THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Submission on Bill C-3
Immigration and Refugee Protection Act amendments
(Certificate and Special Advocates)

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Citizenship and Immigration Law Section, the Criminal Justice Section, and the Constitutional and Human Rights Law Section, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Submission on Bill C-3
Immigration and Refugee Protection Act amendments
(Certificate and Special Advocates)

EXECUTIVE SUMMARY

The Canadian Bar Association (CBA) welcomes the opportunity to express its views on Bill C-3, amending the *Immigration and Refugee Protection Act* (IRPA). In February 2007, the Supreme Court of Canada held that the present security certificate provisions in IRPA violated section 7 of the *Canadian Charter of Rights and Freedoms*. Bill C-3 is the government's response.

The CBA believes that Bill C-3 contains several serious flaws and does not go far enough to rectify the deficiencies in the security certificate proceedings in IRPA. The Bill adopts the United Kingdom model of special advocates without regard to fundamental improvements to that system which have either been recommended or already implemented. Key flaws in the special advocates system have been incorporated in Bill C-3. Moreover, the Bill does not recognize or incorporate many positive aspects of the Security Intelligence Review Committee (SIRC) process, a "made in Canada" regime, which was successfully utilized to handle secret information in immigration proceedings prior to the introduction of the current legislation.

If Parliament proceeds with a regime of special advocates for the purposes of rectifying the constitutional inadequacies of the current security certificate regime, the CBA recommends several necessary changes. These can be clustered under three themes:

- Evidentiary matters;
- Selection of special advocates and their relationship to the named person; and
- Safeguards against unlimited detention

Evidentiary Matters

Full Disclosure: Bill C-3 lacks mechanisms to ensure full disclosure of security evidence to the Court and special advocates, or ensuring the disclosure of exculpatory evidence respecting the person concerned. This deficiency has already been noted, and corrected, in the U.K. special advocates regime. Bill C-3 should contain an express and ongoing obligation on the government to disclose all relevant information to the court and special advocate, not just the evidence upon which it seeks to rely to support the security certificate. To emphasize this point, there should be express reference to the ongoing obligation to disclose any exculpatory information, that is, favourable to the person concerned.

Possibility of SIRC Review: For more than a decade prior to the passage of IRPA, SIRC was entrusted with evaluating a decision, based on security or intelligence reports, that a permanent resident was inadmissible on national security grounds. SIRC has established over time the necessary mechanisms for reviewing CSIS files, as a result of its operations and its involvement with complaints involving the conduct of CSIS. The best way to provide an independent process for ensuring that the named person obtains full disclosure is to have SIRC certify that the disclosure has been proper. Accordingly, the special advocate should have authority to request that SIRC review the file in the possession of the government and certify that full disclosure has been made.

Remedy for Breach of Disclosure Obligations: The CBA recognizes that the government, having commenced security certificate proceedings, may determine that the threat of disclosure of some inculpatory or exculpatory information is simply unacceptable, notwithstanding the protections in place. However, *the fact that the government is holding back material information* should be completely transparent, and non-disclosure should not be done in a deliberately surreptitious manner. In the event the government chooses not to disclose information that is subject to a court order to disclose, it could simply withdraw the evidence and not have the judge consider it. Where fundamental fairness requires disclosure despite the government's withdrawal, or where it is shown that there has been active and deliberate concealment of material information from the court and the named person, the presiding judge should have the option of staying the proceedings.

Disclosure to the Named Person and Consistency with the *Canada Evidence Act*: Under the *Canada Evidence Act*, if there is relevant evidence to which the government has a valid claim to suppress, the court must conduct a balancing test to determine whether it ought to be disclosed. It must weigh the potential impact of this disclosure on national security and foreign relations against the relevance of the information and the importance of its disclosure for the person to be able to know and meet the case against them. This balancing process should be included in the security certificate process. Bill C-3 should state the criteria to be employed by a judge in deciding whether and what to disclose to the named party (the person subject to the proceeding), consistent with the balancing test that exists for regular proceedings involving national security information under s.38 of the *Canada Evidence Act*.

Powers of Special Advocate to Present Evidence: The special advocates should have an express ability to call witnesses and present evidence in proceedings, to allow them to fulfill their responsibility to protect the interests of the named person.

Torture Evidence: Canada's obligations under the *Convention Against Torture and Other Forms of Cruel and Degrading Treatment,* and jurisprudence both in the U.K. House of Lords and in Canada, makes it clear that information obtained under torture should not be considered as evidence within the context of any proceeding, be it criminal or civil. There should be an express bar on reliance by the government on information or evidence where there are reasonable grounds to believe it is the product of torture.

Selection of Special Advocates and their Relationship to the Named Person

Choice in Selection of Special Advocates: There is no logical reason why the named person should not have a meaningful choice of representation from the list of security-cleared special advocates. This would also promote a relationship of trust between the person and the advocate. Bill C-3 should ensure that the named person has choice in the selection of special advocate, and that if the named person declines to make a selection, the selection is made by the court.

Relationship of the Special Advocate with the Named Person: For the named person to maintain confidence in the special advocate, Bill C-3 should state that while the special advocates are not in a solicitor-client relationship with the named persons, they owe a duty of confidentiality to the named person and cannot be compelled to reveal information to them disclosed by the person.

