Legislative Summary **LS-567E**

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

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LEGISLATIVE HISTORY OF BILL C-3

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	22 October 2007	First Reading:	
Second Reading:	20 November 2007	Second Reading:	
Committee Report:	10 December 2007	Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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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*

BACKGROUND

A. Purpose of the Bill

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, was introduced in the House of Commons and received first reading on 22 October 2007. It amends the *Immigration and Refugee Protection Act*(1) (IRPA) to provide a new procedure relating to security certificates and, in particular, to provide for the appointment of a special advocate to represent the interests of a person named in a security certificate.

The bill was introduced after the Supreme Court of Canada ruled in February 2007 that IRPA's procedure for judicial approval of security certificates infringes the *Canadian Charter of Rights and Freedoms* and was therefore of no force or effect. The Court suspended its declaration for one year **(until 23 February 2008)** to provide time for Parliament to amend the procedure.

The bill received second reading and was referred to the House of Commons Standing Committee on Public Safety and National Security on 20 November 2007. It was reported back to the House of Commons with amendments on 10 December 2007.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended while being considered by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) S.C. 2001, c. 27.

B. The Pre-existing Law: Security Certificates and Related Procedure

A security certificate is one method used to remove from Canada a non-citizen who has been determined to present a high level of risk to the national security or to any person. This method may be used when the risk determination is based on secret evidence that cannot be disclosed to the person subject to removal.

A security certificate may be used only in relation to a permanent resident or a foreign national – never a citizen. If such a person is believed to be inadmissible to Canada on grounds related to security, the violation of human or international rights, serious criminality or organized crime, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness ("the two Ministers") together may sign a certificate naming the person and refer it to the Federal Court to determine whether the certificate is reasonable (section 77 of IRPA).(2)

The old procedure by which the Court would judge the reasonableness of the certificate has already been modified, in part, by a Supreme Court ruling and is subject to further amendment under Bill C-3. (It is described in the present tense in this legislative summary for clarity of exposition.) Under that procedure, a judge is required to examine the evidence in private within seven days of a certificate being referred to the Federal Court (section 78(*d*)). This review differs from other types of court applications in that the security certificate procedure is preventative, the intention being to deal with threats before they manifest themselves. Accordingly, the review is administrative in nature and does not contain the full array of rights and procedural safeguards included in criminal law.(3) The judge is required to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit (section 78(*c*)). The judge is able to receive into evidence, and base a decision on, anything that the judge believes is appropriate, even if such evidence would be inadmissible in a court of law (section 78(*j*)).

On the request of either of the two Ministers, the judge is required to hear all or part of the evidence in the absence of the person named in the certificate and their counsel if, in

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(2) Information about the preparation of security intelligence reports that often support the issuance of security certificates is available on the website of the Canadian Security and Intelligence Service at http://www.csis.gc.ca/en/newsroom/backgrounders/backgrounder14.asp.

(3) This fact has been the subject of much criticism in view of the fact that the consequences of an affirmative reasonableness determination are often more serious than those of a criminal conviction.

the judge's opinion, disclosing such evidence would be injurious to national security or to the safety of any person (section 78(*e*)). For example, evidence might be undisclosed in order to protect the identity and therefore the life of an informant, to keep investigative techniques confidential, or to protect the confidentiality of information provided by a foreign government. However, the judge is required to provide the person subject to the certificate with a summary of the secret evidence to enable that person to be reasonably informed of the circumstances giving rise to the certificate, but without disclosing the secret evidence (section 78(*h*)). Also, the judge is required to provide the person named in the certificate with an opportunity to be heard regarding his or her inadmissibility to Canada (section 78(*i*)).

If the judge concludes that a certificate is not reasonable, the certificate is quashed (section 80). If the judge concludes that a certificate is reasonable, the certificate becomes a removal order not subject to appeal (section 81).

Often a person named in a security certificate is detained pending determination of whether the certificate is reasonable. The specific rules of detention depend on whether the named person is a foreign national or a permanent resident.

A foreign national named in a certificate is detained automatically (section 82(2)). There is no review of that detention until after the hearing on the reasonableness of the certificate. The person's first opportunity to apply for release comes if he or she is not removed from Canada within 120 days after a judge determines that the certificate is reasonable. At that time, a judge may order the person's release, subject to terms and conditions the judge considers appropriate, but only if the following conditions are met. First, the judge must be satisfied that the person will not be removed from Canada within a reasonable time. Second, the judge must be satisfied that the release will not pose a danger to the national security or to the safety of any person (section 84(2)). In situations where these conditions are not met, detention may continue for years.

A permanent resident is detained only if there are 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. In that case, the two Ministers issue a warrant for the person's arrest and detention (section 82(1)). A judge is required to commence a review of the reasons for detaining a permanent resident within 48 hours of the person being taken into custody. The rules applied in reviewing the reasons for detention are the same as those that apply in reviewing the reasonableness of the certificate. Accordingly, the judge is permitted to

consider evidence that is not disclosed to the detained person, who receives only a summary of that evidence. The permanent resident's continuing detention is reviewed, at a minimum, at six-month intervals until the judge determines whether the certificate is reasonable (section 83). No provision is made for reviewing the continuing detention of a permanent resident who is not immediately removed after an affirmative determination of reasonableness is made.

