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CONSTITUTIONAL CANARIES AND THE ELUSIVE QUEST TO LEGITIMIZE SECURITY DETENTIONS IN CANADA

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Canada, like many other countries, has struggled with questions of how to prevent terrorist attacks without undermining human rights. One tool that gained prominence in recent years involves preventive detention under “security certificates.” This measure, undertaken through immigration legislation, applies to non-citizens found inadmissible for one of a number of reasons, including a suspicion that they endanger national security. Such detentions have ignited considerable controversy within Canada. In February 2007, the Supreme Court of Canada found the existing scheme unconstitutional. While the Court did not find the scheme to be discriminatory, in spite of its application only to non-citizens, it did find that the potential use of secret evidence contravened procedural fairness. Canada subsequently passed legislation, creating a special advocate system. This article argues that continued problems exist with these detentions, including questions of discrimination and concerns about the fairness of the new special advocate system.

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I. INTRODUCTION

In the days following the attacks of September 11, 2001, there were rumors that some of the hijackers entered the United States via Canada.\(^1\) The rumors, which proved entirely unfounded, contributed to a sense of urgency in Canada as to the need to radically tighten immigration controls and anti-terrorism measures.\(^2\) In line with new legislation in the United States and a significant number of other countries, Canada enacted statutes that facilitated the preventive detention of individuals suspected of conspiring to commit terrorist attacks. The constitutionality of administrative detention pursuant to “security certificates” in Canada was tested in a February 23, 2007 decision by the Supreme Court of Canada (Supreme Court). In Charkaoui v. Canada (Charkaoui), the Supreme Court issued a historic and unanimous ruling that found the security certificate scheme unconstitutional.\(^3\) The Charkaoui decision was one of several national high court decisions issued around the world that addressed detention practices for those accused of some form of terrorist affiliation.\(^4\)

As will be explained in greater detail below, a security certificate is an immigration order that is issued in certain cases, clearing the way for a non-citizen to be deported from Canada. Under the security certificate scheme, people can be detained, often for very long periods, particularly in those cases in which deportation cannot be easily accomplished—usually because of a claim that the person faces a risk of torture if deported. The standards and procedures for issuing security certificates vary considerably from those normally applied in criminal cases and also vary from those applied in typical immigration proceedings. Perhaps the biggest and most controversial distinction is that security certificates can, in some circumstances, be issued based on evidence that the named person is never allowed to see. Security certificates may also place significant restrictions on judicial review of the basis of a person’s detention. Although various situations can give rise to a security certificate proceeding, security certificates have been used primarily to detain those suspected of some sort of terrorism affiliation since September 11, 2001.

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2 See, e.g., Doug Struck, Canada Fights Myth It Was 9/11 Conduit, WASH. POST, Apr. 9, 2005, at A20.
The Supreme Court considered security certificates in its *Charkaoui* decision. *Charkaoui* involved three men—Adil Charkaoui, Hassan Almrei, and Mohamed Harkat—who had been detained under Canada’s security certificate provision. This article analyzes the Supreme Court’s ruling as well as legislation recently enacted in Canada to respond to that ruling. Section II provides a factual background on the three litigants, as well as an explanation of the legal context in which the Supreme Court ruled. Section III focuses on the Supreme Court’s reasoning in *Charkaoui*. Section IV details the response of the Government of Canada. Finally, Section V analyzes both the decision and the governmental response, explaining ongoing problems with security certificate proceedings.

II. BACKGROUND ON THE CASES

A. Factual Background

Adil Charkaoui is a permanent resident of Canada, originally from Morocco. He has been living in Canada since 1995. Charkaoui was first arrested and detained in 2003 under a security certificate. Charkaoui was released under a condition of bail in 2005, after having been held for approximately two years, and without ever having been charged with any criminal offense. To this day, Charkaoui remains under constant monitoring by way of an electronic device that he must wear at all times, with his ability to travel and to communicate via telephone or internet significantly restricted. Charkaoui maintains that he would be at risk of torture if he was deported to Morocco. Charkaoui has a wife and three children living with him in Montreal, where he teaches French and is working on a Ph.D. part time. Charkaoui has consistently denied any terrorism affiliations. Because much of the evidence being used against Charkaoui is considered classified, he and his attorneys have not been made privy to all of the evidence, instead

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7 *Id.*

8 *See* Charkaoui (Re), [2005] F.C. 248, ¶ 16 (Can.) [hereinafter Charkaoui (Re)].


at times only being presented with summaries of the evidence that has been determined subject to disclosure to Charkaoui.\footnote{See generally Federal Judge Rejects Request to Lift Conditions on Adil Charkaoui, CBC NEWS, Oct. 10, 2007, available at http://www.cbc.ca/canada/montreal/story/2007/10/10/qc-charkaoui1010.html (explaining that Charkaoui’s release requires conditions to protect national security); Charkaoui (Re), supra note 8, ¶ 86 (explaining the conditions of Charkaoui’s release).}

Charkaoui has been vigorously protesting the security certificate in his case. For example, in addition to the Supreme Court case discussed herein, Charkaoui filed an additional challenge regarding the evidence the Government is using against him. Charkaoui challenged a late disclosure of allegedly “new” evidence that was submitted as part of the justification for his detention under a security certificate. Charkaoui also raised issues regarding the alleged destruction of some of the original evidence by the Canadian Security Intelligence Service (CSIS).\footnote{Supreme Court of Canada, Case Summary of Adil Charkaoui v. Minister of Citizenship and Immigration http://cases-dossiers.scc-csc.gc.ca/information/cms/case_summary_e.asp?31597 (last visited May 10, 2008) [hereinafter Summary: Adil Charkaoui].} In June 2008, the Supreme Court ruled that CSIS has a duty to maintain such evidence, and that submission of mere summaries of the evidence to the presiding judge does not meet the requirements of Section 7 of the Charter, although the Court left the determination as to any specific prejudice in this case to the judge hearing the matter.\footnote{Charkaoui v. Canada (Citizenship and Immigration), [2008] 2008 SCC 38 ¶ 2, 18, 77 (Can.) (noting that the obligation of submission of full evidence pertains to the ministers, who then must convey it to the judge). The judge retains the option of presenting only a summary of the evidence to the detainee upon the relevant findings of national-security concerns. The Court further clarified that it was not revisiting the issues raised in the first Charkaoui case, nor was it commenting on Bill C-3. Id.} It is notable, as well, that Charkaoui has filed a constitutional challenge to the new Bill C-3—the legislation discussed in this article. That challenge is in a very early stage as of the writing of this article.\footnote{Charkaoui File: Legal Update and Overview, COALITION JUSTICE FOR ADIL CHARKAOU, http://www.adilinfo.org/en/taxonomy/term/18 (last visited Oct. 10, 2008) (containing regular updates to the extensive litigation Charkaoui is bringing on various issues).}

The second individual whose security certificate was considered in Charkaoui, Mohamed Harkat, is a Convention refugee originally from Algeria, living in Canada as a foreign national.\footnote{See Charkaoui, supra note 3, ¶ 10.} Harkat was arrested and detained in 2002.\footnote{Id.} In 2005, a judge of the Federal Court ruled that his security certificate was “reasonable.”\footnote{Id.} In 2006, he was released on extensive bail conditions, restricting his movements, his ability to use the phone and internet, and even his ability to remain unsupervised in his home, and he remains
under those conditions today.\textsuperscript{18} Harkat has been advised that he will be deported to Algeria, a decision he is challenging on the basis that he is at risk of torture if deported there.\textsuperscript{19} In late January 2008, Harkat was re-arrested on a government allegation that he had violated the terms of the conditions attached to his release, and he subsequently was re-released on conditions as the court considered the allegations.\textsuperscript{20}

