Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

PUBLIC SAFETY CANADA CONSULTATION:

OUR SECURITY, OUR RIGHTS: NATIONAL SECURITY GREEN PAPER, 2016

Federation of Law Societies of Canada Submission

Ottawa, December 14, 2016

1. The Federation of Law Societies of Canada ("the Federation"), on behalf of its member law societies, appreciates the opportunity to contribute to the government's consultation, "Our Security, Our Rights: National Security Green Paper, 2016" ("the consultation").

Submission Overview

1. This submission focusses on the special advocate regime currently in place under the *Immigration and Refugee Protection Act*[1] ("IRPA"), and the potential use of security-cleared lawyers in criminal, civil and administrative proceedings.

2. The Federation agrees that the protection of public safety and the safeguarding of confidential information related to national security are of vital importance. In our submission, however, in protecting national security it is essential that the rights of individuals in legal proceedings be upheld. In our submission, the current special advocate scheme fails to adequately protect the rights of individuals in proceedings under the IRPA. In particular, we are concerned about the adequacy of disclosure to the special advocate and the restrictions on the ability of the special advocate to communicate with the individual whose interests they are required to protect.

3. While it is the position of the Federation that full disclosure of the case against an individual in any legal proceeding is a fundamental aspect of our system of justice, we recognize that national security interests will at times restrict the information that can be disclosed. To address the obvious concerns created in those circumstances, there may be merit in considering a role for security cleared advocates to protect the rights and interests of the individual. Subject to the recommendations made below, the special advocate scheme under the IRPA may offer a model for such a role.

The Federation of Law Societies of Canada

4. The Federation is the national coordinating body of Canada's 14 law societies, which are mandated by provincial and territorial statutes to regulate the country's 117,000 lawyers, Quebec's 4,500 notaries and Ontario's nearly 8,000 licensed paralegals in the public interest. Among other activities, the Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members. The Federation also speaks out on issues critical to safeguarding the public's right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

5. Ensuring that the rule of law is respected and more particularly that the rights afforded individuals under the Charter and principles of natural justice are not infringed except in

[1] SC 2001, c 27

limited and exceptional circumstances set out in law are of vital importance to the proper and fair functioning of our system of justice.

Background: The Federation's Interest in Public Safety and National Security

6. The Federation has in the past expressed its support for the appropriate use of special advocates in closed security certificate (immigration) proceedings. The Federation appeared before the Supreme Court of Canada as an intervener in *Charkaoui v Canada (Citizenship and Immigration)*[2] to emphasize the importance of requiring the inclusion of special legal counsel in security certificate proceedings where the named person and his/her counsel are not privy to confidential information.

7. In September 2007 the Federation made submissions 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.* Bill C-3 was the government's response to *Charkaoui* and its requirement to have special counsel represent the interests of named persons in closed proceedings. At that time, the Federation expressed a number of concerns with Bill C-3's proposed regime; namely, that it did not adequately protect the fundamental rights of the individual named on the security certificate, that it provided inadequate access by the special advocate to information held by the government about the named individual, and that it unduly restricted communications between the special advocate and the named individual. Many of those concerns remain today.

The Federation's Concerns regarding the Special Advocate Scheme

8. The special advocate regime was an imperfect solution to a complex problem; individuals named on security certificates face the possibility of being removed from Canada on the basis of confidential national security information that is not available to either them or their counsel in the course of public proceedings. While maintaining the confidentiality of national security information is essential to protecting the public, great care must be taken to ensure that the rights of individuals, including the right to make full answer and defence to the case against them, are not unduly infringed. This is particularly acute in the context of security certificate proceedings, where an individual's liberty is at stake.