Any person subject to a security certificate and who is being detained may effect his or her own release at any time by choosing to leave Canada (section 84(1)). However, this is not always a tenable solution, as some detainees face the risk of torture or death if they return to their country of origin. Safe third countries willing to accept such a person may be few or non-existent.

Because some people may face a risk of torture or death **if they are returned to their** country of origin, Canada does not remove every person whose security certificate is found to be reasonable. IRPA provides that, while the Federal Court is considering the reasonableness of the certificate, either the Minister of Citizenship and Immigration or the person named in the certificate may request that the proceeding be suspended while the Minister makes a decision on an application for protection (also known as a pre-removal risk assessment, or PRRA) (sections 77(2), 79(1) and 112(1)). The PRRA is conducted to determine whether the person named in the certificate would be at risk of torture, death, or cruel and unusual treatment or punishment if he or she were returned to the country of origin. If the Minister determines that the person would be at risk, and that this risk outweighs the risk the person poses by staying in Canada, then the application for protection is allowed and any subsequent order that the person be removed to the country that poses the risk is stayed (sections 113 and 114).

In some cases, such people are released from detention on conditions. In other cases, such people continue in detention for years.

Security certificate provisions within immigration law have existed for many years, but they have been used only rarely. In total, 28 security certificates have been issued since 1991, six of which were issued after the 11 September 2001 terrorist attacks. Of the 28 issued, three have been quashed by the court for being unreasonable. One of those three was subsequently re-issued. A total of 19 certificates have resulted in removals from Canada. The two most recent removals were in December 2006, when a man using the alias Paul William Hampel was removed to Russia on the grounds that he had engaged in espionage, and in March 2005, when Ernst Zundel was deported to Germany in relation to right-wing extremism.

Currently, six people in Canada are named in security certificates: Mohamed Harkat, Hassan Almrei, Adil Charkaoui, Mohammad Mahjoub, Mahmoud Jaballah and Manickavasagam Suresh. All but Hassan Almrei have been released from detention on conditions.

C. Ruling by the Supreme Court of Canada

Three of the men currently named in security certificates, Adil Charkaoui, Hassan Almrei and Mohamed Harkat, challenged the constitutional validity of IRPA's security certificate procedure before the Supreme Court of Canada in 2006. On 23 February 2007, the Court released its decision,(4) overturning an earlier decision of the Federal Court of Appeal.

The Court found that two different IRPA provisions relating to security certificates violated the *Canadian Charter of Rights and Freedoms*. First, section 78(*g*) of IRPA violated section 7 of the Charter. Section 78(*g*) of IRPA allowed "for the use of evidence that is never disclosed to the [person named in a security certificate] without providing adequate measures to compensate for this non-disclosure."(5) Two procedures relied on this section: that for determining whether a security certificate was reasonable, and that for reviewing a related detention. Therefore both procedures infringed section 7, which guarantees to "everyone" 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."

Because the outcome of either of these procedures could deprive a person of life, liberty or security of the person (such as by being removed to a dangerous country or by being detained for a significant period of time), section 7 requires that the government accord the person a fair judicial process. However, the secrecy required by the security certificate procedure rendered it unfair, as it denied the named person "the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermine[d] the judge's ability to come to a decision based on all the relevant facts and law."(6) Accordingly, neither the procedure for reviewing the reasonableness of a security certificate nor the detention review procedure constituted the type of fair judicial process required under section 7 of the Charter.

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(4) *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. Available on the website of the Supreme Court of Canada at: http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html.

(5) Ibid., para. 139.

(6) Ibid., para. 65.

The Court found that these section 7 infringements could not be justified under the Charter's section 1 limitations clause as "minimal impairments" of the rights of the person named in a certificate.(7) The Court was of the opinion that the government could do more to protect the person's rights and noted the use of special counsel "to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by [the Security Intelligence Review Committee] and is presently done in the United Kingdom."(8)

The second Charter infringement the Court found relates to section 84(2) of IRPA, which did not provide for review of a foreign national's detention until 120 days after the reasonableness of the security certificate had been judicially determined. The Court found that this section violated "the guarantee against arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the right to prompt review of detention under s. 10(c) of the *Charter*."(9) The Court noted that a permanent resident detained under a security certificate was entitled to a mandatory detention review within 48 hours. Accordingly, the Court concluded that the long delay in reviewing the detention of a foreign national was not justified under section 1 of the Charter, as it was not a minimal impairment of rights.

1. Remedy

In response to the first Charter violation, the Court declared the procedures for judicial review of security certificates and detention to be of no force or effect.(10) However, it suspended this declaration for one year in order to give Parliament time to amend IRPA.(11)

In relation to the second violation, the Court struck down the offending IRPA section 84(2) and modified section 83 to effect the result that both foreign nationals and permanent residents are entitled to a review of their detention within the first 48 hours, and thereafter at six-month intervals.

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(7) Ibid., para. 87.

(8) Ibid., para. 86.

(9) Ibid., para. 91.

(10) Ibid., para. 139.

(11) Ibid., para. 140.

D. Parliamentary Committee Reports

In addition to the Supreme Court ruling discussed above, in 2007 three separate parliamentary committees recommended changes to the security certificate procedures.

