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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

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Abstract

“Special advocates” are security-cleared lawyers representing the interests of parties excluded from national security-related hearings in which the government leads secret information. They 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, by denying the party the right to know the case against them, do not meet fair hearing standards. Canada has also used special security-cleared lawyers in proceedings before the Security and Intelligence Review Committee (SIRC), and the Arar Commission, among others, and is moving towards a fuller special advocate model in national security proceedings before the Federal Court (particularly in relation to security certificates under the *Immigration and Refugee Protection Act*).

This study examines the role and utility of special advocates in Canada, the United Kingdom and New Zealand. It draws on public source material, but mostly reflects insight obtained via telephone interviews and two London roundtables conducted during the summer of 2007 with over a dozen special advocates, the UK Special Advocates Support Office and several United Kingdom defence counsel and civil society organizations as well as other Canadian and foreign experts.

The report concludes that the UK 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. This study advises that Canada build on the SIRC model rather than import the UK/New Zealand approach and makes the following specific recommendations:

RECOMMENDATION 1: All questions of secrecy in relation to information withheld by the government should be assessed against the same balancing test; specifically, one analogous to that established in section 38 of the *Canada Evidence Act* in which a judge weighs the public interest in disclosure against the public interest in non-disclosure and is empowered to authorize forms and conditions of disclosure that reflect this balancing.

RECOMMENDATION 2: Before even reaching the question of special advocates, a court must be persuaded that other, less rights-impairing alternatives will not preserve a *bona fide* government interest in secrecy. These alternatives include:

- *In camera* proceedings during which named persons and their counsel are present; and,
- *In camera* proceedings during which named persons’ counsel, but not their clients, are present.

RECOMMENDATION 3: In the limited circumstances where alternatives are not reasonably available, a special advocate should be used to press for greater disclosure of secret information to the named person before the Federal Court (pursuant to the *Canada Evidence Act*-like balancing test discussed above) and, in relation to information that is not disclosed, to test its veracity in active cross-examinations and independent investigation. However, only a special advocate system with the following qualities is acceptable:

1. The government must make full disclosure to the special advocates themselves;
2. Special advocates must be authorized to question the named person after reviewing the secret information;

3. Special advocates must be highly-skilled trial advocates and must be adequately resourced, trained and independent of government, and;
4. The special advocate system must be established by statute, and not as an *ad hoc* measure.

RECOMMENDATION 4: Separate and apart from a special advocate system, the currently undemanding burden of proof and standard of review applied to the government in immigration and other administrative proceedings should be escalated once it becomes clear that life, liberty or security of the person are in peril.

Analytical Summary

I. Background to the Report

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

In February 2007, the Supreme Court of Canada held in *Charkaoui v. Canada* that the procedure employed in the security certificate system violates section 7 of the *Canadian Charter of Rights and Freedoms*. The Court concluded that the truncated disclosure to named persons did not permit these people sufficient opportunity to know the case against them. The Supreme Court also held that the constitutional violation was not saved by section 1 of the *Charter* because there were alternatives less impairing of fair hearing rights available to the government. In noting these alternatives, the Supreme Court voiced substantial support for some form of system that employs “special advocates” – that is, security-cleared lawyers representing the interests of parties excluded from national security-related hearings in which the government leads secret information. It suspended the effect of its judgment for one year, to allow Parliament to enact amending legislation.

II. Objectives and Methodology

We undertook this study in the summer of 2007 as a contribution to the policy deliberations on special advocates in Canada. The report was commissioned by the Canadian Centre for Intelligence and Security Studies, with the support of the Courts Administration Service. It is divided into six substantive Parts.

The first five Parts of the full study constitute the fact-finding report and focus on: the evolution of national security procedures in Canadian immigration law; the content of similar procedures in other areas of Canadian law; the development of parallel bodies of law in the United Kingdom; the design and function of the special advocate model in the United Kingdom; and a review of the special advocate system in New Zealand.

The detailed description of the UK and New Zealand special advocate models draws on public source material, but mostly reflects insight obtained via telephone interviews and two London roundtables conducted during the summer of 2007 with over a dozen special advocates, the UK Special Advocates Support Office and several United Kingdom defence counsel and civil society organizations. These persons and organizations are listed in Appendix I of the full report.

The final substantive Part of this study comprises the policy review. This Part draws on the factual report to propose principles we believe should guide the development of rules on national security confidentiality in proceedings triggering the application of *Charter* section 7. To inform our assessment in this Part, we interviewed several Canadian lawyers who have performed functions in Canadian national security procedures analogous to those undertaken by UK special advocates. These included persons involved in the Security Intelligence Review Committee process, discussed at length below, and the Arar Commission.

This analytical summary highlights the study’s key findings and conclusions. Readers are referred to the full report for detailed descriptions and analysis.

II. Key Findings and Conclusions

A. Starting Premises

1. Any system that denies persons the right to know the information that is being used against them in a proceeding implicating life, liberty or security of the person (a section 7 triggering proceeding) is inherently unfair and necessarily inconsistent with the principles of fundamental justice. In the IRPA security certificate process, where the bulk of the information is withheld from named persons, it is effectively impossible for these individuals to challenge the information used against them. Such a procedure is clearly inconsistent with the principles of fundamental justice.
2. A procedure that is inconsistent with the principles of fundamental justice may only rarely be justified under section 1 of the *Charter* as a “reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.” The government bears a heavy onus to justify recourse to a system abrogating fundamental justice in a section 7 triggering proceeding. This is particularly true where the consequences of those proceedings include prolonged detention without trial or other constraints on liberty and/or possible deportation to torture or other forms of persecution, outcomes that may be graver than those permissible under the Canadian criminal justice system.
3. Because all these consequences potentially flow from IRPA security certificate proceedings, the government should consider whether or not there are alternate measures that could be employed to abate security concerns before turning to security certificates. These alternatives could include using the criminal law process or relying on close surveillance.

B. Alternatives Short of Recourse to a Special Advocate

4. In any circumstances where the government employs a process that limits the right to a fair hearing, the government must establish that these limitations are minimally impairing of that right. This focus on minimal impairment guides the analysis in this study.
5. First, there must be clear recognition that not all claims to national security secrecy are the same and that in some circumstances measures that fall short of denying information to both counsel and the named person can be utilized where the secrecy interest is less pressing or persuasive. All questions of secret information withheld from the named person should be assessed against a balancing test; specifically, one analogous to that established in section 38 of the *Canada Evidence Act* in which a judge weighs the public interest in disclosure against the public interest in non-disclosure and is empowered to authorize forms and conditions of disclosure that reflect this balancing. These conditions of disclosure must include the possibility of disclosure to the named person and their counsel, rather than simply authorizing an immediate recourse to a special advocate.
6. Applying this approach, and even before even reaching the question of special advocates, a court must be persuaded that other, less rights-impairing alternatives will not preserve a *bona fide* government interest in secrecy. These alternatives include:
 - *In camera* proceedings during which the named persons and their counsel are present; and,
 - *In camera* proceedings during which the named persons’ counsel, but not their clients, are present.

C. Prerequisites of a Satisfactory Special Advocate Model

7. Based on our study of the UK and New Zealand special advocate models and analogous procedures in Canada, we have come to the following conclusions on the propriety and utility of special advocate procedures.
8. In the limited circumstances where the alternatives noted above are not reasonably available, a special advocate could play an important role in non-criminal matters in pressing for greater disclosure of secret information to the named person before the Federal Court (pursuant to the balancing test discussed above) and, in relation to information that is not disclosed, in testing its veracity in active cross-examinations and independent investigation. However, our research suggests that *only* a special advocate system with the following qualities would be acceptable:

- 1) **The government must make full disclosure to the special advocates themselves**

9. As noted, the consequences to named persons in IRPA proceedings may far exceed those that may be lawfully imposed under the *Criminal Code* – removal to persecution or prolonged detention without trial. It is unpersuasive, disingenuous and simply unjust to urge that the nominally administrative nature of IRPA (and several of the other section 7 triggering proceedings) should attract standards of disclosure that fall short of the full criminal model. Without this system of expansive disclosure, a special advocate model would do nothing to minimize the unfair hearing. A blindfolded special advocate can do little or nothing to advance the interests of the named person.

We believe there are five criteria that disclosure must meet:

- disclosure in at least those IRPA proceedings in which detention and/or removal to persecution are possible outcomes must be full, and include information both favourable and unfavourable to the government case;
- the government must act in utmost good faith in performing this disclosure obligation and must disclose on an ongoing basis as new information comes into its possession;
- while the government’s assessment of the relevance of information is a starting point, relevance must also be assessed by an impartial, independent assessor;
- a failure to meet disclosure obligations must be correctable; that is, there must be a body with the power to compel disclosure of the information to the special advocate; and,
- intelligence employed as “evidence” in court proceedings must be retained, preserved and accessible in the disclosure process, including electronic copies of intercepted communications from which transcripts are developed and on which intelligence assessments are based.

- 2) **The special advocates must be authorized to question the named person after reviewing the secret information**

10. The UK system bars meaningful contact between the special advocate and the named person once the former has seen secret information. This is the UK system’s most objectionable quality, one that has attracted stern criticism from parliamentary committees, among others. Without question, it is essential that a Canadian special advocate system follow other models – not least that developed by the Canadian Security Intelligence Review Committee (SIRC) –

by permitting the special advocate ongoing access to the named person throughout the proceeding. Obviously, the special advocate must guard against involuntary disclosure and should be subject to secrecy obligations. However, the outside counsel acting for SIRC to whom we spoke was unequivocal about the importance of this access: even while counsel's questions must be carefully phrased to avoid involuntary disclosure, this lawyer has seen government cases collapse based on information he could only have obtained because of this ongoing communication.

3) The special advocates must be highly-skilled trial advocates and must be adequately resourced, trained and independent of government

11. Without full resourcing of the special advocate system, the inequality of arms between the government and the special advocate will make the latter simply token. The special advocate must also be (and be perceived as being) independent of government to have credibility in the eyes of named persons and the public. Meeting these objectives necessitates the following attributes of the special advocate office:

- a. First, special advocates should be of advanced standing in the profession and must be experienced trial lawyers.
- b. Second, special advocates should be appointed to a roster of special advocates (from which named persons choose) by a body that is itself arm's-length from executive government.
- c. Third, the special advocates must be adequately supported by an administrative apparatus that allows them to master and marshal "evidence" in the case. They must have the capacity to conduct independent research and analysis. Much as was the case with the Arar Commission, they should also be able to draw on a pool of security-cleared experts in security and intelligence as expert witnesses or advisors on intelligence matters that arise.
- d. Fourth, the special advocate must be in a relationship of solicitor-client like confidentiality with the named person.
- e. Last, having stripped the named persons of their right to full answer and defence and having denied access to the government information by named persons' chosen counsel, the government should provide sufficient funding so as to ensure that counsel of the highest quality are willing and able to participate in the special advocate system.

4) The special advocate system must be established by statute, and not as an *ad hoc* measure

12. An *ad hoc* system of special advocates appointed by the court in a pseudo-*amicus curiae* role is unworkable. It cannot meet fully the other prerequisites set out above. Lacking an administrative support system funded by parliamentary appropriation, court-appointed special advocates would be gravely under-resourced. Their selection would appear arbitrary, and their powers and ability to access secret information contestable. Further, their exact status vis-à-vis the named person would be unclear: would, for example, they have a duty of confidentiality to that person.

D. Assessment of the UK/New Zealand Special Advocate Models

13. The UK/New Zealand special advocate model does not satisfy several of these criteria. Although it is true that the interests of named persons in the UK and New Zealand are served by an independent, security-cleared counsel, the inability of this counsel to continue to communicate (in any meaningful sense) with the person after counsel has reviewed the secret (“closed”) information, along with the apparent difficulties special advocates have in obtaining full disclosure of the entire file, so undermine the special advocates’ ability to be effective that the procedure does not provide a viable and satisfactory alternative to the existing Federal Court model in Canada.

E. SIRC and the Availability of a Less Rights-Infringing Alternative Model

14. Instead, there are other alternative models in Canada that have been employed over a large number of years that permit fuller participation by the named person. Although not perfect, these systems provide for a fairer procedure. One of the models (employed successfully in Canada for over twenty years) is the Security Intelligence Review Committee model. The SIRC model remedies, at least in part, many of the obvious deficiencies in the UK special advocate model:
- a. **Full Access to Information:** Under SIRC procedures, SIRC counsel (or legal agent/outside counsel, if appointed) has access to the entire file in the possession of the Canadian Security Intelligence Service (CSIS). As a result, concerns that the security services might either intentionally or inadvertently fail to disclose relevant (and indeed exculpatory) information to counsel are alleviated.
 - b. **Continued Contact with Named Person:** In addition, under the SIRC model, SIRC counsel (or legal agent/outside counsel, if appointed) can meet with the named person even after SIRC counsel has reviewed the secret information. Although those meetings will be subject to the obvious constraint that the counsel must take great care not to reveal secret information, experience over many years at SIRC has established that it is possible to have such meetings without risk of inadvertent disclosure. Further, these meetings do increase the effectiveness of SIRC counsel to represent the interests of SIRC by seeking to minimize the unfairness of proceedings in which the named person is excluded from the hearing. After reviewing the CSIS file, SIRC counsel will have contact with the named person or their counsel to obtain a list of questions that the latter wish to have asked during the secret proceeding. Likewise SIRC counsel may have contact with the named person after a summary of information tabled in the secret proceedings has been provided to him or her. After reviewing the summary, the named person may wish to have additional CSIS witnesses appear before SIRC to be cross-examined by SIRC counsel.
15. Given SIRC’s successful track record, we do not believe that a special advocate model following the UK/New Zealand pattern and more constraining of fair trial rights than the SIRC model would survive a minimal impairment analysis under section 1 of the *Charter*.

F. The Government’s Burden in IRPA Security Certificate Cases

16. Even a special advocate system that met all of the prerequisites set out above would not cure certain fundamental difficulties with the present IRPA system. As in the UK, IRPA permits deprivations of liberty and possible removals to persecution on the basis of government

suspicions, and nothing more. Where the consequences to the named person are so grave – and indeed graver than anything our criminal law could impose – burdens of proof and standards of review applied to the government should move in lock step. Thus where the consequences of the proceedings to the person trigger application of section 7, we recommend that the security threat posed by that person should be proven to at least a balance of probabilities standard and the courts should apply a much less deferential standard of review.

17. This escalating burden should apply in at least three manners:

- First, where a person remains detained under IRPA for more than a limited period of time, the government should be obliged to justify continued detention on a “balance of probabilities” standard rather than with reference to the reasonable suspicion that justifies the original detention
- Second, where the consequences of removal to the person trigger application of section 7, the standard of proof applied in assessing whether the government’s information justifies a conclusion that the security certificate is reasonable should be that of balance of probabilities and not reasonable grounds to believe.
- Third, where the consequences of removal to the person trigger application of section 7, courts should apply a searching standard of review to the government’s security assessments, possibly as high as correctness.

Full Report Table of Contents

PART I: INTRODUCTION	1
A. Context for this Report.....	1
B. Research Methodology.....	2
1. Fact-Finding Report.....	2
2. Policy Report	3
PART II: THE EVOLUTION OF NATIONAL SECURITY PROCEDURES IN CANADIAN IMMIGRATION LAW	5
A. Pre-2002.....	5
1. SIRC Role in Relation to Permanent Residents.....	5
a) SIRC Overview	5
b) SIRC Immigration Role	6
i) Mandate	6
ii) Procedure.....	6
2. Federal Court Role for Non-Permanent Resident Foreign Nationals	10
B. 2002 to Present	10
1. Security Certificates under the <i>Immigration and Refugee Protection Act</i>	10
2. Criticism of the <i>Ex Parte</i> Security Certificate Process	12
3. Constitutionality of the Security Certificate Process	12
PART III: NATIONAL SECURITY CONFIDENTIALITY IN OTHER CANADIAN PROCEEDINGS.....	14
A. Informer Privilege	14
B. <i>Canada Evidence Act</i>	14
1. Injury to International Relations, National Defence or National Security.....	15
2. Public Interest Balancing	16
3. Attorney General's Certificate.....	17
4. Fair Trial Protections	18
C. Secret Information in Other Circumstances	18
PART IV: PROCEDURAL CONTEXT FOR THE USE OF SPECIAL ADVOCATES IN THE UNITED KINGDOM.....	20
A. Immigration Law.....	20
1. Overview.....	20
2. Special Advocates.....	20
B. Control Orders	21
1. Overview.....	21
2. Special Advocates.....	22
C. Other Proceedings	23
PART V: DESIGN AND FUNCTION OF THE UK SPECIAL ADVOCATE SYSTEM	25
A. Selection of Barristers as Special Advocates	25
1. Diversity and Experience.....	25
a) Basic Facts.....	25
b) Independence from Government.....	26
c) Professional Experience	26
d) Security and Intelligence Expertise.....	27

e) Caseload and Experience.....	27
2. Security Clearance	28
3. “Tainting” of Special Advocates	28
a) Background	28
b) Impact on Institutional Knowledge.....	29
4. Impact of Special Advocate Work on the Special Advocate’s Regular Practice.....	29
B. Case Intensity and Resourcing of Special Advocates	30
1. Case Intensity and Billing Practices	30
2. Administrative and Logistical Support for Special Advocates.....	30
a) Structure of the Special Advocates Support Office.....	30
b) Function of the Special Advocates Support Office.....	30
c) Resourcing of the Special Advocates Support Office	31
C. Relationship between the Special Advocate and the Named Person.....	31
1. Level of Cooperation	31
2. Response to Rejection.....	32
D. Role and Effectiveness of the Special Advocate.....	32
1. Communications with the Named Person.....	34
a) Communications Prior to the Closed Sessions.....	34
i) Utility.....	34
ii) Strategies	34
b) Communications after Access to the Closed Material	35
i) Rules on Communications during the Closed Proceedings	35
ii) Practice in Relation to Communications during the Closed Proceedings	36
iii) Alternative Approaches	37
2. Key Functions.....	38
a) Challenging the Government Case.....	38
b) Pressing for Fuller Disclosure to the Special Advocate Him or Herself.....	40
i) Nature of Secret Information Disclosed to the Special Advocate	40
ii) Extent of Disclosure to the Special Advocate	41
c) Enhancing Disclosure to the Named Persons and their Counsel.....	42
d) Communicating Existence of Grounds for Appeals.....	43
3. Legitimacy of the Special Advocate System	43
a) Necessity	43
b) Criticisms	44
c) Alternatives	46
d) Scope.....	46
E. Strengthening the UK Special Advocate System	47
PART VI: DEVELOPMENTS IN NEW ZEALAND	49
A. Overview	49
B. Special Advocates	50
PART VII: EVALUATION AND POLICY CONCLUSIONS	51
A. Fair Hearing Rights Are the Metric Against Which to Measure IRPA Security Certificates and Analogous Procedures.....	51
B. The Fair Hearing Obligation Is Violated Whenever Persons Are Not Entitled to Know Fully the Case Against Them	52
C. Where the Government has a Compelling Interest in Secrecy, that Secrecy Should Be as Minimally Impairing of the Fair Hearing Interest as Possible	53
D. Not All Government Claims to Secrecy Are Equal	53
1. Not Every Claim to Third-Party Originator Control Should Be Treated the Same Way .	53

2. Not Every Claim of a Mosaic Effect Should Be Treated the Same Way 55

E. Not All Claims to Government Secrecy Raise the Same Pressing and Substantial Objective
Justifying Departure from Ordinary Fair Trial Standards 56

1. Some Secrets Justify No Departure from Fair Hearing Rights 56

2. Some Secrets Justify a Departure from Fair Hearing Rights Only to the Extent That
Court Proceedings Are Closed 57

3. Some Secrets Justify a Departure from Fair Hearing Rights Only to the Extent that the
Named Person (but not their lawyer) Is Excluded 58

4. Some Secrets Justify a Departure from Fair Hearing Rights and Require Recourse to a
Special Advocate Meeting Core Prerequisites 59

5. No Secrets Justify Anything More Extreme than Recourse to a Special Advocate
Meeting Core Prerequisites 60

F. In Those Limited Circumstances Where Special Advocates are Appropriate, the Special
Advocate Function and Office Should Meet Certain Core Prerequisites 61

1. The Government Must Make Full Disclosure to the Special Advocates Themselves 61

2. The Special Advocate Must Be Authorized to Question the Named Person after
Reviewing the Secret Information 63

3. The Special Advocate Must be Adequately Resourced and Independent of Government 64

4. The Special Advocate Must Have Legislative Sanction 66

G. The Government’s Burden Should Reflect the Gravity of the Consequences to the Named
Person 66

APPENDIX I 69

PART I: INTRODUCTION

This report examines the use and utility of “special advocates” representing the interests of “named persons”¹ excluded from national security-related hearings in which the government leads secret information (often drawn from intelligence sources).

