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The Canadian Security Certificate Regime

CEPS Special Report/March 2009

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This work was prepared as part of the EU–Canada project - *The Changing Landscape of Justice and Home Affairs Cooperation in the European Union and EU-Canada Relations* – funded by the European Commission, Directorate-General for External Relations, Relations with the US and Canada.

This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanisation of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

ISBN-13: 978-92-9079-870-5

Available for free downloading from the CEPS website (<http://www.ceps.eu>)

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THE CANADIAN SECURITY CERTIFICATE REGIME

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AUDREY MACKLIN*

Introduction

Like other states, Canada is wrestling with the task of devising national security policies that are able to withstand allegations that fundamental human rights have been sacrificed at the altar of the war on terror. The policy instrument of choice for Canada thus far has been the deportation of suspected security threats. The appeal of deportation resides in its capacity to literally expel the putative menace from the body politic. In addition, courts have historically denied to non-citizens enmeshed in immigration proceedings the legal protections afforded to defendants (citizen and non-citizen alike) in the criminal justice system. Justifications for this discounting of the rights of non-citizens rest on two propositions: the first is the traditional sovereigntist insistence that immigration is a privilege and not a right, and so the migrant is disentitled from complaining about the process of how that privilege is granted, denied or revoked. Secondly, deportation is framed as something qualitatively different from criminal punishment; unlike incarceration, deportation does not intrinsically constitute a deprivation of liberty or security of the person. Operationally, the significance of these distinctions is that it is easier to deport than to prosecute. Non-citizens become more vulnerable targets of state surveillance and sanction than citizens, and even where criminal prosecution might be possible, deportation proceedings remain more attractive to the state because they erect fewer rights-based impediments to enforcement.

The obvious drawback to this reliance on immigration law is the fact that it only applies to non-citizens. Citizens suspected of terrorism-related acts can only be tried under criminal law, thereby bringing into sharp relief the normative implications of subjecting non-citizens to a different and less fair process than citizens for otherwise comparable conduct. Notably, recent UK legislation permits the Secretary of State to revoke citizenship of both birthright and naturalized citizens where it is “conducive to the public good”.¹ Though rarely used, this extravagant extension of ministerial discretion power operates to legally ‘alienate’ the citizen in order to render him available for a remedy that can only be inflicted on non-citizens, namely deportation.

This preference for deportation also rests on a curiously parochial premise: despite repeated claims by states that terrorism is a problem of global dimensions, the deportation as remedy presupposes that removal of a dangerous person from one territory to another will neutralize the terrorist threat posed by that individual. Lord Bingham of Cornhill remarked on the dubious nature of this assumption in the House of Lords decision in *A (FC) and others (FC) v. Secretary of State for the Home Department*² (Belmarsh Case):

... [A]llowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country.

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¹ British Nationality Act 1981 (c. 61), s. 40(2).

² [2004] UKHL 56 at para. 33.

In other words, to say that there is an immigration aspect to international terrorism should not be construed to mean that terrorism is a problem that immigration law can solve. Nevertheless, the allure of immigration law seems to outweigh its practical and normative limitations, at least for the UK and Canadian governments.

The purpose of this report is to provide a critical account of Canadian law, policy and practice since 2001 regarding the detention and deportation of non-citizens alleged to pose a danger to national security. Developments since 2007, when the Supreme Court of Canada declared the existing regime unconstitutional, warrant particular attention.

The Security Certificate Regime

Within weeks of 11 September 2001, the Canadian government introduced and passed into law the *Immigration and Refugee Protection Act*. The draft legislation pre-dated the attacks on the United States, and it is telling that the political climate that ensued did not actually affect the content of the legislation as much as dampen dissent from opposition politicians and civil society. In effect, the Canadian government had already decided to ‘get tougher’ on non-citizens. The events of 9/11 simply made it easier to do so.