1. The Special Senate Committee on the *Anti-terrorism Act*

After the 11 September 2001 terrorist attacks in the United States, Parliament quickly passed complex anti-terrorism laws. In light of the speed with which the *Anti-terrorism Act*(12) was studied and passed, a provision was included requiring a parliamentary committee to undertake a comprehensive review of the provisions and operation of the Act within three years of the Act receiving Royal Assent.(13) Accordingly, a Special Senate Committee on the *Anti-terrorism Act* was struck and, in February 2007, it tabled a report entitled *Fundamental Justice in Extraordinary Times*.(14)

The report sets out the Special Senate Committee's views and recommendations on a wide variety of issues related to the *Anti-terrorism Act*, including racial profiling, terrorism financing, and electronic surveillance. Two chapters of the report relevant to Bill C-3 raise concerns related to the fairness of security certificate procedures in IRPA. One chapter discusses special advocates, and the other discusses other aspects of the security certificate procedure.

The chapter that discusses special advocates is relevant to a number of different "circumstances where an individual is not able to obtain full disclosure of information, despite the serious consequences that may result from the proceedings."(15) The "proceedings" referred to include five different contexts under various Acts, including the security certificate procedure under IRPA. With respect to each of these proceedings, the Special Senate Committee was concerned that the person subject to the proceedings was not in a position to make full answer and defence. Accordingly, the Special Senate Committee recommended that a special advocate be appointed to represent the interests of the person subject to the proceedings. The special advocate would have access to the secret information, and would challenge the facts and allegations against the person, as well as the government's arguments for not disclosing the information.(16)

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(12) S.C. 2001, c. 41.

(13) Section 145.

(14) Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times*, Main report, 1st Session, 39th Parliament, Ottawa, February 2007 ("Senate Committee Report"), http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm.

(15) Ibid., p. 30.

(16) Ibid., Recommendation 7, p. 42.

The report states:[17]

> Due to the obvious need for confidentiality in matters of national security, the appointment of a special advocate is the best option available to protect the interests of a party who is denied access to certain information. While the special advocate would not be the party's lawyer in the usual solicitor-client sense, … he or she would nonetheless communicate with the party and his or her counsel. The objective would be to ensure that the process during *in camera* hearings has been or will be as fair and just as possible. Given the obligation to keep confidential information secret, the appointment of a special advocate would not completely guarantee procedural fairness, but would significantly improve the current state of affairs.

The Special Senate Committee provided some details regarding how the special advocate system would work. It recommended that "the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security."[18] Also, it recommended that "the party affected by the proceedings be entitled to select a special advocate from among an adequately sized roster of security-cleared counsel who have the appropriate expertise and are funded by, but not affiliated with, the government."[19]

Regarding the IRPA procedure in particular, the Special Senate Committee noted that the need for a special advocate was particularly important given that there was a relatively low standard of review,[20] no appeal was available, and the consequences of the process could be serious.[21]

In a separate chapter of the report, the Special Senate Committee made a number of other recommendations aimed at relieving perceived unfairness in the security certificate procedure. Specifically, the Committee recommended that IRPA be amended to provide for review of the detention of a foreign national subject to a security certificate within 48 hours of

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(17) Ibid., p. 35.

(18) Ibid., Recommendation 8, p. 42.

(19) Ibid., Recommendation 9.

(20) The Federal Court judge is required to determine only whether the certificate is reasonable, and not whether the allegations are actually true.

(21) Consequences could include indefinite detention or removal to the country of origin to face a risk of torture.

the detention,[22] as was provided for a permanent resident. The Committee further recommended a mandatory review of detention of everyone subject to a security certificate within 30 days after detention, and at least once every 90 days thereafter.[23]

In recognition of the danger of relying on evidence obtained by means of torture, as well as the moral aspects of using such information, the Committee recommended a change to IRPA to clarify that the judge may receive into evidence anything that is "reliable and appropriate."[24]

Further, the Committee recommended that an appeal from a reasonableness decision be allowed,[25] that Canada enact an express prohibition against deportation under a security certificate if there are reasonable grounds to believe that the person will be subject to torture,[26] and that Canada not remove an individual to a country where torture is possible on the basis of a diplomatic assurance that the individual will not be tortured, unless there is an effective means of monitoring the individual's situation after his or her return.[27] Two additional recommendations called for Canada to show leadership in engaging the United Nations on issues of how to properly deal with alleged or known terrorists who either pose a threat to the international community, or who are subject to indefinite detention without the prospect of proceedings being brought against them.[28]

2. The House of Commons Standing Committee on Public Safety and National Security (Subcommittee on the Review of the *Anti-terrorism Act*)

While the Special Senate Committee was reviewing the provisions and operation of the *Anti-terrorism Act*, the House of Commons Standing Committee on Public Safety and National Security formed a Subcommittee on the Review of the Anti-terrorism Act to continue with a review that had stalled in November 2005 when Parliament was dissolved. The

(22) Senate Committee Report, Recommendation 30, p. 105.

(23) Ibid., Recommendation 31.

(24) Ibid., Recommendation 32, p. 107.

(25) Ibid., Recommendation 33, p. 108.

(26) Ibid., Recommendation 34, p. 110.

(27) Ibid., Recommendation 35, p. 112.

(28) Ibid., Recommendations 36 and 37, p. 113.

