C-3 submission
26 November 2007

A. INTRODUCTION

Bill C-3 represents the government's response to the recent Supreme Court of Canada ruling on security certificates (*Charkaoui*)[1], which struck down as unconstitutional certain provisions in the *Immigration and Refugee Protection Act* (IRPA), notably with respect to the non-disclosure of information used in a decision to detain and remove a person under a security certificate. The Court found that non-disclosure, or the use of "secret evidence", violates section 7 of the Canadian Charter of Rights and Freedoms, which guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Canadian Council for Refugees believes that:

- Canada's response to potential security threats should be founded on full commitment to human rights and should not rely on distinctions between citizens and non-citizens.

- The use of secret evidence is a grave threat to the principles of fundamental justice. Given this, any use of secret evidence must be kept to the absolute minimum and maximum safeguards must be provided to any person whose rights are at stake. If the safeguards are insufficient to allow the person to know and meet the case against them, the secret evidence must not be used.

- The security certificate process should be eliminated.

- The potential for the use of secret evidence in other immigration proceedings (through s. 86) is much broader than in security certificates and the rights safeguards are minimal. This aspect of Bill C-3 has not received the attention it deserves.

- Canada must take seriously its obligations to protect non-citizens from removal to persecution or torture. The law needs to be amended in this regard to conform with international human rights instruments to which Canada is signatory.

B. OVERALL CONCERNS

1. Need for a strategy of criminal prosecutions

Through Bill C-3, the Canadian government is pursuing a strategy of removal under immigration legislation, rather than a strategy of criminal prosecutions. This is a mistake, for a number of reasons:

- Immigration procedures do not guarantee those affected the same procedural protections as the criminal justice system.

[1] *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9, 23 February 2007.

- Among the most significant differences is the much lower standard of proof for many immigration procedures than for criminal prosecutions ("reasonable grounds to believe" rather than "proof beyond a reasonable doubt"). It is often difficult for an innocent person to defend themselves against the charge that there are "reasonable grounds to believe" an allegation about them. Furthermore, immigration procedures, including the security certificate procedure, rely on an extremely broad definition of security inadmissibility that covers associations that are not contrary to any law.[2]

- The *Canada Evidence Act* now provides for "secret" evidence in criminal trials.[3] The government therefore cannot claim that it needs to resort to immigration procedures simply because it wishes to avoid disclosing some evidence.

- Immigration procedures can only be used against non-citizens, whereas both citizens and non-citizens may pose a security threat. The immigration strategy is therefore ill-adapted to the evil it is meant to address. It is also discriminatory because it is applied to some people and not others.

- The immigration strategy fails to take account of the international dimension of security threats. It assumes that threats arise within borders when both logic and the evidence available today points to the opposite.[4] It ignores the responsibility to limit risks of violence. It is a "not in my backyard" approach to security that is satisfied with removing a potential security threat from Canada without regard to whether the person will, after removal, continue to pursue acts of violence against Canada or another target.

- Recourse to immigration procedures inhibits the normal work of police investigation, which is essential to combating crime. The standard response to suspicions of criminal activity is an investigation with a view to uncovering sufficient concrete evidence to launch a prosecution, if warranted. However, when cases are referred to the immigration stream based on suspicions, they are diverted from police attention. The concrete evidence that might assist in averting acts of violence, as well as leading to prosecution, is likely never uncovered.[5]

- Canada has international obligations to prosecute acts of terrorism.[6]

- Removing persons suspected of having links to terrorism is in many cases likely to expose those persons to a serious risk of torture, in violation of Canada's obligation under the

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[2] For example, a person is inadmissible not only for engaging in terrorism, but also for being a member of organization that engages, has engaged or may engage in terrorism. *Immigration and Refugee Protection Act* [IRPA], s. 34.

[3] *Canada Evidence Act*, para. 37-38. This provision was part of the *Anti-Terrorism Act*, 2001, c. 41, s. 43. The amendments are problematic and have been criticized by the UN Human Rights Committee. See below footnote 22.

[4] See UK House of Lords, A (FC) and others (FC) v. Secretary of State for the Home Department, "Belmarsh", [2004] UKHL 56, December 2004, paras. 33 and 44.

[5] Ian Macdonald, former UK Special Advocate, made this point in testifying before the Canadian Parliament: Standing Committee on Citizenship and Immigration, Evidence [Macdonald testimony], 39th Parliament, 1st Session, 26 April 2007, (at 11:10, 11:25 and 11:45-12:05).

[6] *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA. Res. 54/109, ratified by Canada 15 February 2002, Art. 4, 9,10; see also, UN Security Council Resolution 1456 (2003), 20 January 2003, UN Doc.S/RES/1456: "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute" (para. 3); UN General Assembly Resolution 58/81 (2003), 9 December 2003, UN Doc.A/RES/58/81, para. 7.

