House of Commons
CANADA

Standing Committee on Public Safety and National Security

SECU • NUMBER 004 • 2nd SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, November 27, 2007

Chair

Mr. Garry Breitkreuz

Standing Committee on Public Safety and National Security

Tuesday, November 27, 2007

● (1535)

[*English*]

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): I'd like to bring this meeting to order. This is meeting number 4, for consideration 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. You have the agenda before you.

I'd like to welcome the Minister of Public Safety, the Honourable Stockwell Day.

The usual practice at this committee is to give you approximately ten minutes or so, and then the questioning will begin with the official opposition and go around the table.

Welcome, sir. If you're ready, you may go ahead.

[*Translation*]

Hon. Stockwell Day (Minister of Public Safety): Thank you, Mr. Chairman.

It is a honour for me to be here with you, my colleagues. I believe that the work of this Committee is very important. The security of our citizens from sea to sea is a priority for our government, and I am convinced that it is also a priority for you.

[*English*]

Because of that, I'm always interested to receive the information you have, the advice you give, and the questions you ask on a variety of issues. You've heard us say a number of times that the safety and security of citizens is the primary role of any level of government. I know that's your focus also, and I appreciate that.

In a year Canada has about 95 million people who cross our borders for a short period of time or a longer period of time—95 million. About 263,000 of them are people who are applying for or who have received some type of immigrant status. I believe that reflects the generosity and history of our country in welcoming people, and also in terms of sending the signal that we need people to immigrate to this country to continue to build this nation into the nation of strength and peace that it is. We have a very welcoming approach to that.

From time to time there are people who come to our country who are of concern or interest. From time to time, and it's rare, they are people who are deemed as being dangerous to Canada, its citizens, and possibly to our interests. They could be people with known terrorist affiliations or backgrounds. They could be people involved in organized crime. They could be people who are known to be those who would spy upon Canadian citizens.

That presents a problem. In the course of the year, with 95 million visitors, a quarter of a million of whom want to stay for long periods of time, there are people who are deemed to be inadmissible. As any country does when that has been noted, those people are not admitted to the country. In those cases many of them return to their country of origin, or they go to another country. But there are times when people want to appeal that particular decision. When that happens, there's a bit of a dilemma for our authorities.

[*Translation*]

What must we do when people who represent a threat for our citizens and our country appear at our borders?

[*English*]

So what do we do in a situation where a person is deemed inadmissible because they are a threat, but they do not accept that designation and they say they're staying?

And they can stay. They can appeal. Appeals take place every day. Thousands of appeals take place, and we have a generous appeal system. In fact, people can appeal that status. Once you start an appeal, maybe by claiming refugee status, that appeal can go on, in some cases, for years.

The dilemma is, here you have a person deemed to be dangerous, and yet they're making an appeal. Most people, when they are in the appeal process, make their appeal and then they're free to stay and move around the country. But here you've got a situation where somebody is deemed highly dangerous.

So a process of having security certificates was developed. As you know, this is not new. It was a process developed years ago by the Liberal government. It doesn't get used a lot, but that particular process allows the Minister of Public Safety or the Minister of Citizenship and Immigration to sign a certificate saying this person, while they are here, needs to be detained while they're going through the appeal process.

That also has to be approved by a Federal Court judge, who will see all the information about that person that would lead them to have this designation of being dangerous. If the court agrees with the minister who signed it, then the person is detained. Their appeal still continues, but they are detained.

It's an interesting detention process because we call it a three-sided detention facility. It only has three sides, meaning that person can return to their country of origin at any time. However, there are cases where the person says if they return to their country of origin, they fear they will be tortured or something might happen to them, so they are detained while the appeal takes place.

As I said, that process has been in place in Canada for a number of years. It's been used 28 times since 1991. It's not used extensively when you figure that a quarter of a million people a year come in on some kind of immigration status. It's been used six times since 2001. It's always been used under Liberal governments. That's not to diminish it in any way. We have supported this particular process.

The Supreme Court of Canada, in the Charkaoui case, looked at this a little over a year ago, and contrary to what you often read by those reporting on it.... We often read it was struck down as unconstitutional. The security certificate process was not struck down, and it was not, as a broad process, deemed unconstitutional. But there were some areas the Supreme Court said needed to be fixed. If they weren't fixed, then that process would become null and void. That will happen by February 23, 2008, I believe.

In carefully going through what the Supreme Court has said, listening to testimony and concerns from around this table, and pursuing this matter with all the appropriate experts and various interest groups, we believe we have respected what the Supreme Court has asked for.

First, they have asked that there be a designation of an individual known as a special advocate. Somebody who is being detained can have a lawyer, and most of them do. The lawyer, however, is not allowed to see items related to national security, which could put the country at risk, and which could put at risk certain individuals who have maybe gained information through their intelligence activities about the particular person being detained.

That lawyer will have some limited ability to see all the information. However, the special advocate who is going to be designated, or is allowed to be designated, will be able to see the full range of information, even what has been deemed of national security interest.

A continuum takes place. First of all, that special advocate would meet the individual being detained and their counsel and would get an idea of all the types of questions he or she might be able to ask in camera.

● (1540)

The special advocate will get the unclassified document with the background about the individual and then that special advocate can go before the court in camera and see all the information, even the classified stuff.

From there, that special advocate has the ability to appeal on behalf of the individual detained and is there for that purpose, to protect the interests and to speak up for the interests of the person being detained. As you can see and as you know—I know you've gone through the act—there is detail in the act on how that will work.

I understand, Mr. Chairman, that following the one hour here there are people available on the technical side if there are important questions related to the minutiae of the act itself.

So that's the first provision we responded to. The second one is the area of allowing for a review of the certificate. With the previous act, in the way it was written, there was a review process in place that applied to those who are permanent residents—and remember, the security certificates cannot be used on Canadian citizens—but permanent residents had a review that took place, first of all, within 48 hours of them receiving the security certificate that indicated it would detain them. Within 48 hours they would have a review, and then every six months, at least, they would have a review, because, as I said, this process can carry on for a number of years.

That was not available to those who were deemed to be foreign nationals if they weren't permanent residents. The Supreme Court said that had to be fixed, so we believe we have fixed that, addressed that. The same provisions that apply to permanent residents will apply to foreign nationals. They will have a review immediately within 48 hours of that designation and at least every six months.

The third area—there are a number of smaller areas also—has to do with something called the privative clause. That had a limiting effect on areas that could be reviewed and that the particular justices could order to be reviewed and looked at. It was actually the Senate committee, I believe, looking at the Anti-terrorism Act, that wanted a repeal of that, and we have done so.

I see the chairman giving me the wrap-up sign, even though I think I'm still within ten minutes, but I would not want to take my full time because I want to hear from you folks.

That, I believe, shows that we have responded to the Supreme Court direction and that this act will in fact withstand further tests. I would ask members—we're not asking for undue haste nor asking people to be imprudent in terms of how quickly you move on this—to keep in mind that we need this done. This has to be passed before February 23. Otherwise, not only will the provision be quashed, but people who are presently under detention who have been deemed by the Federal Court to be under detention would in fact not be in that case. There is not a rash urgency, but there is a compelling time constraint here, and I would ask that you respectfully consider that also.

Thank you for your questions and suggestions.

● (1545)

The Chair: Thank you, Mr. Minister.

I am going by the timing device I have here, but I may have smashed it when I brought my gavel down at the beginning, so it may not be keeping accurate time. My apologies if some of you don't get as much time as you think you should have.

Mr. Dosanjh, you would like to lead off.

Hon. Ujjal Dosanjh (Vancouver South, Lib.): Thank you, I would. I have two questions, depending on what the chair does with me.

The first question, Mr. Minister, is about the security certificate legislation that you've introduced. It allows only reliable and appropriate evidence to be produced by the government and to be relied upon by the judge. Why did you not see fit to expressly bar evidence that's the product of torture or degradation or inhuman treatment? As the law stands currently in Canada, the courts will regard that evidence as absolutely inadmissible. Why would you not expressly include that prohibition with respect to evidence that is the product of torture in the legislation?

Secondly, I'm veering off here and I know that the chair might say something. Will you let me put the question? You can rule it out of order.

Sir, this is about the CBSA. The CBSA report came yesterday. It made very clear to me that the disjointed reports are going to come from all the federal institutions to you, whether the police report, the Paul Kennedy review, or the CBSA. They're going to be disjointed, isolated from each other, and are not going to provide complete, comprehensive answers we're looking for. The B.C. process is the only process that is going to be able to provide the comprehensive answers, and unfortunately, ironically, B.C. has no jurisdiction on any of this.