Requirement for Reasons for Termination of Special Advocates by Judges: Once appointed, the circumstances under which a special advocate may be terminated should be exceptional and rare. There should be no hint of terminating an advocate merely for vigorous or aggressive challenging of government evidence or for claiming confidentiality. To ensure transparency and public confidence in the administration of justice, Bill C-3 should provide that a judge terminating a special advocate shall provide reasons for doing so to the named person and the Minister of Justice, limited only by legitimate considerations of confidentiality.

Continued Access by the Special Advocate to the Named Person: Experience in the SIRC context has shown that a special advocate's contact with the named person after reviewing confidential information, properly conducted, does not result in the release of this information. This experience has also shown that information obtained by this contact can be pivotal in enabling the named person to provide a proper answer to the allegations against them. In the U.K. and New Zealand, the inability of the special advocate to continue to communicate in any meaningful sense with the named person after reviewing the secret information gravely undermined the special advocate's effectiveness. *This occurred even though (as in Bill C-3) the tribunal was empowered to authorize this communication*. Bill C-3 should expressly allow the special advocate to have continued contact with the named person after reviewing the secret evidence, subject to an obligation that the secret evidence not be disclosed. The Minister should be entitled to bring an application preventing this communication upon demonstrating exceptional circumstances.

Special Advocates should be Lawyers: The Minister's representative in the Federal Court proceedings is a Department of Justice lawyer specializing in security inadmissibility and confidentiality matters. It is inexplicable why the Bill would not then require that special advocates have legal training and be a member in good standing in a Canadian law society. Bill

C-3 should provide that special advocates must be practicing lawyers licensed by a provincial or territorial law society.

Special Advocates should be Senior Litigators with Independence from Government: Bill C-3 should further provide that special advocates have a minimum 10 years experience, including extensive litigation experience. This minimal requirement will better ensure that special advocates are sufficiently senior to be able to exercise their unique function with utmost expertise and integrity. The selection of special advocates should be through an official invitation to qualified barristers to apply. All applications should be screened first by an independent arms-length committee made up of members of the Canadian Bar Association and law societies, to ensure that the applicants are qualified to meet the demands of the position and independent from government. Government officials should be excluded from being special advocates.

Support for Special Advocates: Bill C-3 should establish sufficient logistical and administrative support for special advocates. This could be done by establishing a Special Advocate Support Office to train special advocates in matters of security issues, and engage expert security-cleared support staff with whom they may communicate in all matters pertaining to the evidence and information for which confidentiality is claimed.

Adequate Legal Fees to Special Advocates: The work of special advocates cannot be compared to the usual legal work with which most lawyers are familiar. The special advocate has a unique role in upholding the values of our justice system, the work is labour intensive, and traditional procedural protections will not exist with the same vigor in the security certificate regime. Sufficient funding is therefore vital to ensure that Canada's most experienced, trusted and able advocates can act. Bill C-3 should provide that the court determine the appropriate rate of compensation for special advocates on an *ex parte*, case-by-case basis.

Safeguards Against Unlimited Detention

Limits on Indefinite Detention: The government justifies lengthy, indefinite detention pursuant to security certificates on the basis that is has a continuing intent to deport the named person, but is constitutionally prohibited from doing so where the named person's country of citizenship engages in torture. In these circumstances, the risk of persons being indefinitely detained under security certificates for reasons unrelated to immigration, but rather on the basis of suspicions of criminal terrorist activity, are high. There should be a provision indicating that where the person subject to detention or conditional release under the security certificate will not be amenable to removal under immigration law in the reasonably foreseeable future because of the risk of torture in the person's country of citizenship, the government should be required to instead pursue options available under the Criminal Code if the security threat so warrants.

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to express its views on Bill C-3, amending the *Immigration and Refugee Protection Act* (IRPA) in relation to certificate and special advocates. In February 2007, the Supreme Court of Canada held that the present security certificate provisions in IRPA violated section 7 of the *Canadian Charter of Rights and Freedoms*. Bill C-3 is the government's response.

As the national and international voice of the Canadian legal profession, the CBA has an important stake in fashioning the appropriate balance between the role of the judiciary, counsel, and the person concerned in legal proceedings. The CBA's mandate includes improving the administration of justice, and promoting the Rule of Law, access to justice, and fairness and equality in the justice system. The right of a person to a fair hearing in the security certificate process under IRPA engages all of these issues.

The right to a fair hearing and the collection and use of intelligence information has been raised in the context of two recent commissions of inquiry, Arar and Air India. The CBA made representations to the Arar inquiry and is an intervener before the Air India Inquiry. The CBA is particularly concerned with these issues at this juncture because they are fundamental to achieving an appropriate balance between national security and civil rights. In the post-9/11 political climate, this is of vital importance to the preservation of the Rule of Law.

The CBA also intervened in the case of *Charkaoui v. Canada (Citizenship and Immigration),*[1] in which the Supreme Court of Canada determined that the present security certificate proceedings in IRPA violated section 7 of the *Charter*. The Court found that the use of secret evidence in those proceedings denied persons named in certificates the opportunity to know the case put against them, and therefore to defend themselves against the government's case. A key element of a fair hearing is the right to be heard by an impartial judge who makes the decision based upon all of the relevant facts and law. The security certificate proceeding was also held to breach the right to a fair hearing because named persons could not have full disclosure and make representations on the facts and law. Despite their best efforts, judges may not have all relevant

[1] 2007 SCC 9.

evidence or law before them before deciding the reasonableness of the certificate. The Supreme Court suggested that an appropriate system of special advocates could instituted, and suspended the declaration of unconstitutionality for one year so the government could rectify the deficiencies in the legislation.