Under ordinary immigration law, a non-citizen seeking to enter or remain in Canada may be inadmissible for various reasons, including non-possession of an entry visa, misrepresentation, criminality, violation of human or international rights, health risk, destitution, or risk to national security.³ Inadmissibility on security grounds may be based on “facts for which there are reasonable grounds to believe [] have occurred, are occurring or may occur”,⁴ and applies in the following circumstances:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (b) engaging in or instigating the subversion by force of any government;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

To appreciate the expansive reach of these provisions, and the attenuated threshold of proof required under them, consider that s. 34 (1)(f) permits the labelling and deportation of a person *qua* terrorist if there are reasonable grounds to believe he is, was, or will be a member of an organisation that there are reasonable grounds to believe has, does, or will in engage in terrorism.

³ See Immigration and Refugee Protection Act, SC 2001, c. 27, ss. 34-43 (hereafter “IRPA”).

⁴ IRPA s. 33.

A non-citizen facing exclusion or expulsion is generally entitled to an admissibility hearing before an adjudicator of the Immigration and Refugee Board. If the person concerned is detained (which occurs relatively infrequently), the detention is subject to regular review by an adjudicator.

The Security Certificate regime deviates from this system in various ways. First, if the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness sign a Security Certificate declaring the person concerned as inadmissible on grounds of security, violating international or human rights, serious criminality or organised criminality, the named person will be invariably (and in most cases automatically) detained.

Next, a designated judge of the Federal Court will be tasked with determining whether the Security Certificate is 'reasonable'. This standard of review compounds the low threshold of proof described above in relation to s. 34, especially s. 34(1)(f). Meanwhile, the named person may apply to the Minister of Citizenship and Immigration for protection from removal on the basis of a well-founded fear of persecution or substantial risk of torture or cruel and unusual treatment or punishment if expelled to his country of nationality.⁵ Even where the person otherwise qualifies for protection, the Minister may deny protection if, "in the opinion of the Minister . . . the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or danger to the security of Canada".⁶ This determination will be reviewed for its 'legality' by the same designated judge.

If the named person is a permanent resident, his detention will be reviewed every six months by the designated judge. If he is a foreign national,⁷ IRPA does not mandate any review of the detention prior to determination of the Security Certificate's reasonableness. IRPA places no statutory limit on the length of detention, except to state that the person concerned may apply for release anytime to permit departure from Canada. If a Security Certificate is upheld as reasonable, the judge *may* order the release of the named person 120 days later, "if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person".⁸ Once a protection determination has been deemed lawful, and the Security Certificate upheld as reasonable, the named person is deportable with no further opportunity for appeal.

The Security Certificate process has evolved somewhat from its inception in 1978 to its post-2001 format. Each iteration has been more restrictive and secretive than the last. As of 2001, the Security Certificate process was effectively a secret trial. The Minister of Citizenship and Immigration could apply for an order of non-disclosure of evidence on grounds of national security confidentiality. The Federal Court judge was authorized to hear the case in the absence of the named person or his counsel and to receive and rely on evidence that would be inadmissible in a court of law and which was not disclosed to the person concerned or his counsel. The named person was entitled only to a "summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person".⁹ The statutory criteria for deciding whether to permit

⁵ All persons named in Security Certificates to date have been male.

⁶ IRPA s. 115(2)(b).

⁷ A foreign national is a non-citizen without permanent resident status. The category includes asylum seekers, refugees who have not yet obtained permanent residence, lawful temporary residents, and non-status migrants.

⁸ IRPA, s. 84.

⁹ IRPA s. 78.

the named person to attend his hearing, what to admit into evidence, what to disclose to the named person, what to include in the summary, and what to rely upon as probative, did not include any consideration of the named person's ability to make full answer and defence to the allegations against him.¹⁰

Expulsion to Torture: Suresh and Ahani

In May 2001, the Supreme Court of Canada heard the appeals in two Security Certificate cases. Manickavasagem Suresh was a Tamil refugee named in a Security Certificate as a threat to national security on the grounds that he was a fundraiser for an organisation that had links to the Liberation Tigers of Tamil Eelam (LTTE), known as the Tamil Tigers. Mansour Ahani was an asylum seeker whose refugee claim had not been determined prior to the issuance of a Security Certificate naming him as a threat to national security based on allegations that he was an assassin for the Iranian secret police.

In both cases, the named persons claimed that expulsion would put them at substantial risk of torture at the hands of their respective governments, contrary to Article 3 of the Convention Against Torture.

