COMMISSION OF INQUIRY INTO THE INVESTIGATION
OF THE BOMBING OF AIR INDIA FLIGHT 182

IN THE MATTER OF ORDER OF COUNCIL P.C. 2006-293,
MADE PURSUANT TO PART I OF THE *INQUIRIES ACT*:
COMMISSION OF INQUIRY INTO THE INVESTIGATION
OF THE BOMBING OF AIR INDIA FLIGHT 182

SUBMISSIONS OF THE FEDERATION OF LAW SOCIETIES OF CANADA

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A. INTRODUCTION

The Federation of Law Societies of Canada ("the Federation") is the national coordinating organization of 14 governing bodies of the legal profession in Canada. The Federation's members are authorized by provincial and territorial statutes to regulate the country's 95,000 lawyers and Quebec's 3,500 notaries in the public interest. Part of the Federation's mission is to comment on national and international issues that affect the independence of the legal profession, its relationship with the public at large, and the role of legal counsel in the effective administration of justice. Consistent with this mandate, the Federation has been a leading voice on the many legislative initiatives advanced against the threat of terrorism that have become a government imperative since the attacks of September 11, 2001. The Federation has promoted an approach that prioritizes national security without sacrificing respect for the hallmarks of the Canadian justice system and the rule of law.

The Federation appreciates the opportunity to participate in the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. The Federation's submissions will focus specifically on proposed legislative changes to the procedure under section 38 of the *Canada Evidence Act* ("CEA") for the protection of information from disclosure in court in the interest of national security, national defence or international relations. The Federation submits that these changes are required to ameliorate difficulties resulting from conflict between the state's legitimate interest in protecting the secrecy of intelligence information in certain circumstances and the right of a person accused of a criminal offence to make full answer and defence. The Federation's recommendations attempt to balance these competing interests while respecting the need for clarity and efficiency in the criminal justice system.

Case law supports the view that a Federal Court judge hearing a section 38 application has the discretion to appoint a special advocate to represent the accused's interests in disclosure of the information in issue.[1] The Federation supports the use of special advocates in section 38 proceedings and the enactment of legislation codifying the role of the special advocate. Appropriate legislation would:

(1) better protect the right of the accused to make full answer and defence;

(2) ensure consistency of section 38 proceedings with *Charter* principles;

(3) promote within section 38 proceedings the benefits of the traditional adversarial system of justice; and

(4) afford legislatures the opportunity to clarify the precise scope of the special advocate's role.

The balance of the Federation's submissions will focus on specific recommendations aimed at defining the role of the special advocate and the nature of his or her relationship with the accused. These recommendations touch on:

(1) the codification of the accused's right to a special advocate and the special advocate's right of access to information proposed to be withheld from disclosure to the accused;

(2) the ability of the accused to select his or her own special advocate;

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[1] Most recently in the concurring opinion of Pelletier J.A. in decision of the Federal Court of Appeal in *Khawaja v. Canada (Attorney General)*, 2007 FCA 388, upholding the constitutional validity of *ex parte* proceedings under section 38: see paras. 77-78.

(3) the establishment of a roster of independent advocates to serve as special advocates in section 38 proceedings;

(4) provision for ongoing communication between the accused and the special advocate throughout a section 38 proceeding and, to facilitate that communication, access by the special advocate to to all information relevant to the offence charged that is in the possession or control of the government;

(5) the duty of confidentiality that should be promoted between the special advocate and the accused; and

(6) the infrastructure required to support the special advocate's functions.

B. BACKGROUND

Section 38 of the CEA provides for a special procedure applicable to the protection of information if its disclosure in a court proceeding would be injurious to national security, national defence or international relations. The procedure is unique in that the Federal Court of Canada is granted jurisdiction to decide all national security confidentiality claims that may arise in criminal prosecutions in the provinces and territories.

Section 38.01 of the CEA imposes an obligation on every individual to notify the Attorney General of Canada if he or she intends to disclose information that is believed to be injurious to "national security", "national defence", or "international relations", which the government of Canada has taken measures to safeguard.[2] This obligation applies to information that is in the

[2] *Canada Evidence Act,* R.S.C. 1985, c. C-5, s. 38.01.

possession of the government of Canada regardless of whether it was gathered by a domestic or foreign agency.