Convention against Torture not to send anyone to torture. When individuals are removed to countries that practise torture, the allegations of links to terrorism made by Canada attract the attention of the authorities in those countries and place them at high risk of torture.[7]

- The use of security certificates leads to long-term indefinite detention. This is often also true of other immigration proceedings used to remove people on the basis of security inadmissibility. The Supreme Court recognized in *Charkaoui* that "while the *IRPA* in principle imposes detention only pending deportation, it may in fact permit lengthy and indeterminate detention or lengthy periods subject to onerous release conditions."[8] The Court also recognized that "[s]tringent release conditions, such as those imposed on Mr. Charkaoui and Mr. Harkat, seriously limit individual liberty."[9] In 2006, the UN Human Rights Committee expressed its concern over Canadian security certificate rules, whereby "some people have been detained for several years without criminal charges, without being adequately informed about the reasons for their detention, and with limited judicial review."[10] Similarly, the UN Working Group on Arbitrary Detention, following a visit to Canada, criticized Canada's use of security certificates and recommended that "detention of terrorism suspects be imposed in the framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law".[11] The conditions of detention experienced by several of the security certificate detainees in recent years have been extremely harsh, including long periods in solitary confinement and the denial of touch visits with spouse and children.

- The use of security certificates imposes dramatic constraints and heavy burdens not only on those who are the subject of the certificate, but also on their families. Conditions of release have included intrusive monitoring of the family home as well as the requirement that family members supervise the person subject to a security certificate at all times.[12] The effect is to deprive the whole family of much of their liberty.

- The use of immigration procedures has led to protracted legal challenges resulting in important decisions finding against different aspects of the procedures.[13] The *Charkaoui* decision will not be the last: further issues are already before the courts, notably with respect to return to torture. The success of legal challenges reflects the fact that immigration procedures violate non-citizens' rights in many ways.

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[7] The UN Committee against Torture, in its concluding observations on Canada in 2005 expressed concern at "[t]he State party's apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory, thus implicating issues of article 3 of the Convention more readily, rather than subject him or her to the criminal process" [article 3 prohibits removal to torture]. *Committee Against Torture*, Conclusions and recommendations of the Committee against Torture: Canada, 7 July 2005, para 4(e). CAT/C/CR/34/CAN. The Supreme Court recognized the "potential consequences of deportation combined with allegations of terrorism", which they note "have been under a harsh spotlight due to the recent report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar." *Charkaoui*, at para. 26.

[8] *Charkaoui*, at para. 105.

[9] Ibid. at para. 116.

[10] Human Rights Committee, CCPR/C/CAN/CO/5, 20 April 2006, at para. 14.

[11] UN Economic and Social Council, *Report of the Working Group on Arbitrary Detention: Visit to Canada*, E/CN.4/2006/7/Add.2, 5 December 2005, at para. 92.

[12] The UN Working Group on Arbitrary Detention pointed out, for example, that Adil Charkaoui was released on very strict terms and conditions "that disrupt the life of his entire family." Ibid. at para. 86

[13] See, in addition to *Charkaoui*, *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; 2002 SCC 1.

- The security certificate regime has proven extremely costly, both in legal costs and in expenses for detaining persons and for monitoring those released under conditions.[14]

2. Concern over expanding use of secret evidence

> "Openness and transparency are hallmarks of legal proceedings in our system of justice." Justice Dennis O'Connor[15]
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> "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." Chief Justice McLachlin[16]

The use of secret evidence runs directly counter to the vital principles that courts must be open and that individuals have the right to know and meet the case against them. These principles are particularly important when fundamental rights, including the right to life, liberty and security of the person, are at stake, as they are in security certificates.

Secret evidence is repugnant primarily, of course, because of the injustice it causes to persons affected. Its use also undermines public confidence in the justice system. As the Supreme Court has said, "In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[17] Many Canadians have opposed the security certificate process because there is no way for the public to satisfy themselves that justice is being done.

The importance of the principle of open courts is underlined in both the Canadian legal tradition and in international human rights law. Article 14 of the International Covenant on Civil and Political Rights states that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." While the Covenant allows for some exceptions to the general rule of publicity, the UN Human Rights Committee, in General Comment 13, has stated that "[t]he publicity of hearings is an important safeguard in the interest of the individual and of society at large."[18]

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[14] $3.2 million were spent to open the Kingston Immigration Holding Centre, according to Catherine Solyom, Montreal Gazette, *Protest groups seek abolition of controversial security certificates*, 17 February 2007, http://www.canada.com/nationalpost/story.html?id=b095e28a-11c2-49fb-8320-786db78f47c5&k=38636. Speaking to a parliamentary committee on 15 May 2007, Public Safety Minister Stockwell Day cited the figure of $2.3 million for the construction alone, but noted that he wanted to check its accuracy. *Standing Committee on Public Safety and National Security*, Evidence, 39th Parliament, 1st Session, 15 May 2007, at 11:45. The monitoring of those released on conditions requires significant staff resources from Canada Border Services Agency and presumably other agencies.