A. Context for this Report

This focus on special advocates is prompted by recent developments in Canadian immigration law. Specifically, under the *Immigration and Refugee Protection Act* (IRPA), the Federal Court of Canada reviews “security certificates” issued by the Minister of Immigration and the Minister of Public Safety. These certificates are linked to the detention and, where adjudged reasonable by a Federal Court judge, the potential removal of the named person. Where the security concerns are grave enough, IRPA purports to authorize the removal of the named person even if he or she is at risk of torture or other maltreatment in the receiving state, after the government balances the risk to the named person against the risk the person poses to Canada’s national security.² In the Federal Court proceeding, the person subject to the certificate receives only a summary of the secret information produced by the government in support of the certificate.³ Put another way, named persons have a very limited ability to contest the information marshalled against them.

In February 2007, the Supreme Court of Canada held in *Charkaoui v. Canada*⁴ that the procedure employed in the security certificate system violates section 7 of the *Canadian Charter of Rights and Freedoms*.⁵ The Court concluded that the truncated disclosure to named persons did not permit these people sufficient opportunity to know the case against them. The Supreme Court also held that the constitutional violation was not saved by section 1 of the *Charter* because there were alternatives open to the government.⁶ In noting these alternatives, the Supreme Court voiced substantial support

¹ The persons subject to national security proceedings are labelled differently in different contexts – interested person, named person, appellant, complainant, detainee, etc. For the sake of simplicity, this report will refer to the person implicated in the national security proceeding as the “named person”.

² The constitutionality of this provision is still uncertain. The Supreme Court of Canada’s decision in *Suresh v. Canada*, [2002] 1 S.C.R. 3, left open the *possibility* of deportation to torture in exceptional circumstances but it must still be determined whether such exceptional circumstances do in fact exist. Removal where there are substantial grounds to believe a person would be tortured would be an indisputable violation of Canada’s international obligations under Art. 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

³ As discussed below, the summaries are often extremely general, and in order to protect the sources of information do not provide particulars as to the information relied upon thereby limiting the ability of the person to challenge the credibility of the information which is disclosed in the secret proceeding.

⁴ *Charkaoui v. Canada*, 2007 SCC 9 [Charkaoui].

⁵ *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. Section 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

⁶ *Ibid.* Section 1 reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

for some form of system that employs special advocates. It suspended the effect of its judgment for one year, to allow Parliament to enact amending legislation.

Two parliamentary committees have since called for adoption of a special advocate model. In its 2007 report on Canada's anti-terrorism law, a special Senate committee recommended that a special advocate process be extended to all proceedings where "information is withheld from a party in the interest of national security and he or she is therefore not in a position to make full answer and defence."⁷ The counterpart Commons committee also recommended a comprehensive "panel of special counsel" for national security cases.⁸

On July 18, 2007, the government of Canada responded to the Commons committee recommendations. It noted the need to address the Supreme Court's February ruling within one year, and indicated that it was studying "the possibility of establishing a special advocate role in the security certificate process." More broadly, it concluded that

[t]here remain a number of challenges and considerations related to whether to introduce a special advocate for all *in camera*, *ex parte* proceedings, which involve the limited disclosure of information and evidence. Not all processes engage the *Charter* rights of individuals as in the *Charkaoui* case or to the same extent as in that case. ... At the present time, the Government believes that further study of the use of special advocates in other processes is required.⁹

B. Research Methodology

We undertook this study in the summer of 2007 as a contribution to the policy deliberations on special advocates in Canada. The report was commissioned by the Canadian Centre for Intelligence and Security Studies, with the support of the Courts Administration Service. It is part of a larger project on the "Administration of Justice and National Security in Democracies".

1. Fact-Finding Report

The first five Parts constitute the fact-finding report and focus on: the evolution of national security procedures in Canadian immigration law; the content of similar procedures in other areas of Canadian law; the development of parallel bodies of law in

⁷ Canada, Special Senate Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (February 2007) at 42 [online] ["Senate Special Committee"].

⁸ Canada, House of Commons Subcommittee on the Review of the Anti-terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (March 2007) at 81 [on-line].

⁹ Canada, *Response of the Government of Canada to The Final Report of the Standing Committee on Public Safety and National Security Subcommittee on the Review of the Anti-Terrorism Act* (released 18 July 2007) at 23 [online].

the United Kingdom; the design and function of the special advocate model in the United Kingdom; and, a review of the special advocate system in New Zealand.

The detailed description of the UK and New Zealand special advocate model draws on public source material, but mostly reflects insight obtained via telephone interviews and two London roundtables conducted during the summer of 2007 with over a dozen special advocates, the UK Special Advocates Support Office and several United Kingdom defence counsel and civil society organizations. These persons and organizations are listed in Appendix I. The interviews were conducted on the understanding that while the information obtained in them could be used freely, specific views would not be attributed to individuals (except with their consent).

2. Policy Report

The final substantive Part of this study comprises the policy review. This Part draws on the factual report to propose principles we believe should guide the development of rules on national security confidentiality in proceedings triggering the application of *Charter* section 7. To inform our assessment in this Part, we interviewed several Canadian lawyers who have performed functions in Canadian national security procedures analogous to those undertaken by UK and New Zealand special advocates. These included persons involved in the Security Intelligence Review Committee process, discussed at length below, and the Arar Commission.

In the policy review, we make four recommendations, as follows:

RECOMMENDATION 1: All questions of secrecy in relation to information withheld by the government should be assessed against the same balancing test; specifically, one analogous to that established in section 38 of the *Canada Evidence Act* in which a judge weighs the public interest in disclosure against the public interest in non-disclosure and is empowered to authorize forms and conditions of disclosure that reflect this balancing.

RECOMMENDATION 2: Before even reaching the question of special advocates, a court must be persuaded that other, less rights-impairing alternatives will not preserve a *bona fide* government interest in secrecy. These alternatives include:

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RECOMMENDATION 3: In the limited circumstances where alternatives are not reasonably available, a special advocate should be used to press for greater disclosure of secret information to the named person before the Federal Court (pursuant to the *Canada Evidence Act*-like balancing test discussed above) and, in relation to information that is not disclosed, to test its veracity in active cross-examinations and independent investigation. However, only a special advocate system with the following qualities is acceptable:

- 1. The government must make full disclosure to the special advocates themselves;**
- 2. Special advocates must be authorized to question the named person after reviewing the secret information;**
- 3. Special advocates must be highly-skilled trial advocates and must be adequately resourced, trained and independent of government, and;**
- 4. The special advocate system must be established by statute, and not as an *ad hoc* measure.**

RECOMMENDATION 4: Separate and apart from a special advocate system, the currently undemanding burden of proof and standard of review applied to the government in immigration and other administrative proceedings should be escalated once it becomes clear that life, liberty or security of the person are in peril.

PART II: THE EVOLUTION OF NATIONAL SECURITY PROCEDURES IN CANADIAN IMMIGRATION LAW

The government employs secret information obtained from intelligence services in judicial and tribunal proceedings, without disclosing this information in full form to named persons.¹⁰ Secrecy in these matters preserves security service intelligence sources and techniques from exposure. At the same time, it inhibits named persons' right to know the case against them. This Part reviews the procedural history of secret information used as "evidence" in national security-related immigration matters.

A. Pre-2002

For more than a decade prior to 2002, Canadian immigration law included two special procedures closely implicating national security confidentiality:¹¹ deportation hearings before the Security Intelligence Review Committee (SIRC); and, a security certificate review process before the Federal Court. These procedures may be briefly summarized as follows.

1. SIRC Role in Relation to Permanent Residents

a) SIRC Overview

SIRC is a body of often prominent individuals appointed by the Governor-in-Council (after consultation with the leaders of official parties in the Commons) to review the Canadian Security and Intelligence Service (CSIS), Canada's security intelligence agency.¹² In performing its functions, SIRC has two roles: to review the activities of CSIS and to investigate complaints against CSIS. In relation to the latter function, the most generic complaint concerns "any act or thing done by the Service."¹³

¹⁰ It should be noted that the Supreme Court of Canada has recently granted leave to appeal in the case of *Charkaoui (2) v. MCI*, [2006] C.S.C.R. no 329 (QL). The case raises the issue of whether or not the security agencies have a duty to ensure the integrity of evidence in circumstances where they seek to use information gathered in an intelligence context as evidence in a non-criminal proceeding.

¹¹ It should be noted that secret evidence is not only used in the context of a deportation proceeding but can be used in any immigration proceeding. In determinations of inadmissibility in applications for permanent residence for example, immigration officers are often provided with secret evidence which is not disclosed to the person concerned but which is relied on by the officer. Indeed, there is a procedure in s.87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 [IRPA], which allows the Federal Court to review the secret evidence, and if the Court determines that its disclosure would be injurious, to consider that evidence without disclosing the evidence to the named person. Challenges to these provisions have all been unsuccessful.

¹² *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 ["CSIS Act"], s. 38.

¹³ CSIS Act, s. 41. SIRC also investigates complaints emanating from a denial of a security clearance (s.42), as well as matters that are referred to it by the Canadian Human Rights Commission under s.45 of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6, when the complaint raises security considerations. As well, SIRC can investigate complaints regarding the *Citizenship Act*, R.S.C. 1985 c. C-29.

b) SIRC Immigration Role

i) Mandate

Prior to 2002, SIRC also had an important role in immigration proceedings in which the government was seeking to remove a *permanent resident* on, *inter alia*, national security-related grounds.¹⁴

Under the *Immigration Act*, as it then was, where the Minister of Immigration and the then-Solicitor General of Canada were of the opinion, based on security or criminal intelligence reports received and considered by them, that a permanent resident was a person inadmissible to Canada on, *inter alia*, security grounds, a report would be issued to SIRC. Once received by SIRC, the chair of the latter would assign one or more members to investigate the report's accuracy. Following its deliberations on this question, SIRC would make a report to the Governor-in-Council containing "its conclusion whether or not a certificate should be issued" by the latter, along with reasons. Subsequently, if it was persuaded that the named person was inadmissible on, *inter alia*, security grounds, the Governor-in-Council could then instruct the immigration minister to issue a certificate to that effect.¹⁵ This certificate, in turn, resulted in the issuance of a deportation order, subject to a truncated right of appeal of that deportation order to the Immigration Appeal Division.¹⁶ Both the SIRC recommendation and the decision of the Governor-in-Council were reviewable on standard judicial review grounds in Federal Court.¹⁷

In the course of performing its assessment, SIRC members were provided with the information the government had relied upon in making its findings. Further, under the CSIS Act, as incorporated into the then-existing immigration law, SIRC had (and in relation to its still existing complaints and investigations role, retains) broad powers to subpoena persons and documents.¹⁸

ii) Procedure

Disclosure

Under its rules of procedure for complaints, SIRC members decide how much of the government information is disclosed to the named person, after consultation with the director of CSIS. The SIRC rules employed in immigration cases provided that, subject to the SIRC member's oath of secrecy,¹⁹ "it is within the discretion of the assigned members in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine if the facts of the case justify

¹⁴ *Immigration Act*, R.S.C. 1985, c. I-2 [*"Immigration Act"*], s. 39, now repealed by IRPA.

¹⁵ *Immigration Act*, s. 40, now repealed by IRPA.

¹⁶ *Immigration Act*, ss. 27 and 32 and s-s. 70(4), now repealed by IRPA.

¹⁷ See, e.g., *Al Yamani v. Canada (Solicitor General)*, [1995] F.C.J. No. 1453 (FCTD); *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] F.C.J. No. 1160 (FCA).

¹⁸ CSIS Act, s. 50, referenced in *Immigration Act*, s-s.40(5), now repealed by IRPA.

¹⁹ Members of SIRC and its employees must comply with all security requirements under the CSIS Act and take an oath of secrecy. CSIS Act, s. 37. They are also "persons permanently bound to secrecy" under the *Security of Information Act*, R.S.C. 1985, c. O-5, and are therefore subject to that statute's penalties for wrongful disclosure of sensitive information.

that the substance of the representations made by one party should be disclosed to one or more of the other parties.”²⁰ Prior to disclosure, SIRC would (and in relation to SIRC’s continuing complaints role, does) consult with the director of CSIS, to determine the extent of disclosure permissible under SIRC’s oath of secrecy. SIRC engages in negotiations with CSIS to arrive at a consensus as to what information can be released to the named person. Where SIRC and the director disagreed firmly, in theory the question of disclosure could be adjudicated by the Federal Court under section 38 of the *Canada Evidence Act*, described below. We were told, however, that this eventuality has not yet arisen. However, on occasion SIRC has received letters from Department of Justice counsel acting on behalf of CSIS warning SIRC that if the disclosure of information was not made in accordance with the direction of CSIS, that the Department of Justice counsel would initiate proceedings under the *Canada Evidence Act* to prohibit the disclosure.

In performing its functions, SIRC was and is empowered to hold *ex parte* and *in camera* hearings to receive information that is not disclosed on security grounds. In the *ex parte* hearings, several counsel are present: counsel to CSIS, counsel for any witnesses, counsel for any government departments with an interest in the case, and SIRC’s own counsel.²¹ The latter include inside counsel and/or a SIRC legal agent.

SIRC Inside Counsel and SIRC Legal Agents

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

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

The Committee’s counsel is instructed to cross-examine witnesses for the Service with as much vigour as one would expect from the complainant’s counsel. Having been present during the unfolding of the complainant’s case, the Committee counsel is able to pursue the same line of

²⁰ SIRC, Rules of Procedure of the Security Intelligence Review Committee in Relation to its Function under Paragraph 38(C) of the *Canadian Security Intelligence Service Act*, para. 46(2)(a). See also para. 48(4) (providing for a similar balancing where a party is excluded from *vice voce* testimony).

²¹ It should be noted that a lawyer holding a Top Secret clearance who represents a department in the case (for instance) of a security clearance denial, and any departmental representative is usually excluded from the hearing while a CSIS witness testifies before the Review Committee *ex parte in camera*. Hence, there are occasions when not only the complainant and the complainant’s counsel are excluded from the hearing.

questions. In addition, however, since Committee counsel has the requisite security clearance and has had the opportunity to review files not available to the complainant's counsel, he or she is also able to explore issues and particulars that would be unknown to the complainant's counsel.²²

Still, as this same author also noted, “a great deal turns on the ability of Committee counsel to perform effectively in this unfamiliar role.”²³ Outside counsel (or “legal agents”) may be retained in some cases where, because of workload issues, inside counsel is not fully capable of acting in the adversarial proceedings. In other cases, legal agents may be retained where inside counsel judge that the case will require particularly aggressive cross-examination of CSIS. Certainly, inside counsel will conduct forceful cross-examination in the cases with which they are charged. However, SIRC inside counsel must strive to remain (and appear to remain) objective and impartial in order to protect SIRC from any real or perceived apprehension of bias. In those cases where a particularly aggressive cross-examination is required, SIRC may retain a legal agent to preclude an apprehension of bias directed towards SIRC or SIRC's counsel.²⁴ In other cases, where an issue of law is particularly sensitive or complex, SIRC may retain legal agents to provide an expert opinion.

In practice, the extent to which legal agents are employed has reportedly varied over the years, reflecting the predispositions of changing SIRC administrators and the caseload at SIRC. As of the time of this writing, there were four legal agents on the SIRC list, of varying levels of experience. These individuals were selected on a fairly informal basis, without a formal application process, and are security-cleared. At present, whenever a legal agent is retained by SIRC for a case, that retainer must be authorized by the Department of Justice.²⁵ We were told that Justice generally accommodates SIRC requests for outside counsel and understands the need for SIRC to maintain an arm's length relationship with government.²⁶ The pool of lawyers across Canada from which SIRC can select legal agents is small. SIRC can only retain outside counsel, who are in

²² Murray Rankin, “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness” (1990), 3 Can. J. Admin. L. & Prac. 173 at 184 [“Rankin”].

²³ *Ibid.*

²⁴ The SIRC outside counsel to whom we spoke did not regard this probing role as a practical impediment, so long as in his questioning of witnesses he alerted the government witness to his adversarial function (lest it otherwise be attributed to SIRC itself).

²⁵ This authorization is required in accordance with section 4 of the *Government Contracts Regulations* SOR/87-402 and the *Treasury Board Common Services Policy*. For a discussion of the government's legal agents rules, see http://www.justice.gc.ca/en/dept/legal_agents/agent_overview.html. Note that rates of pay for legal agents on the government scale are lower than what these individuals likely bill private clients.

²⁶ SIRC sought a delegation of authority to contract for legal agents from the Department of Justice on September 21, 2006 to ensure its independence and impartiality. By letter dated October 21, 2006, the Assistant Deputy Attorney General for the Civil Litigation Branch of the Department of Justice informed SIRC that a delegation of authority would not be granted and all agents would continue to be approved for appointment by the Department of Justice on an *ad hoc* basis.

possession of a top secret clearance, are not in a conflict of interest with either the government or the named person, and have expertise in litigation and national security matters. There may also be a language requirement for the contract depending on the first language of the named person or the CSIS witnesses.

Relationship with Named Person

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

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

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

We were told that neither SIRC inhouse or outside counsel have ever received any complaints from the government that this contact with the named person has resulted in an involuntary disclosure injurious to national security.

Role of SIRC Counsel

It should be noted that SIRC counsel – whether inside or outside – has one interest: SIRC's fair conduct of an investigation.²⁷ The role of SIRC counsel is more in keeping with the role of counsel to a commissioner, who is presiding over a Commission of Inquiry. Insofar as the interest of SIRC is to seek the truth through testing the credibility of the government's witnesses and the reliability of the government's information, the interest of the named person intersects with the interest of SIRC.

Nevertheless, it should be noted that because of his or her function, the SIRC counsel (whether inside or outside) has obligations to the committee that preclude a confidentiality obligation to the named person. If the latter discloses information to the SIRC counsel that the SIRC counsel believes should be disclosed to the committee, he or she will do so. SIRC counsel are not, in other words, in anything resembling a solicitor-client relationship with the named person.

²⁷ See discussion *Khawaja v. Canada*, 2007 FC 463 at para. 55 (FC)

2. Federal Court Role for Non-Permanent Resident Foreign Nationals

The procedure employed in the period prior to 2002 for foreign nationals who were *not* permanent residents involved a hearing before a Federal Court justice.²⁸ Under this system, the Minister of Immigration and the then-Solicitor General would issue a certificate if they were of the opinion that a non-permanent resident alien was inadmissible on, *inter alia*, security grounds. A Federal Court justice would examine the security or criminal intelligence reports considered by the ministers and hear such other information presented by the government. If so requested by the government, the judge would consider this information in an *ex parte*, *in camera* setting. He or she would determine what could be disclosed without injury to national security so as to allow the named persons to be “reasonably informed” of the case against them. The latter would also be given an opportunity to be heard.

Subsequently, the Federal Court judge determined whether the certificate was reasonable on the basis of the information available to the judge. A certificate adjudged reasonable by the justice was deemed conclusive proof that the person was inadmissible for, *inter alia*, security reasons.

B. 2002 to Present

1. Security Certificates under the *Immigration and Refugee Protection Act*

In 2002, the *Immigration and Refugee Protection Act (IRPA)* was enacted, replacing the *Immigration Act*. IRPA radically altered the pre-2002 pattern described above. In a nutshell, IRPA eliminated the SIRC process and extended the Federal Court security certificate system to permanent residents (in addition to non-permanent resident foreign nationals).

The current system is, therefore, different from that available under the old Act (for at least permanent residents) in several important respects:

1. The SIRC process involved cross-examination of government witnesses by a SIRC lawyer or legal agent during the *ex parte* portion of proceedings. No such procedure exists for security certificates at the Federal Court, although it has been applied in other contexts.²⁹
2. The SIRC process appears to have involved a full *de novo* review of the government’s assessment of inadmissibility – SIRC was to offer its own recommendations. In the Federal Court process, the court assesses the reasonableness of the government’s certificate determination. Notably, in

²⁸ *Immigration Act*, s.40.1, now repealed by IRPA.

²⁹ See discussion of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 [CEA], below. It should be noted that in one security certificate case, counsel applied to the court for the appointment of an independent counsel – an *amicus* – but the court rejected the application holding that it was not necessary for the court to be able to fulfill its obligations under IRPA: *Re Harkat*, [2005] 2 F.C.R. 416, 2004 FC 1717.