Subcommittee tabled its final report entitled *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* in March 2007.(29)

Like the Senate Committee Report, the Subcommittee Report focuses on a review of the *Anti-terrorism Act*, but it includes comments on the security certificate procedures contained in IRPA. In general, the Subcommittee commented that "more needs to be done to further assure the rights and freedoms" of people subject to the security certificate procedure.(30)

Specifically, the Subcommittee expressed a concern with what it described as "the imbalance between the state and the individual"(31) stemming from "limited disclosure of information mak[ing] it difficult, if not impossible, for affected persons to fully defend their interests"(32) in a number of different types of proceedings, including the security certificate procedure under IRPA. Accordingly, the Subcommittee recommended a system whereby the government, in consultation with the legal profession and the judiciary, would establish a panel of special counsel to hear secret information and represent the interests of a person subject to a proceeding. The Subcommittee specified that counsel appointed to the panel should be security cleared and have relevant expertise. Further, the functions of special counsel should be to test the need for confidentiality and closed hearings, and to test the evidence not disclosed to a party.(33)

Three related recommendations were as follows. First, "that counsel from the Panel should be appointed at the request of a judge presiding over a hearing or by a party excluded from an *ex parte, in camera* proceeding."(34) Second, "that the Panel should have the capacity to provide counsel appointed to it with the investigative, forensic and other tools they require to effectively carry out the functions assigned to them."(35) Finally, the Subcommittee recommended "that counsel appointed to the Panel be provided with the necessary training to allow them to effectively carry out the functions assigned to them."(36)

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(29) House of Commons Standing Committee on Public Safety and National Security (Subcommittee on the Review of the Anti-terrorism Act), *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*, Seventh report, 1st Session, 39th Parliament, Ottawa, March 2007 ("Subcommittee Report"), http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=199086.

(30) Ibid., p. 71.

(31) Ibid., p. 80.

(32) Ibid.

(33) Ibid., Recommendation 53, p. 81.

(34) Ibid., Recommendation 54.

(35) Ibid., Recommendation 55.

(36) Ibid., Recommendation 56.

The Subcommittee made other general recommendations relating to the security certificate procedure. It shared the Special Senate Committee's concern that a judge reviewing the reasonableness of a security certificate could consider evidence obtained by means of torture. Such evidence is considered by many "not to be the best source of truthful, accurate facts."(37) Accordingly, the Subcommittee recommended that the word "reliable" be added to the applicable provision of IRPA(38) so that the judge "may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate."(39)

In addition, the Subcommittee recommended that IRPA be amended to allow for a PRRA only after a security certificate has been found to be reasonable.(40)

The government response to the Subcommittee Report was released on 18 July 2007 and is generally supportive of the recommendations discussed above.(41)

3. The House of Commons Standing Committee on Citizenship and Immigration

In 2007, the House of Commons Standing Committee on Citizenship and Immigration tabled two reports relevant to security certificates and the people detained under them. On 8 February 2007, the Citizenship and Immigration Committee tabled its 10th Report, calling for measures to address complaints and resolve the hunger strike of security certificate detainees held at the Kingston Immigration Holding Centre.(42)

On 16 April 2007, the Citizenship and Immigration Committee tabled its 12th Report, entitled "Detention Centres and Security Certificates."(43) The report contains 25 recommendations. Many relate to conditions of detention at the Kingston Immigration

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(37) Ibid., p. 71.

(38) Section 78(*j*).

(39) Subcommittee Report, Recommendation 51, p. 72.

(40) Ibid., Recommendation 52, p. 73.

(41) The government response is available on the website of the House of Commons Standing Committee on Public Safety and National Security at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=213371. See pp. 22-3 in particular.

(42) House of Commons Standing Committee on Citizenship and Immigration, 10th Report, 1st Session, 39th Parliament, Ottawa, February 2007, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10469& Lang=1&SourceId=190051.

(43) House of Commons Standing Committee on Citizenship and Immigration, *Detention Centres and Security Certificates*, 12th Report, 1st Session, 39th Parliament, Ottawa, April 2007 ("Citizenship and Immigration Committee Report"), http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10469&Lang=1&SourceId=200549.

Holding Centre. Seven recommendations stemming from concerns about procedural fairness raised by the security certificate procedure are described in the following discussion.

Like the other committees, the Citizenship and Immigration Committee recommended that special advocates be used in the security certificate procedure.(44) They envisioned special advocates being security-cleared lawyers appointed to represent the interests of the person named in the security certificate and to test the secret evidence.(45) They stated that such a process should, "subject to national security considerations and with minimal impairment to the rights of detainees, afford detainees an opportunity to meet the case against them by being informed of that case and being allowed to question or counter it."(46)

Other recommendations were also similar to those of the other committees. The Citizenship and Immigration Committee Report called for amendments to IRPA to provide an appeal from the reasonableness determination,(47) as well as an assurance that no one shall be removed to their country of origin to face a risk of torture, cruel or unusual treatment or punishment, or a risk to their life.(48)

Some recommendations were completely new. The Citizenship and Immigration Committee recommended that "the government institute a policy stating that charges under the *Criminal Code* are the preferred method of dealing with permanent residents or foreign nationals who are suspected of participating in, contributing to or facilitating terrorist activities."(49) Further, with a view to controlling detention times, they recommended that after a specific length of time security certificate detainees either be charged criminally or released without conditions.(50)

The government responded to the Citizenship and Immigration Committee Report on 22 August 2007.(51)

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(44) Ibid., Recommendation 1, p. 13.