The third individual, Hassan Almrei, is also a Convention refugee, originally from Syria, who was living in Canada when he was arrested and detained in 2001.\textsuperscript{21} His security certificate was judicially determined to be “reasonable,” and he remains in detention to this day.\textsuperscript{22} Although initially slated to be deported to Syria, that deportation order was stayed, based on a determination that an original assessment, which had found that he was not at risk of torture, was flawed.\textsuperscript{23} The Supreme Court, in referring to Almrei’s detention, noted that Almrei does not know “when, if ever, he will be released.”\textsuperscript{24}

B. Security Certificates Under Canadian Law

Canada has followed a trend, seen around the world, of using its immigration legislation to detain non-nationals suspected of terrorism involvement. Security certificates involve a finding that a non-national is inadmissible to Canada.\textsuperscript{25} The outcome, if a certificate is deemed reasonable, is generally deportation of the person in question.\textsuperscript{26}

Specifically, security certificates are issued under Canada’s Immigration and Refugee Protection Act (IRPA), which was enacted in late 2001 and entered into force in early 2002.\textsuperscript{27} Prior to 2002, a special process ex-

\begin{footnotesize}
\begin{enumerate}
\item See id. See also, Harkat v. Minister of Citizenship and Immigration, [2006] FC 628, at 60–62 (Can.) (listing the conditions of Harkat’s bail).
\item Charkaoui, supra note 3, ¶ 15; Security Certificates, supra note 9.
\item Charkaoui, supra note 3, ¶ 10.
\item Id.
\item Charkaoui, supra note 3, ¶ 13.
\item See IRPA, supra note 5, § 77.
\item See id. §§ 80–82.
\item Id. §§ 77–85. Canada has had security certificate processes in its immigration legislation, in varying forms, for many years. After September 11, 2001, however, when Canada significantly changed its immigration legislation— replacing the prior Immigration Act with the IRPA— it included amendments to its security certificate legislation that significantly reduced procedural safeguards for those accused of terrorism offenses. The security certificate practice, therefore, has gained considerable notoriety in Canada since September 11, 2001, as it is now clearly used as a terrorism-prevention tool. John Ip, Transnational Law
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isted for permanent residents for whom removal was sought on national security grounds. Such cases were held before the Security Intelligence Review Committee (SIRC) and included a number of procedural safeguards, including security-cleared lawyers and specified procedures for evidence claimed to be classified. For foreign nationals who were not permanent residents of Canada, there was a separate security certificate proceeding, held before a federal judge. In 2002, there were significant changes to Canada’s immigration legislation including, among other things, elimination of the SIRC process for permanent residents. There have been suggestions that the IRPA improperly eliminated necessary procedural safeguards. Since the September 11th attacks, the Canadian security certificate system has come under considerable criticism.

The relevant provision of the IRPA, considered by the Supreme Court in Charkaoui, provides:

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


28 Forcese & Waldman, supra note 27, at 5–6.
29 Id. at iv, 6–7.
30 Id. at 10.
31 Id. at 10–11.
32 Id. at 12. See also Charkaoui, supra note 3, ¶¶ 70-77 (explaining the former SIRC process in the earlier version of Canada’s immigration legislation, as well as other less-restrictive means that Canada has used to weigh competing interests of fairness with the need to keep certain information confidential).

33 See Forcese & Waldman, supra note 27, at 12. See also Sharryn J. Aiken & Andrew J. Brouwer, This Pen Is Too Mighty: Letter to Public Safety Minister Anne McLellan (Oct. 14, 2004), http://www.justiceforharkat.com/e107_plugins/content/content.php?content.105. The Akin-Brouwer letter protests Canada’s detentions under security certificates, as well as the potential of deportation to torture. The letter is signed by Sharryn J. Aiken, Assistant Professor of Law, Queen’s University and Andrew J. Brouwer, Co-Chair, Legal Affairs Committee, Canadian Council for Refugees. The letter contains a long list of endorsements, including, for instance, a large number of law professors across Canada, Amnesty International, the Canadian Bar Association, and the Criminal Lawyers Association. Id.

34 IRPA, supra note 5, § 77. As will be discussed in more detail in the following sections, this provision was found unconstitutional by the Supreme Court of Canada, and new legis-
According to the Government of Canada, security certificates are employed when there is a need to use sensitive information that needs to be protected for reasons of national security or for the safety of any person. According to the IRPA, the purpose of the detention is to determine whether the person is admissible to Canada and, if not, whether that person should be deported.

The Supreme Court has indicated that the security certificate regime was designed to handle “tension” between issues of procedural fairness in deportation proceedings and the need to protect the public from a threat of terrorism. Specifically, the Court noted that:

the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (“IRPA”) … attempts to resolve this tension in the immigration context by allowing the Minister of Citizenship and Immigration (the “Minister”), and the Minister of Public Safety and Emergency Preparedness (collectively “the ministers”) to issue a certificate of inadmissibility leading to the detention of a permanent resident or foreign national deemed to be a threat to national security. The certificate and the detention are both subject to review by a judge, in a process that may deprive the person named in the certificate of some or all of the information on the basis of which the certificate was issued or the detention ordered.

The process is initiated when a Minister signs a certificate, finding that the permanent resident or foreign national is inadmissible into Canada. Where the person is already present within Canada, this certification triggers a deportation proceeding. The earlier version of the IRPA indicated that when a security certificate was requested, a permanent resident “may” be detained under this provision and a foreign national “must” be detained—as discussed more later in this article, this provision was changed after the Charkaoui ruling. A federal judge then reviews the certificate to determine reasonableness. Under the version of the IRPA considered by the Charkaoui Court, the Government could request an in camera review, without the detainee or his representative present, if the evidence being used was alleged to be classified. The detainee and representative were not allowed to

36 See Charkaoui, supra note 3, ¶ 2 (explaining the purpose of security certificates).
37 Id.
38 See id. ¶¶ 6–9.
see such evidence, although the evidence could form the basis of any decision made. In some circumstances, a detainee could be given a summary of the evidence, but this summary could not include any of the information that had been determined to be sensitive to national security. There was no right of appeal if the judge found the certificate reasonable.\(^{39}\)

III. THE SUPREME COURT DECISION: CHARKAOUI V. CANADA (CITIZENSHIP AND IMMIGRATION)

The men detained after September 11, 2001 brought extensive legal proceedings, attempting to secure their releases and to prevent their deportations.\(^{40}\) In February 2007, the Supreme Court ruled that specific components of the scheme violated the Canadian Charter of Rights and Freedoms (the Charter), which forms part of the Canadian Constitution.\(^{41}\)

The appellants argued that the IRPA security certificate provision violated five sections of the Charter: the right of life, liberty, and security of the person found in Section 7; the guarantee against arbitrary detention found in Section 9; the guarantee of prompt review of detentions found in Section 10(c); the prohibition on cruel and unusual treatment found in Section 12; and the guarantee of equal protection under the law found in Section 15. The appellants additionally argued that the security certificate provision violated the rule of law.\(^{42}\)