Canadian immigration law, the courts have applied a very low threshold for findings of reasonableness.³⁰

3. In the SIRC process, the certificate was issued only after consideration by SIRC and then further deliberation by the Governor-in-Council, grafting another layer of review and consideration – in this case, at the highest political level – onto the decision. The SIRC and Governor-in-Council decisions were themselves subject to judicial review before the Federal Court. In the Federal Court process, the reasonableness decision by the judge is a final determination on the question of inadmissibility.
4. In the SIRC process, SIRC had access to the entire file on the named person in the possession of CSIS.³¹ In the Federal Court procedure, the Federal Court justice does have the power to compel production of any documents but is normally presented with (and relies on) those portions of the file that the security services deem to be relevant.³² The judge may ask to see additional information if he or she becomes aware of potentially relevant additional material (through press reports or otherwise), but there is reportedly no discovery-like process undertaken by the judge.
5. In the current system, the Federal Court must “ensure the confidentiality of the information” on which a security certificate is based “and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person.” The court is to provide named persons “with 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 if disclosed.”³³ The statutory considerations at which the court is instructed to look do not include a balancing of the security interest in non-disclosure against the public interest in disclosure, a balancing

³⁰ See *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, [2000] F.C.J. No. 2043 at para. 60 (F.C.A.) [*Chiau* cited to F.C.J.] (describing the term “reasonable grounds” “as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence”) (citations omitted).

³¹ Rankin, *supra* note 22 at 182 (“It must be stressed that the Committee has access to virtually all information, even source reports collected by the Service, and can use this information in reaching its decision. The only exception to this rule of access pertains to Cabinet records in the possession of the Service, but in almost all complaints cases, this statutory exception would be of limited relevance”).

³² Indeed s.78 of IRPA provides that the Federal Court judge is to be provided with the information that was before the Ministers when they signed the certificate together with any other evidence *that may be provided to the judge*. The implication of this provision is that the security services provide the evidence that they wish to rely on. Although this does not prevent the judge from requiring other evidence, it does suggest that it is the role of the security services to determine what evidence is before the judge.

³³ IRPA, s. 78.

that is anticipated in the SIRC rules (and the *Canada Evidence Act*, described below).

2. Criticism of the *Ex Parte* Security Certificate Process

Since their inception, the procedural attributes of the security certificate process have generated substantial controversy. The summary of secret information provided to the named persons is extremely general in nature; it does not contain the precise allegations against them nor is it accompanied by sufficient information to build an adequate defence. As a direct result, the role of counsel for the named person is minimal throughout the security certificate process. Since counsel is only privy to the summary provided, and is not present when information is presented to the judge, he or she cannot test its credibility through cross-examination.

To cure this problem, the Federal Court has adopted a pseudo-inquisitorial style in an effort to probe the government information.³⁴ The named person is left to rely on the inquisitorial skills and aptitude of the Federal Court judge during the *ex parte* proceedings. Judges must cross examine the witnesses in a vacuum without having the informed perspective of, or responsive information from, the named person to assist them in their task. Meanwhile, judges are placed in a difficult double role: not only must judges act in their essential role as an impartial decision-maker, they must also assume these additional, adversarial-style responsibilities.

In the most famous critique of the IRPA process, Justice James Hugessen commented in 2002 that judges in security certificate cases “greatly miss... our security blanket which is the adversary system that we were all brought up with and that...is for most of us, the real warranty that the outcome of what we do is going to be fair and just.”³⁵ Justice Hugessen probably was not reflecting a universally held view on the court. Nevertheless, his critique has resonated strongly with opponents to the security certificate process.

3. Constitutionality of the Security Certificate Process

The constitutionality of the security certificate process has been before the courts on more than one occasion. The Federal Court was first confronted with the question in *Ahani v. Canada*, a decision under the original, pre-IRPA Federal Court system. In this case, the applicant argued that the lack of disclosure and opportunity to challenge the information against him was a violation of the principles of fundamental justice.³⁶ On this issue, the court demurred and held that the plaintiff’s arguments were based on criminal law principles that were found to have no application in his immigration case. The court held that that a Federal Court judge was well-placed to effectively challenge *in*

³⁴ See *Harkat (Re)*, 2005 FC 393 (FC) at para. 93 *et seq.*

³⁵ James K. Hugessen, “Watching the Watchers: Democratic Oversight” in David Daubney *et al.*, eds., *Terrorism, Law and Democracy: How is Canada changing following September 11?* (Montreal: Canadian Institute for the Administration of Justice, 2002) 381 at 384-385.

³⁶ *Ahani v. Canada*, [1995] 3 F.C. 669 (T.D.), *aff’d* [1996] F.C.J. No. 937 (C.A.).

camera information on their own and ensure as full disclosure as possible. In subsequent challenges, the Federal Court came to similar conclusions.³⁷

The Supreme Court of Canada expressed different views in February 2007. In *Charkaoui v. Canada*, the Supreme Court unanimously held that the current security certificate procedure “unjustifiably violates s.7 of the *Charter* by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests.”³⁸ Fundamental justice, reasoned the Court, “requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case.” While acknowledging that the government may have legitimate reasons to claim secrecy and section 7’s protections “may not be as complete as in a case where national security constraints do not operate,”³⁹ the Court held that if section 7 “is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.”⁴⁰

The Court also held that the IRPA process was not saved by section 1, the provision of the *Charter* permitting rights violations where justified in a free and democratic society. In *Charkaoui*, the government showed no reason why it had failed to adopt a model involving examination of government witnesses by a security-cleared advocate. The Court showed evident enthusiasm for such an approach, pointing in particular to the experience of SIRC and of the United Kingdom with “special advocates” (while at the same time noting some of the controversies the latter system has generated).

³⁷ See, e.g., *Charkaoui (Re)*, [2004] 3 F.C.R. 32, [2003] F.C.J. No. 1816, 2003 FC 1419 [*Charkaoui (Re)*] and *Charkaoui (Re)*, [2006] F.C.J. No. 868, 2006 FCA 206.

³⁸ *Charkaoui*, 2007 SCC 9 at para. 3. The Court also found that the impugned provisions violated ss. 9 and 10c) of the *Charter* as some of the time limits for continuing detention of foreign nationals are arbitrary.

³⁹ *Ibid*, at para. 27.

⁴⁰ *Ibid*, at para. 61.

PART III: NATIONAL SECURITY CONFIDENTIALITY IN OTHER CANADIAN PROCEEDINGS

Before turning to a review of the United Kingdom experience, this report briefly outlines other instances in which national security confidentiality rules are applied in Canadian law, at common law or under statutory rules.

A. Informer Privilege

The most likely secret at issue in a national security proceeding is the identity of informers. For example, information withheld in IRPA security-certificate proceedings may include details “concerning human or technical sources.”⁴¹ Informer identity is already richly protected in the Canadian law of evidence by the “informer privilege”:

The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.⁴²

It “prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity.”⁴³

Informer privilege is subject to the “innocence at stake” exception; that is, secrecy will give way where “disclosure of the informer’s identity is necessary to demonstrate the innocence of the accused.”⁴⁴ Where informer privilege yields to the innocence at stake doctrine, “the State then generally provides for the protection of the informer through various safety programs.”⁴⁵

B. Canada Evidence Act

Amendments made in 2001 to section 38 of the *Canada Evidence Act* contain special rules limiting access to “potentially injurious information” and “sensitive information” in “proceedings”, including administrative proceedings and criminal trials.⁴⁶ The concepts of potentially injurious information and sensitive information are

⁴¹ CSIS, “Backgrounder No. 14: Certificates Under The *Immigration and Refugee Protection Act (IRPA)*” (February 2005) [online] [“CSIS Backgrounder”].

⁴² *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 105.

⁴³ *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 18.

⁴⁴ *Ibid.* at para. 21.

⁴⁵ *R. v. McClure*, 2001 SCC 14 at para. 45.

⁴⁶ CEA, s. 38. A “proceeding . . . means a proceeding before a court, person or body with jurisdiction to compel the production of information.” For a discussion of the scope of s. 38 in relation to the earlier doctrine of “public interest immunity,” see Hamish Stewart, “Public Interest Immunity after Bill C-36” (2003) 47 *Crim. L.Q.* 249.

broadly defined: potentially injurious information means “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security,” whereas sensitive information means “information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.”⁴⁷

Participants in a proceeding must notify the federal Attorney General when they intend (or believe another participant or person intends) to disclose these classes of information. The Attorney General may then authorize disclosure, or alternatively, may deny this authorization, in which case the matter is taken up by the Federal Court.

1. Injury to International Relations, National Defence or National Security

Summarizing the test to be applied by the Federal Court under section 38, the Federal Court has identified three steps: first, an assessment of whether the information is relevant to the proceeding in question; second, a determination of whether disclosure would be injurious to international relations, national defence or national security; and, third, a determination of whether the public interest in disclosure outweighs the public interest in nondisclosure.⁴⁸ This section and the one that follow discuss the last two steps.

Under section 38.06, a specially designated Federal Court judge authorizes disclosure unless persuaded that it would be injurious to international relations, national defence or national security. The terms “international relations, national defence or national security” in section 38 are undefined, a situation that attracted some negative commentary from a special senate committee in 2007⁴⁹ and efforts at definition by the Federal Court.⁵⁰

In weighing whether disclosure would in fact be injurious, the Federal Court of Appeal has concluded that deference is owed the minister:

the Attorney General’s submissions regarding his
assessment of the injury to national security, national
defence or international relations, because of his access to

⁴⁷ CEA, s. 38. Note that the inclusion of a type of information – sensitive information – that relates to national security, but the disclosure of which would not injure that security has been criticized as too sweeping. See, e.g., Peter Rosenthal, “Disclosure to the Defence after September 11: Sections 37 and 38 of the *Canada Evidence Act*,” (2003) 48 *Crim. L.Q.* 186 at 191.

⁴⁸ *Khawaja*, 2007 FC 490 at paras. 62 et seq.; *Canada (Attorney General) v. Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar*, 2007 FC 766 (FC) (Arar Commission) at paras. 37 et seq.

⁴⁹ Senate, *Fundamental Justice in Extraordinary Times* at 64 (recommending that the expression “international relations” in the Act be defined to specify the sort of injury triggering application of this concept).

⁵⁰ *Arar Commission*, 2007 FC 766 at para. 68 (“‘national security’ means at a minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada”. The court then listed a number of specific sorts of information raising national security concerns, discussed further below.

special information and expertise, should be given considerable weight by the judge. ... The Attorney General assumes a protective role vis-à-vis the security and safety of the public. If his assessment of the injury is reasonable, the judge should accept it.⁵¹

Nevertheless, there must still be a “sound evidentiary basis” for the government’s claim of injury.⁵² The anticipated injury must be probable, and “not simply a possibility or merely speculative”.⁵³ Moreover, the “Attorney General is ... under an obligation to ensure that the information presented to the Court is complete, and that due diligence has been met with respect to ensuring that the privileges are properly claimed.”⁵⁴

The Federal Court has underscored that it will not sanction the use of the *Canada Evidence Act* to deny disclosure “when the Government’s sole or primordial purpose for seeking the prohibition is to shield itself from criticism or embarrassment.”⁵⁵

2. Public Interest Balancing

Even where disclosure would be injurious, the information may still be released if the public interest in disclosure exceeds the injury.⁵⁶ In these circumstances, the judge considers “both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure,”⁵⁷ and authorizes the release, if at all, “subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.”⁵⁸ The Supreme Court has referred to this process as reflecting a parliamentary concern for “striking a sensitive balance between the need for protection of confidential information and the rights of the individual.”⁵⁹ However, the Federal Court

⁵¹ *Canada v. Ribic*, 2003 FCA 246 at para. 19 (F.C.A.).

⁵² *Khawaja*, 2007 FC 490 at para. 157.

⁵³ *Arar Commission*, 2007 FC 766 at para. 49.

⁵⁴ *Khawaja*, 2007 FC 490 at para. 158. See also *Arar Commission*, 2007 FC 766 at para. 47 (making similar points).

⁵⁵ *Arar Commission*, 2007 FC 766 at para. 58, citing *Carey v. Ontario*, [1986] 2 S.C.R. 637 at paragraphs 84-85 (“the purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government”).

⁵⁶ CEA, s-s. 38.06(2).

⁵⁷ In weighing the public interest in disclosure, the Federal Court “is free to consider those factors it deems necessary in the circumstances.” *Khawaja v. Canada*, 2007 FC 490 (FC) at para. 93. A partial, but not exclusive list includes: “(a) the nature of the public interest sought to be protected by confidentiality; (b) whether the evidence in question will ‘probably establish a fact crucial to the defence’; (c) the seriousness of the charge or issues involved; (d) the admissibility of the documentation and the usefulness of it; (e) whether the [party seeking disclosure] have established that there are no other reasonable ways of obtaining the information; and (f) whether the disclosures sought amount to general discovery or a fishing expedition.” *Khan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 316 (F.C.T.D.) at para. 26.

⁵⁸ CEA, s. 38.06.

⁵⁹ *Charkaoui v. Canada*, 2007 SCC 9 at para. 77.

has suggested that the government claim of national security confidentiality puts one finger on that balance: the “public interest served by maintaining secrecy in the national security context is weighty. In the balancing of public interests here at play, that interest would only be outweighed in a clear and compelling case for disclosure.”⁶⁰ More recent decisions have highlighted considerations that should drive the public interest inquiry. These include:

- (a) The extent of the injury; (b) The relevancy of the redacted information to the procedure in which it would be used, or the objectives of the body wanting to disclose the information; (c) Whether the redacted information is already known to the public, and if so, the manner by which the information made its way into the public domain; (d) The importance of the open court principle; (e) The importance of the redacted information in the context of the underlying proceeding; (f) Whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc; (g) Whether the redacted information relates to the recommendations of a commission, and if so whether the information is important for a comprehensive understanding of the said recommendation.⁶¹

Courts clearly have the principal role to play under the *Canada Evidence Act* test. As the Federal Court has indicated, “Parliament has required the designated judge to balance competing interests, not simply to protect the important and legitimate interests of the state.”⁶² The court has also held that under section 38 of the Act, “the designated judge has a very broad discretion to exercise.”⁶³

3. Attorney General’s Certificate

However, the *Canada Evidence Act* allows the government to short-circuit a court disclosure order. Section 38.13 of the Act empowers the Attorney General to personally issue a certificate “in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security.”⁶⁴ Issuance of the certificate has the effect of

⁶⁰ *Singh (J.B.) v. Canada (Attorney General)*, [2000] F.C.J. No. 1007 at para. 32 (FCTD); *Canada v. Kempo*, 2004 FC 1678 at para. 110 (FC).

⁶¹ *Arar Commission*, 2007 FC 766 at para. 98.

⁶² *R. v. Ribic* (2001), 221 F.T.R. 310 at para. 22 (F.C.T.D.). See also *Khawaja*, 2007 FC 490 at para. 92 (“Parliament has tasked the Federal Court with the responsibility of balancing the competing public interests”).

⁶³ *Ribic v. Canada*, 2002 FCT 290 at para. 2 (F.C.T.D.).

⁶⁴ CEA, s. 38.13.

barring any subsequent disclosure of the information in a proceeding for 15 years (and for a further period if the certificate is renewed at the end of that 15 years). In other words, the certificate may reverse an order from the Federal Court authorizing disclosure under section 38.06, subject to a limited appeal before a single judge of the Federal Court of Appeal.⁶⁵

4. Fair Trial Protections

The system established by the Act would be vulnerable to constitutional attack in those circumstances where a person's innocence in a criminal trial can only be proven by evidence which a Federal Court refuses to disclose, or which is subject to an Attorney General's certificate barring that disclosure. To compel trials to proceed even where the only evidence available to establish the accused's innocence is withheld from him or her would be an unquestionable violation of section 7.⁶⁶

The Act sidesteps this possible clash between legal rights and the state's secrecy preoccupation by providing *criminal* trial judges (but not judges in other proceedings) with an escape from the dilemma:

The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, [other than ignoring a Federal Court determination on disclosure or a Attorney General's certificate].

Among the permissible orders are:

- (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
- (b) an order effecting a stay of the proceedings; and
- (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.⁶⁷

C. Secret Information in Other Circumstances

Canadian law includes a number of other national security confidentiality provisions, usually tied to *ex parte* proceedings. The terrorist group listing provisions of

⁶⁵ CEA, s. 38.131. The government urges that the attorney general certificate process is necessary to bar release of information obtained in confidence under international intelligence-sharing arrangements. Canada, *Government Response: Seventh Report of the Standing Committee on Public Safety and National Security, "Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues"* (Presented to the House on July 18, 2007) at 16 [on-line].

⁶⁶ For an assessment of s. 38 of the CEA's overall compliance with *Charter* s. 7, see Kathy Grant, "The Unjust Impact of Canada's *Anti-terrorism Act* on an Accused's Right to Full Answer and Defence" (2003) 16 W.R.L.S.I. 137.

⁶⁷ CEA, s. 38.14

the *Criminal Code*, for example, contain provisions permitting *ex parte* hearings.⁶⁸ In a challenge to a terrorist group listing decision under section 83.05 of the *Criminal Code*, a judge may, at the request of the Attorney General, hear all or part of the government's information in the absence of the applicant and any counsel representing the applicant, "if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person."⁶⁹ The judge is, however, to provide a summary of the confidential information. Analogous language is found in the sections governing the terrorist-financing certificate process in the *Charities Registration (Security Information) Act*⁷⁰ and in the terrorism financing regulations under the *United Nations Act*.⁷¹

Moreover, in an immigration context, secret information is used routinely in many instances by immigration officers considering applications by foreign nationals. For example, in cases involving applications for permanent residence made outside of Canada officers will often receive secret information from Canadian or other security services. This information can be considered by the official without any duty to disclose it to the person concerned. Indeed the Federal Court has concluded that such information does not need to be disclosed and can be considered by a justice sitting in judicial review of the decision.⁷²

⁶⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.05.

⁶⁹ *Criminal Code*, para. 83.05(6)(a).

⁷⁰ *Charities Registration (Security Information) Act*, S.C. 2001, c. 41, s. 113, s. 6. But note that here, the court "shall" allow the *ex parte* proceedings.

⁷¹ *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360, s. 2.2 and *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444, s. 5.4.

⁷² See *Chiau*, [2001] 2 F.C. 297. In this context the Federal Court has determined that there is no constitutional requirement for the appointment of a special advocate to challenge the evidence. See *Segasayo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 372 (FC).

PART IV: PROCEDURAL CONTEXT FOR THE USE OF SPECIAL ADVOCATES IN THE UNITED KINGDOM

This report now turns to an examination of the United Kingdom “special advocate” model, focusing first on the procedural context in which special advocates are employed and then exploring in detail the manner in which the system operates.⁷³

A. Immigration Law

1. Overview

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

This system was challenged successfully by a named person in the European Court of Human Rights. In *Chahal v. UK*,⁷⁴ the Court concluded that the UK system violated the European Convention on Human Rights because it precluded court review and denied any means for lawyers representing the named persons’ interests to challenge secret information against the latter. In the course of deciding the case, the Court alluded to the system employed by the Federal Court of Canada involving what are now known as special advocates. Since no such system existed (or exists) before the Federal Court, the European Court was probably referring to the SIRC system discussed above.

In direct response to *Chahal*, the UK parliament enacted the *Special Immigration Appeals Commission Act 1997*. This statute created the Special Immigration Appeals Commission (SIAC), a superior court of record sitting in panels comprising a High Court judge (or other holder of high judicial office), an immigration adjudicator and a lay member with security and intelligence expertise. SIAC hears asylum and immigration appeals (and now citizenship revocation cases) involving national security. Appeals from SIAC are to the Court of Appeal.

2. Special Advocates

The SIAC Act authorizes the appointment of a special advocate – that is, “a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative

⁷³ Unless otherwise noted, material in this Part is drawn from Treasury Solicitors Department, “Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO)”, online: <http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf> [“Open Manual”]. Readers are also referred to the overview provided by Andrew Boon and Susan Nash, “Special Advocacy: Political Expediency and Legal Roles in the Modern Judicial System” (2006) 9(1) *Legal Ethics* 101.

⁷⁴ *Chahal v. The United Kingdom*, (1997) 23 E.H.R.R. 413, [1996] Eur. Ct. H.R. 54.

of his are excluded.”⁷⁵ Once an appeal is lodged with SIAC against a government immigration decision, the UK Secretary of State decides whether the appeal is likely to implicate information that will not be disclosed to the named person on national security grounds. In these circumstances, a special advocate may be (and in practice invariably is) appointed by the UK Attorney General. In fact, the government may not rely on “closed” – that is secret – information at the hearings if no special advocate is appointed.⁷⁶

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

B. Control Orders

Although special advocates originated in the immigration context, their use has now spread to other areas, including “control orders” made pursuant to the UK *Prevention of Terrorism Act 2005*.

1. Overview

A control order is an instrument imposing obligations on a person “for purposes connected with protecting members of the public from a risk of terrorism.”⁷⁷ They come in two species: non-derogating control orders – those that do not constitute a violation of the *European Convention on Human Rights* – and derogating control orders – those that would amount to a violation of the European treaty, unless a proper derogation was entered.

