Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission to the Standing Committee on Public Safety and National Security in respect of Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*

Federation of Law Societies of Canada

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I INTRODUCTION

1. The Federation of Law Societies of Canada is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of governing Canada's 95,000 lawyers and 3,500 notaries in Quebec in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public. The Federation appreciates the opportunity to contribute to this Committee's study of *Bill C-3 - An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* ("Bill C-3").

2. The Federation has specialized knowledge and expertise regarding the role of counsel in the preservation of the rule of law and the administration of justice and is well placed to speak about legislative measures that deal with that role. In the fall of 2005 it made submissions before the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness about the security certificate process set out in the *Immigration and Refugee Protection Act* (the "IRPA")[1] and appeared before the Special Senate Committee on the *Anti-Terrorism Act*. The Federation also appeared before the Supreme Court of Canada as an intervener in the case of *Charkaoui* v. *Canada (Citizenship and Immigration).*[2]

II THE FEDERATION'S CONCERNS

3. The Federation has a number of concerns about the special advocate model contained in Bill C-3. The Bill proposes a minimalist model that does not adequately protect the fundamental rights of the individual named in a security certificate (the "named individual") when the government seeks to rely on confidential security information.

4. In particular the proposed model fails to:
   a. ensure that the special advocate has full access to all relevant material in the possession of the government;
   b. provide for an unqualified right of the special advocate to communicate with the named individual and the named individual's counsel throughout the entire proceeding;
   c. permit individuals named in security certificates to choose a special advocate from a roster of security-cleared lawyers;
   d. clarify the precise nature of the relationship between the special advocate and the named individual and to recognize the special advocate's duty of confidentiality to the named individual; and

e. ensure that the government will establish the appropriate infrastructure to guarantee that the special advocate is provided with sufficient resources to effectively perform the role.

III THE SECURITY CERTIFICATE REGIME AND SPECIAL ADVOCATES

a) Background

5. Bill C-3 is the government's response to the February 2007 decision of the Supreme Court of Canada in *Charkaoui*. The Court held that the procedure for determining the reasonableness of security certificates under the IRPA violates the principles of fundamental justice protected by section 7 of the *Canadian Charter of Rights and Freedoms*[3] (the "*Charter*") and is not saved by section 1 of the *Charter*.

6. Security certificates are used to declare permanent residents or foreign nationals inadmissible to Canada on grounds of "security, violating human or international rights, serious criminality or organized criminality." Once signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration a certificate must be reviewed by a judge of the Federal Court to determine whether it is reasonable.[4]

7. The IRPA requires the designated judge to determine the sufficiency of secret government evidence, which, if accepted, can serve as the basis for the detention and/or deportation of the person named in the certificate. The secret evidence is not disclosed to the named individual or the named individual's counsel, and is never tested by his or her counsel. Instead, the designated judge reviews the secret evidence and examines or cross-examines the government's witnesses personally, in the absence of the named individual and the named individual's counsel. It is this feature of the security certificate process that led the Court in *Charkaoui* to find the provisions unconstitutional.

8. While recognizing that the government may have legitimate grounds to keep certain evidence secret, the Court held that there are alternatives available to protect the secrecy of the evidence that would be less intrusive on the rights of the named individual. The Court specifically identified the use of special advocates as one of those alternatives.

b) The Special Advocate Experience

9. The Federation supports the appropriate and effective use of special advocates – - lawyers who have been security-cleared by the government and who represent the interests of named individuals when they and their counsel are excluded during the presentation of secret evidence. The special advocate model has been employed in Canada in the past and is used extensively in the United

Kingdom to attempt to alleviate some of the unfairness inherent in a process that does not permit a person to know the case he or she has to meet.[5]

i) The United Kingdom Model

10. The special advocate system has been in use in the United Kingdom since 1997. It is employed in immigration proceedings and in proceedings under the *Prevention of Terrorism Act* when secret evidence is being presented by the government and the affected person and his or her counsel are excluded from the hearing.

11. The special advocate is mandated to act in the interests of the affected person. It is the special advocate's role to challenge the government's case. The affected person is entitled to select the special advocate from a roster of security-cleared barristers. There are no restrictions on the right of special advocates to meet with the affected person prior to reviewing the secret information. After seeing the information, however, the special advocate is not permitted to have any communication with the individual without the permission of the court or tribunal. This aspect of the special advocate model has been severely criticized both by those who have acted as special advocates and by others in the United Kingdom. Concern has also been expressed about the extent of disclosure to the special advocate made by the government.[6]

12. One feature of the UK model that has been praised by lawyers who act as special advocates in the UK and other commentators is the extent to which the government has ensured that the lawyers appointed as special advocates be seen as independent of the government. The roster of special advocates includes highly regarded civil and human rights lawyers, and lawyers who have defended people accused of terrorism related offences.

ii) The SIRC Model

13. For more than twenty years, Canada has had its own special advocate model – a model that, in the view of the Federation, avoids many of the shortcomings of the UK model. Security-cleared lawyers have been used in proceedings before the Security and Intelligence Review Committee ("SIRC") in situations where secret evidence is presented in the absence of the affected person and that person's counsel.