[15] *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), [O'Connor part 1], at p. 304.

[16] *Charkaoui* at para. 61.

[17] *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 1.

[18] UN Human Rights Committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, at para. 6.

Over the past several years the Canadian government has expanded the use of secret evidence in different settings (immigration[19], citizenship – attempted, but not passed[20] –, deregulation of charities[21], *Canada Evidence Act*[22]). This trend represents a disturbing erosion of the commitment to the principles of fundamental justice and the rule of law in Canada.

In *Charkaoui*, the Supreme Court ruled that the use of secret evidence in the security certificate procedures "does not conform to the principles of fundamental justice as embodied in s. 7 of the *Charter*."[23] It is important to take very seriously the fact that the Court found that the use of non-disclosed evidence means that decisions are not based on the facts and the law, and that persons affected do not know or have an opportunity to respond to the case against them.[24] The Supreme Court concluded that these flaws mean that those subject to a security certificate do not receive a fair hearing.[25] The proper conclusion to draw from this ruling is that the use of secret evidence is inconsistent with the principles of fundamental justice. We should therefore seek to reduce its use to the absolute minimum, and certainly not contemplate broadening its use. Yet Bill C-3 does just that.

The Supreme Court did not say, as some believe[26], that secret evidence can be used without violating the Charter if a special advocate is provided. The Court referred to special advocates in relation to arguments about whether the admitted rights violation involved in using secret evidence should nevertheless be allowed. This is because section 1 of the Charter allows limits on rights if the limits are "demonstrably justifiable in a free and democratic society". A limitation of rights is not justifiable if there are less intrusive alternatives: the Court points to the existence of special advocates in other contexts as clear evidence that less intrusive alternatives exist. It does not follow that the use of secret evidence will necessarily comply with the Charter if a special advocate is present. That was not the question that the Court was addressing.

C-3's amendments to the *Immigration and Refugee Protection Act* allowing secret evidence in the presence of special advocates should not be adopted for the following reasons:

- The use of secret evidence infringes on the individual's right to fundamental justice. The presence of a special advocate might offer some improvement over the current situation, but it does not resolve the basic problem that the individual is denied a full opportunity to know the case to meet, and to meet the case. The injustice will remain.

- There is another strategy available to the government, which it has not attempted, namely pursuing criminal prosecutions.

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[19] IRPA, 2001, added at s. 86 provisions for secret evidence in hearings before the Immigration and Refugee Board, on the same terms as in security certificate cases.
[20] *Bill C-18 (Citizenship of Canada Act),* November 2002, 37th Parliament, 2nd Session.
[21] *Anti-Terrorism Act,* s. 113.
[22] Also *Anti-Terrorism Act* (see above, footnote 4). The UN Human Rights Committee has criticized Canada for these amendments to the *Canada Evidence Act,* which do not comply with article 14 of the Covenant on Civil and Political Rights. Human Rights Committee, CCPR/C/CAN/CO/5, 20 April 2006, at para. 13.
[23] *Charkaoui*, at para 65.
[24] *Charkaoui*, at paras. 48-64.
[25] *Charkaoui*, at para. 65.
[26] For example, *Detention Centres and Security Certificates,* Report of the Standing Committee on Citizenship and Immigration, April 2007, p. 8: "Since the Court said that a less intrusive approach would be to allow for a special advocate in the security certificate process it is implicit that if Parliament were to amend the Act to provide for a special advocate, the security certificate process would be *Charter* compliant."

- The introduction of special advocates is likely to lead to further litigation. The Supreme Court noted in its decision that s. 7 violations are difficult to justify under s. 1 of the Charter[27].

- The use of special advocates in the UK has been fiercely criticized from many sides[28], including by some who have acted in this role. In announcing his resignation as a Special Advocate with the Special Immigration Appeals Commission (SIAC), Ian Macdonald, QC, said that he felt he was being used to "provide a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial."[29] The UK human rights organization JUSTICE has said: "In our own view, the use of closed sessions and special advocates involves serious limitations on an appellant's right to fair proceedings. The rights limited include the individual's right to know the case against him; be present at an adversarial hearing; examine or have examined witnesses against him; be represented in proceedings by counsel of his own choosing; and to equality of arms."[30] In its July 2007 report, a Joint Committee of the House of Commons and the House of Lords declared that its members had found the evidence they had heard from special advocates "most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving special advocates, as currently conducted, fail to afford a "substantial measure of procedural justice"."[31] These concerns were echoed in a recent decision of the UK House of Lords, in which the majority found that, in the cases before them, the presence of a special advocate was not sufficient to overcome the grave disadvantage of reliance on secret evidence, resulting in the men being deprived of a fair hearing.[32] In light of this decision, as well as the other criticisms, the UK model of special advocates is clearly not one to follow.