Non-derogating orders may be made by the Home Secretary, subject to limited judicial supervision, and endure for up to twelve months and longer with extensions. Derogating measures require a more substantial judicial review and blessing and last for up to six months and longer with extensions. Control orders may, in other words, be renewed indefinitely.

Control orders are imposed where “necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.” Thus, for non-derogating orders there must be reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity and that the order is necessary for purposes connected with protecting members of the public from a risk of

⁷⁵ *Special Immigration Appeals Commission Act 1997* (U.K.), 1997 c. 68, s. 6.

⁷⁶ *The Special Immigration Appeals Commission (Procedure) Rules 2003* (U.K.), S.I. 2003 No. 1034, Rule 37(2) [“SIAC Rules”].

⁷⁷ *Prevention of Terrorism Act 2005* (U.K.), 2005 c. 2 [*Prevention of Terrorism Act*], s. 1.

terrorism.⁷⁸ Derogating orders, by comparison, require a higher degree of certainty concerning the person's involvement in terrorism-related activity.⁷⁹

Terrorism-related activity is a broadly defined term that captures actual involvement in the commission, preparation or instigation of acts of terrorism, as well as “conduct which gives encouragement to the commission, preparation or instigation of such acts.” Indeed, it reaches as far as conduct that supports or assists persons believed to be involved in terrorist-related activity, including those who encourage the instigation of such acts.⁸⁰

The constraints that may be imposed by control orders are extensive. The list enumerated in the Act includes limits on possession of articles or use of services or facilities and the carrying on of specified activities. Restrictions may be imposed on the nature of employment, membership in associations or communications with other persons. Control orders may also regulate a person's place of residence and those who can have access to it and place limitations on presence in certain places or movement within or from the United Kingdom. The person may be required to allow searches of him- or herself or of her or his residence, to wear electronic monitoring equipment and to report to the authorities.⁸¹

2. Special Advocates

In the adjudication of control order questions, the government is required to disclose all relevant material. However, the court may permit non-disclosure of information where disclosure would be contrary to the public interest.⁸² The “public interest” includes the interest of national security, the international relations of the United Kingdom and the detection and prevention of crime.⁸³ In keeping with this public interest exception to disclosure, hearings may be held *in camera* and *ex parte*. The Attorney General may name a special advocate to represent the interests of the named person in these closed proceedings.⁸⁴ As in SIAC proceedings, the government may not rely on secret information at the hearings if no special advocate is appointed.⁸⁵ The named person selects special advocates from the roster in the same manner as with SIAC appeals.

The legitimacy under the *Human Rights Act, 1998* of the SA process in adjudicating control orders is currently before the House of Lords, on appeal from the English Court of Appeal. In the latter decision, the Court of Appeal held that recourse to

⁷⁸ *Prevention of Terrorism Act 2005*, s. 2.

⁷⁹ *Prevention of Terrorism Act 2005*, s. 4.

⁸⁰ *Prevention of Terrorism Act 2005*, s. 1.

⁸¹ *Ibid.*

⁸² *Prevention of Terrorism Act 2005*, Schedule, s-s.4(3).

⁸³ *Civil Procedure Rules* (U.K.), S.I. 1998/3132, as am. by S.I. 2005 No. 656 (L. 16), Rule 76.1(4) [“CPR”].

⁸⁴ CPR, Rule 76.24.

⁸⁵ CRP, Rule 76.28.

special advocates provides a sufficient safeguard against the prejudice use of secret information causes the named person.⁸⁶

C. Other Proceedings

Special advocates are also employed in a series of other proceedings implicating national security concerns, including the following:

- **Proscribed Organizations.** Under the *Terrorism Act 2000*, the UK government maintains a list of banned organizations “concerned in terrorism”. Listed organizations are illegal, and individuals affiliating with these groups may be charged with assorted offences. Appeals to listing may be brought by organizations to the Proscribed Organisations Appeal Commission (POAC), a three member tribunal chaired by a past or current senior judicial officer. Pursuant to the *Terrorism Act 2000*, a special advocate may be appointed to represent the interests of the organization in proceedings before the Commission from which the organization has been excluded.
- **Access to Dangerous Substances.** The *Anti-terrorism, Crime and Security Act 2001* authorizes the government to deny a named person access to dangerous substances on national security or public safety grounds. Appeals to this ban are brought to the Pathogens Access Appeals Commission, a three member body chaired by a past or current senior judicial officer. A special advocate may be appointed to represent the interests of the named person in proceedings before the Commission from which that person has been excluded.
- **Security Clearance.** Individuals denied security clearance may bring appeals to the Security Vetting Appeals Panel. The latter has procedures in place permitting the appointment of special advocates (junior counsel from the special advocate roster) to represent the named person’s interests in closed proceedings, generally in written submissions.
- **Criminal Cases.** In *R. v. H and C*,⁸⁷ the House of Lords endorsed the appointment of special advocates in public interest immunity proceedings in criminal matters – that is, circumstances analogous to section 38 *Canada Evidence Act* matters in which the government is claiming an exception to full disclosure requirements. In adjudicating these questions, the appointment of special counsel “may be necessary to ensure that the contentions of the prosecution are tested and the interests of the defendant protected”.⁸⁸ The Court noted that the appointment of special advocates raises novel ethical questions tied

⁸⁶ *Secretary of State for the Home Department v. MB*, [2006] 3 W.L.R. 829, [2007] Q.B. 415, [2006] E.W.C.A Civ. 1140 at para. 86. See *Human Rights Act, 1998* (U.K.), 1998, c. 42.

⁸⁷ [2004] UKHL 3.

⁸⁸ *Ibid* at para. 36.

to the absence of a formal lawyer-client relationship, as well as a number of practical problems relating to the trial process. Any appointment of a special advocate must, therefore, be an exceptional last resort in meeting the overriding requirement of fairness to the defendant.⁸⁹

- **Planning Inquiries.** Pursuant to the *Town and Country Planning Act 1990*, as amended, a person excluded from planning inquiries implicating national security considerations may have their interests represented by a form of special advocate.
- **Race Relations.** In race relations proceedings under the *Race Relations Act 1976*, as amended, a person excluded in the interests of national security may have their interests represented by a form of special advocate.
- **Parole Proceedings.** In *Roberts v. Parole Board*,⁹⁰ the House of Lords held that the parole board may restrict parolee access to relevant material and appoint a form of special advocate to represent that person's interests.

⁸⁹ *Ibid* at para. 22.

⁹⁰ *Roberts v. Parole Board*, [2005] 2 A.C. 738, [2005] 3 W.L.R. 152, [2005] U.K.H.L. 45 [*Roberts*].

PART V: DESIGN AND FUNCTION OF THE UK SPECIAL ADVOCATE SYSTEM

This Part provides a detailed overview of the design and function of the special advocate system in the United Kingdom. It focuses on: the selection and appointment of barristers as special advocates; the relationship between special advocates and named persons; the resourcing of special advocates; the functions and effectiveness of the special advocate, and; comments on strengthening the special advocate system. The focus throughout is on the special advocate’s role in SIAC and control order proceedings, the areas where special advocates have been most active.

A. Selection of Barristers as Special Advocates

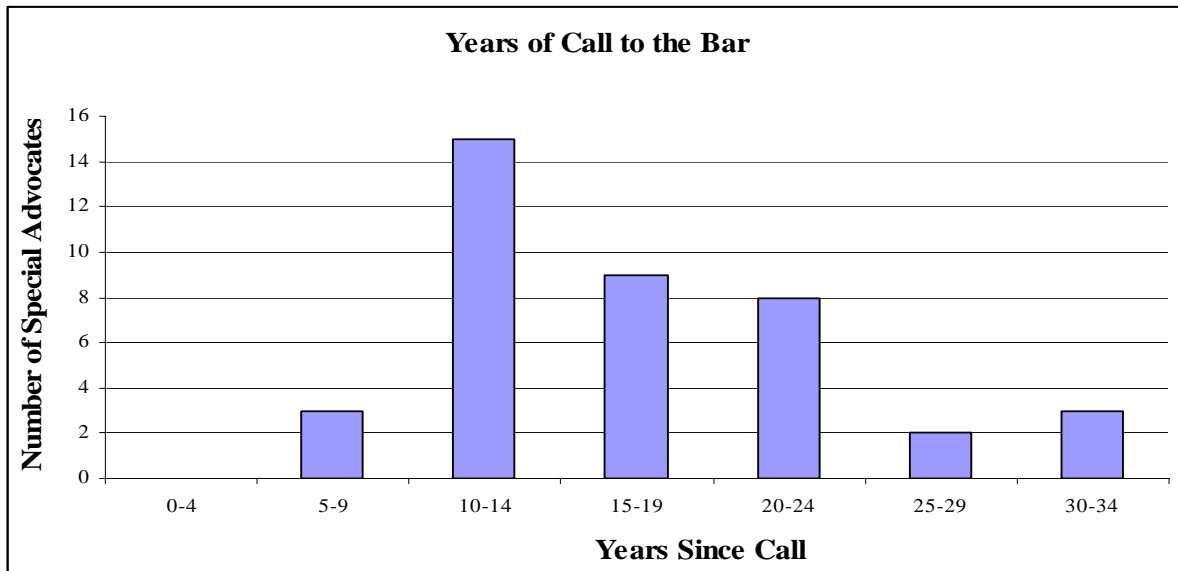
1. Diversity and Experience

a) Basic Facts

Forty-one barristers were on the roster of special advocates (SAs) in the United Kingdom by the time of this writing. Some of these individuals had been approached by the government to apply to become special advocates. Others applied in response to published advertisements. Barristers file applications⁹¹ (with references),⁹² which are then screened by the government on competency grounds and sent for security vetting (described below).

The special advocates on the existing roster have been members of the bar for, on average, 18 years (median: 16 years; most junior: 9 years; most senior: 34 years). Table 1 shows the distribution of special advocate levels of experience.

Table 1: Experience Levels of UK Special Advocates



⁹¹ See Special Advocate – Application Form, online: http://www.attorneygeneral.gov.uk/attachments/Application_Form_2006.doc

⁹² See Special Advocate – Reference, online: http://www.attorneygeneral.gov.uk/attachments/Reference_2006.doc.

b) Independence from Government

SAs are not government proxies. In our interviews, SAs underscored the extent to which the UK government had been careful to include on the roster persons with strong reputations as civil and human rights advocates and/or persons unlikely to be accommodating of government positions. For instance, the roster of SAs includes barristers who have defended persons accused of terrorist group affiliation, a fact that may enhance its credibility in the eyes of named persons.

c) Professional Experience

The current roster of SAs appears to be drawn from three main background areas: immigration; criminal law; and human rights law. At least some SAs are, however, experienced civil litigators. The view held commonly by SAs was that pre-existing subject-matter expertise, while certainly relevant and useful, was less important than experience in eliciting facts in a trial process. Several SAs underscored the importance of this experience: SAs with established litigation or administrative proceeding experience rely on this expertise in order to perform their role effectively. Aptitude for cross-examination was singled out as a particularly vital skill.⁹³

At the same time, other SAs emphasized that named persons should have access to as diverse a roster as possible, with diversity measured in terms of the professional backgrounds and experience levels of barristers. In part, the latter concern seemed driven by the need to ensure that not all the barristers on the list were lawyers who had acted for the government in the past; at least some should have an exclusively non-governmental client base. This is, of course, less of a preoccupation in Canada, where lawyers generally do not move back and forth in working for government and non-governmental parties. However, SAs also suggested that variability in terms of background and range of experience enhances the exchange and cross-fertilization of ideas among SAs.

A second, and more general, reason for ensuring a range of experience and professional backgrounds on the roster of SAs relates to the issue of “tainting” discussed below. To minimize the impact of “tainting” on the SA role (and in keeping with the tradition in the practice of UK barristers), SAs usually operate in teams of two. One of the lawyers on the case is a senior advocate – often a Queen’s Counsel and usually a lawyer with at least 15 years at the bar – while the other is more junior. While one SA is often “tainted”, the other is sometimes not.

⁹³ Similar views have also been expressed frequently in the past. See, e.g., Lord Carlile of Berriew Q.C., independent reviewer of UK anti-terrorism law, “Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003” at para. 75 [online] [“Lord Carlile”]. See also United Kingdom, House of Commons, Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC): Written Evidence” (7 February 2005), HC 323-II at 20 [“Evidence submitted by a number of Special Advocates”]; Eric Metcalfe, “‘Representative But Not Responsible’: The Use of Special Advocates in English Law” (2004) 2 JUSTICE Journal 11 at Appendix (reporting similar views held by SAs at the time of a survey of SAs conducted in 2004) [“Metcalfe”].

d) Security and Intelligence Expertise

SAs do not have appear to have a background in security or intelligence matters, although at least some have acted in cases in the past for which they were obliged to obtain security clearance (in advance of any SA position). Assessors of the SA system have urged in the past that training in security and intelligence be offered to SAs.⁹⁴ Modest instruction is now available. SAs are provided with a day-long session with the security services, one that is not mandatory for new SAs but which some SAs described as vital.⁹⁵

Several SAs urged that their lack of formal expertise in the area of security intelligence contributed to the challenges of second-guessing government positions. Experience in security intelligence was cited as enhancing the SAs ability to spot gaps, inconsistencies and weaknesses in the government's case.

The SAs were supportive in principle of some sort of resource system that would allow them to call upon the expertise of individuals well-acquainted with security intelligence in making their cases. For instance, they have proposed that they be empowered to call independent expert evidence.⁹⁶ However, most SAs we interviewed thought such a system would be unworkable in practice – those with the requisite expertise and security clearance (*i.e.*, retired members of the security services) would likely not willingly deploy it to assist those accused of being a security threat by the government. The issue of institutional knowledge and information sharing between special advocates is discussed further below.

e) Caseload and Experience

SAs acknowledged that the periodic nature of SA work and the fact that none of the SAs performed their task on a full-time or specialized basis means that they possessed less expertise than would be the case if there were a dedicated office of special advocates with full-time barristers. Nevertheless, SAs who responded to this issue felt that there were enough cases in the UK system for those on the SA roster to acquire sufficient expertise, especially where senior and more junior barristers worked on cases together.

Moreover, a standing office of SA barristers would be inconsistent with the UK practice of barristers working as independent agents, retained by government or private individuals as the case may be. SAs urged that any such permanent office would not be perceived as impartial and independent of government, and that specialists acting exclusively on SA cases could be subject to actual capture by the security service mind-set. More than that, at least one SA emphasized that the SA task is an emotionally-trying and stressful one and would be very difficult to undertake on a full-time basis.

⁹⁴ See, *e.g.*, Lord Carlile, *ibid.* at para. 73. Metcalfe, *ibid.* at Appendix (reporting similar views held by SAs at the time of a survey of SAs conducted in 2004).

⁹⁵ At least one SA suggested that this training should take place as part of the initial appointment and not after that appointment. This view may reflect the fact that some SAs have apparently been assigned cases prior to attending this training session.

⁹⁶ See, *e.g.*, Evidence submitted by a number of Special Advocates *supra* note 93 at 19.

2. Security Clearance

SAs are security-cleared by the security services. All special advocates indicated that the clearance process focused on identifying attributes or conduct that might render the SA susceptible to blackmailing, including details on financial and marital status and conduct. The security services did not probe the professional background of SAs in the sense of scrutinizing their client base or in an effort to approve SAs with certain political views or perspectives. As noted, the government has been careful to include among the roster persons with strong reputations as civil and human rights advocates and/or persons unlikely to be accommodating of government positions. The roster is not, in other words, populated with lawyers likely to be friendly to the government's case, and the security clearance process was in no way a politically-oriented cleansing process.

In the security clearance procedure, the questioning was intrusive, but none of the SAs considered it inappropriate, especially since the security service explained the rationale for the various questions. The single most serious problem with the clearance process appeared to be the length of time it took to obtain clearance (and the administrative hassle associated with completing the required screenings). Given these delays, some SAs queried whether the SA roster could be kept adequately replenished with fresh SAs as existing advocates withdrew or became tainted.

3. "Tainting" of Special Advocates

a) Background

A key (and reportedly growing) problem in the UK special advocate system concerns so-called "tainting" of existing SAs. Once an SA has seen "closed" material – that is, information in relation to which the government is claiming national security confidentiality – he or she is potentially "tainted". Because he or she is now privy to secrets, none of which can be disclosed to named persons, the SA is no longer in a position to meet and converse with named persons in subsequent cases (at least where those persons' cases may implicate the same secret information). (A related and very acute problem, discussed below, is that a once untainted SA may no longer meet with the named person in the case at bar once they have gone "into closed" – that is, seen the closed material in the case).

In practice, tainting seems to occur on a country-specific basis; that is, SAs who have seen closed information in relation, for example, to Algeria are "tainted" in relation to future Algerian cases. An SA may also be "tainted" if there are factual connections between named persons in different cases or in relation to a particular secret document used in multiple proceedings. Because SAs and the Special Advocates Support Office (SASO) are generally unaware of any such factual links in advance of the case, they are obliged to take their guidance on tainting from the security services.

For all of these reasons, the more experienced the SA is, the more likely it is that he or she may never meet the named person and have any sort of conversation with him or her.

b) Impact on Institutional Knowledge

The concept of “tainting” has also begun to affect information sharing between special advocates. Up until recently, the UK government was reasonably accommodating of SAs conversing amongst themselves in relation to closed material, even with SAs not involved in the same cases. This practice obviously enhances the ability of SAs to impart experience, especially to more junior counsel. It also increases the capacity of SAs to identify inconsistent use of similar or identical closed material between cases. The SASO does maintain databases of information useful to SAs: an open database with open material and a closed database that includes the decisions of the SIAC on closed matters, such as rulings on disclosure of secret information to the named person. The closed matter database is available at least to those SAs who have already acted in closed sessions, and thus are already tainted.

Information sharing between SAs has, however, become controversial with the government. In recent months, the UK government has reportedly begun taking the view that this information exchange is inconsistent with the “need to know” principle of secrecy doctrine. The latter notion posits that even security-cleared individuals should be given access to information only where necessary to discharge their functions, minimizing the circle of persons with access to the material.

Objections to the government’s position on information sharing among SAs flow from differing understanding of “need to know”. Some of the people with whom we spoke underscored that effective SA work in a common law system depends on access to precedent in closed matters. Moreover the discharge of the SA function in terms of challenging the government’s case depends on familiarity with how the government is deploying identical or similar intelligence information between cases. SAs indicated that at the present time there was no clear resolution of the issue of information sharing amongst SAs in the face of the resistance on both sides.

4. Impact of Special Advocate Work on the Special Advocate’s Regular Practice

SAs were questioned about the broader impacts of their SA work on their practice. As noted, even the most experienced SAs perform their SA role on a periodic rather than full-time basis. The bulk of their work continues to be conventional barrister representation of private (or government) clients. When questioned about the impact of their SA function on the rest of their practice, some special advocates anticipated no negative impact on their non-SA client base. However, others expected (or had in fact experienced) an unwillingness on the part of at least some solicitors to retain the services of the barrister in non-SA related work. At least part of this resistance reportedly stemmed from the (erroneous) perception that barristers who had become SAs were, in some sense, acting for the government. Those who had marketed their skills in part on the strength of their exclusively non-government client base might find this perception unhelpful in their future dealings with solicitors attracted to this record.

A second, broader problem relates again to the concept of “tainting”; that is, the question of whether a barrister’s work as an SA and his or her access to closed material render him or her unable to represent clients in related matters. For example, a barrister

performing SA work in a case involving deportation to Algeria where the question of torture upon removal is material might (and indeed probably would) see secret information relating to this question. Subsequently, that barrister might be precluded from representing a similarly situated Algerian (this time, as their counsel) in a subsequent deportation proceeding where this same question is engaged. Where this situation arises, the matter is referred to the security services for their reaction and potentially to the SIAC tribunal. Security service positions on whether a barrister is tainted are not binding, but SAs acknowledged that this situation could create difficulties, and restrict their ability to represent the client. This issue has arisen for at least one SA on an *ad hoc* basis.

B. Case Intensity and Resourcing of Special Advocates

1. Case Intensity and Billing Practices

As noted, SAs typically work on cases in teams of two comprising a more senior and a more junior barrister. SAs are paid by the government and bill at their usual professional rates. None reported any criticism or second-guessing of their billings by the government or SASO. Several underscored that the SAs on the roster are experienced and established barristers unlikely to operate inefficiently or bill unreasonably.

Several SAs were asked about the number of hours they spend on an average case. These persons noted that cases tend to be time intensive, amounting in the assessment of one SA to about 80 hours of preparation and 40 hours of hearing time and in the words of another to about a month (full-time) of preparation and 5-10 days of hearings.