(45) Ibid., Recommendation 2.

(46) Ibid., Recommendation 3.

(47) Ibid., Recommendation 7, p. 14.

(48) Ibid., Recommendation 5, pp. 13-14.

(49) Ibid., Recommendation 4.

(50) Ibid., Recommendation 6, p. 14.

(51) The government response is available on the website of the House of Commons Citizenship and Immigration Committee at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10469&Lang=1&SourceId=213794.

DESCRIPTION AND ANALYSIS

Bill C-3 substantially changes the security certificate procedure. It provides for the appointment of a special advocate as well as for a limited right of appeal. It provides for equal treatment of permanent residents and foreign nationals in making detention decisions, and requires periodic reviews of such detentions. It clarifies ministerial responsibilities, takes care of various housekeeping matters, and contains transitional provisions and a consequential amendment to the *Canada Evidence Act*.

A. Secret Information and the Special Advocate (Clause 4 adding new sections 78, and 83 to 85.6)

Perhaps the most notable changes made by Bill C-3 relate to the procedures for dealing with secret evidence and information, including the incorporation of a role for a special advocate in the new procedure. Bill C-3 continues the practice of having a Federal Court judge determine whether a certificate is reasonable (new section 78), but sets out a new procedure for that determination (new section 83(1)). The new procedure is also applicable to the review of a detention or release decision, as well as related appeals (modified as necessary) (new sections 83(1) and 84).

1. Secret Information

The rule for deciding what information or evidence will be heard in the absence of the person and the public is now easier to meet. Previously, the test was whether in the judge's opinion the disclosure *would* be injurious to national security or to the safety or any person. Under Bill C-3, the new test is whether the disclosure *could* be injurious to national security or endanger the safety of any person. In addition, under Bill C-3 the judge is empowered to form that opinion on his or her own motion in addition to at the request of a Minister, as the law previously provided (new section 83(1)(*c*)).

2. Special Advocate

Responding to the Supreme Court decision and recommendations made by all three parliamentary committees that reported on security certificates, Bill C-3 establishes a role for a special advocate in the process.

The Minister of Justice is required to establish a public list of people who may act as special advocates. Bill C-3 states that the *Statutory Instruments Act* does not apply to the list of special advocates. Accordingly, the list is not subject to the same rules regarding examination, publication and scrutiny as regulations and other statutory instruments. **However, the bill now specifies that the Minister of Justice must ensure that special advocates are provided with adequate administrative support and resources (new section 85).**

During a security certificate proceeding, the judge hears representations from the Minister and from the person named in the security certificate before appointing a person from the list to act as a special advocate in the matter. In selecting a special advocate, the judge gives particular consideration and weight to the preferences of the person named in the security certificate (new section 83(1)(*b*)). If the named person requests that a particular person be appointed to act as special advocate, the judge appoints that person unless the judge is satisfied that: (i) the appointment would result in the proceeding being unreasonably delayed; (ii) the appointment would place the person in a conflict of interest; or (iii) the person has knowledge of information or other evidence whose disclosure would be injurious to national security or endanger the safety of any person and, in the circumstances, there is a risk of inadvertent disclosure of that information or other evidence (new section 83(1.2)).[(52)] The judge is also empowered to terminate the **special advocate** appointment and appoint another person in the proceeding (new section 83(2)).

As anticipated, the special advocate's role in a security certificate proceeding is to protect the interests of the person named when information or other evidence is not disclosed to him or her. Proceedings include the reasonableness determination, as well as related detention and release proceedings (new section 85.1(1)).

Once a special advocate is appointed in a proceeding, the Minister of Public Safety and Emergency Preparedness provides the special advocate with a copy of all the secret evidence (new section 85.4(1)). Then, on behalf of the named person, the special advocate challenges the Minister's claim that the secret evidence may not be disclosed to the person or the public, and challenges the relevance, reliability and sufficiency of the secret evidence, as well as the weight to be given to it (new section 85.1(2)).

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(52) The version of Bill C-3 first introduced in the House of Commons provided for the judge to appoint the special advocate without input from either the Minister or the person named in the security certificate.

The special advocate may make oral and written submissions with respect to the secret evidence, and may participate in, and cross-examine witnesses during, any part of the proceeding held in the absence of the public and of the person and his or her counsel. Other powers are available to the special advocate if authorized by the judge (new section 85.2).

Despite the fact that he or she plays this role on behalf of a named person, the special advocate is not a party to the proceeding. Accordingly, there is no solicitor–client relationship between the special advocate and the person named in the certificate (new section 85.1(3)). **However, Bill C-3 specifies that *communications* of a solicitor–client nature between the person named in the security certificate (or the person's counsel) and the special advocate are privileged. This means that, in respect of such communications, the special advocate is not a compellable witness in any proceeding (new section 85.1(4)). Also, the** special advocate is not personally liable for anything he or she does or omits to do when acting in good faith in this role (new section 85.3). **Bill C-3 requires the chief justices of the Federal Court and the Federal Court of Appeal to establish and preside over a committee to make court rules for special advocates in their respective courts. The bill specifies the composition of each committee (new section 85.6).**

Bill C-3 includes various provisions aimed at avoiding disclosure of the secret evidence. First, after the special advocate receives the secret evidence, he or she may not communicate with anyone about the proceeding, including with the person named in the certificate, without first obtaining the judge's authorization and subject to any conditions the judge considers appropriate (new section 85.4(2)). Second, to the extent that the special advocate does communicate with someone during the proceeding, that person also must seek the judge's authorization before communicating with someone else about the proceeding, and any such further communication may be subject to conditions (new section 85.4(3)). Third, Bill C-3 includes a general provision prohibiting anyone from disclosing the secret evidence, or communicating with anyone about any part of the proceeding held in the absence of the named person, without the judge's authorization (new section 85.5).