Under section 38.03 the Attorney General may at any time enter into an agreement with the accused authorizing the disclosure of all or part of the information at issue.[3] If a disclosure agreement is not reached, the Attorney General or any other party seeking the disclosure of the information may make an application to the Federal Court under section 38.04 for an order respecting disclosure of the information.[4] After hearing submissions concerning the identity of all parties whose interests might be affected by a disclosure order, the presiding judge must determine whether it is necessary to hold a hearing.

In the event that a hearing is necessary, section 38.06 gives the presiding judge the discretion to decide whether the statutory prohibition of disclosure should be confirmed or denied, or whether some limited form of disclosure would be appropriate in the circumstances.[5] The three-step test for making this determination was set out in *Canada (AG) v. Ribic*:[6]

1. On hearing the application, the judge's first task is to determine whether the information sought to be disclosed is relevant under the *Stinchcombe* rule.[7] This analysis includes a consideration of whether the information is inculpatory or exculpatory, such that it may be reasonably useful to the defence.[8] The burden at this initial stage rests on the party seeking disclosure, but it is not an onerous one.

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[3] *Ibid.* s. 38.03.
[4] *Ibid.* s. 38.04.
[5] *Ibid.* s. 38.06
[6] 2003 FCA 246, [2005] 1 F.C.R. 33 (F.C.A.).
[7] *R. v. Stinchcombe,* [1991] 3 S.C.R. 326.
[8] *Ribic, supra* note 6 at para. 17.

2. If the judge is satisfied that the information is relevant, the next step is to determine whether disclosure would be injurious to "national security", "national defence" or "international relations".[9] These terms are not defined in the legislation. In making this determination the judge must examine the information at issue and consider the submissions of the parties as well as supporting evidence. The judge must be satisfied that the concerns raised about disclosure have a factual basis established by the evidence. If that is established the judge is required to defer to the judgment of the Attorney General, who has the benefit of expertise in national security. The burden at this stage of the analysis is on the party seeking to prevent disclosure.

3. If the judge determines that disclosure could be injurious, the next step is to determine whether the public interest in disclosure outweighs the public interest in non-disclosure.[10] The party seeking disclosure bears the burden of demonstrating that on balance the scale is tipped in favour of disclosure. In the criminal context this encompasses the right of the accused to make full answer and defence, given: (1) the seriousness of the charge or issues involved; (2) the admissibility of the information and its usefulness; (3) whether there are other reasonable ways of obtaining the information; (4) whether the disclosure sought amounts to general discovery or a 'fishing expedition'; and (5) whether the information will establish a fact crucial to the defence.

This three-step test requires both the Attorney General and the accused to make submissions to the Federal Court. Section 38.11(2) of the CEA permits the accused, at the discretion of the

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[9] *Ibid.* at para. 18 & 19.

[10] *Ibid.* at para. 21 & 22.

judge, to make *ex parte* submissions in support of disclosure.[11] These submissions may include an explanation of the accused's proposed defences. The accused must argue for the disclosure of information that neither the accused nor counsel has seen. Any attempt by the accused to make specific arguments about the information will be speculative at best.

Under the current procedure the judge assumes the dual role of decision maker and inquisitor. The judge is required to test the evidence offered by the executive without argument adverse to the Attorney General's position. The judge must also determine whether the information at issue is relevant to the proposed defence without the benefit of argument from the accused. This task is made potentially more difficult because the Federal Court judge is not privy to the criminal proceedings.

Ideally an accused's defence counsel would have full access to the information at issue and full participatory rights, since he or she will be in the best position to establish the relevancy and necessity of any non-disclosed information. The Federation acknowledges that this is likely to be impracticable by reason of legitimate government security concerns and the potential delay associated with acquiring security clearance for defence counsel. The Federation submits that providing for security cleared special advocates on behalf of the accused in section 38 proceedings may provide a reasonable balance between the state's legitimate interest in protecting the secrecy of intelligence information related to government action against terrorism and the accused's right to make full answer and defence. The use of security cleared special advocates on behalf of the accused in section 38 proceedings cannot be a perfect substitute for the accused's own counsel. It is, however, a procedural model which in the special

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[11] *Evidence Act., supra* note 2, s. 38.11(2).

circumstances of terrorism cases is likely to result in the least drastic intrusion upon the right of the accused to make full answer and defence.