Why would you not step up to the plate and order a full public inquiry that would look at all of the elements that are under federal jurisdiction and do your duty as the minister of the crown and not leave it to provincial jurisdictions that have no jurisdiction?

The Chair: I'll have to interrupt here.

We made an agreement when we were planning the agenda.

Hon. Ujjal Dosanjh: No, we didn't.

The Chair: Sir, with all due respect, I think you were part of the agreement that we were going to study the topic at hand, Bill C-3. Correct me if I'm wrong.

Hon. Ujjal Dosanjh: I will, because what I said to you was, “I'm going to ask a question, possibly, about the CBSA and other issues”, and you said, “I'll rule you out of order”, and I said, “I'll see.”

The Chair: Okay, well, you are ruled out of order.

Mr. Minister.

Hon. Ujjal Dosanjh: Well, it's up to the minister to decide to answer or not answer.

The Chair: Okay, we'll leave it up to the minister.

Hon. Stockwell Day: I'm open to any questions, but I think, understanding the rules of procedure, it is not up to the minister to decide on a particular ruling; it's up to the chair. So I'm subject to—

The Chair: Yes, you may answer the first question. Go ahead, sir.

Hon. Stockwell Day: It is notably recognized in Canadian law that we do not pursue, nor do we support, nor do we advocate in any way—as a matter of fact, we condemn—the use of torture and information that may be gleaned by torture. It's both explicitly and implicitly a matter of Canadian law, which is probably why the Supreme Court didn't address itself to that issue when looking at the security certificates. There are a number of things that are understood in law that simply do not need stating. That's why we took the lead from the Supreme Court itself on that. We accept the fact that information cannot be, should not be.... We condemn the gleaning of information by way of torture.

There's also a provision that is given to the special advocate that was not in the act before that allows the special advocate to challenge any of the information that comes forward on its reasonableness. And on the scope of that, if you tried to delineate all of the things that would qualify to be challenged, you'd quite rightly have a book or probably several hundred pages.

It's absolutely open for the special advocate to challenge any information on its reasonableness and to make an appeal on that. That's why we have approached it in this particular fashion.

● (1550)

The Chair: Thank you.

Do you have any further questions?

Hon. Ujjal Dosanjh: No. I'll ask my colleague to take over.

The Chair: Mr. Cullen.

Hon. Roy Cullen (Etobicoke North, Lib.): How much time do I have, Mr. Chair?

The Chair: Four and a half minutes have been used up, so you have two and a half minutes.

Hon. Roy Cullen: Okay, because what I'd like to do then is take two and a half and then I'll get the question on the next round. Or I'll pass on the two and a half minutes. I'd rather have the five minutes on the next round than the two and a half minutes.

The Chair: Okay. Does anybody on the Liberal side...?

Yes, Ms. Barnes.

Hon. Sue Barnes (London West, Lib.): Special advocates, I understand, don't have solicitor-client privilege. Is that correct?

Hon. Stockwell Day: Yes, that is correct, because they are going to be seeing national security information that is classified and that the court has deemed should be classified for the purpose of national security. So they wouldn't have the full range of privilege that counsel would have, and the Supreme Court did not indicate that there should be a change in that.

Hon. Sue Barnes: What about resources for special advocates? What types of resources are you intending to provide, and who chooses the special advocates? Also, pursuant to that, will the person held have any choice on changing a special advocate? In fact, how helpful will this actually be as we have it right now? There is a lot of concern from lawyers who have approached me on this, on everything from compensation to whether it's going to be like a legal aid roster of inexperienced lawyers.

We'd like some of those questions addressed, please.

Hon. Stockwell Day: Those are good questions, and on a number of those you can direct the lawyers who were talking to you to the act itself. It shows that the roster that will be prepared outlines how much experience a lawyer has to have. Also, there's a unique provision there that the person who is being detained can speak to the roster also if that person has concerns with who is on it.

On the issue of resources, that is going to be in regulations so that adequate resources can be assured. We've looked at some of the other jurisdictions where they have a similar situation. In the United Kingdom, for instance, it's very restricted in terms of the ability to apply resources. We want to make sure that the process is not only fair but is seen to be fair, so there'll be a regulatory process in place to make sure adequate resources are available.

The Chair: You have about 15 seconds.

Hon. Sue Barnes: Would that include offices and research facilities and access to all the materials that they would require? People's definitions of "resources" can vary widely.

Hon. Stockwell Day: That's why it will be in the regulations. You mentioned access to the materials. Access to the full file will be made available to the special advocate. The special advocate then has the ability to appeal for a wide range of resources, including those that will be indicated in the regulatory provisions. This is, I think, one of the many benefits of the changes we've made. The special advocate is going to have a lot of leeway in terms of making application for various needs as he or she sees fit.

The Chair: Thank you.

Now we'll move over to the Bloc Québécois. Please go ahead, Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you, Mr. Minister. Mr. Minister, the notion of special advocates is not new in legislation. We already have special advocates in cases where a complaint is filed against the Canadian Security Intelligence Service for its activities. These advocates can meet several times with a person complaining of illegal or disputable activities on the part of security services.

Despite the fact that, just as is the case with the special advocates provided for under this bill, they have access to confidential information, there has never been a single complaint that a special advocate communicated such information to the person he or she was representing.

Why, in this case, can the special advocate not have any contact, except with the permission of the judge in exceptionable circumstances, with the person he or she is responsible for defending, and why can he or she not play his or her proper role for the individual involved? I am obviously relying here on the French text, despite the fact that it, is in my view, a poor translation.

● (1555)

Hon. Stockwell Day: Thank you for your question. It is in my view very important to recognize that, if information becomes public or falls into the hands of someone who is not committed to confidentiality, then there could be a potential security problem. Such is the case not only here, in our country, but also in the case of the security services of other countries, such as the United Kingdom and Australia, if they have fears that the information, if divulged, might, in the opinion of national security authorities, become public. Under the bill, special advocates may request permission from the judge. After having obtained the information, they can appeal in order to have further discussions with the detainee, not to discuss the information itself, but to ask other questions and acquire a better knowledge of the situation.

The fact that this bill allows special advocates to appeal and to have further discussions with the person detained is unique. This only applies when national security is involved. The Supreme Court realized that such a provision was sometimes necessary.

Mr. Serge Ménard: I would underscore that I was aware of that part of the answer, but I find that, under the bill, it would be extremely difficult for a special advocate to have meetings, given that there is a requirement for permission from the judge, etc.

In any event, I would like to put to you other questions that, they too, are important. You have just confirmed for me the interpretation I had of the bill, namely that the special advocate is not tied by solicitor-client privilege to the person he or she is going to represent. You are now giving as a reason that it is because the special advocate is aware of confidential information. First of all, except as otherwise authorized, there is just one meeting, and there is no provision made for access to confidential documents during this meeting.

In any event, that is not where the problem lies. What the individual tells the special advocate is not secret. This individual can therefore not clear this or her chest, so to speak, as would a person accused of a crime. The individual cannot place all his or her trust in the person who is supposed to be his or her representative in front of the judge. What troubles me is not the possibility that the special advocate give information to the person he or she is representing, but that that person, when he or she meets with the special advocate, have the assurance that this advocate is not an investigator or someone who will expose him or her if he or she admits to things that no one was aware of.

I really fail to understand why this special advocate, even if he or she is not the lawyer of the person represented, does not have the same obligations with regard to the individual being represented as would be the case for any lawyer with regard to a client.

● (1600)

Hon. Stockwell Day: As for the list, when we provide the names of lawyers who could serve as special advocates, we must take into account their experience, their integrity. It is perhaps true that there could be among them someone who does not respect the process. But I do not believe that such will be the case. A lawyer will have meetings with the person detained in order to obtain information. The lawyer will then be able to look at the whole file on the individual and then, following an appeal, he or she could come back and have further discussions with the individual.

Mr. Serge Ménard: Perhaps I did not put my question properly.

[*English*]

The Chair: I'm sorry, the seven minutes has passed. You can do it on the next round.

[*Translation*]

Hon. Stockwell Day: You indicated that it was possible that special advocates not truly represent the individual, by not putting their whole heart into it. But a lawyer does not want to come across as someone without integrity, who does not take on his or her work with sincerity. Even the Supreme Court has not indicated that there are other protection mechanisms for such cases.

[*English*]

The Chair: Thank you.

You can come back to the issue on the next round.

Ms. Priddy, please.

Ms. Penny Priddy (Surrey North, NDP): Thank you.

Thank you, Mr. Minister.