- The findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar demonstrate that mistakes can and have been made by Canadian security agencies. Similar findings were made twenty-five years earlier by the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police.[33] We should therefore be very sceptical of the credibility of undisclosed and untested evidence. Given the potential consequences for individuals accused of having links to terrorism, they must not be asked to defend themselves with a special advocate, which is no more than a substitute for full justice. As the Supreme Court has said with respect to access to judicial records: "Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation."[34]

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[27] *Charkaoui*, at para. 66.
[28] As noted by the Supreme Court, ibid. at para. 83.
[29] News release, "Ian Macdonald QC resigns from SIAC", 1 November, 2004, http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268
[30] JUSTICE Briefing for House of Lords Debate, Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2007, March 2007, at p. 7, footnotes removed. Available at http://www.justice.org.uk.
[31] UK Parliament, Joint Committee On Human Rights, Nineteenth Report, HL 157/HC 790, 30 July 2007, at para. 192 [hereafter UK Joint Committee].
[32] Sec. of State for the Home Dept v. MB [2007] UKHL 46, 31 October 2007.
[33] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law,* Second Report, 1981.
[34] *Attorney General (Nova Scotia) v. MacIntyre*, [1982], 1 S.C.R. 175 at 183-184. The Court also quotes Bentham's articulation of the rationale for "openness" in respect of judicial acts: " 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable

- There are widespread prejudices and misinformation about Arabs and Muslims, which can lead to stereotyping and faulty assessment of evidence. To avoid the danger of racial and religious stereotypes tainting the judicial process, and the danger of the perception that this is occurring, it is particularly important that there be open and transparent testing of the evidence against those alleged to represent a security threat. [35]

- Unlike the concrete evidence required in criminal matters, immigration security cases are often built on allegations of association, profiles and "expert" assessments. A special advocate is not able to challenge this type of evidence effectively. Former UK Special Advocate Ian Macdonald recently told a Canadian parliamentary committee about the difficulty of challenging vague assessments made by people who cannot be effectively cross-examined because they do not have direct knowledge of the information on which the assessment is based.[36] The UK Joint Committee quoted one of the special advocates as follows: "the best way of describing sometimes what goes on in these closed sessions is not evidence proving a proposition, as you would do in a civil or criminal trial, by your best evidence or all the available evidence, but selected highlights of a plausible hypothesis, and responding to that is challenging."[37]

- Some immigration security cases rely heavily on evidence from informers. Informers are notoriously unreliable witnesses: when their evidence is undisclosed it is very difficult for their testimony to be effectively challenged.[38] Similarly, foreign intelligence sources, often relied on in security certificate cases, need vigorous testing.[39]

> "It is not to the point to say that the special advocate procedure is "better than nothing". Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only." (Lord Steyn)[40]

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to judicial injustice operate. Where there is no publicity there is no justice.' ' Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' "

[35] In his report for the Arar Commission, Justice O'Connor recommended that Canadian agencies involved in security investigations have clear policies prohibiting racial, religious and ethnic profiling and increased training on these issues. He justified his recommendations on the basis of the need to combat both the reality and the perception of profiling, both of which are detrimental to effective policing and security intelligence work. O'Connor part 1, pp. 355-358.

[36] Macdonald testimony, at 11:10, 11:30 and 11:50.

[37] UK Joint Committee, at para. 207.

[38] Regarding jailhouse informants, the Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin provides useful cautions about the dangers. Ontario Ministry of the Attorney General, 1998. Chapter III, Jailhouse Informants, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/.

[39] See the comments of Ian Macdonald : "If there's an informer who is speaking to Algerian intelligence, you're not going to have access to that informer to know whether or not the information is reliable. In fact, you may not even know whether or not anything emanating from Algerian intelligence is reliable. That's the problem." Macdonald testimony, at 12:00. Recent developments in Adil Charkaoui's case illustrate the questionable nature of some of the evidence relied on in security certificate cases: in April 2007 Ahmed Ressam recanted his testimony linking Charkaoui to Al-Qaeda, saying his earlier evidence was inaccurate and due to psychological stress. CBC News, "MPs speak out in support of terror suspect", 25 April 2007, http://www.cbc.ca/canada/story/2007/04/25/charkaoui070423.html.

[40] Roberts (FC) v. Parole Board, [2005] UKHL 45 at para. 88, Lord Steyn dissenting.

3. IRPA s. 86 proceedings

The concerns outlined above with respect to secret evidence in security certificate cases apply equally and indeed with even more force to s. 86 proceedings, which allow for secret evidence before the Immigration and Refugee Board (IRB).[41] Bill C-3 proposes the continued use of secret evidence under s. 86, in a wide range of cases. The IRB is much less able to meet the procedural fairness hurdles set out by the Supreme Court. The IRB is a quasi-judicial administrative tribunal, not a court, and only some of its decision-makers are lawyers, and none are judges. Hearings before the IRB are conducted with greater informality and fewer procedural protections than before a court. Yet, the potential consequences for persons affected, including prolonged detention and removal from Canada to a danger of persecution or torture, are the same as in security certificate cases.