On a related point, Bill C-3 includes a new provision stating that the "judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister" (new section 83(1)(*f*)).

B. Other Procedural Changes
(Clause 4 adding new sections 77(2) to 80, 83(1), and 86 to 87.1)

In addition to the creation of the role of special advocate, Bill C-3 makes other changes to the security certificate procedure.

1. Summary of Secret Evidence

Under the pre-existing law, the judge reviewing the reasonableness of the certificate would provide the person named in the certificate with a summary of information or evidence of the circumstances giving rise to the certificate. Under Bill C-3, the Minister of Public Safety and Emergency Preparedness is now responsible for producing the summary of the Minister's case (new section 77(2)), and the judge must ensure that the person is provided with the summary throughout the proceeding (new section 83(1)(*e*)). Also in relation to the summary, previously the judge would not consider information or evidence that was erroneously not disclosed in the summary. The new provision permits the judge to base a decision on information or evidence regardless of whether a summary of that evidence has or should have been provided to the person (new section 83(1)(*i*)).

2. Security Certificate Interaction with Other Proceedings

Previously, the referral of a security certificate to the Federal Court stopped all other immigration proceedings other than an application for protection (PRRA). That exception continues under Bill C-3. However, under the new procedure, an application for a PRRA may be made at any time during the security certificate process, including after a certificate has been determined to be reasonable, and such an application no longer has the effect of suspending the security certificate proceeding (new section 77(3)). This is a slight variance from the Subcommittee's recommendation to allow a PRRA only after a security certificate has been found to be reasonable.[53]

In addition to the PRRA exception, Bill C-3 introduces into the security certificate provisions a reference to the pre-existing principle of non-refoulement (subject to exceptions) in IRPA section 115 (new section 77(3)). This provision applies in the case of someone who is already recognized as a protected person.

(53) Subcommittee Report, Recommendation 52, p. 73.

For consistency and clarity, Bill C-3 also states that the detention and release proceedings related to security certificates may be commenced or continued after a certificate is referred (new section 77(3)).

3. Admissible Evidence

Following the recommendation of two parliamentary committees,[54] Bill C-3 allows the judge to receive into evidence "anything that, in the judge's opinion, is reliable and appropriate." (new section 83(1)(*h*)). The committees had recommended adding the word "reliable" out of concern that information obtained by means of torture might otherwise be taken into evidence. **The House of Commons Standing Committee on Public Safety and National Security further modified the provision to make it clear that reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or the use of cruel, inhuman or degrading treatment or punishment within the meaning of the United Nations Convention Against Torture (new section 83(1.1)).**

4. Opportunity to be Heard

The former law required the judge to provide the person subject to the security certificate with an opportunity to be heard regarding his or her inadmissibility. Bill C-3 extends the right to be heard to the Minister of Public Safety and Emergency Preparedness, and drops the limit that the hearing be in relation to inadmissibility. Further, the new provision specifically contemplates that both the Minister and the person named in the certificate have an opportunity to be heard in relation to the appointment of the special advocate (new section 83(1)(*g*)).

5. Consequence of a Finding of Reasonableness

Under both the former law and Bill C-3, a security certificate that is determined to be reasonable is deemed conclusive proof that the person named in it is inadmissible and constitutes a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing (new section 80). However, Bill C-3 introduces a new right of appeal from the determination to the Federal Court of Appeal, but only if the judge certifies

(54) Senate Committee Report, Recommendation 32, p. 107; Subcommittee Report, Recommendation 51, p. 72.

that a serious question of general importance is involved, and states the question. This appeal is not available in respect of an interlocutory decision (new section 79).

6. Application to Other Proceedings

Bill C-3 contemplates the procedure described above, with necessary modifications, to be applied in other immigration proceedings involving secret information (new section 86). Accordingly, special advocates may play a role in admissibility hearings, detention reviews or appeals before the Immigration Appeal Division. During a judicial review involving secret evidence, Bill C-3 contemplates a modified version of the above process being followed without the appointment of a special advocate, unless the court believes one is required (new sections 87 and 87.1).

C. Detention and Release
(Clause 4 adding new sections 81 to 82.4)

The new detention and release provisions introduced by Bill C-3 incorporate the changes required by the Supreme Court ruling and go further.

Under Bill C-3, the process for detaining and releasing a person subject to a security certificate is now the same whether the person is a permanent resident or a foreign national. No such person is detained unless both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness issue a warrant for the person's arrest and detention. Warrants are issued if the two Ministers have reason 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 (new section 81).