Not only does the issue of fair hearing within the security certificate regime engage domestic law, it also has repercussions for Canada's international obligations, including those under the *International Convention on Civil and Political Rights (ICCPR)*.[2] If Canada is to retain its status as a world leader in respect for human rights (as shown by the numerous international declarations, covenants, and conventions to which it is a signatory), it cannot disregard the application of international law to its own actions.

The CBA believes that Bill C-3 is an insufficient attempt to address the Supreme Court's concerns with security certificate review. It contains numerous and serious flaws and does not go far enough to rectify the deficiencies in the security certificate proceedings. The Bill adopts the United Kingdom model of special advocates without regard to fundamental improvements to that system which have either been recommended or already implemented. Key flaws in the special advocates system have been incorporated in Bill C-3. Moreover, the Bill does not recognize or incorporate many positive aspects of the Security Intelligence Review Committee (SIRC) process which was successfully utilized prior to the introduction of the current legislation.

Accordingly, the CBA recommends a number of improvements which may be broadly categorized as: (a) those relating to evidence; (b) selection of special advocates and their relationship to the named person; and (c) procedural safeguards against unlimited detention. We elaborate upon these recommendations below.

II. USE OF SPECIAL ADVOCATES IN CANADA THROUGH SIRC

The Security Intelligence Review Committee (SIRC) is a body of individuals appointed by the Governor-in-Council (after consultation with the leaders of official parties in the Commons) to

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[2] G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16 at 52, U.N. Doc. A/6316 (1967).

review the actions of the Canadian Security and Intelligence Service (CSIS), Canada's security intelligence agency.[3] In performing its functions, SIRC may investigate complaints concerning "any act or thing done by the Service".[4]

Prior to 2002, SIRC also had an important role in immigration proceedings where the government was seeking to remove a permanent resident. The Supreme Court commented favourably on this role in *Charkaoui*.[5] Under the *Immigration Act*, as it then was, where the Minister of Immigration and Solicitor General were of the opinion, based on security or criminal intelligence reports, that a permanent resident was inadmissible to Canada on, *inter alia*, national security grounds, a report would be issued to SIRC.[6] The chair of SIRC would assign one or more members to investigate the report's accuracy. SIRC would report to the Governor-in-Council "its conclusion whether or not a certificate should be issued", along with reasons. If persuaded that the named person was inadmissible, the Governor-in-Council would instruct the Immigration Minister to issue a certificate to that effect,[7] ultimately resulting in a removal order.

In performing its assessment, SIRC members were provided with the information the government had relied upon in making its findings. Under the *CSIS Act*, as incorporated into the then-*Immigration Act,* SIRC also had (and in relation to its existing complaints and investigations role, still has) broad powers to subpoena persons and documents.[8]

Under its rules of procedure, SIRC members decide how much of the government information is disclosed to the named person. The SIRC rules in immigration cases provided that, subject to the

SIRC member's oath of secrecy,[9] "it is within the discretion of the assigned members in balancing the requirements of preventing threats to the security of Canada and providing fairness

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3 S.38, *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 [CSIS Act].
4 S.41, *CSIS Act*.
5 *Supra, note* 1, at paras. 71-77.
6 S.39, *Immigration Act*, R.S.C. 1985, c.I-2, [now repealed].
7 S.40, *Immigration Act*. [now repealed].
8 S.50, *CSIS Act*, referenced in *Immigration Act*, s-s.40(5) [now repealed].
9 Members of SIRC and its employees must comply with all security requirements under the *CSIS Act* and take an oath of secrecy: s.37, *CSIS Act*. They are "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.

to the person affected to determine if the facts of the case justify that the substance of the representations made by one party should be disclosed to one or more of the other parties".[10] 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. In theory, if SIRC and the director disagreed about the extent of disclosure, the matter could be adjudicated by the Federal Court. This has not arisen to date.

SIRC could hold *ex parte* and *in camera* hearings to review information that could not be disclosed on security grounds. SIRC counsel, including inside counsel and outside counsel retained by SIRC (known as a "legal agents") were present in these hearings. Inside counsel were SIRC employees and had a close working relationship with CSIS and the security services. Independent counsel would be retained in cases where inside counsel could not devote the time to fully participate in adversarial proceedings or where the case required aggressive cross-examination of CSIS (and was therefore best handled by outside counsel less concerned with preserving future relationships with CSIS operatives).

In relation to SIRC's immigration function, SIRC counsel represented the permanent resident's interests to the best of their ability. They were expected to "explore issues and cross-examine witnesses for CSIS with as much vigour as one would expect from the complainant's counsel".[11] SIRC counsel had access to the entire file in the possession of CSIS, alleviating any concern that the security services might either intentionally or inadvertently fail to disclose relevant (and indeed exculpatory) information to counsel.