Because the NDP takes a somewhat different position on this, I'm going to use about a minute of my seven minutes to put some context around that. I think the minister knows that the NDP is opposed to this legislation. We think terrorism and espionage and organized crime are very serious matters that should be dealt with under the Criminal Code of Canada. We don't necessarily think Canadians are safer when people who are a threat to our system are simply made to leave the country. We do have a very good justice system here in our country. So we believe that anyone who's responsible for a criminal act should be charged under the Criminal Code, regardless of their status in Canada.

We are concerned that under these circumstances the security certificate process proposed in Bill C-3 undermines some fundamental values in our justice system. Even with the provision for a special advocate—and I know we will talk more about that—security certificates, we still think, violate certain civil liberties that are important to any democracy.

So in light of those objections, I'd like to explore just a bit with the minister some questions that I might have, and I thank you for answering those.

If a foreign national or permanent resident is suspected of terrorist activities, they are detained, and may appeal—correctly—and perhaps then be deported as the next possible step under the security certificate process. What happens if a Canadian citizen is charged with the same crime? Would they then be arrested, charged, tried, and punished? So why are there two separate processes?

Secondly, when a permanent resident or a foreign national is deemed to be a threat in Canada and is deported back to their own country, what happens to them when they arrive in their own country? Are they free, then, to go back to organizing all of those things that we were worried they would organize here? Or are they under some kind of penalty when they return?

Hon. Stockwell Day: That's a series of good questions.

You're quite right: we see this differently. There's a difference of opinion. Frankly, you also have a different opinion from that of the Supreme Court on this, because they see it differently. I do think we're agreed that when it comes to fundamental liberties here, we have to be very cautious. Any time either a group or an individual is asking for a provision to grant increased security, you're going to look at taking away some freedom somewhere. If I want increased security, say, around this building, we may be able to get that, but it's going to limit some of our liberties in terms of coming and going. That's a formula we will always contend with in a free and democratic society, and it's one we should look at very carefully. So I think we're agreed on that in terms of fundamentals, and we disagree on when that should kick in.

This is different from pursuing somebody for a conviction for a crime, as you know. In one process, the criminal process itself, you have to have evidence that stands up in a court of law, sufficient that a person be convicted and actually put in prison.

● (1605)

Ms. Penny Priddy: I understand all that.

Hon. Stockwell Day: We're not talking about that when we're looking at the security certificate. We're talking about who's been deemed inadmissible, which happens every day, in hundreds of cases. People are deemed inadmissible, and sometimes at that point they in fact go back to their country of origin, or sometimes they appeal. It's understood that for any country that would have to go through the full range of criminal proceedings to deem somebody inadmissible at the border, the border itself would collapse under the weight of that.

But you do have to show some reasonable cause that a person should be deemed as such, and that's why, again, it comes back to the difference of opinion that we have. As far as possible, you need a process in place that will respect rights, but it can't be to the same extent as pursuing somebody for breaking a law and then wanting to put them in jail. This is strictly detaining them while they are appealing, and once the appeal is over, without any hesitation, they're going to be fully free to go back home to their country of origin or to be free to walk around the country. So it is a very different set of circumstances.

In terms of what happens to them when they return home, the courts have been clear that you can't deport somebody if there is, in the court's view, a reasonable prospect that they're going to face torture.

Ms. Penny Priddy: I understand.

Hon. Stockwell Day: In terms of what they do when they return home, they will then be, I would gather, back in their country of origin. And would they be free, as you said, to continue to plan terrorist activities or do whatever? Well, we can't monitor, necessarily, what people are doing in other countries. You can to a degree. So I would think—this is speculation now—that a person like that who's been identified as inadmissible and then goes back to their country of origin would probably think they're under some kind of scrutiny, either by their home authorities or by other authorities, and that whole process would probably cause them to restrict their activities somewhat.

The Chair: Did you have another question—

Hon. Stockwell Day: The last part of what I said is speculation.

Ms. Penny Priddy: Thank you.

I was very interested in your answer to a previous questioner about the fact that we don't state that you cannot use evidence that has been received when someone has been tortured. It is implicit, but we don't have to state it; it has been implicit. I have to say that I do find that a bit ironic, because I always thought it was somehow implicit that we returned to Canada our citizens who had been found guilty and were facing the death penalty in another country. That's not stated; while it was implicit, it no longer is, but that is an aside.

Mr. Minister, given that the U.K., on which this model is heavily based, has twice said there are problems with this system—most recently on October 14—I'm curious as to why we would still proceed with a system that is very much like theirs, when it has twice been criticized by their House of Lords.

The Chair: You have about half a minute.

Hon. Stockwell Day: If I'm not wrong, they've had to change theirs in terms of the special advocate three times—not just the recent one I mentioned, but also in 1997 and 2003. We've learned from that. I believe we have a special advocate system that is in fact quite different. In their system, their advocate is appointed by the Attorney General. Here we have a roster, and a justice will appoint them. They don't have a roster process in the same way we do. Their special advocate can only cross-examine and give written or oral submissions, but in our case the judge has the authority, if the special advocate here asks for it, to permit them to call in witnesses, to listen to testimony, and to actually cause those people to appear.

I think there are some far-ranging differences. There is greater liberty on behalf of our process, and we've learned, in fact, from some of the changes they were forced to make in the U.K. I believe we still have, with respect to the U.K., a better process.

● (1610)

Ms. Penny Priddy: I assume we're out of time, so thank you, Mr. Chair.

Thank you, Mr. Minister.

The Chair: Thank you.

We will now go over to the government side. Go ahead, Mr. Brown, please.

Mr. Gord Brown (Leeds—Grenville, CPC): Thank you very much, Mr. Chairman.

Thank you, Minister, for appearing today.

As you know, I chaired the subcommittee of this committee that reviewed the Anti-terrorism Act last year in the first session of this Parliament. When the Supreme Court ruled on the validity of the security certificate regime, there were a lot of media reports that in fact the Anti-terrorism Act had been struck down. You've told us that the security certificate regime actually came into effect in 1991. Maybe you can tell us a little bit more about the history of how it worked and why it came in.

Also, in many cases it may not necessarily be.... Some actually believe that this has solely to do with terrorism-related activities. Could you tell us about different types of national security risks that might be considered for someone who would be subject to a security certificate?

Hon. Stockwell Day: I'll try to address those questions.

First of all, I mentioned the year 1991 in saying there had been 28 successful applications of the security certificate process. I didn't want to give the impression this process started in 1991; I believe it was 1977 when it first came in, so I should have mentioned that at the start.

If I'm not wrong, it was actually to do with organized crime. Some cases were identified internationally as being involved in organized crime in such a significant way that a process had to be developed. Those people were trying to come to Canada, and as it was widely known who they were and what they were doing, the Liberal government of the day said, I think quite rightly, that there had to be a process to stop that. Yes, they could appeal, but those people were so dangerous.... Maybe it was drug-related or assassination-related—who knows? In any case they were saying they were so dangerous that we were just going to have to find a way to detain them while they were here.

So when it came in, it was related to organized crime in the first instance, and that's an important part of your question. We're looking at this in a post-9/11 context, thinking about terrorism all the time, but in fact it applies to organized crime. In one case not that long ago, it was applied to an individual as a known espionage agent; the same process was put in place, so it's not talking strictly about terrorism.

Did I catch all parts of the question there? Was there something I missed? I wrote down the one on national security, and when it began....

Mr. Gord Brown: Could you just say a little bit more on why it came in?

Hon. Stockwell Day: Again, it was on the grounds of national security or of Canadians being significantly threatened by an individual whose known history was such that it posed that threat. I think the government of day, in this case the Liberals, took the right position in saying that if it was the role and responsibility of government to protect its citizens, then a government would be irresponsible if it let a known menace just wander around; it would in fact be irresponsible of a government to do that.

Therefore, this provision was put in place, still recognizing the right of appeal and still recognizing that a person who comes to Canada, even though they're not a citizen, does have certain rights, though not as broad as a citizen would. So it tries to respect the same balance Ms. Priddy raised, the balance between liberty and protection. That's a fine line to walk, and I believe the balance was achieved correctly when this type of legislation was initiated. I believe we've also addressed what the Supreme Court thought was an imbalance in two of the areas.

If I can just restate that point, the Supreme Court did not say the security certificate process was unconstitutional, but deemed that two areas were unconstitutional: fix those and the process will hold; don't fix those and the whole process will collapse.

● (1615)

Mr. Gord Brown: That gets to my next question.

You've outlined the specifics of Bill C-3, but so that all of us can really appreciate the context of this bill, can you confirm that the Supreme Court actually upheld the constitutional validity of all existing security certificate processes of arrest and detention, the withholding of information to detainees on the basis of national security, extended or uncertain detention or restricted release, the notion that the rule of law permits restricted rights of appeals in presumptive detention in the security and immigration context, and that section 6 of the charter notes that non-citizens do not have a charter right to enter or remain in Canada?