The Court agreed that the security certificate procedure, as it stood, violated rights guaranteed under Sections 7, 9, and 10 of the Charter. In addition, the Court rejected the Government’s argument that the scheme could be justified under Section 1 of the Charter.\(^{43}\) Section 1 is a general limitation clause that applies to all rights and freedoms protected under the Charter:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.\(^{44}\)

Despite accepting the appellants’ arguments discussed above, the Court rejected their claims that the scheme violated a ban on indefinite de-

\(^{39}\) See id. ¶ 5 (explaining the IRPA procedure).
\(^{40}\) See id. ¶ 10.
\(^{41}\) Id. ¶ 138–143; see also Part V, infra (explaining the more detailed aspects of the court ruling).
\(^{42}\) Id. ¶ 11.
\(^{43}\) Id. ¶¶ 11, 138–143.
tentions, constituted a violation of equal protection principles, or violated the rule of law. The Court suspended its ruling for one year, giving the Government until February 2008 to put together a new statutory framework. The Court noted that the “reasonableness” of Charkaoui’s security certificate had not yet been determined, and that, should the Government choose to determine its reasonableness during the year of suspension, the pre-existing provision of the IRPA would apply. After that year, given the declared unconstitutionality of the IRPA, all existing certificates would lapse unless a replacement statute was enacted.

The Court reflected on the so-called “tension” between certain fundamental liberties and the idea of national security. Specifically, it noted:

One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

The Court noted that the deportation of non-citizens, by itself, would not automatically breach the protections guaranteed under Section 7 of the Charter, but that certain aspects of the deportation process, such as detention under a security certificate or deportation to torture, might do so given the significant infringement on their liberty interests.

The Court further noted that Section 7 inquiries do not involve the question of whether liberty interests should be balanced against societal interests but, rather, whether a limitation imposed on liberty respects the principles of fundamental justice. If the process is deemed to be fundamentally unfair, the inquiry then shifts to Section 1 of the Charter, and the Government can then argue that the process, even if flawed, has a justification relating to the public interest.

As this Court stated in Suresh, “[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of funda-

45 Charkaoui, supra note 3, ¶ 143.
46 Id. ¶ 140.
47 Id.
48 Id. ¶ 1.
49 Id. ¶ 17.
50 Id. ¶¶ 21–22.
51 Id. ¶ 22.
mental justice under s. 7 of the Charter.” Thus, “factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts.”

The Court concluded that national security constraints may limit the procedural protections available under Section 7 of the Charter, but national security constraints cannot be allowed to erode those protections to the point where the guarantees of Section 7 no longer exist. Rather, under Section 7, protections must be “meaningful and substantial.” The fact that evidence is withheld from the detainee, based on security concerns, and that the judge is therefore left as the only participant to question any such evidence, leads to the conclusion that the requirements of procedural fairness, whereby a person must be shown the case against him, are not only undermined but are “effectively gutted.” In the Court’s words, “[h]ow can one meet a case one does not know?”

The Court specifically noted that less intrusive alternatives were available. Under Section 1 of the Charter, for example, the Government could justify the abridged access to supposedly secret information. The Court referred to the process used in the United Kingdom involving “special advocates,” who represent the interests of the detainee at the hearings while maintaining the confidentiality of the information.

Additionally, the Court concluded that the lack of a timely review for foreign nationals was a violation of Sections 9 and 10 of the Charter. Specifically, the Court ruled that barring judicial review for 120 days, in the case of a foreign national, after a determination that a security certificate is “reasonable,” violates the Charter protections against arbitrary detention found in Section 9 and the right to a prompt review found in Section 10. Citing a number of international cases, including the U.S. Supreme Court Rasul decision, the Court insisted that “foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law.”

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52 Id. ¶ 25 (internal citations omitted) (citing Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, ¶ 118 (Can.) and Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053, 1077 (Can.)).
53 Id. ¶ 27.
54 Id.
55 Id. ¶ 64.
56 Id. ¶¶ 69, 81–87.
57 Id. ¶¶ 91–94.
58 Id. ¶ 94.
59 Id. ¶ 90 (citing various authorities, including Rasul v. Bush, 542 U.S. 466 (2004)).
IV. The Response of the Canadian Government

In October 2007, the Canadian Government introduced a Bill in Parliament, called “An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act,” also known as Bill C-3 (Bill C-3).60 After hearings before the Standing Committee on Public Safety and National Security, Bill C-3 was presented, in a revised form, to the House of Commons in December 2007.61 Bill C-3 was subsequently approved in both Houses of Parliament, receiving Royal Assent in February 2008.62

The most significant change contained in Bill C-3 is a procedure allowing for the appointment of “special advocates”63 in security certificate proceedings.64 Some of the specifics of this provision were revised after Bill C-3 went through the Committee review.65 For example, a judge may appoint a special advocate “after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national.”66 This revision still allows a judge to hear evidence outside of the presence of the permanent resident or foreign national and legal counsel, if “in the judge’s opinion, its disclosure could be injurious to national security

60 Bill C-3 was enacted in February 2008. For clarity within this article, the prior version of the IRPA, considered by the Supreme Court, will be referred to as the IRPA, and the new legislation will be referred to as Bill C-3. 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, 2d Sess., 39th Parl., 2007, available at http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3_2/C-3_2.PDF [hereinafter Bill C-3]. The Canadian Library of Parliament released a legislative summary on Bill C-3. Canada, Parliament, Parliamentary Information and Research Service, “Legislative Summary — 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,” No. LS-576E (Nov. 2, 2007, rev. Dec. 31, 2007), available at http://www.parl.gc.ca/39/2/parlbus/chambus/house/bills/summaries/c3-e.pdf [hereinafter Legislative Summary].


62 Bill Status, supra note 61.

63 Bill C-3 describes the role of a special advocate as follows: “A special advocate’s role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.” Bill C-3, supra note 60, at cl. 85.1(1).

64 Bill C-3, supra note 60, at cls. 83–85.6.

65 Bill Status, supra note 61.

66 Bill C-3, supra note 60, at cl. 83(1)(b).
or endanger the safety of any person.\textsuperscript{67} For such evidence, the judge also is charged with ensuring confidentiality.\textsuperscript{68} Bill C-3 provides for the judge to give the permanent resident or foreign national a “summary” of the evidence being used against him, to allow him to be “reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed.”\textsuperscript{69} Even if a summary of evidence is not provided to a permanent resident or foreign national, the judge may base a decision on the undisclosed evidence\textsuperscript{70} —a change from the prior version of the IRPA that required the prosecution to produce the evidence summary in order to be considered.\textsuperscript{71} In describing the evidence that can be used, the Committee version included an added provision that such evidence could not include any information obtained through the use of torture.\textsuperscript{72} The Committee revision also allowed for the permanent resident or foreign national to request a specific person as the special advocate, unless the judge found such an appointment would: (1) result in an unreasonable delay of the proceedings; (2) create a conflict of interest; or (3) compromise national security because the special advocate “had 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 was a risk of inadvertent disclosure of that information or other evidence.”\textsuperscript{73} The special advocate can challenge the Minister’s claim that the disclosure of information could be injurious to national security or endanger the safety of any person. The special advocate can further challenge “the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.”\textsuperscript{74} Bill C-3, however, specifically provides that the special advocate is not a party to the proceeding and does not have a solicitor-client relationship with the permanent resident or foreign national.\textsuperscript{75}

\textsuperscript{67} Id. at cl. 83(1)(c). The prior version of the IRPA contained language that the judge had to find that the disclosure “\textit{would} be injurious to national security or endanger the safety of any person,” thus making it easier for a judge to so find. Legislative Summary, supra note 60, at 14 (emphasis in original).