C. CONSTITUTIONALITY OF SECTION 38 PROCEDURE AND APPOINTMENT OF SPECIAL ADVOCATE

Section 38 of the CEA does not expressly refer to the use of a special advocate for the accused. This omission was raised in the context of a constitutional challenge to *ex parte* proceedings authorized by section 38[12] in *Canada (AG) v. Khawaja.*[13] In determining that the *ex parte* proceedings did not violate the *Charter*, Lufty J., at first instance in the Federal Court, observed that section 38 includes a number of procedural protections, including the ability of the presiding judge to appoint a special advocate on behalf of the accused.[14] In a concurring opinion in the Federal Court of Appeal, Pelletier J.A. has similarly indicated that that appointment of "*amicus curiae*" to advocate on behalf of the accused may play an important role in section 38 proceedings.[15]

In *Khawaja* a majority of the Federal Court of Appeal found that constitutional liberty interests were not implicated by the *ex parte* procedure.[16] It is arguable that this is incorrect where section 38 is invoked in criminal proceedings, since the liberty interest is always engaged in such proceedings.[17] Section 38 proceedings must be considered as an integral part of the criminal proceeding as a whole. Whether or not section 38 violates the *Charter*, however, it cannot be

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[12] In section 38.11 (2) .

[13] 2007 FC 463, [2007] 280 D.L.R. (4th) 32 (F.C.).

[14] In considering the source of this jurisdiction, Justice Lufty cited *Re Harkat,* 2004 FC 1717, [2005] 2 F.C.R. 416 (F.C.). in which Justice Dawson explained (at para. 20) that "... a power may be conferred by implication to the extent that the existence and exercise of such a power is necessary for the Court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision."

[15] See *Khawaja v. Canada (Attorney General),* 2007 FCA 388 at paras. 77-78.

[16] 2007 FCA 388, [2007] F.C.J. No. 648 (F.C.A.).

[17] See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 18, per McLachlin C.J.C.

denied that an accused's right to disclosure is at stake in section 38 proceedings, and that the right to disclosure is central to the right of full answer and defence protected by section 7 of the *Charter*.[18] Scrupulous fairness is necessary in such circumstances.

D. ARGUMENT FOR CODIFICATION

There are strong arguments that support the codification of the role of the special advocate. The current procedure has a sufficient negative impact on the right of the accused to make full answer and defence that legislative measures should be adopted to reduce that impact to a minimum.

Justice in Canadian courts is based on the adversarial system, in which opposing parties advance arguments against each other before an independent judge. In the absence of a special advocate section 38 proceedings have, at least to some degree, an inquisitorial character. This necessarily follows from the requirement that the judge make determinations without argument on behalf of the accused. The court would benefit from the intensity and depth of debate inherent in the traditional adversarial model. In *Charkaoui v. Canada (Citizenship and Immigration)*, McLachlin C.J.C. quoted comments by Hugessen J.A. of the Federal Court of Appeal on *ex parte* immigration proceedings:

> We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party . . .
>
> If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges

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[18] See, for example, *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336 and 342, per Sopinka J.; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. La*, [1997] 2 S.C.R. 680; *R. v. Carosella*, [1997] 1 S.C.R. 80.

> do not do that. . . . [W]e do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us. [Emphasis added.][19]

The usefulness of adversarial submissions in section 38 proceedings was also acknowledged by Noel J. in *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar.*[20]

Maximizing adversarial practice in section 38 proceedings would also enhance the impartiality and independence of the judge.[21] It is well known that independence and impartiality are fundamental not only to the capacity of the judge to do justice in a particular case, but also to individual and public confidence in the administration of justice.[22] The current necessity of a judge entering into the arena to challenge the government's position in section 38 proceedings necessarily compromises the ability of the judge to function in a manner that is independent and impartial. Although the section 38 judge is not otherwise involved in trying the case, his or her independence and impartiality with respect to section 38 issues should be of no lesser importance than if he or she was the trial judge. Lord Greene warned in *Yuill v. Yuill* that where a judge directly investigates facts by examining witnesses, the judge:

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[19] See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at para. 36, per McLachlin C.J.C.

[20] 2007 FC 766 (F.C.): "I feel it is important to reiterate that the Court, contrary to other section 38 applications, had the benefit of assessing the *ex parte (in camera)* hearings from different view points given that both the Commission and the Attorney General made submissions at these hearings. The fact that I heard from both the Applicant and one of the Respondents can be useful in making a decision."

[21] See the discussion in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at para. 33 and following, per McLachlin C.J.C.