9. The imperfection of the scheme was recognized by the Supreme Court in *Canada (Citizenship and Immigration) v. Harkat* ("Harkat") where the Court held that "the scheme remains an imperfect substitute for full disclosure in an open court, and the designated judge has an ongoing responsibility to assess the fairness of the process and to grant remedies in s. 24(1) of the *Charter* where appropriate"[3]. While the role played by the judge is essential to ensuring the overall fairness of the process, the role of the special

[2] 2007 SCC 9 ("Charkaoui")
[3] 2014 SCC 37 para 77

advocate is also of vital importance: in the absence of counsel for the named person it is the role of the special advocate to protect and represent the individual's rights and interests. The very nature of the proceedings, including most importantly the restriction on sharing confidential national security information with the named individual, creates significant challenges in representing that person's interests. Unduly restricting the special advocate's access to the confidential information and his or her right to communicate with the named person significantly increases those challenges.

10. The Federation recognizes that the Court in *Harkat* found the special advocate scheme (as it existed at the time of those proceedings) to be constitutional and fair. In our view, however, elements of the scheme particularly as amended by Bill C-51, *Anti-Terrorism Act, 2015* unnecessarily restrict the ability of special advocates to protect the interests and rights of individuals named in security certificates

11. The Federation recommends the following changes to ensure special advocates are able to properly represent the named individual's interests, and to better support the administration of justice more broadly:

    a) There should be an express statutory provision providing the special advocate with access to all material in the possession of the government. Failing that, the IRPA should be amended to impose rigorous disclosure obligations on the government to ensure continuing disclosure of all material, inculpatory and exculpatory, to the special advocate.

    b) The legislation should be amended to give the special advocate an unqualified right to communicate with the named individual and the named individual's counsel throughout the entire proceeding, subject to the obligation not to disclose the secret evidence.

12. These points will be discussed in further detail below.

a) *Grant Full Disclosure to the Special Advocate*

13. As the Federation submitted in 2007, to effectively perform their role, special advocates must have access to all information about the person in the possession of the government. Not only was this concern not adequately addressed following the 2007 consultations, the 2015 amendments further restricted the access of special advocates to this information.

14. Prior to the amendments introduced by Bill C-51, the Minister was obligated under subsection 85.4(1) to disclose to the special advocate "a copy of *all information and other evidence* that is provided to the judge but that is not disclosed to the permanent

resident or foreign national and their counsel" [emphasis added]. This was a broad disclosure obligation that was not at issue in *Harkat.*

15. As amended, subsection 85.4(1) now obligates the Minister to provide the special advocate with a) relevant information and evidence presented to the court that forms the basis for the security certificate, and b) any other information that is relevant to the case, but does not form the basis for the certificate and which has not been presented to the court.

16. In addition, section 83(1) was amended to permit a judge to exempt the Minister from providing the information specified in section 85.4. Although the judge cannot rely on any exempted information in determining the outcome of the proceedings, this restriction does not strike the appropriate balance between national security interests and the interests of the named individual. While the IRPA provides for the possibility that the special advocate may be invited to make submissions on the issue of disclosure and may, for that purpose, be provided with limited information, such an invitation is entirely at the discretion of the judge.[4]

17. In the submission of the Federation, these restrictions on the special advocate's access to information are unnecessary to protect national security and may unduly hamper the ability of the special advocate to protect the interests of the named person. Without seeing all of the information about the named person that is in the government's possession, there is a real risk that the special advocate will be denied access to valuable information that could serve the individual's interests.

18. By its very nature, the role of the special advocate – representing the interests of an individual without being able to discuss relevant evidence – is a difficult one that presents very real challenges. Legal proceedings that take place in the absence of the individual whose rights and freedom are at stake represent a significant departure from the principle of open and transparent proceedings that is a foundation of the Canadian system of justice. While national security may justify this departure, in the submission of the Federation it is critical that the special advocate be given as much scope as is reasonably possible to protect the interests of the named person. This includes ensuring that they are able to scrutinize, challenge and rely upon all information and evidence that may assist them in protecting the rights of the named person.