\textsuperscript{68} Bill C-3, supra note 60, at cl. 83(1)(d).

\textsuperscript{69} Id. at cl. 83(1)(e).

\textsuperscript{70} Id. at cl. 83(1)(i)

\textsuperscript{71} Legislative Summary, supra note 60, at 16.

\textsuperscript{72} Bill C–3, supra note 60, at cl. 83(1.1).

\textsuperscript{73} Id. at cl. 83(1.2).

\textsuperscript{74} Id. at cl. 85.1(2).

\textsuperscript{75} Id. at cl. 85.1(3).
In response to criticism regarding the role of the special advocate, the Committee added a provision that, notwithstanding the fact that there is no solicitor-client relationship, any communication between the special advocate and the permanent resident or foreign national and his counsel is privileged, if it would be a privileged communication in the case of a solicitor-client communication. Additionally, a special advocate cannot be compelled to appear at a proceeding as a witness. During the proceeding, the special advocate may make submissions regarding evidence that the prosecution did not provide to the permanent resident or foreign national and his counsel. The special advocate also may cross-examine and otherwise question witnesses for any part of the proceeding in which the permanent resident or foreign national and his counsel are not allowed to be present. Finally, the special advocate may “exercise, with the judge’s authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.” The special advocate, upon receiving the confidential information, may communicate with another person about the proceeding only with the judge’s authorization. The judge, however, may authorize only limited disclosure.

Bill C-3 further addresses concerns over the fact that the finding of reasonableness of the security certificate, which constitutes a removal order, was not appealable under the prior version of the IRPA. The new version provides a right of appeal to the Federal Court of Appeal, provided that the judge first “certifies that a serious question of general importance is involved and states the question.” There is no right of interlocutory appeal.

The prior version of the IRPA had disparate requirements relating to detention, depending on whether the person was a permanent resident or a foreign national. The new Bill C-3 makes the requirements for detention the same for both permanent residents and for foreign nationals. Under Bill C-3, neither the permanent resident nor the foreign national will be detained unless 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 after they have established “reasonable grounds to believe that the person is a danger to national security or to the safety of any

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76 Id. at cl. 85.1(4).
77 Id.
78 Id. at cl. 85.2(a).
79 Id. at cl. 85.2(b).
80 Id. at cl. 85.2(c).
81 Id. at cl. 85.4(2).
82 Id. at cl. 79.
83 Id.
person or is unlikely to appear at a proceeding or for removal.”

For both permanent residents and foreign nationals, a judge must now review the detention within 48 hours of arrest. Under the previous version of the IRPA, a judge was only required to review the detention of permanent residents. Once a security certificate is found reasonable, the detainee may now apply to the Federal Court for further review at six-month intervals.

While a judge was previously required to detain a person after a finding that this person continued to be a threat to national security, Bill C-3 only allows the judge to continue detention if there is an additional finding that a release under conditions will not address the perceived risk. The Minister may order that a detained person be released at any time to allow departure from Canada.

V. ONGOING PROBLEMS WITH CANADIAN SECURITY CERTIFICATES

The Supreme Court of Canada certainly deserves praise for its unanimous ruling, particularly in the often-controversial area of terrorism allegations. In deciding that certain fundamental liberty protections cannot be compromised to such an extent, the Court struck a blow in favor of judicial fairness, during a time when governments around the world have been aggressively seeking to limit judicial oversight of the detentions of those they suspect of terrorism. More generally, the Court made a powerful statement about the role of the judiciary in protecting the rights of individuals who come before the Court. After the Charkaoui decision, it is clear that Canada does not stand for the proposition that public interest can always undermine individual human rights. The unanimous Charkaoui decision stands in contrast, for instance, to the deeply divided U.S. Supreme Court in the “War on Terror” cases.

Charkaoui seems, in some ways, especially remarkable given the Court’s rejection of the Government’s claim that any infringements on tra-

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84 Id. at cl. 81.
85 Id. at cls. 82(1)–82(3).
86 Legislative Summary, supra note 60, at 18.
87 Bill C-3, supra note 60, at cl. 82(3).
88 Legislative Summary, supra note 60, at 18–19.
89 Bill C-3, supra note 60, at cl. 82(5)(a).
90 Id. at cl. 82.4.
ditional rights protections could be justified under Section 1 of the Charter. Section 1 of the Charter, which explicitly allows for limitation of Charter rights when certain standards are met, distinguishes the Canadian approach to the constitutional protection of human rights from that of the United States, where the Bill of Rights contains no similar provision. Thus, the finding by the Court that the IRPA is inconsistent with Sections 7, 9 and 10 of the Charter was not the end of the story. The analysis then shifted to Section 1 to determine whether such limitations may be demonstrably justified in a free and democratic society. This justification reflects both the law’s objectives, which must be pressing and substantial, and the means employed, which must be proportional. While the Charkaoui Court readily agreed to the pressing and substantial need to prevent terrorist attacks in Canada, the fact that other jurisdictions had found ways to pursue similar objectives in a manner that better accommodated the need for due process weighed heavily on the analysis of the proportionality of such measures, ultimately leading to the conclusion that the restrictions could not be saved under Section 1.

While there is much to praise in the Court’s reasoning in this case, significant concerns remain over specific aspects of the ruling as well as with the Canadian Government’s legislative response to that ruling. First, the fact that the Court suspended its ruling for a year, in order to give the Canadian Government time to respond, is troubling. Given the Court’s clear view that the security certificate legislation had some connection to matters of national security, it may seem understandable that the Court wished to ensure that the Government was not put in a position of possibly compromising national security. That said, however, having found that national security did not justify the violation of fundamental Charter rights of these detainees, the Court seemed oddly unconcerned with the fact that it was authorizing the potential detention of persons for an entire year without any constitutionally legitimate basis. The very length of time granted to the Government to devise a lawful alternative to the scheme struck down by the Court seems subject to criticism. In contrast to the Canadian Court, the British Government promptly responded to the decision of the House of Lords, which ruled that the law allowing for indefinite security detention was incompatible with the European Convention on Human Rights. The House of Lords issued its decision in December 2004 and by January 2005, the Government had announced its plans to create a new system of control orders meeting the requirements of the European Convention on Human Rights.

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92 Compare Canadian Charter of Rights and Freedoms, supra note 44, § 1, with U.S. CONST. amends. I–X.
93 Charkaoui, supra note 3, ¶¶ 66–94.
94 See Belmarsh Detainees, supra note 4, ¶¶ 46, 66, 73.
Rights. This new system was enacted in March 2005. Given the deprivation of liberty involved in any suspension of the finding of unconstitutionality, the Supreme Court could have sent a much more clear signal to the Government that this was a matter of urgency.