The issues before the Supreme Court of Canada encompassed both substantive and procedural questions. Chief amongst the former was the constitutionality of returning a person determined to constitute a threat to national security to a country where he faced a substantial risk of torture. The procedural aspects challenged the absence of notice and opportunity to respond to the Ministerial determination of whether to deport the named person.

The Supreme Court of Canada rendered its decisions in *Suresh v. Canada (Citizenship and Immigration)*¹¹ in January 2002, and 9/11 casts a long shadow over the judgement. The Supreme Court of Canada ruled that s. 7 of the Canadian Charter of Rights and Freedoms prohibited return to torture in all but "exceptional circumstances".¹² By leaving a notional door open to expel a person to face a substantial risk of torture in another country, the Court adopted a stance in stark contrast to the 1996 European Court of Human Rights decision in *Chahal*,¹³ and in apparent contravention of Article 3 of the Convention Against Torture (to which Canada is a party), and possibly *jus cogens*.¹⁴ While the Court's decision on this point has been widely criticised, it is probably fair to suppose that the Court expected that resort to the exception would remain in the realm of the hypothetical. If so, the Court was mistaken. Since the *Suresh* judgement, the Canadian government has invoked exceptional circumstances favouring return to torture in each Security Certificate case where the opportunity has arisen.

On the procedural side, the Supreme Court of Canada ruled that if a named person could establish a *prima facie* risk of torture upon return to the country of nationality, he was entitled to disclosure of evidence upon which the Minister intended to rely (subject to privilege). The named person must know the case against him, and have the opportunity to present evidence

¹⁰ IRPA s. 78.

¹¹ [2002] 1 SCR 3. The companion case of *Ahani v. Canada (Citizenship and Immigration)*, [2002] 1 SCR 72 adopted the reasoning in *Suresh* but reached a different outcome on the facts regarding whether Ahani had made out a *prima facie* risk of torture.

¹² Section 7 of the Charter states that "Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with fundamental justice".

¹³ *Chahal v. United Kingdom*, (1996) 23 EHHR 413.

¹⁴ For the Supreme Court of Canada's discussion of applicable international law, see *Suresh* at paras. 59-78.

and provide written submissions on the danger posed by his continued presence in Canada, and the risk of torture if deported. The Minister must provide written reasons dealing with the substantive issues.

The Suresh decision only addressed the final phase of the process, which arose after a Security Certificate had already been upheld as reasonable, and involved the exercise of executive discretion by the Minister to deport the named person. It took another six years before the judicial assessment of the reasonableness of the Security Certificate itself came under scrutiny by the Supreme Court of Canada.

In *Charkaoui v. Canada (Citizenship and Immigration)*,¹⁵ the Supreme Court of Canada confronted constitutional challenges to the statutory possibility of indefinite (or at least indeterminate) detention of persons named in Security Certificates, as well as the characterisation of the judicial review of Security Certificates as a secret trial by secret evidence. On the issue of detention, the Supreme Court found that the absence of any detention review for foreign nationals until after the Security Certificate was reviewed by the Federal Court constituted a violation of the constitutional right against arbitrary detention. The Court insisted that the Charter requires “a meaningful process of ongoing review that takes into account the context and the circumstances of the individual case”.¹⁶ The Court lists a variety of factors that are relevant to determining the need for ongoing detention, but evades entirely the scenario of a detained person who is alleged to constitute a threat to national security, but who cannot be deported in the foreseeable future because of a substantial risk of torture. Is it constitutionally justified to detain a person indefinitely when there is no actually discernable prospect of deportation? The Supreme Court of Canada ventures no further than adverting obliquely to the “possibility of a judge concluding at some point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice”.¹⁷ Although four of five men subject to security certificates were released on strict conditions by January 2007 (the fifth was ordered release, subject to negotiations that have yet to be concluded as of the time of writing), the average time in custodial detention was almost six years.¹⁸

Prof. Kent Roach astutely characterises the Supreme Court’s approach to detention as an instance of what Prof. Cass Sunstein dubs “judicial minimalism”: courts avoid ruling on the legality of an uncircumscribed legal power (in this case, a statutory power to detain with no temporal limitation). Instead, the Courts reserve the authority to proceed incrementally, offering the prospect of relief if and when the exercise of legal power in a particular case strays beyond constitutional limits.¹⁹ As Prof. Roach observes, this approach “leaves the existing legislation intact but uncertain as both detainees and governments wait and speculate about the particular point of time in which courts will conclude that detention has become constitutionally

¹⁵ [2007] 1 SCR 350.