2. Administrative and Logistical Support for Special Advocates

a) Structure of the Special Advocates Support Office

Special advocates are now supported by the Special Advocates Support Office, a branch of the Treasury Solicitors Department (roughly equivalent to parts of the Canadian justice department). The administrative and physical proximity of SASO to the government has raised concerns among civil society groups, named persons and their counsel about its independence. However, SAs clearly regard SASO as arms-length of government, and SASO itself operates with a firewall between itself and the rest of government.

SASO has four solicitors, split between an “open” team and a “closed” team. The latter have access to the secret material while the former deal with the named person and their solicitors.

b) Function of the Special Advocates Support Office

SAs are not instructed *per se* by solicitors at SASO, as would be the case in regular solicitor-barrister relationships. SASO provides logistical and administrative support, and was described as essentially oiling communication between the government and the SAs and between the SAs and the named persons and their counsel (assuming the latter agree to cooperate with the process). As noted, SASO also houses a jurisprudence

database as a resource for SAs and keeps a summary of key recurring issues. SASO has prepared manuals – one known as the “open manual” and the other a closed manual – to familiarize SAs with the SA function and role.

In addition, SAs are convened by SASO in regular meetings to share experiences and develop institutional knowledge. These meetings were described by many SAs as an essential means of sharing and gaining experience. One SA urged that SAs were essentially operating in the dark until (against government opposition) they began holding these meetings to discuss ethical and practical issues.

c) Resourcing of the Special Advocates Support Office

Established in February 2006, SASO was a response to fierce complaints about the prior resourcing of the SA function.⁹⁷ The SAs with experience with both SASO and the less formal and under-resourced system that existed before SASO underscored how much better matters function now that SASO exists. SAs on the whole were consistently satisfied with the office. Nevertheless, several SAs suggested that more resourcing would enable SASO to expand its functions to include more detailed substantive and analytical work on individual cases. At present, SASO does not house enough solicitors that it can contribute meaningfully to the substantive aspects of the SAs’ function.

SAs also noted the resource imbalance between SASO/SAs and the government side, with the resources of the latter far outstripping those of SASO and the SA.

C. Relationship between the Special Advocate and the Named Person

1. Level of Cooperation

Special advocates are not in a solicitor-client relationship with the named person. They are, however, charged with acting in the best interests of the named person⁹⁸ – a responsibility that one SA described as fiduciary in nature.

While the experience of SAs appears to vary, at least some reported that solicitors working for the named persons and the named persons themselves were prepared to cooperate with SAs. In those circumstances where the SA is not “tainted”, s/he is often able to meet with the named person prior to the closed sessions in order to ask questions and suggest lines of inquiry and legal theories that named persons and their lawyers might explore. In other situations, named persons wished the SA to represent their interests in the closed hearing, but declined to meet with them prior to the closed sessions. SA/named person meetings are discussed further below.

Some solicitors and named persons have refused, however, to cooperate formally with the SA.⁹⁹ In some cases, this decision is evidently driven by a desire to preserve an

⁹⁷ See, e.g., Lord Carlile, *supra* note 93, at para. 74; Metcalfe, *supra* note 93 at Appendix (discussing concerns held by SA about resourcing at the time of a survey of SAs conducted in 2004).

⁹⁸ The SIAC rules specify that the “functions of a special advocate are to represent the interests of the appellant by - (a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded; (b) cross-examining witnesses at any such hearings; and (c) making written submissions to the Commission.” SIAC Rules, Rule 35.

⁹⁹ See, e.g., *Abu Qatada v. Secretary of State for the Home Department*, SC/15/2002 (8 March 2004) at para. 5 [*Abu Qatada*].

ability to appeal on grounds challenging the legitimacy of an adjudicative process in which counsel were unable to access full information. More broadly, this decision is sometimes motivated by a desire on the part of solicitors and named persons not to participate in a process to which these people objected on grounds of principle or for political reasons.

To some extent, SAs (and their support office, SASO) are caught in the middle: they are tolerated, but far from popular, with the security services and are often condemned as the gloss on an inherently unfair system by opponents of the SIAC and control order processes. Each side – the security services and those named persons and solicitors who refuse to participate – view the SA as the champion of the other. Nevertheless, personal interactions between the SA and the other lawyers involved in the case were described by those SAs who addressed this issue as generally collegial, with any tensions reflecting an institutional caution rather than difficulty in personal relationships.

2. Response to Rejection

SAs expressed varying views on how to respond to an outright rejection of their role by a named person. Some suggested that in those circumstances, they would feel obliged to withdraw from the case. Others viewed the objection as a consideration affecting their decision on whether to continue and as a factor determining how assertive they would be in the closed hearing. Still others emphasized that the named person could not “fire” an SA and that the SA continued to have a legitimate role to play in the case, of the sort described below. One SA suggested that without knowing the nature of the closed information, named persons could not make an informed decision as to whether or not they wished the assistance of the SA. For another SA, withdrawal should come only if the named person expressed a lack of confidence in the SA personally, and not simply an objection to the role the SA is tasked with performing.¹⁰⁰

D. Role and Effectiveness of the Special Advocate

Before examining the specific roles and effectiveness of special advocates, we briefly outline the sequence of events in SIAC (and control order) proceedings:¹⁰¹

¹⁰⁰ Whether SAs should be entitled to withdraw from a case in the face of opposition from the named person has been a matter of some discussion. See, e.g., *Abu Qatada*, *ibid.*, at para. 9 (expressing concern at the withdrawal of special advocates in that case); Lord Carlile, *supra* note 93 at para. 78 *et seq.* (suggesting that special advocates should always be present, although there may be times when prudence demand they take a more passive role); Metcalfe, *supra* note 93 at 34 (opposing the notion that named persons should be unable to oblige the withdrawal of special advocates); Nicholas Blake QC, *The Role of the Special Advocate* (26 March 2007) (on file with the authors) at 3-4 [“Blake”] (observing that a “strong expression of preference by the appellant will be something the SA will take into account, but as the appellant does not see the closed material and therefore cannot form a judgment on what his best interests are, such opinions cannot bind the SA who has to form a judgment on his or her own”).

¹⁰¹ This discussion is drawn from Open Manual, *supra* note 73 at 29-32 except as otherwise noted.

Open Stage

- Service of “open material” (that is, non-secret information, if any) on the newly appointed SA by SASO.
- Meetings between untainted SAs and cooperating named persons.
- Submission to the tribunal by named persons and their lawyers of their evidence.
- Submission by the government to the tribunal of any additional open or closed (secret) information. This information is supposed to include exculpatory material in the government’s possession. The open information is served on the named persons and their lawyer and the SA (through SASO)

Closed Stage

- Service by the government of the closed (secret) information on the SA (through SASO). The SA is now “in closed” and may not have any additional contact with the named person, except in writing with the permission of the tribunal.
- The SA reviews the information, and performs some of his or her core functions, including pressing for greater disclosure to the SA him- or herself or to the named person (discussed below). There is currently no obligation that a sanitized summary of the closed information be provided to the named person by the tribunal or government, a fact that has attracted criticism from parliamentarians.¹⁰²

Hearing

- An open hearing is held at which the named person and his or her lawyers are present. The SA may observe, and glean a further sense of how the named person is advancing his or her theory of the case.
- Subsequently, the closed hearing is held during which the focus shifts to the secret information. The SA now represents the interests of the named person, and may cross-examine and (in theory) call witnesses, although the latter possibility has not been pursued in practice. These issues are discussed below.

Judgment

- Judgment is issued, usually in an open and closed format. Occasionally, only an open judgment is issued. An open judgment is first vetted by the government prior to release to the named person to ensure that no sensitive details are disclosed. In theory, disputes between the SA and the

¹⁰² United Kingdom, House of Commons and House of Lords, “Joint Committee On Human Rights - Nineteenth Report” (16 July 2007) online: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm> [“Joint Committee On Human Rights”].

government on whether such a detail is included in the judgment may be resolved by a hearing before the tribunal, but to date there have been no such proceedings.

1. Communications with the Named Person

a) Communications Prior to the Closed Sessions

i) Utility

Where the SA has not already been “tainted” by access to relevant “closed” material, he or she may have as many meetings with the named person as the SA and the named person wishes.¹⁰³ SAs varied in the extent they had participated in these meetings, and had different views on their utility.

No SA proposed a system that eliminated the possibility of meetings between non-tainted SAs and named persons. However, some SAs did not see much value in meeting with the named person, since at the time of these meetings all involved are operating in ignorance of the core government case and very little useful information can be obtained from the named person. The open case may have little or no relation to the closed material, creating a massive handicap for persons trying to anticipate the government’s actual case.

Other SAs felt (sometimes strongly) that their effectiveness was greatly impaired where they could not have these meetings because of “tainting” or because the named persons and their counsel refused to participate. Some SAs indicated that the meetings were helpful in their overall preparation for the closed hearing. One SA emphasized that the meetings allowed the SA to impart suggestions and to serve as a “second pair of eyes” in reviewing the government’s open case. Still another SA emphasized that meetings allow the SA to gauge the personal qualities of the person – whether, for example, they follow strict religious mores. Subsequently, these impressions may help the SA challenge the picture painted by the government in the closed case.

ii) Strategies

Receiving relevant information is an obvious objective of any meeting between the SA and the named person. When asked about their strategies in the meetings that are held, SAs varied in their description. Some SAs indicated that they did pursue a “shotgun” approach to questioning the named person – imagining what might be in the government information and pre-emptively asking questions relating to these issues. These questions might focus, for example, on a person’s associations and travels. Since the SA will not subsequently be able to seek instruction from the interested person on the use of this information in closed proceedings, he or she may seek advance permission to use the information in the person’s best interest, as the SA sees fit.

¹⁰³ See SIAC Rules, Rule 36(1): “The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant.”

Other SAs were less comfortable with this tactic of questioning in response to supposed or hypothetical government cases – or reported that the lawyers for the named person were uneasy with this strategy. A number of reasons for this discomfort were posited, and identified as significant in varying degrees.

First, if the person disclosed inculpatory information in the meeting(s) with the SA that turned out not actually to be part of the government's case, a special advocate might be concerned about misleading the tribunal if he or she were to follow an otherwise sensible line of questioning concerning the government's actual information that was somehow distorting in light of what the SA knew. Some SAs felt this was a false dilemma, and that the *sui generis* functions of SAs meant that they do not labour under conventional concerns about misleading the tribunal. Their role is to react to the case actually presented by the government, not to temper their approach to that case in response to the information obtained from the named person.

Second, a special advocate aware of inculpatory information not part of the government's case might be loath to follow a line of questioning that, while potentially important in probing the government's case, might ultimately be prejudicial given the actual facts of the case. In conventional practice, this sort of dilemma would be resolved by seeking instruction from the client and asking that person to determine whether the benefits outweighed risks. SAs cannot seek this input, and thus are left to make judgment calls on their own.

Third, SAs do not disclose prejudicial information to the government, but they are not technically in a solicitor-client relationship, protected by a privilege of confidentiality. In these circumstances, it is an open question as to whether the government could compel SAs to disclose information provided to them. At least some SAs regarded this concern as unwarranted, either because the UK law of privilege would in fact protect this quasi-solicitor-client relationship or because as a practical matter, the government would not seek to compel information for fear that this would discredit the entire SA system.

Some SAs suggested that a solution to all of these dilemmas was to be very cautious in the questioning of the named person affected during any open period meeting, and to focus questions on clearly exculpatory details. Determining what these questions might be in advance would, however, be a difficult undertaking, perhaps explaining the indifference of at least some SAs to a meeting with the named person.

Where meetings are held, SAs describe them as collegial, with all concerned shared a similar frustration at not having access to the relevant information.

b) Communications after Access to the Closed Material

i) Rules on Communications during the Closed Proceedings

Once an SA has been given access to the closed material in the case (and even before, where the SA is already tainted), the SA is said to be "in closed". She or he may have no communication with the named persons or their solicitor without the permission

of the tribunal. This permission, in turn, can only be provided after the government has a chance to respond to the request.¹⁰⁴

Without question, these strict limitations on communications between named persons and special advocates constitute the most dramatic departure from conventional fair trial standards and the most controversial aspect of the UK special advocate system.

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

The limitations on SA communication with the named person are part of a broader obligation on the SA not to disclose the closed information. A failure to abide by this requirement would trigger consequences under rules of professional responsibility and possibly scrutiny under the *Official Secrets Act*. Notably, however, SAs are not asked to sign a particular oath of secrecy or, it would seem, given official designation as persons under the *Official Secrets Act*. They do not, in other words, have the status of "persons permanently bound by secrecy" as exists in Canada's *Security of Information Act*.

ii) Practice in Relation to Communications during the Closed Proceedings

As several SAs argued before a parliamentary committee in 2005, the fact that questions to named persons during the closed session are vetted by the government – the opponent in the proceedings – "precludes communications even on matters of pure legal strategy".¹⁰⁵

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

¹⁰⁴ See SIAC Rules, Rule 36: "After the Secretary of State serves material on the special advocate...the special advocate must not communicate with any person [other than, *e.g.*, the government, the tribunal] [except at the] direction of the Commission". Where the SA requests directions from SIAC authorizing communication, "(a) the Commission must notify the Secretary of State of the request; and (b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made." The named person may unilaterally communicate with the SA. For the equivalent provision in control order proceedings, see CPR Rule 76.25.

¹⁰⁵ Evidence submitted by a number of Special Advocates, *supra* note 93.

through the tribunal and security services – could well spark the interest of the security services, in a manner prejudicial to the named person. A subsequent failure of the SA in the proceeding to then rely on whatever answer was provided by the named person would also attract the attention of the security services.

iii) Alternative Approaches

When asked whether they could imagine meeting with the named person while at the same time not divulging closed information, SAs' first reaction was to note that the security services would never permit such meetings, and that these services currently have substantial political influence in the UK government. This view was not, however, shared by Lord Carlile, the independent reviewer of UK anti-terrorism law. Lord Carlile quite emphatically urged SAs to continue pressing for fuller access to the named person once "in closed", and wished to put this view on the record in this study.

Whether this additional access would make a difference was the subject of some discussion. Some SAs were skeptical that they could function more effectively if given this access. Several SAs found it difficult to imagine how they could craft questions of the sort that might prompt answers useful in assessing the credibility of the government's case, without disclosing information through the questioning. To ask, for example, whether the person had been to Afghanistan in 1997 might alert the person that some person associated with that trip was an informant.

SAs imagined that alternative systems – involving, for example, access to closed information by the named person's own lawyers on an undertaking that they would not disclose to their client – would be awkward for those lawyers, left to constantly parse their questions for innocent and involuntary disclosures. They also wondered whether this situation would simply put the lawyer in the same position as SAs – that is, unable to ask meaningful questions of the named person of the sort likely to adduce useful information. Finally, confidentiality of this sort, where information is withheld from the client, would require a readjustment of UK rules of professional responsibility, which greatly limit this sort of arrangement.

Other SAs took a different view on the utility of meeting with named persons once "in closed". Some SAs speculated that it might be possible to meet with the named person's lawyers pursuant to a pre-agreed agenda with a very full record of exchanges. Another SA imagined such meetings might be possible if carefully designed through a statutory scheme, with clear rules on how the SA is to operate. One SA noted that an SA is not in a position that is any different from that of an intelligence officer questioning a suspect or a witness when the former has secret information that s/he wishes to verify while at the same time trying to avoid involuntary disclosures. The SA suggested that the skills obtained in years of work as a barrister adequately equip the SA to steer around involuntary disclosure. The writings of one SA cite with approval the view taken by the Senate of Canada in its 2007 report on Canadian anti-terrorism laws; namely, that an

adequately trained SA should be able to take instructions and seek information from a named person without compromising secret information.¹⁰⁶

At our July roundtable, SAs were also introduced to (and were supportive of) the Canadian SIRC process, in which the SA equivalent enjoys access to the named person throughout the process.

As noted above, Lord Carlile strongly favours a relaxation of the named person communication rules, as have several UK parliamentary committees.¹⁰⁷

2. Key Functions

a) Challenging the Government Case

As noted, the SA acts in the best interest of the named person. SAs are specifically charged in SIAC and control order proceedings with “(a) making submissions to the court at any hearings from which the relevant party and his legal representatives are excluded; (b) cross-examining witnesses at any such hearings; and (c) making written submissions to the court.”¹⁰⁸

¹⁰⁶ Blake, *supra* note 100 at para. 4.9. The Senate recommended strongly that a Canadian special advocate be able to meet with the named person even after accessing secret evidence. It noted the following: “In addition to being sworn to secrecy, and being subject to offences under the *Security of Information Act*, a special advocate should follow clear guidelines when meeting with the affected party or his or her counsel. For example, he or she might communicate with the client in the company of another person, likewise sworn to secrecy, so that there can be close monitoring of what is discussed and inadvertent errors of disclosure prevented. In other words, the limited ability of the advocate to communicate information to the party must be acknowledged and maintained. The Committee believes that the government is in a position to establish appropriate safeguards to ensure that sensitive information relating to matters of national security is kept secret. The underlying objective would be to permit communication between the special advocate and the affected party, in the interest of procedural fairness, while still maintaining the credibility and integrity of matters involving national security confidentiality.” Senate Special Committee, *supra* note 7 at 36.

¹⁰⁷ Lord Carlile of Berriew Q.C., “Anti-Terrorism, Crime And Security Act 2001 Part IV Section 28 Review 2004” at para. 78 (“there should be available to special advocates an easier and closer relationship with the individuals whose interests they represent, and their private lawyers. In some cases such contact would have to be subject to the approval or direction of SIAC, especially in the absence of agreement between the special advocate and the police etc as to the nature and extent of the issues to be raised. There must be factual issues, about where the detainee was and when, or about the reasons for association with certain persons, on which direct discussion with the detainee or his private lawyers would assist in the doing of justice” [“Lord Carlile 2004”]; Joint Committee On Human Rights, *supra* note 102; United Kingdom, House of Commons and House of Lords, Joint Committee On Human Rights, “Review of Counter-terrorism Powers, Eighteenth Report of Session 2003-04” HL 158, HC 713 (4 August 2004) at para. 40 (“The rule that there can be no contact whatsoever between the detainee and the special advocate as soon as the advocate sees the closed material also means that there is little meaningful contact between the detainee and the representative of their interests in the closed proceedings”) [“Review of Counter-terrorism Powers”]; United Kingdom, House of Commons, Constitutional Affairs Committee, “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates - Seventh Report of Session 2004-05” Vol. I, HC 323-I (3 April 2005) at 33 (recommending that the government reconsider the extreme limitation of SA/named person contact during the closed session and noting that it “should not be impossible to construct appropriate safeguards to ensure national security in such circumstances” and that “this would go a long way to improve the fairness of the Special Advocate system”).

¹⁰⁸ CPR, Rule 76.24; SIAC Rules, Rule 35.

In practice, SAs may present arguments on the admissibility of government information, albeit under rules that are quite permissive on the question of admissibility.¹⁰⁹ SAs presumably present arguments on the weight information should be given by the tribunal. SAs do also cross-examine government witnesses, exploring inferences drawn from government information or inconsistencies in witnesses' testimony.¹¹⁰

Lord Carlile, in his review of UK anti-terrorism law, has reported that SA "analysis and examination of factual matters" has been rigorous.¹¹¹ Further, there have in fact been instances where SAs have challenged successfully at least part of the government's case by noting discrepancies in the government's approach between cases. In one circumstance, the government used information in one case that had been discredited in the other. The government was challenged successfully on this practice by the SA, who happened to be the same person in both cases. All told, one SA indicated that there had been three successful SIAC appeals (and several bail hearings) in which the SA had played a significant role.¹¹² In a number of other cases, the SA has pressed the government on matters of consistency and disclosure with significant impact, but without altering the overall outcome of the case. Given this experience, Lord Carlile regards criticisms of SA effectiveness as unduly pessimistic.

Without question, however, it is clear that SA effectiveness is inhibited by the inability of SAs to communicate with the named person once they are in "closed". The defence lawyers to whom we spoke emphasized quite pointedly that the SAs' ability to offer a full answer and defence is non-existent, given the constraints on communication between the SA and the named person. They cautioned against overstating the utility of SAs in challenging the government case.

SAs themselves consistently acknowledged that their inability to communicate (other than in the narrowest circumstances) with the named persons or their solicitors after receiving closed material impairs their effectiveness.¹¹³ SAs are obviously ill-positioned to challenge the credibility of government information in the same way they might do so in a regular proceeding; that is, by offering an exculpatory explanation (of the sort that can only be derived from the named person him or herself) for superficially incriminating information. For example, a named person impugned by a secret government informer might be able to cast doubt on the information provided by the

¹⁰⁹ Evidence produced via torture or other abusive forms of interrogation would, however, be vulnerable to challenge by the special advocate on admissibility grounds. See discussion in Blake, *supra* note 100 at para. 1.10.

¹¹⁰ *Ibid* at para. 1.16.

¹¹¹ Lord Carlile 2004, *supra* note 107 at para. 74.