[22] See *R. v. Valente*, [1985] 2 S.C.R. 673 at 689, per Le Dain J.

> ...descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.[23]

The effective participation of counsel for both sides is necessary to ameliorate this difficulty.

Codification may also improve consistency and fairness by promoting consistent application of the special advocate model for all accused in section 38 proceedings. Codification would also allow for useful definition of the special advocate's role. In order to be effective the special advocate must be afforded clear rights and responsibilities with respect to the accused, details of which are set out with our recommendations below. It is also important that the role of the special advocate be clarified so as to make plain the nature of the relationship between the special advocate and the accused, which is different than one of a traditional solicitor-client relationship. In particular, the extent of the duty of confidentiality owed by the special advocate to the accused should be clearly articulated, as also discussed further below.

E. THE FEDERATION'S RECOMMENDATIONS ON THE ROLE OF THE SPECIAL ADVOCATE

The Federation has devoted considerable attention to the appropriate role for the special advocate in the national security context. Most recently the Federation made submissions to the Standing Committee on Public Safety and National Security in respect of Bill C-3.[24] In its submissions, the Federation voiced recommendations to improve the special advocate model contained in Bill

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[23] *Yuill v. Yuill*, [1945] 1 All E.R. 183 at 189 (C.A.). See also *Jones v. National Coal Board*, [1957] 2 All E.R. 155 at 159, per Lord Denning (C.A.).

[24] See Federation of Law Societies of Canada, "Submissions to the Standing Committee on Public Safety and National Security in respect of Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*", Legislative Comment on *Canada* Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to make consequential amendment to another Act,* 2nd Sess., 39th Parl., 2007. online: <http://www.flsc.ca/en/whatsnew/whatsnew.asp#c3>.

C-3. The Federation respectfully submits that many of its recommendations are relevant to any initiative involving special advocates under section 38.

(1) Mandatory Appointment of a Special Advocate

The right of an accused to fully and effectively challenge through counsel positions taken by the state is a fundamental element of the accused's right of full answer and defence. The Federation therefore submits that the appointment of a security cleared special advocate for the accused in criminal proceedings be mandatory, and not a matter of discretion, in all cases in which it is proposed not to disclose evidence to an accused or his counsel under section 38. Codification should also expressly provide for the special advocate's right of access to information proposed to be withheld from disclosure by the state.

Recommendation 1

The Federation recommends that section 38 of the *Canada Evidence Act* be amended to provide that in section 38 proceedings in a criminal prosecution a special advocate must be appointed to represent the accused in those proceedings, and that the special advocate shall have an express right of access to all information proposed to be withheld from disclosure to the accused.

(2) The Right of the Accused to Choose an Independent Special Advocate

In the Federation's view the accused should be permitted to select, in consultation with his or her defence counsel, a special advocate from a list of security cleared advocates. The accused must have a representative in whom he or she has confidence. In the United Kingdom the failure to permit individuals to select special advocates in the context of immigration proceedings has been

widely criticized. In joint submissions made to the House of Commons Constitutional Affairs Committee, a group of special advocates commented on this deficiency:

> The Special Advocates are selected at the discretion of a Law Officer who is a member of the executive which has authorised [an individual's] detention. In these circumstances, it would not be surprising if the appellant had little or no confidence in his Special Advocates. There is no reason of principle why the appellant could not be allowed to choose his Special Advocate(s) from a panel of security-cleared advocates.[25]

Similarly, in its submission on Bill C-3, the Federation cited the recommendation of the Special Senate Committee on the *Anti-Terrorism Act*:

> ...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.[26]

In its submissions on Bill C-3, the Federation recommended that the Minister of Justice consult with organizations external to the government, including the Federation, in appointing counsel to the roster of special advocates. *The Director of Public Prosecutions Act* forms a precedent for this type of consultation in providing that a representative from the Federation participate in the process for the selection of the Director and Deputy Director of Public Prosecutions.[27] The Minister of Justice has now taken up this suggestion. Although Bill C-3 has not yet been enacted, the Minister of Justice has established an Interim Selection Committee to screen

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[25] U.K., H.C. "The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", Cm 323-1 in *Sessional Papers,* vol. 1 (2004-05) 1, at para. 70.

[26] *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act,* February 2007, Recommendation 9, page 42.