¹⁶ *Charkaoui*, para. 107.

¹⁷ *Charkaoui*, para. 123. While the Supreme Court of Canada claims that its position is consistent with US and UK authorities, arguably it contradicts the dicta from these jurisdictions.

¹⁸ See Craig Forcese and 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), <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>.

¹⁹ See Cass Sunstein, “Minimalism at War”, 2004, available at Social Science Research Network SSRN: <http://ssrn.com/abstract=629285>.

excessive”.²⁰ Given that the subjects of security certificates (including Charkaoui himself) had, in fact, already languished in detention for several years, the Supreme Court’s hesitant approach seemed feeble.

The Supreme Court of Canada did explicitly address the breach of fundamental justice entailed by judicial review of the security certificate. As the Court observed, the statutory scheme casts a cloak of secrecy over the content of the case against the named person, and withholds from him the opportunity to know or respond to it:

Confidentiality is a constant preoccupation of the certificate scheme. The judge “shall ensure” the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(b). At the request of either minister “at any time during the proceedings”, the judge “shall hear” information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person: s. 78(e). The judge “shall provide” the named person with a summary of information that enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(h). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(g). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see.

The scheme imposes on the reviewing judge sole responsibility for testing the credibility of the secret evidence, which the judge discharges by putting questions to government counsel and witnesses. The judge cannot call or elicit evidence from the government. This task is wholly incongruous with the traditionally passive role of the common law judge, as Federal Court Justice Hugessen lamented in a speech excerpted in the Charkaoui judgement:

We do not like this process of having to sit alone hearing only one part, and looking at the materials produced by only one party...

If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. ... we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us.²¹

The Supreme Court of Canada ultimately validates Justice Hugessen’s concerns about the inadequacy of relying on judges to fill the gap left by the absence of the named person and his counsel. The Court determines that the scheme does not accord with the principles of fundamental justice under s. 7 of the Charter, specifically the right of the named person to know and respond to the case against him:

Under IRPA’s certificate scheme, the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet. Without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of

²⁰ Kent Roach, “Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue Between Courts and Legislatures”, (2008) 42, *Supreme Court Law Review* 281, p. 307.

²¹ J. Hugessen, quoted in Charkaoui at para. 36.

informants or refuge false allegations. This problem is serious in itself. It also underlies the concerns, discussed above, about the independence and impartiality of the designated judge, and the ability of the judge to make a decision based on the facts and law ...

The named person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.²²

Canadian constitutional law, in common with many other jurisdictions, subjects rights infringing conduct to a proportionality test. In Canada, the proportionality test occurs after a litigant has proven a rights violation on a balance of probabilities, whereupon the burden shifts to the government to justify the limitation. Section 1 of the Canadian Charter provides that “the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society”.²³ The Supreme Court of Canada was easily satisfied that the “protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective”, and that the restrictions imposed under the Security Certificate regime were rationally connected to the attainment of that objective. Its attention turned swiftly to the next stage of the analysis, which inquires into the existence of less restrictive alternatives to the impugned provisions. The principle at stake is that a given restriction on a constitutional right may be disproportionate where less restrictive alternatives exist for meeting the otherwise valid objective.

The Supreme Court of Canada surveyed a range of precedents – both domestic and foreign – for dealing with the competing demands of national security confidentiality and the fairness requirement that affected persons know and respond to the case against them. Unfortunately, some of the accounts of past practice regarding Security Certificates and of practices developed in different Canadian contexts were either inaccurate or incomplete.²⁴ The Supreme Court noted a past instance where counsel for a criminal accused obtained access to security-sensitive material on an initial undertaking not to divulge it to the accused or anyone else. It arguably gave unduly short shrift to the possibility of disclosure to security-cleared counsel representing the person concerned. In addition, the Supreme Court of Canada failed to advert to precedents where an independent, security-cleared counsel was entitled to full disclosure of relevant secret evidence and could also communicate thereafter with the person concerned and/or the person’s counsel in order to pose questions, glean avenues of inquiry and sources of evidence, and formulate bases upon which to test the government’s evidence (including calling its own witnesses).²⁵ Crucially, this post-disclosure communication with the named person and/or the person’s counsel was achieved by counsel without divulging the content of the secret information to the named person, and with no subsequent allegations of advertent or inadvertent ‘leaks’ of confidential information.

