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Chair

Mr. Garry Breitkreuz

Standing Committee on Public Safety and National Security

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● (0905)

[*English*]

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): I'd like to bring this meeting to order. This is meeting number 5 of the Standing Committee on Public Safety and National Security.

Today, we are examining Bill C-3, An Act to amend the Immigration and Refugee Protection Act, focusing on certificates and special advocates, and to make consequential amendments to any other acts.

For the first hour this morning we would like to welcome two witnesses to our committee, Professor Craig Forcese and Mr. Lorne Waldman.

We have one hour with you gentlemen. You may make an opening statement for approximately 10 minutes. I suppose you know the practice at the committee is then to go around, and I'll offer questions and comments.

Ms. Priddy, do you have a comment?

Ms. Penny Priddy (Surrey North, NDP): With the greatest of respect to the witnesses, this is not about the witnesses who are here, and who I know.

Before we begin, I want to put this on the record, Mr. Chair. Even since our last discussion, I have had a number of letters from people who are concerned, such as Amnesty International, Human Rights Watch, etc., that they have not been—

The Chair: With all due respect, that is probably a future business of the committee issue. I don't know if we should take any time right now.

Ms. Penny Priddy: I'm just putting it on the record. I'm not asking for a discussion about it.

The Chair: Could you wait until it's—

Ms. Penny Priddy: If it goes under future business and it's in camera, then it doesn't get on the record.

The Chair: You'll have a chance to do this when it's your turn.

Ms. Penny Priddy: All right, thank you. I'll use it then.

The Chair: Thank you. Otherwise, you're going to take time away from our witnesses.

I think without any further ado, we'll go ahead.

Which of you gentlemen would like to go first?

Mr. Lorne Waldman (Barrister and Solicitor, As an Individual): I'll go first. As lawyers, we have a hard time keeping to our time limits, but I have my watch here and I'll try to do five minutes, and Professor Forcese will do five minutes as well.

First we'd like to thank you for the invitation. I was asked by many of my friends to echo the concerns of Ms. Priddy. There are many people who would like to speak, and we received numerous e-mails asking the committee to consider having more hearings because we believe the bill is extremely important and goes to very important issues of the rule of law. So we're expressing the views of many other organizations that asked for the opportunity to speak.

I thought I would start off by saying I've done security certificate cases. I don't know how many other witnesses before the committee have done them, so by an example, I wanted to tell you what it's like. I used it recently in another context, but I think it serves the purpose.

Imagine that Professor Forcese gets charged with murder and he asks me to represent him and I say, “Well, we don't know who you've killed, we don't know who the witnesses are, and we don't know what the evidence is.” So I ask Craig, “Did you kill anyone? Who did you kill?” He says, “I didn't kill anyone.” “Well, who do you think they might think you killed?” That's what it's like to defend someone under a security certificate.

You don't know the evidence. You don't know the witnesses. You don't get the opportunity to challenge them within the context of the hearing process. All the substantive evidence is sealed and is only reviewed by the people who have access to the in camera hearings.

That's why we both believe that security certificates are fundamentally unfair and that the Government of Canada should explore other alternatives, rather than security certificates, to deal with this very difficult problem.

Having said this, Professor Forcese and I embarked upon a study because we knew this bill was coming forward as a result of the Supreme Court of Canada decision in Charkaoui. We did the study with a view to trying to look at the other models that are out there and to consider the extent to which the other models addressed the concerns we had.

The Supreme Court of Canada basically instructed Parliament to try to come up with a model that was as close as possible to allowing full due process rights while permitting some evidence to be held in camera. They considered several options in the Supreme Court of Canada decision, one of them being special advocates, the other being SIRC.

The important thing to understand is that if you're going to deprive the person accused of being a member of a terrorist organization access to the evidence that is being used against them, so they and counsel can effectively challenge it, you have to try to come as close as humanly possible to some kind of alternate model that meets the requirements.

Our study of the special advocate model, which we understand was the model for this legislation, led us to believe that it's woefully inadequate. Indeed, there have been so many criticisms of it that there have been significant changes to the model in the United Kingdom, many of which have not been incorporated into this bill. The bill we have here seems to have not even taken into account some of the changes that were put into place in the U.K. system.

Given the challenge of trying to come up with a system that comes as close as humanly possible to meeting the requirements of allowing a person to participate fully in the process, the conclusion that Professor Forcese and I came to, after our study looking not only at Canada but also at the United Kingdom and New Zealand—which also has a form of special advocates—is that the model we have already in Canada is the best option, and that model is the Security Intelligence Review Committee model.

The Security Intelligence Review Committee was routinely involved in immigration matters up until 2002, when the immigration law was changed. They routinely deal with all sorts of national security complaints. In the context of those hearings, they have security-cleared counsel that review the entire file that is the property of CSIS, so they have access to the complete file. They get full disclosure, which is one of the main flaws of this system.

● (0910)

The second key issue that occurs within the context of the Security Intelligence Review Committee process is that counsel, who represents the committee, who is independent counsel, and who, I would say, has a role analogous to that played by the special advocates in the U.K. system, is not barred under any circumstances from continuing to meet with the person who is the subject of the hearing after he or she reviews the secret evidence. This is extremely important for any fair process.

So what we're suggesting to you in our report is that there is another system. It's a made-in-Canada system that's worked for over 20 years, and it's a system that is far superior to the one that is in this bill.

Acknowledging that there is a bill, Professor Forcese is now going to discuss with you how this bill could be changed to bring it in line with what we believe are the minimum requirements. If you continue with this bill, I can guarantee you that counsel will argue that the Supreme Court of Canada said you have to come as close as possible to a fair hearing, and this bill is far short of what's provided for in the Security Intelligence Review Committee.

So the government is going to have to show why they didn't implement that process, and there are likely to be constitutional challenges, whereas if you implement the SIRC process, I can assure you that it would be very difficult for lawyers like myself to engage upon a constitutional challenge.

Professor Forcese.

Prof. Craig Forcese (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Thanks very much, Lorne, and thanks to the committee and to the chair for having us here today.

As Lorne noted, we're proposing a series of relatively minor amendments to Bill C-3 that incorporate these key objections that Lorne has raised. We have tabled a document with you that is essentially an annotated version of Bill C-3. The amendments we're proposing amount to maybe 500 words, and with those 500 words we think Parliament could graft onto Bill C-3, as presently constituted, something analogous to what happens in SIRC.

The two key areas enhanced in these proposed amendments are, first of all, an absolute statutory obligation on the government to disclose everything—all relevant information—so in our proposed language here we define what we mean by "relevant information". We impose the obligation to disclose all relevant information on the government. We then certify or allow the special advocate to challenge the scope of disclosure by the government and then to seek the assistance of SIRC, which would have access to all the government information, to certify that in fact there has been full disclosure. This is a way of wrapping SIRC, which has a statutory authority to see all the information in the possession of CSIS except cabinet confidences, into the process of scrutinizing the scope of disclosure.

Now I want to underscore that we're not proposing this because we think that just in principle it's a good idea; we're proposing it because in the United Kingdom the special advocates told us they don't get to see everything. They take the view that there is an obligation on the government to disclose all information, including exculpatory information, but the special advocates in the U.K. have told us that there are instances in which they have discovered exculpatory evidence in case A that was not disclosed, and they only find this out through happenstance in case B. We want to pre-empt this possibility.

The other reason we're urging a statutory full disclosure obligation is the Arar commission experience. Counsel for the Arar commission told us that but for the fact that he could subpoena information above and beyond what the government thought was relevant, the truth in relation to Mr. Arar would never have come out. Both of these experiences drive our recommendation in this area.

As Lorne noted, there is a second broad area that we think requires tinkering. It is to apply an affirmative right for the special advocate to continue to communicate with the interested party after they have seen the closed information, the secret information. That is a practice, as Lorne noted, that is available in SIRC. Outside counsel for SIRC, who we hoped would be able to attend today but is not able to because he's in court right now, told us quite emphatically that he has seen cases collapse because he was able to ask for information that did not betray any secret that this counsel had in his possession. He was able to ask for information from the interested party that then prompted the government case to collapse in a SIRC proceeding.

That experience again—this practical, on-the-ground experience—suggests that it's vital for this special advocate to have continued access to the interested party, subject to an obligation not to disclose a secret, so the questioning would have to be oblique, but even oblique questioning, we're told, has resulted in the special advocate receiving information that causes government cases to collapse.

The last point I'll make, because I know our time is coming to an end here, is about an issue that Lorne did not raise. We have here a requirement in the bill that a summary be prepared for the interested party themselves. It is a summary prepared initially by the government and then endorsed by the judge, essentially. That summary, right now, contains information that a judge decides does not impair national security.

That is a very different standard from the standard applied in our Canada Evidence Act. In the Canada Evidence Act, information that raises a national security interest can be released if that interest is outweighed by a public interest in a fair trial. So there's a balancing that goes on in the Canada Evidence Act.

The absence of a balancing in this bill renders this bill, in our view, inconsistent with the House of Lords' recent determination at the end of October. The House of Lords in the United Kingdom ruled that in the United Kingdom the special advocate system there, which does not allow a balancing either, was too restraining. So it's likely that in the next few months we'll see a change in the U.K. system that will allow the adjudicator in these U.K. proceedings to weigh the national security interest against the fair trial interest. We're proposing a total of 25 or 30 words of amending language that would create a balancing test in the IRPA context.

I know we're out of time and I know there are probably some questions, so let me end there.

● (0915)

The Chair: Thank you very much.

We'll begin with Mr. Cullen, please, for seven minutes.

Hon. Roy Cullen (Etobicoke North, Lib.): Did you want to go first?

Hon. Ujjal Dosanjh (Vancouver South, Lib.): Yes, I have just one question.

The Chair: Oh, are you sharing time?

Go ahead, Mr. Dosanjh.

Hon. Ujjal Dosanjh: Mr. Waldman, you said that the U.K. system has already been changed and what the government has adopted in this legislation is the unchanged special advocate system. How has the U.K. system changed?

Mr. Lorne Waldman: Craig will fill in some of that. There are some key aspects.

The first complaint the special advocates had was that they didn't have enough resources. Imagine, if you're a lawyer, that you're given boxes and boxes of material. You can't discuss it with anyone; you can't bring your junior into the room, because you're the only person who has the security clearance. You have to go through all of these boxes and boxes of material to prepare your case, and you have no support. You can't even get your secretary to write a letter to the lawyer representing the government to ask for correspondence or whatever. You have to do this all yourself, and some lawyers aren't very good on.... So there is no support.

They've created something called the special advocates support office, which is an office made up of security-cleared lawyers whose function it is to assist the special advocates. That's the first thing.