Second, it is unclear why the Court did not see fit to open the door to an ad hoc review of the detention of the individuals named in the appeal which would have conformed to Canadian constitutional law. In similar circumstances, for instance, the Canadian Federal Court of Appeal (Federal Court) previously has agreed to appoint an amicus curiae to act in a manner quite similar to the special advocates, whose intervention is described in approving terms in the Supreme Court’s decision. Acting pursuant to its inherent powers, the Federal Court in Khadr v. Canada appointed an amicus curiae to challenge evidence withheld from the applicant for national security reasons. Even though the applicants in Charkaoui and associated cases did not make amicus curiae applications, perhaps making it impossible for the Supreme Court to directly issue such an order, mentioning this option would have been an appropriate way for the Court to suggest that immediate review of the validity of each detention could be achieved by appointing an amicus curiae. Had the Court done so, then at least it would have sent a signal that some interim measure was needed to avoid allowing the Charter violations to continue unabated for a year. Quite to the contrary, however,

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96 See Khadr v. Canada (Attorney General), 2008 FC 46, ¶¶ 20–27 (Can.) [hereinafter Khadr]. The Khadr Court noted that before the Supreme Court’s decision in Charkaoui the Federal Courts did afford both Charkaoui and Almrei an opportunity to bring motions to appoint amici in supporting their conditional release applications. Nonetheless Charkaoui and Almrei both declined the appointment of amici. Id. ¶ 17 (citing to Charkaoui (Re), supra note 8, and Almrei v. Canada (Minister of Citizenship and Immigration), 2007 FC 1025 (Can.) [hereinafter Almrei]). Charkaoui’s refusal of an amicus was based on an ongoing objection to the use of confidential evidence at all. Charkaoui (Re), supra note 8, ¶¶ 14–15. The counsel for Almrei similarly declined an amicus because of a concern of further delaying the proceedings. Almrei, supra, ¶ 17.

97 See Khadr, supra note 96, ¶¶ 20–27.

98 As the Khadr court explained, Harkat filed a motion to appoint an amicus before the Supreme Court’s Charkaoui ruling, and had been denied, based, in part, on the Court’s finding that the legislation allowed for the judge to adequately discharge the duties imposed—a conclusion later expressly disavowed by the Supreme Court in Charkaoui, and leading to the
the Court specified that should the Government wish to proceed with an assessment of the reasonableness of Charkaoui’s security certificate during the year of suspension, the unconstitutional provisions of the IRPA would still apply.99 Additionally, those certificates previously found to be “reasonable” under the prior procedure would not lose their reasonable status during that one-year suspension period.100

Beyond the issues discussed above, three substantive concerns remain in view of both the Supreme Court’s decision in Charkaoui and the Government’s legislative response: (1) the ongoing discrimination between Canadian nationals and non-nationals, which lies at the heart of the Canadian approach to security detention; (2) the ongoing use of secret evidence and the mechanisms resorted to in order to protect both national security and the rights of the named person; and (3) the applicable standard under which a Court may find that a person is reasonably being detained as a threat to national security.

A. The Discrimination Issue

The Court’s conclusion that the security certificate procedure was not discriminatory in nature is deeply troubling, given the applicability of this detention practice only to non-citizens of Canada suspected of terrorism, and not to citizens under similar suspicion. Far from seeing it as a problem, the Government apparently considers the discriminatory aspect of security detention as a strong selling point, highlighting the fact that Canadian nationals are immune to this type of restriction on their rights.101 The exemption of citizens is alarming considering that non-nationals hold no monopoly on terrorism threats, in Canada or elsewhere.

The Court discussed the landmark decision out of the United Kingdom, A (FC) and others (FC) v. Secretary of State for the Home Department (Belmarsh Detainees), in which the House of Lords considered terrorism-related detentions under immigration provisions.102 Factually, the cases bore

99 Charkaoui, supra note 3, ¶ 140.
100 Id.
101 For example, Canadian Minister of Public Safety, the Hon. Stockwell Day, made statements before the House of Commons in support of the proposed legislation. “I would encourage all colleagues to set aside partisanship to realize that the security certificates have been proven not to threaten the individual rights and freedoms of Canadians. As a matter of fact, the security certificate cannot even be applied against a Canadian citizen. It can only be used on foreign nationals or those who are not Canadian citizens.” 142 39th Parl. Deb., H.C. 2nd Session, (2008) No. 041, at 1340, available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=41&Language=E&Mode=1&Parl=39&Ses=2.
102 Charkaoui, supra note 3, ¶¶ 125-131 (discussing Belmarsh Detainees, supra note 4).
some similarities, since the detainees in the U.K. case had been ordered deported, but the deportations could not occur because of the risk of torture in the receiving countries. The Belmarsh detainees had never been charged with any criminal offense, but most continued to be held based on the British Government’s claim that it would be a risk to national security to release them. The House of Lords rejected this argument, in part because of the discriminatory nature of these detentions, which only applied to non-nationals.

The Supreme Court in Charkaoui found the IRPA legislation to be distinguishable from the statute considered in Belmarsh Detainees because the U.K. legislation allowed for indefinite detention, while the IRPA requires periodic review of detention. In fact, the legislation considered by the House of Lords was quite similar to that considered in the Charkaoui case, although it did contain language that explicitly allowed for indefinite detentions where deportation could not be carried out. While the IRPA does not contain such express language, as the Supreme Court had already noted, the effect in certain cases could still be indefinite detention. For example, appellant Hassan Almrei, who has been detained for seven years in, does not know “when, if ever, he will be released.”

The distinction between the two statutes based on the indefinite detention language in the U.K. legislation would thus not appear to significantly distinguish the security detention schemes.

The Supreme Court noted that the security certificate provision of the IRPA was not discriminatory on its face because although only non-nationals were subject to the IRPA, immigration legislation by its very definition only applies to non-nationals. The Court specifically stated that detentions for the purpose of deportation did not represent prohibited discrimination, and concluded that the detentions before the Court had not “become unhinged from the state’s purpose of deportation.” This conclusion seems open to challenge, however, in cases such as those that were before the Court in Charkaoui, where the facts suggested that the detainees could not be deported because of a risk of torture, and yet they still continued to be

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103 See Belmarsh Detainees, supra note 4, ¶ 9.
104 See id. ¶¶ 1–3.
105 Charkaoui, supra note 3, ¶¶ 125-28 (citing Belmarsh Detainees, supra note 4).
106 Id. ¶¶ 125–131.
107 See Anti-terrorism, Crime and Security Act 2001, 2001 c. 24, § 23 (“A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.”).
108 Charkaoui, supra note 3, ¶ 13.
109 Id. ¶ 131.
detained, admittedly for national security reasons. The claim that these detentions, under the circumstances, were still connected with the policy of deportation seems questionable.

Indeed, it appears that the factual scenarios presented by cases like Charkaoui present the possibility for indefinite detention. The detention is not based, as in a criminal matter, on past criminal conduct. Rather, detention is based on a fear of potential future conduct on the part of the detainee, a fear presumably rooted in some past action or alleged affiliation. It is difficult to imagine how frequent reviews would really change much in terms of the ongoing nature of such liberty restrictions. The facts giving rise to a fear of a future action may well not change much over time, and such changes may be difficult to assess. Thus, the likely ongoing fear of future action could still result in detention, or other liberty infringements, which may continue indefinitely. Because the person named in a security certificate often cannot be deported, the practical effect is the possibility of indefinite detention or, if released subject to certain conditions, indefinite restrictions on the person’s liberty. The distinction with the U.K. legislation does not appear to be a meaningful one in practice.

Moreover, the basis on which the House of Lords found the U.K. detention scheme discriminatory in Belmarsh Detainees was the fact that it involved the use of the immigration system to address a security matter. Lord Bingham, for example, wrote that the detainees should be compared to U.K. nationals who were suspected of terrorism affiliations. He noted that, like the detainees, those nationals had the common characteristics of being suspected of terrorism affiliation and not being subject to removal from the country. Thus, he argued, the two groups were similarly situated, with the only distinction being that one group could be subject to detention based solely on national origin. Lord Bingham noted that, more generally in the immigration context, some distinction necessarily must be made between nationals and non-nationals, and that it is permissible to detain a non-national pending deportation. Clearly, a national would not be subject to such a detention.

The issue in Belmarsh Detainees was the intent behind the impugned detentions. It was conceded that individuals were being detained

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110 The IRPA does provide for a release on “conditions,” which ultimately was implemented for two of the three appellants in this case. Id. ¶ 10. Those conditions, as noted previously, still involve a significant infringement on liberty, and again are based on a fear of future conduct, and so could continue indefinitely. See IRPA, supra note 5, § 84 (2).
111 Belmarsh Detainees, supra note 4, ¶¶ 8, 73.
112 See id. ¶¶ 52–54.
113 See id. ¶ 54.
114 See id. ¶¶ 52–53, 67–68.
115 See id. ¶¶ 67–68.
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because the British Government considered them to be safety risks through possible future acts of terrorism, and that they could not be deported. A British national, similarly suspected, could not be similarly detained because the national would not be subject to the immigration proceedings. Lord Bingham found this distinction unacceptable, writing “[w]hat cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.”

Lord Scott took that analysis further, noting that Article 15 of the European Convention on Human Rights does not justify a discriminatory distinction between different groups of people all of whom are suspected terrorists who together present the threat of terrorism and to all of whom the measures, if they really were “strictly necessary,” would logically be applicable. If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims. Some might well not be professed Muslims. Similarly, it would be irrational and discriminatory to restrict the application of the measures to men although the bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational and discriminatory to restrict the application of the measures to suspected terrorists who have no right of residence in this country. Some suspected terrorists may well be home-grown.

Lord Scott’s last comment relating to “home-grown” terrorists appeared to have been prophetic, when, several months later, three of four men who carried out suicide bombings in London in July 2005 turned out to be British nationals.

Lord Nicholls further noted in Belmarsh Detainees that the discriminatory nature of these detentions was sufficiently compelling to provide a basis for judicial intervention on a national security measure, because normally Parliament would enjoy greater leeway. In fact, Parliament’s failure to enact corresponding provisions allowing for the detention of nationals presenting a similar threat undermined the entire scheme:

The difficulty with according to Parliament the substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar

116 Id. ¶ 68.
117 Id. ¶ 158.
118 See Dominic McGoldrick, Security Detention – U.K. Practice, 40 CASE W. RES. J. INT’L L. 507, 513 (noting, additionally, that by the end of 2007 eight U.K. nationals were subject to control orders).
security risk. The government, indeed, has expressed the view that a ‘draconian’ power to detain British citizens who may be involved in international terrorism ‘would be difficult to justify.’ But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national. There is no significant difference in the potential adverse impact of such a power on (1) a national and (2) a non-national who in practice cannot leave the country for fear of torture abroad.

It is clear that the issue of discrimination—based on the use of the immigration system to detain only non-nationals suspected of terrorism—was central to the House of Lord’s declaration that the detention scheme was incompatible with the European Convention on Human Rights.

Turning back to Canada, the Supreme Court in *Charkaoui* dealt with the discrimination argument under Section 15 of the Charter in a cursory manner, distinguishing the House of Lords’ decision in *Belmarsh Detainees* on the basis that British law explicitly entertained the possibility of indefinite detention for non-nationals only. As noted above, however, that does not seem to have been the pivotal issue for the House of Lords. Rather, the Law Lords seem to have based their finding of discrimination on the application of detentions to terrorism suspects who were non-nationals (and not nationals), and on the overarching inappropriateness of using the immigration system to further national security objectives. It was that disparity more than the potential length of the detention that seemed pivotal.

This distinction is important because the House of Lords found the entire scheme invalid, largely based on this part of its ruling. The Supreme Court, however, in failing to find the scheme discriminatory, left the overarching system in place, choosing to address some of the underlying procedural problems rather than acknowledging that the entire system was flawed. The Supreme Court invited a Government response focused on procedural mechanisms rather than on the more fundamental human rights implications of this detention scheme. The Court’s suggestion that the security detention had not become “unhinged” from the deportation process seems to unquestionably accept a legislative scheme that could be challenged as disingenuous. Deportation and detention must each be justified on its own distinct merits. Clearly, a non-national engaged in the planning of terrorist activities can be deported from Canada on that basis. The mere fact that deportation has been ordered cannot, on its own, justify detention. Risk of flight offers a basis for detention that seems fully related to the interests behind deportation, because flight can derail expulsion from the country.

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119 See *Belmarsh Detainees*, supra note 4, ¶ 83.
120 *Charkaoui*, supra note 3, ¶ 130.
121 See *Belmarsh Detainees*, supra note 4, ¶ 83.
Conversely, conspiracy to commit a terrorist attack certainly can justify, in some circumstances, the detention of suspected individuals, whatever their nationality. The fact that the deportation and terrorist conspiracy coexist in some cases does not mean that they become inextricably linked in any case, so that, henceforth, the interests behind deportation can be assumed to justify detention. This seems self-evident in situations in which deportation is impossible *de facto* or *de jure*, meaning that detention can no longer be rationally justified as necessary to ensure the deportation process. Detention of anyone as a means of trying to disrupt a terrorist conspiracy should be justified by a process and on bases which meet the constitutional guarantees entrenched in the Charter. If a distinction is introduced between nationals and non-nationals in that scheme, then that distinction should be justified under the terms of Sections 1 and 15 of the Charter. That is the type of analysis which led the House of Lords to reject the British security detention scheme in *Belmarsh Detainees* but which, inexplicably, is side-stepped by the Supreme Court in *Charkaoui*.

In closing on the issue of discrimination, even if the detention powers claimed by the Government in *Charkaoui* were extended to include citizens, thus addressing the discrimination issue, this does not mean that such detentions necessarily would be justified. As Lord Hoffman famously wrote in the *Belmarsh Detainees* ruling:

> Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

**B. Secret Evidence**

In *Charkaoui* the Supreme Court expressed considerable concern about the use of evidence against a detainee to whom the evidence had never been shown. The finding that the IRPA scheme violated Section 7 of the Charter was heavily based on the fact that the evidence was not made avail-

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122 Compare id.
123 Id. ¶ 97.
able for the person to dispute. The Court thus noted that “a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case.” The Court rejected the Government’s argument that this was offset by the powers given to the reviewing judge, explaining that:

The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

The Charkaoui decision referred approvingly to the special advocate system in the U.K. as a model which better reconciles the need for confidentiality of sources and the protection of the detainees’s fundamental rights. Interestingly, this system has been criticized in the U.K. itself as unfair, in large part because it deprives detainees of a meaningful chance to know of the evidence against them. The British Parliament Joint Committee on Human Rights, for example, issued a harsh condemnation of the special-advocate system, calling it “Kafkaesque” and comparing it to the “Star Chamber.”

The U.K. House of Lords issued three important rulings on October 31, 2007, in which, among other things, they raised concerns about the special-advocate system. In Secretary of State for the Home Department v. MB (FC) (MB) the House of Lords considered the 2005 Prevention of Terrorism Act, the Government’s answer to the Belmarsh Detainees case, which allowed for control orders to be issued on the basis of evidence withheld from those subject to them. Control orders are used in the U.K. as a less severe deprivation of liberty than detention for those suspected of terrorism. The orders can apply to either citizens or non-citizens. A person can be subjected to a variety of restrictions of liberty, based on a finding

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124 Charkaoui, supra note 3, ¶ 53.
125 Id. ¶ 64.
126 Id. ¶ 80.
129 MB, supra note 128; see also Prevention of Terrorism Act 2005, supra note 95.
that the person poses some risk to national security or a risk of harm. The restrictions can include measures such as house arrest, limitations on movement, association, and communications. With some limitations, the House of Lords generally upheld the validity of the new control orders system. Some of the Lords, however, had specific concerns about the special-advocate system, particularly because of its interconnection with the use of evidence that is withheld from the detainee.

The House of Lords in MB relied on language from Charkaoui, quoted above, in explaining the importance of allowing the controlled person to be shown the evidence being used against him. Lord Bingham additionally cited authorities from around the world to support the proposition that, where a deprivation of liberty is contemplated, the person’s right to be apprised of the case against him is a fundamental aspect to procedural fairness. He included the U.S. Supreme Court decision in Hamdi v. Rumsfeld, among many other authorities, for the basic proposition that a detainee has a right to be apprised of evidence against him, and the right to be heard, which the Hamdi Court had described as “essential constitutional promises.” While noting that special advocates undoubtedly aid in the process, Lord Bingham pointed out that:

“[t]he use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him.” The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. “Grave disadvantage” is not, I think, an exaggerated description of the controlled person’s position where such circumstances obtain. I would respectfully agree with the opinion of Lord Woolf in Roberts, para 83(vii), that the task of the court in any given case

130 See generally Prevention of Terrorism Act 2005, supra note 95.
131 See generally id.
133 MB, supra note 128, ¶¶ 24, 90.
134 Id. ¶ 30.
135 Id. ¶¶ 29–34.
136 Id. ¶ 30 (quoting Hamdi v Rumsfeld, 542 U.S. 507, 533 (2004)).
is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person.\footnote{Id. ¶ 35 (quoting Lord Woolf in R (Roberts) v Parole Board [2005] UKHL 45, 2 AC 738, ¶ 60 (U.K.)). Lord Bingham noted, however, that the use of evidence kept from the controlled person might not constitute unfairness if there was enough evidence in the information that was made available to support the order. Id. ¶ 44.}

Still in \textit{MB}, Lord Brown agreed that the right to a fair hearing could not be absolutely guaranteed through the special advocate process, noting that he could not accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.\footnote{Id. ¶ 91 (internal citation omitted).}

Given the \textit{Charkaoui} Court's concerns about the use of secret evidence, it seems highly problematic that Bill C-3 allows for a special-advocate procedure to continue to deprive the named person of access to the evidence being used against him. Moreover, since the Supreme Court expressly referred to the U.K.'s special-advocate system, it is of significance that, after the \textit{Charkaoui} decision was issued, the House of Lords criticized the U.K. special advocate system, which supported the deprivation of evidence from the controlled person. If the House of Lords criticized the system in the case of control orders, which represent a less severe deprivation of liberty than detention, one plausibly can assume they would have even greater concerns about the system in a detention situation.

The Canadian Government, in Bill C-3, actually lowered, rather than raised, the standard from the prior version of the IRPA regarding what level of finding is required for evidence to be kept from the detainee.\footnote{Bill C-3, \textit{supra} note 60, at cl. 83(1)(c).} This move is surprising in light of the \textit{Charkaoui} Court's conclusion that the standard for keeping evidence from the detainee represents a fundamental fairness issue. The prior version required the judge to find that the information \textit{would} be injurious to national security or the safety of any person, while the new version requires only that a judge find that it \textit{could} be so injurious in order for it to be sealed.\footnote{Id.; Legislative Summary, \textit{supra} note 60, at 14.} Given the importance of allowing any-
one facing detention to see and respond to the evidence against them, this broad and low standard is disturbing, and does not appear to meet the concerns raised by the Supreme Court of Canada and other courts around the world.

The repercussions of a security certificate detention are quite extreme and differ from the repercussions of an ordinary deportation order. Because a person could be permanently deprived of liberty, fairness safeguards must be applied that more closely resemble those in a criminal proceeding than the lesser safeguards generally applied to deportation proceedings.\(^{141}\) There could be an argument in favor of short-term detention under certain circumstances involving a fear of some future behavior. In such a case, the standard applied could be similar to the standard applied in bail proceedings, where risk of flight or imminent harm to the safety of others can be used to justify a short-term detention under abridged procedural standards. Such a detention, however, is inextricably linked to the idea that, sometime in the near future, the person will have an opportunity, with full procedural safeguards, to defend against the allegations leading to the detention.

In security certificate proceedings, the abridged detention standard does not appear to have any link to a future proceeding, in which full procedural fairness will allow the person to defend against the detention. Once the detention loses its short-term nature, the deprivation of liberty becomes nearly indistinguishable from that resulting from a criminal conviction, mandating that the process authorizing such detention should more closely resemble the process used in regular criminal proceedings.\(^{142}\) The absence of such a conclusion in the current Canadian approach is a distinct concern. Fundamental to the concept of fairness is the idea that a detainee must know what evidence is being used to justify a detention in order to adequately rebut that case. Even under the revised version of the IRPA, this fundamen-

\(^{141}\) See Charkaoui, supra note 3, ¶ 25; MB, supra note 128, ¶¶ 24, 90.

\(^{142}\) The U.S. Supreme Court used similar reasoning in its decision in Hamdi v. Rumsfeld, 542 U.S. 507, 534–535 (2004)(plurality opinion). Hamdi involved the detention of a U.S. citizen, not an immigration detention, within the U.S. on a Government claim that he was an “enemy combatant.” The Court ruled that the Government might have a right to detain a citizen, captured on the battlefield, for the short term, but when the detention extended past a short-term need the citizen has an absolute right to challenge his detention before an independent tribunal. Id. at 533–535. Hamdi had been captured in Afghanistan in 2001 and held, with no judicial review. Id. at 511. After the Court’s ruling, instead of bringing Hamdi before an impartial tribunal, the U.S. entered into a release agreement with him, under which he “voluntarily” relinquished his American citizenship and was sent to Saudi Arabia under travel restrictions. See Jerry Markon, Hamdi Returned to Saudi Arabia, WASH. POST, Oct. 12, 2004, at A2, available at http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html.
tional protection is missing, calling into question the constitutionality of the new legislative framework.  