²² Charkaoui, at paras. 54-55.

²³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴ For further elaboration, see Audrey Macklin, “Tranjudicial Conversations about Security and Human Rights”, in Mark Walters (ed.), *EU-Canada Security Relations: The Other Transatlantic*, forthcoming.

²⁵ The two examples are the Arar Commission and the practice of the Security Intelligence Review Committee security-cleared counsel. While the Supreme Court of Canada adverts to both bodies, it fails to accurately depict their respective practices. See Macklin, *supra* note 24; Kent Roach, *op. cit.*, pp. 293-304; Forcese and Waldman, *op. cit.*, pp. 360-367.

Ultimately, the Supreme Court of Canada highlights the UK Special Advocate model. After the 1996 European Court of Human Rights decision in *Chahal v. UK*,²⁶ in which the European Court ruled that the existing UK system violated the European Convention on Human Rights, the British government introduced the Special Advocate scheme. The Special Advocate system entails the appointment of a security-cleared counsel 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”.²⁷ In its description, the Supreme Court of Canada draws particular attention to the provisions of the UK scheme that prohibit the special advocate from communicating with the person concerned after seeing the protected information, unless the special advocate seeks permission from the Special Immigration Appeals Commission (SIAC), and the Secretary of State has an opportunity to object to the proposed communication before SIAC decides.²⁸

The Supreme Court of Canada cites the positive academic reception to the special advocate model, while noting that the system has also been subject to criticism for the barriers to communication with the person concerned or his counsel, the inability of special advocates to call witnesses, and the lack of resourcing.²⁹ Despite these apparent weaknesses, the Supreme Court of Canada concludes by invoking SIAC’s own favourable commentary on the contribution of special advocates to its own successful operation. It even chided the Canadian government for not explaining to the Court why the drafters of the impugned Canadian legislation “did not provide for special counsel ... [as] is presently done in the United Kingdom.”³⁰ Among the ‘less restrictive’ alternatives canvassed by the Supreme Court of Canada, the UK scheme impaired the rights of the person concerned more than the others. Yet, a fair reading of the judgement conveys the impression that the Supreme Court of Canada was signalling its advance approbation *not* of the available option that impaired rights the least, but rather of the most restrictive of those less-restrictive alternatives. This might suggest that judges in one jurisdiction look for ‘political cover’ when striking down domestic legislation by pointing to less restrictive laws in another jurisdiction: if the Supreme Court of Canada endorsed existing UK practice, it could not be accused of making Canada a uniquely attractive haven for terrorists.

Presented with a declaration of unconstitutionality from the Supreme Court of Canada, and a year within which to introduce a new and improved version, the Canadian government ultimately responded by introducing Bill C-3. The bill was predictable in its content. First, Bill C-3 remains silent on the so-called “Suresh exception” that countenances the legality of deporting a non-citizen to a country where he faces a substantial risk of torture. After all, since the Supreme Court of Canada in *Charkaoui* did not resile from its prior dicta, the government faced no legal pressure to restrain the exercise of its discretion.

Secondly, Bill C-3 extended the requirement of a semi-annual detention review to foreign nationals as well as to permanent residents (IRPA, s. 82). It more or less codified existing practice by Federal Court judges regarding the conditional release of Security Certificate detainees, a practice the Federal Court belatedly adopted once the British courts had set the precedent with their use of control orders in situations of long term detention in the absence of a

²⁶ (1997) 23 EHRR 413.

²⁷ Special Immigration Appeals Commission Act 1997, (UK) 1997, c. 68, s. 6. See Treasury Solicitors Department, “Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office”, http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf.

²⁸ *Charkaoui*, paras 80-81.

²⁹ *Charkaoui*, para. 83.