No solicitor-client relationship exists between the named person and SIRC counsel or outside counsel. They could meet with the named person even after they reviewed the secret information. Although those meetings were subject to the constraint that counsel could not reveal secret information, experience over many years at SIRC established that it is possible to meet without risk of inadvertent disclosure. These meetings increased the effectiveness of SIRC counsel to represent the interests of SIRC. SIRC outside counsel advises that some government

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[10] 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 *CSIC Act* ss. 48(4) (providing for a similar balancing where a party is excluded from *viva voce* testimony).

[11] Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990), 3 C.J.A.L.P. 173 at 184.

cases collapsed on the basis of information they obtained via continued contact with the named person. There has never been an allegation that this continued contact resulted in a disclosure injurious to national security.

A number of salient points arise from this uniquely Canadian system. First, contact with the named person, properly conducted, does not result in the release of secret information. Second, information obtained by this contact can be pivotal in enabling the named person to provide a proper answer to the allegations against them. In light of the Canadian experience, and the concern expressed by the lawyers acting in systems in other jurisdictions (discussed below), one must question why a successful and constitutionally acceptable approach created and successfully operated in Canada is not the basis of the new legislation. As in many aspects of human and civil rights, the Canadian approach may not be perfect, but it has much to commend it to the world.

III. USE OF SPECIAL ADVOCATES IN OTHER JURISDICTIONS

Special advocates have been employed extensively in the United Kingdom and, to a lesser degree, in New Zealand, in an effort to enhance the fairness of processes that deny the party the right to know the case against them.

The special advocate scheme in Bill C-3 is similar to the scheme established in the U.K. under the *Special Appeals Commission Act 1997*[12] and amended by the *Anti-Terrorism, Crime and Security Act 2001*,[13] for the hearing of confidential evidence in Special Immigration Appeals Commission (SIAC) proceedings. In 2005, the U.K. House of Commons Constitutional Affairs Committee heard extensive evidence from current and former special advocates, examined the use of special advocates and considered the lessons learned from the experience of SIAC's operation for eight years.[14]

The Committee found that "there are a number of defects with the special advocate system as it operated through the Special Immigration Appeals Commission, particularly in relation to

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12 C.38 (U.K.).

13 C.24 (U.K.).

14 House of Commons, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and the Use of Special Advocates* (London: The Stationery Office Limited, 2005).

support provided to special advocates and the disclosure of exculpatory material." The defects were uniformly recognized by the witnesses before the Committee, including the State representatives. Significant disadvantages identified in the special advocate system included:

- The prohibition against communicating and taking instruction from the person in whose interest they are acting, or their counsel, after they had reviewed the confidential information or evidence;
- The lack of resources of an ordinary legal team for the purpose of conducting a full defence in secret (for instance, for inquiries or research);
- The lack of Special Advocate authority to call witnesses;
- The lack of right of the Special Advocate to access the entire security file; and
- The lack of obligation on the part of the Minister to disclose exculpatory evidence.

Canadians Lorne Waldman and Craig Forcese also conducted a study of these models in 2007,[15] based primarily upon telephone interviews and two London roundtables conducted during the summer of 2007. They consulted with over a dozen special advocates, the U.K. Special Advocates Support Office (SASO) and several United Kingdom defence counsel and civil society organizations, as well as other Canadian and foreign experts.

Their report concluded that the U.K. and New Zealand special advocate models suffer from a number of shortcomings, many of which do not exist in the model employed by the Canadian SIRC. In the U.K. and New Zealand, the inability of the special advocate to continue to communicate in any meaningful sense with the named person (that is, the person subject to the proceedings) after reviewing the secret information gravely undermined the special advocate's effectiveness. Further, special advocates complained that the government has withheld relevant and sometimes exculpatory information in its possession. 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".[16]

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15 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

16 United Kingdom, House of Commons and House of Lords, "Joint Committee on Human Rights - Nineteenth Report" (16 July 2007), online: <http://www.publications.parliament.U.K./pa/jt200607/jtselect/jtrights/157/15709.htm>.

Three notable changes resulted from such criticisms. First, the government introduced SASO, after repeated complaints by the special advocates that it was impossible to do their work without support. Special advocates have access to secret evidence which they can not share with their colleagues, so it is essential to have a dedicated office of solicitors to assist special advocates in their work. Given the volume of material, the need for assistance in doing research and the fact that the special advocate can only obtain the assistance of security cleared individuals who are authorized to review the material, any system that provides for the use of special advocates but does not clearly provide them with adequate support can not be fair.

The second innovation was allowing the named person to choose a special advocate from the roster. The special advocate is supposed to represent the interest of the named person, so the preference of the named person should be the one designated to assist.

The third innovation was to introduce an express requirement that the intelligence agencies present all relevant evidence and information before SIAC, including exculpatory evidence. In light of the fact that the normal criminal law disclosure requirements do not exist, requiring disclosure of exculpatory evidence was thought to be essential.

IV. DEFICIENCIES IN BILL C-3

The Supreme Court of Canada in R. v. *Hape*,[17] recently reconfirmed the importance of international covenants in interpreting the government's domestic legal obligations under the *Charter*:

> This Court has also looked to international law to assist it in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other. For example, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056, Dickson C.J., writing for the majority, quoted the following passage from his dissenting reasons in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349:
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> > The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to

[17] 2007 SCC 26

> provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[18]

Under Article 4 of ICCPR, while "in time of public emergency (…), the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant", it also limits such measures to the extent strictly required by the exigencies of the situation. The Covenant requires its signatory states to treat all persons equally before the courts and tribunals and ensure that all the elements that compose a fair hearing be respected in the determination of charges against them in a court of law.