Are you confident that the Supreme Court will uphold the constitutional validity of what we're proposing here in Bill C-3?

Hon. Stockwell Day: Well, those are key points that you're making. I'm just giving myself a slight opening when I say that I believe in every case where it's been tested, the Supreme Court.... As a matter of fact, the Federal Court of Appeal has heard appeals on the constitutional validity of these cases. In each case—and certainly in the recent cases since 2001—the court has upheld the constitutionality of the process. It's part of assuring that the charter itself is being respected.

As these cases came forward, one by one, not only did the court uphold the validity of the concern that these individuals could indeed pose a risk to Canadians, but also in response to the many vigorous appeals that it was unconstitutional for them to be kept in detention, the court agreed—in cases where it said they could come out of the facility—that house arrest be extremely restrictive, even to the point in some cases of these individuals not being allowed to take telephone calls, or having their calls monitored; having to wear an electronic bracelet; not being allowed to have Internet capabilities in their house; and requiring permission to leave the house. Remember, this was the court agreeing to these restrictions. So it wasn't just an academic nod of the legal hat saying this is a constitutional process, but when it came time to be pragmatic and to put in place some very clear specifics, the court also upheld those.

That's why I say the constitutionality of these, and this process, was upheld. But the Supreme Court said that we had to fix some particular areas. They said we could still detain somebody, but if they were a foreign national, they had to get a review in the first 48 hours, and every six months thereafter. So, broadly speaking, the detention, based on what we've provided, is constitutional—but they said we have to put some extra provisions in here.

It was the same with the special advocates, where the Supreme Court said they wanted to be sure the individuals had somebody who was exploring the full range of appeal options on their behalf.

The Chair: Thank you.

We will now go to five-minute rounds.

Mr. Cullen, please.

Hon. Roy Cullen: Thank you, Mr. Chairman.

Thank you, Minister, for coming.

Many of us in this room were on the subcommittee of this committee that looked at the Anti-terrorism Act. In fact, if you go back two Parliaments, that's when the process started. I know that my colleagues Tom Wappel and Serge Ménard were on that.

Gord, were you chair of the first one?

● (1620)

Mr. Gord Brown: No.

Hon. Roy Cullen: It goes back a bit, but in the course of looking at that, the decision was made by the subcommittee to include the review of security certificates, even though it's under the Immigration and Refugee Protection Act.

It's interesting that you're leading on Bill C-3, sir, and not the Minister of Citizenship and Immigration, but maybe this is the new reality. It's the processing. Frankly, I'm not that interested.

I have a few points on a couple of the issues. One of the things our subcommittee concluded—admittedly with dissenting opinions from the Bloc and the NDP—was that security certificates were still required, but some improvements had to be made to the process. We felt we were in pretty good company with the Supreme Court. I can't remember which decision came first.

One of the compelling things for me was when we heard from Paul Kennedy at the very first subcommittee. He was not the complaints commissioner at the time; he was a senior official at Public Safety and Emergency Preparedness Canada. He brought a file concerning an alleged Iranian assassin. It was in a thick binder, and he had whited out all those things that would compromise national security and confidentiality. He took the committee through the whole dossier.

There was a member from the B.C. Civil Liberties Association sitting at the table on the panel. I remember asking him if he would like to have this individual as his next-door neighbour. He said no, he wouldn't. I said, “So your problem is...?” He said, “Well, it's the process”. We're on the same page. We think the process needs improvement.

There's something in the response in Bill C-3 that I'm a little curious about and a little disappointed in. Our subcommittee had recommended a special advocate counsel, like a cadre, that would look at not only the security certificates process, but also a few other processes, like the deregistration of registered charities, denial of charitable status, and applications for the disclosure of information under the Canada Evidence Act. There have been allegations—and I think with some merit—that these have star chamber types of characteristics to them as well.

The government's response this summer sounded lukewarm. It said: "At the present time, the government believes that further study of the use of special advocates in other processes is required." Reading between the lines, I don't know if that means we don't agree and we're deep-sixing it, if there is a study, or if there is a study, what the timelines are.

What are some of the issues that were presented in not adopting these recommendations at the same time? I'm not pretending that we own a monopoly on truth and wisdom on these, but are you looking at developing a cadre to be used for these other processes as well?

Hon. Stockwell Day: The very fair question you're posing also requires me to point out that some of the items you just listed are not under public safety legislation; they are under the Minister of Justice and the Attorney General of Canada. I'm not passing that off in any way, but he or his officials—

Hon. Roy Cullen: Well, you're already answering questions for the Minister of Immigration.

Hon. Stockwell Day: He appropriately has jurisdiction for a number of those.

We looked at concerns that were raised around this table. We looked at other jurisdictions, and that's why I have made references to the role of the special advocate. We looked at some of the shortcomings of the U.K. model. These are the areas that are under my jurisdiction.

There is an interesting provision in this new legislation in paragraph 85.2(c) that along with everything delineated here in terms of protecting the individual, the judge has some sweeping—and I'll very cautiously use the word "liberal"—powers to do a number of things that aren't delineated in the act if he or she feels that it's going to be in the interest of the person being detained.

So we are not only dealing with the exact items I mentioned—some of which you have mentioned in your list there—that would have application to this act without having to delineate them. The judge is given some specific powers, if he or she determines that it's in the interest of that person being detained, to allow other provisions and extensions of these curtailments of liberty you just mentioned.

Hon. Roy Cullen: That really doesn't answer my question, but perhaps it's a question I will put to the Minister of Citizenship and Immigration.

I think there are other elements of the processes. For example, I would have presumed that charitable status would come under you or the Minister of Finance.

Hon. Stockwell Day: You're right—under the Minister of Finance. Some applications that go to me mainly fall under the Minister of Finance.

You may be aware that a year and a quarter ago Canada assumed chairmanship for an international group called the Egmont Group. It comprises 101 different countries that have agreed to share financial information. We also draw from the Office of the Superintendent of Financial Institutions, and that goes to the Minister of Finance.

So if people bring forward concerns about a certain charitable organization and what activities they're involved in, there is a way to track that. I'm quite pleased that we've also assumed chairmanship of this international organization to assist in the tracking of proceeds of crime—terrorist or organized.

● (1625)

The Chair: Thank you.

Mr. Ménard, do you want to finish your questions?

[*Translation*]

Mr. Serge Ménard: Mr. Minister, at proposed subclause 85.1(3)...

Hon. Stockwell Day: Subclause 3?

Mr. Serge Ménard: You will recognize it right away, as soon as I read it to you. It says the following:

>) For greater certainty, the special advocate is not a party to the proceeding [...]

Hon. Stockwell Day: Excuse me, but I did not hear you. This is in subclause 3?

Mr. Serge Ménard: Of subsection 85.1. It says:

> For greater certainty, the special advocate is not a party to the proceeding [...]

This is a poor translation, and I hope it will be corrected.

It is stated that:

> [...] the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

Mr. Minister, I understand why the special advocate is not a party to the proceeding and why this relationship, that does exist, cannot be that of solicitor and client. You will therefore conclude, as I do, that the special advocate has no solicitor-client privilege obligation towards his or her client. Personally, even if I understand why there is no solicitor-client privilege, I do not understand why the special advocate is not required to keep secret confidences made by the individual involved, as would be the case for any other lawyer.

You seem to be saying, in your first response, that a lawyer with any integrity would keep this information secret. However, given the way this bill has been drafted—and you will agree—, anything the individual says to this advocate could one day be used as evidence against him or her. If you believe that a lawyer's integrity should force him or her to respect confidentiality, then I imagine that you would expect that we clarify the Bill in order to ensure that the individual who speaks to this advocate will be able to do so with the assurance that he or she is not there to trap him or her nor to draw from him or her information that the security services agents are unaware of.

Hon. Stockwell Day: Obviously, this is a situation for which we are clearly in disagreement. I agree with the Supreme Court that, I hope, will lay out the process that the Court has asked for.

In my view, we have responded to the Supreme Court's request, especially with regard to the questions you have asked. I have already indicated that under proposed paragraph 85.2(c), even with all of the specific protections laid out, the special advocate is free to call upon the judge in order to obtain further opportunities to pursue his or her discussions with the client in order to protect the latter's interests.

In clause 85, we can see that there is much protection. Later on, there are other protections, that are not specifically designated, but are there. If, even with all of these provisions, the advocate wishes to do something else in view of the evidence or of the concerns of the detainee, he or she will be able to call upon the judge in order to obtain other powers, other possibilities.