³⁰ *Charkaoui*, para. 84.

reasonable prospect of removal.³¹ However, it does not explicitly preclude indefinite detention. Nor does it articulate any factors relevant to the determination of whether to release (conditionally or otherwise), the appropriate conditions of release. Instead, the provisions reiterate that the risk to national security or endangerment of any person constitute reasons to detain, continue detention, or terminate conditional release in favour of custodial detention (ss. 82, 82.1, 82.2). There is little doubt that the powers to detain non-citizens, to impose conditions on their release and to revoke conditional release, are much broader under IRPA than the peace bond, the nearest analogue under criminal law. A ‘peace bond’ is a long-standing instrument of the Canadian criminal justice system that imposes specific conditions on persons to protect the safety or property of others upon establishment of reasonable apprehension of future harmful conduct. Section 810.01 of the Criminal Code, enacted as part of Canada’s anti-terrorism legislation, empowers a provincial court judge to impose a ‘peace bond’ where reasonable grounds exist to believe that the person “will commit ... a terrorism offence”.³² While potentially quite restrictive, the limitations on liberty available under a peace bond are not as draconian as those devised by Federal Court judges for purposes of conditional release under the Security Certificate regime. Secondly, the process for issuing and reviewing peace bonds is more transparent and more regular than for conditional release.³³

Finally, the major innovation in Bill C-3 was the importation of a special advocate regime closely modelled on the UK precedent. By the time Bill C-3 was introduced, the government had the benefit of considerable commentary about the deficiencies of UK Special Advocate model. This included serious reservations expressed by Special Advocates themselves and by the House of Lords and House of Commons Joint Committee on Human Rights and even a judgement of the House of Lords itself concerning control orders.³⁴ Various stakeholders, academics and advocates recommended amendments to Bill C-3 that would avoid or ameliorate the flaws in the UK law. Apart from relatively minor amendments, the government was unresponsive to these submissions. In the result, the Canadian system mimics its UK predecessor.

The salient aspects of Bill C-3 in relation to Special Advocates are the following (all references are to IRPA):

1. The Minister of Justice must prepare a list of persons “who may act as Special Advocates” (s. 85.1). 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 named person and their counsel (s. 85.1(1)).
2. The Minister must disclose to the Special Advocate “a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and his counsel” (s. 85.4(1)).
3. The Special Advocate may challenge non-disclosure of evidence where the Minister asserts that disclosure would injure or endanger national security or the safety of any person (s. 85.1(2)).

³¹ See Forcese and Waldman, *op. cit.*, pp. 410-412.

³² Refusal to enter into a peace bond or a breach of the bond constitute criminal offences are punishable by up to one year.

³³ See Forcese and Waldman, *op. cit.*, pp. 411-12.

³⁴ See text accompanying notes 29-31, *infra*.

4. The judge is authorized to receive into evidence and to rely on anything that “in the *judge’s opinion* is reliable and appropriate” even if inadmissible into a court of law” (ss. 83(h)) (emphasis added), but this does not include any material “that is believed on reasonable grounds to have been obtained as a result of the use of torture ... or cruel, inhuman or degrading treatment or punishment.” (s. 83(1.1)) The judge shall not base a decision on information or evidence that the judge determines to be irrelevant (s. 83(h)).
5. The Special Advocate may challenge the relevance, cogency, sufficiency or weight of non-disclosed evidence or information, and make oral and written submissions regarding that evidence or information (s. 85.1(b), 85.2(a)).
6. The Special Advocate may participate in hearings from which the named person and his counsel, and the public, are excluded; this includes the right to cross-examine witnesses who testify (s. 85.2(b)).
7. The Special Advocate may “exercise, with the judge’s authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national” (s. 85.2(c)).
8. After viewing information or evidence that is not disclosed to the permanent resident or foreign national or counsel, the Special Advocate requires judicial authorization (with or without conditions) to communicate with another person (s. 85.4(2), 85.5).
9. The Federal Court and Court of Appeal may make binding rules governing the practice and procedure in relation to the participation of Special Advocates in proceedings before the court (s. 85.6(1)).