Bill C-3 is the government's attempt to rectify the non-compliance of the security certificate regime with the *Charter,* as found in *Charkaoui.* The Bill maintains the previous scheme in IRPA permitting the use of secret information in circumstances where the court determines that "its disclosure would be injurious to national security or endanger the safety of any person".[19] However, it introduces special advocates, whose 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".[20]

A. Evidentiary Matters

i. Full Disclosure

Bill C-3 lacks mechanisms to ensure full disclosure of security evidence to the Court and special advocates, or disclosure of exculpatory evidence respecting the person concerned. The Government should be obliged to disclose its entire security file to the court and special advocate, not just the information or evidence it seeks to rely upon. There should be a continuing obligation on the Government to disclose any exculpatory information in its possession that favours the person concerned.

The best way to provide for an independent process that ensures the named person obtains full disclosure is for SIRC to certify that the disclosure has been proper. SIRC has reviewed the

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18 *Ibid,* at para. 55.
19 S.83.1(d)).
20 S.85.1(1).

activities of CSIS for over twenty years and has a wealth of experience in this area. SIRC has established over time the necessary mechanisms for reviewing CSIS files as a result of its operations and its involvement with complaints involving the conduct of CSIS. With SIRC's experience, the procedure would neither lengthen the proceedings nor risk improper disclosure of the evidence. It would however, provide a further safeguard to ensure that all of the relevant evidence is before the Court.

As noted above, the U.K. has amended its rules governing the use of secret evidence and entrenches the duty of the Secretary of State to disclose any evidence favourable (exculpatory) to the person concerned, regardless of whether the Secretary of State intended to rely on the evidence. Under Rule 9 of the *Special Immigration Appeals Commission Appeals (Procedure) (Amendment) Rules 2007*,[21] the Secretary of State must file at the outset a list of exculpatory evidence of which he is aware and has an ongoing obligation to search for and file further exculpatory information in response to any evidence filed by the person concerned. The Special Advocate may apply for a direction requiring the Secretary of State to file further information about the case, or other information.

The CBA recognizes that the government, having commenced security certificate proceedings, may determine that the threat of disclosure of inculpatory or exculpatory information is simply unacceptable. This may be due to a change in the underlying security situation or a reassessment of the balance between the value of the information and the need for secrecy. This determination may be made notwithstanding the disclosure requirements of the security certificate proceeding, and any court order to disclose. However, the *fact that the government is holding back material information* should be completely transparent, and non-disclosure should not be done in a deliberately surreptitious manner. If the government chooses not to disclose information that is subject to a court order to disclose, it could simply withdraw the evidence and not have the judge consider it. Where fundamental fairness requires disclosure despite the government's withdrawal, or it has been shown that there has been active and deliberate concealment of material information from the court and the named person, the presiding judge should have the option of staying the proceedings.

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[21] Statutory Instrument 2007 No. 1285 (U.K.), online: http://www.opsi.gov.uk/SI/si2007/20071285.htm.

RECOMMENDATION:

There should be an express (and ongoing) obligation on the government to disclose all relevant information to the court and special advocate, and not just the evidence upon which it seeks to rely to support the security certificate. To emphasize this point, there should be express reference to the ongoing obligation to disclose any exculpatory information, that is, favourable to the person concerned.

The special advocate should have authority to request that SIRC review the government's file and certify that full disclosure has been made;

The Court should have discretionary authority to set aside a certificate in response to government failure to meet its disclosure obligations.

ii. Disclosure to the Named Person and Consistency with the *Canada Evidence Act*

Under s.38 of the *Canada Evidence Act*,[22] when the court determines whether evidence that the government wishes to withhold should be disclosed, it must go through a three-stage process. First, the court must review the evidence that the government seeks to suppress and determine its relevance. If the court concludes that the evidence is irrelevant, it need not be disclosed.

If the court concludes that the evidence is relevant then it must consider first whether there is a valid government claim to suppress the evidence. If the court concludes the government has a valid claim then the court must engage in a balancing process, to balance the potential impact of this disclosure on national security and foreign relations against the relevance of the information and the importance of its disclosure for the person to know and meet the case against them.

This balancing process should be included in the security certificate process. Even where there are issues of national security, the court should have the discretion to order disclosure where required to ensure a fair hearing.

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22 R.S.C. 1985, c. C-5.

In such a circumstance, the government would have two options. Again, it could either disclose the evidence in the manner directed by the Federal Court judge or withdraw the evidence so that it would not be considered by the judge.

RECOMMENDATION

The Bill should state the criteria to be employed by a judge in deciding whether and what to disclose to the named party, consistent with the balancing test that exists for regular proceedings involving national security information under s.38 of the *Canada Evidence Act*;

iii. Powers of Special Advocate to Present Evidence

The lack of an express power for special advocates to call witnesses and present evidence was criticized as a defect in the U.K. process and hindered their ability to mount a robust defence on behalf of the named person. In *Charkaoui* as well, the Supreme Court remarked on how the lack of participation of the named person in the adversarial process (including producing relevant evidence) undermined the court's ability to determine the case based upon the relevant facts and law.[23] To ensure *Charter* compliance, there should be express recognition of the special advocate's ability to engage in these aspects of the adversarial process.