As was previously the case for permanent residents only, now a judge will commence a review of the reasons for detention of any person held under a security certificate within the first 48 hours and, thereafter, at six-month intervals until a decision is made regarding the reasonableness of the certificate. Pursuant to a new provision, detainees now have a right to apply to the Federal Court for further reviews at six-month intervals after the certificate is determined reasonable (new sections 82(1) to 82(3)). As described below, instructions are provided for the purpose of calculating the six-month period between reviews, as well as the six-month period applicable in other contexts (new sections 82.1(2) and 82.2(4)).

Bill C-3 may facilitate the release of detained persons. Previously, a judge reviewing the reasons for a person's detention was required to order that the detention be

continued if that judge was satisfied the person continued to be a danger to national security or to the safety of any person, or was unlikely to appear at a proceeding or for removal. Bill C-3 modifies that provision by requiring the judge to continue the detention only if he or she is satisfied that releasing the person under conditions would not address the problem. Otherwise, under Bill C-3, the person is released from detention under conditions that the judge considers appropriate (new section 82(5)).

Perhaps in recognition that more people subject to security certificates will be released on conditions, Bill C-3 sets out new rules for arresting and detaining a person on release if a peace officer has reasonable grounds to believe that the person has contravened, or is about to contravene, any condition applicable to his or her release (new section 82.2(1)). As is the case for an original detention decision, the person must be brought before a judge within the first 48 hours of the detention (new section 82.2(2)). If the judge agrees that the person has contravened, or was about to contravene a condition, the judge may vary the conditions, confirm the release order, or order that the person's detention be continued. The latter order may be made only if the judge is satisfied that the person's release under conditions would be injurious to national security or would endanger the safety or any person, or that the person would be unlikely to appear at a proceeding or for removal (new section 82.2(3)).

Bill C-3 provides new avenues of review and appeal for detention decisions. First, if there occurs a material change in the circumstances that led to an order for continued detention or for release, either the person subject to the order or the Minister of Public Safety and Emergency Preparedness may apply to have the order varied (new section 82.1(1)). Second, at six-month intervals, a person released from detention under conditions may apply to the Federal Court for a review of the reasons for continuing the conditions (new section 82(4)). Third, Bill C-3 provides for an appeal to the Federal Court of Appeal of any detention or release decision (other than an interlocutory decision), but only if the judge certifies that a serious question of general importance is involved, and states the question (new section 82.3).

At any time, the Minister may order that a detained person be released to permit his or her departure from Canada (new section 82.4).

D. Ministerial Responsibilities
(Clause 1 amending section 4, and clause 4 amending section 77(1) and adding new section 81)

Bill C-3 makes various amendments to clarify which minister is responsible for the administration of various parts of IRPA. A new subsection specifies that the Minister of

Justice is responsible for all matters relating to special advocates, unless the Governor in Council designates a different minister (clause 1(1) amending section 4(1) and adding new section 4(1.1)).

Without making a substantive change, Bill C-3 assigns various responsibilities to the Minister of Public Safety and Emergency Preparedness directly, replacing an indirect reference (clause 1(2) amending section 4(2)). An administrative adjustment clarifies that the Governor in Council may specify by order which one or more of the three ministers[55] is or are responsible for administering any provision of IRPA (clause 1(3) amending section 4(3)).

The pre-existing subsection 77(1) of IRPA has been interpreted as empowering the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to start the security certificate procedure against a named person. New wording for subsection 77(1) clarifies and confirms this interpretation (clause 4 amending section 77(1)). A similar clarification is made elsewhere (clause 4 replaces pre-existing subsection 82(1) with new section 81).

E. Housekeeping Matters
(Clause 2 amending section 5(2); clause 3 amending section 36(3)(*e*); clause 4 amending sections 76 and 77(1), and adding new section 87.2; and clause 5 amending section 166)

Section 166 of IRPA is a general provision setting out how proceedings before a Division are to be conducted. Bill C-3 amends only the English versions of paragraphs 166(b) and (c) (clauses 5(1) and (2)). The old wording, which contemplated certain proceedings being held "in private," reasonably could have been interpreted several different ways. The new wording, which contemplates proceedings being held "in the absence of the public," better describes the nature of such proceedings. The bill does not modify the French versions of the same paragraphs, which continue to use the expression *huis clos*.

Apparently without intending to change the substance or meaning, Bill C-3 clarifies the wording of certain provisions (clause 4 amending sections 76 and 77(1); clause 5(3) amending section 166(*f*)).

Bill C-3 provides a new regulatory power specific to the part of IRPA relating to security certificates. New regulations may set out conditions and qualifications that are required

(55) The three ministers who share responsibility for administering IRPA are the Minister of Citizenship and Immigration, the Minister of Public Safety and Emergency Preparedness and, pursuant to Bill C-3, the Minister of Justice.

or considered of people to be included in the list of special advocates. **However, the regulations must require that people on the list be members of a provincial bar and they must limit the association that people on the list may have with the federal public administration (clause 4 adding new section 87.2).** Regulations proposed under this power are subject to the same procedure of parliamentary scrutiny applicable to other regulations proposed under IRPA (clause 2 amending section 5(2)).

In a final housekeeping matter, Bill C-3 updates a reference to the *Young Offenders Act* with a new reference to the *Youth Criminal Justice Act* (clause 3 amending section 36(3)(*e*)). The former was repealed and replaced by the latter in 2003.