¹¹² By way of example, see *M v. Secretary of State for the Home Department*, SC/17/2002 at para. 10. Critics of the SA process suggested, however, that in this case the SA's success came in challenging the security service's flawed understanding of the operational scale of a given terrorist group (and whether it could properly be considered an international terrorist entity), not in terms of querying the factual minutiae of the named person's own activities.

¹¹³ Lord Bingham, dissenting in *Roberts* [2005] U.K.H.L. 45 at para. 18, described the special advocate as inevitably "taking blind shots at a hidden target".

informer in a way that no SA could (*e.g.*, the informer and the named person have a history of animosity that might drive the former to lie about the latter).

SAs are technically permitted to call witnesses on behalf of the named person, but one SA has written that “this is a practical impossibility because even if one knew what witnesses were available, calling them to address issues of fact would alert them to the nature of the issues that have to be kept closed in the first place. Expert witnesses will be unable to comment on a secret assessment without themselves being security-cleared and having authorized access to the resources of the security service on which the assessment is based.”¹¹⁴ Moreover, if SAs put forwards a positive case in the closed sessions, “that positive case is inevitably based on conjecture. They have no way of knowing whether it is the case that the appellant himself would wish to advance”.¹¹⁵

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

b) Pressing for Fuller Disclosure to the Special Advocate Him or Herself

i) Nature of Secret Information Disclosed to the Special Advocate

The SIAC rules require the government to serve on the SA a copy of the closed material.¹¹⁶ We were told that the nature of the closed information provided to SAs varies. Sometimes, for instance, SAs do receive actual transcriptions of intercepted communications. In other instances, SAs receive analytical summaries or assessments prepared by the security services that may quote from intercept materials. In the latter instance, SAs worry that the assessment is selective, reflecting the government’s position and not necessarily a full or fully-contextualized rendition of recorded conversations. Moreover, these summaries sometimes contain “piled” hearsay – that is, second-hand (or perhaps seventh or eighth hand) accounts of inculpatory conversations. Some of these accounts may be supplied by other security services, in summary analytical form. In this manner, subjective analysis is compounded by subjective analysis.

Even where SAs receive full transcripts, some noted that the questions posed by the security service tend to be designed to advance the service’s presuppositions, and not always to explore other alternatives. The information received by the SA is, in other words, geared in one direction.

This tendency may reflect the function of security services; namely, to develop risk assessments, and not necessarily to ferret out criminal activity amenable to prosecution in full criminal proceedings. The focus on risk assessments and the

¹¹⁴ Blake, *supra* note 100 at para. 1.8.

¹¹⁵ Evidence submitted by a number of special advocates, *supra* note 93, at 16.

¹¹⁶ SIAC Rules, Rule 37.

information that support them sits poorly with adjudicative models habituated to more conventional standards of evidence.

ii) Extent of Disclosure to the Special Advocate

On a related issue, the obligations on UK authorities in SIAC proceedings to make full disclosure to SIAC, the SA or, in the case of public source material, the named persons and their counsel are more limited than in mainstream litigation. For example, while in regular litigation, the reference in a disclosed document to another document makes the latter discoverable, this approach has not been adopted in SIAC proceedings.

In his 2004 review of the relevant provisions in UK anti-terrorism law, Lord Carlile concluded “that there has been meticulous attention to the importance of disclosure in an appropriate way of material adverse to the Secretary of State’s case or otherwise of assistance to the Appellant.”¹¹⁷ Lord Carlile reaffirmed this view in reacting to a draft of this report, noting that in his view the government has been very careful and accurate in disclosure matters. One SA to whom we spoke also indicated the government record on disclosing exculpatory information was improving.

There was no consensus on this point, however. Several SAs suggested that while they interpret the rules as obliging disclosure of both inculpatory and exculpatory information, the government sometimes fails to disclose exculpatory information in its possession. SAs have had to rely on the government’s own assessment of what information is relevant. For this reason, the material SAs themselves receive is sometimes redacted – that is, portions are blacked out supposedly because they are irrelevant.¹¹⁸

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

SAs have, therefore, sometimes pressed the government to disclose to the SAs themselves more than is on the closed record. While their legal right to do so is unclear, SAs obviously see their role as being not simply reactive; that is, to respond to and probe the information already provided by government. Instead, they have taken a proactive approach, asking for more information. The SA capacity to press for full disclosure will likely be enhanced by recent procedural rule changes. Under these amendments, the government is expressly obligated to disclose both a statement of the information on which it relies and “any exculpatory material” of which it is aware.¹¹⁹ The new rules also

¹¹⁷ Lord Carlile 2004, *supra* note 107 at para. 86.

¹¹⁸ We were told that where the government wishes to redact, it must justify this action before SIAC.

¹¹⁹ *Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007*, S.I. 2007 No. 1285, s. 9, amending rule 10.

set out clear standards of how the government is to conduct its search for exculpatory materials.¹²⁰

It remains to be seen how diligently the government will perform these responsibilities. SAs complained that government disclosure of information to the SAs under the current rules has often been very tardy, to the extent that SAs have often not been able to execute effectively their function in pressing for greater disclosure to the named persons themselves, described below.

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

c) Enhancing Disclosure to the Named Persons and their Counsel

SAs clearly see as one of their key (and perhaps principal) roles pressing for greater disclosure to the named persons and their counsel. In performing his or her functions, the SA serves the best interest of the named person by acting as an impartial assessor of secret information and championing its release where the SA believes it warranted. Thus, having vetted the closed information, SAs may urge the release of innocuous information, and may obtain the consent of the government to this disclosure. Sometimes this release may come in the form of a sanitized summary of closed information. In other instances, it may constitute the actual information in question. For example, the SA may find an alternative, open source for some of the closed information, thereby discrediting the view that this information is non-disclosable to the named person. One SA indicated, for example, that in some cases SAs have been able to force the government to provide fuller disclosure by doing Internet searches to establish that information that was being withheld was readily available over the Internet. Cross-referencing closed material against public source information available elsewhere is obviously a time-consuming activity, one that SAs have in the past said is difficult for them to undertake.¹²¹

According to one SA, most disclosure requests are not in practice tremendously extensive and about half are accepted by the government. In instances where the government resists release, SAs may pursue what is known as a “Rule 38” procedure in an effort to obtain a disclosure order from the tribunal. Several SAs critiqued the UK law applied by the tribunal in adjudicating these disputes. These rules bar disclosure where national security interests are engaged without obliging the tribunal to balance these

¹²⁰ *Ibid.*, s. 10, creating rule 10A. The existing control order rules provide that “The Secretary of State is required to make a reasonable search for relevant material”. CPR Rule 76.26. “Relevant material” is “any information or other material that is available to the Secretary of State and relevant to the matters under consideration in those proceedings”. CPR Rule 76(3) and *Prevention of Terrorism Act 2005*, Schedule, s-s. 4(5).

¹²¹ See, e.g., Evidence submitted by a number of Special Advocates, *supra* note 93 at 19.

interests against the public interest (or interest of the named person) in disclosure.¹²² Where the tribunal does in fact rule in favour of disclosure, the government may simply withdraw the information to avoid this obligation.

SAs were usually circumspect in describing whether they thought the government was too aggressive in claiming secrecy over materials. They sometimes noted the clash of cultures between jurists and the security services in terms of transparency and respective assessments of the public interest. Several SAs acknowledged, however, that they had encountered situations where, in their view, the government had made unpersuasive claims to secrecy – one described some of these claims as “laughable”.

Tribunals were described as deferential (sometimes to excess) of government claims to secrecy. While SAs obviously cannot identify publicly the details of information they believe is wrongfully withheld, nothing bars them from publicly announcing their dissatisfaction with the level of disclosure in a case, and some have sought to communicate this view to named persons.

d) Communicating Existence of Grounds for Appeals

SAs do not themselves have standing to appeal SIAC decisions to the Court of Appeal, a handicap that some SAs believe should be corrected. However, as noted, the SA may seek permission from the tribunal to contact the named person and communicate the existence of grounds for appeal. The actual grounds may concern closed information, and may not, therefore, be disclosable. However, the SA would then be able to plead closed grounds before the Court of Appeal.¹²³

3. Legitimacy of the Special Advocate System

a) Necessity

In his independent reports and testimony, Lord Carlile has been generally supportive of the systems in which SAs operate. In relation to SIAC, for example, he has expressed “no doubt that SIAC has performed its functions in a thorough and entirely judicial way, and to a high standard within its jurisdiction. The questioning and analysis of evidence by the Commission itself has been robust, and they have striven for fairness”. As concerns secrecy rules, he has expressed his belief that

national security could be at risk if certain types of evidence were revealed to the detainees. At risk too would be some individuals’ lives. The kind of evidence I have in mind includes that provided by ... ‘informants’, disclosure of locations used for observation, details of technical facilities available for listening to and/or reading communications, descriptions and identities of police

¹²² See discussion in Blake, *supra* note 100 at 1.11 *et seq.*

¹²³ *Ibid* at para. 1.17.

officers and others, and methods of risk assessment used by control authorities.¹²⁴

Lord Carlile has, therefore, repeatedly accepted the need for special advocates, although he has urged reforms in the area of appointment, training and resourcing (partially or largely fulfilled) and fuller communication between SAs and named persons (not fulfilled).

For their part, SAs generally accepted the need for an SA system in the immigration context, where due process rules are underdeveloped. SAs willingly state, however, that the system of which they are a part is unfair, although they varied in how strongly they made this point. None advanced the argument that their presence ensures a process that comes close to meeting fair trial standards. Fairness hinges on the named person's full right to answer and defence, a right that an SA system does not supplant or satisfy.

SAs urged, however, that their presence represents a marked improvement of what went before – that is, entirely *ex parte* and *in camera* proceedings. Their presence, while not rendering the process tantamount to a fair hearing, at least made the detention better than arbitrary. While one SA underscored the system could never fully satisfy the fundamental common law requirement that justice be seen to be done, others urged that at the least the system could be perceived as fairer.

b) Criticisms

Critics of the SA system include some defence lawyers, civil society organizations and former SAs who resigned in protest. These persons and groups have many objections to the immigration and control order systems in which SAs function. These include concerns about the quality and sort of “evidence” used (that is, intelligence of sometimes doubtful provenance), the burden of proof on the government and the level of disclosure made by the government to the tribunal and named person. As noted above and again below, SAs share many of these concerns.

At core, critics urge that a system in which named persons do not know the case against them cannot be fair. It contaminates the system of justice and breeds cynicism on the part of named persons. SAs “give a veneer of legality” to this fundamentally unfair system.¹²⁵ One former SA who resigned in protest writes that his “role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial.”¹²⁶ Critics often direct their fiercest objections at the concept of tainting and “being in closed” – that is, the notion that special advocates are precluded from meeting with

¹²⁴ “Evidence submitted by Lord Carlile of Berriew QC” (24 January 2005) in Evidence submitted by a number of Special Advocates, *supra* note 93 at 1-2.

¹²⁵ Amnesty International, “Justice perverted under the Anti-terrorism, Crime and Security Act 2001”, AI Index: EUR 45/029/2003 (11 December 2003).

¹²⁶ Ian Macdonald QC, “The Role and Experiences of a Special Advocate in Suspected Terrorist Detentions” (19 June 2007 version) (on file with the authors) at para. 24 [“Ian Macdonald”].

named persons once exposed to closed material.¹²⁷ Some defence lawyers complain that the SAs have not pursued close questioning on issues of significance, such as whether information deployed by the government stems from torturing states. They also argue that SAs, as under-resourced barristers, are woefully ill-equipped to do the investigative work necessary to build a solid defence case. Moreover, they also allege “capture” of SAs; that is, that SAs become accustomed to their insider status in a manner that impairs their effectiveness.

Critics also bemoan the spread of closed information and SAs in UK law. The government now rushes to use closed information in many contexts, in a manner disproportionate to the threat. There have been occasions where, by reason of government error, this closed information has been served on the named person in the past. Defence lawyers argue that in these cases, the information has been of verifiably poor quality.

These complaints have been echoed by parliamentary committees. In July 2007, the UK Parliament Joint Committee on Human Rights issued a strongly-worded report describing the special advocate system as “‘Kafkaesque’ or like the Star Chamber.”¹²⁸ On the specific issue of special advocates and communication with named persons, it made the following recommendation:

In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person. ... With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.¹²⁹

The Committee also criticized the level of disclosure made by the government to the named person – concluding that secrecy is sometimes excessive – and the low burden of proof the government must satisfy to make-out its SIAC case.

¹²⁷ See, e.g., Amnesty International, “Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001”, AI Index: EUR 45/017/2002 (5 September 2002) at 16; Amnesty International, “United Kingdom - Human rights: a broken promise”, EUR 45/004/2006 (23 February 2006); Metcalfe, *supra* note 93 at 17; “Evidence Submitted by Liberty” (February 2005) in Evidence submitted by a number of Special Advocates, *supra* note 93 at 28; Ian Macdonald QC, *supra* note 126 at para. 15.

¹²⁸ Joint Committee On Human Rights, *supra* note 102.

¹²⁹ *Ibid.*

c) Alternatives

SAs, defence lawyers and civil society organizations were each questioned about alternatives to the present system. At least one SA favoured more regular use of the criminal justice system, together with surveillance of suspects by the security services. This person acknowledged, however, that stronger due process protections in the criminal context might limit the ability of the authorities to counter *bona fide* risks.

Critics of the system also propose moving towards a model with greater procedural guarantees. Critics were reasonably receptive to a SIRC-style system; that is, one in which the special advocate had continuous contact with the named person. However, some of these people wish to see the SA function confined to the information disclosure role described above; that is, pushing for greater disclosure of secret information to the named persons and their counsel. In a recommendation that echoes SA complaints, they urged that the SIAC should have power to compel disclosure where the public interest in disclosure – specifically, the interest in a fair proceeding – outweighs the national security interest in secrecy.

Some critics then urge that where the government continues to refuse to disclose information ordered disclosed on public interest grounds, SIAC should be empowered to call a halt to the proceedings on the basis that a fair adjudication cannot be held. This approach would resemble that produced by section 38 of the *Canada Evidence Act*, at least in so far as the latter applies to criminal proceedings.

Halting a proceeding on fair trial grounds begs the question, however, of how subsequently to grapple with the perceived threat presented by the named person. Some critics noted that the operational effectiveness of a named person subject to proceedings is inherently limited, and therefore the risk posed by this person diminished. Other SA critics proposed that persons no longer amenable to proceedings on fair trial grounds, but who continue to be perceived by the government as security risks, should be subjected to enhanced surveillance. Put another way, given a choice between a constraint on liberty produced by an unfair proceeding and an erosion of privacy, at least some critics favour the latter.

Some more comfortable with the SA system viewed this proposal as unrealistic; it does too little to respond to *bona fide* security risks by overstating the utility and effectiveness (while discounting the cost in terms of resources) of surveillance.

d) Scope

While SAs vary in the extent to which they are skeptical of the present system, they consistently resisted “mission creep” or “normalization”; that is, the notion that the SA system would be appropriate in circumstances where due process is richly developed and embedded in UK (and international) law. Criminal matters are a clear case in point; no SA endorsed the notion that their function should be extended to the criminal trial process itself (outside of public interest immunity determinations analogous to *Canada Evidence Act* section 38 proceedings). As one SA put it, the more serious the

consequence of the adjudication to the named person, the more inappropriate the use of the SA in lieu of full answer and defence.

Moreover, some suggested that the propriety of the SA approach even in administrative proceedings varies depending on the nature of the issue. It is one thing for SAs to be used in determining whether a person constitutes a national security threat, a matter where the government interest in secrecy is likely tied to a desire to protect sources and techniques. It was quite another thing for SAs to be used in the adjudication of whether named persons would suffer torture if deported. Information on the latter issue relates to the practices of foreign states, disclosure of which might affect the diplomatic relations of the UK or embarrass the foreign state. However, the interest in protecting international relations did not have the same gravity and weight as the national security interest, and might be preserved by measures short of SAs – including holding *in camera* proceedings in which the named persons or their lawyers were present, perhaps on the strength of a non-disclosure undertaking.

E. Strengthening the UK Special Advocate System

Throughout our study, interviewees were asked to propose changes to the UK SA system that would improve it. SAs made several recommendations, some of which reflect themes that have already been described above.

- *More Contact With Named Persons:* As noted, SAs and many other observers favour a liberalization of the rules governing communication with the named person during the closed session and a relaxation of the concept of tainting. Those with whom we discussed this matter appeared comfortable with the role played by Canada's SIRC outside counsel.
- *Enhanced Standard of Proof:* SIAC proceedings are governed by a "reasonable suspicion" standard of proof, one that is easily met by the government. Some SAs urged that this standard should be increased to a "balance of probabilities", a change that would compel the government to disclose more information (at least to the SA and SIAC) to make out its case.
- *Full Disclosure Obligation:* On a related issue, SAs favour a more comprehensive obligation on government to disclose all relevant information, whether exculpatory or inculpatory, to the named persons, their counsel or, where the material is secret, to the SA.¹³⁰ The disclosure obligation should be legislated in clear terms and should be extensive, circumscribing the scope of what may be considered reliable evidence. As one SA put it, reliable evidence should not include third or fourth hand hearsay information from a source. Moreover, there should be sanctions for very late disclosure of material by the government.

¹³⁰

As noted above, some of these concerns may be addressed by rule changes made in 2007.

- *Balancing Test for Disclosure:* As noted, some SAs support a balancing test to be applied by SIAC in weighing the public interest in disclosure of secret information to the named persons and their counsel against the national security interest in non-disclosure. Some SAs also wished to have the power and standing to appeal non-disclosure orders by the tribunal into the regular courts.
- *Gradation of Secrets:* Some SAs urged that not all secrets should be treated in the same manner. National security secrets dealing with sources and techniques are properly withheld from the named persons and their counsel and are the subjects that should involve SAs in closed hearing. SAs were, however, less persuaded that other secrets – and more particularly those relating to diplomatic and international relations – should be withheld from the named persons and their counsel. The latter sorts of secrets preserve the government from embarrassment but do not relate to fundamental national security preoccupations. Where diplomatic and international relations sensitivities are acute, the proper solution is an *in camera* hearing, a publication ban and/or a non-disclosure undertaking from those made privy to the material.
- *Adequate Information Sharing:* SAs resisted the notion that information sharing of closed material between SAs should be restricted and urged that there be full SA access to all open and closed judgments.

Some SAs expressed a desire to be more involved in the open session case, the portion of the proceeding during which the named person's lawyer leads information and focuses on whatever open source information the government is relying upon. This desire was not shared by other SAs, who suggested that any relevant open material could be dealt with by the SA in the closed session, negating the need to take an active role in the open session.

PART VI: DEVELOPMENTS IN NEW ZEALAND

Before turning to the policy report, we note that one other common law jurisdiction – New Zealand – has now developed a special advocate model in national security-related cases.¹³¹ First introduced on an *ad hoc* basis for a particular case – the review of a security risk certificate issued against Ahmed Zaoui – a statutory model has just been proposed in the Immigration Bill introduced in the New Zealand Parliament on 8 August 2007.

A. Overview

The existing New Zealand *Immigration Act* includes a special national security-related immigration process for proceedings implicating secret information – the “security risk certificate” process.¹³² Under the process, a non-citizen may be stripped of certain immigration privileges, to the point of actual deportation, via the issuance of a security risk certificate. Where credible security justifications exist on the basis of classified security information, the director of the New Zealand Security Intelligence Service may issue a security risk certificate and provide it to the responsible minister. If the latter chooses to rely on the certificate, the named person is served with notice and arrested.

The named person may then seek a review of the director’s decision to issue a security risk assessment by the Inspector-General of Intelligence and Security, an official charged with playing an ombudsman-like role in relation the security services. In this review, the named person may be represented and have access to relevant information, except classified security information. The Inspector-General determines whether the information relied upon by the director is properly classified, whether it is credible and whether the person presents the stated security risk. Supplemental appeals are to the Court of Appeal with leave.

This security risk certificate process has been used once, in the case of Ahmed Zaoui. The Zaoui matter has sparked substantial litigation.¹³³ By the time of this writing, Zaoui was subject to a security risk certificate and had appealed to the Inspector-General. Hearings before the latter were underway. Because some of the information against Zaoui is classified, parts of the proceedings are *in camera* and two special advocates have been appointed to represent his interests.

¹³¹ Note that there is also a special attorney procedure available for the U.S. Alien Terrorist Removal Court, 8 U.S.C. § 1534, but to the best of our knowledge this system has not been used to date.

¹³² *Immigration Act 1987* (N.Z.), 1987/74, Part 4A.