4. Use of information obtained under torture

In the security area, a major concern must be the use of evidence obtained under torture. As well as being highly unreliable, its use involves complicity with torture. The UK House of Lords has already concluded that evidence obtained under torture is not admissible in any legal proceeding.[42]

Parliament must make the Canadian position clear by adopting unambiguous legal prohibitions against the use of evidence that may reasonably be suspected of having been obtained under torture.

5. Need for effective review

In the Policy Review component of the Arar Commission, Justice Dennis O'Connor found that the current mechanisms for review of Canadian government security activities are inadequate. Although his focus was the RCMP, he included in his recommendations other agencies, including the Canada Border Services Agency and Citizenship and Immigration Canada.[43] He concluded that where there are broad discretionary powers, review mechanisms are required to ensure conformity with legal and policy requirements and Charter values. As an example of the use of discretionary powers in decisions on national security matters, he specifically mentioned the security certificate process.[44]

Whatever process is adopted by Parliament as an alternative to the current unconstitutional security certificate regime, it is critical that Justice O'Connor's recommendations for effective review, including for immigration-related activities, be implemented as soon as possible.

C. SPECIFIC CONCERNS WITH C-3

Bill C-3 is fundamentally problematic because it proposes the continuation of the use of immigration procedures, rather than criminal prosecutions, and of secret evidence, denying thereby to those affected the right to know and meet the case against them.

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[41] Before the Immigration Division or the Immigration Appeal Division, but not before the Refugee Protection Division nor the Refugee Appeal Division.
[42] *A (FC) v. Secretary of State* [2005] UKHL 71.
[43] The Supreme Court draws attention to these recommendations in relation to the potential consequences of deportation combined with allegations of terrorism. *Charkaoui*, para. 26.
[44] O'Connor, *A New Review Mechanism for the RCMP's National Security*, VIII, 6, pp. 436-437.

The Charter allows the state under section 1 to limit rights if it can establish that the limits are demonstrably justifiable in a free and democratic society. The Supreme Court notes, however, that "violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1", because "[t]he rights protected by s. 7 — life, liberty, and security of the person — are basic to our conception of a free and democratic society."[45] Furthermore, any limitation on rights must involve a "minimal impairment" of those rights.

We do not believe the denial of the right to a fair hearing is justified. Even if others believe it is justified, the provisions set out in Bill C-3 do not constitute a minimal impairment of the right.

The following are the chief ways in which Bill C-3 broadens the violation of rights beyond the initial decision to deny some non-citizens their right to a fair hearing.

1. Broad scope of use of secret evidence

In discussions about security certificates, their proponents often argue that the government needs the mechanism to deal with individuals who threaten national security. Violations of s. 7 rights can only be justified under the Charter where there are "exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[46]

Yet both the current law and Bill C-3 allow security certificates to be issued, and secret evidence relied on, in cases where there is no allegation that the person represents any kind of security threat.

Certificates can be issued, and are to be upheld by the Court, if there reasonable grounds to believe that the non-citizen is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. "Being a danger to the security of Canada" is only one sub-category of inadmissibility on security grounds, which is itself only one of the grounds for which a certificate can be issued. Other situations where a certificate can be used include:

- The person is alleged to be or have been a member of an organization that had a violent wing, even if the person was not in that wing. (It is worth noting that the definition of security inadmissibility is so wide that all past and current members of the African National Congress, the ruling party in South Africa, are inadmissible to Canada on security grounds, unless the Minister grants an individual exemption.)

- The person is alleged by an informer to have engaged in money laundering.

- The person is alleged by an informer to have committed outside Canada war crimes or crimes against humanity.

S. 86 is even broader, since it allows the Minister to apply for the use of secret evidence during any admissibility hearing, detention review or appeal before the Immigration Appeal Division. There is no requirement that the persons affected even be alleged to be inadmissible on security or criminality grounds. It is enough that the Minister wants to introduce secret evidence. The Immigration and Refugee Board member's decision can be based on this secret evidence if the member considers it reliable, appropriate and relevant.

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[45] *Charkaoui* at para. 66.
[46] Ibid., quoting from *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486

If the government believes that some non-citizens' fundamental rights need to be violated because they represent a threat to security, why is the use of secret evidence not limited to cases where the persons affected are alleged to represent a threat to security?

2. No balancing of interests in determining whether to use secret evidence

Bill C-3 allows secret evidence to be used when its disclosure "would be injurious to national security or endanger the safety of any person".[47] It does not provide for any weighing of the risk of non-disclosure for the non-citizen affected against the risk to national security or the safety of a person. The interest in non-disclosure always trumps the interest in disclosure. This means that the judge is to allow the use of secret evidence, even if its disclosure would involve only a trivial risk, and its non-disclosure will mean that it is virtually impossible for the non-citizen to know the case against them and therefore defend themselves. The potential consequence for the person may be removal to a place where their safety will be seriously endangered.