The second change they made is that they now have two special advocates on all cases. There's a senior and a junior special advocate who are available on all of the cases.

They also made changes that required the government to include all exculpatory evidence, because there were concerns expressed by the special advocates that exculpatory evidence wasn't included.

The other matter—and then we'll see whether Craig can think of anything else—is that the rules were changed to expressly allow that the person who was the subject of the security certificate have a right to choose the counsel from the list, subject to objections by the government.

Have I missed anything?

● (0920)

Prof. Craig Forcese: That's pretty much it.

Hon. Ujjal Dosanjh: Thank you.

Hon. Roy Cullen: Thank you, Mr. Chairman, and thank you to the witnesses.

I can understand, Mr. Waldman, the frustration, if you've worked on these files, and it's why I think most of us agree that we need changes to the process.

I might say, though, that I think you've dramatized it somewhat, because the subcommittee of this committee was taken through a dossier of someone who was being held under a security certificate, an alleged Iranian assassin. It was quite a thick booklet. This was in an open meeting, and the only things that were whited out were the sources of the information. And I might say that whoever the sources were, they were corroborated many times. In the end, the representative of the B.C. Civil Liberties Association agreed they wouldn't want someone like that living next door to them.

Nonetheless, I understand your point, that the information is not as fulsome as one would want it to be. That's why the government I think has responded with this special advocate. Our subcommittee, which looked at this, called for a special advocate counsel as well.

I just have a question with respect to SIRC. It's an interesting-sounding proposition that you're advancing here. I understood there were some limitations on what information is available to the members of SIRC. In fact, I remember hearing from SIRC that they were not privy to certain operational matters; in fact, they complained somewhat about that.

Are you saying—and the important question is whether—SIRC would have access to all the sources of information that CSIS and the RCMP and other agencies relied on to cause them to request a security certificate?

Mr. Lorne Waldman: I'll pass on that and let Professor Forcese....

I just want to comment on your comment. I know the case you're talking about is Ahani, because that was a well-publicized case. The difference between Ahani and virtually every other security certificate is that Mr. Ahani didn't dispute most of the facts in his case. He accepted that he had been involved in the activities that were alleged.

All of the other security certificates that I'm aware of involve people who deny that they're members of the organizations, and the evidence that is relied upon by the government.... Well, the only other case that was like that was that of the Russian spies. Ultimately—I was involved in that case—we didn't get into the evidence, but in the end they admitted they were Russian spies. Most of the time in these cases, the key evidence and the evidence is withheld.

Craig, why don't you deal with the SIRC issue?

Prof. Craig Forcese: The issue of what's in the possession of the Government of Canada is a crucial one. SIRC has a statutory right to everything except cabinet confidences. What is in the possession of CSIS, though, will vary. I can only tell you this based on hearsay, never having seen it.

My understanding is that often we're dealing with an analyst's report, which might be piled on another analyst's report from an allied agency, which in turn may be piled on a series of other analysts' reports, which then in turn might have an extract from some communications intercept.

It's hearsay piled upon hearsay piled upon hearsay. That's the kind of information that may, as far as we know, be being used in the security certificate cases, which then SIRC would have access to.

Would they have access to the raw transcript that's supplied by and might still be in the possession of an allied service, but which is in the possession of CSIS? I would presume not.

One of the concerns that special advocates in the U.K. expressed to us is that the work product they're looking at tends to be cherry-picked—that is, because it's piled hearsay, there's something that looks exculpatory that's been used in one of these analysts' reports, and then it's subjective analysis piled upon subjective analysis.

So the issue of the quality of evidence is going to be a live one, irrespective of whether you get full access to what's in the possession of CSIS or not.

Hon. Roy Cullen: I presume my time is close to being up, but you're characterizing it as hearsay. That would be one way to characterize it.

It's a responsibility of a judge to ensure that the information is corroborated, that it seems to be reliable. The part that's missing, it seems to me, is there's no one to challenge that on behalf of the people of Canada or on behalf of the person they are trying to withhold under a security certificate.

The other comment, Mr. Waldman, is that I expect the profile you're talking about would be similar to that of a lot of people who are arrested and come to trial. Many of them say they're not guilty. I was just reading in the paper—not to trivialize this—that O.J. Simpson has said on many occasions he has done nothing. I'm not surprised people would dispute the fact that they're part of some group or that they have done certain things, but whether that—

● (0925)

Mr. Lorne Waldman: The difference between any other person and people under security certificates is that when they come to trial, they get to see the evidence, they get to cross-examine the witnesses, they get to challenge the credibility of the witnesses, and in some cases they are acquitted. It's not a foregone conclusion.

I think we have to watch carefully what's going to happen in Toronto. I think you'll be quite surprised to see that at the end of the day, of the 18 accused, a number of them are going to walk away without any convictions or with very minor convictions, and indeed many of the charges will have been dropped against some of the accused.

That's why we have a legal system, to make sure the allegations are proved in a way that establishes the guilt of the person. In this process, what happens is the person who's accused doesn't have any of the normal methods of challenging the credibility of the evidence.

The key point, to go back to your first question, is that SIRC has access to everything CSIS has access to. That's why we think it's important that SIRC has the ability to look at the file to make sure that what goes before the judge with the special advocate is the same as what CSIS has.

Hon. Roy Cullen: I'm not so sure about that. I certainly want our researcher to check that out.

The other point is that the idea of the special advocate is to do precisely what you're proposing. That's why our subcommittee recommended that, and that's why the government I think is responding to the Supreme Court in that way. We could debate this at some length, but—

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you, Mr. Chairman.

I am very pleased to have heard you here today, as well as elsewhere, previously. I much appreciate the considerable work that has been done. I understand that your aim must be similar to ours. I understand that security certificates are necessary. I also understand why the source of certain information cannot be revealed. Indeed, this might put the lives of people having infiltrated these organizations in danger. Furthermore, it is possible that security agencies not wish that people be aware of their investigation methods.

We see this in criminal cases. A good many accused who belong to criminal organizations plead not guilty, despite their intention to admit to their guilt, because this allows them to find out how the police managed to infiltrate their organization. This can be admissible in the case of ordinary crime, but I understand the desire to not reveal investigation methods when terrorism is involved.

There is a third reason. We receive a lot of information from different countries. Some of them have the same principles as us, others not. The latter often relay information to us on condition that we not make this information public.

In fact, a security certificate could, in the case of any country that does not share our principles, be a purely arbitrary gesture on the part of the Minister, declaring that any sovereign country has the power to welcome to its territory whomever it wishes and to exclude from it those foreigners who represent a danger. Our desire was that this decision not be arbitrary and that it be subject to some form of judicial review in the context of which evidence must remain secret. This judicial review is not a trial, but I believe, just like you, that this legal procedure must be as close as possible to fair treatment, as in the case of a trial. My impression is that the recommendations you have made to us are precisely of this order.

I will be quite blunt with regard to one aspect. You believe that the decision rendered with regard to the party involved should not be based on information obtained through torture. We could have an example, in Canadian law, of information obtained by the police in ways... Let us get straight to the point. When an accused makes a statement, this statement must be made freely and voluntarily in order for it to be admissible as evidence. However, I do not believe that we are deprived of any material evidence that the police may have found, even in the case of a statement which would be inadmissible as evidence. If the statement of an accused is inadmissible as evidence because promises or threats were made to him or her, but that he or she for example stated that the weapon involved in the crime could be found in such and such a place, I believe that the police continue to be allowed to go in search of the crime weapon and to present it as evidence, what we call “physical evidence“. That is the way it was when I practised law, but it does happen that things change in the course of 15 years.

For you, does this rule pertaining to evidence obtained through torture apply just as much to physical evidence as to statements made by people under torture to their torturers?

● (0930)

[*English*]

The Chair: There are two minutes for the response.

Mr. Lorne Waldman: Okay.

In England, this issue was already discussed by the House of Lords in a case involving the Special Immigration Appeals Commission, which is their equivalent of the security certificates. The House of Lords ruled that any information obtained under torture could not be admitted as evidence in any judicial proceeding, period.

The reasons for that are (a) the evidence is inherently unreliable and shouldn't be used because of its unreliability, and (b), because if you use evidence that you know is obtained under torture, you're basically becoming complicit in the torture itself.

So the position in England is consistent with the position we've taken in our submission, which is that evidence that is obtained under torture cannot be admitted under any circumstances, nor considered by the judge. Indeed, in Canada the Federal Court judges who have considered this already have taken a similar position in several cases.

In other words, where the counsel has alleged that some of the evidence might have been obtained under torture, and if the judge is satisfied there is evidence that that might be the case, they've refused to consider that evidence in the security certificate.

Therefore, what we're proposing is really consistent with what the House of Lords has said and is consistent with what the judges have been doing in practice.

I think there is an importance to this that goes beyond the process, because we can make the argument before the judge, “You can't accept this evidence because it was obtained under torture”. But by making a public statement in this bill that evidence obtained under torture is not admissible, we are also making a statement about the unacceptability of torture as a means of interrogating anyone anywhere in the world. This is another reason why we believe it should be included.

The Chair: Thank you very much.

Ms. Priddy, please, for seven minutes.

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

I will take the very first few seconds, if I might, to say that I have had many letters, even in the last 24 hours, from organizations that are concerned that they have not had an opportunity to testify. I wanted to put on the record that correspondence had been received from groups like the Coalition for Justice for Adil Charkaoui, the Justice for Mohamed Harkat committee, Amnesty International, Human Rights Watch, and the Canadian Arab Federation. I may have missed some, but those are the ones that I've heard from, and I wanted to note their concern that they had information they thought the committee should hear and were not being afforded the opportunity to speak before the committee.

I would like to ask either Mr. Forcese or Mr. Waldman this: if there is not an open communication between the special advocate and the detainee, as it is currently stated in Bill C-3 would not be the case, at least not once the special advocate had reviewed the information, could you speak to both what you might see as the legal implications of that, in terms of the court system, and what you would see as the moral and justice implications, if you will?

● (0935)

Prof. Craig Forcese: Thanks very much for the question.

The first point to note is that Bill C-3 right now doesn't affirmatively close the door to continued access. It leaves it in the discretion of the judge.

A similar rule in the United Kingdom has produced virtually the absence of access. There is no continued access. Why? Because a similar rule in the United Kingdom has been applied, such that the special advocate, if they wish to communicate with the individual after they've seen the secret evidence, must do so in writing, and their questions must be vetted by the government.

No lawyer worth their salt is prepared to pose a question to an individual whose interests they're supposed to represent when it's first going to be vetted by the government for fear that the very fact of asking the question could be prejudicial to their interests.

In practice, there's no continued access. This has been the single most controversial aspect in the United Kingdom system.

In terms of the implications of absence of continued access, I can recount you a story that was, in turn, recounted to us by the SIRC special counsel, who does have continued access in SIRC proceedings.

