National Security, Security Certificates, the Special Advocate Regime and Secret Evidence: The Right to Know and Respond to the Evidence Against You

by

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ABSTRACT

This thesis examines the use of information that is confidential, for reasons of national security, against detainees held under the security certificate provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), without disclosure to the detainee or the detainee's counsel. The striking down of the predecessor legislation by the Supreme Court of Canada and Parliament's response are reviewed, as is pertinent literature in the area.

Parliament's creation of a regime providing for the appointment of a Special Advocate to receive confidential information and represent the interests of an individual detained under a security certificate at hearings where the detained individual and their counsel are excluded is considered. The Special Advocate regime is analyzed to determine its adequacy in protecting the section 7 rights of a detainee under the *Canadian Charter of Rights and Freedoms*. The limitations associated with the Special Advocate regime are identified, with a conclusion that the relevant provisions of the IRPA, including the Special Advocate regime, are inadequate in terms of protecting the right to make full answer and defence and that, therefore, the current legislation violates the *Charter*.

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DEDICATION

I dedicate this work to Ha Yen, Frost and John. Their love, encouragement and prayers have made a world of difference.

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Chapter 1: National Security, Immigration Security Certificates and Confidential Information

1.1 Introduction

In the modern world, as in times past, governments have needed to, and continue to need to, keep certain information secret. "No society can function with complete transparency."[1] The safety of some, or indeed the safety of an entire nation, could be compromised if certain secrets are revealed. Less dramatically, the release of secret information could cause significant harm to diplomatic relations. These types of national security concerns have prompted the Canadian government to enact legislation intended to protect secret or confidential information that could result in harm if not kept secret. In the wake of the 9/11 terrorist attacks on the United States, the use of secret information to justify legal sanctions including the indefinite detention of non-citizens has increased.[2] Canada has committed itself to certain fundamental freedoms and principles of due process that come into conflict with the government's interest in maintaining information confidential in the pursuit of national security. This thesis deals with one important context in which national security and the protection of secret evidence comes into conflict with those fundamental freedoms and principles: the constitutionality of procedures under the *Immigration and Refugee Protection Act*[3] [IRPA] for justifying the

[1] Stanley A Cohen, "State Secrecy and Democratic Accountability" (2005-2006) 51 Crim LQ 27.
[2] Kent Roach, "Secret Evidence and its Alternatives," in Aniceto Masferrer, ed, Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism (London: Springer, 2011), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888615 > [Secret Evidence].
[3] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 83(1) [IRPA].

indefinite detention of non-citizens on national security grounds. In particular, it deals with amendments to the IRPA which keeps evidence purporting to justify detention secret from a detainee but provides access to that secret evidence for a Special Advocate who attempts to test and challenge that evidence but who cannot communicate with the detainee. This disclosure does not include secret evidence that is not being used to support the certificate, however. Thus, based upon the wording of the current statutory provisions, exculpatory evidence that is secret, does not fall within the evidence disclosed to the Special Advocate.

The type of information that a state would likely be concerned about releasing would be in the nature of information, that, if released to the public or indeed anyone that the state has not cleared to be in a position to be entrusted with such information, could result in harm to national security or the safety of others. This would likely encompasses state secrets, including the state secrets of other nations and includes everything ranging from military vulnerabilities to details of ongoing terrorism investigations, details about groups or organizations that have been infiltrated, the identity of agents and informants and the location of safe houses. But the information that a state might not want released would also likely include the type of investigative techniques being used in national security contexts, the type and extent of communications being intercepted, and particulars, such as dates, places and times that particular activities are observed. It may also include information that if released could harm relationships with other states or cause embarrassment to the government in a way that deters allies from sharing important information. In other words, any information that, if known outside the state's security establishment, might pose a risk to lives, or the ability to protect the nation would be

information that a state would not want to reveal. This type of information has many uses. It provides governments with a greater understanding of a situation so as to make more informed decisions about the situation. It provides context. It can provide forewarning of an incident such as terrorist attack to avert a tragedy and capture the alleged instigators. Such information can be used to take precautionary measures to prevent harm from occurring. It "may give governments a leg-up over their international rivals, preserve them from their enemies and insulate them from domestic opponents."[4] It can also be used from a legal perspective as grounds to detain individuals to prevent harm, or to even secure criminal convictions. Thus, it is beneficial for a state to be able to keep certain information secret.

It is where the secrecy of this information comes into conflict with individual rights that the challenge lies.[5] A balance must be struck between maintaining the secrecy of sensitive information and limiting the uses to which that information can be put so as not to infringe on individual rights. In terms of using secret information the question must be asked as to what extent is it reasonable and fair in a democratic society to detain someone, without charge, on the basis of evidence that is never disclosed to the named person? What does the fundamental principle of a fair hearing, including the right to know the "case to meet" mean in this context? Is some kind of substitute disclosure adequate to safeguard fairness? If so, what are the characteristics and limits of that substitute disclosure procedure? These are the kinds of questions that courts are called on

[4] Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law "Complex"" (2004) 36:1 Ottawa LR 49 at 50.
[5] David Irvine, "Security and Freedom: Striking a Balance" (2013), online: Australian Government <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/DGs-Speech-June-26th.html>.

to address in the context of legal proceedings that result in indefinite detention, striking at the core of the individual's right to liberty.

1.2 National Security and Confidential Information in the Immigration Context

In Canada, it is in the immigration law sphere that the use of secret evidence to justify indefinite detention (and other legal sanctions such as deportation) arises. IRPA establishes a regime to protect this type of information in hearings to determine whether non-citizens (foreign nationals and permanent residents) pose a security risk to Canada. These hearings are within the *security certificate* mechanism provided for by IRPA.[6] The existence and use of security certificates predate IRPA, going back to 1978.

The security certificate mechanism in its present form, which was incorporated into IRPA in November of 2001, is designed to deal with inadmissibility to Canada "on grounds of security, violating human or international rights, serious criminality or organized criminality."[7] Security certificates have been used relatively sparingly, with 27 individuals detained since 1991[8] and, of those, only six security certificates being issued since September 11, 2001.[9] While there does not appear to have been a widespread use of security certificates, those impacted by them are certainly gravely affected by the profound deprivation of their liberty. In addition, as long as they are available, there is

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[6] *Ibid,* s 77.
[7] IRPA, *Ibid.*
[8] *Security Certificates*, online: Public Safety Canada <http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-eng.aspx>.
[9] The citations for 17 security certificate proceedings are provided in the factum of the Canadian Council for Refugees and International Civil Liberties Monitoring Group in *Harkat*, para. 5 ("CCR/ICLMG Factum").

always the risk that as world events a government may decide to turn to security certificates as an all-too-easy to use tool to round up people they perceive to be threats.

This thesis is concerned with the rights of individuals subject to security certificates, with particular attention to the reality that most security certificates lead to indefinite detention. For purposes of this analysis, individuals subject to security certificates will be referred to as "named persons" or "detainees". Six individuals have had security certificates issued in relation to them since September 11, 2001. These are Adil Charkaoui, Hassan Almrei, Mourad Ikhlef, Ernst Zundel, Paul William Hampel, and Mohamed Harkat.[10] In addition, Mohammad Zeki Mahjoub, Mahmoud Jaballah, whose security certificates were issued prior to September 11, 2011, remained under certificates past that date. Each of one these men faced allegations that they were a threat to Canada if they were allowed to remain in the country. For example, Adil Charkaoui was alleged to be "a member of the Osama bin Laden network, an organization that engages, has engaged or will engage in acts of terrorism and that as such, the respondent is engaging, has engaged or will engage in terrorism and that consequently the respondent constitutes, has constituted or will constitute a danger to the security of Canada."[11] Charkaoui was held in custody for almost two years before being placed on very strict release conditions until September 2009 when his security certificate was finally quashed.[12] Hassan Almrei was in custody for over seven years and then released to house arrest for an additional

[10] *Security Certificates*, online: Justice for Mahjoub <http://www.supportmahjoub.org/background/security-certificates>.
[11] *Charkaoui (Re)*, 2003 FC 882, [2004] 1 FCR 528 at 3.
[12] *Charkaoui (Re),* 2009 FC 1030 at 113.

year before his security certificate was quashed at the end of 2009.[13] Ernst Zundel was arrested under a Security certificate that alleged ties to violent neo-Nazi groups. He was deported to Germany in March of 2005. Paul William Hampel was detained under a Security Certificate under allegations of being a Russian Spy and deported to Russia the following month. Mohammad Zeki Mahjoub was held in custody for almost seven years before being released to house arrest and remains under house arrest (he briefly returned to custody at his own request in 2009).[14] Mahmoud Jaballah was in custody for almost six years before being released to house arrest and remains under house arrest.[15] Mohamed Harkat was in custody for approximately three and a half years before being released under very strict conditions and remains under a security certificate to this day. The Supreme Court of Canada recently heard an appeal regarding the legality of his detention, including the constitutionality of the Special Advocate system, and has reserved its decision.[16]

In terms of information that is harmful if released, such confidential information may be used to support the validity of the security certificate. Subsection 83(1) of IRPA states:[17]

...

[13] Hassan Almrei: Case Spotlights Fundamental Justice Concerns of the Security Certificate Process, Canadian Civil Liberties Association, online: <http://ccla.org/2011/03/24/hassan-almrei-security-certificate/>
[14] Ben Morris, "The Story of Mohammad Mahjoub" *The Huffington Post Alberta* (14 April 2013), online: The Huffington Post </http://www.huffingtonpost.ca/2013/04/10/mohammad-mahjoub-twelve-year-tour_n_3053889.html>.
[15] *Mahmoud's Story,* online: Justice for Jaballah <http://www.justiceforjaballah.org/mahmouds-story/>.
[16] *Minister of Citizenship and Immigration, et al* v *Mohamed Harkat, et al*, SCC case no. 34884, online: <http://www.scc-csc.gc.ca/case-dossier/info/sum-som-eng.aspx?cas=34884>.
[17] IRPA, *supra* note 3, s 83(1).

> (*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;
>
> (*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
>
> ...

These provisions provide for the hearing of such information and that such information shall be kept confidential. This information has in case law been referred to as the "confidential information"[18] and will be referred to by that term interchangeably with the term "secret evidence" in this thesis.

Thus, IRPA sets out a regime for dealing with the use of confidential information against non-citizens that the government considers to be a security risk. This regime provides a mechanism by which the confidential information may be used to detain and remove a non-citizen from Canada without revealing the confidential information to the detainee. While not the intent of the legislation, depending upon the circumstances, the detention of the non-citizen may become indefinite, as for example, if the individual is from a country that Canada does not deport to, such as one that engages in torture. In addition, while theoretically anyone who is detained under a Security Certificate is able to voluntarily agree to leave the country and thereby end the detention, this is not always an option as in the case of the above example, the detainee faces a risk of torture upon the detainee's return home country. The Supreme Court of Canada in *Charkaoui v Canada*

[18] *Almrei (Re)*, 2009 FC 322 at 10 [*Almrei*].

(Citizenship and Immigration)[19] [*Charkaoui*] recognized the reality that the Security Certificate process may result in long periods of incarceration[20] and considered it a significant enough intrusion on an individual's liberty interest to engage Section 7[21] of the *Canadian Charter of Rights and Freedoms* [*Charter*].[22]

In situations where confidential information is used in a hearing, the hearing is held *in camera*. The detainee and the detainee's lawyer are not provided the confidential information and are not permitted to attend the *in camera* hearing, although a limited summary of the confidential information is provided to them[23]. Instead, under a model similar to that in use in the United Kingdom and New Zealand, a Special Advocate,[24] a lawyer who's role is *not* that of counsel for the detainee,[25] is appointed by the presiding Federal Court judge[26] to among other things, receive the confidential information.[27] The Special Advocate's role includes participation in the *in camera* hearing,[28] but crucially does not allow the Special Advocate to communicate with the detainee, or the detainee's lawyer, after receiving the confidential information without prior authorization of the presiding judge.[29]

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[19] *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350, 276 DLR (4th) 594, 44 CR (6th) 1 [*Charkaoui*].
[20] *Ibid,* at 4 and 13.
[21] *Ibid*, at 18.
[22] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[23] IRPA, *supra* note 3, s 83(1).
[24] *Ibid*, s 83(1)(b).
[25] *Ibid*, s 85.1(3).
[26] *Ibid*, s 83(1)(b).
[27] *Ibid*, s 85.4(1).
[28] *Ibid*, s 85.1(1).
[29] *Ibid*, s 85.4(2).

The findings of fact made through the use of secret evidence not shared with security certificate detainee, Mohammed Harkat, in a recent decision shed light on the context for these cases. In relation to Harkat, the Federal Court of Appeal made the following findings:[30]

- Osama Bin Laden and Al-Qaeda have supplied money and resources to the Chechen terrorist cause through Ibn Khattab and the Basayev group.
- The Basayev and Khattab groups were not part of the Al-Qaeda core, but did belong to the broader [Bin Laden Network].
- [Harkat] operated a guesthouse for Ibn Khattab for at least 15 months. Consequently, he was an active member of a group involved in Chechen terrorism.
- [Harkat] crossed the Afghan border during his stay in Pakistan.
- [Harkat] had links to Al Gamaa Al Islamiya (AGAI), an Egyptian Islamic extremist group.
- [Harkat] used "sleeper agent" methods in Canada. He concealed aliases he used in Pakistan and used false documents and anti-surveillance techniques.
- [Harkat] assisted Abu Messab Al Shehre and Mohammed Aissa Triki, two Islamist extremists, in Canada.
- With the assistance of Abu Zubaydah, [Harkat] provided financial assistance to Al Shehre by paying his legal fees.

[30] *Harkat v Canada (Citizenship and Immigration)*, 2012 FCA 122 [*Harkat FCA*].

- [Harkat] maintained contacts with Islamist extremists in Canada, such as Ahmed Said Khadr and Abu Zubaydah.
- [Harkat] belonged to and supported an entity that is part of the Bin Laden Network prior to and after having set foot in Canada.
- Although it has diminished over time, [Harkat] still poses a danger to Canada.

These findings were made based on evidence of informants and exhibits adduced in an *in camera* hearing. A Special Advocate was present in that hearing but Harkat and his counsel were not. The Special Advocate was not permitted to contact Harkat or his lawyer after viewing the secret evidence.

The participation of the Special Advocate as a partial substitute for the detainee, and the detainee's lawyer, raises the question of whether the rights of detainees such as Harkat are adequately protected by the process. Does the process amount to a substantial substitute for disclosure to the detainee, fulfilling the detainee's right to know and answer to the case against them as required by Section 7 of the *Canadian Charter of Rights and Freedoms*[31] [*Charter*], particularly where liberty interests are at stake through consequences of deportation and indefinite detention? If the process does result in the infringement of section 7 *Charter* rights,[32] is this statutorily codified process nonetheless a reasonable limit on a detainee's rights under section 1 of the *Charter*? These questions are explored in this thesis, using the *Harkat* case currently before the Supreme Court of

[31] *Charter, supra* note 22.
[32] Brief mention will also be made of section 15 equality issues associated with the security certificate regime, but the focus will be on section 7.

Canada as a lens through which to examine them. It will be argued that the current Special Advocate regime provides a constitutionally inadequate level of protection of a detainee's rights to know and answer the case against the detainee in violation of section 7 of the *Charter*, and that the legislation is not a reasonable limit on the detainee's liberty rights. The specific deficiencies in the Special Advocate system will be examined and Charter-compliant alternatives will be proposed.

The analysis will proceed in three parts. Chapter 2, will provide a review of key literature in the field and the themes that emerge from this literature. Varying perspectives on the use of confidential information in national security proceedings, and the role of Special Advocates, will be canvassed.