14. SIRC is a body that reviews the activities of the Canadian Security and Intelligence Service ("CSIS") and considers complaints against CSIS. Prior to 2002, SIRC was involved in immigration proceedings. If the government sought to remove a permanent resident on security grounds, a report would be sent to SIRC, which was charged with the responsibility of determining the report's accuracy. In fulfilling its responsibility, SIRC could hold *in camera* hearings during

which secret evidence would be presented in the absence of the affected person and that person's counsel.

15. SIRC developed its own procedures, one of which was the retention of security-cleared lawyers to act as counsel to SIRC. These lawyers were charged with acting on behalf of the affected person by probing the secret evidence presented in the absence of the individual and his or her counsel and challenging decisions to deny the affected person access to the information. Despite the obligation to safeguard the secrecy of the evidence presented in the affected person's absence, SIRC counsel was permitted ongoing communication with the individual. It should be noted, however, that as counsel to SIRC they owed no duty of confidentiality to the individual.

16. Of utmost significance in the SIRC process were the following two features:
    a. SIRC counsel had access to all of the information CSIS had in relation to the affected person; and
    b. SIRC counsel was permitted to meet with the affected person and the affected person's counsel after reviewing the secret evidence.

17. The Court in *Charkaoui* noted that there had been no suggestion that the special counsel system "had not functioned well" and described the SIRC process as an example of the "Canadian legal system striking a better balance between the protection of sensitive information and the procedural rights of individuals."[7]

IV RECOMMENDATIONS TO IMPROVE BILL C-3

18. The special advocate regime in Bill C-3 is modelled on the UK system and contains many of the same flaws. To be effective and to minimize the inherent unfairness of denying the named individual the right to fully know the case against him or her, we respectfully submit that the regime be amended to include the following elements:
    - The special advocate should have full access to all relevant information possessed by the government;
    - The named individual should be permitted to choose a special advocate from a roster of security-cleared lawyers who are and who are seen to be independent of the government;
    - The special advocate should be permitted to communicate with the named individual throughout the process;
    - Communications between the special advocate and the named individual should be confidential;
    - The appropriate infrastructure should exist to ensure that the special advocate has sufficient resources to fulfill the role.

a) The Special Advocate's Access to Information

19. Once amended by Bill C-3, the *Immigration and Refugee Protection Act* will require the Minister of Public Safety and Emergency Preparedness (the "Minister") to provide the special advocate with a copy of all information and other evidence that will be provided to the judge but will not be provided to the named individual.[8]

20. The special advocate may challenge the Minister's claim that the evidence or other information be heard in the absence of the named individual, and its relevance, reliability and sufficiency.[9]

21. There is no express provision in Bill C-3 permitting the special advocate to review the material about the named individual in the possession of the government. Nor is there an express provision in Bill C-3 requiring the government to make full disclosure of all relevant information, inculpatory and exculpatory, to the special advocate.

22. To effectively perform their role to protect the interest of named individuals, special advocates must not be restricted to reviewing and challenging only that information presented to the court by the government. So restricted, the special advocate would not be in any different position than the Federal Court judges who currently review the reasonableness of security certificates. The Supreme Court of Canada described the judge's current position in *Charkaoui* as follows:

> … the judge's activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet.[10]

23. In the absence of rigorous standards of disclosure such as those laid down by the Supreme Court of Canada in *R.* v. *Stinchcombe*[11], the special advocate must be permitted access to all of the material in the government's possession related to the named individual to ensure that all relevant evidence, including exculpatory evidence, is before the court.