If he were here, he would tell you of one case in particular where at issue in the SIRC proceeding was whether an individual had been in a certain country at a certain time. I don't know what the country is. Let's assume it was Afghanistan in the late 1990s, and the presence in Afghanistan in the late 1990s would have suggested that there might have been some problematic aspect to this person's behaviour. Obviously, having been apprised of that information, the independent counsel could not go directly to that person and ask if they were in Afghanistan in 1997 because that would of course betray the basis of the government case and potentially be prejudicial to national security. So all the special advocate asked for was the CV of the individual, which the security service had never thought to ask for. On that CV was an entry by which, upon follow-up, the special advocate of the independent counsel was able to establish, verifiably demonstrated, that this individual had not been in Afghanistan during the material period.

Here is an example of continued access: a very banal question that one would have hoped the security service would have asked in the first place, a very banal question being posed that caused the government's case to collapse ultimately. The entire government's case was predicated on this issue and the government's case was undermined as a consequence of this very banal question.

Speaking to SIRC and to independent counsel, there's never been an allegation that this continued access by SIRC legal counsel to individuals has been prejudicial to national security, that there's been an involuntary disclosure.

We acknowledge that there should be an affirmative obligation on the independent counsel not to disclose the secrets. We believe that any lawyer worth their salt can pose a question in a manner that extracts useful information but does not betray a national security confidence.

That was the case for the Arar commission, and I'm sure Lorne could describe how little information he was able to glean from any of the questions that were posed to him by the Arar commission counsel.

Mr. Lorne Waldman: I would like to add to that. I was counsel to Mr. Arar, and Mr. Cavalluzzo and his team of lawyers met, read all of the secret evidence, and then continued to meet with us. They would ask us questions, and of course we would say, why is he asking that question? We wouldn't know, but he assured us after the fact that the answers to those questions were extremely important in his being able to undertake an effective cross-examination of the secret witnesses in the in camera hearings. But as he said, "I knew how to ask the questions to try to elicit the information I needed, and obviously I didn't reveal anything, because we would never come away from that knowing anything more than we knew before we came in."

That is just another example of a scenario in which ongoing contact was permitted. There were no leaks, and yet it made the special advocate, or the counsel in this case, a more effective advocate for the individual.

● (0940)

Ms. Penny Priddy: Do I have any time left?

The Chair: Yes, you have about a minute and a half.

Ms. Penny Priddy: Thank you.

Having said that, and having described SIRC, do you see some profound difference, which I don't understand, between the SIRC model and security certificates that would require that in the case of SIRC a question may be posed and an experienced lawyer would be able to pose a question in a way that did not in any way endanger security, while for security certificates there is some legal reason, which I do not understand, for why it should be different?

Mr. Lorne Waldman: The proceedings are analogous. Indeed, SIRC did do security certificates prior to 2002 for permanent residents, so they were doing them. They followed the same process in the permanent residents' cases that they followed in all the other cases, so there was no issue of any leaks of evidence.

There is no reason why we could not have a similar type of process here. It would be one of the things that I think would go the farthest to make this system a fairer system, which is what we all want at the end of the day.

Ms. Penny Priddy: Thank you.

The Chair: We will now go over to Mr. Brown, please, for seven minutes.

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

I'd like to thank our witnesses for coming today.

Mr. Cullen referred to the subcommittee of this committee that reviewed the Anti-terrorism Act. I chaired that committee, and we dealt with security certificates, although they weren't part of the Anti-terrorism Act.

I'm just trying to remember our discussions. One of the reasons that I think the SIRC model wasn't used was that in SIRC proceedings the government-cleared legal counsel who participate in closed SIRC proceedings are in fact SIRC counsel, and their responsibility is to the SIRC process, not to the subject of the SIRC proceedings. That's why the SIRC counsel may communicate with the individual, and the consequences of an inadvertent disclosure really were significantly less. That's why it would not address the Supreme Court ruling.

I wonder what you might have to say about that, both of you.

Prof. Craig Forcese: That's true, in the sense that in terms of the obligation they have, the SIRC counsel have a sort of bifurcated obligation. Certainly they are there to serve as the arm, if you will, of the committee member in question; yet they also, in the course of serving that role, serve the best interest of the person who's been excluded from these in camera, *ex parte* proceedings.

I don't understand why that bifurcated rule makes SIRC counsel less prone to make a slip-up in their questioning than an independent counsel would be in a security certificate context. They would be amenable to the same sorts of penalities; they would be under the same obligations not to disclose secret information. I see nothing in that institutional structure that makes SIRC more amenable to continued access than a properly structured special advocate system would be.

Mr. Gord Brown: Okay.

I want to hear a little bit more about the changes that are being made to the U.K. advocate model, because that's what we're looking at. I'm not familiar with the changes they're making, that weren't in their system before.

Mr. Lorne Waldman: I'll start.

One of the first changes that came into effect....

How long has that been in effect? Is it three years now?

Prof. Craig Forcese: It's less than three years, probably two years.

Mr. Lorne Waldman: Two years.

I think what happened in 2005 was that there was a parliamentary committee that studied...and at that point a lot of the special advocates—special advocates who had resigned—came forward and complained about the system. One of the key changes was the requirement that they create a special advocate support office. What that is, is an independent office of lawyers who have security clearance so they can assist and see the whole file.

The problem we have is.... Let's say I am appointed special advocate. I can't show the file to anyone else in my office; I can't get the assistance of anyone else. I can't retain another lawyer to help me. It has to be someone who has the same clearance and has the same authority to review the file that I have.

That was the biggest problem that special advocates had. We've proposed, in our proposed amendments, a requirement that there be a support office created. That would be extremely important, because without it, really I don't think the special advocates are going to be able to fulfill their task.

● (0945)

Prof. Craig Forcese: Two changes are on deck right now, as Lorne mentioned. Now, in the new rules that will govern special advocate procedures, there's a more emphatic obligation to disclose exculpatory evidence. There's an affirmative obligation on the government now to reveal all relevant information, including exculpatory evidence, and then in the new regulations there's a point-by-point discussion of the due diligence the government has to undertake to ensure that it has adequately searched its files to find relevant information. That's coming onstream right now.

The other change, which will follow in the wake of the House of Lords decision at the end of October, which has not yet been codified, is again the idea of a balancing test. How much information goes to the interested party or not will be assessed not simply on whether national security would be prejudiced, but also on whether that national security interest is outweighed by the broader interest in a fair trial. It will now, presumably, be permissible in the U.K. system for information to be disclosed where there's a relatively incidental national security interest, but a massive fair trial interest at stake in the case.

Mr. Gord Brown: Okay.

The Supreme Court has upheld almost the entire security certificate regime, except for the part about the special advocate. You're talking about balancing that with a fair trial. Our information is, and we're quite confident, that the Supreme Court would uphold what's being proposed in this legislation. I'm sure that was checked out before it came to Parliament.

Do you sense that something different from this may happen?

Mr. Lorne Waldman: I can tell you, as a lawyer who may in the future end up on another security certificate case, that if you adopt the bill as is....

You see, what the Supreme Court of Canada said in Charkaoui was that the system was unfair as it was, because there was no person who was in the room other than the Federal Court judge challenging the government's case. So they said there were other models available that could allow for some challenge that would make the system fairer, that would also take into account the need to protect national security.

The government was told that it had to create a fairer model because there were other options, and the Supreme Court listed them without saying, “This is acceptable, this isn't acceptable”. They just listed several options, including SIRC, including special advocates, and including the Arar commission model as well. It was up to Parliament to make the amendments.

Now, if Parliament adopts something like the SIRC model, it would be my position that that's as close as you could come, and the Supreme Court says some departure from the fair trial principles might be permitted. If you adopt the fairest system, there would be no constitutional challenge.

If you adopt the special advocate system here, I will go to the Supreme Court and say, "Well, why did they choose this when they could have had SIRC, they could have had full disclosure, they could have had continuing access? That's not provided for in this legislation, and therefore the new bill is also unconstitutional."

So if you want to ensure that there's no constitutional challenge, you have to make sure that you provide for the fairest system possible, short of full disclosure. We believe this bill doesn't do that, unless you take into account the amendments that we've sought.

Obviously, the government may have gotten an opinion from their lawyers to differ with that.

Mr. Gord Brown: So you think, with this legislation as is, it is subject to another challenge.

Mr. Lorne Waldman: Absolutely. I've been told that by counsel. The counsel who are representing the men on the security certificates now will definitely challenge it.

Mr. Gord Brown: Thank you.

The Chair: Thank you.

I think we have time for one more round.

Ms. Barnes, please.

Hon. Sue Barnes (London West, Lib.): Thank you very much. I too would like to have a list circulated by the clerk of all the other witnesses, all the other people who have applied to be witnesses, and if they've tabled any submissions, maybe they could circulate those.

The Chair: Let me reply to that right away, because I was going to do so at the end of this round.

All the submissions are presently being translated, and they will all be submitted to the committee, of anybody who applied. All those submissions will be available to all of us.

Hon. Sue Barnes: Okay, but are there some potential witnesses who didn't submit submissions? I'd also like their names, because I'd like to know who applied to be witnesses, that we didn't get their names.

● (0950)

The Chair: Okay.

Hon. Sue Barnes: Does my time start now?

The Chair: Sure. Go ahead.

Hon. Sue Barnes: Thank you very much.

I really appreciate the work you did over the summer and your appearances here today.

I'd just like you to go over in a little bit of detail the House of Lords' October 31, 2007, decision and how it would impact what we're trying to do here. I think you talked about the changes that had been made, but because of the 2007 House of Lords decision, you are anticipating further changes, and I'd like you to go over that.

Because it's only a five-minute round, I'm going to keep quiet and let you go over, in more detail, the suggested amendments to make this a fairer system. Thank you.

Prof. Craig Forcese: The House of Lords decision was a challenge that, amongst other things, looked at the use of special advocates in what in the U.K. are called control orders, which are basically a form of house arrest.

The House of Lords, on the whole, said that special advocates are a compromise. On the whole, they seem an adequate compromise, except that there has to be a residual expression for the judge to preserve the inherent fairness of the trial in circumstances where the special advocate doesn't do that. So there has to be a residual discretion on the part of the judge to weigh the national security interest against the fair trial interest, and if the fair trial interest prevails, to disclose the information to the interested party, and if the government doesn't like that, it will have to withdraw its information and its case may collapse as a consequence.

That's what the House of Lords said on October 31, and that's going to have a bearing on the special advocate system, writ large, in the United Kingdom.