RECOMMENDATION

The special advocate should have an express ability to call witnesses and present evidence in proceedings, in order to allow him or her to fulfill their responsibility to protect the interests of the named person.

iv. Torture Evidence

Canada's obligations under the *Convention Against Torture and Other Forms of Cruel and Degrading Treatment*[24] and jurisprudence both in the U.K. House of Lords and in Canada, make it clear that information obtained under torture should not be considered as evidence in the context of any proceeding, be it criminal or civil. The CBA believes that Bill C-3 should expressly provide for the exclusion from consideration of any evidence where there are reasonable grounds to believe that the evidence was obtained under torture. The word "reliable"

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23 *Supra, note* 1 at para. 50.

24 G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

in the Bill to describe evidence that may be considered by the judge[25] provides some protection, as one could certainly take the view that information obtained under torture is not reliable. However, in testimony before the Arar Commission, Ward Elcott, then director of CSIS, testified that evidence obtained under torture would not automatically be discarded by CSIS as unreliable if it could be corroborated by other evidence. Given this context and the fact that evidence before the Federal Court judge in the security certificate process emanates from CSIS, it is necessary to ensure that evidence obtained under torture is excluded.

RECOMMENDATION

There should be an express bar on reliance by the government on information or evidence where there are reasonable grounds to believe it is the product of torture.

B. Selection of Special Advocate and Relationship with Named Person

i. Relationship between the Special Advocate and the Named Person

It was the opinion of the U.K. special advocates that there was no logical reason why the person concerned should not have a meaningful choice of representation. When the state is detaining and prosecuting the person concerned, and determining who should be eligible for appointment as a special advocate, there is little reason for the person concerned to trust an advocate that they had no choice in selecting. In circumstances where the named person declines to make a selection then the court should appoint the independent counsel from the list.

For the named person to maintain confidence in the special advocate, it should also be clear that in no circumstances should the special advocate be a compellable witness against the named person, despite there being no solicitor-client relationship between them. Proposed s.85.1(3), states that there is no solicitor-client relationship between the named person and the special advocate. We presume the reason for this is so the special advocate is not obliged to take instructions from the named person and there is no conflict between the special advocate's professional obligations and the requirement not to reveal information to the named person. It should not result in the special advocate becoming an arm of the state against the named person.

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[25] S.83(1)(h).

Once appointed, the circumstances under which a special advocate may be terminated should be exceptional, and rare. There should be no hint of terminating an advocate merely for vigorous or aggressive challenging of the Government evidence or for claiming confidentiality. Minimum threshold circumstances must be set in the legislation, describing appropriately exceptional circumstances before a Court may consider termination of an appointed special advocate. To ensure transparency and public confidence in the administration of justice, Bill C-3 should provide that a judge terminating a special advocate shall provide reasons for doing so to the named person and to the Minister of Justice, limited only by legitimate considerations of confidentiality.

RECOMMENDATION

Bill C-3 should state that the named person has choice in the selection of a special advocate, and that if the named person declines to make a selection, the selection is made by the court.

Bill C-3 should state that, while the special advocate is not in a solicitor-client relationship with the named person, he or she owes a duty of confidentiality to that person and cannot be compelled to reveal information disclosed by the person.

Where a judge terminates a special advocate with or without the appointment of a new special advocate, the judge shall provide reasons for doing so to the named person and the Minister of Justice, limited only by legitimate considerations of confidentiality.

ii. Continued Access by the Special Advocate to the Named Person

It is no answer to the Supreme Court declaration of unconstitutionality to create a special advocate to challenge the government's assertion of confidentiality of evidence and sufficiency of evidence, but then deny the special advocate the ability to communicate with the person concerned. This places the special advocate in no better position the Federal Court judge under the impugned IRPA scheme.

The scheme sets up a barrier between the person with full knowledge of exculpatory facts (the named person), who is not allowed to see the evidence or to participate in any proceedings

involving the evidence or information,[26] and the person with the full knowledge of the case against the named person (the special advocate). While the special advocate can see the evidence and must make submissions on its confidentiality and sufficiency, the special advocate cannot communicate with anyone about the proceedings or substance of the information, without the authorization of the Court, and subject to conditions the Court may impose.[27] Similar provisions in the U.K. legislation were found to effectively prevent the Special Advocate from having any meaningful communication with the person concerned. *This occurred even though (as in Bill C-3) the tribunal was empowered to authorize this communication*. From the U.K. 2005 Report:

> Once the special advocates have seen the closed material, they are precluded by r. 36(2) from discussing the case with any other person. Although SIAC itself has power under r. 36(4) to give directions authorizing communication in a particular case, this power is in practice almost never used, not least because any request for a direction authorizing communication must be notified to the Secretary of State. So, the Special Advocate can communicate with the appellant's lawyers only if the precise form of the communication has been approved by his opponent in the proceedings. Such a requirement precludes communication even on matters of pure legal strategy (i.e. matters unrelated to the particular factual sensitivities of a case).[28]

Instead, the special advocate should be entitled, as of right, to communicate with the named person after disclosure of information asserted to require confidentiality. This entitlement should be subject to successful motion by the Government to assert an extraordinary right to prohibit communications between the advocate and the named person. The onus should be on the government to demonstrate the need for prohibition of communication, rather than upon the special advocate to justify the need for communications, however minimal.