Mr. Serge Ménard: Mr. Minister, forgive me, but we are going around in circles.

[*English*]

I have the impression that you don't understand me. What I asked you, and you say you don't agree with me, is do you recognize that the way you've written the law here, anything the person says to the special advocate is admissible against that person later? Do you agree with this, or is that the part you don't agree with?

[*Translation*]

Hon. Stockwell Day: That is always the case. A witness, an individual who is accused, even under this Bill, could say something that could be used against him or her. But were an advocate to use something against a client, that would be contrary to the Bill.

● (1630)

[*English*]

Mr. Serge Ménard: Okay, fine. That's your interpretation. So you will agree with an amendment that makes it clear, will you?

The Chair: Monsieur Ménard, your time is up, so you'll have to pursue this maybe if you submit an amendment. I'm sorry. You'll have to come back.

Hon. Stockwell Day: No, it's fine.

Mr. Serge Ménard: I hope the persons who are behind you understand that you agree that we could put it more clearly.

[*Translation*]

Hon. Stockwell Day: I understand your concern, and if we disagree, this is not the first time.

Mr. Serge Ménard: Nor the last.

[*English*]

The Chair: Thank you.

The last questioner in this round is Mr. Norlock.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): I think we've approached some of the very tender subjects, some of the most important parts of the legislation that the anti-terrorism committee looked at, even though they weren't necessarily part of the act, as Mr. Cullen indicated.

I have had some people approach me, average Canadians, who believe that Bill C-3 is being very generous to people who are foreign nationals. They have the right to expect to be treated in accordance with Canadian law, but they also have the right to leave the country if they feel they're ill done by. That's the so-called three-sided jail.

One of the other issues that surrounds us in these times of great need in our country, which we hear both in this place and out in the communities, is the cost of doing business in governance. One of the issues that was brought up, and it's not to demean the process but to actually bring some light to the process to the average person on the street who listens to the esoteric arguments and some of the discussions that go on here, is have we costed it out?

One of the important things that we see in our judicial system is the cost of doing business and the cost of providing legal representation. Have we costed out some of the provisions that are being suggested? In other words, how much more is this going to cost the Canadian taxpayer? I guess what I'm trying to say is that good lawyers don't come cheap.

Hon. Stockwell Day: I guess I would ask, what price liberty, what price freedom? But I do agree that people raise the issue in terms that we also need to be responsible in relation to our tax dollars.

The facility itself, known as the detention facility, which was constructed by the Liberals—at the request, actually, of individuals who were at that time detained in a provincial system, which was not an appropriate place for them to be detained—was $2.3 million, to build a facility of six beds. So there's a cost there.

The average cost of a person in corrections, depending on the facility in Canada, can be as low as $87,500 but as high as over $300,000 per individual. There's a considerable range there, but it averages out at somewhat over $100,000.

That would not be the case for those detained in this particular facility. The costs are higher. You don't have the efficiencies and economies of scale that you would can apply when you have, say, 100 inmates.

The cost of a special advocate won't have to be assumed by the person being detained. Some person might call that a whole lot of expensive, free legal protection, but in Canada we do value those types of protections. So we think in most cases the taxpayers would see that it's money well spent to protect our liberties and at the same time protect citizens.

It's always a balance, it's always a challenge, and the costs will not be insignificant, but we believe the costs are appropriate when we're talking about the maintenance of our Charter of Rights and maintenance of individual freedoms.

Mr. Rick Norlock: Thank you.

The Chair: Are you finished, Mr. Norlock?

Mr. Rick Norlock: Yes.

The Chair: Okay, we will suspend for a few minutes.

Just before you leave, however, at the very end of the meeting we have to deal with a budget item for witnesses, and we also have another issue with a couple of witnesses who are not able to come.

Thank you, Mr. Minister; we appreciate your coming here.

● (1635)

Hon. Stockwell Day: Thank you, Chairman, and thank you for the good questions and advice from around the table. We'll consider it all. We appreciate that.

The Chair: Thank you.

● _____ (Pause) _____ ●

The Chair: Okay, I'd like to bring this meeting back to order.

We would like to welcome, from the department, from the Canada Border Services, Mr. David Dunbar; from the Department of Justice, Mr. Daniel Therrien; from the Department of Public Safety and Emergency Preparedness, Ms. Lynda Clairmont, Ms. Edith Dussault, and Mr. Warren Woods. Welcome to all of you.

Do you have any presentation or opening comments to make?

A voice: No.

The Chair: You will simply be answering questions.

Okay, it's a continuation of the meeting.

We will now move over to the Liberal Party in this round. It is still a five-minute round.

Ms. Barnes.

Hon. Sue Barnes: Thank you.

For general counsel, please, could you just inform us whether or not the special advocates in Great Britain after which this is supposedly modelled have solicitor-client privilege?

● (1640)

Mr. Daniel Therrien (Acting Assistant Deputy Attorney General, Citizenship, Immigration and Public Safety Portfolio, Department of Justice): They do not. They do not have solicitor-client privilege.

Hon. Sue Barnes: Okay.

I would like to go on and ask you about the new section—I think it's proposed subsection 82.2(1)—that allows for a warrantless arrest by a peace officer on breach of conditions. Why did you decide to go warrantless?

Mrs. Lynda Clairmont (Associate Assistant Deputy Minister, Emergency Management and National Security, Department of Public Safety and Emergency Preparedness): Right now, those arrests without warrant, if they're violating their conditions of release, are built into the release order. So we were attempting to just formulate that in law.

Hon. Sue Barnes: So right now anybody on condition has a breach of condition saying it's automatic?

Mrs. Lynda Clairmont: Generally that's how it's dealt with. In their conditions of release, if they breach the terms of their release, then they can be picked up.

Hon. Sue Barnes: Okay.

I see the minimum standards you have for your special counsel in the legislation, but I know there would be a concern about what resources mean. You're the people who will be designing the regulations. I'm not talking about just desks and offices. I'm talking about real resources of access to proper information and advice by security-cleared people.

What are you thinking of? Can you elaborate? I really didn't get any real information from the minister's answer. He just replied that it was in the regulations. What are you talking about? I know the people who would want to be special advocates and who are needed as special advocates will need to know this, including the other aspect of what I call the compensation. I hope this isn't something we're thinking—at a legal aid rate of return for trying to attract people to do this job for us.

Mrs. Lynda Clairmont: I would ask my colleague from the Department of Justice to deal with that, because they're setting up the program.

Daniel.

Mr. Daniel Therrien: To start with the question of compensation, they would not be paid at the legal aid rate. What we have in mind is that special advocates would be people of some experience, paid accordingly.

They would have various types of experiences. Definitely, at the core, we think that special advocates should have important litigation experience. Then the type of experience will be able to be one of various kinds, but at the core, litigation experience and probably, as an asset, knowledge of national security law, immigration law, perhaps human rights law.

The idea is to attract a sufficient pool of people with significant experience, so we don't want the criteria to be too narrow—say, many years of litigation experience in immigration law with national security, etc.—because the pool of people might be too small. We want to have criteria that recognize experience and knowledge but not be *trop pointu*, not too narrow.

That may mean that the people we have in mind will have experience and knowledge, but we may have to supplement their knowledge in some respects. For instance, if we have someone with, again at the core, significant litigation experience and knowledge of national security law but not immigration experience, we would provide training to supplement that, if required. Or vice versa: if someone has knowledge in a certain area of the law but not national security law or not hands-on knowledge in the national security field, we may supplement that. That calls for some training capacity, then, to again supplement the knowledge base of special advocates.

Hon. Sue Barnes: Will the detained person have the right to choose from among a panel, or will he or she be assigned a specific person? And if for some reason that relationship doesn't work out, will they be able to choose another person from that panel?

Mr. Daniel Therrien: It is the judge who will decide on the special advocate, with submissions from both the individual concerned and the government. So the individual will have a say, but will not have the final say. The judge will decide. If there is a breakdown somehow in the relationship, it would be open to the person to again apply to the court to change the special advocate.

Hon. Sue Barnes: The documentation that the special advocate gets to see, is that documentation that's been redacted, or will they see the original text, the full text?

● (1645)

Mr. Daniel Therrien: They will see everything the court sees, which is everything.

The Chair: Thank you very much.

Now we'll move over to Mr. Mayes, for five minutes please.

Mr. Colin Mayes (Okanagan—Shuswap, CPC): I'll follow up on some of the questions of Ms. Barnes.

Who will determine what is significant experience, what is important litigation, what is some experience? Who's going to sit down and make that determination?