What we're proposing doing in the amendments and on this issue in the balancing—in our submission, which you may have before you, it's on page 10, in relation to clause 83—is simply grafting on to the current test for how much information goes to the interested party, that same balancing. We simply borrowed the same language that's in our Canada Evidence Act right now. So if this wasn't an immigration proceeding, if this was just a regular proceeding in a Canadian court and the government wanted to withhold something on national security grounds, it would go in front of a Federal Court judge, and the Federal Court would weigh the national security interest against the fair trial interest.

In IRPA, under this bill, the Federal Court just stops when it gets to the national security issue. It doesn't do a weighing, at least according to the language of the statute. So we're just harmonizing with the Canada Evidence Act and we're harmonizing with what the House of Lords has said is necessary in the United Kingdom.

Mr. Lorne Waldman: If I could just add one recent example of how important that is, in the Arar case itself, the government withheld 1,500 words, and we went to court and got 500 more words. The 500 words we got were not words that anyone who looked at them after the fact thought were reasonably protected on national security grounds, but they were words that were highly embarrassing to the RCMP and the government. They failed to tell the justice of the peace who was doing a search warrant that the information they were relying on might have been obtained under torture and things like that. So that's why we think it's extremely important that the judge have that discretion.

You asked for other amendments. We could go through them. We think it's important that in the bill itself you include clear criteria for the selection of special advocates. It will make the system far more credible in the eyes of the public if you put in the bill that special advocates have to be lawyers. That's not even in the bill now. They have to have 10 years' experience. They have to have trial experience.

The other thing that would be in the bill is that the person have an option of electing, if he so chooses, from a list of special advocates. I would say it would make the bill more credible if you put in the bill that there has to be adequate support available to special advocates so they can properly exercise their function. The concern we have now is if it's not included in the bill, you're going to appoint special advocates, and they're not going to be able to do their job properly.

We've touched on the relationship between special advocates, we've touched on tortured evidence, and we think one of the other key issues that hasn't really been addressed is the question of limits to indefinite detention. The way the bill is drafted now, you could be under a security certificate forever. What happens is if you can't be deported because you're going to be tortured, you can't be sent away, but you could still be detained.

So we think it's important that at a certain point, when there's a decision that you can't be deported because you're going to be subject to torture and the courts or the government decide that makes it impossible, then the certificate has to allow for release, which would mean the government would have to choose other options to deal with the person. You can't have indefinite detention under an immigration process when deportation is no longer possible.

● (0955)

Hon. Sue Barnes: Would you add in a Suresh exception?

The Chair: Your time was up a long time ago.

Mr. Lorne Waldman: Right, that's a Suresh exception.

[*Translation*]

Mr. Serge Ménard: I thought the same thing as you when I read the bill for the first time. Indeed, I had understood that the special advocate was not bound by solicitor-client privilege in the context of his or her conversations with the individual. I see that you have taken note of this as well and are suggesting that solicitor-client privilege apply.

Generally speaking, solicitor-client privilege applies in all civilized legal systems so as to ensure that the individual who consults a lawyer is able to place his or her trust fully in that lawyer with the knowledge that the latter will not reveal what the client tells him. The lawyer is bound by solicitor-client privilege.

However, you are proposing that subsection 4 of Clause 85.4 provide that the judge be authorized to order that a member of the Review Committee attend this meeting between the special advocate and the individual. In such a situation, how could the individual have as much trust with regard to the conversations he is to have with this special advocate if he sees the latter accompanied by a member of the security service?

[*English*]

Prof. Craig Forcese: On the first point, on the issue of professional responsibility, right now the bill says the individual is not in a solicitor-client relationship. So there's no solicitor-client relationship between the special advocate and the individual concerned, which begs the question, if it's not solicitor-client, what is it? In other words, is there a duty to confidentiality in relation to what the special advocate might hear from the interested party?

What we propose is that duty of confidentiality be expressly grafted onto the bill, if only because a lot of my colleagues in the practising bar will have the same question and might be deterred, frankly, from being a special advocate unless their special professional responsibility is clear.

You asked specifically about subsequent meetings between the special advocate and the individual after the special advocate has seen the secret evidence. What we suggest in the bill is if the security services have this concern about a special advocate perhaps involuntarily disclosing or not somehow being meritorious enough, then one of the lawyers from the Security Intelligence Review Committee, which is not the security service, be in the room. That's the arm's-length review body for CSIS. But we're also suggesting that that lawyer be subject to the same confidentiality requirement as the special advocate is under. So we're preserving the confidentiality requirement for both those individuals.

Frankly, the only reason we're proposing that SIRC be in the room is to anticipate government objections to the special advocate being there alone. In practice, in relation to SIRC proceedings, if they have outside counsel, my understanding is that outside counsel is typically accompanied by the SIRC lawyers themselves in terms of meetings with the complainant.

Mr. Lorne Waldman: I just want to add two things.

One is that the reason they do that in SIRC is to protect the lawyer as well. If I've read the secret file, I'm not going to want to go into a room by myself and then have an allegation a year later that I said something I wasn't going to. You need to have that protection there. To our way of thinking, the closest you can come is to have someone from SIRC available to be a witness as to what was said and to perhaps advise if a lawyer thinks a question might be inappropriate.

[*Translation*]

Mr. Serge Ménard: I understand. You are telling me that this is contained in paragraph 5. I had not understood that.

I however remain skeptical. What attitude will the person wishing to have a special advocate he or she is able to trust have when that individual sees the advocate accompanied by another lawyer who is there to supervise the special advocate in order to ensure that he does not divulge to the individual information that this person should not have? One must have a very well trained legal mind to understand all of these subtleties. I am not convinced that the individual involved will be as trusting as we would like him or her to be.

I understand that you have provided for that in paragraph 5, but the language could perhaps be a little clearer. I understand that that is what you wanted to say.

I however remain skeptical with regard to the level of trust that the individuals involved will have in this regard. I also believe that the use of the word “défenseur“ is deceptive. That is not what this is about.

● (1000)

[*English*]

Mr. Lorne Waldman: I understand completely.

The Chair: We really have no time for a response; I'm sorry.

Mr. MacKenzie is next.

Mr. Dave MacKenzie (Oxford, CPC): Thank you very much for being here. I do appreciate your comments and what we've heard today. I think they will add a great deal to what the committee has, because of your experience.

One of the things I noticed, particularly with my colleagues opposite, is that when you said some of these issues will be challenged in court if they are put in, in the current manner, you suggested that if we accept the SIRC model, or some of your suggestions, they wouldn't be challenged. I'm not sure that's really a fair assessment. My experience has been that the role of a lawyer is to challenge the legality of these things against the charter.

Is it really fair to say that if we accept what you suggest, they won't be challenged by someone? Perhaps it won't be by you—you understand it—but by someone else who understands it a different way and feels the need to challenge it.

Mr. Lorne Waldman: I'll go first.

Obviously there will be lawyers who will challenge anything. I belong to the school that doesn't challenge. I don't do things unless I think I have a reasonable prospect of success. I suppose what I was saying was that my reading of the Supreme Court of Canada decision accepts that there can be a departure from the normal rule of full disclosure to the person. What the Supreme Court says is that the current system doesn't do the job, because there are other options that are better, so I take that to mean that the job of Parliament is to give the best possible option.

After all our research, we've concluded that the best possible option is something like SIRC. If you were to adopt something close to this, I would not be able to go before the Supreme Court, after having written this report, and with any credibility say to the Supreme Court that it's not good enough, having put my name and Professor Forcese's name to this report.

Now, there may be someone who would still want to challenge. My personal opinion would be that they would have an extremely difficult time in doing so if you adopt the amendments we've put forward.

Mr. Dave MacKenzie: Are we out of time?

The Chair: Well, you have 30 seconds.

Mr. Dave MacKenzie: I appreciate that.

Oh, I see; we're at 10 o'clock.

The Chair: Yes.

Okay, thank you very much, gentlemen. We appreciate your coming before the committee.

We'll suspend for a moment, just to let the other witnesses come before the committee.

● _____ (Pause) _____

●

● (1005)

The Chair: Ms. Basnicki, are you ready to begin?

Mrs. Maureen Basnicki (Founder Director, Canadian Coalition Against Terror): I am.

The Chair: I don't know what happened to our other witnesses, but we might as well start because we're on a tight timeline here.

Mrs. Maureen Basnicki: I would like the courtesy of—

The Chair: Of everybody sitting down. That's why I'm trying to get the meeting back to order.

Mrs. Maureen Basnicki: Thank you.

The Chair: Thank you.

Mrs. Maureen Basnicki: I was formerly an Air Canada flight attendant and I made sure that everybody listened to my emergency demonstration—

The Chair: There are a few people still talking. If you have an important conversation, please take it outside the room. I would like to begin.

Please introduce yourselves as your turn comes. Not everybody is here at this point.

Ms. Basnicki, the usual procedure here is 10 minutes. Then after all the witnesses have given their presentations, we'll go around and get questions and comments.

Mrs. Maureen Basnicki: Thank you.

The Chair: Whenever you're ready, you may begin.

Mrs. Maureen Basnicki: Good morning.

My name is Maureen Basnicki. My husband, Ken Basnicki, a proud Canadian, was murdered by al-Qaeda terrorists in New York on September 11, 2001, while attending a meeting on the 106th floor of the north tower of the World Trade Centre. Ken was one of 24 Canadians murdered that day.

I am here as the founder of C-CAT, the Canadian Coalition Against Terror. C-CAT is a non-partisan advocacy body comprised of Canadian terror victims from every walk of life and faith group, as well as counter-terrorism professionals, lawyers, and other individuals committed to enhancing Canada's counter-terrorism policy.

My comments before this committee will be focused primarily on the issue of terrorism as it relates to security certificates, not on the broader categories of inadmissibility set out in the Immigration and Refugee Protection Act.

I would argue that the most crucial role of security certificates pertains to terrorism, and in particular to the prevention of terrorist acts.

When Canada removes non-Canadian citizens with past records of criminality, or even war crimes, we are making an important statement about our Canadian values and acting to maintain the integrity of Canada as a society. But when Canada removes non-Canadian citizens where there are sufficient grounds to believe they are planning to murder Canadians, to bring down our subways, our school and our water systems, that is more than a statement about Canadian values; that is about saving human lives.

In most of my previous appearances before parliamentary committees and the Air India commission of inquiry, I have testified on behalf of the victims we represent about issues related to counter-terrorism and the rights of terror victims. Today, I am here to speak on behalf of those Canadians who are not yet victims and their rights, to speak about a fundamental right of every Canadian and every human being: the right not to be a victim of a terrorist attack. This is expressed in more general terms in section 7 of the charter of rights, which guarantees the right to life, liberty, and security of the person. There is a corresponding obligation of the Canadian government to ensure that such rights are protected.