F. Transitional Provisions and Consequential Amendment (Clauses 6 to 12)

Bill C-3 contains detailed transitional provisions. In general, security certificate proceedings and related PRRA proceedings currently underway are terminated when the bill comes into force, and are re-started under the new law. Detentions and conditional releases continue when the bill comes into force, although a person subject to a continuing detention or conditional release may apply for a review of the reasons for it within 60 days. Other proceedings affected by the bill continue in accordance with the new rules (clauses 6 to 10).

Bill C-3 makes a consequential amendment to the schedule of designated entities in the *Canada Evidence Act* so that the relevant item in the schedule references the Federal Court of Appeal (which is newly charged with hearing security certificate appeals), and contains updated section numbers (clause 11).

The bill will come into force on a day to be fixed by order of the Governor in Council (clause 12). Depending on the bill's progress through both houses of Parliament, a likely date for its coming into force is 23 February 2008. That date marks the anniversary of the Supreme Court ruling when the existing security certificate procedures will lose all force and effect.

COMMENTARY

Bill C-3 appears to address the Charter violations identified by the Supreme Court that served as the catalyst for the legislative changes. However, soon after its introduction in Parliament, the bill attracted criticism from various interested parties. Amnesty International

described the bill as falling "dismally short of what would be required to meet minimal international and constitutional fair trial guarantees."(56) Forcese and Waldman have suggested that Bill C-3 is likely to create problems in Canada similar to those experienced in the United Kingdom in relation to its controversial system of special advocates.(57) Mohamed Harkat, who is currently subject to a security certificate and on release under strict conditions, is quoted as having said that Bill C-3 is an "insult" to human rights activists in Canada.(58)

Four aspects of the bill appear to be of particular concern.

First, critics raise concerns with the fact that once secret evidence is provided to the special advocate, he or she may no longer communicate with the person named in the certificate without authorization from the judge.(59) This is similar to the controversial special advocate system that has been in place in the United Kingdom for a number of years.(60) Amnesty International describes the special advocate as "severely constrained in his or her ability to respond in a meaningful way to the government's secret evidence."(61) According to Amnesty International, "UK experience points to such communication being authorized only rarely."(62)

Second, critics have raised a concern that, while special advocates will have access to the secret evidence the Minister provides to the judge, Bill C-3 does not explicitly provide a power for the special advocate to seek and obtain other government records believed to be relevant.(63)

Third, critics suggest that the bill would be improved by providing for a resource office to support special advocates in their work and thereby better balance the special

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(56) Amnesty International (Canada), "Proposed Security Certificate Legislation Fails to Address Human Rights Shortcomings," News release, Ottawa, 25 October 2007, http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=4099&c=Resource+Centre+News.

(57) "Canada doesn't need a Star Chamber," *National Post*, 25 October 2007, p. A23, http://www.nationalpost.com/news/story.html?id=c921bff0-e9ce-48b8-9ca8-4084e2ccc415. Craig Forcese, Associate Professor, Faculty of Law, University of Ottawa, teaches national security law. Lorne Waldman is a lawyer with Waldman & Associates who represents Maher Arar.

(58) Jon Willing, "Harkat slams Tory legislation," *The Ottawa Sun*, 25 October 2007, p. 22.

(59) Pre-dating Bill C-3, the following report provides an overview of core prerequisites a special advocate function and office should meet, including providing for the special advocate to have meaningful contact with the named person after the special advocate has obtained the secret evidence: Craig Forcese and 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*, Study commissioned by the Canadian Centre for Intelligence and Security Studies, Ottawa, August 2007, p. 61.

(60) Ibid., pp. 34-5.

(61) Amnesty International (Canada) (2007).

(62) Ibid.

(63) Forcese and Waldman (2007), *Seeking Justice in an Unfair Process*, pp. 61-2.

advocate's power against the government. According to Forcese and Waldman, "[s]pecial advocates must be supported by an administrative apparatus that allows them to master and marshal information in the case. They must have the capacity to conduct independent research and analysis. … [T]hey should also be able to draw on a pool of security-cleared experts in security and intelligence as expert witnesses or advisors on intelligence matters that arise."(64)

Finally, Amnesty International condemns the fact that Bill C-3 does nothing to change provisions in IRPA that allow Canada to deport someone believed to be a danger to the security or public in Canada to a country where he or she would be at risk of torture.(65)

In general, some critics are disappointed that the new special advocate procedure appears to be modelled on the United Kingdom's regime, which they feel is not the best example to follow. It has been suggested that better systems exist, including one from Canada, upon which to base the security certificate procedure under IRPA:(66)

> One such system is the Security Intelligence Review Committee (SIRC) model, employed successfully in Canada for over 20 years.
>
> …
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> Given SIRC's successful track record, it is very unlikely that a special advocate model less thorough than the SIRC model will survive constitutional scrutiny. The Charkaoui case turned on the court's conclusion that the government had better options in the design of its security certificate system. That conclusion is not fully reflected in the bill presented by the government on Monday. Parliament should now move promptly to add additional precision and detail to the government's sparse effort.

(64) Ibid., p. 65. **Note that, in response to this criticism, the House of Commons Standing Committee on Public Safety and National Security amended Bill C-3 to provide that the "Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources" (new section 85(3)).**

(65) Amnesty International (Canada) (2007). See also sections 113 and 115 of IRPA.

(66) Forcese and Waldman (2007), "Canada doesn't need a Star Chamber."