In light of the experience with the Special Advocate system in the UK, various aspects of the Canadian analogue give cause for concern.³⁵ Perhaps most significantly, the restriction on the Special Advocate’s communication with the named person and anyone else (including other Special Advocates) after viewing the secret evidence seriously hampers the Special Advocate’s capacity to do his or her job. A House of Commons and House of Lords Joint Committee on Human Rights summarised the frustration reported to the Committee by Special Advocates:

The Special Advocates told us that the prohibition of communication with the controlled person frequently limits the very essence of their function of protecting their interests, because the Special Advocate may have no idea what the real case is against the person until the start of the closed proceedings, by which time it is too late to ask any questions of the controlled person to find out what explanations they might have. This was described as “extremely frustrating and counter-intuitive to the basic way that lawyers are used to doing their job”. It was explained that the facility in the Rules to seek the Court’s permission to consult with the controlled person was rarely used in

³⁵ Bill C-3 does not explicitly require the Minister to disclose to the judge (and thereby the Special Advocate) the entire contents of its dossier. In the UK context, a comparable lacuna has led Special Advocates to complain that the government discloses only the information and evidence upon which they intend to rely, namely inculpatory evidence. Information that may be exculpatory, or may open up possible lines of inquiry leading toward exculpatory evidence, may be withheld from the Special Advocate. Although the Canadian legislation is no more helpful than its UK precedent, a follow-up case to the first Supreme Court of Canada decision in *Charkaoui* states that the Canadian Security Information Service “should be required to retain all the information in its possession and to disclose it to the ministers and the designated judge.” *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38, 26 June 2008, at para. 62. (*Charkaoui II*). The reference to *all* the information would appear to comprehend potentially exculpatory as well as inculpatory information and evidence. The extent to which the government acts in accordance with the spirit and letter of this dictum is difficult to monitor.

practice, partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was to discuss anything to do with the closed case, and partly because the Rules require any application for such permission to be served on the Secretary of State, which is not considered tactically desirable because of the risk that it might give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation.³⁶

The House of Lords subsequently validated the essence of Special Advocates' objections in the following remarks by Lord Bingham in *Secretary of State for the Home Department v. MB (FC)*:³⁷

In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. ...[T]he task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person.³⁸

Most recently, the European Court of Human Rights heard an appeal from the UK House of Lords in the *Belmarsh* case.³⁹ The European Court of Human Rights, *inter alia*, ruled on the adequacy of the Special Advocate model in relation to the procedural fairness guarantee contained in Article 5 § 4 of the European Convention on Human Rights.⁴⁰ Taking as a given that Special Advocates will be precluded from meeting with the named person after the former has viewed secret evidence, the Court found that "where the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied".⁴¹

³⁶ UK House of Commons and House of Lords Joint Committee on Human Rights, Nineteenth Report, 16 July 2007, para. 201, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm>

³⁷ [2007] UKHL 46.

³⁸ MB at para. 35. See also paras. 64-66 (per Baroness Hale: "I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used ... would be sufficient to comply with article 6 [of the ECtHR].... There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases ... All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in [the special advocate legislation], the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge".) The MB case was heard just prior to the release of the Joint Committee Nineteenth Report.

³⁹ *Case of A. and Others v. The United Kingdom*, Application 3455/05, 19 February 2009 (European Court of Human Rights).

⁴⁰ Article 5 § 4 states, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

⁴¹ *Case of A.*, *supra* note 39 at para. 220.

In theory, the Special Advocate model adopted in Canada could ameliorate the aforementioned problems of restricted communication between the Special Advocate and the named person (as well as other Special Advocates) in two ways. First, designated judges could exercise their power to authorize communication in a facilitative manner on a case-by-case basis. Secondly, the Federal Court could exercise its statutory authority to devise binding rules governing the participation of Special Advocates (s. 85.6(1)) that would establish parameters for communication between Special Advocates and named persons and/or their counsel, and among Special Advocates themselves.

The short time that has passed since the Special Advocate regime was introduced in Canada gives equal cause for optimism and for pessimism that the system will create a meaningful right of non-citizens named in Security Certificates to know and respond to the case against them. The reason to be optimistic is that the lawyers appointed as Special Advocates thus far are extremely reputable, respected and experienced counsel drawn from the criminal and immigration bar. They include counsel who have represented persons named in Security Certificates. One has every reason to expect that they will assertively and zealously execute their responsibilities with full commitment to the objective of ensuring a just and fair process. The reason for pessimism is that the Federal Court has still not exercised its authority to develop rules regarding the participation of Special Advocates (s. 85.6(1)). Such rules could, presumably, resolve at least some of the problems that the legislation creates through its silences and also its breadth.