In Chapter 3, the Special Advocate regime and its elements and evolution will be discussed in the context of the security certificate process in the IRPA. The Supreme Court of Canada's decision in *Charkaoui,*[33] striking down the predecessor security certificate process on the basis that it violated section 7 of the Charter will be reviewed and Parliament's legislative response to *Charkaoui* will be considered. The Special Advocate regime was introduced as a purported remedy to the constitutional deficiencies in the security certificate regime. Key features and parameters of the resulting Special Advocate role will be described to provide context for the Charter analysis to follow.

Chapter 4 will discuss the *Charter* shortcomings of the Special Advocate regime, with a focus on the arguments made by parties and intervenors in *Harkat*. The central

[33] *Charkaoui, supra* note 19.

argument will be that the Special Advocate regime, in its current legislative articulation, is not a substantial substitute for the disclosure of secret evidence to detainees, thereby unjustifiably infringing the right to a fair hearing guaranteed by section 7 of the *Charter*. Finally, Chapter 5 will briefly examine implications and alternatives to the Special Advocate regime.

Chapter 2: A Survey of Literature in the Field

A number of themes or perspectives are evident in the literature relating to Special Advocates in national security proceedings. Most of the literature acknowledges the importance of national security and for the state's need to keep certain information secret. Another theme is that the Special Advocate regime, although flawed, is better than no protection at all, and may perhaps be improved upon. A contrasting perspective is also found in much of the literature, suggesting that the Special Advocate regime does more harm than good by giving a false sense of the protection of rights and therefore an increased and less discriminate use of undisclosed confidential information. Yet another theme is that processes in the criminal law sphere are better able to protect due process rights. The literature also suggests that regimes like Canada's security certificate removal/detention procedures amount to discrimination against non-citizens. A theme also emerges that states are leaning towards repressive law and order and national security policies as a result of terrorist attacks, particularly those of September 11, 2001. Lastly, there is a perspective that other, better approaches are available that are superior to the Special Advocate regime.

The recognition that national security is important appears to be widely held. Views on the keeping and use of secret information as a result of national security concerns is somewhat more divergent. For example, In "Secret Evidence and its

Alternatives,"[34] Kent Roach discusses how the realities of today necessitate a different approach to thinking about confidential information, given that the information is no longer just for use in counter-intelligence, but also now being used as evidence against individuals in legal proceedings. He argues that the current context requires societies to confront fundamental questions about the widespread use of secret evidence (and the reality that secrecy may be "overclaimed"[35]) and to investigate alternatives to its use.

The theme that the Special Advocate Regime is better than no regime emerges as a logical theme in the literature in this area. The regime can arguably be a means of mitigating, although not replacing, the need of a detainee to know the case against them and to meet it.[36] Having a mechanism in place to reduce the degree to which individual rights are infringed seems to be a better balance between national security and individual rights[37] than allowing for the greater infringement of rights that would occur in the absence of the Special Advocate Regime. This is so even if alternatives that would strike a better balance between individual rights and national security exist.

The contrasting theme that emerges is that since the Special Advocated Regime is flawed, it is better not to have this flawed attempt at ameliorating the infringement of individual rights. On the surface this argument appears counter-intuitive in preferring a greater intrusion of rights. However, one of the concepts behind this approach is that the

[34] Secret Evidence *supra* note 2.
[35] Helen Fenwick and Gavin Phillipson, "Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond" (2011) 56:4 McGill LJ 862-918, para 65, cited in factum of Amnesty International in Harkat, para 25.
[36] Lani Invararity, "Immigration Bill 2007: Special advocates and the Right to be Heard" (2009-2010) 40 VUWLR 471.
[37] Graham Hudson, "The Administration of Justice? Certificate Proceedings, Charkaoui II, and the Value of Disclosure" (2010-2011) 48 Alta L Rev 195.

flawed protections of the Special Advocate Regime provide a false sense of security that allows for the potential overuse of the system because it is believed that adequate protections are in place.[38] There are also arguments that, in addition to individual rights, national security may actually be harmed.[39] Governments choosing to over-classify material as secret because they believe appropriate protections are in place is another reason why it may do more harm than good to have the Special Advocate Regime in place.[40]

The theme that the criminal law may be the more appropriate place to deal with matters of national security also emerges. This is the idea that criminal law already has the substantive and procedural protections of individual rights in place and so can better balance.[41] While the courts have been working their way towards a greater recognition that immigration proceedings are in many instances analogous to criminal proceedings in determining Charter rights.[42]

Some of the literature also suggests that there is no valid ground for discriminating against non-citizens when it comes to national security.[43] This is in line with the reality that both citizens and non-pose risks to the security of a country and it makes no sense that secret evidence would be used against non-citizens but not citizens,

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[38] John Ip, 2009 N.Z. L. Rev. 207 at 209 [Ip]
[39] Justice, "Secret Evidence" (2009) online: jusice.org <http://www.justice.org.uk/data/files/resources/33/Secret-Evidence-10-June-2009.pdf>.
[40] Daphne Barak-Erez And Matthew C. Waxman "Secret Evidence and the Due Process of Terrorist Detentions" (2009-2010) 48 Colum J Transnat'l L 3.
[41] Hudson, *supra* note 37.
[42] *Ibid.*
[43] Jonathan Shapiro, "An Ounce of Cure for a Pound of Preventive Detention: Security Certificates and the Charter" (2007) 33 Queen's LJ 519.

in circumstances where the result may potentially be the same, namely long term or indefinite detention. Authors Quirine Eilkman and Bibi van Ginkel note the distinction that Canadian citizens accused of terrorism are charged criminally and provided full disclosure, whereas non-citizens face immigration proceedings that do not afford them the same level of disclosure. [44] Rayner Thwaites argues that a regime change is needed such that there is no discrimination against non-citizens.[45]

A theme also emerges that states are leaning towards repressive law and order and national security policies as a result of terrorist attacks, particularly those of September 11, 2001.[46] This reactive approach has drifted many western societies to recalibrate the balance, tipping more in favour national security over individual security. Commentators such as Rhonda Powell argue in this vein that rights need to be safeguarded, even where national security is an issue, and that courts should not be overly deferential to the state in balancing individual rights with national security interests,[47] and, as Kent Roach argued in "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law," the courts have a significant role to play in ensuring the rights of individuals are safeguarded.[48]

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[44] Quirine Eilkman and Bibi van Ginkel, "Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials" (2011)3 Amsterdam LF 3 at 10-12.
[45] Rayner Thwaites, "Process and Substance: Charkaoui I in the Light of Subsequent Development" (2011) 62 UNB LJ 13.
[46] Cian Murphy in "Counter-Terrorism and the Culture of Legality: The Case of Special Advocates" (2013) 24:1 *King's Law Journal* 19.
[47] Rhonda Powell, "Human Rights, Derogation and Anti-Terrorist Detention" (2006) 69 Sask L Rev 79.
[48] Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 Windsor Rev Legal & Soc 5.

The overarching theme throughout the literature seems, however, to be a consensus that the Special Advocate Regime is inadequate, or at least insufficient, in terms of the level of protection it provides to individual rights[49] and represent a departure from the principles of natural justice.[50] This is generally based on a conclusion that the Regime, while allowing some level of participation to the detainee,[51] does not allow for adequate disclosure to a person detained under a security certificate. Counsel are unable to play their role as such in Security Certificate proceedings where secret information is involved because they are exclude, effectively preventing the detainee and their counsel from meeting the case against them. [52] Authors such as Craig Forcese and Lorne Waldman argue that significant disclosure is preferable whenever possible and that Special Advocates be used only in exceptional circumstances.[53] One of the key inadequacies identified with respect to the Special Advocate regime is the inability of Special Advocate to communicate with the detainee after becoming privy to confidential information,[54] except with permission from the presiding judge. Andrew Boon And Susan Nash raise the debate about whether it is appropriate for lawyers to depart so significantly from the traditional model of representation, including whether this departure ends up being a disservice to the individual being represented. [55]

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[49] Craig Forcese & Lorne Waldman, "A Bismarckian Moment: Charkaoui and Bill C-3" 42 SCLR (2d) 355 [A Bismarckian Moment].
[50] "Justice and Security Green Paper: Response to Consultation from Special Advocates" (December 16, 2011).
[51] Barak-Erez and Matthew Waxman, *supra* note 40.
[52] Michael Code and Kent Roach "The Role of the Independent Lawyer and Security Certificates" (2007) 52 Crim LQ 85.
[53] Craig Forcese & Lorne Waldman, "Seeking Justice in an Unfair Process Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings" [Forcese and Waldman, "Seeking Justice"].
[54] *Ibid*.
[55] Andrew Boon and Susan Nash, "Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems" (2006) 9 Legal Ethics 101.

In terms of national security, I acknowledge that it is important and that there must be a balance between national security and individual rights. I also believe that the Special Advocate Regime provides an inadequate balance and that a better solution is required. However, I suggest that while awaiting and advocating for change, it is better to have the Special Advocate Regime in place then to have no system at all. The system as it is today, though imperfect, does not seem to be doing more harm than good. On the contrary, there are some definite benefits to individual rights by having the Special Advocate Regime in place. I am of the opinion that the distinction between citizens and non-citizens is an unjustified one when it comes to national security. I believe that one of the key inadequacies of the Regime is the way that confidential information is used. I am also of the view that the courts should look at the impact of legislation (including, for example, the reality of indefinite detention in these cases) rather than draw distinctions in terms of the level of rights protection between regimes that are characterized as criminal or immigration/administrative in nature.

Chapter 3: The Special Advocate Regime: Elements and Evolution

3.1 Security Certificates

Security certificates are tools under IRPA that allow the state to detain and remove from the country non-citizens whom the state believes are a danger to the country. The security certificate mechanism essentially empowers the Minister of Immigration and the Minister of Public Safety [collectively the "Ministers"] together to issue a certificate that states that an individual is a danger to national security[56]. A process is thereby commenced that generally leads to a removal order and ultimately detention because many named persons cannot be deported to their home country where they may face torture. IRPA deals with information that is considered harmful to national security by allowing its use as evidence at hearings that determine the validity of the security certificate, but at the same time not permitting its disclosure to the individual who is the subject of the proceedings, or their counsel. The Security Certificate provision of IRPA states[57]:

> **77.** (1) The Minister and the Minister of Public Safety and Emergency Preparedness shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.

In essence, this section says that if the Minister of Public Safety and the Minister of Citizenship and Immigration believe that a non-citizen should not be allowed to stay in Canada because the person represents a security risk, or was involved in the violation

[56] IRPA, *supra* note 3, s 77.
[57] *Ibid*.

human or international rights, serious criminality or organized crime, then the Ministers must sign a security certificate indicating their belief and forward the certificate to the Federal Court for review by one of its judges. The concept of the security certificate is that the government should be able to take steps against individuals that it considers to be a threat, including removal of such individuals. Thus the mechanism allows the government to detain and remove a non-citizen from Canada if the non-citizen is deemed to be a danger to the country.

As noted earlier, the ostensible purpose of the security certificate is to deport dangerous individuals. Courts have, in past, taken a contextual approach in differentiating between criminal law matters and immigration law procedures, as can be seen in *Chiarelli v Canada (Minister of Citizenship and Immigration [Chiarelli]*.[58] *Chiarelli* was a case about an individual who had been convicted of a criminal offence that carried a maximum penalty over 5 years, and had a security certificate issued against him because it was believed he would engage in organized crime activities. Chiarelli challenged his deportation as being a violation of his *Charter* rights under section 7. In following *R v Wholesale Travel Group Inc*,[59] the court noted that the "*Charter* is to be interpreted in the light of the context in which the claim arises." The Supreme Court of Canada then stated that:

> in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country.

[58] *Chiarelli v Canada (Minister of Citizenship and Immigration* [1992] 1 SCR 711 at 732-733 [*Chiarelli*].
[59] *R v Wholesale Travel Group Inc* [1991] 3 SCR 154.

The court also considered the use of confidential information, determining that the use of confidential information under the procedures provided at that time (the SIRC model) provided an adequate balance of the competing interests. Arguably, the court also likely had in mind that deportation would occur and occur in a timely way, rather than indefinite detention. This can be gleaned from how the context was framed as non-citizens not having a right to enter or remain in a country.

Under the current security certificate mechanism justification of the security certificate is based on a determination by a Federal Court judge of the existence of reasonable grounds for issuing the security certificate in light of the evidence presented to the court on behalf of the ministers. This determination is only appealable if the judge who makes the decision "certifies that a serious question of general importance is involved and states the question."[60]

Under section 81 of the IRPA,[61] once an individual is named in a security certificate and even prior to its consideration by a Federal Court judge, the ministers are able to issue a warrant for the arrest and detention of a permanent resident or foreign national the ministers believe represent a danger to national security or the safety of any person.[62] Section 81 of IRPA states:[63]

[60] IRPA, *supra* note 3, s 79.
[61] *Ibid*, s 81.
[62] *Ibid*, s 82.
[63] *Ibid*, s 81.

> **81.** The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

The hearings that determine the validity of security certificates are based on section 78 of IRPA.[64] All security certificates are referred to a federal court judge in accordance with section 77(1). Section 78 states:

> **78.** The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.

This validity test is one of reasonableness.[65] This means that, unless the court considers that the certificate is unreasonable, the certificate will stand. As the Supreme Court of Canada stated in *Charkaoui*, "'Reasonable grounds to believe' is the appropriate standard for judges to apply when reviewing a continuation of detention under the certificate provisions of the IRPA."[66] Thus, if this test is met, the certificate stands and can be used to detain an individual. As raised earlier, while the purpose of the legislation is removal rather than detention, the reality is that detention may end up being indefinite if an individual is not removed from the country for any reason (*i.e.*, if the named person would face torture in the country to which they would be deported). This is quite different from the proof beyond a reasonable doubt standard in the criminal law context to deprive a person of their liberty.

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[64] *Ibid*, s 78.
[65] *Almrei v Attorney General of Canada, Towaij,* 2011 ONSC 1719 at 7.
[66] *Charkaoui, supra* note 19 at 39.

3.2 Evidence Before the Judge and Non-Disclosure

With regard to the evidence before a judge, s. 77(2) of IRPA states:[67]

> (2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

With respect to review of the security certificate by the judge of the Federal Court, IRPA requires the judge to review the information upon which the security certificate is based. The first concern arises from the possibility that the evidence presented to the Federal Court judge might contain information that was confidential, the release of which could cause harm to individuals, or to national security. The judge is required to keep the information confidential if the judge believed that its release might be injurious to national security or the safety of any person. At the request of either minister, it is compulsory for the judge to continue this procedure in the absence of the individual named in the certificate (usually a detainee at this point) and in the absence of their counsel as well. If the information reviewed in the absence of the detainee and their counsel is believed by the judge to be information that, if released, could be injurious to national security or the safety of any person, then that information may not be released to the detainee or their counsel.

[67] IRPA, *supra* note 3, s 77(2).

Another key aspect of the of the security certificate process is that it explicitly allows confidential information that the person named in the certificate and their counsel are not aware of to be used as evidence against them in justifying the detention of the person named in the security certificate. Section 83(1) [68] of IRPA states:

> (*h*) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;
>
> (*i*) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national.

While under the legislation the person named in the certificate and their counsel are entitled to a summary of the information, this is limited by any determination by the court that information in this summary may be contrary to national security. Again, while detention is intended to be incidental to removal, there are very real circumstances where removal cannot be carried out.