¹³³ See, e.g., *Zaoui v. Attorney-General*, [2006] 1 N.Z.L.R. 289 (N.Z.S.C.); *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 577 (N.Z.C.A.); *Zaoui v. Greig*, [2005] 1 N.Z.L.R. 105 (N.Z.H.C.); *Zaoui v. Attorney-General*, [2005] N.Z.S.C. 38; *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 690 (N.Z.C.A.); *Zaoui v. Attorney-General*, [2004] 2 N.Z.L.R. 339.

B. Special Advocates

The New Zealand special advocate system is in its infancy and has been thus far utilized on an *ad hoc* basis. Many of the procedures undertaken in the Zaoui matter are being invented from whole cloth. In brief, the special advocates in that case were appointed by the Inspector-General to present argument on the question of how much secret information should be disclosed to Zaoui and his counsel and, when the time comes, to test in cross-examination the closed information employed by the government and to make submissions on the closed material. Both special advocates – a senior and a junior barrister – have backgrounds in criminal law, and were selected for their cross-examination experience and ability to assess facts.

The appointment was made by the Inspector-General based on the latter's statutory ability to control his own process. The special advocate system does not as yet have a formal statutory imprimatur. Special advocates are not supported by a support office, and indeed appear to be in the same under-resourced situation reported by UK special advocates prior to the creation of SASO. As in the United Kingdom, the special advocates have little or no access to security-cleared security experts able to assist in the interpretation of the security information, and regard this as a serious impediment.

In the Zaoui matter, the Inspector-General's role has been largely inquisitorial rather than adjudicative; that is, the Inspector-General has often met with the security services in the absence of the special advocates and the named person to discuss the intelligence marshalled against the latter.

In the last several months, that inquisitorial process has morphed into a more adjudicative stage in which the so-called "open" information relied upon by the security service has been challenged in hearings. The special advocates have now also begun to receive closed information, and as in the United Kingdom are from this point forward barred from meeting with the named person. Hearings on the closed material have been delayed by disputes over the scope of disclosure, with the special advocates questioning whether the security services have provided to them all relevant information. As in the United Kingdom, the security services reportedly have a different view of relevancy than do the jurists performing the special advocate role.

PART VII: EVALUATION AND POLICY CONCLUSIONS

This final Part of the report draws on the factual materials distilled above to propose principles that should guide the development of Canadian administrative procedures in the national security area. It begins with several premises that inform the policy proposals and then describes a system satisfying these premises.

A. Fair Hearing Rights Are the Metric Against Which to Measure IRPA Security Certificates and Analogous Procedures

The *Immigration and Refugee Protection Act* (IRPA) is not intended as a punitive statute, instead fostering the conditional presence of non-nationals in Canada. Nevertheless, it includes provisions that, in practice, may result in the imposition of special disadvantages on non-nationals up to and including prolonged incarceration without trial where national security concerns are engaged. Further, since IRPA now technically permits removal in extreme circumstances to face torture or other forms of persecution in the destination state, this immigration system may culminate in the indirect administration of a penalty far graver of what could legally be imposed in Canada. Put another way, IRPA security certificates are dressed up as an administrative procedure, but set in train consequences that may be in excess of those legally available under the criminal law.¹³⁴ Exactly for this reason, the government should always consider whether or not there are alternate measures that could be employed to abate security concerns before resorting to IRPA. These could include using the criminal law process or relying on close surveillance.

In any event, because of the potentially grave consequences of IRPA proceedings, it is unfathomable that the fair hearing rights extended under security certificates should be more relaxed than those in criminal proceedings. This position should now be uncontroversial in light of the Supreme Court's approach in *Charkaoui*. In that case, the Court clearly used robust fair hearing rights housed in section 7 of the *Charter* as the metric by which security certificates were evaluated. Section 7 was triggered, first, by the fact that the security certificate process produces the detention of the named person and second, by the fact that the security certificate may culminate in the removal of the person to possible persecution and even torture.¹³⁵ It should also be observed that the serious reputational impact of identifying the named person as a terrorist could, in its own

¹³⁴ The case for robust fair hearing rights should not be overstated: not all IRPA and potentially not all national security-related procedures will trigger application of s. 7. Applications for permanent residency from within Canada, a matter governed by the discretionary powers accorded the Minister of Immigration by IRPA, do not usually implicate fears of persecution, detention or psychological injury. Even in these cases, there is a right to be heard as a function of common law procedural fairness. There is not, however, a constitutional right to the fair trial guarantees found in s. 7. The prescriptions we propose in this Part are, therefore, directed at procedures that truly implicate a life, liberty or security of the person interest.

¹³⁵ *Charkaoui*, 2007 SCC 9 at para. 13 and 14.

right trigger, section 7. Security of the person protects against state action potentially inflicting serious psychological injury.¹³⁶

The robust approach to fair hearing rights advanced by the Supreme Court in *Charkaoui* apply, almost certainly, to other procedures implicating life, liberty and security of the person. These include, in addition to security certificate, the following, procedures in Canadian law:

- regular inadmissibility proceedings under the *Immigration and Refugee Protection Act* in which the named person is either detained or is potentially subject to removal to persecution;
- the section 38 process under the *Canada Evidence Act* in which the underlying proceeding is either criminal or an administrative proceeding implicating a life, liberty or security of the person interest; and,
- terrorist group listing and delisting processes in the *Criminal Code* and under the relevant regulations of the *United Nations Act* because of the reputational impact of naming a person a terrorist entity or financier.

For ease of reference, we describe these procedures as “section 7 triggering” in the discussion that follows.

B. The Fair Hearing Obligation Is Violated Whenever Persons Are Not Entitled to Know Fully the Case Against Them

A hearing without full knowledge of the case to be met will always be unfair,¹³⁷ at least where the consequences of the proceeding for the named person implicate a life, liberty or security of the person interest.¹³⁸ This right is violated by use of secret information. Any use of secret information is a derogation from a right. It must be justified as such.

¹³⁶ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 at para. 116 *et seq.*, *per* McLachlin C.J. (noting that “serious psychological effects [as well as physical harm] may engage s. 7 protection for security of the person”). It should also be noted that the terrorist label affixed to some individuals subject to security certificates enhances the prospect of persecution should they be removed to a country with a repressive regime.

¹³⁷ *Charkaoui*, 2007 SCC 9 at para. 53 (“a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case”).

¹³⁸ *Ibid* at para. 60 (“Where limited disclosure or *ex parte* hearings have been found to satisfy the principles of fundamental justice, the intrusion on liberty and security has typically been less serious than that effected by the *IRPA* ... It is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention.”)

C. Where the Government has a Compelling Interest in Secrecy, that Secrecy Should Be as Minimally Impairing of the Fair Hearing Interest as Possible

Other values may sometimes necessitate an unfair hearing. In Canadian law, this concept is captured in section 1 of the *Charter*, permitting departures from *Charter* rights where necessary in a free and democratic society. In *Charkaoui*, the Supreme Court underscored that departures from section 7 fair hearing rights are permissible only rarely and in the most extraordinary circumstances.¹³⁹ They must also meet the standard section 1 test; that is, the existence of a pressing and substantial objective and proportional means. The latter requirement, in turn, requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective.¹⁴⁰ These considerations guide the discussion that follows.

D. Not All Government Claims to Secrecy Are Equal

In *Charkaoui*, the Supreme Court concluded that the protection of national security intelligence sources constitutes a pressing and substantial objective justifying a departure from fair hearing standards.¹⁴¹ Not every secret claimed in national security cases implicates national security intelligence sources, however, or implicates these sources in the same fashion. Two secrecy issues that commonly arise in Canadian national security cases are originator (or third-party) control and the mosaic effect.

1. Not Every Claim to Third-Party Originator Control Should Be Treated the Same Way

As a middle power with limited foreign intelligence capacities, Canada is particularly inclined to observe “third-party” or “originator” control caveats on information supplied by foreign intelligence services under information sharing arrangements or otherwise. These provisions bar the disclosure of intelligence supplied by the originator agency without the latter’s permission. For example, provisions allowing *in camera* and *ex parte* proceedings and limiting disclosure of information in the security certificate process are motivated, in part, by the need to keep foreign-provided intelligence secret.¹⁴²

It is often claimed that failure to honour these understandings will impair the subsequent willingness of agencies to share information, to the detriment of Canadian

¹³⁹ *Ibid* at para. 66.

¹⁴⁰ *Ibid* at para. 67.

¹⁴¹ *Ibid* at para. 68.

¹⁴² See *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 142 at para. 75 (FC). CSIS reports, for example, the reasons for non-disclosure of information in IRPA security certificate proceedings include the need to protect “methods or information communicated in confidence from a foreign agency”: CSIS Backgrounder, *supra* note 41. This issue has also arisen in prosecutions in relation to terrorist offences. See *Khawaja*, [2007] F.C. 490 at para. 123 *et seq.*

national security.¹⁴³ However, blanket prohibitions on disclosure because of simple foreign provenance gives secrecy law an extended reach in an intelligence-importing country like Canada. Care should be applied, therefore, in recognizing an originator control justification for secrecy.

First, the fact that intelligence-sharing agreements Canada has entered into contain these requirements is not, alone, a justification for impairing a *Charter* right. There is no authority for (or sense in) the proposition that an international agreement entered into by the executive somehow trumps constitutional rights. For this reason, consideration of originator control arguments should always be functional rather than preoccupied with the simple existence of international agreements. The analysis should focus on whether disclosure would, in actual fact, impair an intelligence-sharing relationship in a manner likely to cause jeopardy to Canada and its residents.

Second, it is unlikely that every piece of foreign information must truly be held secret because it would jeopardize the security interests of the providing state. At the very least, the government should be obliged to seek permission to disclose from the foreign source in an effort to separate actually sensitive information from more benign data. This is an obligation that probably already exists in the *Access to Information Act* and *Privacy Act* contexts¹⁴⁴ and has also been invoked by the Federal Court in relation to the *Canada Evidence Act*.¹⁴⁵ In the latter context, the court examines whether “good faith efforts were made and continue to be made to obtain such consent.”¹⁴⁶ This is an approach that should be applied also in all section 7 triggering procedures.

Moreover, the government cannot claim “third-party” confidentiality over information that, although obtained from a foreign partner, it has received or possesses also by other means. Any refusal to disclose this information must instead be grounded in another justification.¹⁴⁷ Nor can third-party confidentiality be used “to protect the mere existence of a relationship between Canada and a foreign state or agency, absent the

¹⁴³ CSIS, for example, told the Federal Court in 1996 that “CSIS receives sensitive information, not just because of the third party rule which requires CSIS to treat the information as confidential, but also because there is confidence on the part of information providers that the Canadian government understands the need for confidentiality and has in place practices and procedures to safeguard information”: *Ruby v. Canada (Solicitor General)*, [1996] 3 F.C. 134, [1996] F.C.J. No. 748 (F.C.T.D.) at para. 26. Without this confidence in Canada’s ability to restrict disclosure, some allies “may discontinue the alliance or association. Others may continue their alliance, but with a reluctance to be candid”: *ibid.* at para. 27. Similar views were expressed in this and other cases by the RCMP and the Department of National Defence and Foreign Affairs. See, e.g., *Ribic v. Canada (Attorney General)*, [2003] F.C.J. No. 1965, 2003 FCT 10 at para. 10; *Khawaja*, 2007 FC 463 at para. 122 *et seq.* The RCMP – which reports that it receives seventy-five times more information from partner agencies than it provides – implies caveats even when documents do not contain emphatic language on sharing information with third parties: *ibid.* at para. 127.

¹⁴⁴ See *Cemerlic v. Canada (Solicitor General)*, [2003] F.C.J. No. 191, 2003 FCT 133 at para. 18 *et seq.* (F.C.T.D.) (discussing s. 19 of the *Privacy Act*, R.S.C. 1985, c. P-21)

¹⁴⁵ *Khawaja*, 2007 FC 463 at para. 146 (“it is not open to the Attorney General to merely claim that information cannot be disclosed pursuant to the third party rule, if a request for disclosure in some form has not in fact been made to the original foreign source”).

¹⁴⁶ *Ibid.* at para. 152.

¹⁴⁷ *Ibid.* at para. 147; *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2006 FC 1552 (FC) at para. 66.

exchange of information in a given case.”¹⁴⁸ It follows also that secrecy designed to avoid simply embarrassing foreign governments and to preserve diplomatic relationships does not constitute an objective that should justify a limitation on fair hearings in section 7 triggering proceedings.

Last, there comes a point where disclosure limitations on the basis of originator control are simply unacceptable. For example, claiming originator control as a justification for non-disclosure to a judge or a special advocate him- or herself, even on an *in camera* and *ex parte* basis, constitutes such a gross overreach that it should not be permitted, even at risk of irritating a foreign government. To do otherwise would be to engineer a system in which the executive can imperil life, liberty or security of the person without ever truly showing cause for this disadvantage before an impartial tribunal. It also amounts to deferring to intelligence-sharing states to the point of surrendering control over the administration of justice in Canada.

If a named person cannot be pursued by the government without recourse to information that a foreign government refuses to disclose at least to a judge or special advocate, the government must find some other way to develop its case or to protect Canada’s security interest.

2. Not Every Claim of a Mosaic Effect Should Be Treated the Same Way

Government secrecy in security certificate or other national security cases is often predicated on the “mosaic effect”. The mosaic effect posits that the release of even innocuous information can jeopardize national security if that information can be pieced together with other data by a knowledgeable reader. The result is a mosaic of little pieces of benign information that cumulatively disclose matters of true national security significance,¹⁴⁹ such as intelligence sources and techniques.¹⁵⁰

The mosaic effect has been accepted by Canadian courts, and has guided decisions on disclosure. At core, the doctrine is sensible, at least if the feared adversary is a fully-equipped foreign intelligence service. The doctrine is much less persuasive when invoked to stave off information collection by much less well-resourced and expert terrorist groups. For this reason, the mosaic effect almost certainly does not always necessitate a full limitation on fair trial rights. As discussed below, strictures on the flow of information less pernicious than full *ex parte* proceedings might, in some instances,

¹⁴⁸ *Khawaja*, 2007 FC 463 at para. 148.

¹⁴⁹ As urged by one CSIS official in a public affidavit in Federal Court, “assessing the damage caused by disclosure of information cannot be done in the abstract or in isolation. It must be assumed that information will reach persons with a knowledge of Service targets and the activities subject to this investigation. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source”: reproduced in *Canada (Attorney General) v. Kempo*, [2004] F.C.J. No. 2196, 2004 FC 1678 at para. 62.

¹⁵⁰ See, e.g., discussion in *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 at para. 29, *aff’d* [1992] F.C.J. No. 100 (FCA). See also the discussion in *Arar Commission*, 2007 FC 766.

vitiate the risk posed by the mosaic effect. In other cases, the SIRC experience demonstrates that a named person could certainly be questioned by a suitably cautious special counsel in a manner that satisfies concerns about the mosaic effect.

E. Not All Claims to Government Secrecy Raise the Same Pressing and Substantial Objective Justifying Departure from Ordinary Fair Trial Standards

Because not every secret is equal, not every secret necessitates an erosion of fair hearing rights, or where it does, the same limitation. There are four possible levels of secrecy concerns, measured against the degree to which they legitimate a departure from conventional fair hearing requirements:

1. The secrecy concern raises no pressing and substantial objective sufficient to justify any departure from the full fair hearing requirements.
2. The secrecy concern raises a pressing and substantial objective, but one that can be addressed through holding an *in camera* (but not *ex parte*) proceeding.
3. The secrecy concern raises a pressing and substantial objective, but one that can be addressed through *in camera* proceedings allowing counsel for the named person access to the information pursuant to a non-disclosure undertaking.
4. The secrecy concern raises a pressing and substantial objective that can only be addressed through a special advocate.

Each of these levels of departure from fair hearing rights is discussed in turn.

1. Some Secrets Justify No Departure from Fair Hearing Rights

It is almost trite to note that not every claim to government secrecy warrants erosion of fair hearing standards. The government claims confidentiality to most of the information in its possession, with greater or lesser degrees of urgency. There is a broad swath of information that might, for example, be unavailable under the *Access to Information Act* pursuant to one of its exceptions but which, in a proceeding triggering constitutional fair hearing provisions, must be disclosed. The simple invocation of national security confidentiality by government does not suffice. There must always be room for a court to order disclosure where, on balance, it disagrees with the government assessment or the public interest in disclosure outweighs the secrecy imperative. This is, in essence, the system created by section 38 of the *Canada Evidence Act*. There is no principled reason why the disclosure procedure employed in any of the section 7

triggering proceedings should differ from this section 38 balancing approach. Government claims to secrecy where fair hearing considerations are in play should be assessed according to a similar standard.

The outcome of that assessment must not be simply a choice between full disclosure or disclosure of only a rudimentary summary, and then recourse to *ex parte* proceedings. There are gradations of responses open to the courts, including those that are discussed below.

We underscore, however, that we do not agree with all aspects of section 38, as it is now crafted. For one thing, we query the need for an Attorney General's certificate. We also believe that the concepts of "potentially injurious information" and "sensitive information" in section 38 are overbroad and, in this respect, prefer the focus in IRPA on information "injurious to national security or to the safety of any person".

RECOMMENDATION 1: All questions of secrecy in relation to information withheld by the government should be assessed against the same balancing test; specifically, one analogous to that established in section 38 of the *Canada Evidence Act* in which a judge weighs the public interest in disclosure against the public interest in non-disclosure and is empowered to authorize forms and conditions of disclosure that reflect this balancing.

2. Some Secrets Justify a Departure from Fair Hearing Rights Only to the Extent That Court Proceedings Are Closed

In Canada, court proceedings are presumptively open.¹⁵¹ However, hearings may be closed if a court is persuaded that "the salutary effects" of the closed court are proportionate to its deleterious effects on the rights and interests of the parties and the public.¹⁵² Even in situations where a court is closed, however, parties are presumptively present. The hearing is not *ex parte*, in other words.

Some government secrets may justify a closed court (and a publication ban), but not the exclusion of the named person. Without limiting the range of possible secrets

¹⁵¹ The Supreme Court of Canada has repeatedly underscored this point, pointing to the common law and relying on the *Charter*. See, e.g., *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paras. 21-22, [1996] S.C.J. No. 38 [*Canadian Broadcasting Corporation* cited to S.C.R.]; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124. For instance, the Supreme Court has held that "freedom of expression in section 2(b) protects both listeners and readers": *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, 2002 SCC 75 at para. 52. It therefore supports "open courts": "openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings": *ibid.* at para. 53, citing *Canadian Broadcasting Corporation (ibid.* at para. 23).

¹⁵² *Re Vancouver Sun*, 2004 SCC 43 at para. 71.

falling into this class, it seems likely that some (although not all) claims to the mosaic effect are unpersuasive if information is shared within a narrow circle and kept off the public record. It may strain credulity to imagine that all terrorist groups, for example, have the capacity to chase down even receptive named persons participating in *in camera* proceedings and piece together assorted pieces of innocuous information in a manner that is ultimately prejudicial to national security.

The *in camera* approach might also be properly used to reduce the circulation of secrets that embarrass foreign governments or hinder Canadian foreign relations, but only incidentally jeopardize a national security interest. Limiting disclosure to the named person and his or her counsel minimizes the prospect of the feared foreign relations fallout. It also recognizes that even if this fallout arises, it cannot trump the named person's right to a fair hearing.

3. Some Secrets Justify a Departure from Fair Hearing Rights Only to the Extent that the Named Person (but not their lawyer) Is Excluded

Some secrets implicate national security interests more squarely or more seriously. Perhaps because of the mosaic effect, this information may not be disclosable to the named person without serious consequence. At the same time, that person's lawyer might be cleared to view this information. Sharing secrets in this manner might abate concern about the mosaic effect – the information in question would only fall in the hands of adversaries if lawyers shared the information. The latter possibility would be minimized if counsel were security-cleared and under a non-disclosure undertaking.

This approach has been employed at least once in Canada. In the Air India criminal trial,¹⁵³ counsel for the defendants were allowed access to information over which the government claimed national security confidentiality. In return, they undertook not to disclose this information to their clients. Subsequently, counsel negotiated with the Crown and CSIS on whether individual documents were of real importance to the defence and should be disclosed in the public interest. This system of examination and discussion reportedly “allowed counsel for the parties to resolve every disclosure dispute involving potentially privileged documents.”¹⁵⁴ Documents that were released in this manner were then available to the defendants, while other documents were returned to CSIS.¹⁵⁵

RECOMMENDATION 2: Before even reaching the question of special advocates, a court must be

¹⁵³ Decision reported as *R. v. Malik*, 2005 BCSC 350.

¹⁵⁴ Michael Code & Kent Roach, “The Role of the Independent Lawyer and Security Certificates” (2007) 52 *Crim. L.Q.* 85 at 107 [“Role of the Independent Lawyer”]. See *Role of the Independent Lawyer* (*ibid.* at 109-111) for a discussion of the implications of this approach for the solicitor-client relationship and an argument that this relationship is not unduly impaired.