Mr. Daniel Therrien: I'm using vague language because this will be in the regulations, essentially. When you see the regulations, you will see what "significant" means. It will be in the number of years. What we are fairly certain will appear in the regulations is, at the core, litigation experience. In the regulations you will see how many years, in what area, etc. So it will be quite clear in the regulations.

Mr. Colin Mayes: Will it be somewhat independent of the government? Would it be a body that would be outside of the jurisdiction of the government or influence by the government that would make that determination?

Mr. Daniel Therrien: Absolutely. First of all, by statute, the role of the special advocate is to represent the interests of the individual, not to represent the government. The rules leading us to the selection of special advocates are geared to ensure independence from government.

First, as I said, the judge will actually appoint the special advocate. The roster of special advocates will be determined by the Minister of Justice but following a recommendation of a group of persons, probably a selection committee, that will have representation outside government and will actually be composed mostly of people from the outside. So the bar, obviously, would be an important player in the body that will make recommendations to the justice minister on the composition of the roster.

All of this is to take place with a view to ensuring that the advocates who will be part of the roster and eventually play a role to represent the interests of the individual are, and are seen to be, independent from government.

Mr. Colin Mayes: Thank you for that reassurance.

The Chair: You're done, Mr. Mayes?

Does anybody from the Liberal side have a question?

Mr. Wappel, with the committee's consent, of course.

Mr. Tom Wappel (Scarborough Southwest, Lib.): I appreciate that very much, since I'm not an accredited member of this committee.

I'd like to ask the witnesses two very specific things. In the report of this committee on the Anti-terrorism Act, there was a brief chapter on security certificates. There were two recommendations. One recommendation dealt with adding the word "reliable" to the type of evidence, and I notice that the government accepted that recommendation in paragraph 83.(1) (h), so I thank the government for that.

However, I'm a little unclear on the government's position on recommendation 52. Recommendation 52 recommended that a determination on the reasonableness of the certificate should be made before a determination on whether or not a person would be removed to possible torture. The new bill doesn't contain any provision similar to section 79 of the present act. So I guess taking that out of the act addresses the committee's recommendation. At least that's how I'm reading it. However, proposed subsection 77.(3) provides that once the certificate is referred there will be no proceeding respecting the person other than proceedings relating to some named sections. One of the named sections is section 112, and section 112 provides—and I'm a little confused about it, so I'm hoping somebody from the Immigration Department can help us out here—section 112 provides that a person may apply to the minister for protection if they're named in a certificate in subsection 77.(1). So they can apply for protection, and yet subsection 77.(3) says that refugee protection cannot be granted for a person who is named in a certificate in subsection 77.(1).

Is there a difference between refugee protection and the protection that section 112 talks about?

● (1650)

The Chair: Mr. Woods.

Mr. Warren Woods (Senior Policy Analyst, Operational Policy Section, National Security Policy Directorate, Department of Public Safety and Emergency Preparedness): Yes.

If I understand correctly, the committee that studied the Anti-terrorism Act, and it also included the study of IRPA in their jurisdiction, were concerned with the Federal Court process that was a dual process. It included both an assessment as to whether or not the certificate was reasonable and it also determined if a pre-removal risk assessment issued by the Minister of Citizenship and Immigration was lawful. So it had this double assessment process, and that process was complex and it led to delays in the issuance of both PRRA decisions as well as reasonableness findings from the Federal Court.

This played out in a number of cases, so the committee recommended that we eliminate the suspension that suspends the reasonableness hearing. So this has been done in Bill C-3. That's been done, and it goes further than that. It allows the reasonableness hearing to proceed in parallel with an application for refugee protection or an application for a pre-removal risk assessment, so that's what you're reading in subclause 77.(3).

Mr. Tom Wappel: So instead of suspending the reasonableness hearing, it allows both to proceed at the same time?

Mr. Warren Woods: And parallel from each, exactly, to arrive at a decision under their own natural progress.

Mr. Tom Wappel: Thank you. That's how I'm reading it, and that's what I understood. So it's almost what the committee recommended, but it's tweaked.

Mr. Warren Woods: Yes.

Mr. Tom Wappel: That's fine. It's better than not taking the recommendation.

The grounds for issuing a certificate are inadmissibility "on grounds of security, violating human or international rights, serious criminality or organized criminality". Those are the same words under subsection 112.(3) that would prevent a person from being granted refugee protection. What's the distinction?

Mr. Warren Woods: You could say that there are two types of people who become subject to a certificate, two types of foreign nationals or permanent residents. Some of them enjoy conventional refugee status. Those individuals do not apply for a pre-removal risk assessment or PRRA, because they've been deemed to be a refugee. But those who do not have conventional refugee status are entitled under IRPA to apply for pre-removal risk assessment. The assessment will assess whether or not they face harm in their source country—torture or other forms of serious harm or ill treatment. If they're granted protection under the PRRA process and they're subject to a certificate that's been found to be reasonable, there would be a deferral of removal in their case, if there's a potential for harm in their source country.

Mr. Tom Wappel: Thank you very much, Mr. Chairman.

Thank you, members of the committee, for allowing me to ask those questions.

The Chair: Thank you.

The last person in this round is Mr. MacKenzie.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair, and thanks to the panel.

Can you explain to us what happens if this is not passed by February 23, 2008?

Mrs. Lynda Clairmont: If this isn't passed by February 23, 2008, then the applicants, or the people who are being detained or are on conditional release under security certificates, would appeal to the court to have those security certificates or conditions of release quashed, and they would be successful.

● (1655)

Mr. Dave MacKenzie: If the bill is passed February 23, on or before then, how does it apply then to the people who are currently either being held or are on release?

Mrs. Lynda Clairmont: Then the ministers of immigration and public safety would receive new security certificates, which they would be required to sign. Then the individuals who are being either detained or are on conditions of release would go through the process before the court with a special advocate.

Mr. Dave MacKenzie: So they would then have reviews within 48 hours and all of the provisions of the act would then take place, giving them these rights that they perhaps didn't have in the past. Is that correct?

Mrs. Lynda Clairmont: Yes.

Mr. Warren Woods: The bill itself has transitional provisions towards the back of it. Those provisions capture how the current cases would be treated under the new legislation, if new certificates are issued against individuals currently subject to a certificate. Obviously if a person is detained, they would need to have a new detention review and a special advocate would have to participate there, and new reasonableness hearings before the Federal Court would occur and a special advocate would have to be there. There are other details that are contained in the transitional provisions that are essentially there to provide an orderly transition between the existing process and the new, and to also give the individuals the benefits that were ordered by the Supreme Court in the Charkaoui decision.

Mr. Dave MacKenzie: One of the things that we frequently hear is some issue with respect to the U.K. system, and perhaps what some would view as a shortcoming. My understanding is that the Supreme Court of Canada did look at the U.K. model and had some recommendations. I would feel comfortable, but I would like to hear from you folks that you've looked at the U.K. model. If there are areas that we can improve, can you tell us what they might be, and what differences there are in the two models, the first being proposed here and what the U.K. model is?

Mrs. Lynda Clairmont: First of all, we did look at the U.K. model, particularly with respect to the special advocates. I think when the minister was testifying he indicated some of the differences between what we're proposing and what exists in the U.K. system. Essentially, what we tried to do was to look at the system—and we went mostly from the Supreme Court decision—and as the minister said, we tried to learn lessons that the U.K. had.

Did you want to speak directly to some of the actual differences?

Mr. Daniel Therrien: Let me start with what the Supreme Court actually said in Charkaoui about this, because that involves your role as parliamentarians. The Supreme Court, in Charkaoui, found, as the minister said, essentially two flaws in the current security certificate process, one of them being that the individual who is the subject of the certificate, because he or she does not see all of the evidence, was not treated fairly according to section 7 of the charter.

The court does not actually precisely mandate a special advocate regime. What the court does is find the current process, in that respect, unconstitutional and says there should be an improvement, some modification to the current process, to replace or accommodate for the fact that the individual will not be able to see all of the evidence. So the court accepts that, except that it's necessary for the government to act in a way that does not give all of the evidence against the individual. Obviously this is an exceptional process, but the court accepts that. It finds that the process as currently constructed is generally unfair, in part because of its reliance on the Federal Court to test the evidence, and then it says it's up to Parliament to devise a way to make up for the flaw.

In its judgment, the court looks at a number of alternatives, including the U.K. system and others. We look to the U.K. system because there is a lot to learn from their regime, from their laws. We were driven to the U.K. system, which we did not apply completely but in good part, in part because the Supreme Court mandate was to make sure that the special advocate represents the interests of the individual. The only living example of this was the U.K. special advocate system, so that was essentially how we got to the U.K. model as the starting point.