Section 83(1)(e) states:

> (*e*) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

Thus, if a judge forms the opinion that it would be harmful to national security to release the information, even in summary form, then the information is not provided in

[68] *Ibid*, s 83(1).

summary form either. The key point here is that IRPA explicitly[69] allows for the federal court judge to rely upon this information that is not provided to the detainee or their counsel in determining whether the security certificate is valid. While requiring that the judge provide a summary of the confidential information upon which the security certificate is based to the detainee and their counsel, no information can be included in this summary that the judge believed "…would be injurious to national security or to the safety of any person if disclosed."[70] Thus, it is very possible, if not likely, that the summary does not contain the evidence against the detainee to justify the certificate which is being used to continue the detainee's detention pending removal. As noted, it is possible that removal may never occur.[71] The net result is that, where release of information is thought to be a threat to national security, a detainee and their counsel are not directly able to challenge or give answer to the evidence that is being used against the detainee because they are not even aware of what that evidence is. In other words, undisclosed evidence is being heard and relied upon by a federal court judge to determine whether the security certificate, the existence of which authorizes the detention of the person named, as well as their removal from Canada, is reasonable.

The second concern with the security certificate mechanism, which, compounds the problem raised by the first, is a concern in relation to the practical aspects of deportation. The concern arises with respect to individuals named in security certificates as a result of the general principle that Canada adheres to that Canada is constitutionally

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[69] *Ibid*, s 83(1)(i).
[70] *Ibid*, s 78(h).
[71] See for example, *Charkaoui, supra* note 19 at 13, where the Supreme Court of Canada considered this as a possible outcome for Almrei, one of the appellants who was detained under a Security Certificate in that case.

constrained from deporting an individual to a country if that individual is likely to face torture in that country. This principal was enunciated by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)* [*Suresh*].[72] The result of this principle is that, if the security certificate is held to be valid by the Federal Court, and an individual is being detained pursuant to the security certificate, there is a very real potential that such an individual will be detained indefinitely given that many of the countries from which named persons originate are those that are known to engage in torture.

Combining this impact with the requirement that evidence, the release of which could be injurious to national security, not be revealed to a detainee detained under a security certificate can therefore potentially result in the detainee certificate being held indefinitely based upon information that the detainee is not aware of and therefore cannot challenge.

3.3 Regime's Applicability Only to Non-Citizens

A significant feature of the security certificate and Special Advocate regime is that it only applies to individuals who are not Canadian citizens. Other legislation, such as the *Canada Evidence Act*[73] applies in other proceedings to which both citizens and non-citizens may be subject. The evidence may very well be the same in both types of proceedings, as for example evidence that reveals information about intelligence

[72] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].
[73] *Canada Evidence Act*, RSC 1985, c C-5.

networks. Even more interestingly, and as will be discussed below in relation to the *Charkaoui* decision, the other legislation deals with secret or confidential information differently than does IRPA. This creates a dichotomy between how information related to national security is treated in relation to citizens and non-citizens.[74]

In effect there is unjustified inconsistent treatment of confidential information when the liberty of citizens is involved in comparison to the liberty of non-citizens. Confidential information that is not disclosed may not be used to deprive a citizen of their liberty. However, it may be used to deprive non-citizens of their liberty. The question arises as to why an identical danger to national security posed by a citizen does not justify the use of confidential information against the citizen, but does justify that same information being used against a non-citizen. A hypothetical may be used to illustrate. A & B are siblings born in Syria. A has just become a Canadian Citizen. B's paperwork was slightly delayed in processing and he is on the cusp of, but yet to become a Canadian citizen. A and B are both arrested as a result of the same confidential information, that they were both in a conversation with an undercover operative making plans to detonate an explosive device. A faces criminal charges as a Canadian citizen. Under Canadian criminal law, if this evidence is not revealed to him A cannot be convicted and incarcerated based upon this undisclosed evidence. In contrast, B, as a non-citizen, may be held indefinitely based upon a security certificate supported by the exact same undisclosed evidence.

[74] Rayner Thwaites, "Discriminating Against Non-Citizens Under the Charter: Charkaoui and Section 15" (2008-2009) 34 Queen's LJ 669.

In contrast, the present UK system to deal with terrorist threats is by the use of control orders, which may be used both on citizens and non-citizens, without distinction. The Canadian regime is under-inclusive in this way and, in effect, disproportionately affects non-citizens. This differential treatment which may raise an issue with respect to the equality provisions of Section 15 of the *Charter* will not be dealt with in any detail in this thesis. However, it is worth noting that the distinction may be problematic and unreasonable.

3.4 IRPA and the *Charkaoui* Decision

Prior to the 2007 decision of the Supreme Court of Canada in *Charkaoui*, IRPA offered very little opportunity for a named person to challenge the secret evidence on which a security certificate was issued. It was effectively left to the Federal Court judge to determine whether the issuance of the certificate was reasonable to take into account the interests of the person named in the security certificate on their own and without outside input. There was no adversarial hearing as such when it came to the issue of information that fell under the national security blanket, and no challenge to this information, even though this might be critical in the finding that it was reasonable to issue the certificate.

In 2007 the Supreme Court of Canada determined that the mechanism for review of security certificates issued under the prior provisions of IRPA was unconstitutional.

The court held that a review mechanism by way of a judge of the Federal Court, without any representation on behalf of the individual named in the security certificate, violated the *Charter* when it came to how the provisions dealt with confidential information in a national security context.[75]

Adil Charkaoui, a permanent resident of Canada, and two foreign nationals granted refugee status, were all arrested and detained under security certificates based upon allegations of terrorist activities. The foreign nationals were Mohammed Harkat and Hassan Almrei. Charkaoui was in custody from 2003 until 2005, Harkat from 2003 to 2006 and Almrei remained from 2001 up to and including the time of the Supreme Court's decision in 2007.[76] All three detainees challenged the constitutionality of their detention under IRPA. The Supreme Court of Canada's decision, which came down on February 23, 2007, unanimously declared that the security certificate system as set out in IRPA as it was at that time, was unconstitutional to the extent that it did not in any way allow the interests of the detainee to be adequately represented. The court found that the liberty interest of the detainees was affected by the possibility of indefinite incarceration as well as the possibility of being deported to torture or cruel and unusual punishment. The court therefore found the detainees' Section 7 *Charter* rights "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" had been engaged. The court proceeded to determine whether the non-disclosure of confidential information mandated by IRPA amounted to an infringement of the detainees' Section 7 *Charter* rights. The court had

[75] *Charkaoui, supra* note 19.
[76] *Ibid* at 10.

difficulty with the detainees having no opportunity to challenge the evidence being used against the detainees. The court was specifically concerned about the right to a fair judicial process.[77] The court went on to enumerate the relevant facets to this principle of fundamental justice. The court listed the right to a hearing, the right to be heard before an independent and impartial magistrate, the right that the decision of the magistrate be based upon facts and law, the right to know the case put against one, and the right to answer that case. The court allowed for some flexibility in terms of context but indicated that to satisfy the requirement of Section 7 of the *Charter* each of these facets "must be met in substance."[78]

In terms of the requirement of a hearing the court had no qualms about recognizing that there was a hearing to review the certificate.[79] In terms of the requirement of impartiality, the court looked more carefully at the concept of a designated judge hearing all the evidence presented by the Minister but not being able to share this evidence with the detainee. Concern was expressed that designated judges may be perceived as being co-opted from their independent judicial function into becoming agents of the executive, may be functioning more investigatively than judicially, and may, conversely, also be perceived as defenders of the detainee in their absence and identify with them. The court, after careful consideration and cautions to remain vigilant, determined that the designated judge could be considered independent and impartial.

[77] *Ibid* at 28.
[78] *Ibid* at 29.
[79] *Ibid* at 30.

With respect to the requirement that decisions be based upon fact and law, the court separated each of these two elements and had concerns about both. In terms of fact, while praising designated judges for taking on a pseudo-inquisitorial role, the Supreme Court found that designated judges reviewing security certificates did not have the power to independently investigate all the facts and could not "rely on the parties to present the missing evidence."[80] In terms of law, the court found that while detainees were able to make legal arguments, the absence of disclosure and full participation hindered their ability to make meaningful objections or "develop legal arguments based upon the evidence."[81] The court therefore concluded that decisions by designated judges were not based on the facts and law.

In terms of the detainee knowing the case to meet and being given an opportunity to answer the case the Supreme Court found that since the detainee might not get all the information regarding the case against the detainee when confidential information is involved and so they would not know the case to meet and therefore would not have a meaningful opportunity to answer. The court found that while substitute disclosure was a possibility, given the combination of the extensive nature of the information withheld in national security cases and the grave impact on the liberty interests of detainees, it was extremely unlikely that an acceptable substitute disclosure could be found, as, typically, the circumstances under which substitute disclosure had been found to be acceptable did

[80] *Ibid* at 51.
[81] *Ibid* at 51-52.

not have the same impact on liberty interests as security certificates.[82] The court did not consider review by the designated judge as an adequate substitute.

Thus, in its *Charter* analysis the court found that a person held under a security certificate based on information that was not available to that person and their counsel amounted to a deprivation of the person's liberty that was not in accordance with the principle of fundamental justice, contrary to section 7.

The court then inquired as to whether the government had established that the legislation could be saved under Section 1 of the *Charter*. Section 1 of the *Charter* states:

> 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.

Under this section, courts must determine whether legislation, although violating a right protected by the *Charter*, is still acceptable as a reasonable limit on an individual's rights.[83] The court applied the *R v Oakes*[84] test to the legislation. The *Oakes* test requires consideration of whether the objective of legislation is of sufficient importance to justify overriding a right protected by the *Charter* and whether the limit is proportionate to the objective and therefore reasonable and demonstrably justified. The court in *Charkaoui* acknowledged that national security issues were a pressing and substantial concern and

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[82] *Ibid* at 53-62.
[83] Peter Hogg, *Constitutional Law of Canada*, Student Edition 2008, (Scarborough, Ont: Thomson-Carswell, 2008) at 38.2 [Hogg].
[84] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, 24 CCC (3d) 321 [*Oakes*].

that there was a rational connection with the non-disclosure of evidence, but found that IRPA failed to minimally impair the detainee's rights.[85] On a separate issue, the court also held that a differentiation between permanent residents and foreign nationals in terms of the set review period for detentions was unconstitutional. With respect to this issue, the court simply imposed the shorter review period applicable to permanent residents to foreign nationals as well. With respect to the unconstitutionality of the review procedure of security certificates, rather than immediately give effect to this judgment, the court provided Parliament with one year to remedy the legislation.

In addressing minimal impairment, the court provided examples of methods that trampled less on the rights of a detainee than the path Parliament had chosen. One of these was the venerated Security Intelligence Review Committee ("SIRC") system Canada previously had in place. The SIRC System was a system that had a government committee review evidence prior to allowing a security certificate to be issued. SIRC Counsel had full access to the entire CSIS file and was allowed to communicate with the detainee and the detainee's lawyer after having access to the file which contained confidential information.[86] SIRC Counsel were also entitled to call their own witnesses *in camera*.[87]

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[85] AC Banfield, AC and M Zekulin, "From Defence to Dialogue: National Security and the Courts in the Post 9/11 Era" Manuscript prepared for the Annual Meetings of the Canadian Political Science Association. UBC, June 4-6 2008.
[86] Craig Forcese and Lorne Waldman, "Comments on Bill C-3" (November 2, 2007) online: National Security Law From an International Perspective, <http://craigforcese.squarespace.com/national-security-law-blog/2007/11/2/detailed-comments-on-bill-c-3-special-advocates.html>
[87] *Chiarelli, supra* note 58 at 746c.

Another model was that found in the *Canada Evidence Act*,[88] which is used in criminal matters in Canada when it comes to the use and disclosure of confidential information. This model involves an application to withhold information that the government claims as confidential. The detainee must, based on a relatively low threshold convince the court that the evidence is in all likelihood relevant to the defence. The burden then shifts to the government to show that release of this information is harmful. Lastly, if convinced by the government that the information would be harmful if disclosed, the judge must still exercise discretion in determining whether the public interest to disclose outweighs the harm to national security.[89] In such cases, another remedy, such as a stay of proceedings, may be appropriate.[90] There is never an option to use undisclosed information against an accused. The only question raised is whether the disclosure should be provided because it assists in raising a defence. If a judge determines that the evidence should not be disclosed then the evidence is not used against an accused facing criminal charges.

The court also looked to the procedure used for confidential information in the Air India trial. This model involved undertakings by defence counsel who were given access to confidential information not to discuss this information with their client or anyone else.[91] The system was based on an agreement between crown and defence that the defence get consent of their client to not release information to them, and provide

[88] *Canada Evidence Act*, *supra* note 73.
[89] *Charkaoui, supra* note 19, at 77.
[90] *Canada (Attorney General) v Ribic*, 2003 FCA 246, [2005] 1 FCR 33 at 15-18.
[91] *Charkaoui, supra* note 19 at 78.

their professional undertaking not to release the information to anyone including their client.[92]

The court also looked at the Arar Commission model which applied the *Canada Evidence Act* but had independent counsel with security clearance vetting the evidence to ensure only evidence that would genuinely harm national security was held back from disclosure.[93]

Lastly, the court looked at the United Kingdom's Special Advocate model, noting its similarities and differences with the SIRC model.[94] The United Kingdom Special Advocate model involved appointment of a special advocate who did not represent the detainee to hear and challenge evidence presented in camera. The UK Special Advocate was not allowed to communicate with the detainee after becoming privy to confidential information.

In suggesting these systems, the court was pointing out that there were ways that national security objectives could be attained without being as oppressive as *IRPA* as it then was. McLachlin, C.J.C. for the court stated at paragraph 85 "…the alternatives discussed demonstrate that the IRPA [the *IRPA*] does not minimally impair the named person's rights."[95] Arguably, the court was not reviewing the constitutional acceptability of each of these systems, nor was it precluding the adoption of a totally different system.

[92] *R. v. Malik*, 2005 BCSC 350, [2005] B.C.J. No. 521 [*Malik*].
[93] *Ibid* at 79.
[94] *Ibid* at 80-84.
[95] *Ibid* at 85.

It was merely using these models as proof that that there were other means available that had a less significant impact on a detainee's Section 7 *Charter* rights.

3.5 The Legislative Response

IRPA was amended in 2008 by the federal government in response to the Supreme Court of Canada's decision in *Charkaoui*. This amendment enacted the Special Advocate regime[96] as an attempt to rectify the flaws the court identified in the predecessor legislation. The Supreme Court of Canada, in striking down the security certificate provisions of IRPA as they related to review and use of confidential information without representation on behalf of the person named in a security certificate, provided a one year window for Parliament to address and correct the ills the court identified with the process. Parliament waited until eight months after the *Charkaoui* decision before introducing proposed legislation to participate in a dialogue with the courts. The concept of a dialogue is one in which the courts strike down legislation and Parliament provides responding legislation which attempts to meet the concerns expressed by the courts in striking down predecessor legislation and, at the same time, still attempting to achieve the intended objects of the predecessor legislation.[97] Eventually, the new legislation may be considered by the courts in the process of this dialogue, and a line of cases have referred to as "second look" cases, has developed.[98]

[96] *An Act to amend the Immigration and Refugee Protection Act (certificate and Special Advocate) and to make a consequential amendment to another Act*, 2d Sess, 39th Parl, 2007.
[97] Hogg, *supra* note 83 at 36.5.
[98] *Ibid*, at 36.5(b).

This provides an opportunity for the courts to determine how Parliament has attempted to strike a better balance between individual rights and valid societal objectives. As noted by Peter Hogg in his discussion of *R v Mills*,[99] the court can, in particular, examine "Parliament's careful deliberative process"[100] in arriving at the new legislation. There are some who hold the view that in this "second look" the courts should be more deferential, keeping in mind that the court has already provided its view and is now looking at the response of a legislative body that has the mandate of the people.[101]

Bill C-3 [Bill] was introduced in the House of Commons for first reading on October 22, 2007[102] in response to the *Charkaoui* decision. There does not appear to have been any consultation with the public prior to the introduction of the Bill. The government appears to have taken the *Charkaoui* decision as the court presenting them with a menu of acceptable options from which to choose one in terms of reviewing security certificates. The Bill introduced the concept of the Special Advocate into the security certificate system. This was a United Kingdom barrister styled model that faced criticism with regard to how it operated there. The critiques of the UK Special Advocate system included the inability of the Special Advocate to communicate with the detainee after receiving confidential information without the courts consent and thereby not being able to fully represent the interests of the detainee. Another is that closed proceedings result in at least partially closed judgements of the court, and while Special Advocates are entitled to see closed judgements they have difficulty determining if a particular issue has

[99] *R v Mills* [1999] 3 SCR 668; Hogg s*upra* note 83 at 36.5(b).
[100] Hogg, *supra* note 83 at 36.5(b).
[101] Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue, and Deference" (2009) 47 Osgoode Hall Law Journal 235
[102] House of Commons Debates, 39th Parl, 2d Sess, Vol 142, No. 005 (22 October 2007).

been adjudicated. Difficulty in calling expert witnesses as a result of security concerns is another hurdle UK Special Advocates face.[103]

The Bill provides for the appointment of a Special Advocate in situations involving security certificates where there is an issue regarding confidential information that, if released, could harm national security or endanger the safety or life of a person. The concept of the Special Advocate introduced by the Bill is intended to allow an independent lawyer vetted by the federal government to meet with and discuss the case with a detainee and their counsel. The Special Advocate would then have access to confidential material so as to be able to review it and challenge it on behalf of the detainee. The Special Advocate would appear in an *in camera* hearing before a judge of the federal court who is charged with the task of determining the reasonableness of the certificate based upon the evidence that was submitted to support it. The hearing is intended to be adversarial in nature. One key element with respect to the role of the Special Advocate is that the Special Advocate is not in a relationship of solicitor and client with the detainee.[104] Under the Bill, the Special Advocate could not further consult with the detainee, their counsel, or anyone else for that matter after being exposed to the confidential information, unless first receiving the presiding judge's authorization.

Bill C-3 was debated in the House of Commons on October 26, 2007[105] House of Commons Debates, November 19, 2007[106] and November 20, 2007.[107] The Bill naturally

[103] Justice and Security Green Paper (UK) at 25-26 and App F.
[104] IRPA, *supra* note 3, s 85.1(3).
[105] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 009 (26 October 2007).
[106] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 019 (19 November 2007).

had the support of its Government sponsor (albeit through his Parliamentary Secretary). Ujjal Dosanjh spoke for the Liberal party and indicated Liberal party support for the bill at the second reading stage but highlighted deficiencies in the proposed legislation that he expected to be of interest at the committee stage. Serge Menard, speaking for the Bloc Quebecois party, indicated support for the Bill in principle, but highlighted some concerns. Penny Priddy spoke on behalf of the NDP and suggested that the bill failed to enhance the security of Canadians while at the same time undermining our fundamental freedoms. The bill passed second reading on November 20, 2007 on a vote of 226 to 30[108] and was then referred to the Public Safety and National Security Committee.

The Public Safety and National Security Committee met on November 27[109] and 29[110], and December 4,[111] 5,[112] 6, [113]and 7,[114] 2007, to review the Bill. The committee heard from 32 witnesses, including the Minister of Public Safety. Twenty-six witnesses expressed significant concerns with respect to the proposed legislation before this house committee. Of the other six, one was the Minister of Public safety and the other five were Federal Civil Servants speaking in their official capacities.

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[107] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 020 (20 November 2007).
[108] *Ibid*.
[109] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, (27 November 2007).
[110] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, (29 November 2007).
[111] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings* , (4 December 2007).
[112] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, (5 December 2007).
[113] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, (6 December 2007).
[114] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, (7 December 2007) [Minutes - 7 December 2007].

To its credit, the Committee did propose some amendments to the Bill to attempt to safeguard the rights of individual detainees. These included amendments that prevent the use of evidence obtained by torture, allowing the person named in the security certificate to select which particular Special Advocate they want to be their Special Advocate, as long as it is reasonably convenient to do so, and protecting the communications between the person named under a security certificate and their Special Advocate under the auspices of solicitor client privilege, providing for independence of the Special Advocate, and to provide adequate administrative support.[115] The committee seems, however, to have missed one of the most significant concerns expressed about the Special Advocate regime, the lack of disclosure and therefore the lack of ability to respond to the allegations facing individuals in custody. As Professor Craig Forcese has stated, "these are welcome amendments. They do not, however, address core preoccupations with the Special Advocate model."[116]

The Coalition justice for Adil Charkaoui website[117] lists the following groups as among those opposed to the Bill: Amnesty International, Human Rights Watch, the International Civil Liberties Monitoring Group, the Canadian Arab Federation, CAIR-CAN, the Muslim Council of Montreal, the Canadian Bar Association, the Quebec Bar Association, the Federation of Law Societies of Canada, the Canadian Council for Refugees, the Ligue des droits et libertés, the BC Civil Liberties Monitoring Group, the

[115] Standing Committee on Public Safety and National Security, "Report 1 - 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" in *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 034 (10 December 2007).
[116] Craig Forcese, "Minor Amendments Proposed to Bill C-3 by Commons Committee" (13 December, 2007) (blog), online: National Security Law: Canadian Practice in International Perspective http://cforcese.typepad.com/ns/2007/12/minor-amendment.html.
[117] "Analysis of Bill C-3", online: Coalition justice for Adil Charkaoui http://www.adilinfo.org/node/232.

Muslim Lawyers' Association, and the Refugee Lawyers Association of Ontario. In addition, groups such as the National Union of Public and General Employees (NUPGE), one of Canada's largest labour organizations with over 340,000 members also spoke out against the Bill.[118] It did not appear that there were civil society groups speaking in favour of the Bill.

The report of the committee was presented to the House of Commons on December 10, 2007.[119] It was debated in the House of Commons on December 10, 2007[120] as well as January 31, 2008[121] and February 4, 2008.[122] The Bill was presented at the report stage on February 4, 2008, and the amendments proposed by the committee were accepted.[123] The amended Bill was debated at third reading on February 5[124] and 6, 2008 and passed 3rd reading February 6, 2008 (Division no. 37), with a vote of 196 to 71.[125] There were 25 absent and 10 paired (abstaining by arrangement) members.

[118] "Human rights groups urge Liberals to vote against Bill C-3" online: National Union of Public and General Employees http://www.nupge.ca/news_2007/n14de07b.htm.
[119] Minutes - 7 December 2007, *Supra*, note 115.
[120] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 034 (10 December 2007).
[121] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 020 (31 January 2008).
[122] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 043 (4 February 2008).
[123] *Ibid.*
[124] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 044 (5 February 2008).
[125] *House of Commons Debates*, 39th Parl, 2d Sess, Vol 142, No. 045 (6 February 2008).

The breakdown of the vote at third reading by parties was as follows[126]:

Party	Yeas	Nays	N/A
Liberal	76	1	18
Conservative	120	0	6
Bloc Québécois	0	42	7
NDP	0	27	3
Independent	1	1	2
	197	71	36
	64.8%	23.3%	11.8%

As can be seen by the numbers, the Bill was passed in the House of Commons by the concerted efforts of the Conservative and Liberal parties. The final version of the Bill created the Special Advocate regime as it operates in Canada today. Although the Bloc Quebecois supported the Bill in principle on second reading they appear to have abandoned that support when it came to the 3rd reading. Clearly the vote was along party lines. Whether the parties came to their decisions on the final vote based on political considerations or a true analysis of the proposed legislation is uncertain. From a political perspective, the Liberal party was, at this time, generally supporting the Conservative government in an effort to get work accomplished and avoid an unnecessary election.

[126] "Bill C-3 – 3rd Reading", online: How'd They Vote www.howdtheyvote.ca/vote.php?id=501.

The Liberals were not in a position, financial or otherwise, to fight another election.[127] The other parties were generally behaving as Federal opposition parties do, opposing government proposed legislation. As an additional twist, the clock was ticking as to the expiration of the time provided by the Supreme Court of Canada for Parliament to deal with this issue. Again, whether this was because of the complexity of the issue, or an orchestration of the government to create urgency, is a matter of debate.

After being passed by the House of Commons, the Bill then moved on to the Senate. Because of the fast approaching deadline imposed almost one year prior by the Supreme Court of Canada, the Senate dealt with the Bill very quickly. First reading of the Bill in the Senate was on February 6, 2008[128] (the same day it passed third reading in the House of Commons). Second reading debates and the vote on second reading occurred the following day on February 7, 2008[129] in the Senate. The Bill then went to the Special Senate Committee on Anti-Terrorism. The committee discussed the Bill on February 11and 12[130] and had 26 witnesses lined up, and many more who could not be accommodated.[131] Except for those representing the government in their official capacities, all the scheduled witnesses were opposed to the proposed legislation. The Senate committee produced a report on February 12 that was presented to the Senate on

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[127] Jane Young, "Canada's new Conservative minority government on the brink of collapse" (29 November 2008) Pundit, online: <http://pundit.co.nz/content/canadas-new-conservative-minority-government-on-the-brink-of-collapse>.
[128] *Debates of the Senate*, 39th Parl, 2d Sess, Vol 144, Issue 30 (6 February 2008) [Debates - 6 February 2008].
[129] *Debates of the Senate*, 39th Parl, 2d Sess, Vol 144, Issue 31 (7 February 2008) [Debates - 7 February 2008].
[130] *Proceedings of the Special Senate Committee on Anti-terrorism*, 39th Parl, 2d Sess, Issue 4 (11-12 February 2008).
[131] *Debates of the Senate*, 39th Parl, 2d Sess, Vol 144, Issue 32 (12 February 2008).

that date.[132] The Senate committee report suggested concerns of the Senate committee but did not propose any amendments. Instead, because of the looming deadline imposed by the Supreme Court of Canada, the Senate committee proposed that they further review the security certificate system after the Bill became law. Their concern was apparently that there would not be enough time to amend the legislation, send it back to the House of Commons for their reconsideration, and return it to the Upper Chamber.[133] The approach of passing the Bill now and reviewing it later was endorsed by the Minister of the Public Safety.[134] (The Senate committee did in fact hold further hearings after the bill was passed and the legislation came into force[135], however, nothing seems to have come of these further hearings). The Bill was further debated in the Senate on February 12 and passed 3rd reading on that date.[136] The Bill received Royal Assent on February 14, 2008[137] and came into force on February 22, 2008.

3.6 Alternatives

Clearly, all the methods suggested in the *Charkaoui* opinion are better in terms of rights protection than the system in place at the time of that decision. However, the Special Advocate regime established in Bill C-3 was the most infringing on individual rights among these options. The Security Intelligence Review Committee (SIRC)

[132] Special Senate Committee on Anti-terrorism, "Report: 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" in *Debates of the Senate*, 39th Parl, 2d Sess, Vol 144, Issue 32 (12 February 2008).
[133] Debates - 7 February 2008, *Supra* note 129.
[134] *Ibid*.
[135] *Proceedings of the Special Senate Committee on Anti-terrorism*, 39th Parl, 2d Sess, Issue 5,6,7 (3 March 2008, 14 April 2008, 5 &12 May 2008, 2 June 2008)
[136] Debates - 7 February 2008, *supra* note 129.
[137] Royal Assent (2008) C Gaz I, vol 142, no 8.

system, which had counsel representing SIRC with broad powers to vigorously protect the rights of, and communicate with, individuals subject to security certificates, that was previously in place in Canada provided a better balance between national security and the rights of the individual and has been endorsed by many as the better alternative.[138] In particular the ability to communicate with a detainee after receiving confidential information provided significant assistance to SIRC Counsel in protecting the interests of the detainee. In particular, SIRC Counsel could gather relevant exculpatory information from the detainee after accessing confidential information. The SIRC model also is beneficial in that a hearing occurs prior to the issuance of a certificate, a committee a government committee hears the evidence and then makes a recommendation to the Governor in Council (Cabinet) and Cabinet then may direct the Minister to issue a Security Certificate, allowing for significantly more review before a certificate is issued. The only potential negative impact of this process might be a delay in the issuance of the Security Certificate.

The alternative of the *Canada Evidence Act* approach to confidential evidence is better than the Special Advocate model in at least two respects. Firstly, the approach does not allow evidence to be used against an individual if that individual does not have access to that evidence, a standard applied in criminal cases involving national security, such as the Toronto 18 terrorism case.[139] Secondly, the *Canada Evidence Act* model

[138] Submission to Parliament by Canadian Bar Association, "Submission on Bill C-3 *IRPA* Amendments (Certificate and Special Advocates)" (November 2007) online: Canadian Bar Association http://www.cba.org/CBA/submissions/pdf/07-59-eng.pdf; C Forcese & L Waldman, "Canada doesn't need a Star Chamber," National Post, (25 October 2007) online: National Post http://www.nationalpost.com/news/story.html?id=c921bff0-e9ce-48b8-9ca8-4084e2ccc415.
[139] *R v Ahmad,* 2009 CanLII 84782 (Ont SC) at 5.

allows a judge to balance the interests of national security and justice to allow for release of confidential information if in the judge's view the good outweighs the harm, effectively allowing disclosure for the purpose of exculpating the detainee. Even a modification of the Special Advocate regime to allow on-going communication between the detainee, their counsel and the Special Advocate would alleviate one of the biggest concerns in relation to that regime.

The witnesses that appeared before either or both the House of Commons committee and the Senate committee came from various different perspectives, including representatives of the legal profession, civil libertarians, union leaders, respected academics, and Charkaoui himself.[140] The Minister of Public Safety and some members of the government bureaucracy also testified. Other than the members of the bureaucracy and the Minister, no one spoke in favor of the proposed legislation.

Yet the minority government, with the assistance of the opposition, passed this legislation. Concerns expressed about the legislation were virtually ignored. Subsequent to the passing of this legislation, ongoing concerns were expressed by many individuals and groups. Even the commentary about the Bill on the Library of Parliament website by a Library of Parliament analyst was critical of both the legislation and the haste with

[140] Debates - 6 February 2008, *supra* at note 128.

which it was passed.[141] Yet, despite all the expressed concern, no further changes have ever been made to the legislation.

Parliament appears to have interpreted the court's list of less infringing means of dealing with national security issues than the one being examined in *Charkaoui* as an endorsement of all the listed means. The choice of what is arguably the least desirable option from a right-protection point of view has led to a new Charter challenge in *Harkat*. As Kent Roach put it, *Charkaoui* and Bill C-3 only represent "a minimalist episode in a continued dialogue between courts and legislatures."[142] The dialogue between the courts and Parliament seems to have functioned inadequately in this instance because of the poorly carried out response of Parliament. It will be for the Supreme Court to pronounce on whether the legislative response is constitutionally permissible, as discussed in Chapter 4 below.

3.7 The Special Advocate Regime

The Bill C-3 amendments to IRPA[143] were passed by Parliament[144] in response to the *Charkaoui* decision, almost one year after the court decision and barely within the one year deadline imposed by the court. These amendments established a regime that

[141] Penny Becklumb, "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, (2 November 2007, rev'd 9 July 2008, online: Parliament of Canada <http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c3&source=library_prb&Parl=39&Ses=2#commentary>.

[142] Kent Roach, "*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures" (2008) 42 Sup Ct Law Review (2d) 281 at 353.

[143] *An Act to amend the Immigration and Refugee Protection Act (certificate and Special Advocate) and to make a consequential amendment to another Act*, 2d Sess, 39th Parl, 2007.

[144] Royal Assent (2008) C Gaz I, vol 142, no 8.

provides for the appointment of a Special Advocate to represent the interests of the individual named in a security certificate at hearings where the individual named in the certificate, and their counsel, are excluded. The exclusionary aspect of IRPA in relation to the detained person named in the security certificate and their counsel was not changed by the amendments to IRPA. Sections 83 through 85.5 of IRPA create the Special Advocate regime. Section 83 (1)(b) of IRPA states:

> the judge shall appoint a person from the list referred to in subsection 85(1) to act as a Special Advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national.

Under IRPA, the Special Advocate plays a role in some ways similar to that of counsel at these *in camera* proceedings. IRPA states:[145]

> 85.1 (1) A Special Advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.
>
> (2) A Special Advocate may challenge
>
> (a) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and
>
> (b) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

A key distinction, however, is that the Special Advocate is limited by not being allowed to communicate with the detained individual, or anyone else for that matter, about the

[145] IRPA, *supra* note 3, s 85.1(1).

proceeding after receiving sensitive information, except as authorized by the presiding judge, and even then only with whatever conditions the judge may attach.[146] Section 85.5[147] of IRPA states:

> 85.5 With the exception of communications authorized by a judge, no person shall
>
> (a) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or
>
> (b) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

This authorization to enter into communications is, however, discretionary in the hands of the Federal Court judge, and subject to whatever terms the Federal Court judge wishes to impose, assuming he or she decides to allow communication at all.

This effectively puts control of part of the defence of the person named in the certificate in the hands of the Federal Court judge rather than the Special Advocate or counsel for the individual. The existence of a Special Advocate to review the evidence and make representations on behalf of the person named in a security certificate (usually a detainee at that point) to challenge the evidence is limited in that even if the Special Advocate receives permission from the presiding judge to communicate with the detainee, which is by no means a certainty, the presiding judge is statutorily bound to

[146] *Ibid*, s 85.5.
[147] *Ibid*.

ensure the confidentiality of the confidential information[148] and so would not be able to allow the Special Advocate to discuss this information in any way with the detainee. Thus, the Special Advocate would not always be able to receive appropriate instructions for the defence of the detainee because the Special Advocate is unable to pursue information that might be relevant in defending the person named in the certificate.

As well, it is important to note that the relationship between the Special Advocate and the person named in the security certificate is explicitly stated in the legislation in section 85.1(3) as not being a solicitor and client relationship. This means that the Special Advocate's loyalty to the detainee could be questioned. In terms of professional ethics and professional responsibility it is unclear as to whom Special advocates owe a duty. It also means that the Special Advocate can never also be the detainee's lawyer. If the Special Advocate was not a special advocate at all but a security cleared lawyer who represented a detainee, with undertakings from the lawyer to protect the confidential information, the model would be very different and allow for a true representation of the detainee. As described by the Canadian Bar Association in its intervenor factum in *Harkat*, "the limitations on Special Advocates in Canada undermine both the solicitor-client relationship as well as the adversarial process…. The ephemeral nature of the pre-disclosure relationship with the Special Advocate places pressure on the person concerned that is not present in an ongoing solicitor-client relationship."[149] Fundamentally, Special Advocates do not *represent* the detainee. Instead, their role is to

[148] *Ibid*, s 83(1)(d).
[149] CBA factum in *Harkat* at para 14.

protect the detainee's interests.[150] This is a crucial distinction and one that was missed by the Federal Court of Appeal in *Harkat*.[151] The significance of the distinction is not just limited to releasing the Special Advocate from the duty to keep the detainee informed, which in itself is already critical. Acting in the best interests of the detainee is not equivalent to a lawyer receiving instructions from the detainee. Determining the best interests of the detainee in the absence of receiving instructions results in the Special Advocate having no choice but to use his or her own judgement to determine what is in the best interest of the detainee. For example, implicating a person who is close to the detainee such as a family member in an effort to exonerate the detainee is very much a question that a lawyer acting on behalf of a client would seek instructions about. Can a Special Advocate truly act in the best interests of a detainee under a Security Certificate if they do not know what the detainee wants to do in a particular situation?

Special Advocates operate under further limitations. For example, they may make oral and written submissions, but they have not statutory authority to call witnesses of their own or to submit evidence. Their role is essentially limited to cross-examining witnesses who are called by the Minister to testify in the secret hearings.[152] Their ability to effectively cross-examine those witnesses is, of course, hampered by their inability to communicate with the detainee. If for example there is evidence that the detainee was somewhere other than where a witness claims they were, a Special Advocate would not know this because they would not be able to ask the detainee for this information. All in

[150] IRPA, *supra* note 3, s 85.1 (1).
[151] *Harkat v Canada (Citizenship and Immigration),* 2012 FCA 122 at para 84 [Harkat Fed CA].
[152] Factum of Amnesty International in *Harkat*, para. 20.

all the Special Advocate regime does not provide for effective advocacy on behalf of individuals detained under security certificates.

3.8 Relationship to UK Special Advocate Model

As mentioned earlier, Canada's Special Advocate regime has roots in the regime being used by the United Kingdom. Interestingly, the United Kingdom's Special Advocate procedure was apparently developed using the Canadian Security Intelligence Review Committee security-cleared counsel model as a starting point. The SIRC model had been cited in the decision of the European Court of Human Rights in *Chahal v United Kingdom*[153] as a means of improving the fairness associated with secret hearings.[154] The UK model, while being very similar to the new Canadian Special Advocate legislation, differs from the Canadian model in the key respect that, while it can curtail liberty up to and including house arrest, it cannot result in indefinite incarceration.[155] In addition, litigation challenging the "control order" regime in the UK which includes the Special Advocate procedure, has resulted in a ruling by the House of Lords requiring the government to provide disclosure of secret evidence to the detainee where doing so is necessary to the fairness of the hearing *even where it would be*

[153] (1996) 23 EHRR 413.
[154] John Ip, 2009 N.Z. L. Rev. 207 at 209 [Ip]; "The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates" House of Commons Constitutional Affairs Committee (UK) 22 March 2005.
[155] *Prevention of Terrorism Act 2005* (UK) c.2, s. 9. In response to the House of Lords' decision in *Secretary of State for the Home Department v AF*, [2009] UKHL 28 finding aspects of the PTA incompatible with the UK's international human rights obligations, the UK Parliament enacted the *Terrorism Prevention and Investigation Measures Act 2011* (UK) c. 23 which authorizes only house arrest and not custodial detention at all.

injurious to national security.[156] The British Columbia Civil Liberties Association has described the current UK model as entailing "less jeopardy and more process" than the current Canadian model.[157]

In reviewing the UK model as it was in 2007 post-*Charkaoui*, Forcese and Waldman drew from the Canadian SIRC Model and the *Canada Evidence Act* to address the shortcomings they identify of the UK (and New Zealand) Model.[158] The key critique of those models surrounds the inability of Special Advocates to have ongoing communications and for even the Special Advocate to obtain full disclosure, noting that this compromises the ability of Special Advocates to adequately protect the interests of the detainee under a Security Certificate. Forcese and Waldman recommend meaningful ongoing communication between the detainee and the Special Advocate, noting that this type of communication occurred under the SIRC model and that there was never an inadvertent disclosure or an endangerment of national security in the 20 year history of the process.[159] Forcese and Waldman also observe in "A Bismarckian Moment" the irrationality of that argument given that the government's lawyers and investigators communications with a detainee, which are not restricted after the government's lawyers and investigators access confidential information, and yet there is no fear of inadvertent disclosure in these interactions.[160] They also recommended full access to all material in the possession of the government to guard against incomplete disclosure. Other recommendations included a recognition of the confidentiality of communications

[156] *Secretary of State for the Home Department v AF*, [2009] UKHL 28 at para 68.
[157] [BCCLA factum in Harkat at para 17.]
[158] Forcese and Waldman "Seeking Justice", *supra* note 53.
[159] *Ibid, a*t viii.
[160] "A Bismarckian Moment," *supra* note 49.

between the Special Advocate and the detainee, as well as the greater balancing of public interest and national security afforded by the *Canada Evidence Act* in relation to confidential information, and removing the possibility of indefinite detention from the Security Certificate process and moving situations that would result in indefinite detention to the criminal law realm.[161] Regrettably, their recommendations have gone unheeded.

The UK based Special Advocate regime may, on cursory examination, resemble the historic barrister role within the barrister and solicitor dichotomy of English legal tradition. The concept of the barrister model, however, allows for the ongoing interaction between the barrister and solicitor to meet the needs of representing the client. There is no restriction on the communications between these two individuals, and thus no issue associated with properly providing defence and representation to the client. The role of the barrister has always been to present the case, and the role of the solicitor to prepare it.

> …it is traditionally the barrister…who presents the case and expresses the arguments on the client's behalf, whilst the solicitor's task is to deal directly with the client, to ensure that the barrister chosen is properly instructed, to collect and collate all relevant evidence…[162]

With respect to the UK regime, a UK Commons committee report identified one of the key concerns regarding the Special Advocate system as the inability of the Special Advocate to communicate with a client after the Special Advocate had received

[161] Craig Forcese and Lorne Waldman, "Comments on Bill C-3" (November 1, 2007) online: <http://aix1.uottawa.ca/~cforcese/other/C3comments.pdf>.
[162] Phil Harris, *An Introduction to Law* (London, UK: Weidenfeld and Nicholson, 1980) at 101.

confidential information.[163] A similar critique is applicable to the Canadian Special Advocate regime, which follows the UK model as it stood in 2007. As already noted, the critique in the UK has been that the absence of ongoing communication between the Special Advocate and the detainee makes full and proper representation of the detainee difficult.

3.9 Special Advocates and First Principles of Advocacy

Special Advocates in Canada come from the bar and are not to be in the current employ of the federal government. They are, however, vetted and selected by the federal government,[164] ostensibly for security clearance but without restriction on how the federal government selects these individuals, beyond whom they can not appoint (e.g. non- lawyers, federal civil servants). At present, all but one of Special Advocates are from the Ontario or Quebec bars.[165]

Among the twenty-two Special Advocates that the federal government presently has on their list,[166] a person named in a security certificate is allowed to select one, provided however that their selection does not cause undue delay.[167] More significantly, the appointment is made by the presiding federal court judge, and the legislation makes it

[163] United Kingdom House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, 7th Report, Sess 2004-05, vol 1. London: Stationery Office, 2005.
[164] IRPA, *supra* note 3 , s. 85(1).
[165] Department of Justice online : <http://www.justice.gc.ca/eng/fund-fina/jsp-sjp/list-liste.html>.
[166] *Ibid*.
[167] IRPA, *supra* note 3, s 83(1.2).

possible for the judge to, at his or her discretion, dismiss the Special Advocate and appoint another of their own choosing.[168] Special Advocates are to be provided administrative support.[169] Administrative support actually addresses one of the critiques of the United Kingdom model,[170] which has also since been changed.

What then does an advocate do? For our purposes, the most relevant definition of advocate in the Oxford English Dictionary is "one who pleads, intercedes, or speaks for, or in behalf of, another; a pleader, intercessor, defender."[171] An advocate is, in essence, one who is called upon to speak on behalf of another. Advocates have existed at least as far back as ancient Greece and Ancient Rome.[172] In ancient Greece,

> At first advocates were generally drawn from the litigant's friends, relatives, clubfellows, and fellow-demesmen. These were the men who knew him and his affairs best. But I the course of time advocates tended to become professional in private as well as in public suits and the practice of paying advocates arose.[173]

Another custom that developed in ancient Greece was for an individual to explain his case to an orator or writer and for that orator or writer to prepare a speech for the individual to deliver.[174]

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[168] *Ibid*, s 83(2).
[169] *Ibid*, s 85(3).
[170] Justice and Security Green Paper, s*upra*, note 50.
[171] *Oxford English Dictionary,* online: <http://www.oed.com.proxy2.lib.umanitoba.ca/view/Entry/3022?rskey=gJkZ6x&result=1&isAdvanced=false>.
[172] E W Timberlake "Origin and Development of Advocacy as a Profession" vol 9 Virginia L R 25 at 25 [Timberlake].
[173] Robert J. Bonner and Gertrude E. Smith "The Administration of Justice From Homer to Aristotle" in Association of American Law Schools *Selected Readings on the Legal Profession* (St. Paul, Minnesota: West Publishing Co, 1962).
[174] Timberlake, *supra* note 172.

In Ancient Rome the role of advocate, the Roman lawyer, began as an aristocratic, public-spirited and honoured calling pursued by patriotic and economically independent men who by their position and experience in public life had acquired a large store of practical knowledge and professional competence.[175] This custom appears to have developed from the right during Roman times for the "Roman patrician to render assistance, and afford protection, to his dependents and even to others who sought his services and advice. For this purpose, therefore the patrician frequently appeared in the courts to defend the cause of his client."[176] Clearly the ancient Greek and Roman customs with respect to advocates appears to have been in line with assistance being provided in presenting one's legal case.

The role of the advocate carried over not only to all the civil law jurisdictions that based their legal systems on the Roman legal system, but a similar concept of advocacy also developed in the English legal profession. "Advocacy -- the oral argument of a litigant's case in court -- is rightly thought of as a barrister's chief and distinctive professional function."[177]

One of the primary duties of an advocate is to represent the client.[178] In the context of an advocate acting on behalf of a child, Justice Rothman of the Quebec Court of Appeal in *F(M) c L(J)* stated that is was the advocate's role to plead cases in

[175] Anton-Hermann Chroust "the Legal Profession in Ancient Republican Rome" in Association of American Law Schools *Selected Readings on the Legal Profession* (: St. Paul Minnisota: West Publishing Co, 1962).
[176] Timberlake, s*upra* Note 172 at pp 25-26.
[177] Wilfred R Prest "*The Rise of the Barristers"* (Clarendon Press: Oxford, 1986) p 12.
[178] David Pannick *Advocates* (Oxford University Press: Oxford, 1992) p 89.

accordance with their client's wishes.[179] The advocate, then, approaches the presentation of an individual's case from the perspective of that individual.

In considering the role of the advocate through the ages, it appears that the primary reason an advocate would be engaged to present an individual's case would be because they were seen to be more adept at presenting a case on behalf on an individual than the individual themselves. They would presumably be in this better position to present the case of an individual, rather than the individual themselves, because of the advocate's natural communication skills, knowledge, training, social status or other attributes.

Advocacy is an extension of freedom of expression.[180] By providing the arsenal of communication skills and legal expertise of an advocate to an individual, the individual may be able to convey information that this individual might otherwise not have the ability to articulate. Generally, an advocate is expected to be able to provide information in a clear concise manner, organize and contextualize information and, from a legal perspective, relate information and evidence to law.

In an ideal world, perhaps an individual would not need an advocate to speak on their behalf. The individual might be able to express their information and argument completely on their own, with a full knowledge, skill and ability to deal with legal and other issues that rise. Unfortunately, this is not an ideal world, and so individuals do rely

[179] [2002] RJQ 676, 211 DLR (4th) 350, 2002 CanlII 36783 , online: <http://www.canlii.org/fr/qc/qcca/doc/2002/2002canlii36783/2002canlii36783.html>.
[180] *Advocates*, *supra* note 178 at p.246-247.

on advocates to be extensions of the individual themselves. Extensions of themselves that can take the information, thoughts and ideas of the individual and build on these with the advocate's skills and expertise.

It is fundamental to the concept of advocacy that to properly advocate for an individual, an advocate must communicate with that individual. In order to build on the information, thoughts and ideas of an individual, and be an extension of that individual in representing the individual, the advocate must have ongoing access to the information, thoughts and ideas of the individual. Just as an individual representing themselves has unfettered, ongoing and interactive access to their mind, so too must an advocate to fully play their role. The most common role of advocate in today's society is that of a lawyer. In fact the French language has retained the term advocate – *avocat* – for lawyer. The importance of communication between anyone acting as advocate and their client is analogous to the importance of communication between a lawyer and their client, since the goals of both are to fully represent the interests of the client. In *R v McClure*,[181] in the context of a solicitor client privilege issue, the court recognized the principal that "Free and candid communication between the lawyer and client protects the legal rights of the citizen."[182] The concept that the lawyer is a professional with specialized skills that needs to candidly consult with the person whose interests he represents to carry out this role was also recognized by the Supreme Court of Canada in *Blank v Canada*

[181] *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.
[182] *Ibid* at 33.

(Minister of Justice).[183] This rationale very clearly translates to anyone attempting to represent the interests of another in an advocate's role.

The concept of the advocate speaking on behalf of an individual has taken some different forms in different times and places. However, there seems to be one commonality in the role. The advocate has always been intended to be a more capable alter ego of the individual they are representing. One who is perhaps more eloquent, or more familiar with rules and procedures, or better able to deal with those hearing the case. In that sense, one can see the advocate not just as having the tools but *being* the tool used by an individual to help the individual present their case.

The Special Advocate under IRPA is out of step with the classic role of advocate. The Special Advocate does not have the freedom to at all times communicate freely with the detainee. They are charged with protecting the interests of the detainee,[184] rather than representing them. Special Advocates are not accountable to the detainee and the detainee is not the client of the Special Advocate. While the Special Advocate may genuinely believe they are acting in the best interests of the detainee this may not be consistent with what the detainee would do if they were acting on their own behalf with the specific knowledge of the case and the general expertise that the Special Advocate has. In contrast, after receiving advice from their lawyer, the detainee would be able to provide instructions to their lawyer. Thus, the distinctions between the Special Advocate and a true advocate detract from the ability of the Special Advocate to truly act as an

[183] *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 at 26.
[184] IRPA, *supra* note 3, s 85.1 (1).

advocate of the detainee and for the Special Advocate regime to remedy the fair trial defects of the security certificate system.

Chapter 4: Charter Failings of the Special Advocate Regime

4.1 Chapter Introduction/Roadmap

As discussed in Chapter 2, The Supreme Court of Canada in *Charkaoui*[185] conducted an in depth analysis of the constitutional validity of the security certificate provisions that immediately preceded the current provisions. The provisions with respect to security certificates were the same in the predecessor legislation as they are in the current provisions, the primary difference being that the current legislation has adopted the Special Advocate regime. This chapter revisits the Charter analysis from *Charkaoui* decision and applies it in the context of the amended security certificate regime, with particular attention to the arguments made in the *Harkat* case currently before the Supreme Court of Canada. The focus is on whether the Special Advocate regime satisfies the principles of fundamental justice in accordance with Section 7 of the Charter.

As previously indicated, the pre-2008 version of IRPA provided for the issuing of a security certificate by the Minister of Immigration and the Minister of Public Safety in the same form and substance as the legislation today. As is the case today,[186] under the predecessor legislation the reasonableness of the security certificate was then assessed by a Federal Court judge.[187] In the review conducted by the Federal Court judge, any information that was considered sensitive in relation to national security was heard *in camera*, in the absence of the person named in the security certificate and that person's

[185] *Charkaoui, supra*, note19.
[186] IRPA, *supra* note 3, s 78.
[187] *Ibid*, s 80 as it was prior to 2008 amendments.

counsel.[188] Again, as is the case in the current legislation,[189] summaries of this sensitive information were to be released to the named person and their counsel, but no information could be included in the summaries if the Federal Court believed it would be harmful to the National Security interests.[190] The evidence provided on behalf of the Ministers was reviewed by the Federal Court judge and was used as the basis of the reasonableness of the security certificate, whether or not this information was provided to the named person in full, in summary form, or not at all,[191] which continues to be the case today.[192] The certificate, once being determined as reasonable, would then be the basis for the removal of the person named in the certificate, potentially affecting their right to life, liberty or security of their person, or just as importantly, the security certificate could become the basis of the indefinite detention of the named person to their country because Canada was not permitted, under most circumstances, to return the person to the named person's country of origin because there was a risk of the named person being subjected to torture if returned to that country.[193] The predecessor legislation differed from the current legislation in that it did not have any means by which the interests of the person named in the certificate could be protected at the *in camera* hearings.

The Supreme Court of Canada held that the inability to have any representation on behalf of the person named in the security certificate at the hearing of the confidential information upon which the security certificate was based violated the *Charter* rights of

[188] *Ibid*, s 78(e) as it was prior to 2008 amendments.
[189] *Ibid*, s 83(e).
[190] *Ibid*, s 78(h) as it was prior to 2008 amendments.
[191] *Ibid*, s 78(g) as it was prior to 2008 amendments.
[192] *Ibid*, s 83(i).
[193] *Suresh, supra* note 72 at 76.

the person named in the certificate. As indicated previously, the court allowed Parliament one year to modify the legislation to ensure compliance with the *Charter*.

Given the elements of the Special Advocate regime set out above, the key question is whether the section 7 *Charter* violation has been remedied by the amendments. It will be argued that the problem of the detainee not being able to know the case against him or her, and the consequent inability to make full answer and defence persist even with the involvement of Special Advocates. It will further be argued that this limit on the detainee's section 7 rights is not a reasonable limit pursuant to section 1 of the *Charter*. Lastly, the appropriate remedy will be considered.

4.2 Interpretive Principles from International Human Rights Law

International human rights law provides an important interpretive framework for considering the section 7 rights of detainees under security certificates. Section 3(3) of IRPA provides that "This Act is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory."[194] The Amnesty International factum in *Harkat* describes the key elements of fair trial safeguards provided in international law, beginning with the *Universal Declaration of Human Rights*[195] and the *International Covenant on Civil and Political Rights*.[196]

[194] IRPA, *supra* note 3, s 3(3)(f).
[195] GA Res 271 (III), UN GAOR, 3d. Sess, Supp. No. 3, UN Doc A/810 (1948)
[196] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

[ICCPR]. They are: the right to equality of arms; the principle of an adversarial process; and the principle of open justice.[197] Equality of arms in particular refers to being provided a reasonable opportunity to present ones case on relatively equal footing with the other side.[198] The adversarial process requires "both parties to know and comment upon the evidence and argument in order to challenge it and establish by contrary evidence that it is incorrect."[199] The principle of open justice refers to public hearings and public judgements so as to ensure public confidence in the justice system. All of these principles stem from Article 14 of the ICCPR,[200] and can also be found in Article 6(1) of the *European Convention on Human Rights*.

4.3 Section 7 of the *Charter*

The first stage of analysis under section 7 of the *Charter*, namely whether the law in question constitutes a deprivation of one of the three interests protected – life, liberty, or security of the person, is easily satisfied by the IRPA provisions. The court in *Charkaoui* correctly found that named persons detained under security certificates are deprived of their liberty.[201] In particular, the court noted that this detention can last several years and is, in fact, indefinite.[202] The court also found that the possibility of the process causing the removal of the person named in the security certificate to another country could result in that individual's life or freedom being threatened in the country to

[197] Amnesty International factum in *Harkat*, para 8.
[198] *Ibid*.
[199] *Ibid*.
[200] *Ibid* at 9.
[201] *Ibid* at 16.
[202] *Ibid* at 13.

which they would be removed.[203] The current legislation only differs from its immediate predecessor in any significant sense in that it now incorporates the Special Advocate regime. The security certificate provisions of IRPA still have the same effect of permitting removal and indefinite detention of a named person pursuant to the security certificate. These are profound restrictions on a named person's liberty, thereby engaging section 7.

The rights embodied by section 7 of the *Charter* include the guarantee of procedural fairness. The court in *Charkaoui* recognized that the guarantee can vary depending on "the circumstances and the consequences of the intrusion."[204] Thus determining whether the standards of procedural fairness are met depends on the "consequences of the intrusion on life, liberty for security."[205] Section 7 does not require the same process in all cases but rather, a fair process having regard to the nature of the proceedings and the interests at stake.[206]

The section 7 case law makes it clear that the greater the jeopardy faced by the individual, the greater the level of procedural fairness required.[207] The court in *Charkaoui* cites *Suresh*, for the principle that "the greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common-law

[203] *Ibid* at 14.
[204] *Ibid* at 19.
[205] *Ibid*.
[206] *Ibid* at 20.
[207] The BCCLA factum in *Harkat* (para 10) cites a number of cases for this principle: *May v Ferndale Institution*, [2005] 3 SCR 809; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643.

duty of fairness and the requirements of fundamental justice under section 7 of the *Charter*."[208]

Having found a deprivation of liberty, the next step then is to identify whether the potential deprivation on the Section 7 rights of the detainee is in accordance with the principles of fundamental justice. The court in *Charkaoui* identifies the relevant principle of fundamental justice as requiring a fair judicial process.[209] The facets of the principle of fair judicial process cited in *Charkaoui* are the right to a hearing, the right to have the hearing before an independent and impartial magistrate, to have the decision by the magistrate be based on the facts in the law, and the right to know the case put against one and the right to answer that case.[210] The court allowed for some flexibility in terms of context but indicated that to satisfy the requirement of Section 7 of the *Charter* each of these facets "must be met in substance."[211]

The key issue in *Charkaoui* was the profound limitation on the named person's ability to know the case against them and to answer that case. The court stated that the right to disclosure is not absolute and may depend on the context,[212] and also found that national security considerations can limit the extent of disclosure. However the fundamental question emerging from *Charkaoui*, and at issue in the *Harkat* appeal discussed below, is whether the legislation provides a substantial substitute for disclosure

[208] *Charkaoui*, *supra* note 19 at 25.
[209] *Ibid* note 19 at 28.
[210] *Ibid* at 29.
[211] *Ibid* at 29.
[212] *Ibid* at 57.

of the case to meet to the named person, sufficient to satisfy the principle of fundamental justice requiring a fair judicial process.

4.4 *Harkat* and the Section 7 Failings of the Special Advocate Regime

In *Harkat*,[213] an individual was detained under a security certificate primarily as a result of allegations that he was part of the Bin Laden terrorist Network. The facts, as summarized by the Federal Court of Appeal, were that Harkat arrived in Canada in October of 1995, carrying both a false passport indicating Saudi Arabian citizenship, as well as a genuine Algerian passport. Harkat applied for refugee status upon entry and was granted same in February of 1998. On December 10, 2002, a Security Certificate was issued naming Harkat. In March 2005, the Federal Court upheld the reasonableness of the Security Certificate issued against Harkat. The Federal Court of Appeal upheld the decision later that year.[214] Leave to appeal to the Supreme Court of Canada was granted and Harkat's case was heard together with the appeals involving Almrei and Charkaoui, which ended with a finding that the security certificate legislation as it then stood was unconstitutional.[215] After the legislation was amended as discussed in this thesis, Harkat again challenged the constitutional validity of the security certificate in the Federal Court.[216] The Federal Court found, based upon the evidence, much of which Harkat was not privy to, that for example, he had operated a guesthouse for an individual named Ibn

[213] *Harkat FCA*, *supra* note 30.
[214] *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 285
[215] *Charkaoui, supra* note 19.
[216] *Harkat (Re),* 2010 FC 1242 [*Harkat FC*].

Khattab who the court found, among other things, was part of the broader Bin Laden Network involved in Chechen terrorism; that he had links to an Egyptian extremist group; and that he used "sleeper agent" methods in Canada.[217]

The *Harkat* appeal was argued before the Supreme Court of Canada on October 10 and 11, 2013, with the decision reserved. At time of writing, the decision had not yet been released. A number of issues are before the court, including whether CSIS sources (informants) are protected by a class privilege and the appropriate remedy for the destruction by CSIS of relevant confidential information used in security certificate proceedings. However, the key issue for our purposes is the constitutionality of the Special Advocate regime. In addition to one government intervenor (the Attorney General of Ontario), ten intervenors[218] made submissions to the court, many of them focusing on issues related to Special Advocates. As such, the submissions in *Harkat* provide useful context and analysis in relation to revisiting the section 7 issues laid out in *Charkaoui.* The section below examines the facets of the principle of fair judicial process in relation to the post-*Charkaoui* regime used in *Harkat*: (1) the right to a hearing; (2) the right to have the hearing before an independent and impartial magistrate; (3) the right to have the decision by the magistrate be based on the facts and the law; and (4) the right to know the case put against one and the right to answer that case.[219] The focus of the

[217] *Harkat FCA*, *supra* note 30 at 36.
[218] British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Canadian Council of Criminal Defence Lawyers, Canadian Bar Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees and International Civil Liberties Monitoring Group, Canadian Council on American-Islamic Relations, Amnesty International, and Criminal Lawyers' Association (Ontario).
[219] *Harkat FCA, supra* note 30 at 29.

analysis is on the fourth element, the right to know the case-to-meet and the right to answer that case.

Briefly, with respect to the requirement of a hearing the court in *Charkaoui* found that a hearing did indeed occur, that being the hearing to review the reasonableness of certificate.[220] This right was also recognized by the court in the context of the extradition case *United States of America v Ferras; United States of America v. Latty.*[221] The current legislation continues to have the process of a hearing before a designated judge, and as such a hearing requirement is met.

In terms of the requirement of an independent and impartial judge, this requirement is a long standing principle of fairness, confirmed and expounded upon in detail by the Supreme Court of Canada in *Valente v The Queen.*[222] In *Valente* the court reviewed the requirement of independence and impartiality in the context of provincial court judges hearing criminal matters and Section 11(d) of the *Charter*. In *Charkaoui* the court expressed concerns about the designated judge hearing all the evidence presented by the Minister but not being able to share this evidence with the detainee. The court was also concerned about the possible perception that designated judges may be seen to be operating as an arm of the executive rather than independently, while in contrast, also being perceived as representing the interests of detainees who otherwise had no representation. Nonetheless, the court found designated judges to be independent and

[220] *Ibid* at 30.
[221] *United States of America v Ferras; United States of America v. Latty,* 2006 SCC 33, [2006] 2 SCR 77 at 25.
[222] *Valente v The Queen* [1985] 2 SCR 673 [*Valente*].

impartial under the predecessor legislation. With the addition of a Special Advocate being present at the secret hearing with a mandate to protect the interests of the named person, the process becomes more adversarial and the government argues that there is no problem of judicial impartiality.

However, the Canadian Civil Liberties argues in *Harkat* that the requirement for a Special Advocate to seek judicial authorization before communicating with anyone about the proceedings undermines the principle of judicial independence by making the judge the arbiter of communication within the defence brief.[223] In the process of seeking authorization the Special Advocate will be required to disclose to the judge strategic issues that underlie the request for certain communication (such as with the detainee's counsel). It will be very difficult in this process for the Special Advocate to respect litigation privilege and solicitor-client privilege (keeping in mind that the relationship between Special Advocate and detainee is explicitly not a solicitor-client one but information obtained by the Special Advocate from the detainee is deemed by s. 85.1(4) to be solicitor-client communication) and undermines the ability of the Special Advocate to protect the detainee's interests. This requirement of judicial authorization for communication by the Special Advocate operates along with other features of the regime to undermine fairness. This is especially the case as the government has an opportunity to hear the details of the Special Advocate's request for permission to communicate and has an opportunity to make submissions regarding that request.

[223] Factum of the Canadian Civil Liberties Association in *Harkat* at 16-18.

With respect to the requirement that decisions be based upon fact and law, this requirement is also enunciated in the leading administrative law decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick.*[224] The court in *Charkaoui* looked in turn at fact and law. With respect to fact, the Supreme Court held that designated judges reviewing security certificates lacked the ability to fully investigate facts,[225] and were not able to base their decisions on the facts. Under the current regime this concern is partially, but not adequately, addressed.

The Special Advocate can receive and respond to the evidence on behalf of the detainee. The Special Advocate can also cross-examine government witnesses. However, there are significant constraints on the Special Advocate's role. Any other step the Special Advocate wishes to take requires authorization of the designated judge.[226] Independent investigation, calling of witnesses, and seeking additional disclosure are all dependent on the designated judge's consent. Even assuming that consent was obtained, it is unlikely that the Special Advocate will be given consent to disclose the confidential information to others, thus making it doubly difficult to gather additional information. Presenting witnesses to rebut the confidential information also not only requires the consent of the designated judge to call a witness, but also to discuss the proceeding, and the witness would likely have to be security cleared even if those consents were obtained. In addition, facts in rebuttal from the detainee would not normally be obtainable as the communication is not permitted without the judge's consent, and even if it were, as discussed previously, the court would be statutorily bound not to allow the Special

[224] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at 47.
[225] *Charkaoui, supra* note 19 at 51.
[226] IRPA, *supra* note 3, s 85.4, 85.5.

Advocate to ask the detainee questions that would possibly reveal the confidential information. Thus, the court's concern about decisions being made by the judge on the basis of facts prior the enactment of the current regime are not adequately addressed by the current legislation as the designated judge may still not have all the relevant facts before them.

In terms of the requirement that the decision be based on the law, the court in *Charkaoui* found that while detainees were able to make legal arguments, the absence of disclosure and full participation hindered their ability to make meaningful objections or "develop legal arguments based upon the evidence."[227] The *Charkaoui* court therefore concluded that decisions by designated judges were not based on the law. Special Advocates can certainly address this concern based upon their training as lawyers and access to the confidential information before the court. The only limitation would be with respect to legal arguments surrounding facts that they do not have because the Special Advocates were not allowed to communicate with detainees. For example, the need for an alibi for a particular date might not become apparent until confidential information is provided to the Special Advocate.

The right of the detainee to know and answer the case to meet is the crucial issue with respect to the limitations on Special Advocates. Two prior decisions of the Supreme Court of Canada enshrine this principle; *R v Stinchcombe*[228] and *R v Chaplin*[229] emphasize the need for full disclosure as essential to fairness. The Supreme Court in

[227] Charkaoui, *supra* note 19 at 51-52.
[228] *R v Stinchcombe* [1991] 3 SCR 326.
[229] *R v Chaplin* [1995] 1 SCR 727.

Charkaoui found that since the detainee would not receive all the information regarding the case against him or her when confidential information is involved, they would not know the case to meet and therefore would not have a meaningful opportunity to answer it. The court found that while substitute disclosure was a possibility, the extensive nature of confidential information withheld in national security cases combined with the grave impact on the liberty interests of detainees, made it extremely unlikely that an acceptable substitute disclosure could be found.[230] The court did not consider review by the designated judge as an adequate substitute.

The new regime, while still leaving the detainee and the detainee's lawyer in the dark, provides a form of substitute disclosure by giving access to the confidential information to the Special Advocate. The court discussed the concept of substitute disclosure in this context in *Charkaoui.*[231] At paragraph 61 of the court states:

> In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice 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. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 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.[232]

[230] *Charkaoui, supra* note 19 at 53-62.
[231] *Ibid* at 61.
[232] *Ibid*.

While indicating that a substitute for full disclosure may constitute compliance with Section 7 of the *Charter*,[233] the court also went on to distinguish the case law that allowed for such substitutes of full disclosure stating "it is one thing to deprive the 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." The court stated that limited disclosure being used to satisfy the principles of fundamental justice has only been historically found in case law as appropriate where the "intrusion on liberty and security has typically been less serious than that effected by IRPA."[234] Thus, the court effectively set an extremely high standard for substitute disclosure to meet the requirements of Section 7 when it came to the substantial impact the security certificate had.

The key question, then, is to assess whether the Special Advocate regime provides sufficient substitute disclosure to meet the high bar set by the *Charkaoui* case. The purpose of substitute disclosure is to provide an individual the knowledge of the case against them and provide them with an on opportunity to make answer to the charge.

The Federal Court of Appeal, in looking at the *Harkat* case in the context of a security certificate matter, stated that the right to disclosure was not absolute.[235] In supporting this assertion the court cited *R v Lyttle*,[236] and *R v Ahmad*.[237] It should be noted that the reference to *R v Lyttle* is about the right to cross examine not being

[233] *Ibid* at 59.
[234] *Ibid* at 60.
[235] *Harkat FCA*, *supra* note 30 at 111.
[236] *R v Lyttle,* 2004 SCC 5, [2004] 1 SCR 193.
[237] *R v Ahmad,* 2011 SCC 6, [2011] 1 SCR 110.

absolute, but that case addressed the situation where the right to cross-examine is being abused.

Similarly, *R v Ahmad,* in discussing non-disclosure of confidential information under the *Canada Evidence Act*, does not address the use of the undisclosed evidence against an individual, nor does it address the discretion the *Canada Evidence Act* provides to judges to provide a remedy, including a stay of proceedings, if non-disclosure affects the fairness of a hearing. In contrast, the Special Advocate regime explicitly allows for the use of undisclosed information against a detainee[238] and does not provide the discretionary remedies available under the *Canada Evidence Act,* although the court does indicate in *Harkat* that the *Charter* remedy provided by section 24(1) is available if a breach of procedural fairness has occurred.[239] The Federal Court of Appeal leaves the door open that, depending on the facts of a particular case, non-disclosure may amount to a breach of procedural fairness and leave open an appropriate remedy under section 24 of the *Charter*.[240]

Section 7 of the *Charter* protects individuals' liberty interests from detention without due process. It is fundamental that detainees be given an opportunity to respond to the case against them. It cannot be due process to allow indefinite detention without this opportunity, and allowing a substitute who cannot communicate with a detainee without judicial authorization does not fulfill this requirement.

[238] IRPA, *supra* note 3, s 83(1)(h) and (i).
[239] *Harkat FCA, supra* note 30 at 119.
[240] *Ibid* at 112.

It is important to keep in mind that a detainee's defence under the security certificate regime is divided: the detainee's own counsel and the Special Advocate have access to different parts of the same case.[241] Detainee's counsel has access to the material which has been publicly released, but not the secret evidence, and can communicate freely with the detainee. On the other hand, the Special Advocate has access to the secret evidence but cannot communicate with the detainee after viewing the evidence without authorization from the presiding judge. The detainee may continue to provide information to the Special Advocate, which may be helpful in some circumstances but is not helpful in circumstances where the detainee does not know what information the Special Advocate specifically needs to assist them in protecting the detainee's interests. The detainee and his or her counsel are entitled to receive a summary of the evidence against the detainee, which is not disclosure of the evidence itself. This may be acceptable in many administrative law contexts but should be considered critically when liberty interests are at stake. More importantly, the summary may not itself include, even in summary form, anything that the court considers be a risk to national security or a danger to anyone. Thus, direct disclosure is certainly lacking. The Federal Court and Federal Court of Appeal in *Harkat* found it significant that the detainee was provided with "some valuable supporting factual evidence" through the summary public disclosure. This was seen as better than what the pre-*Charkoui* system provided and therefore constitutional. However, "better than before" is not the standard. It is important to examine the adequacy of this limited summary disclosure, as well as the constrained access the Special Advocate has to the secret evidence, against section 7 standards.

[241] Factum of the Canadian Civil Liberties Association in *Harkat*, at para. 9.

The Special Advocate has access to the secret evidence as a substitute to disclosure being provided directly to the detainee. While this may be effective in some instances, such as when *in camera* cross-examination of a CSIS witness reveals contradictions in testimony, as occurred in *Re Almrei,*[242] there will be other instances in which the stark disconnect between the recipient of the disclosure (the Special Advocate) and the detainee will frustrate the ability to properly answer the evidence against a detainee. The detainee will not have the evidence and will therefore not be in a position to make full answer and defence. For example, the Special Advocate may not be aware of an alibi of the detainee because the details of such as the time and place of a particular event are secret evidence.

The Special Advocate will have disclosure of the case against the detainee but will not have all the knowledge and information of the detainee relevant and necessary to mount a defence to refute the allegations against the detainee. For example, in *Harkat* there is an allegation that Harket associated with known terrorists. While Harkat and his counsel were provided with their names, all Harkat could do is make a bare denial of the allegations because he was not privy to the circumstances that gave rise to government agents coming to this conclusion. In contrast, while the Special Advocate would know details of the alleged association, upon receiving these details, the Special Advocate is precluded from communicating with Harkat without judicial authorization, thus preventing the Special Advocate from eliciting relevant exculpatory information from Harkat. This disjointed relationship is therefore an inadequate substitute for disclosure. As Forcese and Waldman noted in their interviews with UK Special Advocates, a

[242] *Almrei (Re)*, 2009 FC 1263 at 164.

repeated theme was that the Special Advocates felt that their ability to make full answer and defence was non-existent.[243] The right under section 7 of the *Charter* to know and respond to the case against you is violated by placing a chasm between the recipient of the disclosure and the one who has the knowledge to answer it.

With respect to the Federal Court of Appeal's suggestion in *Harkat* that when the occasional circumstance does arise that the legislation operates to violate the rights of an individual that section 24 of the *Charter* may be invoked as a remedy,[244] I suggest that this is a misunderstanding of the use of Section 24. Section 24 is intended to provide a remedy where state action results in the violation of a *Charter* right. However, when legislation in its operation results in the violation of a *Charter* right (even if not in every case) the appropriate remedy is a finding of invalidity under Section 52 of the *Constitution Act, 1982*, unless the infringement is saved by Section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.

4.3 Section 1 Charter Analysis in Relation to Infringement of Section 7

It remains to consider whether the deprivation of a detainee's liberty in a manner not in accordance with the principle of a fair judicial process can be upheld as a reasonable limit under section 1 of the *Charter*.

[243] Forcese and Waldman, "A Bismarckian Moment," *supra* note 49 at 375.
[244] *Harkat FCA, supra* note 30 at 119.

Section 1 of the *Charter* functions to "save" legislation that otherwise would be declared invalid because it infringes an individual's *Charter* rights. However, it is important to keep in mind that the Supreme Court of Canada has never upheld a violation of section 7 as a reasonable limit under section 1 of the *Charter*.[245] It is difficult to imagine a situation in which a law or measure that violates principles of fundamental justice could ever be minimally impairing of rights, as we will see below is required in the section 1 analysis. In the context of section 7, which is a qualified right (the principles of fundamental justice analysis already entails some balancing of competing interests), section 1 generally has little interpretive work to do. And as we shall see in this case, the minimal impairment stage of the analysis is determinative because there are other options available to the government to protect national security information without infringing rights to the extent involved in the current security certificate regime.

As noted above, the classic test in determining whether legislation can be upheld under section 1 is found in *R v Oakes*.[246] *Oakes* requires the satisfaction of two criteria to allow legislation to be found to be demonstrably justified in a free and democratic society. The first of the two criteria is that the intended objective of the legislation must be important enough to justify infringing on constitutionally enshrined rights. In other words the interest must be "pressing and substantial."

The second of the two criteria involves determining the reasonableness of the infringing measure taken in pursuit of the objective.: is the limit proportionate to the

[245] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2013) at 38-46.
[246] *R v Oakes*, [1986] 1SCR 103.

objective? A three prong proportionality test is invoked. The first prong of the test requires a "rational connection" between the objective and the measure taken to achieve that objective. The second prong stipulates that there be minimal impairment on the rights of the individual. The last prong of the test requires "proportionality of effects" between the impact of the measure taken by legislation and the importance of the objective. In the final analysis, the negative effects of the limit on rights must not outweigh the measure's positive effects.

The Supreme Court of Canada in *Charkaoui* applied the *Oakes* test in its analysis of whether the legislation could be saved by Section 1 of the *Charter*.[247] The court found that national security and protection of related information sources was indeed "a pressing and substantial objective."[248] The court also found that there was a rational connection between the non-disclosure of evidence at security certificates hearings and the objective of National Security and protection of related intelligence sources. The court stated "this information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality: see *Ruby*."[249] This is the extent of the court's analysis in terms of a rational connection.

In considering the new, current version of legislation, national security and protection of intelligence information and its sources clearly remains a pressing and substantial concern. However with respect to the rational connection between the

[247] *Charkaoui, supra* note 19 at 67.
[248] *Ibid* at 68.
[249] *Ruby v Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3, which was a case where the appellant sought disclosure of personal information held by CSIS in an information bank.

National Security objective and the nondisclosure of information, more consideration is required. The question that needs to be asked is whether there is a rational connection between not just non-disclosed information and the objective but allowing the use of this non-disclosed information against the individual. Is it necessary to use the information that is not disclosed to protect the objective of national security and intelligence sources? Just as in *Oakes* there was no rational connection between placing the onus on the accused to prove that they did not have the intent to traffic and the purpose of the law to prevent trafficking, so too using information against a detainee that is not revealed to them is not rationally connected to protecting intelligence information and national security. This is particularly an issue since undisclosed information is not used in other similar contexts for individuals who are Canadian citizens.

The last question to address is the question of minimal impairment. The court in *Charkaoui* found that since there were less intrusive methods available than this scheme in their review of the previous version of the IRPA used within the security certificate context, therefore that system was inappropriate as it was not a minimal impairment of an individual's rights. The court provided a list of less intrusive means of achieving the objective. The Special Advocate regime was one of the examples provided by the court. It is submitted that this listing of examples was not intended to be an endorsement of the list, but rather only a means of indicating that less intrusive methods existed. Given that Parliament has chosen the Special Advocate regime as a means to have a less intrusive method of reaching its objectives, the Special Advocate regime must be examined specifically to determine if it minimally impairs the rights of the individual.

The Special Advocate regime allows information to be used against an individual that an individual may not be allowed to have access to and thereby respond to.[250] While the existence of the Special Advocate reduces the impact of not providing this information to the individual, there would be even less of an impact on the individual if the information that they did not have access to was either not used against them, as would be the case under the *Canada Evidence Act* in very similar criminal matters, or the Special Advocate had the ability to have unfettered communication with the individual after receiving the "secret" information, such as is used in the SIRC model (this does not mean that the Special Advocate has to be allowed to reveal the secret information, just communicate with the person named in the certificate and their counsel as an opportunity for further communication to help assist in the Special Advocates presentation of a case in support of the detained person).

At the trial level of the *Harkat* case, Justice Noel proceeded with a section 1 *Charter* analysis in the alternative.[251] This portion of his judgment was affirmed by the Federal Court of Appeal. Noel J. applied the *Oakes* test and found that there is a pressing and substantial objective, noting that based on *Chiarelli*, immigration law questions are not the same as criminal law questions.[252] He identified the pressing and substantial objective as providing security for its citizens:

> in order to strike a balance between the security of Canadians and the rights of the named person, parliament chose a limited disclosure process with the participation of Special Advocates who defend the interests of the

[250] IRPA, *supra* note 3, s 83(1)(h)(i).
[251] *Harkat FC, supra* note 216 at 205.
[252] *Ibid* at 212.

> named person in order to ensure that no information of a national security nature that could cause an injury will be disclosed. [253]

Justice Noel then considered whether there is a rational connection to a pressing and substantial objective.[254] To this end he quotes and relies upon paragraph 68of *Charkaoui*.,[255] wherein the Supreme Court of Canada finds that "the protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective" and that the provisions in IRPA "regarding the non-disclosure of evidence at certificate hearings are rationally connected to the objective."[256] On the question of minimal impairment, Justice Noel found that there was more complete disclosure as a result of official being involved in closed hearings to fully defend the interests of the named person.[257] Further, because of the judicial discretion allowing communication, Justice Noel concluded that the Special Advocate regime creates the least impairment compared to any other model.

In terms of proportionality, Justice Noel concluded that there is proportionality between protection of the National Security information and the limitation on disclosure.[258] Thus, he indicated that even if he was wrong about the provisions not infringing section 7 of the Charter, he found that 1 of the *Charter* would save the Special Advocate regime provisions of the IRPA. I argue that Justice Noel came to an incorrect conclusion in this analysis. He did not take into account that the *Canada Evidence Act*,

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[253] *Ibid* at 210 to 214.
[254] *Ibid* at 218.
[255] *Ibid* at 219.
[256] *Charkaoui*, *supra* note 19 at 68.
[257] *Harkat FC, supra* note 216 at 224.
[258] *Ibid* at 230-232.

SIRC system, and broader communication powers under the Special Advocate regime would all be effective tools in protecting national security with less impairment of section 7 *Charter* rights under the current formulation of the Special Advocate regime, and that accordingly, the Special Advocate Regime falls out of the range of minimally impairing alternatives. In addition, Justice Noel failed to take into account the irrationality of allowing the use of "secret" evidence against non-citizens under IRPA to protect national security where the result may be indefinite detention, when the criminal context in relation to charges such as terrorism, proceedings that fall under the *Canada Evidence Act*, does not allow for its use, even though the national security concerns are the same. Finally, he failed to appreciate that there are comparative international models that provide more protection to a detainee's rights in the context of national security proceedings.

In *A and Others v The United Kingdom*,[259] [*A and Others*] the European Court of Human Rights looked at the use of undisclosed evidence against detainees under the United Kingdom Special Advocate Model. In this case, 11 individuals had had their liberty affected as a result of allegations that they were a risk to national security. The court dealt with the circumstances of each separately, but concluded that, as an overarching principle, where there was insufficient disclosure to a detainee to allow the detainee to challenge the allegations against them, the right of the detainee to procedural fairness under Article 5 § 4 of the European Convention on Human Rights was effectively violated.[260]

[259] *A and Others v The United Kingdom* [2009] ECHR 301 [*A and Others*].
[260] *Ibid* at 223 and 224.

The European Court of Human Rights in *A and Others* was examining a Special Advocate regime much like that in place in Canada today, and in fact the systems upon which the Canadian model is based. The court acknowledged that it might be necessary to "withhold certain evidence from the defence on public interest grounds."[261] However, the court made a distinction between "where evidence was to a large extent disclosed and open material played a predominant role in the determination," and where a "detention was based solely, or to a decisive degree," on undisclosed information. The court indicated that in the latter situation the right to a fair hearing would be violated.[262]

The House of Lords has applied this decision in the important case of *Secretary of State for the Home Department v AF*[263] [*AF*] In *AF* the House of Lords was dealing with 3 individuals that were the subject of control orders. UK control orders are orders that limit the liberty of individuals where national security is a concern. Evidence to justify the control order may be secret and therefore not disclosed to the individual who is the subject of the control order. A Special Advocate regime is in place that operates just as the Special Advocate regime under the Canadian Security Certificate legislation, which as noted previously, is based upon the UK model. The House of Lords in *AF* sought to determine whether the rights of these three individuals to due process, as enunciated by the European Court of Human Rights in *A and Others,* were being infringed. The House of Lords re-iterated "that a minimum requirement of procedural fairness was that a

[261] *Ibid* at 206.
[262] *Ibid* at 220.
[263] *Home Department v AF* [209] UKHL 28 [*AF*].

person had to be given the opportunity effectively to challenge the allegations against him."[264] The Court encapsulated the *A and Others* decision by summarizing:

> the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.[265]

Crucially, the limited summary to which a detainee is entitled under Canadian law stands in contrast to the right under the current UK control order regime. The *Protection from Terrorism Act* originally provided for a summary to the detainee along the lines of the Canadian model but in the 2009 *AF* decision the House of Lords read in a requirement that the named person be given disclosure necessary to the fairness of the trial *even where it would be injurious to national security*. [266] Under that system, if the government's security forces wish to keep such information secret they cannot rely on it to justify a control order. It is important to underline that control orders involve a lower level of jeopardy to the named person than does the Canadian security certificate regime. They only justify surveillance and house arrest, not detention. The viability of the UK approach, which entails greater protection to the detainee's rights in the context of a similar system, leads to the conclusion that the limitations in the Canadian Special Advocate regime is not minimally impairing of rights.

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[264] *Ibid* at 46.
[265] *Ibid* at 59.
[266] *AF, supra* note 263 at 68.

The approach of the European Court of Human Rights in *A and Others*, as followed by the House of Lords in *AF*, is a rational and appropriate balancing of human rights when individual liberty is at stake. The concept of the right to challenge evidence being used against an individual to deprive them of their liberty is a fundamental human right. Attempting to create an artificial distinction based on the fact that a detention is immigration-related is based on the false premise that immigration detention is brief and transitory. There is no reason that an individual facing indefinite detention under a security certificate should not be afforded the same protections as an individual being prosecuted and facing the prospect of detention under criminal law statutes.

4.4 Irrationality of Distinguishing between Canadians and non-Canadians

A further issue worth noting is the distinction between Canadians and non-Canadians. While this raises the specter of whether section 15 of the *Charter* is violated by the current legislation, something that is beyond the scope of this thesis, it also raises the concept that such a distinction is irrational in terms of protecting national security. In *Charkaoui* the Supreme Court of Canada did not appear to address its mind to the issue of the disconnect between allowing undisclosed evidence to be used against non-Canadians but not allowing it to be used against Canadians where detention was involved. The Special Advocate regime of IRPA effectively creates a different, lower, standard of procedural fairness for non-Canadians. As noted above, *Stinchombe* and *Chaplin* set the standard for disclosure for Canadian citizens where liberty is an issue. *Stinchcombe*

requires full and complete disclosure of all evidence that the crown is relying upon to detain an individual. In the absence of such disclosure, the evidence is inadmissible before the court. In *Stinchcombe,* Sopinka, J. (as he then was) states:

> there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice.[267]

This standard has been followed in the criminal context.[268] It provides an opportunity for an accused to fully respond to the allegations against them before being deprived of the right to life, liberty or the security of person. This fundamental right enshrined in section 7 of the *Charter*, appears to apply differently to Canadians and non-Canadians. IRPA causes this different treatment by creating a unique regime what deals with confidential information differently from any other Canadian legislation. As the relevant provisions apply only to non-Canadians, the applicable treatment of individuals in the procedures surrounding confidential information only apply to non-Canadians. While it is true that the purpose of criminal proceedings is to deal with crime, with one of the possible consequences being incarceration, and the purpose of a security certificate is removal of individuals who are considered a danger to the state, the effect of both may end up being the same, namely lengthy or indefinite detention. In *Charkaoui* the Supreme Court Canada recognized the need to consider the impact on an individual's liberty interest rather than focusing on the type of law.[269] It arguably follows that the impact is more significant than the purpose of the legislation when determining whether

[267] *Stinchcombe, supra* note 228 at 13.
[268] See, for example, *R v La*, [1997] 2 SCR 680.
[269] *Charkaoui*, *supra* note 19 at 18.

section 7 of the *Charter* has been breached. To the extent that the impact may be the same under a security certificate as that in relation to confidential information, there is no rational basis for a distinction in disclosure rules regarding confidential information as it relates to Canadian citizens in comparison with disclosure rules regarding disclosure of confidential information as it relates to individuals who are not Canadian. As previously discussed, here IRPA deals with confidential information by potentially using evidence against an individual named in a security certificate without disclosing that information. If a Canadian was charged and held on terrorism charges based upon the same information, that information would either have to be disclosed or not be used against the Canadian. No explanation is available to validly support the notion that information that affects national security requires different protection in the context of non-citizens as opposed to citizens. If the objective is, it can be said, to protect confidential information while safeguarding Canada against dangerous individuals, as noted earlier treating confidential information differently as it relates to dangerous Canadians versus dangerous non-Canadians is irrational.

In *A and Others*[270] the European Court of Human Rights, and the House of Lords below, found that measures that differentiated between nationals and foreign nationals in dealing with individuals being a risk to national security focused on national security were "disproportionate in that they discriminated unjustifiably between nationals and non-nationals."[271] The UK government responded by eliminating the distinction in

[270] A and Others, *supra* note 259.
[271] *Ibid,* at 190.

successor legislation and creating a regime of control orders[272] that would apply to both nationals and foreign nationals.

As noted earlier, the *Canada Evidence Act* and *The Federal Courts Rules* both provide an alternative process. Another alternative, one considered in *Charkaoui*, was the Security Intelligence Review Committee (SIRC) system, which had counsel representing SIRC with broad powers to vigorously protect the rights of, and communicate with, individuals subject to security certificates, and was previously in place in Canada. There was an expectation under the SIRC system that SIRC Counsel was capable of keeping confidential information confidential. The SIRC system, I suggest, provides a better balance between national security and the rights of the individual than the Special Advocate regime and has been endorsed by many as the better alternative.[273] This is particularly the case because communication is allowed throughout proceedings without the need for judicial oversight required by the Special Advocate regime.

In addition, even the executive detention regime for non-US citizens held at Guantanamo Bay provides for greater disclosure than the Canadian model. No Special Advocates are used. Instead, counsel of choice for the detainee is presumed to need access to all classified information and documents relating to her or his client. Classified

[272] AF, s*upra*, note 263 at 3.
[273] See as examples: Submission to Parliament by Canadian Bar Association, "Submission on Bill C-3 *IRPA* Amendments (Certificate and Special Advocates)" (November 2007); online: Canadian Bar Association http://www.cba.org/CBA/submissions/pdf/07-59-eng.pdf; Craig Forcese & Lorne Waldman, "Canada doesn't need Star Chamber," *National Post*, (25 October 2007) online: National Post http://www.nationalpost.com/news/story.html?id=c921bff0-e9ce-48b8-9ca8-4084e2ccc415

materials are provided to the detainee's counsel, provided they obtain the proper security clearance, and counsel enters into a protective order that governs the use and storage of the information.[274] While by no means is the Guantanamo Bay model being proposed as a better model than Canada's present system, and without inquiring further as to manner in which communication continues between counsel and their detained client after receiving disclosure, it is still of note that even such an otherwise harsh system allows for disclosure to a detainee's counsel.

The current legislation does not withstand *Charter* scrutiny given the great impact of the legislation on individuals affected by it. While national security and individual rights are better balanced with the existence of the Special Advocate regime, the question is really one of the justifiability of using undisclosed evidence against an individual under the rubric of immigration proceedings and not in criminal proceedings. The Special Advocate regime, if it remains in place, should be read down so as not to be used as a justification for the use of undisclosed confidential information as evidence directly against a detainee to justify the detainee's indefinite detention. That is, the ability of the court to rely on undisclosed evidence should no longer be considered an option by the court. Alternatively, the court could allow ongoing communication between the Special Advocate and the detainee and the detainee's counsel, severing and striking down only the subsection that prevents this. The court could find that this adequately addresses the concerns raised regarding a detainee's right to know and make full answer and defence. Lastly, the court could strike down the Security Certificate provisions as a whole and

[274] Factum of the British Columbia Civil Liberties Association in *Harkat,* at para 27-33.

return the matter to Parliament as part of the process of dialogue between Parliament and the courts.

Chapter 5: Striking a Rational Balance Between the Rights of the Individual and National Security Concerns: Implications and the Road Ahead

The Special Advocate regime is an attempt to provide some protection for a detainee's rights in the context of immigration security certificate proceedings that involve the use of secret evidence to justify indefinite detention. However, rather than being a tool that increases fairness, it is a tool that simply legitimizes the significant infringement of the right to know and answer the case against an individual. There is no rational basis to justify the use of undisclosed evidence, when such evidence is not being used in criminal proceedings against Canadian citizens. The simplest and most rational approach is to use an equal standard in both circumstances. A Canadian charged criminally in Canada will never be incarcerated in Canada based on evidence that has not been disclosed to the individual. There is no rational reason why a non-Canadian being held for similar reasons, potentially indefinitely, under a security certificate, should be treated any differently.

The concerns raised in this paper are important, because while the security certificate mechanism is in limited use today, any event such as a terrorist attack close to home may trigger its increased use. These concerns may be addressed in a number of ways. The courts could follow the approach of the Federal Court of Appeal in *Harkat* and the lead of the European Court of Human Rights in *A and Others,* by looking at each detention on a case by case basis and providing a *Charter* remedy in appropriate circumstances. Alternatively, the court may decide to declare the relevant provisions

invalid and suspend the declaration of invalidity for a period of time to permit Parliament to respond.

Is change likely? It is difficult to say. A decision from the Supreme Court in *Harkat* is not likely to be forthcoming until well into 2014. It is hoped that the court will take the opportunity to deal with the concerns regarding whether the Special Advocate regime provides adequate protection of constitutional rights in that arena, rather than leaving the ultimate decision to policy makers and legislators. I do not think this is an appropriate case for the court to give deference to Parliament as a "second look" case under the dialogue theory of the relationship between courts and Parliament. Such deference would be misplaced when it comes to individual rights, as democratically elected governments sometimes fail to champion individual rights, leaving this task to the courts. This was why the *Charter* was conceived of in the first place, to protect individuals from majority and governmental oppression. If the court upholds the legislation, it would be up to Parliament to reconsider the appropriateness of the Special Advocate regime.

Whether upheld or not, Parliament's options include the possibility of allowing ongoing communications between Special Advocates and detainees, even after confidential material is disclosed to the Special Advocates. This would improve the ability of Special Advocates to protect the rights of detainees. Detainee's counsel could be security cleared to receive the confidential information, and naturally continue ongoing communications with their client allowing for a more informed and properly

mounted defence against allegations. The Security Certificate could truly be limited to being temporary, with a non-renewable expiry, after which if there was still a perceived danger, the matter could be continued as a criminal matter with the procedures and protections the criminal law system affords.

Additionally, if the court does not uphold the legislation as it stands, although by far a much more unpalatable option from an individual rights perspective, Parliament could invoke the legislative override contained in Section 33 of the *Charter*, allowing the legislation to remain in place notwithstanding the violation of section 7 of the *Charter*. The section 33 override has never been invoked by the federal government[275] so this option may be unlikely. However, it is possible that the current Conservative government may be willing to use the override in the context of immigration or national security detention, given the popular appeal of appearing to be tough on terrorism. Alternatively, Parliament could also opt to limit, through legislation, the use of secret evidence in security certificate proceedings to emergency situations (so declared), and cover only that use by the notwithstanding clause, with the rest of the legislation being modified sufficiently to come into compliance with the *Charter*. In fact, the present UK Control Order legislation has a provision along these lines in what is referred to as a Derogating Control Order, which, with the court's approval based upon a genuine threat that strikes at the life of the nation, can be used even though it violates human rights.[276] It is to be noted that the section 33 override available in Canada is more absolute and does not

[275] David Snow, Notwithstanding the Override: Path dependence, Section 33, and the Charter" (2009) 8 Innovations 1 at 1, online: ucalgary.ca <http://www.ucalgary.ca/innovations/files/innovations/Snow%20Notwithstanding%20the%20Override.pdf >.

[276] *A and Others*, supra note 259 at 18, explaining derogation.

require justification to the courts or the existence of any apprehension of danger or risk. The fact that the override has been used rarely and never by the federal government has been with good cause as section 1 of the *Charter* should normally provide sufficient latitude to deal with emergency provisions in legislation.

How the Supreme Court of Canada addresses issues associated with the Special Advocate regime in *Harkat* will tell us something about the protection provided by the *Charter* in times of public anxiety about immigration and national security. It is unlikely that *Harkat* will be the final word on this topic, as striking the right balance between national security and robust protection of human rights is an ongoing challenge in liberal democracies. The key to an appropriate balance between national security and individual rights, in my view, is that undisclosed evidence should never be used against an individual such that the individual is deprived of their liberty for any extended period of time based upon that undisclosed evidence.

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