[27] Section 4, *Director of Public Prosecutions Act, 2006*, c. 9, s. 121.

applicants for the role of special advocate in security certificate proceedings under the *Immigration and Refugee Protection Act*. The committee is comprised of a retired Federal Court judge, a representative of the Federation and a representative of the Canadian Bar Association. We understand that the permanent selection committee will also have such external representation. It would be a relatively simple matter for the committee's role to be expanded to include consideration of applicants for the role of special advocate in section 38 proceedings.

RECOMMENDATION 2

The Federation recommends that section 38 of the *Canada Evidence Act* be amended to provide that in section 38 proceedings in a criminal prosecution an accused has the right to choose a special advocate from a roster, prepared by the Minister of Justice, of security cleared lawyers who are not affiliated with the government.

RECOMMENDATION 3

The Federation recommends that this legislation include a requirement for the Minister of Justice to consult with representatives of organizations external to the government, including the Federation, when appointing counsel to the roster of special advocates.

(3) COMMUNICATIONS BETWEEN AN ACCUSED AND THE SPECIAL ADVOCATE

The United Kingdom has experience with the special advocate model in a variety of different contexts. In immigration proceedings there is a role for the special advocate under the *Special Immigration Appeals Commission Act 1997* and the *Prevention of Terrorism Act 2005*.[28] Special advocates may also be used in assessing claims for public interest immunity with respect to

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[28] *Special Immigration Appeals Commission Act 1997,* (U.K.), 1997 c. 68, s. 6; *Prevention of Terrorism Act 2005,* (U.K.), 2005 c. 2, s. 7.

unused prosecution material in criminal trials.[29] One recurring criticism of the United Kingdom model is the inability of the special advocate to consult with the accused individual or their counsel once they have viewed the secret evidence. This is perceived as a significant problem because "in many cases only the appellant may be aware of information that may prove his innocence, but is unable to provide it because he is not able to have sight or knowledge of any allegations based solely on closed material."[30] Further, the prohibition prevents the special advocate from engaging the appellant in a discussion of legal strategy where such a discussion might better enable the advocate to represent the accused's interests.

Similar criticisms have been advanced by many, including the Federation, regarding section 85.4 (2) of the *Immigration and Refugee Protection Act,* as amended by Bill C-3.[31] Pursuant to section 85.4 (2), after viewing the secret evidence a special advocate may communicate with the named individual only with the judge's authorization. In the Federation's opinion, this restriction on communication may undermine the special advocate's ability to properly represent the interests of the accused. Open communication is a cornerstone of the traditional solicitor-client relationship, and should be promoted as much as possible as part of the special advocate model. Undue restrictions on communication would prejudice an already compromised system of representation.

Criticisms of the restriction on communication in the immigration context are relevant to section 38 disclosure proceedings. Section 38 is often invoked prior to the commencement of a criminal proceeding, or during its early stages. At this stage the accused's defence may not be fully

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[29] *Ibid.* at para. 51.

[30] *Ibid.* at para. 85.

[31] *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 s. 85.4(2); *Canada* Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to make consequential amendment to another Act,* 2nd Sess., 39th Parl., 2007, cl. 85.4(2).

developed. Limiting communication between the special advocate and the defence team prevents the advocate from being apprised of what may be a constantly evolving legal strategy. That may in turn impede the ability of the special advocate to test on behalf of the accused the relevance and necessity to the defence of the secret information. Viewing the secret information may also raise questions pertaining to the accused's anticipated legal strategy that requires the advocate to seek clarification from the defence team. In order to facilitate the special advocate's representation of the accused the special advocate should also have a clear right of access to all information relevant to the offence charged that is in the possession or control of the government.

It is possible to implement safeguards that allow for this ongoing communication. The special advocate could be required to undertake that he or she will not disclose the secret information to the accused or their counsel. In its submissions pertaining to Bill C-3, the Federation cited the 20-year experience of counsel to the Security and Intelligence Review Committee ("SIRC") as a precedent for security cleared lawyers having ongoing communication with an affected individual without sacrificing the legitimate need to protect the confidentiality of sensitive information.[32] The Supreme Court of Canada observed in *Charkaoui v. Canada (Citizenship and Immigration)* that the SIRC special counsel system appears to have functioned well.[33]

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[32] *Supra* note 25 at 3. Prior to 2002 the SIRC was involved in immigration proceedings respecting the removal of permanent residents on security grounds. As part of its role, the SIRC would hold *in camera* hearings to examine and test the accuracy of the secret evidence presented by the government. The SIRC developed its own procedures with respect to these hearings. One of these procedures was the use of security-cleared lawyers to test the government's evidence on behalf of the accused. Notably, throughout the process the security-cleared lawyer was permitted ongoing communication with the affected person.