24. It is interesting to note that recent rule changes in the UK will require the government to disclose to the special advocate a statement of the information on which it intends to rely, as well as any exculpatory material of which it is aware.[12]

RECOMMENDATION 1

25. **The Federation recommends that Bill C-3 be amended to stipulate that the special advocate have access to all material related to the named individual in the possession of the government.**

RECOMMENDATION 2

26. **The Federation recommends that failing the inclusion of an express statutory provision providing the special advocate with access to all material in possession of the government, Bill C-3 should be amended to impose rigorous disclosure obligations should on the government to ensure continuing disclosure of all material, inculpatory and exculpatory, to the special advocate. The right of the special advocate to challenge the scope of information provided by the government should also be expressly provided for in the legislation.**

b) The Right of a Named Individual to Choose a Special Advocate

27. The *IRPA*, as amended by Bill C-3, requires a judge conducting a hearing related to the reasonableness of a security certificate to appoint a special advocate from a roster established by the Minister of Justice. The role of the special advocate is to protect the interests of the individual named in a security certificate when secret evidence is heard in the absence of the named individual and the named individual's counsel.[13]

28. As the Supreme Court of Canada determined in *Charkaoui*, a process whereby a named individual can be detained indefinitely or removed from Canada on the basis of evidence that the individual has not heard and to which he or she has not had an opportunity to respond violates the individual's right to fundamental justice guaranteed by section 7 of the *Charter*.

29. The appointment of a special advocate does not alter the fact that the rights of the named individual to know the case against him or her and to answer it are violated. The appointment of a special advocate is an attempt to redress this violation. It is in the interests of justice that the named individual has confidence in the special advocate appointed to assist him or her. The Federation is of the view that the person whose fundamental justice rights are violated must be entitled to choose the special advocate who will protect his or her interests from a roster of lawyers established by the Minister of Justice.

30. In its report, "Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act", the Committee took the same position recommending, "that the party affected by the proceedings be entitled to select a special advocate from among an adequately sized roster of

security-cleared counsel who have the appropriate expertise and are funded by, but not affiliated with, the government."[14]

31. To enhance the confidence in the independence of the special advocates the Minister of Justice may wish to consider consulting with representatives from organizations external to the government in appointing counsel to the list of special advocates. A precedent for such consultation exists under *The Director of Public Prosecutions Act,* which provided that a representative from the Federation of Law Societies of Canada was to participate in the process for the selection of the Director and Deputy Director of Public Prosecutions.[15]

RECOMMENDATION 3

32. **The Federation recommends that Bill C-3 be amended to provide that the named individual has the right to choose a special advocate from a roster prepared by the Minister of Justice of lawyers who are not affiliated with the government.**

RECOMMENDATION 4

33. **The Federation recommends that Bill C-3 be amended to require that the Minister of Justice consult with representatives of organizations external to the government when appointing counsel to the list of special advocates.**

c) Communications between a Named Individual and a Special Advocate

34. The most widely criticized feature of the UK special advocate model is the prohibition on communication with the named individual and the named individual's counsel once the special advocate has seen the secret evidence. The Court in *Charkaoui* noted this feature.

35. Pursuant to section 85.4(2) of the IRPA, as amended by Bill C-3, once having seen the secret evidence the special advocate may communicate with the named individual (or any other person) only with the judge's authorization. This requirement creates a presumption against ongoing communication between the special advocate and the named individual, potentially severely limiting the ability of the special advocate to fulfill his or her vital role. The essence of the case against the named individual may not be revealed until the special advocate has seen the secret evidence. To ensure that the special advocate can properly test the government's evidence and represent the interests of the named individual the special advocate must be able to engage in ongoing communication with the individual. Having the right to seek the authorization of the judge does not provide sufficient assurance that such communication will be possible.

36. There is ample precedent for permitting the special advocate to communicate with the named individual after seeing the secret evidence. For more than 20 years SIRC counsel were permitted such communication and as the Court noted in *Charkaoui* there has been no suggestion that communicating with the named individual after seeing secret evidence compromised the confidentiality of that evidence.

37. The importance of ongoing communication between the named person and the special advocate was noted by the Special Senate Committee on the *Anti-terrorism Act.* In its February 2007 report the committee recommended that, "the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security."[16]

RECOMMENDATION 5

38. **The Federation recommends that Bill C-3 be amended to guarantee the special advocate access to the named individual and the individual's counsel throughout the entire proceeding, subject to the obligation not to disclose the secret evidence.**

d) The Relationship between a Named Individual and a Special Advocate

39. Section 85.1(3) of the IRPA, as amended by Bill C-3 specifies that a special advocate will not be in a solicitor-client relationship with the person named in a security certificate. In a traditional solicitor-client relationship, the lawyer is obliged to share all of the information he or she is aware of that affects the named individual. The requirement that the special advocate keep the secret evidence confidential from the named individual precludes the establishment of a traditional solicitor-client relationship. The question of the confidentiality of communications between the named individual and the special advocate is not, however, addressed in the amendments.