The prohibition against communications should be based only on extraordinary national security threat, for instance a situation of exceptional and actual or imminent danger which threatens the life of the nation, consistent with the standards set out in the Syracuse Principles.[29]

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26 S.83.1(c).

27 S.85.4(2).

28 *Supra, note* 1, at 33.

29 *Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. The Syracuse Principles provide procedural protections for an accused persons in times of national emergencies.

RECOMMENDATION:

> **There should be express provisions that allow the special advocate to have continued contact with the named person after reviewing the secret evidence, subject to an obligation that the secret evidence not be disclosed to any other person. This would be subject to a provision allowing the Minister to bring an application preventing this communication upon demonstrating exceptional circumstances.**

iii. Qualifications and Selection of Special Advocates

Under Bill C-3 the judge would appoint a special advocate from a list, provided by the Minister of Justice, of persons who may act as special advocates.[30] The judge must give the person concerned an opportunity to be heard "in relation to the appointment of the special advocate".[31] The judge's power to appoint includes the power to terminate the appointment, and to appoint another person as special advocate.[32]

There is no requirement under Bill C-3 that special advocates be lawyers. The U.K. system of special advocates requires they be barristers, solicitors or judges.[33] The Minister's representative in the Federal Court proceedings is a Department of Justice lawyer specializing in security inadmissibility and confidentiality matters. It is inexplicable why the legislation would not then require that special advocates have legal training and be a member in good standing in a Canadian law society.

Given the extraordinary role that special advocates play in representing the interests of the named person in secret proceedings, it is essential that measures to ensure their independence be included within the legislation. The following minimum requirements must be established:

- Special advocates must have a minimum of 10 years experience, to better ensure that they are sufficiently senior to exercise their function.
- Special advocates must have extensive litigation experience either in a civil or criminal context to ensure that they are fully capable of fulfilling the role of challenging the evidence withheld from the named person.

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30 S.85(1)b, s.85(1).
31 S.83(1)g).
32 S.85(2).
33 S.6, *Special Immigration Appeals Commission Act* 1997, *Supra, note* 12.

The procedure for selecting special advocates must be impartial and independent of the government. The selection process should be through an official invitation to qualified barristers to apply. All applications should be screened first by an independent arms-length committee made up of members of the Canadian Bar Association and law societies to ensure that the applicants are qualified to meet the demands of the position and independent from government.

The rules should expressly preclude officials employed by the government from being special advocates.

RECOMMENDATION:

Bill C-3 should provide that all special advocates must be practicing lawyers currently licensed by a provincial or territorial law society.

Bill C-3 should further provide that special advocates have a minimum 10 years experience, including extensive litigation experience. The applications should be vetted by the committee of members of the Canadian Bar Association and law societies to ensure that the applicants are qualified to meet the demands of the position and independent from government. The process should exclude government officials from being special advocates.

iv. Support for Special Advocate

Special advocates need assistance to carry out research and investigation, without undue impediment arising from the confidential or "closed" evidence. As stated by the U.K. Constitutional Affairs Committee in its 2005 Report,

> Other problem areas with the Special Advocate system that were highlighted to us included the fact that Special Advocates currently lack support, since they do not benefit from a security-cleared solicitor, and are not able to call on expert evidence.….
>
> … Special Advocates are simply operating on their own with no substantive assistance. They do their best to test the closed material, looking for internal inconsistencies and comparing it with what is known to us to be already in the public domain. The limitations of the latter are, it seems to me, implicit in the system as it operates at present because we have no secretariat, we have no solicitor who can see the closed material and we have no expert assistance on which we can call, so it is something of a feeling of being one man and his dog or perhaps two men and their dogs trying to analyse what is invariably voluminous material and often complex material.

> [There were] extreme restrictions placed on the advocates, who were not even allowed to conduct internet searches on persons named in the controlled material, in order to find out about their background. Because there is no support network for the advocate, it is also impossible to delegate such tasks to security-cleared individuals who could have experience of that type of work.[34]

The Lord Chancellor and Attorney General both accepted this criticism, culminating in the creation of SASO, described above. Bill C-3 does not indicate that the special advocates will have any support for research or investigation to assist in challenges to the certificate grounds.

RECOMMENDATION:

Bill C-3 should establish sufficient logistical and administrative support for special advocates, by establishing a Special Advocate Support Office to train special advocates in matters of security issues, and engage expert security-cleared support staff with whom they may communicate in all matters pertaining to the evidence and information for which confidentiality is claimed.

v. Adequate Legal Fees for Special Advocates

The work of special advocates cannot be compared to the usual legal work with which most lawyers are familiar. In addition to the duty they have towards the named person, they are in a unique position of integrity and trust. It is up to them to ensure the fair administration of justice in a procedure without the traditional safeguards protecting those accused of wrongdoing. The amount of classified material they must review is potentially massive and the proceedings lengthy. The special advocate is not permitted to communicate with anyone else about the material, including the named person. In the U.K., a team of two lawyers are appointed, senior and a junior counsel, to ease this burden. Given the unique role of the special advocate in upholding the values of our justice system, the labour intensive nature of the work, and the fact that the traditional procedural protections will not exist with the same vigor in the security certificate regime, sufficient funding is therefore vital to ensure that Canada's most experienced, trusted and able advocates can act. To do otherwise greatly enhances the risk of wrongful

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[34] *Supra,* note 14, at 30.

detentions and deportation, as well as the risk that the administration of justice will not be served. We believe that the judge in the case is best suited to determine appropriate compensation for the special advocate, recognizing that the advocates will be senior and respected counsel whose dedication and expertise will be the underpinning to a fair hearing.