There are differences between what we have and the U.K. model. Before I get to the differences, let me point out, perhaps after hearing from Ms. Priddy, that the U.K. House of Lords had occasion to look at the new special advocate system recently and it essentially found that system to be in accordance with U.K. law and European law. So the system was found to be good.

● (1700)

The Chair: I'm sorry, what you're telling us is very interesting and very helpful, but the time is up. Maybe a subsequent questioner will allow you to complete your answer here, but just in fairness to everybody who still would like to put some questions on the record, I apologize.

Mr. Daniel Therrien: Sure.

The Chair: We'll now begin again with the Liberal Party, and then we'll go to the Bloc, the New Democratic Party, and the Conservative Party.

Ms. Brown.

Ms. Bonnie Brown (Oakville, Lib.): Thank you, Mr. Chairman, and welcome to all the witnesses.

Because all cases lean pretty heavily on evidence, I'm wondering if anyone here present has actually had the occasion to read through a file that contains the secret evidence on any one of these people who we've already had under security certificates. Is there anyone here who has that experience of reading through the secret evidence?

Mr. David Dunbar (General Counsel, Canada Border Services Agency): I had the occasion to look at the secret evidence in relation to Mr. Zundel, not one of the current cases but a previous case.

Ms. Bonnie Brown: That's a domestic case, as opposed to a case where the evidence comes from overseas.

I'm wondering, in those cases, what percentage of the evidence was gathered by agents of the Canadian government as opposed to agents of other governments. But no one knows that because no one has read through the evidence in any of those cases of people who are currently either in detention or released under conditions. Those are the cases I'm interested in, not a domestic case like Mr. Zundel.

So no one here has any experience of....

Hon. Roy Cullen: I have. I'm not saying a word.

Ms. Bonnie Brown: Yes. He's fascinated by an Iranian assassin.

So he has read through the evidence, but does anybody know what percentage of that evidence was gathered, let's say, by the CIA, the group that brought us weapons of mass destruction in Iraq, which never existed, or perhaps the group that told us all about Maher Arar and that incorrect evidence?

So how can you people be putting this forward unless you're absolutely sure that Canadians with Canadian values assembled the evidence? Do you have any kind of guarantee that this happened or that it's actually gathered from a consortium of international spy agencies?

The Chair: I have trouble, Ms. Brown, with all due respect, with how this relates.

Ms. Bonnie Brown: Of course it relates absolutely directly, Mr. Chairman, because the whole issue of full disclosure of the evidence is one of the key points in the researchers' notes. So the question I have, before I'd move to full disclosure, is how do we know the evidence is valid or invalid?

The Chair: Does anybody want to tackle that?

Mr. Daniel Therrien: I can try to answer. I haven't read the entire file, so I do not speak from that experience, but even in the current system and in the new system one important safeguard is the role of the Federal Court.

The Federal Court reviews all of the information and only confirms the validity of the certificate if it is of the view that it is reasonable, based on the evidence it sees. The Federal Court hears the evidence, sees the CSIS agent who has prepared the report or is involved in the preparation of the report, but at the end of the day, the Federal Court is a very important safeguard in addressing the issue. And the Supreme Court never indicated that this part of the Federal Court role was invalid or not reasonable. So that remains. It exists and it remains. What the Supreme Court did was more to say that the fairness towards the individual left something to be desired, but in terms of testing the validity of the information upon which the certificate is based, the Supreme Court did not find any fault.

● (1705)

Hon. Roy Cullen: On a point of order, Mr. Chairman.

The Chair: Yes, Mr. Cullen.

Hon. Roy Cullen: With respect to my colleague, I want to note that the availability of this information has to do with security clearance, and what you're basically asking these officials is what level of security clearance they may or may not have. But ultimately the minister and those who are sworn under the Privy Council and others, senior officials, are privy to that information. So there's no excuse. That information is available to the minister and to others, and other senior officials. But to put people on the spot to find out what their level of security clearance is I think is inappropriate.

Ms. Bonnie Brown: No, I wasn't trying to find that out. I was trying to raise a question about the validity of the evidence as collected when we already have international examples of evidence collected and used against people or for other purposes when the evidence five years later was proved to be totally faulty. I'm just trying to put that on the table.

Moving on to—

The Chair: You're way over time now, so I'm sorry.

We'll go over to the Bloc Québécois. Mr. Ménard.

[*Translation*]

Mr. Serge Ménard: I know many proceedings on appeal, but none that is as restrictive as the one you have devised in this instance.

Could you tell me where you found the model for the right of appeal in Bill C-3?

Mr. Daniel Therrien: The model comes from the remainder of the Immigration Act. All judicial reviews of decisions made under the Immigration Act are subject to a limitation, which is the certified question of general importance. It is a request for leave procedure under the purview of the trial judge. This procedure exists and is used throughout the Immigration Act.

Mr. Serge Ménard: So you are saying that under the Immigration Act the same judge who made the decision writes the document that will be used to decide if an appeal is allowed? He is the one who decides for what reasons an appeal can be made?

Mr. Daniel Therrien: The judge decides if there is a matter of general importance. However, once the judge has made that decision, the appeal is not necessarily limited to the certified questions. The filter is the need to convince the trial judge that there is a question of general importance, which he must then spell out, but case law says that once that question has been stated, the appeal proceedings can go beyond that.

Mr. Serge Ménard: I will check that out. I am intrigued. You are saying that I can appeal a decision a judge just made against me, but that this same judge will decide for what reasons I can appeal. Furthermore, he will decide... This seems to be a beautiful system to move law forward but it does very little to reassure the person concerned.

But you say that this is already in the Immigration Act.

Mr. Daniel Therrien: This is a system that has been in place for many years under the Immigration Act. Obviously, it shows a desire to move law forward regarding matters of general application while having a system that produces decisions as quickly as possible.

Mr. Serge Ménard: If I remember correctly, in the Supreme Court decision in the Charkaoui case the court looked into the issue of how long these individuals might remain in detention.

I almost feel that the court said—it did not say so, but this is what I think—that the more time goes by the less the individual can be considered dangerous. Even for people who have killed, who committed first degree murder, we agree that after 25 years they can be paroled.

What is your answer? How long are we going to detain these individuals? For how long are we going to maintain in detention these individuals who might have had a relationship with terrorists?

● (1710)

Mr. Daniel Therrien: I might start by answering about the Supreme Court and my colleagues might want to add something.

The Supreme Court provided a formula to assess the legitimacy of a detention that gets longer and longer and this is the formula we intend to apply without codifying it in all its details.

Therefore, the bill contemplates regular reviews of the individual's detention and the factors to be assessed are those spelled out by the Supreme Court, including the passage of time and what it means for the danger the individual represents etc. The Supreme Court spelled out a number of criteria and they will be applied case by case by the Federal Court judge. We believe that giving this power to the Federal Court judge ensures the required fairness and judicial review.

Another factor provided by the Supreme Court is that detention in matters of immigration must necessarily have deportation as its purpose. It is another aspect that needs to be taken into account in the Federal Court review, every six months, the legality of the individual's detention.

[*English*]

The Chair: We'll have to wrap it up. Are you pretty well done, Mr. Ménard? You're out of time. You might not get another turn.

[*Translation*]

Mr. Serge Ménard: Do I have some time left?

[*English*]

The Chair: I'll give you 15 seconds. I'm being very generous.

[*Translation*]

Mr. Serge Ménard: Now I have a blank. Ah! yes, I remember, it was about solicitor-client privilege.

What danger would you see if there was a requirement for the special advocate—in French, you call him *défenseur*—to keep secret information provided to him by the individual?

Mr. Daniel Therrien: I am the one with a blank now.

[*English*]

Do you want to take that?

Mr. David Dunbar: Certainly.

Let me go back and talk a bit about why we say what we say in the act about solicitor-client privilege. The reason we say that—and I believe it's the same reason given by the British, as well—is that lawyers, when representing an individual, have an obligation to that individual to be perfectly frank and candid, to give advice to the best of their ability and not hold back, and to be fully frank in providing the advice and not hide things from the client.

In this case, there are communication restrictions on the special advocates. The special advocates, if you didn't say something about solicitor-client privilege, would find themselves pulled between two obligations: the obligation to maintain the secrecy of the information on the one hand and the obligation to be perfectly frank with the client on the other. That's untenable. So in order not to have that situation occur, we have to deal with it. And we've dealt with it by saying that the solicitor-client relationship isn't here. Having said that, it certainly was not the intention in fixing that problem to then turn around and make the special advocate a compellable witness based on what that individual has heard from the person who is the subject of the certificate. Absolutely not.

The Chair: Thank you.

We'll go to Ms. Priddy.

Ms. Penny Priddy: Thank you, Mr. Chair.