19. In the submission of the Federation there is no evidence that providing full disclosure would present any additional risks to the security of the confidential national security information. The legislative scheme and the oath required of special advocates provide the necessary safeguards to maintain the secrecy of the confidential national security information. As we noted in our 2007 submissions, the experience of the Security

[4] S. 83(1)(c.2)

Intelligence Review Committee ("SIRC") with security-cleared lawyers in closed proceedings supports this conclusion. In *Charkaoui* the Supreme Court noted that there had been no suggestion that the SIRC special counsel system, which operated for more than 20 years, "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."[5]

Recommendation 1:
Amend subsection 85.4(1) to stipulate that the special advocate has access to all material related to the named individual that is in the possession of the government.

Recommendation 2:
Ensure that the right of the special advocate to challenge the scope of information provided by the government is expressly provided for in the legislation.

20. Without prejudice to our position that the legislation should provide for full disclosure to special advocates, if the government declines to amend the legislation as recommended above, the IRPA should be amended to expressly oblige the Minister to continually disclose information to special advocates as it becomes relevant over the course of a proceeding. The legislation is currently silent as to the timing and extent of the Minister's disclosure obligation.

Recommendation 3:
Failing the inclusion of an express statutory provision providing for full disclosure, amend the legislation to impose a continuing disclosure obligation on the government of all inculpatory and exculpatory evidence.

b) <u>Remove the Limit on Communications between Special Advocates and Named Persons</u>

21. Subsection 85.4(2) requires the special advocate to seek judicial authorization to communicate with the named person once he/she has received confidential information. The Supreme Court in *Harkat* found that this restriction does not render the scheme unconstitutional as it is not absolute, and the judge has sufficiently broad discretion to allow necessary communications to occur. The Court also noted that the named person and his/her public counsel can send unlimited one-way communications to the special advocate at any time in the proceedings. The Court considered this to be significant; the named person receives ongoing public summaries that allow him/her to remain sufficiently informed of the case. These summaries may lead to one-way communications, which then trigger requests for judicial permission to communicate.

22. The Federation maintains its 2007 view that for the special advocate to properly test the government's evidence and represent the interests of the named individual, the special

[5] *Charkaoui, supra* paragraphs 76 and 77

advocate should be permitted ongoing communication without court intervention. The Court's recommendation that judges take a liberal approach to authorizing communications does not provide sufficient assurance that such communications will be permitted.

23. Moreover, relying on the named individual to bring forward information to the special advocate based on information contained in the public summaries is an inadequate substitute for ongoing communication and has the potential to compromise the ability of the special advocate to protect the named person's interests effectively and efficiently during closed proceedings. The essence of the case against the named individual may not be revealed until the special advocate has seen the secret evidence.

24. There is ample precedent for permitting the special advocate to communicate with the named individual after seeing the secret evidence. Under the SIRC system referred to above such communications were permitted for over 20 years with no concerns that the confidentiality of evidence was compromised.

25. The importance of ongoing communication between the named person and the special advocate was also 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."[6]

Recommendation 4:
Amend subsection 85.4(2) 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 secret evidence.

Security-Cleared Lawyers in other Legal Proceedings

26. The consultation paper and background document raise a number of issues concerning the processes for permitting national security information in criminal, civil and administrative proceedings. The documents highlight the tension between individual rights and the protection of confidential national security information, and ask whether there may be "a role for security-cleared lawyers in legal proceedings where national security information is involved to protect the interests of affected persons in closed proceedings."

[6] *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, Recommendation 8, page 42.

27. The Federation would answer this question in the affirmative. The principles of fundamental justice require that individuals know the case they must meet and be provided with the opportunity to make full answer and defence to any allegations against them. As a general rule this should include full disclosure of all information that may be relevant to the proceedings. The Federation recognizes, however, the need to protect the confidentiality of national security information that may be relevant in such proceedings. In our view there may be a role for security-cleared lawyers in such proceedings akin to that played by special advocates under the IRPA.