40. While the appointment of a special advocate cannot completely eliminate the prejudice to a named individual who must attempt to meet a case he or she is prevented from fully knowing, every effort must be made to minimize the intrusion on the named individual's rights. Notwithstanding the fact that the relationship between the special advocate and the named individual cannot be one of solicitor and client, it is vital that communications between them be recognized as confidential.

41. The duty of confidentiality is a cornerstone of the ethical obligations of lawyers. The Code of Conduct of virtually every law society in the country spells out a positive obligation for lawyers to maintain the confidentiality of communications with their clients. Although the express exclusion of a solicitor-client relationship contained in Bill C-3 may make it difficult to determine the precise nature of the relationship that will exist between a named individual and a special advocate, the rationale for the duty of confidentiality nonetheless applies: A lawyer cannot render effective professional service to a person unless there is full and unreserved communication between them. Only with the assurance of confidentiality will the necessary full and frank communication take place between a named individual and a special advocate.

42. The need to protect the confidentiality of communications between a named individual and a special advocate also requires that the advocate not be compelled to disclose the communications between the named individual and the special advocate.

RECOMMENDATION 6

43. **The Federation recommends that Bill C-3 be amended to recognize that a duty of confidentiality is owed by the special advocate to the named individual.**

RECOMMENDATION 7

44. **The Federation recommends that Bill C-3 be amended to stipulate that a special advocate may not be compelled to disclose the communications between a named individual and a special advocate.**

e) Infrastructure to Support the Special Advocate

45. Special advocates must be in a position to effectively test the reliability and accuracy of the material presented to the court and evaluate any other information in the possession of the government. In order to do this, they require access to translators, experts in the field of national security and intelligence, and forensic experts.

46. To ensure that special advocates have the resources necessary to perform an independent analysis of the case against the named individual the government must provide the appropriate infrastructure. Failure to do so places special advocates in the same position as Federal Court judges under the impugned system, who were obliged to evaluate the evidence presented by one party without the means to independently examine it.

RECOMMENDATION 8

47. **The Federation recommends that the legislation be amended to impose a positive obligation on the government to establish the infrastructure necessary to support the special advocate role.**

V SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

The Federation recommends that Bill C-3 be amended to stipulate that the special advocate have access to all material related to the named individual in the possession of the government.

RECOMMENDATION 2

The Federation recommends that failing the inclusion of an express statutory provision providing the special advocate with access to all material in possession of the government, Bill C-3 should be amended to impose rigorous disclosure obligations should on the government to ensure continuing disclosure of all material, inculpatory and exculpatory, to the special advocate. The right of the special advocate to challenge the scope of information provided by the government should also be expressly provided for in the legislation.

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RECOMMENDATION 4

The Federation recommends that Bill C-3 be amended to require that the Minister of Justice consult with representatives of organizations external to the government when appointing counsel to the list of special advocates.

RECOMMENDATION 5

The Federation recommends that Bill C-3 be amended to guarantee the special advocate access to the named individual and the individual's counsel throughout the entire proceeding, subject to the obligation not to disclose the secret evidence.

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RECOMMENDATION 8

The Federation recommends that the legislation be amended to impose a positive obligation on the government to establish the infrastructure necessary to support the special advocate role.

Respectfully submitted,

Michael W. Milani, Q.C., President

VI ENDNOTES

[1] S.C. 2001, c.27
[2] 2007 SCC 9 ("*Charkaou*i").
[3] *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 (the "*Charter*").
[4] Sections 77 – 80 of the *Immigration and Refugee Protection Act*, as amended by Bill C-3
[5] For an excellent comprehensive review of the use of special advocates in Canada, New Zealand, and the United Kingdom, see Craig Forcese & Lorne Waldman, "Seeking Justice in an Unfair Process" (2007) citation?
[6] See, for example, United Kingdom, House of Commons, Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC): Report, together with formal minutes" (3 April 2005), HC323-1. A full discussion of the criticisms of the UK model is contained in "Seeking Justice in an Unfair Process" supra, note 8.
[7] *Charkaoui, supra* note 6, paragraphs 76 and 77.
[8] Section 85.4(1)
[9] Section 85.1(2)
[10] *Charkaoui* v. Canada (Citizenship and Immigration), 2007 SCC 9 at para.64
[11] [1991] 3 S.C.R. 326.
[12] *Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007*, S.I. 2007 No. 1285, s. 9, amending rule 10.
[13] Sections 85(1), 85.1(1) and 83(1)(b) of the *Immigration and Refugee Protection Act*, as amended by Bill C-3.
[14] *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, Recommendation 9, page 42.
[15] Section 4, Director of Public Prosecutions Act, 2006, c. 9, s. 121.
[16] *Supra*, note 14.