aside the delegate’s decision only if patently unreasonable. This means that, in order for the Court to intervene, it must be satisfied that the decision was made arbitrarily, or in bad faith, or without regard to the appropriate factors, or the decision cannot be supported on the evidence. The Court is not to re-weigh the factors considered or interfere simply because the Court would have reached a different conclusion.

in torture or maltreatment far in excess of anything that could be imposed under Canadian law.

In this respect, Bill C-3 does nothing to change the prior security certificate regime. It does, however, add structure to what may become a system of indefinite detention (or other, significant constraints on liberty) for foreign nationals. This last section examines this contention, looking first at the question of removal to torture and then detention.

(i) Removal to Torture

Canada appears to be unique among Western states in anticipating in its statute books removal to torture if the security threats are significant enough. Under the security certificate process, where the judge views the certificate as reasonable, the judge's decision constitutes a removal order.²⁰³ However, this process may be complemented (for non-refugees) with a "pre-removal risk assessment process". Specifically, the Act provides that non-refugees subject to a security certificate may be protected from removal if the risk of torture or cruel and unusual treatment is more significant, in the eyes of the government, than the danger that person presents to the security of Canada.²⁰⁴ A similar protection is available to refugees subject to security certificates. Pursuant to section 115 of the Act, a refugee may be removed even where they are at risk of torture where the person constitutes a danger to the security of Canada. However, the security risk must be properly balanced against the risk of maltreatment.²⁰⁵

As these provisions suggest, the risk of torture is not an absolute bar on removal, but instead a limitation on deportations that can be overcome in the interest of national security.

Canada's preparedness to remove persons to torture has generated negative international commentary.²⁰⁶ It is also unquestionably contrary

²⁰³ IRPA, s. 80.

²⁰⁴ *Id.*, s. 112 *et seq.*, particularly s. 113(d).

²⁰⁵ See *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 202, at para. 56.

²⁰⁶ In its 2005 assessment of Canada's compliance with the Torture Convention, A/RES/39/46, annex, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, the U.N. Committee Against Torture expressed concern at the "failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever" and recommended that Canada "unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into the State party's domestic law". *Conclusions and Recommendations of the*

to international law. Certainly, a terrorist is not entitled to refugee status under international refugee law.²⁰⁷ Like every other person, however, such an individual may not be expelled, returned (“refouler”) or extradited “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.²⁰⁸ In assessing these substantial grounds, governments are to “take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.²⁰⁹

These obligations — contained in the U.N. Torture Convention — exist also by virtue of the ICCPR. As noted, that instrument bars torture and cruel, inhuman and degrading treatment and punishment.²¹⁰ The U.N. Human Rights Committee has interpreted this prohibition to apply to deportation proceedings: “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”²¹¹

Where substantial grounds to believe torture will occur exist, the bar on removal to torture is absolute and is subject to no derogation. However, states — including Canada — have sometimes sought to justify removals to countries with notorious torture records on the grounds that the prospect of torture is vitiated by “diplomatic assurances”; that is, pledges provided by states that they will not torture the individual. These assurances — intended to guard against an eventuality that is almost always illegal in these states, and yet occurs on a sometimes vast scale — have been roundly condemned by human

Committee against Torture: Canada (07/07/2005) CAT/C/CR/34/CAN, online: <[www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.34.CAN.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.34.CAN.En?Opendocument)>.

²⁰⁷ *United Nations Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150 (1951), art. 1(F) (the refugee convention does not apply to a person if there is serious reason to consider that he or she has “been guilty of acts contrary to the purposes and principles of the United Nations”). See IRPA, s. 96, Sch., incorporating this rule. The Supreme Court of Canada has concluded (reasonably) that terrorism constitutes such an act. *Pushpanathan v. Canada (Minister of Immigration and Citizenship)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at paras. 66 and 120 (S.C.C.).

²⁰⁸ Torture Convention, A/RES/39/46, annex, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 3.

²⁰⁹ *Id.*

²¹⁰ ICCPR, 999 U.N.T.S. 171, entered into force in 1976, art. 7.

²¹¹ Human Rights Committee, *General Comment 20, Art. 7*, U.N. Doc. HRI\GEN\1\Rev.1 (1994).

rights organizations as ineffective.²¹² The Supreme Court of Canada has also queried their utility in *Suresh*.²¹³

In *Suresh*, however, the Supreme Court created substantial uncertainty as to whether Canada's international obligations under the Torture Convention and the *ICCPR* were also part of Canadian constitutional law. In that case, the Supreme Court applied section 7 of the *Charter of Rights and Freedoms* and held that "insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture".²¹⁴ However, the Court qualified its holding by refusing to "exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1" in exceptional conditions "such as natural disasters, the outbreak of war, epidemics and the like".²¹⁵ Exactly what constitutes these exceptional circumstances remained unclear at the time of this writing.²¹⁶

Unquestionably, however, the "exceptional circumstances" language employed by the Supreme Court in *Suresh* is a fragile basis on which to

²¹² See, for example, Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005), online: <<http://hrw.org/reports/2005/eca0405/>>; Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture* (April 2004), online: <<http://hrw.org/reports/2004/un0404/>>.

²¹³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at para. 124 (S.C.C.) ("We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials"). The use of assurances in the United Kingdom has also been controversial. There, the government has had mixed success in using assurances to justify removal to torturing regimes. See discussion in Duncan Hooper, "Court Deals Major Blow to Anti-terrorism Strategy" [*London Daily Telegraph*, April 28, 2007].

²¹⁴ *Suresh, id.*, at para. 77.

²¹⁵ *Id.*, at para. 78.

²¹⁶ Lower courts, however, have moved to limit the reach of this *Suresh* language. In *Re Jaballah*, [2006] F.C.J. No. 1706, 2006 FC 1230 (F.C.), the Federal Court considered whether the security-certificate detainee in that case could be removed to face substantial risk of torture overseas. While accepting that Jaballah constituted a risk to national security, as claimed by the government, the court did not view his case as the "exceptional" circumstance contemplated by *Suresh*, pointing to the fact that he had not been "personally involved in violence". *Id.*, at para. 82. The court did not outright bar deportation. Jaballah could still be removed to some third country where he would not be tortured. A willing host of this sort may, however, be uncommon in cases where the person constitutes a *bona fide* security risk. All told, therefore, the constitutional ruling in *Jaballah*, if followed in practice under the new security certificate regime, may effectively bar a detainee's removal.

build Canada's national security deportation law. Deportation to torture will also certainly be revisited by the Supreme Court in the foreseeable future. Indeed, recent jurisprudence from the Supreme Court has stressed that, in interpreting the Charter, "courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction".²¹⁷ Since the words of the Charter are more than capable of being read consistently with the Torture Convention, it seems unlikely the *Suresh* exception can survive close application of this interpretive rule.

The senate special committee on anti-terrorism law recommended in 2007 that the IRPA be amended to bar emphatically removal where there are "reasonable grounds to believe the individual will be subject to torture in the country to which he or she will be removed".²¹⁸ Bill C-3 failed to do this, leaving intact a Canadian statute book that cannot be reconciled with Canada's international obligations.

(ii) Detention or Other Limitations on Liberty

(A) DETENTION SYSTEM UNDER SECURITY CERTIFICATES

Once the ministers issue a security certificate, named persons may be held in detention on national security grounds pursuant to a warrant.²¹⁹ The ministers may issue this warrant where they have "reasonable grounds to believe that the permanent resident is a danger to national security", among other things.²²⁰ The detention of a named person is reviewed by a special designated judge of the Federal Court within 48 hours. In this review, the court will order that the detention be continued if the judge is "satisfied" that the named person's release (on conditions, in the new law) would, among other things, be injurious to national security.²²¹ If the judge is so satisfied, the matter is revisited every six months. The reference to "satisfied" could be construed as obliging fairly searching judicial consideration of the detention order. However,

²¹⁷ *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, at para. 56 (S.C.C.); *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, 2008 SCC 28, at para. 18 (S.C.C.). See also *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 79.

²¹⁸ Special Senate Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (February 2007), at 110.

²¹⁹ IRPA, s. 81.

²²⁰ *Id.*, s. 81.

²²¹ *Id.*, s. 82.

because the original ministerial detention warrant is based on a “reasonable grounds the belief” the Supreme Court has concluded that court reviews of the detention should also be based on this standard; that is, a judge is to consider whether “there is an objective basis [that the person is a danger] ... which is based on compelling and credible information”.²²²

In practice, this detention can be prolonged. In part because individuals have resisted deportation to states that may torture them, the men subject to security certificates at the time of this writing spent (or continue to spend) lengthy periods incarcerated: by the beginning of 2007, the average period of detention for the men still imprisoned at that time was almost six years.²²³ This is a period of detention longer than the average sentence for *convicted* attempted murderers in Canada.²²⁴

(B) CONDITIONAL RELEASE

In the years before Bill C-3, the Federal Court demonstrated an unease (expressed in practice, if not in prose) with prolonged security-certificate detention. For instance, in *Charkaoui*, the Federal Court judge acknowledged that factual circumstances change with the passage of time, influencing how the court would assess the need for continued detention. In that case, the prolonged period of detention, coupled with the notoriety of the case, “neutralized” the security threat, prompting the judge to order Charkaoui’s release on conditions, pending the outcome of the removal proceedings.²²⁵ Similarly, a second detainee, Mohamed Harkat, was released by the Federal Court, on strict conditions in 2006.²²⁶ Two other men, Mohammad Mahjoub and Mahmoud Jaballah, were released in similar circumstances in early 2007.²²⁷

²²² *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 39 (S.C.C.).

²²³ This figure was calculated in relation to the three men still detained as of January 2007. As this book was completed, two men (Mahjoub and Jaballah) were released on conditions, pending the resolution of their cases. There were, therefore, four men subject to security certificates, but released on conditions, and one other still detained.

²²⁴ See Statistics Canada, *Sentenced Cases and Outcomes in Adult Criminal Court, by Province and Yukon Territory (Canada)* (2003 data), online: <www40.statcan.ca/101/cst01/legal21a.htm>.

²²⁵ *Re Charkaoui*, [2005] F.C.J. No. 269, 2005 FC 248 (F.C.).

²²⁶ *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 770, 2006 FC 628 (F.C.), affd [2006] F.C.J. No. 934, 2006 FCA 259 (F.C.A.).

²²⁷ *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 206, 2007 FC 171 (F.C.); *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] F.C.J. No. 518, 2007 FC 379 (F.C.).

This practice of judicial release on strict conditions was endorsed by the Supreme Court in *Charkaoui*, and indeed was the feature of the security certificate system that preserved it from being declared cruel and unusual treatment in violation of the Charter.²²⁸ The Court concluded that “extended periods of detention under the certificate provisions of the *IRPA* do not violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors” including: reasons for the detention; length of the detention; reasons for the delay of deportation; anticipated future length of detention; and the availability of alternatives to detention.²²⁹

It must be recognized, however, that the conditions that have been imposed to secure release are very aggressive. For example, the order to which Harkat was subjected upon conditional release required that he not have access to a room with an Internet-equipped computer. Violation of this or any other condition was, according to the release agreement, “an offence within the meaning of section 127 of the *Criminal Code* and shall constitute an offence pursuant to paragraph 124(1)(a) of the *Immigration and Refugee Protection Act*”²³⁰

While perhaps justifiable in their own right, it is notable that strict release conditions allow the state to impose a different code of conduct on suspected security risks than exists under the regular law. Where these closely monitored persons violate the terms of release, the latter may amount to a hair-trigger converting immigration detention into incarceration for criminal offences.

(C) BILL C-3 AND INDEFINITE LIMITATIONS ON LIBERTY FOR FOREIGNERS

Bill C-3 codifies, without truly altering, prior practice on detention and conditional release. It formalizes a graduated form of constraints on

²²⁸ *Charkaoui*, *supra*, note 222, at paras. 98 (“I conclude that the *IRPA* does not impose cruel and unusual treatment within the meaning of s. 12 of the *Charter* because, although detentions may be lengthy, the *IRPA*, properly interpreted, provides a process for reviewing detention and obtaining release and for reviewing and amending conditions of release, where appropriate”) and 107.

²²⁹ *Id.*, at para. 110 *et seq.*

²³⁰ Section 127 of the *Criminal Code*, R.S.C. 1985, c. C-46, creates an indictable offence liable to imprisonment for up to two years for disobeying an order of a court. Section 124 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 creates an offence (punishable in s. 125 on indictment with up to two years’ imprisonment) for failing to comply with a condition or obligation imposed under the *IRPA*.

liberty: detention is to be continued only if a judge is satisfied that conditional release does not adequately protect, *inter alia*, national security.²³¹ It also creates formal statutory authority for conditional release, authorizes a court to adjust those release orders in various circumstances (including “because of a material change in the circumstances that led to the order”)²³² and allows a named person to be arrested by a peace officer where the latter has reasonable grounds to believe the release order has been breached.²³³

ABSENCE OF A “BURDEN ESCALATOR”

The law does not, however, query whether prolonged limitations on liberty truly are acceptable on the reasonable grounds to believe standard. In the view of these authors, a “reasonable ground to believe” standard of proof may be proper for an initial detention. However, as the duration of detention or other limits on liberty increase, the government should bear an escalating burden. Escalating burdens will have the effect of obliging fuller government disclosure — it must show more to make out its case. It would also not prejudice the government’s ability to respond quickly since an initial security certificate could be issued or a detention ordered on the lesser standard. Only as the detention endured would the burden on the government escalate.

TOWARDS A SYSTEM OF LIMITATIONS ON LIBERTY FOR FOREIGNERS

Moreover, the law is entirely silent on whether detention or other constraints on liberty may persist under this regime if the detainee is no longer subject to viable removal proceedings. This is an important omission. It may well be that a named person will not be removed because, on the balancing mandated by the IRPA described above, the persecution threat (including of torture) to the person if removed outweighs the threat to national security posed by the person or because section 7 of the Charter bars their removal to persecution and/or torture.

During the legislative process, the government suggested that the absence of an existing deportation process will be a variable the Federal

²³¹ IRPA, s. 82.

²³² *Id.*, s. 82.1.

²³³ *Id.*, s. 82.2.

Court considers in deciding whether to continue a detention or not.²³⁴ While that seems likely, nothing in the law brings to an end detention or other constraints on liberty under the security certificate process where deportations fail. The letter of the law suggests that this detention or highly constrained release could continue indefinitely if there remain reasonable grounds to believe that the person is a danger to national security.

There are two possible responses to this prospect. First, the Federal Court (or on appeal, a higher court) might conclude that while there is no firm link in the law between detention and a viable removal process, the absence of such removal proceedings is the sort of “material change in circumstance” that justifies a modification (and relaxation) of the release order. The difficulty with this approach is that modification does not mean elimination — the security certificate process anticipates either detention or conditional release, not full release.

Second, the courts may simply adjudge unconstitutional a system that allows for the stand-alone detention or limited release of foreigners on the basis of mere reasonable beliefs, demonstrated by mostly secret evidence. Detention or limited release pending removal is one thing; indefinite detention unconnected to removals, even if housed under the immigration law, would be quite another.

One matter likely to be raised in such a constitutional challenge is the equality guarantees of section 15 of the Charter. In *Charkaoui*, the Supreme Court gave short shrift to equality-based objections to the security certificate system, largely because “the detentions at issue have become unhinged from the state’s purpose of deportation”.²³⁵ If that de-hinging were, however, to arise, the section 15 equality guarantee issues would be ripe for consideration.

On that issue, unquestionably, the system of detention or limited release under security certificates is far more draconian than anything that might be imposed on Canadian citizens. In relation to the latter, the closest analogy would be recognizance on conditions provisions in the *Criminal Code*.²³⁶

Under section 810.01, for instance, a person “who fears on reasonable grounds that another person will commit ... a terrorism

²³⁴ Mr. Daniel Therrien (Acting Assistant Deputy Attorney General, Citizenship, Immigration and Public Safety Portfolio, Department of Justice), *Evidence*, 39th Parl., 2nd Sess., Tuesday, November 27, 2007.

²³⁵ *Charkaoui*, *supra*, note 222, at para. 131.

²³⁶ R.S.C. 1985, c. C-46.

offence may, with the consent of the Attorney General, lay an information before a provincial court judge”. If the provincial court judge is persuaded that these reasonable grounds for the fear exist, he or she may order the defendant to “enter into a recognizance to keep the peace and be of good behaviour” for up to 12 months, and may impose other reasonable conditions. A refusal by the accused to enter into the recognizance is punishable by imprisonment for up to 12 months. A breach of a recognizance is a criminal offence, punishable by up to two years imprisonment if a conviction is secured on indictment.²³⁷

These recognizances — or “peace bonds” — differ from the IRPA process in two key respects, however. First, while the limitations on liberty under peace bonds could be extensive, they cannot be as extensive as those under the IRPA. In *R. v. Budreo*,²³⁸ the Ontario Court of Appeal agreed that a peace bond (in that case, one guarding against sex offences directed at minors) amounts to a restraint on liberty, and thus triggered the application of section 7 of the Charter. It concluded, however, that fundamental justice was not offended where the provision was largely geared to *bona fide* prevention and was not truly penal in nature. Part of that reasoning appears to rest on the fact that the peace bond was reasonably narrowly tailored, restricting the defendant’s liberty in respect to a large, but reasonably discrete group of persons (minors).²³⁹ In rejecting the defendant’s supplemental argument that the constraints imposed by peace bond were overbroad, the court noted the reasonably narrow scope of the restrictions, underscoring that their limited focus permitted “a defendant to lead a reasonably normal life”.²⁴⁰ It is also notable that the *Budreo* court suggested a definite outer limit on the scope of a peace bond: “detention or imprisonment under a provision that does not charge an offence would be an unacceptable restriction on a defendant’s liberty and would be contrary to the principles of fundamental justice”.²⁴¹ This language suggests that, at the very least, no Canadian could be detained for any serious length of time on national security suspicions.

Second, unlike the IRPA process, peace bond questions are adjudicated in open court — there is no specific provision that would

²³⁷ *Id.*, s. 811.

²³⁸ [2000] O.J. No. 72, 46 O.R. (3d) 481 (Ont. C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 542.

²³⁹ *Id.*, at para. 32 (C.A.).

²⁴⁰ *Id.*, at para. 39.

²⁴¹ *Id.*

allow the use of secret evidence, and any effort to withhold relevant information from the named person would presumably be considered under the *Canada Evidence Act* balancing test discussed above.²⁴² That same Act empowers the criminal court judge to dismiss proceedings in circumstances where the government succeeds in denying a person access to information necessary for a fair trial.²⁴³ Put another way, the procedural guarantees in the criminal context are more robust than those that are afforded foreigners under the IRPA.

Under these circumstances, an equality challenge to the security certificate regime seems plausible — perhaps even incontrovertible.

THE SLIPPERY SLOPE

If our courts were to arrive at this conclusion, we would find ourselves where the United Kingdom was in 2004. In December 2004 the House of Lords declared indefinite detention of foreign terrorist suspects without trial under immigration law contrary to U.K. human rights obligations.²⁴⁴ In the words of Lord Nicholls of Birkenhead, “indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law”.²⁴⁵ The decision turned, in part, on the law lords’ conclusion that there was no reason to presume that foreign nationals (as opposed to U.K. nationals) presented the greatest national security threat.

In response to this decision, the U.K. Parliament enacted the *Prevention of Terrorism Act 2005* permitting the imposition of “control orders” directed at the activities of both foreign and U.K. nationals suspected of terrorist activity.²⁴⁶ As noted above, these control orders permit stringent limitations on liberty, on the basis of secret information.

Bill C-3, by failing to address the prospects of indefinite detention frankly, potentially creates a slide towards the U.K. outcome, in slow motion. A preferable course of action would have placed a clear outer limit on limitations on liberty under the IRPA; a point where, with no reasonable prospect of deportation, the fate of the named person must be adjudicated under the standard *Criminal Code* process, if at all.

²⁴² *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.

²⁴³ *Id.*, s. 38.14.

²⁴⁴ *A v. Secretary of State for the Home Department*, [2004] U.K.H.L. 56, [2005] 2 A.C. 68 (U.K.H.L.).

²⁴⁵ *Id.*, at para. 74.

²⁴⁶ *Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2.

VI. CONCLUSION

When these authors spoke to over a dozen United Kingdom (and New Zealand) special advocates in the summer of 2007, some of these experienced barristers expressed the hope that the anticipated Canadian response to *Charkaoui* would come in the form of a robust special counsel model that would overcome the problems experienced in their jurisdictions. As one put it, a Canadian “Cadillac” model would increase pressure on their own governments to improve their systems.

In fact, Parliament could have enacted a system that affirmatively permitted carefully controlled continued dialogue between special advocate and named person, affirmed and guaranteed full disclosure of all relevant information to the court and special advocate, limited detention or other constraints on liberty to periods in which deportation was a possibility, and closed the door on removal to torture, among other things. All of these proposals were before Parliament and parliamentary committees, even before Bill C-3 was tabled. Indeed, several had been endorsed by parliamentary committees in their just-concluded reviews of Canada’s anti-terrorism laws.

Unfortunately, Bill C-3 charted a very different course, abandoning features of Canada’s indigenous SIRC system that side-stepped problems experienced in other jurisdictions and importing, almost *holus bolus*, the U.K. approach. There was no advance consultation by government on this approach, despite acute interest in security certificates. The bill was tabled in the tenth, if not eleventh, hour before the expiry of the *Charkaoui* deadline. It wallowed for weeks in the Commons, and was rammed through a (properly) unhappy Senate. The political atmosphere was tainted with hallway mutterings of confidence votes and finger-pointing if persons characterized by the government as dangerous terrorists were left free to roam the country.

Bill C-3 has skated as close as it could to the constitutional line drawn by the Supreme Court. It will now incite another round of constitutional litigation asking the Court to define exactly where that line is. At the same time, Bill C-3 makes no effort to forestall inevitable supplemental constitutional issues surrounding detention and removal to torture. Constitutional “dialogue” will take the form of an inter-branch ping-pong.

This back and forth may be characterized as healthy democratic evolution; a constitutional chat that looks grand from the court room, class room or parliamentary chamber. It is certainly less attractive to the

five individuals currently in long-term detention or subject to extremely strict limitations on liberty, each of whom is facing removal to possible torture. For these people, as for others involved in the process, Bill C-3 was a trip to Bismarck's sausage factory.