I fully concur with British Minister Ian Pearson, who stated in the aftermath of the 2005 London bombings, that there is no human right more sacred than the right to be alive, and without this human right all others are impossible.

It would therefore be an error to perceive the security certificate debate only as a conflict between civil rights and security imperatives. That language obscures the fact that, in truth, this is a debate about determining the appropriate equilibrium between the rights of non-Canadian citizens subject to a security certificate and the rights of all Canadians who are potential targets of a terrorist act by such an individual.

It is C-CAT's view that Bill C-3, drafted according to the directives of the Supreme Court of Canada and two parliamentary committees, has struck the appropriate balance between protecting the rights of the individual named in the certificate and protecting the rights of the ordinary Canadian to be spared victimhood of the type that I and hundreds of other Canadians have suffered.

Security certificates are giving greater latitude to authorities, ensuring that individuals who are not citizens of Canada and are suspected of having committed or are planning to commit the most egregious offences, such as terrorist acts, cannot remain in Canada, disappear into the woodwork, and harm Canadians.

The ability of the government to detain and remove dangerous non-Canadians from Canada, while protecting sensitive information, implements a critical national objective. This is especially true, in my view, if the security certificates are able to prevent a terrorist act.

According to the 2003 public report of CSIS, safeguarding against the possibility of a terrorist attack occurring in or originating from Canada is the highest national security priority. The strength of Bill C-3 is that it provides a tool to protect Canadian citizens while protecting the rights of an individual subject to a certificate. In fact, it could be argued that when comparing the rights of the individual named in the certificate with the rights of the potential victims, should that named individual actually commit a terrorist act, one could easily conclude that this person's rights have taken precedence over those of the potential victims.

● (1010)

Here are a few examples.

First, any individual detained under the legislation can be released from detention at any time should that individual agree to return to his or her country of origin or to a third country. The choice is that of the detainee.

In contrast, the potential victims of these individuals are given no choices. They cannot choose to leave the location of a terrorist incident. My husband and 3,000 others that day in New York had no such choice. Neither did the 331 people murdered in the Air India bombing.

Second, the Supreme Court of Canada has explicitly noted that detention under a security certificate is not cruel and unusual punishment if accompanied by a process that provides for regular detention reviews. Bill C-3 has created such a process, and a very fair one at that.

It seems to me that a person choosing to remain in detention until the resolution of the process, while benefiting from three meals a day, a stocked kitchen, an exercise room, a television, visits from his or her family and religious leaders, as well as regular reviews of his or her detention and the opportunity to appeal decisions at taxpayers' expense is not suffering cruel and unusual punishment.

But cruelty of the most exceptional sort is precisely what could befall Canadians if a terrorist should slip through our system; cruelty of the type that forced couples trapped in the World Trade Center to jump 100 floors, holding hands, to their deaths; cruelty of the type that killed every man, woman, and child on board Air Canada Flight 182, either from the immediate explosion of the suitcase bomb planted in the cargo or from drowning in the Atlantic Ocean after falling thousands of feet out of the plane.

I cannot help but add that in contrast to the detainees, who have access to an on-call psychiatrist, Canadian terror victims and their families have had to pay out of pocket for much needed psychological counselling. This issue has been raised by Air India family members, who testified at the Air India Inquiry that they were in need of counselling after the attack but did not have the necessary resources to obtain it themselves.

Lastly, any individual subject to a security certificate is entitled to a special advocate, who will have access to classified evidentiary materials and can challenge the minister's claim to the confidentiality of these materials as well as their relevance, reliability, sufficiency, and weight. But for the potential victims of such a named individual, our legal system provides no special advocates or other assistance to address the legal needs of victims after a terrorist attack.

All in all, given the dire and irreversible consequences in store for Canadian citizens if an error is made in favour of an individual named in a certificate who then commits a terrorist act, Bill C-3 has given considerable leeway to these individuals.

If for some the concern regarding the potential abuse of security certificates still supercedes the concern for saving real lives from the very real threat of terrorism, they should consider the following. By assisting authorities in preventing a major terrorist attack, these rather modest provisions will have protected our legal system from the inevitability of coming under even greater pressure, in the aftermath of an attack, to enact measures even more stringent and controversial in order to more adequately protect Canadians from other attacks. This possible backlash, resulting in even tougher laws that would go much farther than Bill C-3, is surely a scenario that all sides of this debate wish to avoid.

Members of the committee, given the unprecedented security challenges presented by terrorism as well as some of the obvious limitations of our criminal justice system in prosecuting the perpetrators and sponsors of terrorist attacks, security certificates are sorely needed. We must face the fact that terrorism is not another form of ordinary criminality. Terrorism is different in its scope, intent, method, and consequence. Combatting terrorism has pushed to new extremes what the Supreme Court has described as the "tension that lies at the heart of modern democratic governance" between "imperatives both of security and of accountable constitutional governance".

● (1015)

We believe that Bill C-3 has found a reasonable and effective accommodation that addresses this tension, fulfilling the base requirements of both imperatives. Terrorism requires special technologies, policies, and legal structures to protect Canadians. Bill C-3 is a very good step in this direction, and on behalf of C-CAT and the terror victims we represent, we wish to voice our support for this bill.

The Chair: Next we have a representative from the Canadian Muslim Lawyers Association.

You may introduce yourself, sir, and go ahead. Thank you.

Mr. Ziyaad Mia (Former Board Member, Chair of the Advocacy and Research Committee, Canadian Muslim Lawyers Association): Thank you, Mr. Chair.

Good morning, everyone. Thank you for taking the time to hear our testimony.

I think I'm going up against Karlheinz Schreiber, so I'm probably not going to get much attention today. That's like going against Mike Tyson, I guess, with my hands cuffed. So I'll do my best. I guess a lot of people want to go there. I think I'll go there after as well.

My name is Ziyaad Mia. I'm the chair of the research and advocacy arm of the Canadian Muslim Lawyers Association. I'm a past board member of that association as well. We have been involved in national security policy and legislation issues for a number of years now. We've testified on the Anti-terrorism Act, the Public Safety Act, security certificates, and we've tried to work in a cooperative way to try to develop security legislation and policy that is consistent with Canadian values.

Today, we're happy to speak about Bill C-3. Just at the outset, and I think you've heard it several times, but I've received several personal messages and phone calls from many other groups who are directly interested in this issue, more directly, even, than my organization, representing some of the men detained and their families, and can speak directly to those issues. I'll try my best, but I can't replicate what they'll be able to tell you.

[*Translation*]

Mr. Serge Ménard: Mr. Chairman, before we start, I have a point of order. Do you have a French translation of the document that has been circulated?

[*English*]

The Chair: We didn't hand out any documents, sir. You must have illegally obtained it.

[*Translation*]

Mr. Serge Ménard: That is fine.

[*English*]

The Chair: I'm not sure how you received that. Maybe it was outside the room, which is all right. I was saying that tongue in cheek, yes.

[*Translation*]

Mr. Serge Ménard: That is fine.

[*English*]

Mr. Ziyaad Mia: Monsieur Ménard, I'll just take a second to answer that.

I've provided my submission to many of the members of the committee. I met with some yesterday and delivered some copies. Mr. Chair, I was remiss in forgetting you, but I'll give you one outside so we won't break any rules. I've provided it to the clerk, and he'll have that translation ready shortly. Because of the tight timeframes, I wasn't able to get it to you in time for translation.

The Chair: Okay. Go ahead.

Mr. Ziyaad Mia: We have prepared a written submission on this legislation, but I just wanted to reiterate that many of these groups have called me personally. I want to put on the record that many people in this country believe that this is a rushed process when it doesn't need to be a rushed process; that they can give you some useful input; and that people in direct contact with the detainees—and I would argue the detainees themselves—should come and speak to you.

I'd like to speak for a few minutes at the end of my opening about the human element. I've met with some of these people. I've been in their homes. I suppose that when we don't have human contact, it's easy to turn someone into a cardboard cutout of what threat they pose, but when you see the human effects, it isn't as easy as we think.

The Canadian Muslim Lawyers Association—and I take a further step beyond that and say the Muslim community in this country, Canadian Muslims—absolutely agree with Ms. Basnicki. We reject violence unequivocally, against all civilians, by state and non-state actors anywhere on this earth. My organization is committed fundamentally to the rule of law and accountable government. As a lawyer, it's a little corny, but I am still wed to those principles, and, really, I don't think there is a balance. I don't think we need to make this a zero-sum game of saying that we need to trade civil liberties or our fundamental values to make this country safer. In effect, you've just heard Mr. Forcese and Mr. Waldman—and I'll speak to these issues as well—say that when we strengthen the values of this country, then we keep Canadians safer. When we have secrecy, we have darkness.

We don't know if these men are innocent or not, and I can tell you that some of the men on these certificates have told me explicitly, “When you speak to these people, they're important people. Tell them I don't want to be let go. That's not what I'm asking for. I'm asking for a fair trial, and if I've done something wrong, then so be it.”

I can also tell you that one of the men loves this country; despite having been in detention for many years and being away from his family, he loves this country and what it stands for on paper. I just wanted to make that clear on the record.

In my submission you'll notice I've thrown in a little bit of literature, a little flair, from Franz Kafka's famous book *The Trial*. The opening sentence—I'll just read it out—is: “Someone must have been telling some lies about Joseph K., for without having done anything wrong, he found himself arrested one morning.”

I find that quite interesting when I'm working on the security certificate process and talking to these families. They're caught in this web of absurdity. You're told you're a bad person. You've done X, Y, and Z, but there's no way for you to punch yourself out of that paper bag. It's frustrating as a human being. To me, as a lawyer, it's frustrating, because it breaks every principle of law that I've been taught as a lawyer. We know what Paul Bernardo and Karla Homolka have done. We've seen the evidence. They had an open trial. Karla Homolka effectively served less time than all of these men cumulatively have served in detention.

All we're asking for is a fair shot, and really, that's what our evidence speaks to.

I'll quickly go through what's in my submission, but I'll ask you to look at that if you can. My detailed recommendations are on page 10 of the submission. There is some discussion of what the Supreme Court lays out as what I think are the road map and guideposts for Parliament in redrafting this legislation, and I'll speak to that a bit.

Our principal position is—and I believe Mr. Allmand is going to echo this—that it is fundamentally wrong to treat citizens and non-citizens in a distinct way when we're dealing with national security. The immigration issue is now a subsidiary issue. I know that for various reasons the Supreme Court has rendered this decision and we're going down this road; I'm ready to offer recommendations, but on the record, our principal position is this: the House of Lords in 2005 clearly followed the law to its end logic, which said that when there are equal threats from a citizen and a non-citizen, you can't treat non-citizens with harsher means, because then that triggers minimal impairment issues similar to those we have in the charter.

The Charkaoui decision looked at the security certificates, and I think Chief Justice McLachlin laid out a number of guideposts, I would say, and directions for Parliament to follow. I'll just hit a few of those, because I don't want to take too much time here.

Essentially any substitute mechanism to a full and open process must be meaningful, substantial, and provide informed participation by the subject party. Chief Justice McLachlin then said what we all know; fundamental justice in section 7 is what every lawyer knows, back to the common law of 400 or 500 years ago—that its full answer and defence is to know the case against you and have the ability to answer that case. Back to the kings of England when they had the rights of monarchs, these principles were laid down.

● (1020)

So it's beyond the charter. It goes back much further. Those are your guideposts in drafting this legislation.

Do I think it meets that? No, I don't think it meets what full answer and defence is. I don't think it meets knowledge and answering, and I can talk about that in a bit more detail in our discussion.

The recommendations we put forward.... I'll just walk through them quickly and I'll ask you—in questioning, we can elaborate a bit more—that there be some substantial representation. The other witnesses have talked about it. You can't stop the communication between advocate and the subject party once they've seen the evidence.

I think there are ways around that. SIRC has proven it. Mr. Cavalluzo has proven it in the Arar commission. I think we saw that in the morning's testimony, so I won't give those examples of how you can craft a way so that it's a robust, organic process. Any lawyer knows that. That was why your client.... I mean, it's not a lawyer-client relationship in this case, but that relationship between you and the person you represent has to be ongoing and healthy.

That's the best way to search for truth, because at the end of the day, I think all of us agree that the adversarial process is the search for truth. When we find the truth, if these men are guilty of something, yes, we are safer. If they are not, let's not waste resources chasing red herrings and persecuting families, essentially, that are innocent. So the search for truth should be our touchstone.

Resources and independence—I think others have talked about that, that the roster should be made independently of government, that persons should be able to choose, and a number of other things, and it should be fully resourced and staffed so they can actually be effective. I'll leave that for you to read, and we can talk about that.

I was pleased to read the transcript of Mr. Day's testimony in which he says we do not approve of torture-derived evidence and we don't approve of torture. That is exactly Canada's commitment under the Convention against Torture, international refugee law, and pre-emptory norms of international law, which are basically the moral norms that nobody can transgress in international law. If we agree to all of that, then why don't we simply write it down? I think it would add more certainty and comfort if we wrote that down. I think Mr. Day has agreed that we don't take evidence from torture, so let's write that down.

I would also add that in the Suresh exception, the Supreme Court opened the door just a crack to say that we don't deport people to torture, except in certain circumstances. That is a breach of the Convention against Torture, our treaties under international law and refugees, as well as pre-emptory norms again.

The Supreme Court, I think, made a mistake there, and it's embarrassing when someone wants to fix that mistake. Parliament can lead on this. I think you have it in your hands now to legislate away that thing, take the moral high ground and say we don't deport people to torture. Plunk that in here and then that gets away from this problem, because now we're having problems where government lawyers are arguing to deport people to torture.

I'll leave the others for later. I'd simply like to close by saying that what we need is a fair and efficient process, and at the end of the day, I would invite you to personally go—and I can arrange this—to meet with these people in their homes. They're not as scary as they're made out to be. At the end of the day, they're human beings like you and me.

I got a call the day before I came from one of the gentlemen. He said "Please tell them"—that's you—"it's not about me. My kids are now prisoners." He can't go to the backyard. He couldn't go to Eid prayers. Even though he follows all the processing rules, it was just refused.

So at the end of the day, this is all about families and fairness.

I look forward to your questions.

● (1025)

The Chair: Thank you.

Last, we'll go to the International Civil Liberties Monitoring Group. You may go ahead, sir, when you're ready.

Hon. Warren Allmand (Member of Steering Committee, International Civil Liberties Monitoring Group): Thank you, Mr. Chairman. I apologize for being late. I was stuck for an hour on the 417, coming into Ottawa, because of an accident in front of me.

My name is Warren Allmand. I'm here with Roch Tassé, representing the International Civil Liberties Monitoring Group, which is a coalition of over 30 NGOs, unions, faith groups, and other civil society organizations that came together in the aftermath of September 11, 2001, to monitor the impact of anti-terrorism measures on human rights and to advocate against violations of national and international human rights standards.

As you know, on February 23, 2007, the Supreme Court ruled unanimously that security certificates used to detain suspected terrorists under the Immigration and Refugee Protection Act were unconstitutional. The certificates allowed government officials to use secret court hearings, untested allegations, indefinite prison terms, and summary deportations when dealing with non-citizens accused of having terrorist ties.

Chief Justice McLachlin, speaking for the entire court, said that the procedures for determining whether a security certificate was acceptable infringed section 7 of the charter. She went on to say at the beginning of her judgment:

> The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case. While the IRPA procedures properly reflect the exigencies of the security context, security concerns cannot be used, at the s. 7 stage of the analysis, to excuse procedures that do not conform to fundamental justice. Here, the IRPA scheme includes a hearing and meets the requirement of independence and impartiality, but the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government's case.

A little further on, in paragraph 54 of her judgment—and I think it's important to refer to these sections—she says:

> Under the IRPA's certificate scheme, the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet. Without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations.

In paragraph 64, she says:

> 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.

Those are her terms: "has been effectively gutted." She continues:

> How can one meet a case one does not know?

She goes on to say that this infringement of section 7 and sections 9 and 10 is not saved by section 1 of the charter. As you know, you can have an infringement under certain sections of the charter, but they can be saved if they meet the standards in section 1. She says they don't meet the standards in section 1; therefore, they're not saved.

Finally, she says that the declaration is suspended for one year from the date of the judgment, in order to give the government time to come up with something that will meet the requirements of the Constitution.

The only major difference between this Bill C-3 and the previous law is the introduction of the special advocate. The key provisions that prevent the right to know the case against you remain the same. Consequently, after careful examination, it's clear that this provision —the special advocate provision—does not overcome the Supreme Court's arguments and decision of illegality. It does not save or sanitize the security certificate process. There is still no due process, and charter sections 7, 9, and 10 are still not respected.

● (1030)

Mr. Chairman, the suggestion that the Supreme Court recommended this solution, the special advocate solution as set out in this bill, is not correct. Chief Justice McLachlin did refer to several possible models—she referred to the SIRC model, to articles 37 to 39 of the Canada Evidence Act, to the process used in the Air India trial, to the process used in the Arar inquiry, and to the U.K. special advocate system—but she did not give her approval to any one of them.

In paragraph 87 of her judgment she said:

> Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the IRPA. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.

Then in paragraph 61, further to that same point, she states:

> In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy section 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case.

Then at the end of that paragraph, she says:

> If section 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.

Of course, she is talking about the situation that was in place before the case went to the Supreme Court.

Mr. Chairman and members of the committee, under the present bill a judge can still authorize a security certificate on the basis of vague and undefined allegations rather than on precise charges; on secret and dubious information. And the bill does not prohibit, as my colleague just said, the use of information produced under torture.

Bill C-3 is a serious departure from the legal values of this country because it betrays the lawyer-client privilege contained in the charter; the individual has no choice in the special advocate assigned to him or her; it gives augmented powers to law enforcement and intelligence agents, who have made grievous errors in the past; and it can result in indefinite detention on the basis of a low standard of proof. The standard of proof, as you know, is that the certificate is reasonable; it is not based on hard evidence.

The people who are producing the information to support security certificates are the same people who said that Maher Arar and his wife were Islamic extremists linked to the al-Qaeda terrorist movement; that Mr. Arar was in Washington on September 11, 2001, when he was in San Diego; that he travelled from Quebec when he had a coffee in Ottawa with Mr. Almalki, when in fact he lived in Ottawa; that he refused to be interviewed by the police, when in fact he had agreed to be interviewed with his lawyer; and that he then left suddenly, after this request for an interview, for Tunisia, when in fact he left five months later.

I want to ask you, members of the committee, is this the type of information that should be the basis of long-term detention? Under Bill C-3, the special advocate would have access to the secret evidence but could not discuss it with the person involved. Not only would the person not have the opportunity to deny the information or justifiably explain it, but he would not have the opportunity to provide other evidence to support his side of the story. The informants might even leave out certain positive information that could help the individuals, simply to strengthen their case against the individual.

The International Covenant on Civil and Political Rights, which Canada ratified in 1976, states the following, in article 14, paragraph 3(a). It says that a person has "to be informed promptly and in detail in a language which he [or she] understands the nature and cause of the charge against him".

● (1035)

Pardon me?

The Chair: Please wrap it up.

Hon. Warren Allmand: Oh, okay.

I refer you to those sections sent to the commission against torture.

I'll wrap it up, Mr. Chair, by saying that what makes this bill even more unacceptable is the fact that none of the recommendations made by Judge O'Connor in his Arar inquiry report, more than a year ago, have been implemented. He recommended an oversight and review agency for all of the agencies collecting security intelligence information. That has not been done. If it had been done, we might have more faith in the type of information that was being put forward for security certificates.

I guess my final word is that Bill C-3 does not meet the requirements of the judgment of the Supreme Court, the nine to nothing judgment last February. I was going to deal with the question of how we deal with Canadian citizens. We have to go before the courts under the criminal justice system, and they may be as bad or worse than landed immigrants or non-citizens, but we have to prove the case against them in a court of law, according to all the rules of due process, Mr. Chairman, and that's not the case here.

The Chair: Thank you.

You, sir, have not submitted a brief.

● (1040)

Hon. Warren Allmand: No, we haven't.

The Chair: Mr. Dosanjh.

Hon. Ujjal Dosanjh: I have only one question, and I'd like the three presenters to answer, if you so choose.

I'm not sure whether you're all familiar with the report that's been submitted by the two previous presenters, Mr. Waldman and Mr. Forcese. Would you say, if I were to ask you generally, that if we were able to implement all of their recommendations, that most of the concerns of the two presenters, Mr. Mia and Mr. Allmand, would be obviated or would be met?

I know Ms. Basnicki said that Bill C-3 is fine, but if it could be improved by general consensus, would you agree that it should be?

Mrs. Maureen Basnicki: Anything that can be done to bring the appropriate balance to the dilemma we have in Canada will certainly be appreciated. I do believe that in my knowledge of the bill—and excuse me, I don't have the legal expertise that many of you have—and how it's been explained to me, we have succeeded in finding the balance as it stands now.

Any improvements would be welcome, but that's ultimately what we're striving for.

Mr. Ziyaad Mia: I've seen Lorne and Craig's piece, and I would concur with all of what they have said, but I have a number of additional.... I would add the Suresh exception and a number of other things. I don't want to go through the whole list here.

As has been cautioned in our submission, because of the short timeframe, we haven't given you everything. What this really needs is a proper timeframe to sit down and work with this. There wasn't really much consultation with lawyers or members in the community that are affected by this legislation. We saw it; I drafted this up on the weekend, and I came.

I would take Craig and Lorne's changes, and I would add the Suresh exception and a number of others, but certainly I would endorse those.

Hon. Warren Allmand: I've seen those proposals, but I haven't had time to really examine them in depth. I also saw the proposed amendments of the Liberal Party and the Bloc Quebecois.

It seems to me that these amendments would improve the bill, but I don't think they would improve the bill to the extent that it would meet the standards set out in a judgment by the Supreme Court. I think it would make for a better bill, but I still don't think it would meet the standards of the judgment.

Hon. Ujjal Dosanjh: Thank you.

Hon. Sue Barnes: Thank you very much. Thank you, all of you, for coming. We always appreciate the testimony. We know we're running on very short deadlines, because the government hasn't asked for an extension.

I want, first of all, to welcome Warren Allmand, who is a former Solicitor General of Canada, and also former chair of this committee for many years. I'm always happy to see you here.

Just for the record, Ms. Basnicki, I don't know if you would feel comfortable doing this, but I would like everybody on the record saying whether or not they feel the current bill is constitutional, would meet a constitutional challenge, in the form it is at this stage. This is just for the record, Ms. Basnicki, if you choose to.

Mrs. Maureen Basnicki: Is the question whether it meets the constitutional requirements?

Hon. Sue Barnes: Yes.

Mrs. Maureen Basnicki: I don't have the knowledge of the constitutional requirements.

Hon. Sue Barnes: That's understandable.

And the other...?

Hon. Warren Allmand: No, I don't think it does, and I cited certain passages in Chief Justice McLachlin's judgment. In my view, those passages have not been met in this bill. I still think there's going to be infringement of sections 7, 9, and 10.

Hon. Sue Barnes: And Mr. Mia.

Mr. Ziyaad Mia: The bill as it currently stands—and if I knew what the Supreme Court were going to do, I'd also know the lottery numbers for next week and I wouldn't be doing this....

As I mentioned, she said the substitute has to be meaningful, substantial, allow informed participation, and meet the two fundamental elements of what fundamental justice is, which are knowledge and answer. This does not gives you that, and I've laid out in my submission how it does not meet that substantial test.

Hon. Sue Barnes: Could I ask, Mr. Allmand, what you would think of just having everything regarding the details of special advocates only in the regulations rather than in the bill itself?

Hon. Warren Allmand: I haven't looked at that.

It's my view that if a Canadian citizen—and you could be a Canadian citizen and never live here; you could be born of Canadian parents and spend your life abroad.... If it's a Canadian citizen who's suspected of terrorism, you have to use the criminal justice system, the penal system, to accuse them and to convict them of some wrong. As far as I'm concerned, the same process should apply to landed immigrants and non-citizens who are here on a residential status.

As I say, many of them have been here longer. I know landed immigrants who've lived in Canada for 30 years. I know Canadian citizens who, because they were born here on a holiday or because they were born of Canadian parents, have hardly been in Canada at all. They would benefit from one system, and then you have another system for the people who are not Canadian citizens, which suspends all the due process system.

My argument is that we should have one system for everybody, and that's the penal system.

● (1045)

The Chair: Ms. Basnicki, do you have a brief comment before we go to Mr. Ménard?

Mrs. Maureen Basnicki: Maybe a clarification.

We're not talking about a criminal trial, where a person could be thrown in jail as punishment here. Canada is not obligated to allow non-Canadians to stay in Canada. When we're talking about security certificates, are we not talking about their right to stay in Canada? This is not a criminal trial that we're referring to.

The Chair: Okay.

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: Thank you, Mr. Chairman.

First of all, I would like to express my sincere sympathy to Ms. Basnicki for all her suffering.

You are very eloquent and sincere as you acknowledge your limited legal knowledge. If it is a consolation, I can tell you that I have practised law since 1966, that I was Minister of Justice and that I had a very hard time understanding those various bills. I had to read them several times to understand all their implications. I believe you will need to have some trust in us.

I would like to say to all the witnesses that having read this government bill, I believe it could be successfully challenged before the Supreme Court of Canada. For the time being, my goal is really to try and improve it in order for it to pass the Supreme Court test, should there be a challenge. The Supreme Court recognizes that we need a special process, that we need to use unusual standards of evidence, but also tells us that our process should be as close as possible to that of criminal trials.

I am going to ask some pointed questions; here comes the first. I understand that you are all opposed to the use of evidence obtained through torture. However, I noticed that the witnesses before us, in their written briefs, talk specifically about statements obtained through torture.

What is your opinion about material evidence? Let me give you a practical example. Let us say that in a country like Syria, a major leader of a terrorist organization is arrested and, after him being subjected to torture, a secret hiding place containing information on the network he is heading is found in his home. In this hiding place were found code names, ways of communicating with people and identifying them. Clearly, the tape or the information would speak by themselves.

Do you believe that under such circumstances, this material evidence should be considered by the judge hearing the case?

[*English*]

Hon. Warren Allmand: Article 14 of the Convention Against Torture says it can't. We've ratified the convention, and there's no exception to the convention.

Once you open the door to the use of torture in the minds of police agents or security intelligence agents.... The case you gave there was one where it was helpful to have found the evidence. One would hope that you could find that evidence in other ways by good investigative techniques. But to open the door to use torture is totally against the convention.

If we don't believe in the convention, let Canada withdraw from it, but not be two-faced about it, saying we support the convention and then trying to find a way around it.

● (1050)

[*Translation*]

Mr. Serge Ménard: My question was more precise: could the judge use it? Your answer is as clear as possible: no, he could not make use of it.

On the other hand, you understand that security agencies try to gather information on the threats against us. I think you understand clearly the difference between the role of security agencies and the role of police. Police look for evidence to lay charges. Security services look not only for evidence but also for clues. They make assumptions in order to measure the danger and take measures in order to ensure these dangers do not become reality.

Do you understand that under such circumstances security services, in trying to prevent terrorist actions, might use such information, if only to maintain under surveillance individuals who are here or else to advance their investigations?

[*English*]

Mr. Ziyaad Mia: I appreciate the question, Monsieur Ménard. I think what you're referring to would in the evidence world be derivative evidence: if I torture the heck out of you and you tell me something, and I can't use that evidence but it leads me to something else—the secondary, derivative evidence.

[*Translation*]

Mr. Serge Ménard: Exactly.

[*English*]

Mr. Ziyaad Mia: I am opposed to that for a number of reasons. First of all, the analog in the criminal law and in the charter jurisprudence, and even in the United States under the Bill of Rights, is that derivative evidence is not allowed, because then effectively you let police or security agencies or whatever they are break the law, since they know they can still get what they want indirectly. They'll torture you and they won't use the primary evidence, but they'll still get the fruits.

I think the U.S. coined the term, “fruits of the poisoned tree”. We don't take the fruits of the poisoned tree, because the source is wrong. If we want to discourage the use of torture to derive evidence, the best way to do that is really to say, if you play this game, none of it is getting in. You snuff it out right there.

I know there's been some academic dancing around this, with Mr. Dershowitz starting to make this a sexy topic—to talk about torture—but it doesn't work. He's fundamentally wrong as a lawyer I think because we all know that except in some rare circumstances, torture gives unreliable evidence—we've seen that in the Arar case—and it is fundamentally immoral; and third, it's impractical, because I think what we end up doing.... The whole torture debate in the United States, as we've seen in the war on terror, is that when we start to break the moral and legal rules of the world, we send the signal to others to start doing those things. I think that's why we need to draw the line.

The Chair: You have half a minute left.

[*Translation*]

Mr. Serge Ménard: I understand all of that and I agree with you. However, you must admit that there can be, under such circumstances, information that, once it has been found, is of such a nature that one can be convinced it is true.

I understand your point of view and recognize that it should not be used as evidence to detain somebody. However, do you understand that security services could use it to draw their own conclusions and therefore organize a defence, organize their surveillance and inform their investigations, using objective evidence that, independently of how it was obtained, could prove extremely useful?

[*English*]

The Chair: There's just time for a brief response.

Ms. Basnicki.

Mrs. Maureen Basnicki: I'd like to ask a question of Mr. Ménard. I'm not a lawyer like yourself, my colleague, and many in this room, but here is my opinion.

C-CAT does not condone torture, but in a case where the information provides reasonable grounds to believe that a non-Canadian citizen may pose a danger to Canadians, Canada is within its rights to use that information to refuse admission to such a person.

Judges are there to evaluate the merit of this information. Judges are what I believe in. We have to believe that judges are going to formulate the correct opinion on the admissibility of the evidence.

The Chair: Does anybody else have any comments?

Hon. Warren Allmand: Unfortunately, I didn't bring the Convention Against Torture document with me today. I read it last night. But even on that last point, what's being suggested is a contravention of the Convention Against Torture. We either support the convention or we don't support it. Let's not be hypocrites about it.

I approve of some of the suggested amendments. At least you put into the bill that torture evidence cannot be used as a basis for a security certificate, and that's why it has to be tested.

For example, if the person identified in the certificate hasn't had a chance to know what that particular evidence is, the type of information that may come forward, and he or she can't respond to it, then we don't have due process.

● (1055)

The Chair: Mr. Mia, did you have any—

Mr. Ziyaad Mia: I'll keep it short.

Mr. Ménard, I see your point that you would have some information that you wouldn't use in the legal proceeding, that you would use for public safety. I see your point, and it gets into that moral dilemma.

I would have to err on the side of the legal principles, only because in society we balance risk. Every day we take risks. We could keep this society 110% secure, but even in the engineering of this building, there's a risk of a few percent that this will just fall down. At some point, we draw the line. I would err on the side of sticking to our fundamental principles, because once we water them down, we've started to set the agenda to move away from them.

The Chair: Ms. Priddy.

Ms. Penny Priddy: Thank you.

May I first ask Ms. Basnicki whether we will be able to receive her testimony if it's submitted and translated?

The Chair: That's a given. That's always the case.

Mrs. Maureen Basnicki: It has been submitted, I believe. Yes.

Ms. Penny Priddy: I just wanted to be clear. Thank you.

I have perhaps two questions.

One of them is first to you. I appreciate your being here. This must be very difficult. Every time you testify, you relive and retell the story. That's not a very easy thing to do, so I thank you for that.

You've heard people this morning talk about some of the additional accommodations that might be made to make this act more acceptable to at least some people. I'm wondering if you have an opinion—I, too, am not a lawyer—about whether that is going too far. We did hear people talk about families, and you could talk about families, I think, with a great deal of credibility and about whether you think that's going too far in making accommodation for the detainee.

Mrs. Maureen Basnicki: We talk about values of Canadians, and it's my understanding that the people who are detained, again, are not suffering cruel and unusual punishment. They're able to go about, for the most part, their daily lives. Some are fathering additional children, teaching in schools. If you look at the detention of these individuals, it's not an uncomfortable lifestyle. They always have the choice of going back to their country of origin, or to a third country, so, really, the choice comes down to the detainee. I would imagine that if you ask a lot of Canadian citizens, natural-born Canadian citizens, if they could trade places with some of these non-Canadian citizens and their lifestyle, they would put their hands up in a hurry.

It takes away from my feeling about my fellow citizens to believe that anybody would be incarcerated against their will and with lack of evidence, but this is not incarceration that we're talking about; this is just about the ability to remain in Canada.

I'm here to remind you of what happens when we make a mistake.

Ms. Penny Priddy: Thank you.

Mind you, in some cases, we are talking about incarceration, but not in all.

You stated that the CMLA has talked about looking at it under the Criminal Code, as opposed to here. Could you speak to that, please? I'm told it's not possible.

Mr. Ziyaad Mia: I can speak to that a bit. On principle, it just doesn't stand when you look at it logically and legally. I know we are in the realm of politics and the law doesn't fully apply in that way, so that's why I'm offering you recommendations.

So, in principle, we would prefer this either to be moved to the criminal process where there are protections, even for national security evidence, after the Anti-terrorism Act was introduced—and I will leave my colleague, Mr. Allmand, to speak a bit more about that—or we would prefer importing criminal law standards to this.

I would like to correct a little of what Ms. Basnicki said, that it is punitive detention. The Supreme Court has actually determined that, because many Federal Court decisions were saying no, this isn't, and drawing that distinction. But at the Supreme Court, Madam Chief Justice McLachlin said, yes, it is what we know it is. It walks like a duck; it quacks like a duck. This is punitive detention. To be in detention for seven years in solitary...it is detention. It is punitive. We need better processes and standards.

So what I would say is, we're using administrative law principles here, a reasonable standard. Those of you who are administrative lawyers will know that that is the lowest standard with the highest deference to the government.

What I would say is, if we're not importing criminals, ideally in my dream world, my fantasy world, I would have the full, criminal, reasonable doubt standards. If we're not having that, at least think about moving that to where the judge just doesn't say, "Well, the reasonable standard says that of what the minister chose, out of all the evidence pile we had, I chose these three things out of the one hundred that are all incriminating, and I'm deciding you're a security threat, Mr. Mayes." Is that reasonable? Of course, based on what you put in front of yourself, it is always going to be reasonable. So you get the circular logic. I'm saying move that standard.

The other end of the administrative spectrum is correctness. The minister must be very good in getting the right decision, and the judge can also ask more probing things: you should have looked at this; this is weak.

I think that's better, because that's really what we're trying to get at, the truth. Move it closer to correctness. If you want correctness, I encourage you to do that, somewhere in the middle, yes, but not reasonableness, because this is basically administrative law that deals with dog-catchers and so on. That's not the standard we want here, because (a), we're dealing with possible national security threats, allegedly, that we don't want low standards on, and (b), the flip side is innocent people are being persecuted for something they haven't done.

So for both reasons we need higher standards to find the truth.

● (1100)

Ms. Penny Priddy: Thank you. My same question was for Mr. Allmand—and it is a delight and an honour to see him here—whether he indeed could see this or would support this under the Criminal Code.

Hon. Warren Allmand: Yes, we do. We're not saying that suspected terrorists should not be pursued and prosecuted. We're saying they should, but they should be pursued and prosecuted for either performing a conspiracy to commit terrorism or in fact committing terrorism or planning to commit terrorism. We think that's the way it should be dealt with, because then you have all the protections of a criminal justice system that goes back hundreds of years with all sorts of protections and practices in it.

As I said earlier, there are many Canadians who are pretty bad actors. If they were involved in a conspiracy to commit terrorism or commit terrorist acts, we would have to go at them in this way. We could not use this security certificate proposal against them.

As I pointed out, it is my view that the line between citizens and non-citizens now in Canada is very minor. As a matter of fact, most benefits in Canada are available to non-citizens—most social programs—and there are many non-Canadians who have lived in Canada much longer than people who have citizenship and who barely live here at all.

The Chair: Mr. MacKenzie.

Mr. Dave MacKenzie: Mr. Allmand, could you tell us when you were in cabinet—the time?

Hon. Warren Allmand: For seven years, from 1972 to 1976.

Mr. Dave MacKenzie: And the origins of this bill started in that timeframe, I'm told.

Hon. Warren Allmand: Not really. We did have some kind of a provision. I can recall being asked. It was on criminal matters, on people involved in organized crime.

Mr. Dave MacKenzie: Isn't the bill still there?

Hon. Warren Allmand: No, I think the bill has changed on several occasions. If you read the judgment of Chief Justice McLachlin, you will see that at one stage certificates were reviewable by SIRC. Then that was taken away. Then with the Anti-terrorist Act of 2002, the review was reduced still further.

Mr. Dave MacKenzie: This bill, with all due respect, is also to keep out espionage people—people with criminal intent to come to this country—and terrorists.

So when you suggest that we use the Criminal Code—

Hon. Warren Allmand: No, you could use criminal-type procedures under the Immigration Act.

Mr. Dave MacKenzie: I think you were saying that this could be in the Criminal Code, that if these were Canadians, we would do this, this, and this.

Hon. Warren Allmand: Yes, if they were involved in a conspiracy to commit terrorism.

Mr. Dave MacKenzie: Would you not agree, though, that what we're talking about are people who are coming to this country and represent a danger to our society? Maybe they haven't committed an offence here, but we're saying, "You're not welcome in our country. The Canadian values are different from those you may have espoused somewhere else, or what you intend to bring to this country."

The real intent of this legislation is not to get to the point where the criminal act occurs in this country; it's to prevent those people from coming into Canada with the intent of committing the criminal acts after they get here.

Hon. Warren Allmand: If that's the case, if they are a real danger, then let it be proven. Are we going to allow security certificates to be given on the type of information that was given in the case of Arar, where the RCMP identified him and his wife as extreme Islamists associated with al-Qaeda, when that wasn't the case at all?

Mr. Dave MacKenzie: But that's one case, though.

● (1105)

Hon. Warren Allmand: I can tell you, as a former Solicitor General, I could give you many other cases in which I received false information. When on checking back later, if I didn't know the individuals that were being targeted, just by chance they would have been denied their rights. So what we need is a system where if you're going to be accused of being a dangerous person, let us see the evidence so that we can respond to it.

Mr. Dave MacKenzie: Mr. Arar was not part of a security certificate. That's a different issue.

Hon. Warren Allmand: But it's the type of information that led to his imprisonment in Syria for a year and the torture. It's the type of evidence that's being presented that's not tested. Untested evidence is contrary to our principles in the rule of law.

Mr. Dave MacKenzie: I appreciate the lawyer's position. I understand that fully. But if I'm an average Canadian out there...and when you say the real intent is to get the truth, I think a lot of average Canadians would say, "If we want the truth, then that individual should also testify". That's not one of the principles of our law, but I know—and I have spent a lot of time in criminal courts—the accused does not testify. The accused doesn't have to say "I didn't do it", or "I did do it".

It seems to me you don't show a great deal of sympathy to the people who have been victimized by some of these folks, and I understand that that's the role you're playing here. That's fair enough. But when you say that people can't go home to their families, or they can't share things, when I see the other witness at the table who does not have those options either, not of her doing—

Hon. Warren Allmand: I think Canadians should be protected against terrorism, but you don't protect Canadians against terrorism by ignoring our Bill of Rights and our Constitution. The Bill of Rights and the Constitution are supposed to protect us, not be suspended so that we can get at people without proving the case against them.

I'm all for getting those people out that you're talking about, and protecting Canadians, but it should be done in a way in which they have the right to defend themselves against false, faulty, and mistaken evidence.

Mr. Dave MacKenzie: I think that's what this bill is about.

Hon. Warren Allmand: Well, it's not doing it.

Mr. Roch Tassé (Coordinator, International Civil Liberties Monitoring Group): May I, Mr. Chair?

As an average Canadian myself, I would feel a lot more protected if those allegations were proven to be true. Right now, on mere allegations, you deport the person assuming the person is a real threat. We're not protecting me by setting that person free in the world. We have an obligation toward international allies to prosecute terrorist suspects. Therefore, we need a level of evidence that actually proves that this person is a risk, not merely deported under flimsy, untested evidence. I don't feel protected at all when that person is being deported. If that person turns out to be a real terrorist, I would like them to be accused, charged, and jailed in Canada, for my protection.

Mr. Ziyaad Mia: Mr. MacKenzie, to be clear and on the record, the Muslim community in this country are Canadians. We're proud to be Canadians. We share many of the values of this country. Our values are not any different from Canadian values.

I wanted that on the record so there's no misunderstanding.

I opened with unequivocal condemnation of violence against any civilians, but al-Qaeda, unfortunately, is not the only group, and terrorist groups aren't state terrorists, we know. I was born in South Africa under a state terrorist regime, and there are many other examples. We won't go through them.

We're not going to change the whole world by going after this thing and watering down our fundamental values. I'm not here to be an academic lawyer looking at the charter that was drafted as some idealistic document. Clearly, the criminal law standards, the adversarial process—he can tell you more than me because he's the expert—is not here simply to protect criminals. The fundamental process in our system, the adversarial process, is to find the truth so that we're all safer.

At the end of the day, many of these men have said, "Show the evidence. Let's have a go at it, and if I've done something wrong, then I'll be punished." That's all they're asking. At the end of the day, it's not only a turnaround of you coming.... Some of these people have set up lives here, and it's not a matter of it being easy to ship them off to torture.

The issue about criminals and someone showing up at the border and being turned back is significantly different from people who have children here, who have lives here and are established, and those are the kind of people we're trying to turn away.

● (1110)

Hon. Warren Allmand: Mr. Chairman, I want to say in answer to Mr. MacKenzie that we support all the human rights in the universal declaration, including the right to life, which is basic. So of course we're against terrorism that would destroy or attack human life. But you don't pick and choose in human rights provisions. You don't just support one article and forget about the others; you support them all. That's what the Vienna conference on human rights said, that all human rights are interdependent and should be taken together.

The Chair: Mr. Mayes.

Mr. Colin Mayes (Okanagan—Shuswap, CPC): I was just going to say that this doesn't just cover terrorism; it also covers organized crime and espionage. It's not just terrorism, so let's not get sidetracked and just focus on that.

The Chair: Okay.

I thank our witnesses for their appearance before the committee today. We appreciated it.

We will meet again this afternoon.

This meeting stands adjourned.

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