C. Additional Shortcomings of Bill C-3

Aside from the substantive problems with allowing evidence to be withheld from the detainee, there are additional procedural concerns regarding the proposed Canadian special advocate system as set forth in Bill C-3. Much can be learned from the British special advocate system, on which Bill C-3’s procedures appear to have been based. Again, even at the time of the Charkaoui decision, the British special advocate system was coming under criticism, a fact that the Supreme Court itself acknowledged briefly in the Charkaoui decision. Some of the strongest criticism has come from lawyers who served as special advocates in the U.K. system, with one advocate going so far as to label it “an odious blot on our legal landscape.”

A review of the new Canadian legislation raises specific procedural concerns. Various groups, including Human Rights Watch, have criticized Bill C-3 as vague on government requirements to disclose information, especially given the fact that special advocates do not have the power to compel disclosure of information not provided voluntarily by the government. This is true even where that evidence could be exculpatory. Bill C-3 also fails to incorporate a number of recommendations that were made before the revised legislation (in the form of Bill C-3) was announced. The Canadian Special Senate Committee on the Anti-terrorism Act, in its report on Fundamental Justice in Extraordinary Times, for instance, recommended that any special advocate system must allow the special advocate to consult with the detainee after the review of any secret evidence, and Bill C-3 fails to include this critical safeguard.

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144 Charkaoui, supra note 3, ¶¶ 83–84.


146 Human Rights Watch, supra note 144.

In the Charkaoui decision, the Supreme Court referred to the “tension” between personal liberty interests and concerns for national security.\textsuperscript{148} Opinions may differ as to whether and to what extent such a tension indeed exists, and where any “balance” should be struck if there is to be balancing at all. It is apparent though that if one concedes that a government may need to use extraordinary measures in some cases to limit liberty, there could be greater procedural fairness than included in Bill C-3. In a recent study, Craig Forcese and Lorne Waldman vividly illustrated the increased type of procedural fairness that could be included, partly based on interviews with special advocates in the U.K. and New Zealand. They argue that any special advocate system employed in Canada should model the special advocate system used by the Canadian Security and Intelligence Review Committee (SIRC), which involves security-cleared lawyers, and includes a number of safeguards, which, in fact, were not included later in Bill C-3.\textsuperscript{149} Their report specifically warned against implementation of a special advocate system such as the one in the U.K. and in New Zealand.\textsuperscript{150} One of Forcese and Waldman’s recommended safeguards included a requirement that any claim of secrecy of evidence be put to a balancing test that would resemble the test laid out in the Canada Evidence Act. Such a balancing test would require a judge to weigh “the public interest in disclosure against the public interest in non-disclosure and [the judge] is empowered to authorize forms and conditions of disclosure that reflect this balancing.”\textsuperscript{151} Before appointing a special advocate, Forcese and Waldman further suggested that a court should expressly find that no less-restrictive alternative is available to protect the information. Examples of less-restrictive alternatives include in camera hearings to have either both the detainee and counsel present or, under some circumstances, to have only the detainee’s counsel present.\textsuperscript{152} Forcese and Waldman do acknowledge that, in limited circumstances, there might not be a less-restrictive option available, and that it might be necessary to appoint a special advocate.\textsuperscript{153} In such a situation, they suggest that the special advocate should have specific functions, such as a duty to seek further disclosure of evidence—a procedure they again compared to the Canada Evidence Act.\textsuperscript{154} Additionally, they argue that the spe-
cial advocate should be actively involved in the advocacy process, including cross-examinations and investigation into evidence that is not disclosed.\footnote{Id. at 63–64.} Applying their reasoning to Bill C-3, and given the lack of an attorney-client relationship between the special advocate and the detainee, as specified by Bill C-3, the government should be required to disclose all information to the special advocate, and the special advocate should be allowed to question the detainee after reviewing all the evidence.\footnote{See id. at ii.}

Interestingly, in the recent MB decision of the House of Lords, Lord Hoffman argued that the government must be allowed to keep some information confidential. He cited to the “Canadian procedure,” which had been previously noted with approval by the European Court of Human Rights in Chahal v. United Kingdom as acknowledging that some national security measures might justify the keeping of some information confidential.\footnote{MB, supra note 129, ¶¶ 51–55 (citing to Chahal v United Kingdom 23 Eur. Ct. H.R. 413 (1996)).} Lord Hoffman noted that the Canadian SIRC procedure was the basis for the special advocate system in the U.K. Interestingly, however, the SIRC system to which the Chahal court had earlier referred, was eliminated in immigration proceedings by the 2002 changes to the Canadian immigration legislation.\footnote{Id. ¶ 54; Forcese & Waldman, supra note 27, at 10–15.} The Supreme Court in Charkaoui also had described with approval the former SIRC procedure, as well as other instances in which Canada had used procedures less restrictive than the outright denial of access to evidence.\footnote{Id. ¶ 54; Forcese & Waldman, supra note 27, at 10–15.} Bill C-3 fails to adopt many of the procedural safeguards that had been applied in those other scenarios. Thus, it appears that safeguards are available, and have even been used to give greater protection to the rights of detainees in those cases in which evidence must be withheld for national security reasons. In failing to include mechanisms that are proven and tested even in Canada, Bill C-3 falls significantly short of the threshold for constitutionality established by the Supreme Court in its analysis under Section 1 of the Charter in Charkaoui.

VI. CONCLUSION

It is commonly said that you can judge a society by the way it treats its weakest members. When it comes to measuring Canada’s true commitment to the protection of fundamental rights and freedoms, individuals caught in the immigration system are our constitutional canaries: they stand on the outer limit of the boundaries of belonging to our community, nearly entirely disenfranchised from the political establishment. It is therefore not a
surprise that many of the most important Canadian human rights decisions over the last several years, cases such as Baker, Suresh, and Mugesera, have involved the immigration and refugee process.\footnote{See Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (Can.); Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1 (Can.); Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).} Within that especially vulnerable population, persons detained pursuant to a security certificate because of alleged terrorist involvement have significantly less recourse to defend themselves than would citizens facing such suspicion. The treatment of persons detained pursuant to a security certificate will stand as the loudest and clearest statement that Canada truly is committed to judicial fairness, and, more broadly, to human rights as fundamental to our society and culture. In the context of the so-called “Global War on Terror,” a genuine commitment to human rights will resonate well beyond our borders. At the international level, the global fight against terrorism has become the excuse of choice to justify any and all denials of human rights, a convenient fig leaf for many governments whose commitment to such rights is perhaps questionable in the first place.\footnote{See, e.g., Robin Kirk, Colombia and the “War” on Terror: Rhetoric and Reality, HUMAN RIGHTS WATCH, Mar. 2004, http://www.hrw.org/english/docs/2004/03/04/columb7932.htm (suggesting that the Government of Colombia is using the War on Terror to justify changes in its own practices); Cathy Majtenyi, Report Says War on Terror Violating Human Rights in Kenya, Somalia, Ethiopia, NEWS VOA, Apr. 4, 2007, http://www.voanews.com/English/archive/2007-04/2007-04-04-voa38.cfm (describing allegations of secret U.S. interrogations of detainees in Ethiopia); Essential Background: Overview of Human Rights Issues in Pakistan, HUMAN RIGHTS WATCH, Jan. 1, 2004, http://www.hrw.org/english/docs/2003/12/31/pakist7008.htm (describing human-rights abuses in Pakistan, undertaken under the auspices of the War on Terror).} Canada to some extent serves as one of the barometers of what constitutes a legitimate reaction to the threat of terrorism. The balanced nature of our reaction will be assessed well beyond our borders.