[33] 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 76, per McLachlin C.J.C.

RECOMMENDATION 4

The Federation recommends that legislation providing for special advocates in section 38 proceedings provide that special advocates have the right to communicate with the accused person the special advocate represents and the accused's defence counsel, subject to the written undertaking of the special advocate not to disclose the secret information. Special advocates should also have a right of access to all information relevant to the offence charged that is in the possession or control of the government.

(4) THE RELATIONSHIP BETWEEN THE ACCUSED AND THE SPECIAL ADVOCATE

Special advocate models in Canada and abroad define the relationship between the special advocate and the individual they represent as something quite different from the traditional solicitor-client relationship. Section 6 (4) of the United Kingdom *Special Immigration Appeals Commission Act 1997* states that the special advocate is not responsible to the person whose interests they are appointed to represent.[34] In Canada, Bill C-3 amends section 85.1(3) of the *Immigration and Refugee Protection Act* to specify that the relationship between the special advocate and the person named in the security certificate is not one of solicitor and client.[35]

The Federation acknowledges that a requirement on the special advocate not to disclose to the accused confidential information disclosed to the advocate in section 38 proceedings precludes the establishment of a traditional solicitor-client relationship between them. Special advocates should nevertheless owe a duty of confidentiality to the accused, so as to maximize the confidence of the accused in the advocate and the ability of the advocate to perform his or her function.

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[34] *Supra* note 28.

[35] *Bill C-3, supra* note 31, s. 85.1(3).

The duty of confidentiality is a central responsibility of a lawyer to a person whose interests he or she represents. It is included in the codes of professional conduct of almost every legal regulatory body in Canada. Absent an unequivocal duty of confidentiality, a client may be unwilling to communicate candidly with counsel for fear that any information divulged might be used to his or her prejudice in the future. Without open communication between an accused person and a special advocate, the latter may be unable to fully understand the accused person's case, and thus be unable to perform the advocate's function in the most effective manner.

The obligation to maintain the confidentiality of secret information does not preclude a duty of confidentiality from applying to communications between the special advocate and the accused. The Federation submits that this duty should be expressly provided for in any legislation describing the role of the special advocate. As an extension of that duty, the legislation should provide that that the special advocate may not be compelled to disclose communications between the special advocate and the accused, save in the very exceptional circumstances authoritatively recognized as requiring disclosure by the accused's defence counsel.[36]

RECOMMENDATION 5

The Federation recommends that legislation providing for special advocates in section 38 proceedings provide for a duty of confidentiality of the special advocate to the accused.

RECOMMENDATION 6

The Federation recommends that such legislation should also provide that the special advocate may not be compelled to disclose communications between the special advocate

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[36] See, for example, the discussion in commentaries forming part of Rule 2.03 of the Rules of Professional Conduct of the Law Society of Upper Canada.

and the accused, save in circumstances which would require disclosure by the accused's defence counsel.

(5) INFRASTRUCTURE TO SUPPORT THE SPECIAL ADVOCATE

The requirement to maintain the confidentiality of secret information may preclude a special advocate from seeking advice on areas that fall outside his or her expertise. This may make it difficult for the advocate to independently analyze secret information and properly represent the accused's interests. The government should therefore establish an infrastructure to support the special advocate. That infrastructure should include access to translators and experts as required. It may also be necessary for the government to provide training and administrative support to the special advocate. In addition to enabling the special advocate to properly perform his or her functions, the existence of such an infrastructure should allow the special advocate to do so in the most efficient and timely manner.

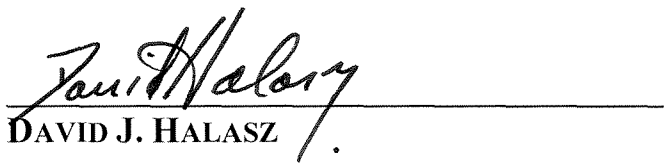
RECOMMENDATION 7

The Federation recommends that legislation providing for special advocates in section 38 proceedings impose an obligation on government to establish an infrastructure necessary to support the special advocate's representation of accused persons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, Ontario, this 31st day of January, 2008

PETER A. DOWNARD



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