The Supreme Court notes that the provisions for undisclosed evidence in the *Canada Evidence Act* allow for a weighing of the public interest in disclosure against the public interest in non-disclosure.[48]

3. The test of "injurious to national security" is too broad

"National security" is difficult if not impossible to define. What is considered to be "injurious to national security" can vary widely depending on a person's point of view and may range from a real and present danger to hypothetical future consequences. Of particular concern is the potential inclusion within its ambit of injury to international relations. A person's fundamental right to a fair hearing should not be violated simply because it might cause embarrassment to another government or make the Canadian government's relations with another government more difficult.

4. No explicit prohibition on use of evidence obtained under torture

Bill C-3 does not explicitly prohibit the use of evidence that may reasonably be suspected of having been obtained under torture. The word "reliable" has been added in the phrase: "the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate." This word could be interpreted to exclude evidence obtained under torture, since such evidence certainly is not reliable. However, this matter is too important to be left to interpretation. This is particularly so given the revelations of the Arar Commission, which make clear that Canadian authorities have on some occasions treated evidence as reliable despite compelling reasons for suspecting that it had been obtained under torture.

5. The standard of proof is extremely low

Bill C-3 does not address the problem of the extremely low standard of proof required for establishing inadmissibility under the *Immigration and Refugee Protection Act*. The standard of "reasonable grounds to believe" is very problematic even in cases where all the evidence is disclosed. It is doubly so when some, most or all of the evidence is not disclosed. If the Minister only needs to satisfy the judge that there are "reasonable grounds to believe" a person is a member of a certain organization, and the Minister will not disclose the evidence on which those "reasonable grounds" are based, it is hard to imagine how the person can hope to defend themselves.

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[47] IRPA, s. 77(2), as proposed in Bill C-3.

[48] *Charkaoui*, at para. 27.

6. No flexibility to deal in different ways with different types of sensitive information

Bill C-3, like the current Act, takes an "all or nothing" approach to sensitive information. If the Minister requests it, the judge reviews evidence in the absence of the public, the person concerned and their counsel. Yet, in practice, there are different types of information that may call for different types of protection. In some cases, it may be considered dangerous to disclose the information in an open court, but there may not be the same risks if the person concerned and counsel see the evidence. In other cases, it may be feasible for counsel to see the evidence. In *Charkaoui*, the Supreme Court points out that the *Canada Evidence Act* allowed for a particular solution to be found for managing sensitive evidence in the Air India trial.[49]

7. No provisions to end the proceedings if justice requires it

Bill C-3 does not direct the judge to halt proceedings if the particular circumstances of the case mean that there is no way for the person to defend themselves. While all hearings using secret evidence will be unfair, it needs to be recognized that there are degrees of unfairness and that it would be intolerable to proceed in cases at the upper end of the unfairness scale.[50] The recent UK House of Lords decision relating to special advocates affirmed the need for the judge hearing a case involving secret evidence to evaluate whether the person concerned received a substantial measure of procedural justice or was denied a fair hearing, given the specific facts of the case.[51]

8. Minimalist special advocate model

As noted by the Supreme Court in *Charkaoui*, there are various models of special counsel that have been used in different settings in Canada and elsewhere. With respect to the UK Special Advocate, the Court specifically draws attention to "three important disadvantages faced by special advocates", as identified by a UK House of Commons committee.[52] Yet it is the UK model, with all its weaknesses, that is most closely followed in Bill C-3.

No model of special advocate will make a hearing with secret evidence fair. The model proposed in C-3 does little to make such a hearing less unfair, for the following reasons:

a) The special advocate does not have access to the whole file

Subsection 85.4 (1) states that the Minister will give to the special advocate a copy of the secret evidence provided to the judge. The Minister is not required to give access to the whole file on the person, which may contain evidence that could exculpate the person.[53]

b) The special advocate is not able to communicate with the person after seeing the secret evidence

Subsection 85.4(2) states that, after receiving the secret evidence, the special advocate may only speak with another person about the proceeding with the judge's authorization. In these circumstances, the ability of the special advocate to defend the interests of the person affected is

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[49] *Charkaoui*, at para. 78.

[50] This possibility is provided for in the *Canada Evidence Act* where the Attorney General issues a certificate banning disclosure, at s. 38.14.

[51] Sec. of State for the Home Dept v. MB [2007] UKHL 46, 31 October 2007.

[52] *Charkaoui*, at para. 83. The three disadvantages are: "(1) once they have seen the confidential material, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant's counsel; (2) they lack the resources of an ordinary legal team, for the purpose of conducting in secret a full defence; and (3) they have no power to call witnesses (para. 52)."

[53] This has been a controversial matter among special advocates in the UK. See Forcese and Waldman, *Seeking Justice in an Unfair Process*, August 2007, pp. 40-42.

extremely limited. A special advocate who cannot speak with the person cannot assist them to meet the case against them.

In the UK, which already has considerable experience with special advocates, this prohibition on communication has drawn strong criticism. A Parliamentary Committee concluded that such further communication is necessary for the special advocates not only "to establish whether the state's evidence can be challenged by evidence not available to the appellant" but also "to form a coherent legal strategy with the appellant's legal team".[54]

It is unclear why the government has imposed this severe constraint on the special advocates. The government is no doubt concerned that secret evidence not be unintentionally disclosed, but SIRC counsel is not so limited, and there are no known breaches of security that have occurred as a result. The counsel for the Arar Commission also had access to secret evidence, yet were able to meet with counsel for Arar and for the interveners (and used these meetings to inform the questions they asked in the closed hearings). Similarly CSIS officers routinely question individuals while having to protect sensitive information. Why should special advocates not be able to do the same?

Bill C-3 does at s. 85.5 provide for the possibility of communication by the special advocate if authorized by the judge. In practice, permission is unlikely to be frequently granted. Certainly this is the experience in the UK. In a recent House of Lords decision, Lord Bingham says: "the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given."[55]

Aside from the question of how frequently permission will be granted, the fact that it must be sought means that the special advocate would have to disclose to the government the nature of the communication desired, thereby potentially compromising the interests of the person affected.[56]

c) The special advocate is not protected by a solicitor/client relationship

Subsection 85.1(3) states that the special advocate and the affected person are not in a solicitor/client relationship. As a result, it is possible that a special advocate could be forced to disclose information obtained from the affected person. This is likely to make affected persons reluctant to talk to the special advocate out of fear about where the information that they disclose might end up.[57]

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[54] UK Parliament Select Committee on Constitutional Affairs, Seventh Report (April 2, 2005), at para. 12.

[55] Sec. of State for the Home Dept v. MB [2007] UKHL 46, 31 October 2007, at para. 35 of his opinion. See also UK Joint Committee, at para. 201: "It was explained that the facility in the Rules to seek the Court's permission to consult with the controlled person was rarely used in practice, partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was to discuss anything to do with the closed case [...]"

[56] This point was made by a number of UK Special Advocates in a written submission to a UK House of Commons Committee: "So, the Special Advocate can communicate with the appellant's lawyers only if the precise form of the communication has been approved by his opponent in the proceedings. Such a requirement precludes communication even on matters of pure legal strategy (ie matters unrelated to the particular factual sensitivities of a case)." UK House of Commons, Select Committee on Constitutional Affairs, Seventh Report, Written Evidence, "Evidence submitted by a number of Special Advocates", 7 February 2005, at para. 9

[57] The Supreme Court of Canada has recognized the importance of solicitor-client privilege. In *R. v. McClure* [2001] 1 S.C.R. 445, for example, the Court (per Major J.) says (at para. 33): "It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosures within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and the client".

d) There is no guarantee that special advocates will have the qualifications and resources necessary

Bill C-3 does not ensure that special advocates will have the necessary skills and independence to perform an extremely difficult, if not impossible, task. Nor is there any guarantee that they will have sufficient resources to make an adequate attempt at defending the person's interests.

e) It appears that the special advocates may be hired by the government

Bill C-3 does not clarify who hires the special advocates, leaving it open to the inference that the government hires them. This is extremely problematic, as it makes the adverse party responsible for hiring the persons who are supposed to protect the interests of the persons affected. We note that SIRC provides a more appropriate model as counsel are hired the decision making body, not the government.

f) The person affected has no right to choose his/her special advocate

The special advocate is appointed by the judge, giving the person affected no right to choose, even within the limited list of special advocates established by the Minister of Justice (s. 83(1)(b)). It is unclear why the person affected should be denied the right of choice. The fact that the special advocate is imposed by the judge will only reduce still further the possibility of the person have any confidence in the special advocate.[58]

g) The powers of the special advocates in the hearing are very limited

Bill C-3 at s. 85.2 outlines a very limited list of powers held by the special advocate in the hearing process: making submissions on the written evidence and cross-examining witnesses who testify during the in camera parts of the hearing. Other powers require the authorization of the judge.[59] Apparently the special advocate is not even entitled to attend the open parts of the hearing. There is no power to call witnesses or introduce evidence. It would seem that the only situations in which a special advocate would be able to help the concerned person's case would be where the secret evidence contains sufficient internal contradictions or witnesses collapse under cross-examination.

The role of the special advocate, as set out at s. 85.1, is "to protect the interests of the permanent resident or foreign national…when information or other evidence is heard in the absence of the public and of the [person named in the certificate] and their counsel." Given the severe limitations imposed on the special advocate, it will be next to impossible for him or her to fulfil that role in any meaningful way.

9. Protection issues

Bill C-3 introduces a number of changes that affect access to protection for refugees and others who, if removed from Canada, face a risk of persecution, torture or cruel and unusual treatment or punishment, or a threat to their life. These issues have not so far received much attention in discussion on the bill, nor have the changes been explained in government comment, with the result that much is unclear.

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[58] This point is made by the UK Special Advocates in their submission cited above, footnote 56: "the present regime gives the appellant *no* choice whatsoever. From his perspective, the Special Advocates are selected at the discretion of a Law Officer who is a member of the executive which has authorised his detention. In these circumstances, it would not be surprising if the appellant had little or no confidence in his Special Advocates." (at para. 21).

[59] 85.2(c): the judge may authorize other powers "necessary to protect the interests of the permanent resident or foreign national."

Among those actually and potentially affected by security certificates and s. 86 procedures are people who have fled persecution in their home countries. In some cases they may have been granted refugee status in Canada and subsequently become the subject of removal processes. In other cases, they may be making a refugee claim when the proceedings using secret evidence are brought against them. Canada has important obligations to refugees under the Convention relating to the Status of Refugees, notably the fundamental obligation of non-refoulement.[60] These obligations must be taken seriously in the context of security certificate and s. 86 provisions.

In addition, as a signatory to the Convention against Torture, Canada must never send anyone to face a danger of torture.[61] As noted above, whether or not they had earlier fled persecution, persons who are identified by Canada as linked to terrorism face a strong risk of torture if they are removed to a country that practises torture.

Among the changes introduced in Bill C-3 that relate to protection issues are the following:

- Security certificates proceedings are no longer suspended while a Pre-Removal Risk Assessment (PRRA) is conducted (s. 79).

- The automatic judicial review of the PRRA (current s. 79(2)) is dropped.

- S. 115 is added as a proceeding that can happen in parallel to the certificate process (s. 77(3)). S. 115 is the principle of non-refoulement that applies to refugees. It appears that the intention is to allow for a re-assessment by a civil servant of a previous determination by the Immigration and Refugee Board that the person is a Protected Person. This represents a disturbing use of a provision in the Act that articulates the State's most fundamental protection commitment – the principle of non-refoulement – to undermine a person's status as a refugee.

On the other hand, the bill does not:

- Introduce amendments to bring Canada into compliance with international human rights obligations by providing an absolute prohibition against return to torture and limiting exceptions to the non-refoulement principle to those contained in the Refugee Convention.

- Ensure that protection decisions are made by a judicial or quasi-judicial decision-maker. Instead, these decisions are made by a civil servant, with even the right to judicial review made subject to a leave requirement, despite the fact that, particularly in the context of allegations of security risk, protection decisions are very sensitive.

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[60] Article 33 of the Refugee Convention states: "(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Since Canada's *Immigration and Refugee Protection Act* (at s. 115(2)) excludes from non-refoulement protection a much broader group of people than defined in the Convention at 33(2), Canada is not in conformity with the Convention. For example, IRPA 115(2) excludes anyone who is inadmissible on security grounds, even though this covers many people who do not constitute a danger to the security of Canada.

[61] Convention against Torture, article 3.

- Address clearly how and when any balancing of risk to the person against risk to Canada will be conducted. Under the PRRA, s. 113 explicitly requires the balancing of the person's need for protection against "the danger that the applicant constitutes to the security of Canada." S. 115 does not contain an explicit requirement for balancing, but it is read into the provision. Yet this balancing process, involving an assessment of the person's danger to Canada, is separate from the process before the Federal Court where a judge is testing the Minister's case against the person, including any allegations that the person represents a danger to national security. A PRRA/s. 115 decision-maker might therefore make one assessment of the danger the person represents to Canada, and the judge subsequently decide that the person does not represent as grave a risk as the Minister claimed. Yet, the PRRA/s. 115 process does not provide for the judge's conclusions to be taken into account in the balancing.

Overall the provisions relating to protection lack clarity and are in fact highly confusing. If they are allowed to stand, they will almost inevitably lead to further litigation.

The provisions also fail to provide the guarantees of principle and of procedure that are necessary to ensure that Canada respects the protection rights of the persons' affected.

10. Other issues

a) Appeal to Federal Court of Appeal

The amendment at s. 79 to provide for increased, though still limited, right of appeal is welcome.

b) Detention provisions

The removal of the discriminatory distinction between permanent residents and non-permanent residents with respect to detention is welcome. However, the proposed six-month interval between detention reviews is excessively long, especially in the early period. The normal calendar for immigration detention reviews is 48 hours, 7 days and then every 30 days.[62] This reflects the fact that it may take a few days to gather relevant information about why a person should be released. There is no reason a similar calendar should not be followed in the case of security certificate detainees.

[62] IRPA s. 57.