¹⁵⁵ Certainly such an approach will place some strains on the solicitor-client relationship and can only be undertaken with the full knowledge and prior informed consent of the named person.

persuaded that other, less rights-impairing alternatives will not preserve a *bona fide* government interest in secrecy. These alternatives include:

- ***In camera* proceedings during which the named persons and their counsel are present; and,**
- ***In camera* proceedings during which the named persons' counsel, but not their clients, are present.**

4. Some Secrets Justify a Departure from Fair Hearing Rights and Require Recourse to a Special Advocate Meeting Core Prerequisites

Other secrets may be so sensitive that they cannot be disclosed to an external party other than in a summary form, even in an adjudicative setting and even pursuant to an undertaking. Originator control may reach this far, for example. In these circumstances, a special advocate might reasonably replace the named person's counsel in non-criminal proceedings.

A word of amplification is warranted here. While this issue lies beyond our remit in this report, we do not believe that a special advocate would ever be appropriate in a criminal trial, except in relation to section 38 *Canada Evidence Act* proceedings. We urge above that the consequences of IRPA proceedings may be graver than those lawfully available under the *Criminal Code*. There remain, however, differences between criminal and administrative proceedings that render special advocates inappropriate in the former. First, use of special advocates (and secret information) in criminal trials impairs the right to a jury trial, since a jury would presumably be excluded from proceedings in which secret evidence is led. Two rights lying at the core of our legal tradition would therefore be affected by a special advocate procedure: the right to a fair trial and the right to a jury trial in criminal matters. Derogations of this double right would be unsupportable, in our view, especially since other jurisdictions have concluded successful terrorism criminal trials without dispensing with juries.

Second, while the consequences associated with IRPA proceedings are as (or even more) dire than those imposed via a criminal conviction, the probability of these consequences arising is greater in criminal matters. A criminal conviction *does* result in a criminal sentence, typically incarceration. Removal of a non-national *may* result in a chain of events that produces persecution in the country of removal (or detention of an uncertain length pending that removal). The IRPA system is not, however, geared towards imposing these disadvantages. Put another way, while both systems attract application of section 7 and fair hearing rights, the derogation from these rights permissible under section 1 should take account of the certainty of the negative consequence flowing from that derogation. The heightened certainty of deleterious consequences stemming from the criminal proceedings militates against use of a special advocate system in the criminal trial.

Our recommendations on a special advocate system are, therefore, directed exclusively at administrative proceedings (in which category we also include section 38

of the *Canada Evidence Act*). The discussion below outlines core prerequisites for a sensible special advocate system. It suffices to say here that special advocates could be brought within the envelope of persons permanently bound by secrecy under the *Security of Information Act*, in the same manner as SIRC or members of security services. As noted above, refusing access to information to special advocates under these circumstances would constitute overreach of originator control or other secrecy rules. Special advocates should also be viewed as persons with the same need to know status under secrecy rules as, for example, the members of the Security Intelligence Review Committee.

We believe that the chief role of the special advocate should be to press for greater disclosure of secret information to the named person before the Federal Court (pursuant to the *Canada Evidence Act*-like balancing test discussed above) and, in relation to information that is not disclosed, to test its veracity in active cross-examinations and independent investigation. To perform these functions, however, the special advocate system must meet certain core prerequisites discussed below.

5. No Secrets Justify Anything More Extreme than Recourse to a Special Advocate Meeting Core Prerequisites

In the Canadian IRPA *status quo*, no special advocate exists and judges exercise an inquisitorial function as well as sitting as a decision-maker. Because of their prior background, some of the designated judges at the Federal Court have experience in security intelligence matters that equals or exceeds that of any prospective special advocate. This is not the case for every judge, however. Moreover, asking a judge to be both an inquisitor and a trier of fact creates an impossible burden. It is not simply that these two roles may create difficult tensions in the psyche of the judge, or that they may lack the training to perform an effective inquisitorial function. As the Supreme Court also noted,¹⁵⁶ judges may not be adequately positioned or resourced to perform the investigative and research function required to counter the government's case.

No one we spoke to in the United Kingdom endorsed the double-tasked judge system employed by Canada, and several – such as Lord Carlile – explicitly warned against it. In Canada, the outside counsel we spoke to from SIRC and the Arar Commission also warned against the Canadian *status quo*.

We believe that judges should continue as adjudicators in the section 7 triggering matters discussed above. We suggest that even in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case. Further, just as in criminal cases the government lawyer is obliged to pursue the interests of justice and not be single-minded in their partisan cause, so too in cases in which the named person is excluded a special burden of fairness must fall on the government side.

¹⁵⁶ *Charkaoui*, 2007 SCC 9, at paras. 50 *et seq.*

There is no question, however, of maintaining a system in which the full burden of testing the government case falls on the judge, even when in the presence of the most principled government lawyer. We can imagine no circumstance in which the state has so pressing and substantial an objective that it would be impossible to employ a special advocate.

F. In Those Limited Circumstances Where Special Advocates are Appropriate, the Special Advocate Function and Office Should Meet Certain Core Prerequisites

As the discussion above makes clear, we believe that pressing grounds may necessitate an unfair hearing, with the most extreme manifestation of that unfairness being recourse to a special advocate in *ex parte* and *in camera* administrative proceedings. It is critical to underscore, however, that not all conceivable systems of special advocates are equal. A system that does not meet certain core prerequisites would, in our view, be worse than no system at all. An inferior system would give the false imprimatur of more fairness. Such a system – paying mere lip service to minimal impairment of a fundamental right – would prove truly perilous to the rule of law.

We will be blunt: any system that does not meet the core qualities we set out in this part will be a sham. We do not make this assertion lightly. It is based on our extensive conversations with participants in and critics of the UK and New Zealand systems and our interviews with outside counsel to SIRC and the Arar Commission. In particular, a system in which the special advocate has no meaningful contact with the named person once the former has seen secret information and where full disclosure is not made to the special advocate is no better than simple *ex parte* adjudication before an experienced and earnest Federal Court judge, knowledgeable in security intelligence matters.

It is also notable that most of the prerequisite qualities we identify are already part of the existing SIRC outside counsel system. For this reason, a special advocate system that does not incorporate these prerequisites would almost certainly constitute a derogation from the practice already employed in Canada in national security cases, including in immigration proceedings prior to 2002. Given this SIRC experience, we do not see how any system less robust than that employed by SIRC could be justified on a minimal impairment theory under section 1.

1. The Government Must Make Full Disclosure to the Special Advocates Themselves

We repeat a point made above: the consequences to named persons in IRPA proceedings may far exceed those that may be lawfully imposed under the *Criminal Code* – removal to persecution or prolonged detention without trial. It is unpersuasive, disingenuous and simply unjust to urge that the nominally administrative nature of IRPA (and several of the other section 7 triggering processes listed above) should attract

standards of disclosure that fall short of the full criminal model. Without this system of expansive disclosure, a special advocate model would do nothing to minimize the unfair hearing. A blindfolded special advocate can do little or nothing to advance the interests of the named person.

We believe there are five criteria that disclosure must meet:

- disclosure in at least those IRPA proceedings in which detention and/or removal to persecution are possible outcomes must be full, and include information both favourable and unfavourable to the government case;
- the government must act in utmost good faith in performing this disclosure obligation and must disclose on an ongoing basis as new information comes into its possession;¹⁵⁷
- while the government's assessment of the relevance of information is a starting point, relevance must also be assessed by an impartial, independent assessor;
- a failure to meet disclosure obligations must be correctable; that is, there must be a body with the power to compel disclosure of the information to the special advocate; and,
- intelligence employed as evidence in court proceedings must be retained and preserved and accessible in the disclosure process, including electronic copies of intercepted communications from which transcripts are developed and on which intelligence assessments are based.

We underscore that full disclosure must mean that a body in addition to the security services is empowered to review a full record in the possession of the security services and to make assessments of relevance. Even acting in the utmost good faith, the security services will have a worldview and predispositions that render their vision of what information is relevant different from that of a legal advocate. This was a point repeatedly made by UK and New Zealand special advocates and Canadian outside counsel involved in the SIRC and Arar processes.

We underscore that in a special advocate model, the mere fact that information is secret should not impede disclosure to the special advocate. The latter's exact function is to see this information. On the other hand, we accept that the special advocate has no need for genuinely irrelevant information. The security services will likely balk, therefore, at even security-cleared special advocates being authorized to rifle at will through CSIS materials, and thereby peruse undeniably irrelevant information in the hunt for relevant material.

This objection would probably be less acute and certainly less persuasive if SIRC were interposed and/or had a supervisory role in the special advocate disclosure process. As discussed above, SIRC is statutorily authorized to see all information in the possession of CSIS, other than Cabinet confidences. This access is not tempered where

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For the seminal case on disclosure in criminal cases, see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

SIRC employs outside counsel (legal agents). Moreover, SIRC is already equipped to handle this information in a manner that preserves confidentiality.

Logically, SIRC's existing review and complaints adjudication role could be extended to grapple with the special advocate disclosure issue. For example, if SIRC's role and resources were expanded so that SIRC incorporated a special advocate support office, independent scrutiny of information in the possession of the security services on relevancy grounds could be undertaken by solicitors employed by SIRC. As SIRC personnel, these solicitors would enjoy SIRC-level access and if they discovered information relevant to the case they would then be authorized to share this information with the special advocate.

This system would have the added benefit of ensuring that an institution with substantial understanding of and expertise in security intelligence, but at arm's-length from the security services, has a central role in aiding special advocates, most of whom will not have special expertise in security matters.

In sum, there is no reason why a special advocate system in IRPA and other matters could not simply be piggybacked on the existing disclosure procedures for a more comprehensively-resourced SIRC. In those limited cases where IRPA or analogous procedures are sparked by RCMP information, there is no reason why SIRC (or any prospective enhanced RCMP review body) could not host disclosure to a special advocate.¹⁵⁸ Creating this system would simply require some tinkering with SIRC's legislative superstructure along with meaningful supplemental resourcing.

2. The Special Advocate Must Be Authorized to Question the Named Person after Reviewing the Secret Information

Without question, it is essential that a Canadian special advocate system follow the SIRC model and permit the special advocate ongoing access to the named person throughout the proceeding. Obviously, the special advocate must guard against involuntary disclosure and should be subject to secrecy obligations. As in SIRC cases, the special advocate could meet with the named person in the presence of SIRC counsel. The latter could assist the advocate in avoiding questions constituting involuntary disclosure. However, the SIRC outside counsel (legal agent) to whom we spoke was unequivocal about the importance of continuing access to the named person: even while counsel's questions must be carefully phrased to avoid involuntary disclosure, he has seen government cases collapse based on information he could only have obtained because of this ongoing communication.

The United Kingdom and New Zealand systems that essentially bar ongoing communication with the named persons are excessive, and the justifications for them hinged on the suspicions harboured by the security services towards special advocates.

¹⁵⁸ Note that under the pre-IRPA system that involved SIRC, described above, SIRC was presented with RCMP evidence when relevant. See discussion in *Chiarelli v. Canada*, [1990] 2 F.C. 299 (FCA), *rev'd* [1992] 1 S.C.R. 711.

There is simply no reason to presume that special advocates are more prone to involuntary disclosure than government lawyers or security service interviewers; indeed one of our interlocutors who has acted for the government in security cases noted that government lawyers too must tread warily in asking questions in public premised on secret information. UK special advocates and their Canadian equivalents argued that an experienced trial lawyer is a professional question-asker, perhaps even more adept at this practice than a security service interrogator.

More than any other feature of the UK system, this absence of real access to the named person has undermined the credibility of the special advocate model. A Canadian special advocate model that barred this access would (rightly) attract controversy. It would also constitute a departure from the SIRC system already employed here and would be very difficult to defend on section 1 grounds.

That said, there is one caveat to adopting the SIRC model. A special advocate model should not replicate the double-role of the current SIRC counsel; that is counsel to the presiding member and counsel tasked with aggressive cross-examination of the security service. First, there is no need in proceedings before the Federal Court for this dual role. Second, as counsel to the presiding member, SIRC counsel have no duty of confidentiality to the named person, possibly deterring the latter from full and frank disclosures and potentially creating complexities in terms of professional responsibility. We recommend below that a duty of confidentiality between the special advocate and the named person analogous to that existing in the solicitor-client relationship be created by statute. If SIRC counsel is to be present during questioning of the named person by the special advocate, a similar duty would have to extend also to SIRC counsel. Since the latter is not in proceedings before the Committee itself, this confidentiality would not impair SIRC counsel's relationship with SIRC members.

3. The Special Advocate Must be Adequately Resourced and Independent of Government

Without full resourcing of the special advocate system, the inequality of arms between the government and the special advocate will make the latter simply token. This is a lesson drawn from the pre-SASO experience in the UK, and indeed one that continues to resonate given the persisting resource imbalance between the SAs/SASO and the government. The special advocate must also be (and be perceived as being) independent of government to have credibility in the eyes of named persons and the public.

Meeting these objectives necessitates the following attributes of the special advocate office.

- First, special advocates should be of advanced standing in the profession and must be experienced trial lawyers. Without trial experience – and the ability to cross-examine and marshal evidence in a court setting – special advocates will be ineffectual. As in the UK, we do not believe that special

advocates require a particular substantive skill set – any record trial experience will do. Special advocates must also be selected for their independence – they must neither be (nor be perceived as being) accommodating of government positions. As one of SIRC’s legal agents put it, the special advocate must be prepared to “rip the throat out” of the security service witness on cross-examination, and not be preoccupied with preserving relations with the service.

- Second, special advocates should be appointed to a roster of special advocates (from which named persons choose) by a body that is itself arm’s-length from executive government. The roster should be public and the lawyers on it sufficiently numerous to allow named persons real choice. Canada should follow the UK precedent in security clearances. That jurisdiction has not “gamed” their system by using the security clearance process to create a roster of advocates sympathetic to government positions.
- Third, the special advocates must be adequately supported by an administrative apparatus that allows them to master and marshal information in the case. They must have the capacity to conduct independent research and analysis. Much as was the case with the Arar Commission, they should also be able to draw on a pool of security-cleared experts in security and intelligence as expert witnesses or advisors on intelligence matters that arise.
- Fourth, the special advocate must be in a relationship of solicitor-client like confidentiality with the named person, and the special advocate must be protected against any effort by the government to compel the advocate to disgorge information disclosed to him or her by the named person.
- Last, having stripped named persons of their right to full answer and defence and denied access to the government information by named persons’ chosen counsel, the government should provide sufficient funding so as to ensure that counsel of the highest quality are willing and able to participate in the special advocate system.

All told, the government must be prepared to finance the special advocate function properly to retain the services of experienced trial lawyers and supply independent administrative support. Again, piggybacking the special advocate system on SIRC is attractive. SIRC has an already established, independent administrative capacity that could be enhanced to support special advocates and aid in their vetting and selection.

4. The Special Advocate Must Have Legislative Sanction

An *ad hoc* system of special advocates appointed by the court in a pseudo-*amicus curiae* role is unworkable. It cannot meet fully the other prerequisites set out above. Lacking an administrative support system funded by parliamentary appropriation, court-appointed special advocates would be gravely under-resourced. Their selection would appear arbitrary, and their powers and ability to access secret information contestable. Further, their exact status vis-à-vis the named person would be unclear: would they have a duty of confidentiality to that person, for example. For all these reasons, the special advocate system must be created by statute, one that addresses all these matters.

RECOMMENDATION 3: In the limited circumstances where alternatives are not reasonably available, a special advocate should be used to press for greater disclosure of secret information to the named person before the Federal Court (pursuant to the *Canada Evidence Act*-like balancing test discussed above) and, in relation to information that is not disclosed, to test its veracity in active cross-examinations and independent investigation. However, only a special advocate system with the following qualities is acceptable:

1. Special advocates must have the power to compel full disclosure to the special advocates themselves;
2. Special advocates must be authorized to question the named person after reviewing the secret information;
3. Special advocates must be highly-skilled trial advocates and must be adequately resourced, trained and independent of government; and,
4. The special advocate system must be established by statute, and not as an *ad hoc* measure.

G. The Government's Burden Should Reflect the Gravity of the Consequences to the Named Person

We end our discussion on a final point related to the adjudication of national security matters. Even a special advocate system that met all of the prerequisites set out above would not cure certain fundamental difficulties with the present IRPA system. IRPA permits deprivations of liberty on the basis of government suspicions, and nothing more.¹⁵⁹ Further, the information offered by the government in support of the

¹⁵⁹ A named person is detained under IRPA, s.82, on "reasonable grounds".

reasonableness of a security certificate is assessed on the basis of a “reasonable ground to believe” standard, a threshold much lower than the accepted criminal or civil law standards of proof.¹⁶⁰ Finally, a person may be removed to face persecution where the government considers the security risk presented by that person so justifies, and these decisions are reviewed by courts applying highly deferential standards of review.¹⁶¹

Where the consequences to the named person are so grave – and indeed graver than anything our criminal law could impose – the burden on the government should move in lock step. A deferential standard of review or a “reasonable ground to believe” standard of proof may be proper in circumstances where a named person’s security of the person interest is not a risk – say removal of a Russian sleeper agent to Russia. Likewise, reasonable suspicion may justify an initial detention pending deportation. However, as the gravity of the prospective consequences of removal to the person or the duration of detention increase, the government should bear an escalating burden. This escalating burden should apply in at least three manners:

- First, where a person remains detained under IRPA for more than a limited period of time, the government should be obliged to justify continued detention on a “balance of probabilities” standard rather than with reference to the reasonable suspicion that justifies the original detention
- Second, where the consequences of removal to the person trigger application of section 7, the standard of proof applied in assessing whether the government’s information justifies a conclusion that the security certificate is reasonable should be that of balance of probabilities and not reasonable grounds to believe.
- Third, where the consequences of removal to the person trigger application of section 7, courts should apply a searching standard of review to the government’s security assessments, possibly as high as correctness.

Escalating burdens will have the effect of obliging fuller government disclosure – it must show more to make out its case. It would also not prejudice the government’s ability to respond quickly since an initial security certificate could be issued or a detention ordered on the lesser standard. Only as the detention endured or the consequences of removal became clearer would the burden on the government escalate.

¹⁶⁰ See, e.g., *Re Jaballah*, 2006 FC 1230 at para. 68.

¹⁶¹ See, e.g., *Mahjoub v. Canada*, 2005 FC 156 at para 42 (“the Court must adopt a deferential approach to these questions, and intervene to set aside the delegate's decision only if patently unreasonable. This means that, in order for the Court to intervene, it must be satisfied that the decision was made arbitrarily, or in bad faith, or without regard to the appropriate factors, or the decision cannot be supported on the evidence. The Court is not to re-weigh the factors considered or interfere simply because the Court would have reached a different conclusion”).

RECOMMENDATION 4: Separate and apart from a special advocate system, the currently undemanding burden of proof and standard of review applied to the government in immigration and other administrative proceedings should be escalated once it becomes clear that life, liberty or security of the person are in peril.

APPENDIX I

List of Discussants in this Study

A. Individual Interviews

1. Special Advocates

Nicholas Blake QC (UK)
 Charles Cory-Wright QC (UK)
 Judith Farbey (UK)
 Martin Goudie (UK)
 Stuart Grieve QC (New Zealand)
 Hugo Keith (UK)
 Angus McCullough (UK)
 Helen Mountfield (UK, written comments only)
 Andrew Nicol QC (UK)
 Dinah Rose QC (UK)
 Joe Sullivan (Special Advocate Support Office) (UK)

2. Civil Society Groups and Defence

Lawyers

Eric Metcalfe (Justice)
 Timothy Otty QC (defence barrister)

3. Canadian Experts

Ronald Atkey QC (Arar Commission *amicus*)
 Gordon Cameron (SIRC outside counsel)
 Paul Cavalluzzo (Arar Commission counsel)
 Michael Duffy (General counsel, CSIS)
 Marian McGrath (Senior counsel, SIRC)

B. London Meetings

1. Special Advocate Roundtable

Zubair Ahmad
 Ronald Atkey QC (Canada, by telephone)
 Nicholas Blake QC
 Gordon Cameron (Canada)
 Paul Cavalluzzo (Canada, by telephone)
 Tom Carpenter (SASO)
 Charles Cory-Wright QC
 Neil Garnham QC
 Angus McCullough
 Joe Sullivan (SASO)
 Michael Supperstone

2. Civil Society and Defence Lawyers

Roundtable

Jessica Granatt (Liberty)

Ian Macdonald QC (former Special Advocate who resigned in protest)
 Eric Metcalfe (Justice)
 Margaret Mulrone (Amnesty International)
 Timothy Otty QC (defence barrister)
 Gareth Pierce (defence solicitor)
 Jago Russell (Liberty)
 Livio Zilli (Amnesty)

3. Other Meetings

Lord Carlile of Berriew QC