In the meantime, the Federal Court deflected a challenge to the constitutionality of the provision requiring judicial authorization prior to any communication between the Special Advocate and the named person after the former has viewed the secret evidence. In *Almrei (Re)*,⁴² Chief Justice Lutfy ruled that the issue was premature, because no Special Advocate had yet approached a judge for authorization in any particular case. This rejoinder misses the point, insofar as the issue before the court was whether advance judicial authorization ought to be required, not whether authorization was improperly denied in a particular case. The effect of this ruling is to perpetuate the judicial minimalism approach that has characterised judicial pronouncements to date: rather than grapple with the systemic impact of an advance judicial authorization requirement on the capacity of Special Advocates to perform their task, the ruling consigns Special Advocates and the Minister to a potentially endless series of protracted skirmishes over the granting or withholding of specific permission in particular situations, while the persons named in the Security Certificate languishes in detention or under the restraints of a conditional release.

Conclusion and Recommendations

The current Canadian system for naming and deporting non-citizens on grounds of national security reflects the influence of several salient trends in post- 9/11 policy making in Canada: judicial minimalism, the adoption of the most restrictive (as opposed to least restrictive) alternative that does not tip over into unconstitutionality, and the avoidance of political risk by following precedents already set by other jurisdictions. In this respect, the UK has been a clear source of inspiration for Canadian courts and parliamentarians regarding Special Advocates and control orders.

Various Canadian commentators have advanced policy proposals for addressing the various challenges posed by the exigencies of national security and the imperatives of rights protection

⁴² 2008 FC 1216, 3 November 2008.

for the objects of state suspicion.⁴³ Insofar as the focus of this brief is on the situation of non-citizens, the main options consist of the following:

1. Non-Discrimination between Citizen and Non-Citizen

To the extent that Canada subjects non-citizens to differential and worse procedures and consequences (including deportation to torture) than citizens alleged to engage in prohibited conduct, the government should simply deal with all alleged terrorism-related activity under criminal law, whether committed by citizens or non-citizens. Non-citizens who are convicted of criminal offences would ultimately remain deportable. The basic position would be that if the criminal law appropriately addresses the attainment of state objectives and the protection of individual rights with respect to citizens, then it must be capable of doing the same with respect to non-citizens as well. A fall-back position would be to resort to the criminal law at least in cases where the alternative was potentially indeterminate confinement or conditional release where deportation was not available because of the substantial risk of torture.

2. Amelioration of the Security Certificate Regime (Including Special Advocate Model)

- a) Explicitly and absolutely prohibit deportation of non-citizens to countries where they face a substantial risk of torture
- b) Elevate the standard of proof required to designate a person a risk to national security beyond “reasonable grounds to believe” to at least a civil standard (balance of probabilities)
- c) Explicitly prohibit indefinite detention
- d) Articulate criteria relevant to the termination of detention
- e) Make the impact of non-disclosure on the fairness of the hearing a factor relevant to the determination of whether to admit, disclose and rely upon evidence for which the government asserts national security confidentiality
- f) Require full disclosure by the government of evidence in its possession to the Special Advocate
- g) Authorize the Special Advocate to question the named person after the Special Advocate has viewed the secret information; such questioning must and can be conducted in such a way as to avoid involuntary disclosure of the secret information.⁴⁴

Although these proposals are specific to the Canadian regime, the larger questions of discrimination against non-citizens and the practical requirements imposed by the duty of fairness in the national security context hang over most states. Diverse courts and governments may arrive at different answers, and a search for perfection will doubtless remain elusive. While one should not let the best become the enemy of the good, nor should the absence of risk-free alternatives become the apologist for the bad.

⁴³ See Forcese and Waldman, *op. cit.*; Kent Roach, *op. cit.*

⁴⁴ For further discussion of the necessity and feasibility of questioning by a Special Advocate of the name person following receipt of the secret information, see Forcese and Waldman, *op. cit.*, pp. 63-64.