RECOMMENDATION:

Bill C-3 should provide that the court should determine the appropriate rate of compensation for special advocates on an *ex parte,* case-by-case basis.

C. Safeguards against Unlimited Detention

When the Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness sign a security certificate in relation to a permanent resident or foreign national, the named person may detained, either automatically (in the case of a foreign national) or upon issuance of a warrant (in the case of a permanent resident).[35]

The Supreme Court in *Charkaoui* examined two aspects of detention pursuant to a security certificate: first, whether the 120 day delay after the confirmation of the reasonableness of the certificate for the review of a foreign national's detention[36] violated *Charter* s.9 (arbitrary detention) and s.10(c) (prompt review of detention); and second, whether the extended periods of detention pursuant to security certificates violated s.7 (security of the person) or s.12 (cruel and unusual punishment). The Court found that the discrepancy between the 120 delay before the detention review for foreign nationals, and the requirement for a review within 48 hours of detention for permanent residents was unconstitutional.[37] However it upheld the potentially lengthy periods of detention *if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors*, such as the seriousness of the threat posed by the named person, the length they have been detained, and the reasons for the delay in deportation.[38] Further, the Court suggested that detention must remain "reasonably necessary for deportation purposes".[39]

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35 S.82, IRPA.
36 S.84, IRPA.
37 S.83, IRPA.
38 *Supra,* note 1, at para. 110 *et* seq.
39 *Supra,* note 1, at para. 124.

Where there is a risk of torture in their countries of citizenship, persons may not be deported barring extraordinary circumstances, pursuant to the *Suresh* decision.[40] This leads to an indefinite "limbo" of detention for those subject to security certificates:

> On the one hand, Suresh confirms that persons would generally not be deported if they might face torture. Thus, speedy deportation becomes unlikely. On the other hand, *Suresh* leaves the lingering possibility that someone may be deported in spite of the risk of torture. Deportation might not be more than a theoretical possibility, but a possibility nevertheless. As a consequence, detention and supervised house arrest are still connected – however tangentially – to the security certificate's designated purpose of facilitating deportation. It is this lingering mode of the *Suresh* decision that puts the security certificate detainees in limbo: deportation is admittedly unlikely, but it is within the realm of the legally possible. The slight doubt to the detainees' non-deportability justifies Canadian immigration law's continuous grip on them.[41]

Thus, the government justifies lengthy, indefinite detention pursuant to security certificates on the basis that is has a continuing intent to deport the named person, but is constitutionally prohibited from doing so where the named person's country of citizenship engages in torture. In these circumstances, the risk is high of persons being indefinitely detained under security certificates for reasons unrelated to immigration, namely the suspicion of criminal terrorist activity. Where there is no possibility of deportation in the reasonably foreseeable future, the government should be required to utilize the *Criminal Code* if the security threat so warrants.

RECOMMENDATION

> **Bill C-3 should indicate that where the person subject to detention or conditional release under the security certificate cannot be removed under immigration law in the reasonably foreseeable future because of the risk of torture in their country of citizenship, the government should be required instead to pursue options available under the *Criminal Code* if the security threat so warrants.**

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40 *Suresh v. Canada* (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3.

41 Christiane Wilke and Paula Willis, "The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation" (September 20, 2007) at 8 [unpublished].

VI. CONCLUSION

The defects in Bill C-3 go to the heart of the failure of the special advocate system to save due process – the failure to balance between the government's secret evidence and the informed challenge to that evidence by the person named in the certificate.

The proposed scheme sets too low a threshold and unnecessarily encourages government use of secret evidence. The use of secret evidence in the context of deportation on the basis of national security is such an egregious breach of the *Charter* entitlement to due process and of international standards, that it should only be used in exceptional cases, with clear and compelling circumstances of necessity.

The CBA does not support the special advocate scheme in Bill C-3 as an appropriate or constitutionally acceptable substitute for full disclosure of evidence in security certificate proceedings. It is not enough to create a scheme for special advocates if those advocates are hamstrung by the same restrictions of being unable to mount an informed challenge to the secret information and evidence as the Federal Court judges under the impugned scheme.

The scheme in Bill C-3 does not meet the Supreme Court's concerns in *Charkaoui*. It does not provide a constitutionally acceptable substitute for the individual's right to a judicial determination on the facts and the law and right to know and meet the case. The scheme fails to provide a meaningful substitute for full disclosure of evidence in security certificate cases. Special advocates are only acceptable if they have the powers and resources to effectively challenge the government's "confidential" evidence. These powers and resources must allow the special advocates to carry out a vigorous and informed challenge to the government's claim for confidentiality, and the reliability and sufficiency of evidence. The scheme in Bill C-3 does not do that. The special advocates are without tools, and without vigor.

The insufficiencies of the C-3 scheme are significant. Given the lessons learned in the U.K. experience with special advocates, Canada should not repeat the same mistakes with the same flawed legislation.