I have only five minutes, so I will ask short questions. If you will give me short answers, that would be a very fine thing.

Earlier—and I perhaps was unclear on the answer—when you were asked how the special advocate was selected, I heard that the lawyer for the person being detained made a submission. Did I hear that somebody else made a submission too?

Mr. Daniel Therrien: It is the government.

Ms. Penny Priddy: Why would the government do that if we have this list of fine, upstanding, respected, experienced lawyers? Why would the government need to make a submission with respect to which of those special advocates should be used?

Mr. Daniel Therrien: It would be difficult to give a short answer to that question.

The U.K. experience, for instance, tells us that there is a phenomenon called tainting that occurs.

● (1715)

Ms. Penny Priddy: Yes.

Mr. Daniel Therrien: And the government would be concerned with tainting and would recognize tainting and may have to make submissions on that issue.

Ms. Penny Priddy: I see. Thank you.

Do you know if—because there are so many people who are interested in this, and I was not here before—either the Canadian Arab Federation or the campaign to stop secret trials in Canada presented before you as you developed your legislation?

I'll ask this question differently at the end, but I just want to know if they—

Mrs. Edith Dussault (Director, Operational Policy Section, National Security Policy Directorate, Department of Public Safety and Emergency Preparedness): Perhaps I can answer that.

There was no actual presentation made to the government. However, there are various other means. The Supreme Court heard many stakeholders, and the committees and parliamentarians, as well, have heard from various stakeholders, and through those decision-rending bodies we took advice.

Ms. Penny Priddy: I see. Thank you.

Can you tell me, aside from the compensation the lawyers will receive—I know it's in the regulations, as I heard earlier—what the budget will be for this? What if, for instance, the special advocate decides, based on the information she receives or sees, that she needs to have more research conducted? Can you tell me what the budget will be for this department?

Mrs. Edith Dussault: Perhaps I can answer that, as well.

Because it is for Parliament to decide on this bill, it's very difficult at this point in time to arrive with specific costs attached. We'll have to look at what Parliament decides, and then after that we'll be able to determine the specific costs.

Ms. Penny Priddy: So there has been no money put aside at this stage for this.

Mrs. Edith Dussault: Of course, we're doing some assessments, but there is no money put aside at the moment.

Ms. Penny Priddy: Thank you.

This is my last question. Do you know what the operating cost is for the detention centre at Kingston?

Mr. Warren Woods: We don't have someone from the Canada Border Services Agency here, but I think on their website and publicly they've stated that it costs in the range of $2.3 million on an ongoing basis.

Ms. Penny Priddy: The minister said that was a capital cost.

Mr. David Dunbar: Could we just undertake to provide you with the exact number?

Ms. Penny Priddy: Yes, please. Thank you.

Thank you very much, everybody.

I'm fine. Thank you, Mr. Chair.

The Vice-Chair (Hon. Roy Cullen): Thank you, Ms. Priddy.

I had put my name down. I was on the other side, but I'm going to cede that to Mr. Dosanjh, and that will wrap it up.

Hon. Ujjal Dosanjh: Thank you.

I have the same question that my colleague Serge Ménard had with respect to the absence of solicitor-client privilege being fine but the non-compellability of the advocate not being explicitly recognized. In fact the advocate is not explicitly prohibited from disclosing that information, not just to the crown, but to anyone in the world. One is putting the individual at a great disadvantage. He or she can't get any information out of that solicitor-client privileged information, but he or she is at risk of being exposed to the entire world, maybe in a book ten years from now, or in a newspaper column, or maybe actually to the crown. Why is there hesitation to explicitly providing that individual that protection from disclosure?

Mr. Daniel Therrien: As my colleague said, it is not our intent to make the special advocate compellable.

Hon. Ujjal Dosanjh: That's not the issue. The issue is that the special advocate has information. He is not under oath to not disclose that information to anyone. Ten years down the road, maybe it will be in a column; maybe it will be in his autobiography.

I understand national security. That's why we support this legislation. It has defects. Why would we not afford even the worst individual the kind of protection we would want for ourselves if we were stuck in that situation? Why is the department hesitant? We should provide explicit protection. We are taking away the right of the solicitor-client privilege from this individual, yet we're not prepared to offer the protection this individual needs on the other side of the equation.

● (1720)

Mr. Daniel Therrien: As officials, our role is to explain what the current version of the bill was meant to say, but we're ill-placed to tell you how to amend it.

Hon. Ujjal Dosanjh: Can I ask you a question? I don't mean to badger you. You're civil servants, and you're being very civil to us. But it is up to the civil servants to actually explain the rationale as to why certain protections might be missing. You say that it wasn't your intent to actually make that information disclosable, which is slightly narrower than information being non-disclosable, or the individual compellable. I take your remark at its face value, but I am left wondering what the rationale is, and I can't comprehend it for the life of me.

Thank you.

The Vice-Chair (Hon. Roy Cullen): Thank you.

This will be our last line of questioning.

We have Mr. Norlock.

Mr. Rick Norlock: Earlier, during a question from Ms. Priddy, she indicated that the U.K. House of Lords had not thought very highly of the special advocate provisions and that it had given a considerable number of reservations. Yet upon questioning I don't know if it was Mr. Therrien or Mr. Dunbar who said that the House of Lords recently said the current legislation in Great Britain was within accordance with U.K. law as well as European jurisprudence. Am I correct in saying that?

Mr. Daniel Therrien: Yes, and I'll expand on that.

Mr. Rick Norlock: Please don't expand too much, because there are a couple of other questions I'd like to get in.

Mr. Daniel Therrien: The principle in the decision of the House of Lords is that the role of the special advocates is consistent with U. K. and European law. The one caveat was that the House of Lords added that it might be in exceptional circumstances that special advocates will not be sufficient to ensure a fair process. In these exceptional cases the trial judge should have discretion to find that the role of the special advocate is not sufficient and to not allow the government to proceed based on the secret information. That is for exceptional circumstances. The norm is that special advocates are sufficient to ensure a fair process.

Mr. Rick Norlock: I made a note, and I may have made my notes a little faulty, but there's very good information flowing. Is it not true that the Federal Court sees all the evidence? In Bill C-3, in our case, we have a balance that the U.K. doesn't, in that the court does see all the evidence and can render decisions vis-à-vis special advocate and other situations. We covered that possible inequity or fault that was seen.

Mr. Daniel Therrien: Certainly the Federal Court, under the charter, would have the opportunity and responsibility to decide whether the system, as applied in a given case, met the charter requirements. At the end of the day, that would ensure fairness in the process.

Mr. Rick Norlock: I was part of the subcommittee that looked at this, created the law, basically reviewed the Anti-terrorism Act that the previous government put through, and fine-tuned it. Then the Supreme Court—although this is not part of that act—had some concerns. We've addressed those concerns.

For an average Canadian looking at the system, we've painstakingly, at great length, listened to every special interest group—as a friend of mine used to say, the people who are interested in the pain in your left toenail—and we've gone through every single special interest group. We've listened to them all. We have probably crafted in this country some of the best legislation when it comes down to the protection of the average Canadian from people who are not Canadian, the people who are perceived to have come to this country to do us harm. We drag ourselves through the smallest knothole to make sure that some foreign person is protected. To the average Canadian—and maybe the justice minister doesn't agree with me—the cost of that is tremendous.

We say that's part of the cost of being a free nation. I guess when we talk about the three-sided cell, if we're that bad a country, if we don't provide that kind of protection, you have an option: you can go somewhere else. Being emotional is just one side of the philosophical disagreement, but we have to make sure that we do give all the protections that are necessary.

I want to get it correct. If the court sees that the special advocate is put in a position, or there is a situation that arises in which the special advocate cannot be of specific assistance to the person who is being held on the certificate, the court can look at that situation and make the necessary amendments or changes or address the specific instances. Am I correct in that?

Mr. Daniel Therrien: We think, of course, that the system we've devised is constitutionally sufficient. In the system of law that we have, it is up to the courts to determine the constitutionality of the legislation. A court faced with that situation would have the tools to make the appropriate decision. To be clear on this point, our view is that the legislation in front of you is constitutionally sufficient. It addresses fully the Supreme Court decision in Charkaoui, and it is constitutional.

● (1725)

Mr. Rick Norlock: Thank you.

The Vice-Chair (Hon. Roy Cullen): Thank you, Mr. Norlock.

Thank you to all the officials for being here today and answering our questions. I had another one, but in the interest of time, I won't ask it.

I think we can adjourn for a couple of minutes and then go in camera to deal with a few items of committee business.

Thank you.

[*Proceedings continue in camera*]

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliament of Canada Web Site at the following address:
Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca
